

No. 14561 $\frac{1}{2}$

Supreme Court of Illinois

Springdale Cemetery
Ass'n.

vs.

Smith

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 181

14561

SPRINGDALE CEMETERY ASSOCIATION

^{vs.}
JOB SMITH *et al.*

} *In the Supreme Court,
April Term, A. D. 1863.*

DEFENDANTS' BRIEF AND POINTS.

1. In this case the evidence on both sides was fairly and fully presented, and the finding of the jury is right.

2. The instructions given on both sides fully and fairly present the law of the case.

Substantial justice having been done, the judgment should be affirmed.

See Gillitt vs Sutt, 1. Gil 490.

Ligh vs Hodges 3. Scam. 18.

*Supervisors of Chinango
vs
Birdsall.* } *4. Wendel, 458.*

*See also, written
Argument on file.*

GROVE,
For Defendants in Error.

181
Springdale Cemetery
Association

vs
Job Smith et al
Depts Inexp Bonds

Filed May 9, 1863
J. L. Lanna
clerk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863

SPRINGDALE CEMETERY ASSOCIATION, }
Appellant, } *Appeal from Circuit Court*
vs. } *Peoria County.*
JOB SMITH & HIRAM PEIRCE, }
Appellees.

ABSTRACT OF RECORD.

pp. 1, 2. Suit commenced before a Justice of the Peace, by appellees against appellant, Jan. 29th, 1857, on open account, of which the following is a copy :

p. 3.

p. 3.

p. 2. Trial before said Justice Feb. 7, 1857.

Judgment for plaintiffs for \$180, and appeal by deft, to Circuit Court.

pp. 6, 7. Cause tried at the December term, 1862, before said Court and a jury, and verdict for plaintiffs for \$147, and cost.

p. 8. Motion by deft for new trial. Same overruled, and judgment rendered against deft on said verdict, and for six-sevenths of all costs, and against plffs for one-seventh said costs, and appeal prayed by deft to this Court.

p. 9. Agreements of parties that the Bill of Exceptions may be signed in vacation.

pp. 9, 10. Stipulation that on the trial the testimony of Jeremiah T. Smith, Cyrus Peirce, Thomas Whitby, and John Hall, may be read in evidence to the jury from the former Bill of Exceptions in this case.

Bill of Exceptions filed Feb. 23, 1863, shows that on the trial, plffs read first to the jury the testimony of said Jeremiah T. Smith, in substance, as follows:

- p. 10. That he was and had been a brick-mason for ten years; knew plaintiffs and the cemetery ground where they built a vault for defendant, in fall of 1856. Witness, with Fred. Hartshorn, measured it after it was built; think it was 22 feet long in the inside, and 23 feet 8 inches from out to out. Front wall solid; the other walls
- p. 11. hollow, and 20 inches thick. Measurement all round was 66 feet. It was 12 feet wide inside, 15 feet 4 inches from out to out, and 7 feet 4 inches high to the spring of the arch. There were 48,268 brick in it, by mason's measure; worth \$12 per thousand to furnish materials and build the vault, (admitted that plffs furnished all the materials.) I helped build the vault. Peter O. Loucks said some things wanted change. By his direction, the wings were made some $2\frac{1}{2}$ feet longer and about 18 inches higher. The piers were near two feet high when he came. At his request we took them down and built them 4 inches wider. We had them 8 inches wide, and he wanted them 12. These piers are the projections in the front wall, called pilasters or anties, and stand out 4 inches from the wall. I was there at the start of the mason work, and left when the wings, side walls, and seven courses of the arch were up. Cyrus Peirce, Hiram's brother, John Johnson, and Bennett, there at same time. Company's men were digging foundation when we came. We worked from five to seven days. The sand came from Burn's bank, and was good. The brick were from Giles' and A. No. 1. Plaintiffs paid \$7 per thousand—an extra price for them. The mortar was from Wilson's lime, and good. Work well done, so far as I could see. Loucks expressed himself satisfied: was there every day except one or two, while I was there. The workmen followed his directions. He saw the materials, and made no objections that I heard. I would likely have known if he had. He told us about the front, and Smith told us to alter as Loucks directed. The hands were good experienced workmen.
- p. 12. Cr.-Ex. Smith & Peirce were partners. Loucks gave no directions about building the arch; His directions referred only to the plan, not the execution of the work. Wings built longer by his directions. He said the plan called for 8 inch pilasters—and he had them altered to 12. The cost of alteration of each wing was \$12. Seven courses of the arch, about 2 feet, laid when I left. The keying of the arch is the most particular and difficult part. Worked by the plan, except as Loucks directed changed. He made no changes except in front.

Re-Ex. Plans referred to only to get size of walls and arch. Walls hollow. Loucks directed about putting in ties. Think side walls built 6 inches higher than plans. Don't know by whose direction. Was there when Morris cemented vault on inside: this was the 20th or 26th Nov., three years ago. I stayed till Morris finished. The centre piece was taken out about a month after the brick work was done. In my judgment the job was well done, and was then finished.

- p. 12. Cyrus Peirce's testimony next read by plffs. Am brick-mason. Helped to build this vault. As far as I know materials good, and think workmanship very good. Think the work done under Loucks' direction, and to his satisfaction. Helped to finish the arch, but not to cement inside. Cement on outside good,

p. 13. and properly put on. It was an inch thick. Loucks there, more or less; don't know that he accepted the work, but seemed pleased. He is not a mason or architect. Gave directions about front; don't know that he gave any about manner of building arch.

RE-EX. Arch one foot thick.

David Burns testified—I hauled the sand for the vault. It was good. I hauled the bricks for the vault from Nathan Giles. They were good.

CR. EX. The sand was hauled by my men. I helped to load it. At least it was my business to be at the bank. I have no special recollection of being there at that time. I don't know how many bricks I hauled. I got one dollar per M. for hauling them. I think there were thirty-five or forty thousand. I think I hauled all the brick—I don't know how many loads.

Nathan Giles testified—I have been a brickmaker fourteen years. Plaintiffs bought bricks for the vault from us. Some they paid an extra price for. Smith first bought a common lot of hard bricks, after that he got an extra lot for the front. Burn's team hauled them.

CR. EX. Smith bought hard bricks for the foundation. I sold them and helped load two loads. I can't say whether there were any soft brick. The lot for the front were to be hard smooth brick. There were from six to eight thousand front brick. Can't be certain.

RE-EX. We had hard brick when Smith made the contract, and when men bought that kind of brick of us they generally got them.

p. 14. William Thompson next called by plaintiffs, said—Have been a brick-mason for 16 years. Helped build the vault. We used good brick and mortar in building it,—the lime we considered of the best. The walls were cemented on outside an inch to an inch and a half thick,—cement was good—the workmen were good. There were one or two ventilating holes in the top of the arch. P. O. Loucks was out often—was President of the Association. He wanted the pilasters twelve inches wide—we had started them eight inches. Think the wings were built higher than the plans. Saw the arch turned. Loucks had more or less to say about it. Loucks lived in Peoria nine years ago. He wanted the wings made wider and higher, which was done. Don't know how much. His directions had to do with the plans, not the workmanship. I was there when the work was commenced. Center piece was in when I left. John Hall was superintendent of the grounds. I saw dirt thrown on the arch by Hall—some dirt was thrown on the sides before it was finished. He put chunks of clay on the arch as they were dug out of the bank. They laid a plank from the bank to the top of the arch, and wheeled barrows over it. The arch was row-locked, and is the strongest arch built. Arch was twelve inches thick. I have some experience in building arches.

p. 15. Workmen deposited their tools in vault before center-piece was taken out.—Hall put plank on arch day it was finished. Smith told him not to cover it until cement was set—dirt was as much as a foot thick. It rained almost every day for a week or two after arch was finished—it then froze.

p. 15. CR. EX. Vault had not been cemented inside when dirt was put on, nor for three weeks after,—nothing wrong then. The row-lock is a single layer of brick run over at a time. We don't cut the brick. Often spring an arch in building a house—don't stop for it to dry., If sides don't give way, arch can't go down by weight placed on top.

Sides did not give way. Can't say as the dirt was cause of the arch giving way. Throwing dirt on might break cement. Takes five or six days for cement to get hard. The water might get in and wash out the mortar. Some places it takes three months for mortar to set. The arch could not be weakened by weight on top. Loucks' directions had nothing to do with manner work was done,—plans were there. Can't say that Loucks referred to plans. Wings were made longer. Pilasters were started eight inches—made them twelve. Heard Hall ask Smith when it would do to put dirt on vault. Smith said as soon as cement is set—heard no time fixed.

We cemented outside while laying brick. Vault is built in a steep hill. Arch was semi-circular—strongest form an arch can be built. Side walls were covered as we went up. No objections were made to Hall's putting the dirt against the sides.

p. 16. RE-EX. Peirce and I closed the arch. Did not use plans much—couldn't tell anything from them, neither the height nor breadth. Smith told Loucks they were unintelligible, and called his attention to their uncertainty. Can't tell why arch should have fallen, unless it was injured in some way—know it was well built and tied.

G. L. Ryors testified—Am a carpenter—made the center piece of the arch, for which Smith & Peirce paid me \$22. It was semi-circular, formed by cutting out segments in form of arch, and boards six inches wide, laid lengthwise. The supports were made of timber cut off the ground. Segments were of one inch lumber, and the boards were fencing. There were three or four posts on each side. No trouble in taking out the center if the person understood it. The arch might be injured by letting down one end first. I was to take centers down—was to have them for taking them down. I went up to do it and found them outside.—There were two ventilators in the vault, six to eight inches square.

CR. EX. The key course was not a full course—saw two or three loose pieces in key course between the ventilators, one of them was loose. John Hall showed it to me. The key course might have been a full course part of the way. It varied in thickness—the loose brick was one to one and a half inches thick. The arch appeared regular in the course. The key course was wider behind than before. I think as much as a brick or more. The way to take out a center is to lower on one side first, and let it down in that way.

William Bennett testified—Am a bricklayer. Helped build the vault—don't recollect about change in foundation. Lower course was laid and I think part of it keyed when I left. Good brick were used in the front. Don't know what kind were used in the arch. Don't know about the mortar. Loucks was there during the time. Can't recollect of any change in the front. Worked on the front.—

p. 17. Hall was there—seemed to be superintending. Supposed he was acting for the company.

Cr. Ex. Takes more work to make pilasters than plain work. Brick in front were nothing extra. They were the best that were brought there. We used common brick for filling in. The front was made by Loucks' directions. He directed as to the style or plan of the front, and his directions were followed, as I thought, rather than the plan.

James Morris testified—Am a plasterer and bricklayer—cemented the vault inside; material was hydraulic cement and sand. It was finished on the 26th of November—did not examine arch, except as I worked along—thought the job well done—my work was well done. The door was four feet by eight.

Cr. Ex. Don't know how long the work was done before it was cemented.—Mortar was as dry as usual at the same length of time. Brick work was perfect as far as I could see. No injury was visible. The cement was such as we usually buy—was put on as fast as mixed. Cement might stand two or three hours before it would set so hard as not to be worked. It was worth fifteen to eighteen cents per yard to cement the vault—same price outside as inside. The cement p. 18. was three-fourths of an inch thick. The arch was not hurt by water when I cemented it. If there had been defect should have known it.

Lawrence Harman testified—Dug foundation for the vault. A change was made in foundation—ground was staked off—won't say we went as far as stakes; went until they said we were far enough, then dug three feet deeper. Got \$20 for extra work. Lightner paid me. First work came to \$34.32, for which plaintiffs gave me an order on company.

Cr. Ex. Was paid after work was finished. Brushwood was set for stakes. The hill had been covered with brushwood. Won't say we dug as far as the brushwood was cut. I believe Smith showed me where to dig. Loucks and Lightner came out after first digging was done, and were not satisfied—thought it ought to have been dug further into the hill: but concluded to dig three feet deeper. I think more dirt was taken out where it is, but it would have been more difficult to dig it farther in the hill. Smith was there,—was not anxious to have more done. Loucks and Lightner thought it was not deep enough, and agreed to give me \$20 extra. The order now shown me is the one on which I drew my pay. It includes the \$34.32 which I was to get from Smith, for first digging, and \$20 for extra digging. It was all paid me by Treasurer of company, at one time.

William Giles, testified—Smith bought bricks of Nathan Giles and myself; said he wanted an extra lot of brick; got hard brick, mostly arch brick; got all the front bricks we could spare, in addition. Think he got between five and seven p. 19. thousand extra bricks. I helped to load them. Burns hauled them. Arch bricks are rough and hard. Were a first rate lot of hard brick.

Cr. Ex. Don't know what bricks cost, nor how many we sold him. Extra bricks were called front bricks. Arch brick sold at about an average price. Don't know where bricks went to, that we sold to Smith. Burns hauled in direction of Cemetery. There were from 35 to 40,000 brick. Wagons going to the Cemetery, go toward the City of Peoria.

Frederick G. Hartshorn, testified—I helped measure the vault. There were 48,000 bricks. We measured as correctly as we could.

CR. EX. Measured vault after arch had fallen. Can't tell size of vault. Pile that fell lay in bottom of vault. Bricks, dirt and rubbish had fallen in. It had fallen in as far as first ventilator. Some of the walls were twenty inches thick, and some twelve inches. Arch was one foot thick. I think side walls were sixteen inches, and hollow. The arch had broken off down to the spring of the arch. The side walls remained firm and plumb.

The Plaintiff here rested.

The Deft then offered in evidence the instrument in writing shown Harman, in words and figures following: "Office of the Springdale Cemetery Ass., Peoria, Oct. 18, '56. Treasurer of said Ass. pay to the order of Lawrence Harman fifty
p. 19. four $\frac{32}{100}$ dollars, for ex. foundation to receiving vault, in the Cem. Grounds.

\$54.32.

H. LIGHTNER, Sec'y.

(Endorsed, Lawrence Harman.)

20 The deft then called Hervey Lightner, who, being sworn on his *voire dire*, tes-

- pp. 21, 22. In connection with this evidence on *voire dire* certain title papers were exhibited. First, a Patent, from the United States of America to Joshua Aiken, assignee of Isaac Underhill, upon a certificate of the Register of the Land Office at Quincy, showing that full payment had been made for the land under an act of Congress, of April 24th, 1820. Said deed dated June 9th, 1845, being for the E. $\frac{1}{2}$ of the N. E. qr. of sec. 34, T. 9 N., R. 8 E., in Peoria County, recorded at the General Land Office, vol. 31, p. 399.
- p. 23. 2nd. Deed from Joshua Aiken and wife to William A. Hall, for said E. $\frac{1}{2}$ N. E. 34, 9 N., 8 E., in Peoria County, dated July 25, 1836. Warrantee against parties
- p. 24. claiming under grantors. Acknowledged before a N. P., Aug. 30th, 1836. Recorded December 13th, 1836, in the Recorder's Office of Peoria County.
- pp. 24, 25. 3d. Patent, United States of America to Isaac Underhill, for the W. $\frac{1}{2}$ of said N. E. qr. of sec. 34, T. 9 N., R. 8 E., in Peoria County, dated June 9th, 1845. Recorded at the General Land Office, in vol. 31, page 419.
- p. 26. 4th. Deed dated July 25th, 1836, from Isaac Underhill and wife to Wm. A. Hall, for said W. $\frac{1}{2}$ of the N. E. qr. of sec. 34, in T. 9 N., of Range 8 E., in Peoria County. Warrantee against parties claiming under grantors.
- p. 27. Acknowledged before a Justice of the Peace, in Peoria County, July 25th, '36. Recorded in the Recorder's Office, in Peoria County, August 3rd, 1836.
- 5th. Deed from Wm. A. Hall to the Springdale Cemetery Association, and their successors, for the use of said Association, in consideration of ten thousand three hundred and eight dollars, of said N. E. qr. of sec. 34, in T. 9 N., Range 8
- p. 28. E., in Peoria County. Warrantee dated September 5th, 1856. Acknowledged
- p. 29. Sept. 6th, 1856. Recorded in the Recorder's Office of Peoria County, November 4th, 1856.
- p. 31. Deft then proposed to have H. Lightner sworn as a witness. Plffs objected. Objection overruled, and plffs. excepted.
- Deposition of Peter O. Loucks.
- p. 32. Ans. to first int.: Know parties to suit.
- To 2d. Know contract made between Smith & Peirce and the cemetery Association for building vault on ground of company a little north of the city. Don't remember date; think it was in October or November, 1856. I negotiated it for the company with Smith. Smith & Pierce were to build a vault according to a plan I had drawn. The size and style were denoted on the plans, as also the materials to be used, which Smith was to furnish, and for which he was to receive
- p. 33. \$515. But after the contract was signed, Smith said he had omitted to charge for cement, and wanted \$10 added for that. I then erased the 15 and put in 25. He told me it was convenient for him to do it right away, and that he would do it cheaper just then, as he had nothing on hand. On this account he got the

job. I belonged to the company then, and was a committee to make the contract.

To 3d. The plans A and B, now exhibited, see page 50 and 51 of Record, are the same by which we contracted, and were used during progress of work.

To 4th. The writing under the plan on paper A, with erasures, as now seen, was made at same time with the contract.

p. 34. To 5th. The signature under said writing is Smith's, and made when we made the agreement.

To 6th. This writing was to evidence the contract as far as it went. When the contract was made, the wings, as designed, were to be ten feet long. If the wings required to be longer, defendant was to pay for the extra length. But this was not mentioned in the written contract: otherwise the writing was designed to evidence the contract.

To 7th. Smith & Peirce began to dig foundation the next week, but delayed the mason work some three or four weeks after the foundation was dug.

p. 35. To 8th. I know Smith began and progressed with the vault till the arch was about two-thirds turned: as I was there seeing whether the work was done according to contract. After that I knew nothing about the work till Smith came and wanted to settle for it. I referred him to the secretary. He said he had seen him, but he objected to settling because the cementing was not done. Smith then agreed to cement it, and when done, he was to set a day, and we were to go and accept the job, if done according to contract. Smith came a week or ten days after, and set the next day; and Mr. Lightner and I were to go up with him. He did not come, but came some days after and again wanted to settle. I then told him I had learned the vault had fallen in. He agreed to rebuild it, and defendant was to pay the contract price when that was done. Plaintiffs never rebuilt the arch to my knowledge.

To 9th. Plaintiffs built the wings two or three feet longer than per contract; the additional cost could not exceed \$10: no other extra work was done that I recollect. There was an alteration about the door-way, but it had been put up
p. 36. wrong, and they took it down and rebuilt it to conform to the plan.

To 10th. Plaintiffs agreed to put in good hard brick. In springing the arch they put in a good many bats and soft brick, to which I objected, and told the workmen they were using too many bats and soft brick. Smith was not present then. I told Smith, when they were hauling brick, they were hauling too many soft brick. He said he had engaged and paid for hard brick, and would go and see about it, and started for that purpose.

To 11th. I have no interest now in the result of this suit. My interest ceased two years since or more.

CR. Ex. by plaintiffs.

p. 37. Ans. to int. 1st. I was president of the Company when the contract was made. I acted as such, in all, about two years, and till after this suit commenced, when I sold my stock, and had no farther interest in the company. When I made the

contract I had an interest of \$400, which I had paid in. The contract with Smith & Peirce was in writing, except what related to wings. Don't know whether company agreed to make road to vault, nor whether the road was to be repaired before the vault was built. Don't know when the road was made, but it was made when I went out and found men digging the foundation. The company selected the site, but did not dig the foundation, nor did they prepare it. I was present from time to time, till the arch was about two-thirds turned. The company was to furnish front door stone, sill and coping. Furnished sill about time of digging foundation. Coping not all furnished till front was up. Part of it on the ground before. I sold one share of stock to Edward Hudson, for sixty dollars, and balance to company. Did not sell in order to become a witness, but because I had a chance to sell. I thought it probable the company would call me, but that was not my reason for selling. The Company made no change in depth of foundation. It was not dug at first as deep as intended. Harman not in employ of Company. The Company made the road over which the brick was hauled, but I don't know that they were to do it.

Ex. in chief resumed.

p. 39. Ans. to int. 1st. Plaintiffs not delayed because of the coping. Part of it was on hand when the wall was ready for it, and Smith said it was of no consequence about the remainder, as he could as well set it when he came to cement the vault.

To 2d. An alteration of the foundation was made either by Smith or Harman, who was in Smith's employ. The effect was to diminish amount of digging. The vault was set in a bank, and the alteration threw it further out, and avoided the deep digging in the bank. The stakes had been set by Lightner, Hall and myself, with Smith, before concluding the contract. When Smith and Harman said they were ready to lay the foundation, I went out, Smith telling me Hall said the excavation was not enough into the bank. And so I found it, and showed Smith it was not according to the stakes. Harman said he had dug as he contracted with Smith, and would dig no deeper unless paid for it. Smith agreed to have it done, the Company to pay Harman and charge Smith.

p. 40. To 3d. At time of making contract nothing was said about making or repairing any road for use of plaintiffs. Before this, Lightner or Hall had said the Company would repair a certain road at or near a ravine, which was done, but don't know when.

To 4th. Plaintiffs never made any complaint about roads that I know of.

5th. Think should have known if they had.

6th. Smith was out at the Cemetery with us, and over the roads before the contract, and knew their condition.

p. 41. 2d Cr. Ex.

1st. Smith came first to settle about the last of November, the year the vault was built.

2d. The word *contract* was not mentioned in the conversation. I supposed the work was all right. Knew nothing to contrary then.

3d. I made no claim then that the vault was not built according to contract.

