

12463

No. _____

Supreme Court of Illinois

Cole

vs.

Chouteau, et al

71641  7

~~124~~ 54

Thomson S. Cole

vs

Pierre Chontean

1837

Cole

vs

Chontean

12463

1857

X

Be it remembered that heretofore to wit: on the twentieth day of February A. D. 1855 there was filed in the office of the Clerk of the Circuit Court of Peoria County in the State of Illinois a Declaration in a certain cause wherein Pierre Chouteau, James Harrison and Felix Vallé were Plaintiffs and Amiran S. Cole is defendant, which said declaration is in the words and figures following, to wit:

"State of Illinois }
Peoria County }²⁰ In the Circuit Court of Peoria County
Illinois, of March Term 1855

Pierre Chouteau, James Harrison and Felix Vallé, trading under the firm of Chouteau, Harrison & Vallé, complain of Amiran S. Cole of a plea of trespass on the case upon promises For that whereas the said defendant afterwards to wit on the first day of November in the year of our Lord one thousand eight hundred and fifty three at the County aforesaid was indebted to the said plaintiffs in the sum of one hundred and seventy three dollars & eighty seven cents for the work and labor care and diligence of the said plaintiffs, by the said plaintiffs, before that time done performed and bestowed in and about the business of the said defendant, and for the said defendant and at his special instance and request and also in the further sum of two hundred dollars for divers goods wares and merchandize by the plaintiffs, before that time sold and delivered to the said defendant and at his

special instance & request, and also in the further sum of two hundred dollars for ~~divers~~ goods ~~monies~~ and merchandises money by the said plaintiffs before that time lent and advanced to and paid, laid out and expended for the said defendant and at his like special instance and request; and also in the further sum of two hundred dollars for other money by the said defendant before that time had and received to and for the use of the said plaintiffs and being so indebted he the said defendant, in consideration thereof afterwards to wit on the day and year aforesaid at the County aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said several sums of money in this count mentioned, when he the said defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards to wit on the day and year last aforesaid ^{at the County aforesaid} accounted with the said plaintiffs under the name and Style Cheuteau Harrison & Valle of and concerning divers other sums of money from the said defendant to the said plaintiffs, before that time due and owing and then in arrear and unpaid, and upon such accounting the said defendant was then & there found to be ~~due~~ in arrear and indebted to the said plaintiffs in the further sum of two hundred and fifty dollars and being so found in arrear and indebted, he the said defendant undertook and then and there faithfully promised the said plaintiffs to pay them the said last mentioned sum of money, when he the said defendant should be thereunto afterwards requested. Nevertheless the said defendant not regarding his said several promises and undertakings hath not as yet paid the said several sums of money or any or either of them or any part thereof to the said

(3)

plaintiffs (although often requested so to do) but the said defendant to pay them the same hath hitherto wholly neglected and refused, and still doth neglect and refuse to the damage of the said plaintiffs three hundred dollars and therefore they bring their suit

Cooper & Reynolds

Attorneys for plaintiffs"

And afterwards, to wit: on the 23rd day of March A.D. 1855 the defendant filed his plea in said cause which is as follows

" Pierre Chouteau & al

vs

Admiral S. Cole

Circuit Court

March Term A.D. 1855

And the defendant comes and defends the wrong and injury when &c and says that he did not undertake and promise in manner and form as in said declaration alledged and this he prays may be enquired of by the Country &c And prays do the like
Bryan for deft
Cooper & Reynolds for plffs."

Proceedings at a term of the Circuit Court begun and held at the Court house at the City of Peoria in and for the County of Peoria in the State of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty five it being the nineteenth day of said month. Present the Honorable Onslow Peters Judge of the sixteenth Judicial Circuit in the State of Illinois, David D. Irons Sheriff and Jacob Gate Clerk to wit:

4

Thursday December 13th A.D. 1855

Pierre Chouteau

James Harrison

Felix Valle

vs

Almiran L. Cole

Assumpsit

This day came the defendant by William F. Bryan his attorney and moved the Court to continue this cause to next term for reasons set forth in affidavit on file, on consideration whereof the Court being fully advised in the premises overruled said motion.

Friday December 14th A.D. 1855

Pierre Chouteau

James Harrison

Felix Valle

vs

Almiran L. Cole

Assumpsit

This day came the parties by their respective attorneys and the defendant moved to suppress & reject and exclude the depositions of John W. Clark and Ferdinand Hahn for the reason that said witnesses have wholly failed to answer a material part of the 4th interrogatory propounded to them respectively, and that a material part of the 4th interrogatory and ⁱⁿ said depositions is wholly unanswered or evasively answered by said witnesses respectively, and the Court being fully advised overruled said motion. Thereupon the defendant withdrew his notice under the general issue and by agreement of

157

parties, all matters both of law and fact