4th. Smith came the second time, in from 7 to 10 days after.

5th. Think he said in this second conversation, that the job was done, or to that effect.

6th. I did not deny it in that conversation.

p. 42. 7th. It was a week or ten days after, when he came the third time.

8th. It was then I told him I heard the arch had fallen in.

9th. Smith said it was not his fault, but was caused by water running down the bluff.

10th. It was at this time that he offered to repair the vault.

11th. He offered to repair it if we would furnish materials.

p. 43. 12th. It was part of his proposition that the company should furnish materials.

13th. He proposed to repair the first warm weather.

14th. I did not understand his proposition to be, that he would do it "as soon as the weather would admit in the next spring."

15th. There was talk about repairing the vault that winter.

16th. I do not recollect the precise words, but it was to the effect that it would thaw and become warmer in a few days, and then he would do it.

17th. Smith's proposition was only to do the mason work.

Re-Ex. by defendant:

p. 44. 1st. I never saw Peirce about settling, but had three interviews with Smith on the subject. The first time he said the job was done except cementing. That he had the hands engaged and would do that immediately, and would like to settle, as he needed money to pay his hands. I referred him to Mr. Lightner, the Secretary. We did not settle then. I next saw him after my return from St. Louis, when he called to set a time to go and receive the vault. We agreed on the next day. He failed to come and we did not go. At the third interview, Smith proposed as stated in my second cross examination, which I did not accept, but told him if he would go on and build the vault, we would settle then with him, which he agreed to, and was to do it the first thaw or warm weather. In my proposal Smith was to furnish every thing, and he agreed to it.

2d. There was no additional compensation to be paid to Smith & Peirce for rebuilding the vault.

p. 45. 3d. Hayes was to set the coping, which he had not ready in time. I did not see him do it, but he brought his bill for doing it to the Company.

Cross-Examination renewed.

Int. 1st. Mr. Peter O. Loucks, will you now state upon oath all that was said by Mr. Smith and by yourself in the conversation that took place between you, at the time you told him you had heard the arch or vault had broken down? Repeat the conversation as it took place, without note or comment, if you please. Also, the language used by the parties. Relate the whole conversation fully, distinctly and fairly, so help you God. State where the conversation took place, when, and who were present.

Ans. It is impossible for me to recollect all that took place. I have already stated in substance, as near as I can recollect, all that took place at

that time. The conversation took place in my store on Washington street. James McCoy was present at the time, and heard the whole conversation.

Int. 2d. Do you upon oath state that you cannot make any further or fuller answer to interrogatory last above.

Ans. Not with any certainty.

p. 46. Int. 3d. How many private conversations have you had with the attorneys of defendants, since commencement of this suit?

Ans. They have spoken to me several times, but I cannot tell how many, as I have not kept account.

Int. 4th. Referring again to the conversation you had with Smith at the time you told him the vault had broken down, will you please relate that portion of said conversation you do recollect. Which of you spoke first on the subject, and what did he say?

Ans. I have already stated what I recollect of the matter, and cannot tell who spoke first.

Int. 5th. Do you positively refuse to answer the last interrogatory propounded to you?

Ans. I have already answered it as near as I can recollect.

Int. 6th. Did Smith in that conversation say anything? If he did, state what he said—repeat his words.

Ans. I cannot repeat his words any nearer than I have already done.

Int. 7th. Please repeat now what he said in that conversation.

Ans. What I have already stated before as nearly as I can recollect.

p. 47. Int. 8th. Did you say anything in that conversation? If you did, please repeat what you said, using the same words as nearly as you can.

Ans. I did; and as nearly as I can recollect are the same as I already stated.

Int. 9th. Did any body else say any thing in that conversation? If they did, state who it was, and what they said.

Ans. I don't know of anything being said by anyone else.

Int. 10th. Will you now please repeat the conversation that took place between you, at the time you told him you had heard the vault had broken in, in the order in which it took place, using the words, if you remember them, and if you do not, so state, and repeat the conversation in substance, as it took place, to the best of your recollection.

Ans. Mr. Smith being in my store at that time, and after a great deal of conversation on both sides, and which I do not recollect sufficiently to state the very words: but Mr. Smith did at first proposed to rebuild the vault, provided the company would furnish the materials. And in reply to this proposition, I told him the company would not accept, but the company would be satisfied to accept the vault provided he would rebuild it at Smith's expense, and which he said he would do the first warm weather.

p. 49. The contract referred to by the witness, Loucks, and attached to his deposition, is as follows:

For this contract and the plans attached, see pages 49 and 52 of Record.

- p. 53. Hervey Lightner called, testified as follows: The Association appointed P. O. Loucks a committee to make a contract to build a vault. I know from Smith & Peirce that a contract was made. Smith told me he had contracted with Loucks to excavate the foundation, furnish the materials, except the stone coping, and do the work for \$525. When we were about making the contract, Loucks, Hall, myself, and Smith, went and selected the site for the vault. The place was marked out, and stakes stuck for the foundation. The next thing I knew, Harman had commenced digging the foundation. Loucks and I went to examine it, and found it was not by eighteen inches far enough into the hill, according to the stakes. At the request of Smith, we agreed that the foundation might be dug deeper. That was done. Harman claimed more pay if he did it. Smith agreed to do it. The defendant was to pay Harman, and charge it to Plaintiffs. The plans attached to Loucks' deposition were referred to, all the time. It was necessary to fill in outside the walls as the work progressed. Some dirt was thrown on the arch before finished. Smith came to me to get pay for vault. I went to see the vault, and found it had fallen. I refused to pay, because the vault was
- p. 54. down. It cost some \$340 to \$350 to repair it. The defendant furnished the material to rebuild it. I can't estimate more than thirty to thirty-two thousand bricks in the vault. The bricks in front were ordinary good bricks, and nothing extra in any of them. I have been an engineer: have built arches and bridges on railroads. The reason why the vault fell, is that it was very poorly put together. If well built, the side walls would give way before it would fall, unless a sufficient weight was put on to crush the material. There had to be new bricks furnished to rebuild. The old were used as far as they would go. Oct. 25, 1856, there was paid to Plffs. \$50. Nov. 1 \$75. Nov 3d \$220. To Harman \$54 and some cents. The vault fell in last of November or beginning of Dec. It is set in the side of the front of a hill. The water can in no case run on the vault.
- p. 54. There was no appearance of any wash. I told Loucks the workmen were using too many bats, and that the bricks were not laid to a centre. This was during the progress of the work. The bricks were not laid regularly. From the inside I saw the key course was wider at one end than the other. The key course run out, and the balance was filled with spalls. Keys should be of the best material. The row-lock, in a foot arch, is, in reality, three four inch arches. Binders are put in when there is a proper place for them. Defendant Peirce and I had a conversation after the arch fell. Peirce said it fell because of bad workmanship, and

p. 55. pliffs ought to rebuild it—that he wanted Smith to rebuild it, which he refused. Said it was damaging to their reputation as masons; that he was not able to do it himself. Peirce then agreed to rebuild it, at bare cost, charging nothing for profit. He did so, and Company paid him for work and materials. This agreement was with Peirce alone, after the firm of Smith & Peirce had dissolved, and the spring after vault fell in.

CR. EX. I commenced engineering twenty-five years ago. At first I was rod-man. I afterwards had the management of twelve or fifteen miles of the Reading Railroad. The arches there were of the stone, and laid very accurately. I had the building of one brick arch eighty or ninety feet long. It was in the form an arc of a circle. The outer ends were laid by a line. The front wall of the vault was sprung one inch or so. It had to be taken down.

John Hall—Know this vault. Was there at the time they were building it.—Noticed the brick used. Some too soft. Told the workmen so. Some soft brick put in side walls and some in arch. Courses in arch not straight. At key course the opening was one-half inch wide at one end, and over a course wide at the other. Both sides of arch were begun and run up together. When they commenced cementing on outside, they had not enough cement, and mixed up a good deal common mortar to make it hold out. I covered the vault. On Saturday after they got through building, I asked Smith when it would do for me to take out the centres. He said: “Any time after Monday.” I then asked when it would do to cover it. He said: “It will do to begin this afternoon;” and marked how high I might then cover it. The balance of covering he said I might put on as soon after that week as I wished. I went on and covered the vault. I rigged scaffolding on each side, wheeled up the dirt, dumped it down on the scaffolding, and then had it shoveled on the vault. Don’t know how long it took to cover it; but it cost something over \$50. The Cemetery Company paid for this. There was no rain while we were covering the vault, nor till about the next Wednesday, a day or two after we got through. No dirt of any account washed off before the vault fell. Water cannot run from the hill above on this vault. The ground slopes so as to carry the water to the sides; and an old log lying in the hill just behind the vault, protects nearly two-thirds of it. I took the centres out about the last of the week after the arch was closed, and after waiting some days, thinking some one might be sent to take them out. Ryors came to do it, with another man, just after I finished, and before I left the ground. In taking them out, I first dug along one side and let the props settle all along, so as to let the centres down about a foot on that side. On the other the centres rested about one-half inch on the wall. I then took all the props except the centre one out, put a rope around this, and with men outside pulled it out, and the centres came regularly down. I saw no disturbance of the arch, except a piece of brick which fell from near the loose one, to which I pointed Mr. Ryors. Was there when arch was cemented on inside, and saw Smith chipping pieces of brick and chinking them in where the bricks were loose. It was cemented the next week, I think, after centres were taken out. On Saturday, three or four days after cementing, I found

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the vault down. There was about twenty inches of dirt on top when it fell. Smith said nothing to me about the way I pulled the centres down. Peirce rebuilt the vault under a new contract, after Smith and he had dissolved. It was rebuilt on same centres and sidewalls, except a soft brick here and there, which we had taken out; and as rebuilt is still standing. May be an inch or two more dirt on it now than before. There have been many heavy rains since. The rebuilding cost \$301 and some cents, which the defendant paid; also, about \$35 for re-covering vault.

Defendant here offered receipts, showing payments to plaintiffs on account of said vault, amounting to \$399.³²/₁₀₀, which are admitted by plaintiffs, except \$20 of the amount paid Harman for deepening foundation, which plaintiffs claim should not be charged to them. The sum paid for rebuilding the arch is not included in said amount.

Witness then further said: By the contract, plaintiffs were to go into the hill ten feet further than first dug. Harman begged off, and it was then agreed to go deeper down. By the change, the digging was one-half less than to go back into the hill. Smith agreed to pay for sinking the foundation deeper. Defendant was to pay Harman and charge to Smith.

CR. EX. In Loucks' absence I was to see that the work was done as required by plan. Have the superintendence of the Cemetery grounds. Was not present when the contract was made, but saw and read it over. The centres were made p. 58. of boards. The posts were made of young saplings. I asked Smith when it would do for me to take out the centres, saying, at the same time, "We want the vault as soon as possible." He replied: "It will do any day after Monday." I told some of the men some of the brick they were using should not go in if the building were mine. It rained the fall the arch fell. It fell in last of November or first of Dec. I spoke to Peirce when rebuilding the arch to have the soft brick in sides dug out. I did not take out the centres the last time. Saw Smith poke up two spauls to tighten bricks in key of the first arch when he came to cement on inside. Since this vault rebuilt, another vault built on these grounds, from which I helped to take the centres out. When this arch first finished there were about four masons at work. The opening of the key course was narrowest in front. Smith consented to dig the foundation deeper, rather than go farther back into the hill.

RE-EX. The plans for this vault were on the ground, and referred to while plffs were building it. It was rebuilt by Peirce in latter part of June and beginning of July, 1857.

James McCoy testified--I was present at a conversation in store of P. O. Loucks, between Smith, the defendant, and Loucks. Smith wanted Loucks to accept the vault, and Loucks would not do so, as it had fallen. After talking a long time, Smith said he would repair it, but thought the Association ought to furnish the materials. Loucks thought not. Smith finally said he would go on and fix it.

CR. EX. Smith wanted the job accepted so he could get his pay. Said the

p. 58. breaking down of the vault was no fault of his. Loucks would settle on no terms but that the vault should be rebuilt, and then he would pay the balance of first contract, when the matter was decided. I understood Smith to agree that pliffs were to furnish materials.

James Hazard testified—I am a bricklayer—saw the vault—part of the arch was down. It was intended for a semi-circular arch—there can be no stronger arch. I can't tell what weight it would bear so long as the abutments stand. A few
p. 59. feet of earth ought not to throw it down. The abutments were not sprung; about two-thirds of the arch was down, more or less. The arch was not broken straight across. I think twelve or fifteen inches of the arch on each side were standing. If well built, of good material, I don't think any weight on the top would throw it down. *The sides were not sprung.* I know this, because the cement in angles was not cracked. I formed no opinion as to what threw it down. In some places there was a good deal of mortar, some places not so much. Soft bricks were in the arch. Thirteen to fifteen courses in the center had no headers. They were formed of single bricks laid in edgewise. There are various opinions about this. Some think three four inch arches are stronger than an arch built together. In my opinion the more headers you can get in the better. (The bricks looked as though they verged to a common center.) If well built, of good materials, it ought not to have fallen. It was worth near \$9 per M. to furnish and lay the brick. I am
p. 60. not certain bricks have been sold as high as \$5 per M. and four dollars for laying them. If properly cemented rain or water ought not to affect it. I can't account for its falling on any other hypothesis than that it was badly constructed. The cement was still on, so I could not see the courses, except where the arch was broken off. I could not see whether the bricks were laid in straight lines. The courses ought not to vary more than half an inch in that distance—an inch would be high variance. A good workman, working by the eye and occasional measurement, ought to keep within that.

CR. EX. I went up with Luther Card and P. O. Loucks, near the last of Nov. It was worth 75 to 80 cents per thousand to haul bricks. The front wall was sprung out—cement was either dry or frozen. The front of the arch was exposed to the frost. If there had been frost enough under the foundation it would tend
p. 60. to lift it up. There had not been enough. I don't think that frost could injure it. A man could pound a hole through a green arch, but would have to strike several times. I don't think the man lives who can key out an arch where the courses are not straight, as strong as one that is. If the brick-mason furnishes the center it is his fault if the boards are not even.

Luther Card testified—I have been a brick-mason thirty years. I have seen the vault. It is twelve by twenty-two feet inside. It would take thirty-six to thirty-seven thousand bricks. It was worth \$9.50 to furnish and lay the brick.— It was worth twenty-five to thirty cents per yard to cement it. It would not vary
p. 61. much from one hundred yards cementing. Birkett's sand bank is one half to three-fourths of a mile from the vault. The distance from Giles' to the vault is half a mile farther than to town. I examined the vault after it had fallen in. The

front was sprung out—the abutments were firm—two-thirds of the arch was down to within a foot or two of the abutments. The brick in the front were good.—The outside of the front would take about two thousand bricks. I can't say why the arch fell, if well constructed. It could not fall without springing the abutments. The dirt on the back part was thickest—one foot thick where it fell, and two feet further back. The vault has been rebuilt. It was the front part that fell.

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CR. EX. In my estimate I counted twenty-two and a half bricks to the foot. I commenced from the surface of the floor. I don't know about the foundation.—This arch was a row-lock. Mechanics differ as to the strength of the arch. In a large circle I prefer the other way of building. The front was sprung from one to three inches. The greatest variation was about the center. The cement on the inside was firm.

RE-EX. Hall could not injure the arch by taking out the center in the way he did it. The front was sprung by the falling of the arch.

Charles Ulricson. I have been an architect twenty years. In the beginning of Dec. I looked at the vault,—two-thirds of the arch had fallen down. The arch had fallen nearly to the abutments at the front, and the break tapered up irregularly as it extended back. The cement was partly scaled off the inside, in small patches, on the sides of the arch, and one place in the center extending from the edge of the break back towards the hill—the size of a table before him, being about two by eight or nine feet.

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I examined the work, and thought from what was standing that the key had not been properly put in. There were soft bricks, but not enough to hurt it. I saw that in the center of the arch the key course had been filled in with spalls. The key ought to have been filled in with good hard brick. The key course was wider at the back end than the front, from a course to a course and a half. The abutments were standing, and not sprung. There was earth piled outside of them. If built as it should be, it should not have fallen with any reasonable weight placed upon it. The front was sprung out by the falling of the arch. The courses had not been laid in a straight line. They were laid irregularly, and did not verge to a common center. If a brick stands too straight up on one side of the center, it is easy to throw the arch down. The props under the center ought to be taken out one side at a time. Witness was shown Diagrams on page 62 of Record.—

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Witness said—I made these Diagrams on the former trial. The upper one shows how brick ought to be laid, and the lower one the manner in which the bricks were laid in this.

CR. EX. If plastered on the outside, freezing and rain would injure the arch. The frost destroys the cementing qualities of mortar.

Defendant here rested.

Frederick G. Hartshorn, recalled by the plffs, testified—I went up to measure the vault a day or two before the suit before the justice. About one-third of the arch was down. I did not measure to see. I can't swear positively to that.—The cement was scaled off in places.

Jeremiah Smith, recalled :—Helped rebuild the vault. Saw no soft bricks dug

from sides. Think I should if done. Remember no complaint by Loucks or Hall, about soft brick. When we rebuilt the arch, cement was off in spots, and about a foot round the edges. Used the old brick, and cement still on them. as many bats in second as in first arch. One-third of the arch had fallen. We p. 64. knocked the rest—a little over half of it—down with scantling. It was very firm. Couldn't see if courses straight or not. Was cemented over inside and dirt on outside. Cement not off where key or arch brick was. Some spots not over eight inches across where cement was. Ulricson might be mistaken—I might be. First saw the arch after it fell, about two weeks before suit before Justice.

Cyrus Peirce recalled—Helped rebuild this vault. Saw no picking of soft brick from wall. Heard no complaint from Hall or Loucks about soft brick. Think first vault built as well as second which still stands. In laying the brick they naturally turned the centre. Remember seeing no strips along centre from which cement was off. One third or a little more of arch standing when rebuilt. Saw no common mortar mixed with cement for outside. If much, should have felt it in working. Ulricson couldn't tell how vault was built from inside.

Thomas B. Whitby next called by Plaintiffs, said—I have been an architect for fifteen years. Heard the testimony about this arch. No difference between strength of arch built as this was done, in which the courses are laid straight. p. 65. The low lock arch the strongest kind. No difference if courses, not straight, if keyed up well and joints parallel. If wall green and work bad, more likely to fall when centres taken out than after. If this arch stood two or three weeks, it was long enough to test the workmanship. Frost may throw down an arch after it comes out. Have known arches thrown down in this way. Frost tends to kill the mortar. A loose brick in an arch twenty feet long, would not endanger it. One may take out half dozen pieces, if not together, without damage. From Plaintiffs' testimony, the work in this arch was well done. Effects of throwing a solid lump of earth on top, when mortar green, injurious.

CR. EX. Never knew arch thrown down by frost. Not workmanlike to have loose brick in arch. Pressure should be equal on all parts of the arch. Can be no perfect key if key lines not same throughout. Presumption in such case that the work was not well keyed. Harder to key where opening narrow. When a brick is set in, the pressure should be equal on every part, as great below as above. If hard spall press above and soft mortar below, key not good. If the brick in this arch were laid, as shown by Ulricson, it could not be keyed.

James Morris recalled, testified—I did not see Smith poking up spalls, at time I cemented the arch. I think I would have seen it if it had been done. I saw no loose bricks. I cemented the same vault afterwards. I saw no difference in them.

CR. EX. I can't tell what made vault fall. I built a cistern which fell, the only

p. 66. one I ever knew. I could see no difference in the courses in first and second arch.

William Thompson recalled, testified—I heard Hall's deposition. I saw no mixing of common mortar with cement. There was plenty of cement for the outside. I heard nothing said by Lightner or Loucks about soft brick, while the arch was building. We put in binder when the courses came up even. We keyed up each arch separately. The courses were brought up as regularly as we could.

The front was an inch or an inch and a half narrower than the back part. We drove the key brick in with a hammer. The first was keyed tighter than the second, and the second tighter than the third. This is the right way. When mortar freezes and thaws, it loses its strength. I was at work all the time. I heard no complaint from Hall or Loucks, while the work was progressing, about soft brick.

Richard Schofield.—There was a heavy rain on the 27th day of November. On December 1st, at 4 o'clock, P. M., it drizzled; at 8 o'clock P. M., it rained. On the morning of December 2d it had frozen hard enough to carry horses and wagon. I remember these facts, because I got married at that time.

James Hazzard, recalled, testified—Luther Card and I went to see the vault about the last of November.

p. 67. The Plaintiff moved to exclude the testimony of Hervey Lightner from the jury, on the ground of interest, and that he was not a competent witness in this suit, which motion was sustained by the Court. To which motion the defendant excepted.

Jonathan K. Cooper, called by defts' counsel, and testified—On the former trial of this cause, in this court, the sum of \$399.32 was admitted as the amount paid by the defendant to plaintiff, for building the vault. This admission was made by Mr. Grove, attorney for the plaintiffs, in consultation with them. The only sum in dispute was \$20 paid by defendants to Harman, which plaintiffs contended ought not to be charged to them.

E. N. Powell, testified—This cause was tried before me in the former trial. I think that the only controversy about payments was about \$20, contained in the receipt of Harman, which defendants said plaintiffs were to pay, and plaintiffs said defendants were to pay. There was no dispute about payment actually made, and the only dispute was who should pay the \$20 to Harman, for extra work.

This was all the evidence in the case.

The Plffs then asked the Court to instruct the jury as follows:

1st. If the jury believe from the evidence that the Plaintiff contracted with the Defendant to build a vault; and that the plaintiffs, in pursuance and by virtue of
p. 68. such contract, furnished proper materials and built the vault according to the contract, and in a good and workmanlike manner, the jury should find for the plffs the price agreed to be paid for building such vault, after deducting payments proven to have been made.

2nd. It is for the jury to determine, from all the evidence, whether there was a contract made between the parties for the building of the vault or not, and if no contract was made, the plffs are entitled to recover whatever they have proven

the materials and work furnished by them to have been worth, minus what the defendants have proven to be paid—provided the work was done in a good and workmanlike manner, and materials proper.

4th. If the jury believe from the evidence that plff made a contract with defendant to build the vault in controversy, and that plffs did furnish the materials and build the vault, as provided in the contract, the plffs are entitled to recover any balance proved to be due them, notwithstanding the arch afterwards fell in—unless the jury shall find that such falling was caused by want of skill or care in building said vault, or some defect in the materials used.

p. 69. 5th. The jury are further instructed, that the plffs are entitled to recover the contract price for building the vault, if they believe from the evidence a contract was made, unless they further believe from the preponderance of evidence that the work was carelessly or unskillfully done, or the materials used were not of suitable quality, deducting payments that had been made.

6th. If the jury believe from the evidence that the arch in controversy fell in consequence of causes arising subsequent to its completion, and not from defect of materials in the construction, or in the workmanship, then the plff should not be held responsible.

7th. The jury are further instructed that if no time was fixed for payment of the price for building the vault, then the plffs became entitled to receive the contract price for building the same, (if the jury believe from the evidence that a contract was made), as soon as the vault was completed, provided the vault was built of proper materials, in a good workmanlike manner.

8th. The jury will entirely disregard the testimony of Hervey Lightner, as the Court has excluded it from their consideration.

9th. If the jury believe, from the evidence, that there was a contract between plffs and defts, in regard to building the vault, and that the plffs furnished the materials and constructed the vault according to the contract, with proper materials, and proper labor, the plffs were entitled to receive the contract price for building it, whether it was formally accepted or not.

pp. 70. 10th. Propositions made by one party to another by way of compromise, and to avoid litigation, are not competent evidence against the party making them; and if the jury believe, from the evidence, that Smith made propositions to Loucks, by way of compromising a matter in dispute, and to adjust the same, to avoid a law suit, such propositions are not evidence against the plffs.

Qualifications of the defts ~~in the~~ 4th instruction :

If the jury believe, from the evidence, that plffs, or either of them, proposed to rebuild the arch if the defendants would furnish materials, then, unless the defendants did furnish the materials, the proposal would not be binding on the plffs.

If the jury believe, from the evidence, that the plffs furnished good materials

and built the vault in a good workmanlike manner, according to the contract, they were entitled to their pay; and if the plffs, or either of them, agreed to rebuild such arch, such agreement would not bind the plffs, unless some new consideration was paid or promised them to rebuild said vault; but such an agreement may be considered by the jury as tending to prove the admission, on the part of the plffs, as to the defective character of the job.

To the giving of each of which instructions the defendants objected. Objection overruled and the same were read to the jury. Defendants excepted. Defendant's counsel then asked the Court to give the following instructions:

1. That if there was a written contract it must govern as to the price and character of the work.

2d. That if the jury believe, from the evidence, that the arch built by the plffs fell in, the presumption is that the same occurred on account of defective work or materials, unless the contrary is shown.

3. That if the jury believe that the arch fell in on account of defects in the material or workmanship, the plaintiffs are liable for all the expenses necessarily paid to rebuild or repair it.

p. 71. 4. That if the jury believe, from the evidence, that after the arch fell in, the plffs, or one of them acting for the plffs, agreed to repair the same at their own expense, and did not do so in a reasonable time, or refused to do so, they are liable for the expense of such repairs, if such agreement was made in consideration of the defective character of the job.

5. That if the jury believe, from the evidence, that there was no written contract between the parties, or that it was abandoned by them, the plaintiffs are only to be credited with the value of the actual amount of brick, materials and labor, put into and expended upon the work, and that from this sum the amount paid by the defts, and the cost of rebuilding the arch, if the same was originally defectively built, and fell in consequence thereof, must be deducted.

p. 72. 6th. If the jury believe, from the evidence, that plaintiffs built the vault mentioned by witnesses in this case for defendants: That soon after it was built, it fell in: That there was then a bona fide dispute between plaintiffs and defendant, through its proper agent, as to whose fault it was that the vault fell in, and whether defendant should pay plaintiffs for building such vault, and that to settle such dispute, it was agreed by plaintiffs (acting through Smith, one of them) and defendant, (acting through P. O. Loucks, its agent) that plaintiffs should rebuild said vault, and that *then*, in consideration thereof, defendant should pay plaintiffs the full amount defendant had contracted to pay plaintiffs, in first place, for building such arch, this would be a valid agreement and binding on plaintiffs; and if plaintiffs did not perform such agreement to rebuild, they would be liable to defendant for damages, which defendant suffered by reason of the vault not being so rebuilt by plaintiffs.

7th. When a mechanic or other workman undertakes, for a valuable consideration, to furnish materials and do a piece of work for another, the law implies a warranty that the work so done shall be reasonably sufficient for the end designed.

And if the jury believe from the evidence that plaintiffs undertook to build an arched cemetery vault, for defendants, and that either from defect of materials or workmanship the arch fell in, and was not rebuilt by plaintiffs when this suit was commenced, plffs are not entitled to recover in this action.

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But the Court refused to give the said 7th and 8th instructions, to which ruling the defendants excepted.

Verdict for plffs for \$147.

Motion by defts to set aside the verdict, and for new trial, for following reasons:

- 1st. Court excluded proper evidence offered by defts.
 - 2d. Court gave improper instructions for plffs.
 - 3d. Court refused proper instructions for defts.
 - 4th. Verdict is against the evidence, the law, and instructions of the Court.
- Motion overruled, and judgment for plffs, and defts excepted.

ASSIGNMENT OF ERRORS:

1. Exclusion of proper evidence offered by defts.
2. Admission of improper evidence for plffs.
3. Refusal of proper instructions asked by defts.
4. In giving improper instructions for plffs.
5. In overruling motion for new trial.
6. In rendering judgment for plffs.

COOPER & PURPLE,
For Appellants.

66 No 181

SPRINGDALE CEMETERY ASSOC'N.

vs.

JOB SMITH & HIRAM PEIRCE.

ABSTRACT.

April 23-1863

G. G. Ireland

Clark

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1865.

SPRINGDALE CEMETERY,)
vs.)
JOB SMITH AND AL.)

APPEAL FROM PEORIA.

BRIEF OF APPELLANT.

1. The contract between the appellees and appellant, for building the Cemetery Vault, to recover for doing which this suit was brought, is an *entire* contract.— By its terms, appellees engaged to “furnish materials and finish the work.”— They never did *finish* said vault within any reasonable intendment. Before the work was dry, and before it could be fairly handed over to the appellant, it fell in, and was wholly useless till rebuilt by appellant, and this from no fault of appellant. Appellees had already been paid the greater part of the contract price, and the damage to appellant from the breaking down of the vault greatly exceeded what remained unpaid. The job being incomplete, no right of action had accrued, and the debt. was besides entitled to recoup the damages occasioned by the insufficiency of the work, against any claim for further pay, set up by the plffs.

2. Not only was the work to be finished, and ready for delivery to appellant, but it was to be formally *accepted*, or at least duly tendered, in good condition, for rejection or acceptance. This was a condition precedent to payment, as the proof shows. No delivery or tender was ever made, or acceptance had. And this—first—because Smith (who represented the appellees,) failed to meet with the agents of appellant on the day fixed. And 2d—because, before he came again the vault had fallen down, and so no tender of it could be made.

3. The new contract of Smith & Pierce, with appellant, to rebuild, not being complied with by them, this action did not lie. Appellant had just grounds for contending that appellees were liable for the damages occasioned by the vault's falling in. This was no mere pretence, to extort money from, or avoid paying for, services actually rendered by the appellees; and the agreement to rebuild was

made in settlement of this controversy, and was binding on the appellees. *Fitch vs. Haight*, 4 Scam. 51; *McKinley v. Watkins*, 13 Ills. 140; *Taylor v. Patrick*, 1 Bibb 168; *Russell v. Cook*, 3 Hill 504; 11 Mees. & Wells, 641; 3 Serg. & R. 331; 5 Pet. 99—et passim.

4. The testimony of Hervey Lightner was improperly excluded. It was material, and indeed conclusive against the appellant.

The real estate of the Cemetery could not be sold on execution. See Charter; Laws 1855, p. 462.

Witness was not a party to the record, and had no interest to disqualify him.—3 Phil. Ev. p. 58; Cowen & Hill's Notes, 37; Meth. Ep. Ch. v. Wood, 5; Ham. Ohio Rep. 283; *Curtenius v. Wheeler*, 5 Gilm. 466.

5. Several of the instructions given for plffs. below are objectionable. Because, 1st—they wholly ignore the contract of said plffs. to rebuild. 2d. Because they assume that if the materials used and work done were good, this alone was sufficient, without regard to any delivery or acceptance by the company, or the sufficiency of the work for the use designed. The arch of the vault fell immediately, and before delivery. This was the loss of the appellees, unless attributable in some way, to the fault of the appellant, of which there is no proof—and if there had been, it was a question for the jury. These objections apply to instructions numbered 5, 6, 7 and 9, and perhaps others.

Instruction 10, for plffs. below, is objected to as wholly irrelevant. This was not a case of a mere proposal for compromise, *unaccepted* by the other party; but an actual *agreement* between the parties. The instruction tended strongly to confuse and mislead the jury, and could have no other effect.

6. The 4th instruction given for deft. below, is law as it stands, and the qualifications 1 & 2, afterwards made to the same by the court, were improper. The 1st, because it proceeds upon an entirely different hypothesis from the instruction it professes to qualify, and of course is no qualification, but tended to divert the jury from the proper consideration of the case made by the instruction itself. Said 2d qualification affirms that the agreement to rebuild did not bind the plffs. without a new consideration, provided only the vault was at first built of good materials, and in a workmanlike manner. If the views above presented are correct, this was not the law.

The 7th and 8th instructions asked by deft. are clearly law, and were pertinent to the case. The court erred in refusing to give them.

7. The verdict of the jury was wholly unwarranted by the evidence, and never could have been arrived at had the jury not overlooked or disregarded material portions of the testimony, and the 6th instruction given for deft.; and the new trial asked for should have been given.

N. H. PURPLE, and
COOPER & MOSS,
For Appellant.

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Springdale Cemetery

vs.

Job Smith et al.

Brief

Filed May 12, 1884
L. Leland
Clerk

COURT OF COMMONS

Springdale Cemetery } Supreme Court =
 vs. } April Term 1863 =
 John Smith & Hiram Peirce } Appeal from Revis-

Additional argument for Appellant =

In the Fall of 1856, Smith & Peirce contracted with Appellant to furnish materials & build a Cemetery vault, for the sum of \$525 = (see test. of Sacks p.p. 7-8 of Abstr. and Contract p.p. 11-12 of same.) ~~They then~~ In their acct filed (p. 1 of Abstr.) they credit Appellant with payments to amount of \$345 = Appellant also proved a further payment to Harman, for digging foundation of \$54.³²/₁₀₀. (Test. of S. Harman, p. 5, and order on Treasurer of Cemetery Association, p. 6 of Abstract.) Amounting in all to \$399.³²/₁₀₀, which was proved to have been admitted by juries below, excepted \$20. part of the sum charged, as paid Harman, which they contended should not be charged to them, but to Appellant. (see test. Cooper & Howell p. 18, of Abstr. Entry on p. 14, in test. of Hale, read from former trial, by agreement. See also, test. Sacks & Hale, p.p. 9 & 14 of Abstr.) The vault was to be cemented inside & outside - (see contract, p. 12): In less, ^{time than} probably, than four days from the cementing on the inside was done, the arch of the vault fell in - (see test. of Hale p. 13, Abstr., at foot, for time), and the rebuilding afterwards, cost Appellant \$336 - (test. of Hale p. 14.) = Appellant claimed damages for this, ~~and at~~ on the trial, on bill filed, and also to set the same off, so far as necessary, against the claim

about this \$20.

of plffs =

It is hardly possible, we think, to examine the evidence set out on this Record, and escape the conviction, that either the Materials used in constructing the Arch of this Vault were defective, or that the work upon it, was unskillful, not to say, faithlessly done. It is true, the hands employed by plaintiff to do this work, say they were good workmen - that the materials were good, as far as they saw, and that the work was well done, for anything that they could see. But to oppose to this, we have the statement of Hall, that the Courses in the Arch were not straight. That, ~~while they~~ at the Key Course, they were only $\frac{1}{2}$ inch apart, at one end of the Vault, while, at the other, the opening between them was over a Course wide. That, when the Centers were taken out a piece of loose brick fell from the Arch, near, or in the Key Course. That there were other loose bricks in the Key Course, and that afterwards ~~when~~ he saw Smith, when he came to cement on the inside, chipping pieces of brick & chinking in, to tighten these loose bricks. Of Pyors, their own witness, that the Key course was not a full course. That it was wider behind than before, as much as a brick or more. ~~And~~ That there were loose pieces in the Key Course of Whirson. An Architect for 20 years, (who saw the Vault after the Arch had fallen). That the Key was not properly put in. That the Key course was wider at the back than the front by a Course to a Course & a half. That in the centre of the Arch the Key Course was filled in with spawls. That the Courses were not straight, and the bricks irregularly laid, not verging to a common Centre. (Here, please see

And, (on his Exp.), that he did not think the man lined who could key out an arch, where the courses are not straight, as strong, as where the courses are straight =

Diagrams on p. 62, of Record. the first designed to show how the bricks in an arch should stand. the second how the bricks in this arch were laid.) - ~~that~~ that, if well built the arch should not have fallen - Of Hazzard, an old brick layer (who also saw the vault after it fell) that in the length of this arch the courses should not vary more than $\frac{1}{2}$ an inch, in ^{from end to end,} width. - that an inch would be a high variance - that a good workman, working by the eye & occasional measurement, ought to keep within that. - that, as the sides were not sprung, no weight scarcely on the top should have thrown it down - that, if well built, of good materials, it ought not to have fallen; and that he could only account for its falling, on the hypothesis that it was badly constructed. -
Of Luther Card, brick mason for 30 years (who examined the arch after it fell). - that the abutments were firm & not sprung (in which all the witnesses agree). - that, if well constructed, the arch could not have fallen, without ^{previous} springing of the abutments. - And last of, Whithy, the architect called by Jeffs, who, tho' stating some rather incredible things on his examination in chief, says, on cross-examination, that it is not workmanlike to have loose brick in an arch - that the pressure should be equal on all parts. - that there can be no perfect key, if the key lines ^{are} not the same through out. - that the presumption in such case is, that the work is not well keyed - that it is harder to key where the opening is narrow; and that if the brick in this arch were laid as shown by Whicson, it could not be keyed.

To all which add, that very soon after the centers which supported the arch, were taken out, and almost before these men had fairly got their hands off the work, this arch - (semicircular in form, ~~and~~ according to all the witnesses, on both sides, who speak of it, the strongest form in which an arch can be ^{made} built, & built in a structure designed to stand for generations), tumbled in, without any reasonable cause that anyone can assign, aside from its bad construction - owing to defective materials, or workmanship, or both - And there is, we think, an array of proof, which ought to satisfy any reasonable mind as to the true cause, and fix the liability upon these plaintiffs - True, a feeble effort was made to show that Hall (who was at the time a sort of general Superintendent of the cemetery grounds, and who covered the vault & took out the centers) had in some way injured the arch - But all that was fully exploded by the evidence, and was scarcely named in argument to the jury - The main ground taken then, and ~~later~~ relied on now, to account for its fall, (see written argument of Mr. Grose) is, that it was occasioned by the action of frost, operating on the inner surface of the arch, through the open front, which it was the business of appellants to close by a door - To which we reply -

1st - One witness, Hazzard, says, I don't think frost could injure it - That frost under the foundation, might lift it up - but that had not been brought - And Whithy, then witness, while saying Frost might throw down an arch, adds. after it comes out - And there was manifestly no time for that -

2nd = Smith, in his interview with Soucks, just after the Arch fell, did not put it on that ground at all, but attributed its fall, ~~but~~ (see answer to 9th Cr. Int. p. 10, of abstract) to water running down the Bluff - (of which, by the way, there is not only no proof, but the same is abundantly disproved in the record =)

3rd = As it was not more than three or four days, at most, from the ^{time the} Cementing was done, till the Arch fell, Anous surrender of the vault to appellants, ~~if~~ if indeed there was any notice that the work was done, there was neither time, nor opportunity, with the utmost diligence, to put in said doors -

We might add also, that the two or three weeks, which the plffs lost before commencing the work, after the foundation was dug, ^(see test. of Soucks) would probably, if improved, have avoided any difficulty on this head. And that, as the plffs were mechanics, skilled in such matters, it was for them to say whether they would undertake such work, at that advanced season of the year - But the thing is really too mere a pretence, to call for serious refutation; And the resort to it only proves the consciousness that the fall of the Arch must, in the estimation of the plaintiffs themselves, be laid to their Charge = On this phase of the case therefore, alone, we think the verdict of the jury was unwarranted by the evidence, and that the new trial asked for, should have been granted.

But waiving this, there is another ground, upon which it seems to us, there can be no doubt - we mean the Contract to Rebuild - This is testified to in the clearest manner by two witnesses, wholly uncontradicted & unimpeached, upon the the record - (see test. of Soucks & James M. Coy, p. p. 8. 10. 11. 13 & 14, of abstract); And the jury were not at liberty to disregard it - they were both men of high character, in every respect - they had the best means of knowing that about which they testified; and there ^{was} ~~is~~ nothing else in the matter of their evidence, or their manner of giving it, ^{or otherwise,} to cast suspicion upon it = Rankin vs. Crow, 19 Ills.

626 = Crabtree vs. Hagenbaugh 25 Ills, 233 =

By this agreement, Smith & Peirce were to furnish materials, (so far as men should be needed,) and rebuild the vault, after which, just before, they were to be paid the balance, ^{which would then be} due them, according to the old contract = These terms, Smith, acting for Smith & Peirce, specifically accepted, as a settlement of the whole controversy, and Appellant was ready, in good faith, to carry out its part of the contract, and acted in the belief that it would be faithfully executed by Smith & Peirce, on their part, instead of which however, they being this Recit = It is wholly incontestable, in every aspect of the case, that they should be credited =

For reasons stated, upon the authorities cited in printed brief, this was a valid contract, supported by sufficient consideration & mutually binding on both parties =

The second point made by Appellant in printed

brief, Mr. Grove thinks has nothing in the record to support
it. - The attention of the court is asked very briefly to the tes-
timony of Souck's bill book on this head - the former, (p. 8,
Abstract), ~~and~~ after stating that Smith came to settle be-
fore the cementing was done, proceeds thus - "Smith then agreed
"to cement it, and when done, he was to set a day, & we
"were to go & accept the job, if done according to Cour-
"track. Smith came a week or ten days after & set the
"next day; and Mr. Siglitzer & I were to go up with him.
"He did not come, but came some days after & again
"wanted to settle. I then told him I had learned the vault
"had fallen in". - Again, p. 10 - "Had three interviews with
"Smith on the subject. The first time he said he had the job
"done, except the cementing - that he had the hands engaged
"and would do that immediately, and would like to settle
"as he needed the money to pay his hands. I next
"saw him after my return from St Louis, when he cal-
"led to set a time to go & receive the vault. We agreed on
"on the next day. He failed to come, & we did not go." And
on p. 11, he says, ^(on ex. pt.) "I told him the company would not ac-
"cept his proposition, but the company would be satis-
"fied to accept the vault provided he would ~~build~~ ^{whitewash}
"it at Smith's expense, and which he said he would
"do the first warm weather". - And on p. 14, Mr. G.
says - "Smith wanted Souck to accept the vault,
"and Souck would not do so, as it had fallen". - and on
Cr. Pp. "Smith wanted the job accepted, so he could
"get his pay". - There is therefore abundant proof
that it was the understanding of both parties that

the work should not only be finished, as the contract required, before plaintiffs could call for their pay; but that, when finished, the company should be duly notified, and ~~then~~ called on for acceptance, so that the opportunity might be afforded of examining the work, and seeing whether it was done according to contract. And, indeed, this is fairly inferable from the contract: that contract was written under certain plans & specifications, to which it is necessary to refer, for size, form, style of building, general contour, ^{and} ~~the~~ even to understand what the contract itself means, or is about.

It was therefore in strict keeping with such a contract that the job, when finished, should be duly tendered for inspection & acceptance, before a demand could be made for the pay. As a matter of fact, however, ~~much~~ much of the pay was made, as the work progressed, doubtless because the plaintiffs needed it to pay for materials & hands. But this was by way of favor, & not of right; and cannot affect the legal standing of the parties under the contract. We have referred to this matter a little more in detail than we otherwise should, because we think the eagerness of Smith to settle, & get the job accepted, & quit, & partly strongly at the suspicion that he thought the ~~main~~ danger in delay - besides indicating that he knew that acceptance was material under the contract, and that a point would be made if that were done: that he did not come on the day fixed, may be accounted for, by his receiving

intelligence that the vault was closed, or that appearances were beginning to be such that it would not do to exhibit it =

Upon the exclusion of the testimony of Mr. Sigher, we refer to the written argument of Judge Peck =

Now do we desire to add further comments upon instructions given & refused, than as contained in printed Brief (to which we also respectfully refer the Court), except perhaps instructions 7 & 8 asked by defendant, & refused = Those instructions, we think, are both plain law, and but too applicable to the case = It is objected to the 7th, that it was calculated to mislead the jury, as the Appellant had furnished the plans of the vault &c., and that if "the work was done according to the plan, - in a workmanlike manner, with proper materials, the plaintiff was entitled to recover, whether the work was sufficient for the end designed or not" = There is certainly nothing in the instruction calculated to mislead; and as to the other objection, the remark that it is not pretended that the plan had anything to do with the fall of this arch - on the contrary the uniform testimony is that the form of this arch is the strongest that can be devised, and it was in the arch alone that the defect was - No other part on which it depended for strength, gave way - But beyond this, the instruction, after asserting the general principle that the undertaking of the workman is ~~to~~ to be taken as commensurate with the design of the work he undertakes to do, proceeds to

place the liability of these people upon deficiency in work or materials alone; the purpose being to bring before the minds of the jurors, the doctrine that this workmanship & these materials, must be of a nature suited to the character & subject of the work they had in hand - As it is clear, that what might be deemed very suitable workmanship & materials for ~~the character~~ ~~of~~ a structure intended for temporary & transient ends, would be utterly unsuited to & insufficient in a structure designed to be durable in its character.

The 8th instruction we suppose not liable to the objection taken to it - that there was a contract of some kind, nobody doubts; And if there was not, what are these people doing in court? They sue the Appellant - upon a contract for the building of a Cemetery Vault; And if they now say there was no contract of any kind - in other words, that the Appellant never employed them to do it, or contracted to pay them for it, we are content =

Only one or two things more, and these very briefly - Something is said by Mr. Goode, about ~~the~~ our taking possession of the vault, by putting tools in it = All there is of that, we believe, is that before the centers were taken out, and of course before the vault was completed or finished, some laborers ~~went~~ ~~into~~ the Cemetery grounds, set there shovels, axes &c., ~~into~~ inside the vault = Whether before, ^{or} after the vault was finished this could not go far to fasten an acceptance of the vault upon the Appellant =

Again, it is said, that Sorels supervised the work, gave directions how it should be done &c. This is only true, in so far as related to the plan. The testimony of every witness is that he gave no directions about the manner of doing the work, but did make some changes, and give some directions about matters relating to the size & form of the things & pilasters in front. And that what he did, affected not in the slightest manner the strength of the arch, or in deed any other part of the work, or in any manner influenced its fall. But, it is said, the front of the arch was springing out. That is so. But the proof is, that the falling of the Arch caused the front to spring. Not that the springing of the front made the Arch fall.

Cooper & Mayo
for Appellant

Ottawa, May 13/63-

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Springdale Cemetery
Nes.
Job Smith val.

addⁿ argument
for appellant =

Filed May 13. 1868
L. Leland
CM

SPRINGDALE CEMETERY ASSOCIATION
vs.
JOB SMITH *et al.*

} *In the Supreme Court,*
} *April Term, A. D. 1863.*

DEFENDANTS' BRIEF AND POINTS.

1. In this case the evidence on both sides was fairly and fully presented, and the finding of the jury is right.

2. The instructions given on both sides fully and fairly present the law of the case.

Substantial justice having been done, the judgment should be affirmed.

See
Gillett vs Smith 1. Gil 490
Ligh vs Hodges 3. Scam. 18.
Supervisors of Chenango
vs
Birdsall } *4 Wendel, 438.*

See also, written argument on file.

GROVE.
For Defendants in Error.

62 181
Springdale Cemetery
Association
vs
Job Smith et al
Depts Bury
Points

Filed May 9, 1863
J. Leland MR

SPRINGDALE CEMETERY ASSOCIATION
vs.
JOB SMITH *et al.*

} In the Supreme Court,
April Term, A. D. 1863.

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GROVE,
For Defendants in Error.

266 181
Springdale Cemetery
Association

vs
Job Smith et al

Depts Corp &

Points

Filed Aug. 1863

J. Leland
CR

The Spruzaale Cemetery } In the Supremo
Appraisal } Court
" } April Term 1863.
Joh Smith & Hiram Price }

Argument of Appellants
This case was brought

to this Court and the Judgment reversed
at April Term 1860. See 24th Mo 480.

The verdict on the former trial was \$1500
on the second trial \$ The Appellants now bring the case a second time to this Court. The Judgment was reversed at the April Term 1860 on the ground that there was error in the instructions.

Taking up the points made by appellants in their briefs I insist
1st That on the trial below appellants offered evidence showing the price and quantity of materials used for the purpose of limiting ~~the~~ the recovery of Appelles to the actual value of the materials & labor furnished & it seems to me that after they relied upon that in their defense it does not lie in their mouth to insist that there was a contract.

(See Testimony of Cross examination of Burns. Giles Paints Abstract, Page 3. Testimony See also Testimony of Hayard & Casa Paints Abstract Page 15)

2. Admitting that there was a contract and that appellants engaged to furnish materials and finish the work I insist that they did furnish the materials and finish the work, and as proof of this I refer to the verdict of the jury and to the evidence in the case.

3. I insert further that the evidence as to character of the materials and of the workmanship was fully and fairly submitted to the jury and they found the facts for the Plaintiffs below.

2. As to the second point made by appellant
1. If this Court can find anything in the pretended contract that the work—the haul—was to be formally accepted or duly tendered as stated in this second point it will succeed much better than I. There is not a word in the contract about an acceptance, nor about a tender, and the whole point has no foundation to rest upon.

2. On the other hand if an acceptance was necessary I submit that the evidence shows an acceptance when the haul of appellants. It all the agent and Superintendent of appellant took possession of the haul as a place of deposit for its tools

area covered it with dirt. See testimony of Hall Printed Abstract page 13,

Appellants by their workman and agents took out the center piece

(See same Page Printed Abstract Hall's testimony) See also Page 44 of same.

Appellants took possession of the vault for the purpose of depositing their tools in it, =

and the whole work was done under the direction and supervision of Loucks & Hall and the question as to whether Appellant did accept the job was submitted to the jury and there was a verdict in conclusion upon this point

3. I deny that there was a new contract made with appellants to rebuild the vault. The only evidence in the record in support of it is the testimony of Loucks and McCoy. I beg of the Court here to read the testimony of Loucks from the original record pages 32, 33, to page 49. Loucks was President of Appellants at the time the vault was built. He volunteered to be a witness, and his testimony is so

evading and uncertain that no contract is satisfactorily proven.

The Plaintiffs below infer laborers their hands had to be paid. The materials were to be paid for and I do know that this engagement was not renewed when the ground that a new contract was made until the court reads the whole of Bonds's deposition. It will be seen that no excuse was set up by Bonds for not paying until the vault fell down.

McCoy's testimony may be found on Printer's Abstract pages 14 & 15 and relates to same ^{subject}. The question of the new contract was fairly submitted to the jury and this court will not disturb the verdict.

But it must be noticed that if the Plaintiffs below furnish the materials and built the vault in all respects as required by the written contract (if such contract was proven and relied on by the defendants below) then there was no obligation binding upon them to rebuild the vault. There was no consideration to support the new contract. All these questions were submitted to the jury.

The Plaintiffs below had to pay for the material, and had also to pay their workman, and at the time this new contract was made as claimed by appellants Smith was urging Loucks to pay the balance due on the job. Smith insisted all the time that the job was well done, done as well as it could be, wanted his pay.

He was put off from time to time by Loucks, and if propositions were made, or made and accepted they were made in the way of a compromise and were not proper evidence on that ground.

The principle is too clear to require authorities. This view of the case was also fairly presented to the jury. It will not be forgotten that Loucks & Hall swear to a conversation that took place long before, and the jury could and probably did exercise a better judgment into the whole case before them - then can be done when the record alone.

4 As to the testimony of Lightner
He was one of the Incorporators.
The Corporation bought the land for
3000\$ 3 or 400\$ was paid down. Light
ner gave his note for 1000\$ They
called it ^{note} 10,000 They set about to have
3333\$ to Baldwin the same amount
and to Lightner the same. The three
owned the Capital stock of the Compa
ny Lightner advanced in addition
2000\$ See his testimony on voir
dire printed abstract pages 7 & 8.

The Company sell lots when an op
portunity offers & they keep lots in
reserve for parties who desire it.

The share or interest of Lightner
in this property is his own individual
property & the act of Incorporation
provides for the sale of ^{the} interest of
any member of the Corporation
See Section 14 of Acts 1855 Page
464 & 465.

He was directly in
terested in the result of the suit

He must pay out of his own pocket
or out of his interest in the Compa
ny one third of the Judgment and
costs. If the Company has a recover
y a Judgment against appellee one
third of the Judgment would have been

the property of Lightree. His testimony was properly excluded. See Terms of 1855. Pages 460 to 466.

5. It is submitted that the instructions given for the Plaintiffs below were proper.

The question as to whether there was a contract for the building of the vault in the fact instances ^{was} fairly presented to the jury, and the Plaintiffs right to recover was put distinctly upon the ground that the Plaintiffs had in all respects built the vault according to the contract.

There was no occasion for the Plaintiffs below to refer in their instructions to any new contract.

Both parties went upon the ground that of the Plaintiffs below built the vault with good materials in a good workmanlike manner according to the contract the verdict should be for the Plaintiffs. This is the view presented by both parties.

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ties in their instructions and in the instructions asked by Plaintiffs below they put their right to recover when the ground that they had furnished proper materials and built the vault in a proper manner.

There was no consideration for the new agreement (even if money, which I do not by any means admit) of the Plaintiffs but by openly performing their part of the undertaking.

But do they ignore the new contract I submit that they do not. See qualifications to Defendants instructions numbered 4 & 6.

The instructions given for Plaintiffs below cover the case fully and were drawn with the view of complying with the decision reported in 20 Murray reports between the same parties.

8.

The instructions asked of appellants were all given but those numbered 7 & 8.

I submit that instruction number 7 is calculated to mislead a jury. Here the appellants show us the plan of the vault, give us the size, the thickness of its walls, the curve of the arch and contracts with the plaintiffs below to furnish the materials & build the vault. None of the work was done according to the plan, in a good workmanlike manner with proper materials. The plaintiffs below were entitled to recover whether the work so done should be sufficient for the end designed or not. There is no warranty in the case.

As to the 8th instruction it was unnecessary for the reason that the same principle is clearly laid down in appellants 3, 4, 5, & 6 instructions to which the court is referred.

Again this instruction assumes that there was a contract for build-

during the hearing. The language is: "But if the Jury believe from the evidence that defendants have suffered damage from care or want of care on the part of plaintiffs in performing their contract for building vault mentioned by witnesses in

What was it that the witnesses mentioned was it the "contract" or the want of the latter then the instruction affirms that there was a contract, and the question taken entirely from the Jury.

Again even if the 7 & 8th instructions were proper still this Court will not reverse the Judgment on that ground as substantial Justice has been done in the case. This Court have frequently held that they will not reverse a Judgment when the grounds that Justice was refused of the whole record shows that substantial Justice has been done.

On this point I refer the Court

Greenup as Stoken 3 Lit 202

See Page

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18 Lbs 454

1 Lit 475-

1 Team 491-407

2 Team 268

3 " 218

4 " 58

1 Lit 10 5-5-6

14 Lbs 472

This case has been tried by three juries and a verdict for the Plaintiff in each. The first before the last trial. It may not be improper to say a word on the general question.

The Plan of the vault with its ventilators was made by appellants.

The vault was built upon its ~~own~~ grounds. The site was selected by A. The Plaintiffs below / provided the very best materials, employed a old and experienced workman (Changes were made at the direction of the officers of the Company) and the whole done under the personal supervision of its officers, yet the vault fell in.

Right here let me add the vault was rebuilt by the same workman, using the same materials exercising the same care & the vault as rebuilt stands. Now what caused the vault to fall in. It was the front part of the arch that gave way. The front wall was pushed out some inches. The side walls remained firm. What agency or power caused

the arch to give way.

The vault was erected late in the season. Its top was covered with soil. This protected the top from injury from frost. Heavy rains fell soon after it was finished, followed by freezing weather. There was no door in the vault. That was to be furnished by appellant. The frost penetrated the vault ~~and~~ acted upon the inside of the arch. Frost like ~~light~~ heat ^{not in} proceeds ~~in straight lines~~, straight lines, and by a law peculiar to itself would strike the lower side of the vault at some distance from the front wall. There was no protection to the exposed part. As the mortar froze it pushed the front wall out & when the chain came that portion of the arch gave way. I can give no better reason for the breaking down of that part of the arch.

The remainders stood firm, and not give way until battered down.

Attention is made to describe that part of the arch that remains firm. The whole evidence shows that he could not see the arch

except at the end. His evidence
 accompanied with his diagrams were
 all presented to the Jury. The witness
 who states that the Cement was still
 firm on the inside. That the soil was on
 the top also appeared before the Jury.
 The whole case fairly submitted.
 and the verdict for the Plaintiffs
 below.

The case in all its hearings
 is submitted.

Yours for aphids

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Springdale Cemetery
Association 181
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Joh Smith et al

Argument, Brief
r Points of Ab
pelles 9

H Grom

Filed May 6, 1863.
Leland
Clk.

Pleas before the circuit court of Peoria County, in the State of Illinois, on the fifth day of December in the year of our Lord One thousand eight hundred and sixty two.

Be it remembered that heretofore, to wit: on the 21st day of February in the year of our Lord One thousand eight hundred and fifty seven, there was filed in the office of the clerk of the Circuit Court of said Peoria County, a Transcript of a Judgment of Bernard Bailey, a Justice of the Peace within and for said County, and of the Proceedings in a certain cause before him, which with the Certificate of said Justice of the Peace thereto attached, are in the words and figures as follows to wit:

Job Smith and	}	In Arrears Demand \$ 270.00
Miriam Pierce		
vs		
The Springdale Cemetery Association		

Summons issued on the 29th day of February A.D. 1857, returnable on the 6th day of February next at 10 O'clock A.M. and returned by Sam^l Grouse Const. Served by reading to the defendant on the 31st Inst. Subpoenas issued for Frederick Hartshorn, William Bennett, Josiah Smith, Wm^m Thompson, Jas. Morris, Nathan Giles, Francis Melhollen, John R. Hall, Jas. Wiley, Joshua Ridgley, and Edward Hudson, and returned by Sam^l Grouse Const. Served. The Plaintiff demanded a Jury, venire issued and returned by said Grouse served on the following named persons, Presley M. Comings, Camd Moore, L. M. Doups, David D. Snyder, Elias Winchell and A. M. Dralcy - By consent of the parties

the cause was continued to the 7th at 8 O'clock A.M. Subpoenas
 Damages \$180.00 issued for John Armstrong, Wm. Burk, Lawrence Harman,
 Justice Cost James Hazard, Luther Card Ryers L. Armstrong
 Iss Sum 19 Charles Aldrickson & Lewis Howell - On the 7th parties
 do Sub 1.12 appeared by their attorneys - The jurors all appeared
 Docket Suit 12 but S.M. Corp, who was indisposed and Charles
 Jury War 35 Greenleaf was taken in his place. The jury was
 Swearing Jury 35 Empanelled and sworn. The parties proceeded to the
 Continuance 12 trial of the cause and after hearing their proofs and
 Swearing 18th 1.12 allegations, the jury retired and after deliberation
 Record Verdict 35 returned into court with the following verdict:
 Cost Judge 35 We the jury find for the plaintiffs and assess the
 Cost Bond &c 35 damage at One Hundred and eighty Dollars signed
 Transcript 25 J.B. Moore Foreman. It is therefore ordered and
 Certificate 35 adjudged that the plaintiffs recover One Hundred
 4.37 and eighty Dollars and costs of suit -

Court Cost
 Ser 4th Sum. 1.00
 Sub 23rd 3.90
 Jury War 50
 attend Jury 35
 5.65
 Jury Fees 150
 Paid by Plff.
 Writ Fees
 To Mulhollen 100

State of Illinois
 Peoria County Jc.

I Bernard Bailey, one of the
 acting Justice of the Peace in and for said County
 of Peoria & State of Illinois do hereby certify that
 the above is a true and correct copy of the docket
 kept by me in the above entitled cause.

Given under my hand and seal this 21st day
 of February A.D. 1857.

Bernard Bailey J.P. Esq.

And also, on the day of the filing of the said Transcript, to wit: on
21st day of February A.D. 1857 there was filed with said Transcript

The Springdale Cemetery Association

1856

To Smith & Pierce

Dr

Oct & Nov. To 48,000 bricks furnishing lime and mortar,

and laying up vault, at \$12 per thousand - - - \$576.00

Cementing Vault and furnishing materials 46.00

Furnishing centre for arch 20.00

\$ 642.00

Credit at sundry times

\$ 345.00
\$ 297.00 "

Damages for failure to perform Contract

598.00
\$ 500.00
\$ 898.00

And afterwards, to wit: on the said 21st day of February A.D.
1857. there was issued from the office of the Clerk of said Circuit
Court a summons, which, with the return of the Sheriff of said
County thereon are in the words and figures as follows, to wit:

The People of the State of Illinois,

To the SHERIFF of Peoria County, Greeting.

We Command you to Summon

Job Smith
vs
Niram Pierce

And also, on the day of the filing of the said Transcript, to wit: on 21st day of February A.D. 1857. there was filed with said Transcript in said Clerk's office ~~an~~ accounts which are in words and figures as follows, to wit:

Smith & Pierce

To Springdale Cemetery Association Dr	
To Cash Pd S. Harmon for Excavation	\$ 53.00
Oct 25, 1856. Cash Paid	30.00
Nov 1 " Do	75.00
" 3 " Do	220.00
	398.00
Damages for failure to perform Contract	500.00
	\$ 898.00

And afterwards, to wit: on the said 21st day of February A.D. 1857. there was issued from the office of the Clerk of said Circuit Court a summons, which, with the return of the Sheriff of said County thereon are in the words and figures as follows, to wit:

The People of the State of Illinois,

To the SHERIFF of Peoria County, Greeting.

We Command you to Summon

Job Smith
Hiram Pierce

if they may be found in your County, to appear before our Circuit Court on the first day of the term thereof, to be held at Peoria, within and for the said County of Peoria on the fourth Monday of February instant then and there in our said Court to ~~appear~~ prosecute their suit against the Springdale Cemetery Association lately appealed from Bernard Bailey, one of the Justices of the Peace in and for said County to our Circuit Court

and make return of this writ, with an indorsement of the time and manner of serving the same, on or before the first day of the term of said Court, to be held as aforesaid

Witness ENOCH P. SLOAN, Clerk of our said Court, and the seal thereof, at Peoria, this 21st day of February in the year of our Lord one thousand eight hundred and ~~sixty~~ fifty seven

Enoch P. Sloan CLERK.

Sherriff return

not served for want of time

F. W. Smith Sherriff

C. Smith Jr. Sply

Mr Ret 15.

And afterwards, to wit: on the 22^d day of October A.D. 1857.
there was issued from the office of the Clerk of said court
a summons, which, with the Sherriff's return thereon, are in the
words and figures as follows, to wit:

The People of the State of Illinois,

TO THE SHERIFF OF PEORIA COUNTY—Greeting:

We Command you to Summon

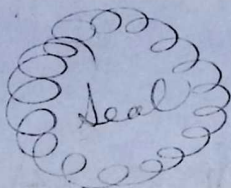
Job Smith & Hiram Pierce

if they may be found in your county, to appear before our circuit court on the first day of the term
thereof, to be held at Peoria, within and for the said county of Peoria, on the third

Monday of November next

then and there, in our said court, to ~~answer unto~~

to prosecute their suit against the Springdale Cemetery association, lately appealed to our
circuit court from the decision of Bernard Bailey a Justice of the Peace in and
for said county and state, by the said Springdale Cemetery association
and make return of this writ with an endorsement of the time and manner of serving the same, on
or before the first day of the term of the said court to be held as aforesaid.



Witness, ENOCH P. SLOAN, clerk of our said court, and
the seal thereof, at Peoria, this 22 day
of October in the year of our Lord
one thousand eight hundred and fifty seven

Enoch P Sloan CLERK.

Sherriff return

Served on the within named Job Smith by reading to him this
writ October 30. 1857. and the within named Hiram Pierce

Ler 100

M 10

Ret 20
135

F. W. Smith S

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Proceedings at a term of the Circuit Court begun and held at the Court-house in the City and County of Peoria, State of Illinois, on the first Monday in the month of May, in the year of our Lord One thousand eight hundred and sixty one, it being the sixth day of said month. Present the Honorable Elihu N. Powell Judge of the 16th Judicial Circuit in said State; James Stewart Sheriff and Enoch P. Sloan clerk, to wit:

Monday May 13th A.D. 1861.

Job Smith & al

vs.

Redocketed from Supreme Court

Springdale Cemetery Association

This day there was presented to the Court a certified copy of the opinion of the Supreme Court reversing the former judgment of this Court herein. Whereupon it is ordered that this cause be redocketed for further proceedings in conformity with the opinion of said Court.

Proceedings at a term of the Circuit Court begun and held at the Court house in the City and County of Peoria, Illinois on the first Monday in the month of April in the year of our Lord One thousand eight hundred and sixty two, it being the seventh day of said month. Present the Honorable Amos L. Lerrina Judge of the 16th Judicial Circuit in said State, Alexander M. Gay States Attorney, James Stewart, Sheriff, and Enoch P. Sloan clerk, to wit:

Wednesday April 9th A.D. 1862.

Job Smith & al

vs.

Appeal from J.P.

Springdale Cemetery.

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By agreement this cause is continued

Proceedings at a term of the circuit court begun and held at the court house in the City and County of Peoria, Illinois, on the first Monday in the month of December, in the year of our Lord one thousand eight hundred and sixty two, it being the first day of said month. Present the Honorable A. L. Herriman Judge of the 16th Judicial Circuit in said State J. A. Murray Sheriff, and Conock F. Sloan Clerk, to wit:

Monday December 1st A.D. 1862.

Job Smith & Hiram Pierce

vs.

Appeal

Springdale Cemetery Association

This day came the Plaintiffs by Grove and Ingersoll, and the Defendants by Cooper and Purcell its attorneys And it is ordered by the Court, that a jury be empanelled to try this cause, whereupon come a jury of twelve good and lawful men, to wit: S. D. Arnold, Wm. Gray, John Mattocks, Wm. Stewart, Henry Sammons, Calvin Stowell, Thomas Fuller, John Weaver, Jas. W. Barker, Calvin Blake, William Franklin and Hiram Sperry, who being duly chosen, tried and sworn to well and truly try the issues in this case, and a true verdict give according to the evidence, And the said jury not having heard all the evidence in the case were adjourned to meet the Court at 9 o'clock to morrow morning.

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Tuesday December 2^d A.D. 1862.

Job Smith & al

vs.

Appeal

Springdale Cemetery Association

This day come the parties and also come the jury sworn to try this cause, and the said jury not having heard all the case were adjourned to meet the court at 9 o'clock tomorrow morning.

Wednesday December 3^d A.D. 1862

Job Smith & al

vs.

Appeal

Springdale Cemetery Association

This day come the parties to this suit, and also come the jury impanelled and sworn to try this cause, and the said jury having heard the evidence &c. in the case retired to consider of their verdict.

Thursday December 4th A.D. 1862.

Job Smith

Horiam Pierce

vs.

Appeal

The Springdale Cemetery Association

This day came the parties to this suit, and also came the jury impanelled and sworn to try this cause according to the evidence, and the said jury upon their oaths aforesaid do say, we the jury find for the plaintiffs and assess their damages at the sum of One hundred and forty seven dollars, The defendant by attorney, entered a motion for a new trial.

Friday December 5th A.D. 1862.

Job Smith &
Hiram Pierce

vs.

Appeal

Springdale Cemetery Association

This day this cause came on to be heard on the motion of Defendant for a new trial, and the Court being fully advised in the premises, overruled said motion. Therefore it is considered by the Court that the said Job Smith & Hiram Pierce have and recover of the said Springdale Cemetery Association, the said sum of One Hundred and forty seven dollars their damages aforesaid, and also six sevenths of their costs and charges by them about their suit in this behalf expended, and that they have execution therefor. ^{Ordered that all the witnesses whom in this cause were necessary} Ordered that Plaintiff pay one seventh of the costs of this suit and that execution issue therefor.

Monday December 8th A.D. 1862.

Job Smith & al.

vs.

appeal

Springdale Cemetery Association

This day came the defendant by Cooper attorney, and prays an appeal to the Supreme Court of this State, which is allowed on its filing in the office of the clerk of this Court in forty days, an appeal bond payable to the plaintiffs in the penal sum of Three Hundred Dollars with Horrey Lightner Isaac Underhill and William A. Hall, as surety, Conditioned as the law directs.

Saturday December 13th A.D. 1862.

Job Smith & al

vs.

Appeal

Springdale Cemetery Association

Agreed that bill of Exceptions may be signed in vacation by the 1st of January next.

Proceedings at a term of the Circuit Court begun and held at the Court House in the City and County of Peoria, Illinois, on the first Monday in the Month of February in the year of our Lord One thousand eight hundred and sixty three, the same being the second day of said month. Present, The Honorable Amos S. Merriman, Judge of the 16th Judicial Circuit in said State, John A. J. Murray, Sheriff, and Enoch B. Sloan clerk, to wit:

Saturday February 14th A.D. 1863.

Job Smith & al.

vs.

Appeal.

Springdale Cemetery & al.

By agreement the Bill of Exceptions herein may be made up and signed in vacation.

Stipulation

Be it remembered, that heretofore, to wit: on the 1st day of December, A.D. 1862. there was filed in the office of the clerk of said court, a stipulation, in words and figures as follows, to wit:

Job Smith & others

vs.

Springdale Cemetery

In l. b. P. b.

It is agreed by the parties that the evidence contained in the Bill of Exceptions in this case so far as the

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testimony of Jeremiah S. Smith, Cyrus Pierce Thomas Whitby
and John Hall is concerned shall be read in evidence on
the trial of this cause, and to have the same effect as though
the witnesses were present in court & testified to the same facts

Ingersoll & Grove for Plffs

Cooper for Deft

Dec. 1. 1862.

Bill of exceptions And afterwards, to wit: on the 23rd day of February A.D. 1863.
there was filed in the office of the clerk of said court, a Bill
of Exceptions, in words and figures as follows, to wit:

State of Illinois 3
Deoria County 3p. In the Circuit Court December Term A.D. 1862
Job Smith et al
vs.
The Springdale Cemetery
Association

Be it remembered that on the trial of
this cause the Plaintiff in order to maintain the issues on their part
read in evidence by agreement of the parties from the Bill of
Exceptions taken on the former trial of this cause, the evidence
of Jeremiah S. Smith in the words following, That he was a brick
Mason by trade & had been for ten years - that he knows the
Plffs & the Cemetery grounds on which said plffs. built a
vault for defendant, three years ago, this fall = Witness together
with Frederick Wartschorn measured it after it was built - Think
it was 22 feet long in the clear in the inside - 23 ft 8 inches
from out to out - The walls except the front which was solid,
were hollow & 20 inches thick = The measurement all round

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was 66 feet = It was 12 feet wide in the clear = 15 feet 4 inches wide from out to out = It was 7 ft 4 inches high to the Spring of the Arch = There were 48,268. Brick in it by Mason's Measure = It was worth \$12, for M. to furnish the materials & build the vault = (It was here admitted that plff furnished all materials) = I helped to build said Vault = Peter O. Loucks was there - He said some things wanted change = The things were made by his direction, some 2 1/2 feet longer, and about 18 inches higher = We had the piers built near 2 feet high when he came. He wanted them taken down, and we did so & made them 4 inches wider = We had them 8 inches wide - He wanted them made 12 inches wide, & we so made them = These piers are the projections in the front wall called pilasters or anties = They stand out 4 inches & were altered from 8 inches wide to 12. = I was there at the start of the mason work - Cyrus Pierce, Heiram's brother, John Johnson & one Bennett were also there - When I left the wings, side walls & 7 courses of the arch were up = When we came the company's men were digging the foundation = We worked from 5 to 7 days = The sand came from Davis Bank & was good = The Brick were from Silas Kihn & were A. No. 1 = plffs paid \$7 - per 1000 - an extra price, for the Brick = The mortar was made from Wilsons lime and was good - So far as I could see the work while I was there was as well done as could be = Loucks expressed himself satisfied = He was there every day except one or two while I was there. The workmen followed his directions = He said the materials & made no objections that I heard of = If he had I would likely have known it = He told us about the font, and Smith told us to make alterations as Loucks directed = The hands employed were good experienced workmen =

Cr. Exc. Smith & Pierce were partners = Loucks gave no directions about building the arch - and his directions only referred to the plan and not to the execution of the work under it = The wings were built longer by his direction = He said the plan called for pilasters 8 inches but that this was too narrow, and he had them altered to 12 inches = The difference in price for each wing occasioned by the alteration was about \$12. = Seven courses of the arch, say about 2 feet were laid before I left = The Keying up the arch is the most particular & difficult part of the work = we worked by the plan except so far as Loucks directed a change = He made no changes except in the front -

Re-Exc. = The plans were referred to only to get at size of walls & arch = The walls were hollow = Loucks directed about putting in ties = I think the side walls were built some 6 inches higher than the plans called for = don't know who directed this = I was there the day the vault was plastered = It was cemented on the inside = Morris did it = We were cementing the floor when I went = The sides & arch were done before I came = This was about the 20th to the 26th of November 3 years ago = I staid till Morris finished the job = The centre piece was taken out about a month after the brick work was done = In my judgment the job was well done & was then finished = Plaintiffs also read from the same Bill of Exceptions by the agreement of parties the evidence of Cyrus Pierce in the words following, I am a Brick Mason & helped to build this vault as far as I know the materials were good & I thought the workmanship very good - I think the work was done under Loucks direction & to his satisfaction - I helped to finish the arch, but not to cement it on the inside - The cement on the outside was good = & properly put on - It was an inch thick Loucks was there more or less - don't

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know that he accepted the work, but seemed to be pleased = He is not a mason or architect - He gave directions about the front - Don't know that he gave any directions about the manner of building the arch =

Re-Ex - The arch is 1 foot thick =

David Burns being called testified as follows - I hauled the sand for the vault = It was good sand. I hauled the bricks for the vault from Nathan Giles, they were good quality.

On Cross Examination witness said. The sand was hauled by my men. I helped to load it; at least it was my business to be at the bank. I have no special recollection of being there at that time, I don't know how many bricks I hauled, I got one dollar per thousand for hauling them, I think there were thirty five to forty thousand. I think I hauled all the bricks I don't know how many loads there were.

Nathan Giles sworn testified as follows; I have been a Brickmaker fourteen years Plaintiffs bought bricks for the vault from us. Some they paid an extra price for, Smith first bought a common lot of hard bricks; after that he got an extra lot for the front. Burns team hauled them away -

On Cross Examination the witness said: Smith bought hard brick for the foundation, I sold him a lot of that kind. I helped load two loads, I can't say whether ~~there were~~ any soft brick in the lot sold Smith. The lot for the front were to be hard smooth brick, there was from six to eight thousand front brick. Can't be certain.

Re Examined. We had hard brick when Smith made the contract and when men bought that kind of brick of us they generally got them -

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William Thompson testified as follows, Have been a brick
Mason for ^{19 or 20} (sixteen) years, I helped to build the vault. we
used good hard bricks and good mortar in building it, the
lime was what we consider the best. The walls were cemented on
the outside one to one and a half inch thick, the cement was
good. Bennett, Smith, Cyrus Peirce and myself helped build
the vault. They were good workman. There were one or two
ventilating holes in the top of the arch. P.O. Loucks was out
nearly every day. He was President of the Association. He wanted
the pilasters twelve inches wide, we had started them eight inches.
I think the wings were built higher than the plans. I was there
when the arch was turned. When Loucks came out he had more
or less to say about it, He seemed to be pleased with the work,
Loucks was living in Peoria when I came here nine years ago,
He wanted the wings to be made wider and higher which was
done, I don't know how much, His directions had only to do with
the plans not the workmanship, I was there when the work was
commenced, The center piece was in when I left, John Hall,
was Superintendent of the grounds, I was there when some dirt
was thrown on the arch by Hall, Some dirt was thrown on
the sides before the arch was completed. He put chunks
of clay on the arch just as they were dug out of the bank. They
laid a plank from the bank, to the top of the arch & wheeled
their barrows on the plank. The arch was row-locked which
is the strongest manner in which an arch can be built.
The arch was twelve inches thick. I have some experience
in the building of arches.

The workmen of the Cemetery Association deposited their tools in the vault before the center piece was taken out. Hall put the plank on the arch the same day the arch was finished. Smith told him not to cover it until the cement was set. I can't say how thick the dirt was: it was as much as a foot. It rained almost every day for a week or two after the arch was finished, it then turned cold and froze.

Cross Examined: The vault had not been cemented inside when the dirt was put on and not for three weeks after, there was nothing wrong then. The row-lock is a single layer of bricks run over at a time. we don't cut the bricks. We often spring an arch in building a house - don't stop for it to dry - If the sides don't give way the arch can't go down by any weight placed on the top of it. The sides did not give way in this case, I can't say that the dirt was the cause of the arch giving way; throwing dirt on might break the cement. It would take five or six days for the cement to get hard, the water might get in and wash out the mortar. Some places it requires three months for common mortar to set. The arch could not be weakened by any weight on top of it. Loucks directions had nothing to do with the manner in which the work was done, there were plans there. Can't say that Loucks referred to the plans, the wings were made something longer, the pilasters were started eight inches; we made them twelve inches. I heard Hall ask Smith when it would do to put dirt on the vault, Smith said it will do as soon as the cement is set. I heard no time fixed, the cemented outside while laying the bricks. The vault is built in a steep hill. The arch was semi-circular, the strongest form an arch can be built, the side walls were covered as we went up. No objections were made by any body to Hall's putting the dirt against the sides.

Re-Examination - Cyrus Peirce and I closed the Arch. We didn't use the plans much, we couldn't tell anything from them. We could not get the height length or breadth from the plans. Smith told Loucks they were unintelligible. Loucks attention was called to the uncertainty of the plans by Smith. I can't tell why the Arch fell unless it was injured in some way. I know the work was well done and properly tied.

S. L. Byers testified, I am a Carpenter, I made the centre piece for the Arch. Smith & Peirce paid me \$22. for making it. It was semi circular. It was formed by cutting out segments in the form of the arch and boards six inches wide laid lengthwise. The supports were made of timber cut off the ground. The segments were of one inch lumber and the boards were of common fencing. There were three or four posts on each side. There would be no trouble in taking out the centre if the person understood it. The arch might be injured by letting down one end first. I was to take the centres down. I was to have them for taking them down. I went up to take them down and found them outside. There were two ventilators in the vault six to eight inches square.

Cross-Examination - The Key course of the Arch was not a full course. I saw two or three loose pieces in the Key course between the ventilators. One of them was loose. My attention was called to it by John Hall. The Key course might have been a full course part of the way. The Key course was not the same thickness the whole length of the Arch. The loose brick was one to one and a half inches thick. The arch appeared to be regular enough in the curve. The Key course was wider behind than before. I think as much as a brick or more. The proper way to

Take out a centre is to lower it along one side first and let it down in that way.

William Bennett - testified. I am a bricklayer. I helped build the vault. I don't recollect about any change in the foundation. The lower course of the arch was laid and I think part of it keyed up when I left. Good bricks were used in the front; don't know what kind were used in the arch; don't know about the mortar, P.O. Loucks was there during the progress of the work. I can't recollect of any change on the front. I worked on the front. Hall was there, He seemed to be superintending around there. I supposed he was acting for the company.

Cross-Examined - It takes more work to make the pilasters than plain work. The brick in the front were nothing extra. They were the best that were brought there. We used common brick for filling in. The front was made by Loucks' directions. He directed as to the style or plan of the front and his directions were followed as I thought rather than the plan.

James Morris. testified - I am a plasterer and bricklayer. I cemented the vault inside. The material was hydraulic cement & sand. It was finished on the 26th of November. I did not examine the arch except as I worked along. I thought the job well done. My work was well done. The door was four feet by eight feet. Cross-Examined. I don't know how long the work had been done before it was cemented. The mortar was as dry as usual at the same length of time. The brick work was all perfect as far as I could see. There was no injury visible. The cement was such as we usually buy. It was put on as fast as mixed. Cement might stand two or three hours before it would set so hard as not to be worked. It was worth fifteen to eighteen cents per yard to cement the vault. Same price out side as inside. The

Cement was three fourths of an inch thick. The arch was not hurt by water breaking through when I cemented it. If there had been any defect in the arch I should have noticed it.

Lawrence Harman testified. I dug the foundation for the vault. There was a change made in the foundation. The ground was staked off I wont say we went as far as the stakes; went until they said we were far enough. It was then dug three feet deeper. I got \$20. for the extra work. Lightner paid me. The first work came to \$34.32 for which Glenn gave me an order on the company.

Cross-Examined. I was paid after the work was finished. There was brushwood set for stakes. The hill had been covered with brushwood, I wont say we dug as far as the brushwood was cut away. I believe it was Smith who showed me where to dig. Soucks & Lightner came out when the first digging was done and were not satisfied with it; thought it ought to have been dug farther into the hill, but concluded to dig three feet deeper. I think there was more dirt taken out where it is but it would have been more difficult to dig it farther into the hill. Smith was there. he was not anxious to have any more done. Soucks & Lightner thought it was not deep enough and agreed to give me \$20. extra. The order now shown me is the one on which I drew my pay. It includes the \$34.32. which I was to get from Smith for the first digging as well as the \$20. for the extra digging. It was all paid me by the Treasurer of the company at one time. William Giles, testified. Smith bought bricks of Nathan Giles and myself. He said he wanted an extra lot, of brick. We got hard bricks. - mostly Arch bricks, We got all the front bricks

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we could spare him in addition. I think he got between five and seven thousand extra bricks. I helped to load them. Burns hauled them - Arch brick are rough and hard. They were a first rate lot of hard brick.

Cross Examined. I don't know what the bricks cost, nor how many we sold him. Extra bricks were what we call front brick. Arch brick sold at about an average price. I don't know where the bricks went to that we sold to Smith. But Burns hauled in the direction of the Cemetery. There were from 35 to 40,000 brick Wagons going to the Cemetery go towards the city of Peoria.

Frederick G. Hartshorn testified, I helped to measure the Vault. There were 48,000 bricks. We measured as correctly as we could.

Cross-Examined - We measured the vault after the arch had fallen down. I can't tell the size of the vault. The pile that fell down lay in the bottom of the vault, bricks dirt & rubbish had fallen in. It had fallen in as far as the first Ventilator. Some of the walls were twenty inches thick & some twelve inches. The arch was one foot thick. I think the side walls were sixteen inches and hollow. The arch had broken off down to the Spring of the arch; The side walls remained firm and plumb.

The Plaintiffs here rested -

The defendant then offered in evidence the instrument in writing shown Harman in the words & figures following.

Office of the Springdale Cemetery Assn. Peoria Oct 18/56

Treasurer of said assn. Pay to the order of Laurence Harman Fifty Four 32/100 dollars - for Exp. Foundation to Receiving Vault in the Cem. Grounds

\$ 54.³²/₁₀₀

H. Lightner - Secy
(Endorsed) Laurence Harman

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The defendant then called Hervey Lightner who being sworn on his voir dire testified as follows: I am a member of the Springdale Cemetery Association, I was one of the corporators when the law was passed. My relation to the Corporation has never been changed by any act of the legislature. I am one of the directors of the Association and have been such director ever since its organization. I have been secretary of the Association most of the time since its organization. The Association that is the defendant owns some personal property in this county consisting of a pair of mules wagon and harness worth \$175 to \$200. There is very little money on hand if any. The Association also has a cart and some tools. As a member of that Association I have an interest in that property. Question by Plaintiff's Attorney. Are you at the present time one of the corporators of the Springdale Cemetery Association? I don't know whether I am one of the Corporators at the present time or not, I was one of the Corporators at the time the law was passed. I don't know whether or not I remain a corporator since the perfecting of the organization under the charter. The Corporation bought a quarter section of land of William A. Hall for \$3000 ^{00/100} Three hundred or four hundred dollars were paid down. I gave my note for \$1000. We called the land worth \$10,000 ^{00/100} We set apart to Hall \$3,333. to Baldwin the same amount and to myself the same. The balance was made up of small interests. The Association organized in the Spring of A.D. 1855. They have sold a number of lots for the aggregate sum of about \$11,250. That money has all been expended on the Cemetery grounds and for the purchase of the personal property mentioned. In case the plaintiff should recover a judgment in this suit I suppose it would be paid

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from the proceeds of sales of lots. If judgment should be recovered in favor of the Association the money would be appropriated to the improvement of the Cemetery grounds or the payment of any debts the Association might owe. I have advanced about \$2000. to the Association. I have never been repaid that but it depends on circumstances whether it ever will be: that is whether the proceeds of the sales of lots is sufficient to keep up repairs on the grounds and to reimburse that money. Our first object was to procure a good and permanent burial place and at the same time hoping to be able to make it pay in the end. We have one hundred and thirty acres cleared out ready for sale. The Association keep the roads and grounds in repair and also the lots of those who own them for a compensation. We keep the hands employed all the time. We keep one or two or three hands employed for the express purpose of improving and keeping in order lots for the owners. We charge from \$2.50 to \$4.00 per lot by the year for taking care of them. It costs us as much to take care of the lots as we get for it we make nothing by it.

In connection with the evidence of said Lightner on voir dire the following deeds.

Certificate }

No. 3150 } The United States of America.

To all to whom these presents shall come, Greeting:
Whereas Joshua Aiken, assignee of Isaac Underhill, has deposited in the General Land Office of the United States, a Certificate of the Register of the Land Office at Quincy whereby it appears that full payment has been made by the said Isaac Underhill according to the provisions of the act of Congress of the 24th of April 1820. Entitled "an act

making further provision for the sale of the Public Lands" for the East half of the North East quarter of Section thirty four, in Township nine North, of Range eight East in the District of Lands subject to sale at Quincy, Illinois, containing eighty acres. according to the official plat of the survey of the said Lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Isaac Underhill.

Now know ye. That the United States of America in consideration of the premises, and in conformity with the several acts of Congress, in such case made and provided, Have given and Granted, and by these presents do Give and Grant, unto the said Joshua Aiken and to his heirs, the said tract above described: To Have and to Hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging unto the said Joshua Aiken and to his heirs and assigns forever. In Testimony whereof I, James K Polk President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed. Given under



my hand at the city of Washington the ninth day of June in the year of our Lord one thousand eight hundred and forty five and of the Independence of the United States the sixty ninth. By the President James K. Polk

Recorded Vol. 31

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By J. Knox Walker Sec'y.
J. M. Laughlin Recorder of the General Land Office

Enc

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This Deed made this twenty fifth day of July eighteen hundred and thirty six. Witnesseth: that Joshua Aiken and his wife, of the Town of Peoria, ^{County of Peoria} State of Illinois in consideration of One hundred twenty five dollars to them paid by William A Hall of the County of Peoria State of Illinois the receipt of which is hereby acknowledged, do by these Presents grant, bargain, sell convey and confirm to the said Hall. The East Half of the North East quarter of Section No. thirty four in Township Nine North of Range Eight East of the fourth Principal meridian in Illinois. To Have and to Hold the afore described premises, with the appurtenances hereunto belonging, to the said William A Hall his heirs and assigns forever: the said Parties of the first part hereby covenanting that they will warrant and defend the title to the aforesaid premises to the said Hall his heirs and assigns forever, against all persons lawfully claiming under the Parties of the first part. In testimony whereof, the said Parties of the first part have hereunto set their hands and seals the day and year above written.

Done in presence of
William Mitchell

Joshua Aiken
Jane Aiken



State of Illinois

County of Peoria SS. I William Mitchell a Notary Public within and for the County aforesaid, do certify that Joshua Aiken and Jane his wife, whose signatures appear to the foregoing deed and who are personally known to me to be the persons described in and who executed the same, did severally acknowledge that they executed the said conveyance for the uses and purposes therein mentioned. And the said Jane having been by me made acquainted with the contents of the said ^{deed} and examined

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Separate and apart from her said husband acknowledged that she executed the same and relinquished her dower to the premises herein conveyed, voluntarily, freely, and without compulsion of her said husband.

Given under my hand and Notarial seal, this twentieth day of August in the year of our Lord one thousand eight hundred and thirty six



William Mitchell

Public Notary P. Co.

State of Illinois }
County of Peoria }

Records Office December 13th 1836

I, Charles Kettelle Recorder of said county, do hereby certify that the within deed and certificate of proof was this day duly recorded in said office at Peoria in Book G.

page 416 In Testimony whereof I hereunto set my hand & private seal (No official being provided) this 13th day of Dec^r. 1836.

Charles Kettelle



R. Peo. Co.

Certificate)

No. 5198

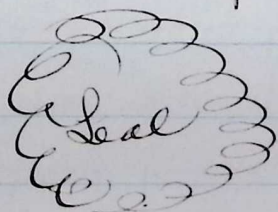
The United States of America.

To all to whom these Presents shall come, Greeting;

Whereas Isaac Underhill of Peoria County, Illinois has deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Quincy whereby it appears that full payment has been made by the said Isaac Underhill according to the provisions of the act of Congress of the 24th of April 1820, entitled "An Act making further provision for the sale of the Public Lands" for the West half of the North East quarter of Section thirty four in Township

Nine North of the Base line, of Range eight East of the fourth principal Meridian in the District of Lands subject to Sale at Quincy Illinois containing eighty acres according to the official plat of the Survey of the said Lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Isaac Underhill. Now know ye, That the United States of America, in Consideration of the Premises, and in conformity with the several acts of Congress, in such case made and provided, Have Given and Granted, and by these presents Do Give and Grant unto the said Isaac Underhill and to his heirs, the said tract above described: To Have and to Hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging, unto the said Isaac Underhill and to his heirs and assigns forever.

In Testimony whereof I, James K. Polk, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington the ninth day of June in the year of our Lord one thousand eight hundred and forty five and of the Independence of the United States the Sixty Ninth



By the President James K Polk

By J Knox Walker

Sec'y.

S H Laughlin Recorder of the General Land office

Recorded Vol 31 Page 419

Exc

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This deed made this twenty fifth day of July eighteen hundred and thirty six. Witnesseth: that Isaac Underhill and Jane S. Underhill, his wife of the Town of Peoria, County of Peoria, State of Illinois, in consideration of One hundred dollars to them paid by William A. Hall of the County of Peoria State of Illinois, the receipt of which is hereby acknowledged, do by these presents, grant, bargain, sell, convey and confirm to the said William A. Hall, The West half of the North East Quarter of Section No thirty four in Township Nine North of Range Eight East of the 4 principal meridian in Illinois. To Have and to Hold the above-described premises, with the appurtenances thereto belonging, to the said William A. Hall his heirs and assigns forever: The said Isaac Underhill and Jane S. Underhill hereby covenanting that they will warrant and defend the title to the aforesaid premises to the said Hall his heirs and assigns forever, against all persons claim under the parties of the first part and none others. In Testimony whereof, The said Isaac and Jane S. Underhill have hereunto set their hands and seals the day and year above written.

Isaac Underhill



Jane S. Underhill



State of Illinois)
County of Peoria) S. Lewis Bigelow an acting Justice of the Peace within and for the County aforesaid, do certify that Isaac Underhill and Jane S. his wife, whose signatures appear to the foregoing Deed and who are personally known to me to be the persons described in, and who executed the same, did severally acknowledge that they executed the said conveyance for the uses and purposes therein mentioned. And the said Jane S. Underhill

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having been by me made acquainted with the contents of the said Deed, and examined separate and apart from her said husband acknowledged that she executed the same and relinquished her dower to the premises therein conveyed voluntarily, freely, and without compulsion of her said husband.

Given under my hand this 25th day of July in the year of our Lord one thousand eight hundred and thirty six.

Lewis Bigelow J. Peace.

State of Illinois
Peoria County

3d. Records Office Peoria

I, Charles Kettelle Recorder of said County do hereby certify that the within Deed and certificate of acknowledgment was this 3^d day of August A.D. 1836. duly Recorded in said office at Peoria in Book 3 page 546. In Testimony whereof I have hereunto set my hand and seal this 3^d day of August 1836.

Charles Kettelle Seal R.P.B.

Know all men by these Presents that I, William A. Hall of the County of Peoria & State of Illinois, for and in consideration of the sum of Ten thousand three hundred & eighty Dollars to me paid by the "Springdale Cemetery Association" of said County and State, the receipt whereof is hereby acknowledged, have granted bargained sold and conveyed, and do hereby grant, bargain, sell and convey unto the said Springdale Cemetery Association & their successors, for use of said Association for Cemetery purposes as set forth in the the Charter of said Springdale Cemetery Association, the following described real estate to wit: The

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North East quarter of Section Number Thirty Four (34)
in Township Number Nine (9) North of Range Number
Eight (8) East of the Fourth Principal Meridian in the
County of Peoria and State of Illinois; To have and to
hold the said premises with all the appurtenances thereto be-
longing ^{or in anywise appertaining} to the said Springdale Cemetery Association and their
successors forever. And I the said William A. Hall for
myself, my heirs Executors and administrators do hereby covenant
to and with said Springdale Cemetery Association & their
successors, that I am well seized of the premises, above con-
veyed, as of a good and indefeasible Estate in fee simple,
and have good right to sell and convey the same in manner
and form aforesaid, that they are free from all incumbrance, and
the said William A. Hall for himself his heirs, Executors, and
administrators the above bargained premises in the quiet & peaceable
possession of the said Springdale Cemetery Association their
successors against all and every person or persons lawfully
claiming or to claim the whole or any part thereof shall & will
forever warrant & defend.

In witness whereof I have hereunto set
my hand and seal this Fifth day of September A.D. one thou-
sand eight hundred and fifty six.

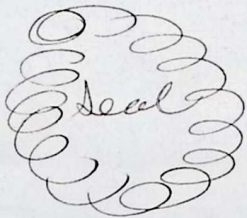
William A. Hall Seal

State of Illinois }
Peoria County } ss. On this sixth day of September A.D. 1856 personally appeared
before the undersigned a Notary Public within & for said County & State William A. Hall
whose name appears subscribed to the foregoing deed of conveyance as having executed the
same and who is personally known to me to be the real person who & in whose name the
acknowledgment is proposed to be made, & acknowledged the execution thereof to be his volun-
tary act & deed for the uses and purposes therein expressed. Given under my hand & official seal
at Peoria the day & year aforesaid

Geo. S. Blakely N. P.

Seal

STATE OF ILLINOIS, }
 PEORIA COUNTY. }



Recorder's Office.

I, ^{James S. Backman}~~Emory R. Scott~~, Clerk of the Circuit Court in and for the County of Peoria and State of Illinois, and ex-officio Recorder of Deeds in said County, do hereby certify that the annexed ^{deed} was filed for Record in my office on the ^{fourth} day of November A.D. 1886 and has been duly Recorded with the accompanying certificate on Page 329. in Book S.A. in said Recorder's office. In witness whereof, I have hereunto affixed the Seal of the said Circuit Court at my office in Peoria, this ^{fifteenth} day of November 1886

James S. Backman

Clerk and Recorder.

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Defendant then proposed to have Harvey Lightner sworn as a witness in the case to which the plaintiffs objected but the court overruled said objections to which ruling of the court the said plaintiffs then and there excepted.

The defendant then read the deposition of Peter O. Loucks in the words and figures following.

Job Smith et al	}	Circuit Court, Peoria County Ill
vs.		
The Springdale Cemetery Association	}	On appeal from Justice of the Peace

The Plaintiffs above named will take notice that on Thursday the 20th day of October instant, between the hours of 8 O'clock A.M. and 6 O'clock P.M. of said day, at the office of Bryan & Stone in the city of Peoria in said County, the defendant in said suit will take the deposition of Peter O. Loucks to be read in evidence on the part of said defendant on the trial of said cause, when and where you the said plaintiffs can appear and cross examine said witness if you deem proper.

Bryan & Stone & Cooper
for Defendant

To Henry Grove Esq.
Peter Davidson attys Plff }

Rec^d copy of the above notice this 11th day of October A.D. 1859. P. Davidson

Caption

The deposition of Peter O. Loucks taken before George Wilmet Notary Public in and for the city of Peoria and State of Illinois, at the office of Mess^{rs} Bryan & Stone in said city - commencing between the hours of 8 O'clock A.M. and 6 O'clock P.M. on Friday the 21st and Saturday the 22nd days of October A.D. 1859. Pursuant

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to the annexed notice - Said deposition to be read in evidence on the part of the Defendants, in a certain cause pending in the Circuit Court of Peoria County State of Illinois - wherein Job Smith and Hiram Pierce are plaintiffs - and the Springdale Cemetery Association are Defendants.

The said Peter O. Loucks having been by me first duly sworn to the several interrogatories to him propounded made answer as follows viz. (Examination in chief by Defendants)

Interrogatory 1st Do you know the parties to this Suit. Plaintiffs & Defendants

Answer I do.

Interrogatory 2nd Do you not know of a contract between said plaintiffs and defendants for the construction of a vault in their Cemetery grounds near Peoria, - if yes, state when said contract was made as nearly as you can, who negotiated the same, what were the terms of said contract, and state your means of knowledge in the premises.

(Question excepted to by plffs atty.)

Answer I know that a contract was made between Smith & Pierce and the Cemetery Association for the purpose of building a vault in the grounds of the Company a little north of the city, - I don't remember the date, but think it was in the year 1856. it was in the fall, think in October, or November, but not certain. I negotiated that contract on the part of the Company with Smith being appointed a Committee by the Company for that purpose, (Smith & Pierce were to build a vault in accordance with a plan I had drawn at the time, the size of the vault & stile was noted on the plan, - and also the materials that were to be furnished by Smith, all of which were to be furnished by him, for which he was to receive the sum of

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five hundred and fifteen dollars) but after the contract was signed Smith objected, saying he had omitted to charge for the cement and wanted ten dollars added for that. I then raised the fifteen and put in twenty five. - He told me it was convenient for him to do it right away, as he would do it cheaper then, - having got through with a job that he had on hand, and had nothing to do, - the understanding between us was, that he should do it right away, and it was on that account he got the job. - I was a member of the Association at the time and was appointed a Committee for the purpose and made the contract. -

Answer
objected to

Interrog^y 3rd

State whether you had the plans referred to, in your last answer, before you when said Contract was made, and are or are not the plans exhibited in the papers now shown you and marked A & B, the same plans in question, - you then had before you. -

Answer

The plans A & B on the papers now exhibited are the same plans by which we constructed, and were used by the workman during the progress of the work. -

Interrog^y 4th

State whether or not there was any writing connected with the said plans, and when was the writing now to be seen on the paper marked A made, -

Answer

The writing under the plan on the paper marked A, with the erasures as now to be seen, was made, at the same time with the contract, -

Interrog^y 5th

Do you or not know the signature under said writing, if yes, state whose it is and when made, -

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Answer

I do, It is Smiths and was made at the time, we made the Agreement. -

Inter 6th

Was or not said writing designed to evidence to any extent and how far the contract then made between you and said Smith & Pierce, -

Answer

It was to evidence as far as it went, the contract between us at the time. At the time the contract was made the wings as designed on the plan were to be ten feet long, - It was understood at the time that if the wings required to be made any longer than ten feet, we were to pay him in addition for the extra length, this about the extra length of the wings was not embraced in the written contract in other respects the writing was designed to evidence the contract.

Inter 7th

State whether or not Smith & Pierce did go to work immediately on said Contract, -

Ans^r

They commenced digging foundation in the next week but delayed the Mason work for some three or four weeks, after the foundation was dug. -

Inter 8th

State what you know about the completion of the work under said Contract by said Smith & Pierce whether the same was ever accepted by the company or any one for them, and if not why, state fully all the particulars, so far as you know and recollect them, -

Answer

I know that Smith commenced the vault and progressed until the arch was about two thirds turned, I was there during the

progress of the work, seeing whether it was done according to Contract, and know that it was built as far as before stated, after that I know nothing about the work, until Smith came to me, and wanted to settle for it, - Smith came to me and wanted me to settle for the work, - I referred him to the Secretary, he said he had been there, but he would not settle with him, he objected on account of the cementing not being done, - Smith then agreed to go and cement it, and when he had completed it, he was to appoint a day, and we were to go and accept the job if it was done according to Contract, - No day was set at that time, but he came a week or ten days after and set a day, - My having been absent at St Louis during the time the cementing was being done, - I was absent some seven or ten days, - after my return he came and set the next day and Mr Lightner & I were to go up with him, - but he did not come, - but he came some days after that and then wanted to settle again, - I then told him I understood the Vault had fallen in, - he then agreed with me to rebuild the Arch, and we were to pay him the amount specified in the Contract, when that was done, It was never rebuilt according to my knowledge by them, -

Int^d 9th What Extra work, if any, was done by said Smith & Pierce upon said Vault, -

Ans^r. We built those wings longer, but I don't know how much, It could not have exceeded two or three feet longer and the additional cost could not have been more than ten dollars, - No other Extra work was done that I recollect, there was an alteration about the doorway, but that was because it had been put

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up wrong & they took it down themselves & put it up again to conform to the plan ●

Inter 10 What kind of material did Smith & Pierce agree to use in construction of said Vault - & what was the character of the material actually used

Answer (They agreed to put in good hard brick) In the springing of the arch they put in a good many bats, and soft brick to which I objected & told the workmen when they were springing the arch that they were using too many bats & soft brick, Smith was not there at that time, I did tell Smith when they were hauling the brick that they were bringing too many soft brick he said he had engaged & paid for hard brick & he would go and see about it and started for that purpose.

Interrogatory 11 Have you or not at this time any interest in the result of this suit or in the Cemetery Association, -

Answer I have not My interest therein has ceased for two years or more,

(The plaintiffs reserve all exceptions to the foregoing questions) and answers, -

Group Examination by Plaintiffs

Interrogatory 12 What office or position did you hold in the Springdale Cemetery Company at the time you made the contract with Smith & Pierce How long did you continue to act as such president - and when did you cease to act as such president - and why, -

3.

What share or interest or part had you in that company or in the Capital Stock thereof at the time you made the ^{said} Contract. State how much you subscribed or paid toward the Capital Stock of said Company. Was the Contract, as made between the Company and Smith & Pierce in writing - or was it in part did the Company agree to make or repair the road to the place where the vault was to be built, - Was the road to be made or repaired before they were to build the vault - When did you make the road to the vault - did the Company select the site and dig the foundation for the vault, and when - did the company prepare the foundation, was you present from time to time as the work progressed - who was to furnish the front door, who was to furnish the stone for the coping and door sills, what materials were the company to furnish and state when you furnished such materials - To whom did you sell out your interest in the company and at what price - did you sell out your interest for the purpose of becoming a witness in this case - did you not expect or intend at the time you sold out your stock to become a witness for the company was there a change made after the contract was made by the company in the depth of the foundation, was it not dug deeper than at first intended - Did the company employ one Harman to dig the foundation as last decided upon - were the company to repair or make the road over which the bricks were to be hauled for the vault.

Answer

I was President of the Company at the time the contract was made. I acted as President in all about two years. I ceased to act as President after this suit was commenced. I ceased to act because I had sold my stock & had no further interest

in the company - at the time I made the contract I had an interest to the amount of four hundred dollars which I had paid in, - The contract between the Company & Smith & Pierce was in writing except that which related to the wings I don't know whether the Company agreed to make a road to the vault or not, - I don't know whether the road was to be repaired or not before the vault was built, - I don't know when the road was made it was made when I went out there & found the men at work at the foundation, - The company selected the site but did not dig the foundation, - The company did not prepare the foundation, - I was present from time to time as the work progressed until the arch was about two thirds turned, - The company were to furnish front door stone sill & coping - We furnished the door sill about time of digging foundation - the coping was not all furnished until the front was up. part of it was on the ground before, - I sold out one share of stock to Edward Hudson for sixty dollars & the balance to the company, - I sold out because I had a chance to do so but not for the purpose of becoming a witness I expected the company probably would call upon me as a witness in this cause, - but that was not the reason I sold out, - There was no change made by the company in the depth of the foundation. it was not dug as deep as at first intended. The company did not employ Harman. I don't know whether the company was to make or repair the road on which the brick was hauled but the company did make the road on which the brick was hauled.

Examination in chief resumed

Int^y 1st Was there or not any delay occasioned to Smith & Pierce by reason of the cemetery company failing to furnish the materials they contracted to furnish in time -

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Answer

There was no delay from that cause, - a part of the coping was not there when the wall was ready to receive it, I had told Smith I would have it there if necessary, - He said it was of no consequence as he would have to come back to cement the vault & it could be as well set then. -

Inter 2nd

If any alteration was made in the foundation of the vault. State by whom the same was made and whether such alteration increased or diminished the amount of work Smith & Pierce were to do under their contract. State also all that took place in relation thereto so far as you know -

Answer

There was an alteration made either by Smith or Harman who was in Smith's employ - The effect of the alteration was to diminish the amount of digging - The vault was set in a bank and by the alteration was thrown further out so as to avoid the deep digging in the bank, - The stakes for the foundation had been set by the Committee Messrs. Lightner Hall & myself in connection with Smith before the contract was concluded, - I went out about the time they were ready to lay the foundation or when Smith & Harman said they were ready, Smith had told me in the morning that John Hall said the excavation was not deep enough into the bank and when I got there I found it so and showed Smith it was not done as the stakes had been set, - Harman said he had dug it as he had contracted with Smith and said he would not dig it any deeper unless he was paid more for it - I asked how much it would cost to make it according to the original stakes & Harman agreed to do it for a given amount but I don't recollect the sum - Smith then agreed to have it done & the company to pay Harman & charge Smith in the settlement of his account.

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Interrogatory 3rd At or before the Contract was made was or not any thing said to your knowledge about repairing or making roads leading to the Cemetery or place where the Vault was to be, and was there or not any Contract on the part of the Company with Smith & Pierce to make or repair said roads, if so, state what it was & whether the same was done and when.

Answer There was nothing said at the time of making the Contract about making or repairing any road leading into or through the cemetery for the use of Smith & Pierce - but there had been something said either by Lightner or Hall - before this time to the effect that the Company would repair a road already existing there at or near a certain ravine, and this was done but don't recollect when -

Inter^y 4th Was or not any complaint made either by Smith or Pierce either before or during the time the work was being done that the roads had not been made or repaired as agreed on, if so what was said about it

Answer They never made any complaints on that subject to my knowledge,

Inter^y 5th Would you or not have probably known it if they had done so

Ans^r I think I should

Inter^y 6th Did or not Smith know of the state of the roads leading to & through said Cemetery at the time and before making said Contract state your means of knowledge on this subject

Answer I think he did, as he was out at the cemetery with us, prior to making the contract and over the road

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Second Cross Examination by Plaintiffs

Inter^y 1st

State at what time Smith came first to you to settle

Answer

About the last of November in the year in which the vault was built

Inter^y 2nd

Did he say in that conversation that the work was done so far as they had proceeded with it according to the contract.

Answer

The word contract was not mentioned. I supposed the work was all right I knew nothing to the contrary at that time

Inter^y 3rd

Did you make any claim at that time in that conversation that the vault was not built according to the contract.

Answer

I did not

Inter^y 4th

State how long after that conversation it was until he came the second time to you to settle

Ans^r

From about seven to ten days.

Inter^y 5th

Did he say in that second conversation that the job was done or the vault was finished or words to that effect.

Ans^r

I think he did

Inter^y 6th

Did you deny it in that conversation

Ans^r

I did not.

Inter^y 7th How long was it after the second conversation until he came the third time

Answer I don't recollect, but it was somewhere about a week or ten days.

Inter^y 8th Was that the time you told him the arch had fallen in

Ans^r. I then told him I had heard that it had fallen in

Inter^y 9th Did Smith in that conversation say that the falling in of the Arch was not owing to any fault of his and state what he did say on that subject

Ans^r. He did say it was not his fault - but it was caused by the rain & water running down the Bluff.

Inter^y 10th Is that the conversation in which he offered to repair the vault

Ans^r. It was at the same time

Inter^y 11 Did he offer to repair the vault if you would furnish him the materials to do it -

Ans^r. He did

Inter^y 12th Was it a part of his proposition to repair the vault that you or the company should furnish the materials to repair the vault with.

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Ans.

Yes that was part of his proposition

Int^y 13th

How soon did he propose to repair the vault if the materials were found him by yourself or the Company

Ans^r

The first warm weather.

Int^y 14th

Did you not understand his proposition to be that he would repair the vault on the materials being furnished as soon as the weather would admit in the next Spring;

Ans^r

I did not

Int^y 15th

Was there anything said by him about repairing the vault that winter in that conversation.

Ans.

There was.

Int 16th

State the precise words he used if you recollect them

Ans.

I do not recollect the precise words but it was to the effect that it would thaw & become warmer in a few days and then he would do it.

Int^y 17th

In the proposition made by Smith to repair the vault, did he propose to do any thing else, than the mason work in repairing it

Answer

It did not.

(Reexamination by Defendant)

Int¹ 1

How many interviews had you in all with Smith or Smith & Pierce relative to settling for the Vault & accepting the same and what took place or was said at each one of them, please state fully, -

Ans.

I never had any interview with Pierce with regard to settling but had three interviews with Smith on that subject, the first time he called he stated the job was nearly completed all but the cementing and that he had the hands engaged for that purpose and would do it immediately, and he said he would like to settle as he wanted money to pay his hands I referred him to the Secretary Mr Lightner we did not settle at that time, I was about going to St Louis, the next interview was after I returned from St. Louis, he then called on me to appoint a time to go and receive the vault, we agreed on the next day Mr Smith failed to come therefore we did not go, at the third interview Smith made a proposition to me as stated in my second cross examination, which I did not accept, but I proposed to him if he would go on & build it up that we would settle with him which he agreed to, - he was to do it at the first thaw or warm weather, in my proposal Mr Smith was to furnish every thing to rebuild the vault, he agreed to it. -

Int² 2

If any additional compensation was to be paid by the company to Smith & Pierce for rebuilding the vault - please state what it was.

Ans

There was not any. -

Int³ 3

Do you know who set the coping that you ^{state} ~~say~~ was not on the

45-

ground when the wall was ready for it. If yes, state who it was how he happened to do it and on whose account

Ans^r

I agreed with Mr. May to set that coping as he was to furnish the coping and did not have it ready at the time when the masons were ready, I did not see him do it, but he brought in his bill for it to the company

Cross Examination renewed

Int 1st

Mr Peter Loucks will you now state upon oath all that was said by Mr Smith and by yourself - in the conversation that took place between you at the time you told him you had heard the arch or vault had broken down repeat the conversation as it took place without note or comment if you please - use the language used by the parties, state the whole conversation fully distinctly, & fairly, so help you God state where the conversation took place, when, and who was present. -

Ans^r

It is impossible for me to recollect all that took place. I have already stated in substance as near as I can recollect all that took place at that time. The conversation took place in my store Washington Street or James M^{rs} Gay was present at the time and heard the whole conversation. -

Int 2nd

Do you upon your oath state that you cannot make any further or fuller answer to above interrogatory last above. -

Ans^r

Not with any certainty

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Int 3 How many Private Conferences have you had with the attorneys of the defendant since the commencement of this prosecution

Ans. The have spoken to me several times but I can not tell how many as I have not kept count.

Int 4 Referring again to the conversation you had with Smith at the time you told him the Vault had broken down will you please relate that portion of said conversation that you do recollect, - which of you, spoke first, on the subject & what did he say.

Ans I have already stated what I recollect of the matter and cannot tell who spoke first. -

Int 5 Do you positively refuse to answer the last interrogatory propounded to you, -

Ans. I have already answered it as near as I can recollect, -

Int 6 Did Smith in that conversation say anything, if he did state what he said, repeat the words

Ans. I cannot repeat his words any nearer than I have already done

Int 7. Please repeat now what he said in that conversation, -

Ans. What I have already stated before, as near as I can recollect.

Int 8 Did you say anything in that conversation if you did please

✓ repeat what you said using the same words as near as you can, -

Ans. I did, And as near as I can recollect, are the same as I already stated

Int^l 9. Did any body else say any thing in that conversation if they did, state who it was, & what they said.

Ans. I dont know of any thing being said by any one else

Int 10 Will you now please repeat the conversation that took place between you at the time you told him you had heard the vault had broken in, in the order, in which it took place, using the words, if you remember them, and if you do not, remember them, so state and repeat the conversation, in substance as it took place, to the best of your recollection, -

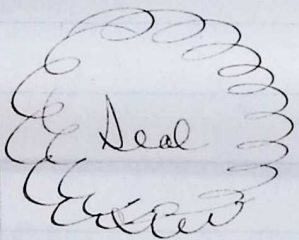
Ans. Mr Smith being in my store at the time, and after a great deal of conversation on both sides, and which I do not recollect, sufficiently to state the very words, but Mr Smith did at first propose to rebuild the vault providing the company would furnish the materials, and in reply to this proposition, I told him, the company would not accept - but that the company, would be satisfied to accept the vault provided he would rebuild it at Smiths expense, and which he said he would do the first warm weather. -

P. O. Loucks

(Certificate)

State of Illinois }
 City & County of Peoria }

I George Wilmot a Notary Public in and for the city of Peoria aforesaid do hereby certify that the deposition of Peter O. Loucks was taken by me at the times & place in the Caption thereof mentioned. — That the said witness was first by me duly sworn according to law, that the plaintiffs were in attendance during the whole time of taking the same, that the said deposition was taken between the hours of 8 A.M. and 6 P.M. of the 21st & 22nd days of October 1859. to which latter time the taking thereof was continued by adjournment, and that after being so taken, & carefully read over to said witness, the said deposition was subscribed by him in my presence. —

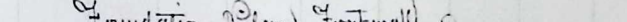


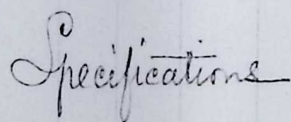
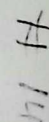
In witness of all which I have hereunto subscribed my name and affixed my Notarial Seal at said city of Peoria this twenty second day of October A.D. 1859.

Fees \$ 740

George Wilmot Notary Public



Foundation Plan (Front wall) 



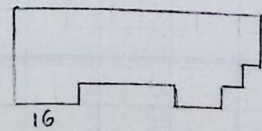
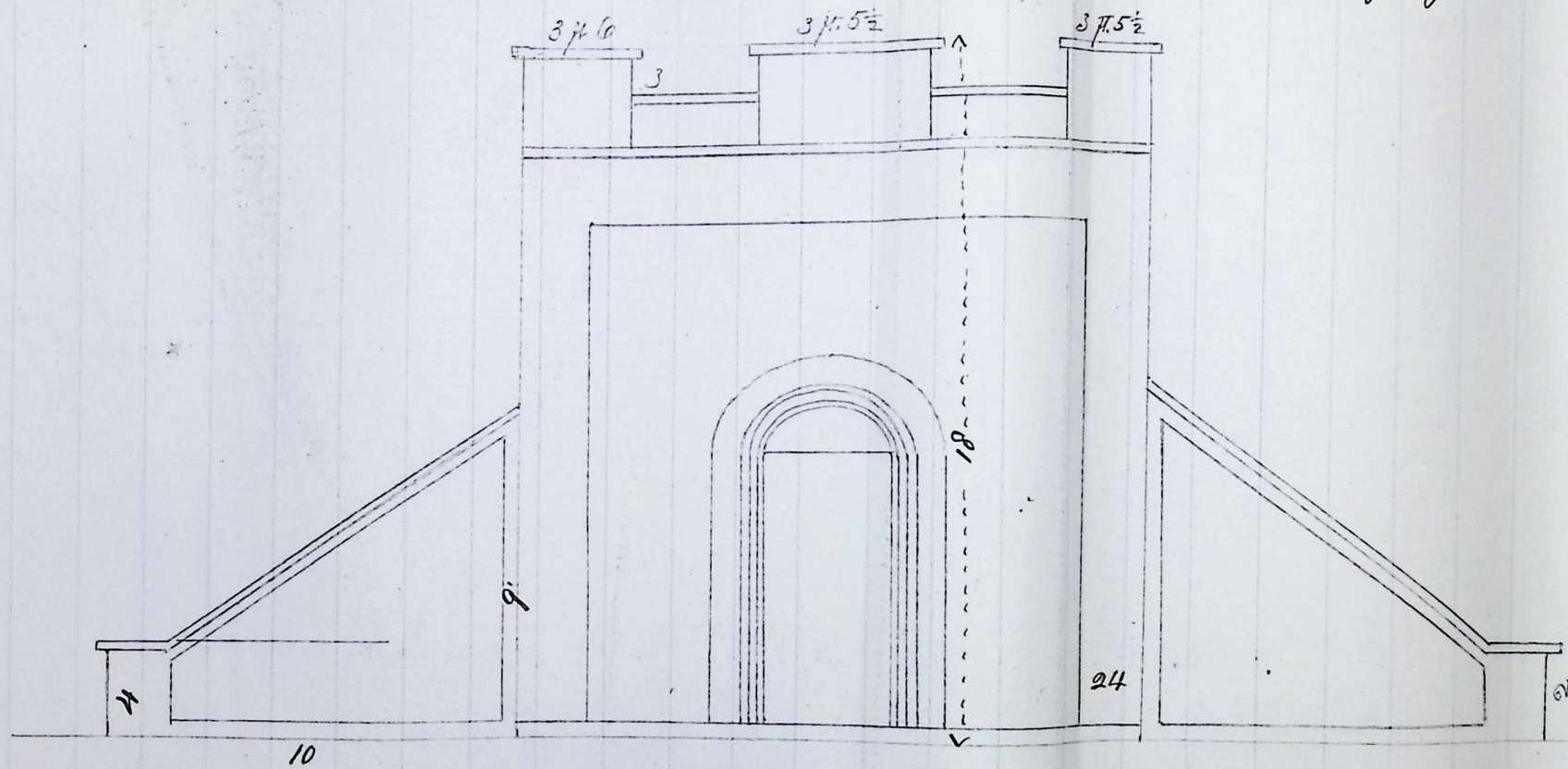
The arch to be twelve in thick

I agree to furnish material & do the work
on the above plan & Specificate for the sum five hundred twenty five dollars

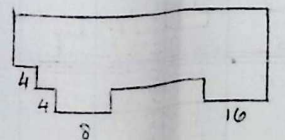
Smith & Pierce

(B)

This is the paper marked B referred to in the deposition of P.O. Loucks
George Wilmut - N.Y.



4 ft 6 in



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The Defendants here offered in evidence Diagrams Marked A & B. & the Proposal of the Plaintiffs written on said Diagrams which were admitted & read in Evidence to the jury which Diagrams A & B. & Proposal are in the words form & figures following -

 (See Diagrams here referred to following Loucks deposition)

Hervey Lightner was then called, sworn and testified as follows: The Association appointed P.O. Loucks a committee to make a contract to build a Vault, I know from Smith & Pierce that there was a contract made, Smith told me he had made a contract with Loucks to excavate the foundation furnish the materials except the Stone coping and do the work for \$525. When we were about making the contract Loucks, Hall, myself and Smith went on the ground and selected the site for the Vault; the place was marked out and stakes stuck for the foundation; the next thing I knew Harman had commenced digging the foundation. Loucks and I went to examine the foundation and found it was not by eighteen inches far enough in the hill according to the stakes, at the request of Smith we agreed that the foundation might be dug deeper; that was done Harman claimed more pay if he did it Smith agreed to give him more. The defendant was to pay Harman and charge it to plaintiffs. The Plans attached to Loucks deposition were referred to all the time. It was necessary to fill in outside the walls as the work progressed some dirt was thrown on the Arch before it was finished, Smith came to me to get pay for the Vault. I went to see the Vault and found it had fallen down. I refused to pay

because the Vault was down. It cost some \$340 to \$350. to repair the Vault. The defendant furnished the material to rebuild it, that is Pierce furnished it & defendant paid him I can't estimate more than thirty to thirty two thousand bricks in the Vault. The bricks in front were ordinary good bricks, There was nothing extra in any of them. I have been an Engineer: have built arches and bridges on rail roads. The reason why the Vault fell in is that it was very poorly put together, If well built the side walls would have to give way before it would fall unless a sufficient weight was put on to crush the material, There had to be some new bricks furnished to rebuild. The old were used as far as they would go. Oct. 25, 1856. there was paid to plff \$50. Nov 1. \$75. Nov. 3. \$220. to Harman \$54. & some cents. The Vault fell in last of November or the beginning of December. The vault is set rather in the side of the point of a hill: the water in no case can run on the Vault. There was no appearance of any wash. I called Loucks attention to the fact that the workmen were using too many bats and that the bricks were not laid to a centre: this was during the progress of the work. The bricks were not laid regularly, From the inside I saw the Key course was wider at one end than the other. the Key course run out and the balance was filled with spalls. Keys should be of the best material, The row-lock in a foot arch is in reality three four inch arches; binders are put in when there is a proper place for them. Defendant Pierce & I. had a conversation after the arch fell in Pierce said it fell down because of bad workmanship and plaintiffs ought to rebuild it, that he wanted Smith to rebuild it which he

refused, that it was damaging to their reputation as masons that he was not able to do it himself. Pierce then agreed to rebuild the vault himself at bare cost charging nothing for profit which he did and the Company paid him the actual cost of work and materials therefor. This agreement was with Pierce alone after the firm of Smith & Pierce had dissolved & the next Spring after the vault fell in.

Work Examined. I commenced engineering twenty five years ago: at first I was rodman. I afterwards had the management of twelve or fifteen miles of the Reading rail road. The arches there were of stone and were laid very accurately. I had the building of one brick arch eighty or ninety feet long. It was in form an arc of a circle. The outer ends were laid by a line. The front wall of the vault was sprung one inch or so. It had to be taken down.

The defendants counsel then read by agreement of parties from the bill of exceptions taken at the former trial the evidence of John Hall in the words and figures following: I know this vault and was there all the while they were building it = I noticed the brick used - some were too soft = I told the workman so = some of these soft brick were put in the side walls and some in the arch = The ^{courses} ~~courses~~ in the arch were not straight = When they came to the key course the opening was $\frac{1}{2}$ inch wide at one end and something over a course wide at the other = They began the arch on both sides and run them up together = When they commenced cementing on the outside, they had not enough cement and mixed up with it a good deal of common mortar to make it hold out = I covered the vault = when they got through building I asked Smith when it would do for me to take the centers out = He said any time after Monday - This was on Saturday = I then asked

when it would do to cover it up. = He said it will do to begin this afternoon, & marked with his finger how high I might cover it then = The balance of the covering he said might be put on as soon after that week as I wished = I went on and covered the vault, I rigged scaffolding on each side and wheeled up the dirt dumped it down upon the scaffolding and then had it thrown upon the vault with shovels. I do not know how long it took to cover it, but it cost something over Fifty (50) dollars, The cemetery company paid for this No rain fell while we were covering the vault. Nor until about the next Wednesday, a day or two after we got the vault covered. No dirt of any consequence was washed off before the vault fell in, There may have been a little but not enough to be observable. Water cannot run from the hills in which the vault is built, upon the vault, for the ground about it slopes off both ways so as to carry the water off to the sides and an old log lying just behind the vault in the hill protects nearly two thirds of it. I took the centre out of the vault about the latter part of the week after the arch was closed & after waiting some days thinking some one might be sent up to take them out. = Ryers came with another man to take them out, just after I had finished & before I had left the ground. In taking out the centres "I first dug out at the foot of the posts along on one side - and let the props settle all along which they did, so as to let the centers down about a foot on that side = On the other side the center rested about $\frac{1}{2}$ an inch on the wall. I then took out all the props except the center one, I then put a rope around this and with men outside pulled it out and the whole center came regularly down = I saw no disturbance of the arch except a piece of brick, which

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fell out from near where the loose one was to which I called Mr Ryers attention. I was there when the vault was cemented on the inside, and saw Smith chipping off pieces of brick and chinking them in where the bricks were loose = It was cemented the next week I think after the centers were taken out = On Saturday I think three or four days after it was cemented I found the vault down. There was about 20 inches of dirt on the top of the arch when it fell. nothing was said by Smith to me about the way I had pulled the center down = The vault was rebuilt by Pierce under a new contract, after Smith and he had dissolved, it was built on the same side walls except a soft brick here and there which we had taken out, This vault as rebuilt is still standing = It was rebuilt on the same centers There may be a little more dirt upon it now than before but perhaps not to vary more than an inch or two, There have been many heavy rains since, The rebuilding of the vault cost \$301 and some cents. The Cemetery Company paid this, for re covering it cost \$35 and some cents - By the contract Plffs were to go Ten feet further into the hill than the foundation was first dug, but Harman begged off, and it was then agreed to go deeper down, By the change in the plan the digging was $\frac{1}{2}$ less than it would have been to dig back into the hill. When it was determined to dig deeper Smith agreed to pay the extra expense = The defendants were to pay Harman and charge Smith =

Ex. When Soules was absent I was to see that the work was done as required by the plan, I have the general Superintendence of the cemetery grounds = I was not present when the contract was made but saw it & read it over, The centers were made of boards = The uprights consisted of Posts made of young saplings =

I asked Smith when it would do for me to take the centers out saying to him at the same time, we want the use of the vault as soon as possible = He replied, it will do any day after Monday. I told some of the men that if the building were mine, ~~some~~, some of the brick they were using should not go in = It rained that fall in which the arch fell = It fell about the last of November or first of December = When Pierce was rebuilding the arch I spoke to him to have the soft brick in the side walls dug out = I did not take out the centers the last time = I saw Smith poke up two spalls to tighten bricks in the key of the first arch when he came to cement on inside = Since this vault was rebuilt, there has been another vault built on these grounds from which I helped to take the centers out = When the arch in controversy was first finished there were about 11 masons at work = The opening in this arch when they came to the key course was narrowest in front = Smith consented to having the foundation dug deeper rather than go further back into the hill =

On Re-examination this witness said - The plans for this vault were on the ground & referred to while pliffs were building said vault = The vault was rebuilt by Pierce in the latter part of June & early part of July 1857.

X James M. Key testified as follows. I was present at a conversation in the store of P. O. Loucks between Smith the defendant and Loucks. Smith wanted Loucks to accept the vault and Loucks would not do so as it had fallen down. After talking a long while Smith said the first fair weather he would go up and fix it up, Smith said he thought the association ought to furnish the materials. Loucks

thought not, Smith finally said the first fair weather he would go and fix it up.
Cross Examined. Smith wanted the job accepted so he could
 get his pay. Smith said the breaking down of the Vault was no
 fault of his, Loucks would settle on no terms but that the vault
 should be rebuilt by Plaintiff & then the defendant would pay the
 balance of first contract. When the matter was decided I under-
 stood Smith to agree that Plaintiffs were to furnish the materials -
James Hazard. testified as follows. I am a bricklayer.
 I saw the vault. Part of the arch was down. It was intended
 for a semi-circular arch; there can be no stronger form of arch.
 I can't tell what weight it would bear so long as the abutments
 stand; a few feet of earth ought not to throw it down; the
 abutments were not sprung; about two thirds of the arch was down;
 probably less or more; the arch was not broke straight across. I think
 twelve or fifteen inches of the arch on each side were standing.
 If well built of good materials I don't think any weight on the
 top would throw it down, the sides were not sprung. I know
 this because the cement in the angles was not cracked. I did
 not form any opinion as to what threw it down. In some
 places there was a good deal of mortar - some places not so
 much. There were some soft bricks in the arch. Thirteen to
 fifteen courses in the center of the arch had no headers; they
 were formed of single bricks laid in edge-wise. There are various
 opinions about this; some think three four inch arches are stronger
 than an arch built together; my opinion is the more headers you
 can get in the better. (The bricks looked as though they verged
 to a common center) If well built of good materials the
 arch ought not to have fallen down. It was worth near \$9.
 per thousand to furnish and lay the brick. I am not certain,
 bricks have been sold as high as \$5. per thousand & four

Dollars for laying them. If properly cemented rain or water ought not to affect it, I can't account for its falling on any other hypothesis than that it was badly constructed. The cement was still on so I could not see the Courses except where the Arch was broken off - I could not see whether the bricks were laid in straight lines. The courses ~~are~~ ^{ought} not to vary more than a half inch in carrying them up that distance - an inch would be a pretty high variance - a good workman working by the eye and occasional measurements ought to keep within that.

Cross. Examined.

I went up with Luther Card and F.O. Loucks in the latter part of November or the beginning of December. It was worth 75 to 80 cents per thousand to haul bricks. The front wall was sprung out: cement was either dry or frozen: the front part of the Arch was exposed to the frost: If there had been frost enough under the foundation it would have had a tendency to lift it up; there had not been frost enough, I don't think the frost could injure the arch. A man can pound a hole through a green arch but would have to strike several times, I don't think the man lives who can key out an arch where the courses are not straight as strong as one in which the courses run straight. If the brick mason furnishes the center it is his own fault if the boards are not even.

Luther Card testified. I have been a brick mason thirty years. I have seen the vault; It is twelve by twenty two feet inside. It would take thirty six to thirty seven thousand bricks. It was worth \$9.50 to furnish and lay up the brick. It was worth twenty five to thirty cents per yard to cement it. It would not vary much from one hundred yards cementing. Birketts Sand bank is one half to three fourths of a mile from the

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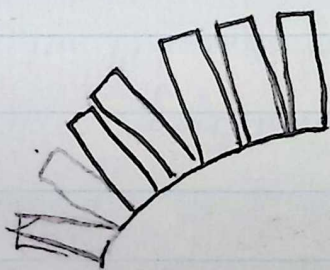
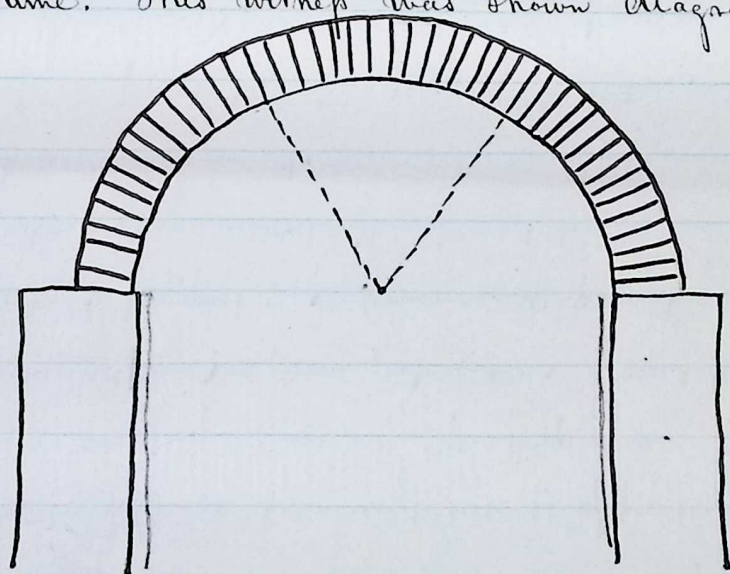
vault. The distance from Giles to the vault is one half mile farther than to town. I examined the vault after it had fallen in; the front was sprung out; the abutments were firm. Two thirds of the arch was down to within a foot or two of the abutments. The brick in the front were good. The outside of the front would take about two thousand bricks. I can't say why the arch fell. If well constructed it could not fall without springing the abutments; The dirt on the back part was thickest, One foot thick where it fell and two feet further back. The vault has been rebuilt. It was the front part that had fallen.

Crop Examined. In my estimate I counted twenty two and a half bricks to the foot; I commenced from the surface of the floor, I don't know about the foundation - This arch was a row-lock; mechanics differ as to the strength of the arch. In a large circle I prefer the other way of building. The front was sprung from one to three inches, the greatest variation was about the center. The cement on the inside was firm.

Re-Examined - Hall could not injure the arch by taking out the center in the manner he did it. The front was sprung by the falling of the arch.

Charles Allison. I have been an architect twenty years. In the beginning of December I looked at the vault. Two thirds of the arch had fallen down; One third was still standing. The arch had fallen nearly to the abutment at the front & the break tapered up irregularly as it extended back. The cement was partly scaled off the inside in small patches on the sides of the arch - and one place in the center extending from the edge of the break back towards the hull - the size of a table before him - being about two by eight or nine feet. I examined the work and thought from what was standing that the key had not

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been properly put in. There were some soft bricks but not enough to hurt it. I saw in the center of the Arch that the Key course had been filled in with spalls, the Key ought to be of good hard bricks. The Key course was wider at the back end than the front from a course to a course and a half. The abutments were standing and not sprung any. There was earth piled outside of them. If built as it should have been it should not have fallen with any reasonable weight placed upon it. The front was sprung out by the falling of the arch. The courses of bricks had not been laid in a straight line. The bricks were also laid irregularly, and did not verge to a common center. If a brick stands too straight up on one side of the center it is easy to throw the arch down. The props under the center ought to be taken out on one side at a time. This witness was shown diagrams in the following form.



Witness then said I made these diagrams on the former trial of this cause - the upper one shows how bricks ought to be laid in an arch and the lower one the manner in which the bricks were laid in this arch

Cross Examined. If plastered on outside freezing first and then rain would injure the arch. If the mortar is poor frost will hurt it. good mortar will be injured by the frost. frost destroys the cementing qualities of mortar.

The defendant here rested.

Frederick G. Heartshorn recalled by the plaintiffs, testified - I went up to measure the vault a day or two before the suit before the Justice - Only about one third of the arch was then down as near as I could judge; I did not measure to see: I can't swear positively to that. The cement was scaled off in some places.

The Plaintiffs counsel then by agreement of Parties read the evidence of Jeremiah T. Smith. Cyrus Peirce & Thomas Whitby as contained in the bill of exceptions on the former trial. Jeremiah T. Smith recalled said = I helped to rebuild this vault - saw no soft brick dug out of sides, and think I should if done = Don't remember any complaint by Loucks or Hall about soft brick, while first arch was building = when we rebuilt the arch the cement was off in spots, and about a foot around the edges = we used the old brick in rebuilding as far as they went, & the cement was still on them = There were as many bats in the second as in the first arch = $\frac{1}{3}$ of the arch had fallen - we knocked the remainder down - a little over half of it, with 2 by 6 inch

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scantling = It was very firm = Couldnt see whether the courses were straight or not = The cement was over the inside & dirt on the outside = The cement was not off where Key or arch brick was = There were some spots, not over 8 inches over, where the cement was off = Mr. Alrison might be mistaken = I might be = The first time I saw the arch after it fell, was about 2 weeks before this suit before Justice Bailey =

Cyrus Pierce recalled = said = I helped to re-build this vault - Saw nothing of picking soft brick out of the wall = Heard no complaint from Hall or Loucks about soft brick = Think the first vault built as well as the second, which is still standing = In laying the brick over the center they naturally turned to the center Dont remember seeing strips along the center from which the cement was off = About $\frac{1}{2}$ or a little more of the arch was standing when rebuilt = Saw no common mortar mixed with cement for the outside - If much mixed with it should have felt it in working = Alrison could not tell how the vault was built on looking at the inside The tiers were all laid straight and each tier properly keyed No man could tell by looking at the inside of the arch how it was built - Think the courses of brick came out about the same in last arch as in first = Cant say if the opening was wider behind than before - Took no more pains with the second than with the first arch =

Thomas B. Whitby next Called as rebutting testimony by Plffs, said = I am an architect & have been for 15 years = have heard the testimony about this arch = There is no difference between the strength of an arch built as this was, and one in which the corners are laid straight = The row lock arch

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is the strongest kind = If the corners are not straight, it makes no difference if they are keyed up well and the joints are parallel. If the wall is green & the work bad, an arch is more likely to fall when the centres are taken out, than afterwards = If this arch stood two or three weeks this was long enough to test the workmanship = Frost might throw an arch down after it comes out = Have known arches thrown this way = Frost tends to kill the mortar = a loose brick in an arch twenty feet long would not endanger it - One may take out a half dozen pieces, if they are not together, or make apertures, without endangering the arch = I heard the testimony of plaintiffs witnesses as to the manner of building this arch, and according to this the work was well done = The effect of throwing a solid lump of earth on the top when the mortar is green is injurious =

Cr. Ex. - I never knew an arch thrown down by frost = It is not workman-like to have loose brick in an arch = The pressure should be equal in all parts of the arch = There cannot be a perfect key, If the line of the key is not the same throughout = There is not the same presumption in such case that the work is well keyed = It is more difficult to key where the opening is narrow = When a brick is set in the pressure should be equal on every part - as great below as above - Hence if there is a hard spall pressing above & soft mortar below the key cannot be good = If the brick in this arch were laid as shown by Morrison the arch could not be keyed.

James Morris on being re-called testified as follows. I did not see Smith poking up spalls at the time I cemented the arch, I think I would have seen it if it had been done. I did not see any loose bricks, I cemented the same vault afterwards, I could see no difference between them.

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Cross Examined. I cant tell what made the vault fall, I built a cistern which fell the only one I ever knew, I could see no difference in the ~~courses~~ ^{courses} in the first & second arch.

William Thompson being recalled testified, I heard Halls deposition, I didnt see any thing of mixing common mortar with the cement. There was plenty of cement to put on the outside I did not hear Loucks or Lightner saying any thing about soft bricks while the arch was building, we put in binders whenever the courses came up even. We keyed up each arch separately, the courses were brought up as regularly as we could. The front was an inch or an inch and a half narrower than the back part, we drove the key bricks in with a hammer. The second arch was not keyed up as tight as the first, nor the third as tight as the second, This is the right way, when mortar freezes and thaws again it loses its strength - I was at work on the arch all the time, I heard no complaint about soft brick or any thing else from Hall or Loucks while the work progressed

Richard Schofield. There was heavy rain on the 27th day of November A.D. On December 1st at 4 O'clock P.M. it drizzled, at 8 O'clock P.M. it rained. On the morning of December 2^d it had frozen hard enough to carry horses & wagon. I remember these facts because I got married at that time,

James Hazard - recalled testified, Luther Ward and I went to see the vault in the latter part of November or the beginning of December,

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The Plaintiffs here moved the court to exclude the testimony of Harvey Lightner from the consideration of the jury on the ground of interest and that he was not a competent witness in the event of this suit which motion was sustained by the court to which ruling of the court the defendant by its counsel then and there excepted.

Jonathan K. Cooper was then called by the defendants counsel and testified as follows: On the former trial of this cause in this court the sum of \$399.32 was admitted as the amount paid by the defendant to plaintiffs for building the vault. This admission was made by Mr. Grove attorney for the plaintiffs in consultation with them. The only sum in dispute was \$20. paid by defendants to Harman which plaintiffs contended ought not to be charged to them.

Edw. Powell testified. This cause was tried before me as Judge at the former trial. My recollection is that the only controversy about payments was in regard to \$20. contained in the receipt of Harman which defendant said plaintiffs were to pay and plaintiffs said defendant was to pay. There was no controversy about the amount of payments actually made the only dispute being who should pay the \$20. to Harman for the extra work. This was all the evidence in the case.

The Plaintiffs then asked the court to instruct the jury as follows

- 1 If the jury believe from the evidence, that the Plaintiffs contracted with the defendant to build a vault, and that the said Plaintiffs in pursuance and by virtue of ~~said~~ ^{such} contract furnished the proper materials and built the vault according to the contract

in a good and workmanlike manner, the jury should find for the plaintiffs the price agreed to be paid for building such vault - after deducting such payments as the defendants have proven that they made.

2nd It is for the jury to determine from all the evidence, whether there was a contract made between the parties, for the building of the vault or not - and if there was no contract made then the plaintiffs are entitled to recover, whatever they have proven, the materials and work furnished, by them to have been worth, subject to such deduction as the defendants, have proven to have been paid - provided the work was done in a good workmanlike manner and materials furnished were of the proper kind

3rd The jury ^{are} further instructed, that if they believe from the evidence that the plaintiffs furnished any extra materials, or performed any extra labor in constructing said vault, than as provided in the contract, the jury should allow the plaintiffs for such extra materials and labor as much as the plaintiffs have shown such extra materials and labor to be worth.

4th If the jury believe from the evidence that the plaintiffs made a contract with the defendant to build the vault in controversy and that the plaintiffs did furnish the materials and build the vault as provided in the contract, the plaintiffs are entitled to recover any balance proven to be due them, notwithstanding, the arch afterwards fell in - unless the jury shall further find from the evidence, that such falling in was caused by the want of care or skill in building said vault, or some defect in the materials used in building said vault.

6^g 5th

Given

The jury are further instructed that the plaintiffs are entitled to recover, the Contract price for building the vault, (if the jury believe from the Evidence a Contract was made) unless they shall further believe from the preponderance of Evidence, that the work was carelessly or unskillfully done, or the materials ^{used} were not of suitable quality, deducting any payments that had been made

6th

Given

If the jury believe from the Evidence, that the arch of the vault in controversy fell down in consequence of causes arising subsequent to the completion of the same, and not from any defect of materials in the construction of the same or in the workmanship of the same, then the plaintiff should not be held responsible for the same.

7

Given

The jury are further instructed that if there was no time fixed for the payment of the price agreed to be paid for building the vault in controversy, then the plaintiffs became entitled to receive the Contract price for building the same (if the jury believe from the Evidence that a Contract was made) as soon as the vault was completed by the plaintiffs provided the vault was built of proper materials & was built in a good workmanlike manner.

8th

Given

The jury will entirely disregard the testimony of Henry Lightner as the court has excluded the testimony of said Lightner from the consideration of the jury -

9

Given

If the jury believe from the evidence that there was a contract between the plaintiffs and defendant, in regard to building the vault, in controversy, and that the plaintiffs furnished the materials, and constructed the vault according to the contract, with proper

70 Materials and labor of a proper character the plaintiffs were entitled to receive the contract price for building the same, whether the same was ever formally accepted by the defendant or not.

10 Propositions of settlement made by one party to another by way of compromise, and to avoid litigation are not competent evidence against the party making such propositions, and if the jury believe from the evidence that Smith made propositions to Loucks by way of compromise a matter in dispute & to adjust the same for the purpose of avoiding a law suit such propositions are not evidence against plaintiffs.

Qualifications of defendants & instruction

1 If the jury believe from the evidence that the plaintiffs or either of them did propose to rebuild the arch if the defendants would furnish the materials, then unless the defendant did furnish the materials the proposal would not be binding on the plaintiffs

2. If the jury believe from the evidence that the plaintiffs furnished good materials and built the vault in a good workmanlike manner according to the contract they were entitled to their pay, and if the plaintiffs or either of them did agree to rebuild such arch such agreement would not be binding on the plaintiffs unless some new consideration was paid or promised them to rebuild said vault, but such an agreement may be considered by the jury as tending to prove the admission on the part of the plaintiffs as to the defective character of the job.

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To the giving of each of which instructions the defendants Counsel objected but the Court overruled the said objection and read the same to the jury. to which ruling of the Court the defendants Counsel then and there excepted.

Defendants Counsel then asked the Court to give the following instructions:

Given
1. That if there was a written contract in this case the same must govern as to the price and character of the work done under the same

Given
2. That if the jury believe from the evidence that the arch built by the Plaintiff fell in, the presumption is that the same occurred on account of defective work or materials unless the contrary is shown

Given
3. That if the jury believe that the arch of the vault fell in, on account of defects in the material or workmanship - the plaintiff is liable for all the expense and costs necessarily paid to rebuild or repair the same

Given
4. That if the jury believe from the evidence that after the arch fell in the plaintiffs or one of them acting for the plaintiffs agreed to repair the same at their own expense, and did not do so in a reasonable time, or refused to do so, they are liable for the expense of such repairs if such agreement was made in consideration of the defective character of the job

5. That if the jury believe from the evidence that there was no written contract between the parties or that the same was

Givens

abandoned by them, then in making up the account, the plaintiffs are only to be credited with the value of the actual amount of brick, materials and labor put into and expended upon the work, and that from this sum, the amount paid by the defendant, and the cost of rebuilding the arch, if the same was originally defectively built, and fell in consequence thereof must be deducted.

6. If the jury believe from the evidence that the plaintiffs built the vault - mentioned by the witnesses in this case for the defendant, that soon after the same was built it fell in; that there was then a bona fide dispute between the plaintiffs and defendant through its proper agent as to whose fault it was that the vault fell in, and whether the defendant should pay the plaintiffs for building such vault; and that for the purpose of settling such dispute it was agreed between the plaintiffs (acting through Smith one of them) and the defendant (acting through Peter O. Loucks its agent) that the plaintiffs should rebuild said vault; and that then in consideration thereof the defendant should pay the plaintiffs the full amount which the defendant had contracted to pay the plaintiffs in the first place for building such vault, this would be a valid agreement and binding upon the plaintiffs and if the plaintiffs did not perform such agreement to rebuild they cannot recover and are liable to the defendant in this action for the damages which the defendant suffered by reason of the vaults being not rebuilt by the plaintiffs.

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x 7

Refused

When a mechanic or other workman undertakes for a valuable consideration to furnish materials and do a piece of work for another, the law implies a warranty that the work so done shall be reasonably sufficient for the end designed; and if the jury believe from the evidence that plaintiffs undertook to build an arched cemetery vault for defendants and that either from defect of materials or in the workmanship the arch fell in, and was not rebuilt by plaintiffs when this suit was commenced, the plaintiffs are not entitled to recover in this action =

Refused

8 If the jury believe from the evidence that the defendant has suffered damage from the default or want of care and skill of the plaintiffs in performing their contract for building the vault mentioned by the witnesses in this cause, and that such damage exceeds the amount which the plaintiffs would otherwise be entitled to recover, then the jury should find for the defendant the amount of such excess, as such excess may be shown by the evidence, to the satisfaction of the jury.

But the court refused to give the said instruction to which ruling of the court in refusing to give the said instruction the defendants counsel then and there excepted.

The jury returned a verdict in favor of plaintiffs and against the defendant in the sum of \$1147. whereupon the counsel for the defendant entered a motion for a new trial in the words and figures following.

Smith & Peirce }
vs }
Springdale Cemetery }
Association }

In the Circuit Court - Peoria Co
Ills. - Dec. 3. 1862.

And now comes the said Deft., and
moves the court to set aside the verdict of the jury, and for
a new trial in this cause, and shows to the court as grounds
of said motion.

1st That the court excluded proper evidence offered by the Deft. =

2nd The court gave erroneous instructions to the jury for said
plaintiffs =

3rd Said court refused proper instructions asked on the part of
said defendant =

4th The verdict of the jury is against the evidence, against the
law, & against the instructions of the court - therefore & for
other good & sufficient reasons Deft. moves as above

N. B. Pursole

D. B. Mculloch

& J. K. Cooper for Deft.

But the Court overruled said motion and rendered judgment
in favor of the said plaintiffs and against the defendant
for the sum of \$147. and costs to which ruling of the
Court in overruling said motion for a new trial and
in rendering judgment in favor of said plaintiffs and
against said defendant, the said defendant by its

75- Counsel then and there excepted and prayed that this bill of exceptions might be signed sealed and made part of the record in this cause according to the statute in such case made and provided which is accordingly done

A. L. Merriman

(Seal)

And afterwards, to wit: on the 10th day of January A.D. 1863 there was filed in the office of the clerk of said court an appeal bond which is in words and figures following to wit:

Know all men by these presents, That we, the Springdale Cemetery Association as Principal, and Isaac Underhill Henry Lightner and William A. Hall, as sureties are held and firmly bound unto Job Smith and Hiram Peirce in the penal sum of Three Hundred Dollars for the payment whereof well and truly to be made, we bind ourselves our heirs and personal representatives, jointly and severally, firmly by these presents = But on this condition, That whereas at the December Term A.D. 1862. of the Circuit Court of Peoria County, Illinois, in a certain suit then pending in said Court wherein the said Smith & Peirce were plaintiffs and the said Springdale Cemetery Association was defendant, a judgment was rendered by said Court in favor of said plaintiffs & against the said defendant for the sum of One Hundred & Forty Seven Dollars debt or damages and for costs, from which said judgment the said Springdale Cemetery Association has prayed and taken an appeal to the Supreme Court of said State = Now if the said Springdale Cemetery Association shall well and truly prosecute said

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appeal, and shall pay all such judgments, costs, interest and damages as shall be awarded, in case said judgment shall be affirmed, then this obligation to be void, otherwise of force =

In witness whereof the said "Springdale Cemetery Association" and the said Isaac Underhill, Henry Lightner and William A. Hall have signed and sealed this instrument this 9th day of January A.D. 1863. =

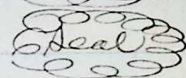
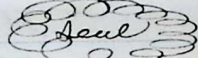
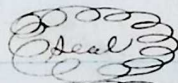


The Springdale Cemetery Association
By - Wm A. Hall Presid^t
H. Lightner Secty -

Wm A. Hall

H. Lightner

Isaac Underhill



State of Illinois
Peoria County ss.

I, Enoch S. Sloan clerk of the Circuit Court in and for said County and State do hereby certify, that the foregoing is a full, true and complete transcript of the papers filed in the cause wherein Job Smith & Hiram Pierce were plaintiffs and the Springdale Cemetery Association were defendants, and of the proceedings of said court, appertaining thereto, as the same appears on file, and of record in my office.

Given under my hand and the seal of said Court, at Peoria, this 30th day of March A.D. 1866

Enoch S. Sloan, Clerk

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John Smith &
Hiram Pierce

The Springdale
Cemetery Association

In the Supreme
Court -
Ottawa Ill
Appeals from Iowa

And now come the defen-
dants and say, that in the Record
& proceedings in the rendition of
the Judgment aforesaid there is
Error in this

- 1st. The Circuit Court excluded proper
evidence offered by the Defs
2. Said Court admitted improper
evidence offered by Plaintiffs
3. Said Court Refused proper
instructions asked by Defendants
4. Said Court gave improper in-
structions asked by Plaintiffs
5. The Verdict of the Jury was
against Law & Evidence and
the said Court erred in Refu-
sing the Defendants a new trial

On Said Court erred in rendering
Judgment for the Plaintiffs

Wherefore said Defendants pray
that said Judgment may be reversed
and set aside Cooper & Purpfe for Defs

Ana tho said John Smith and
Hiram Pierce the defendants
error even if Brown & E C
come & say that in the records
and in the records of
Inauguration there is no error and
that they are ready to help when
you this Party just as that I am
just be offering

of Brown &

E C August

Atty Gen Dept
error

66 181

The Springdale
Cemetery Ass'n

^{vs}
Job. Smith et al

Filed Apr 22 1863

J. Selman
Clerk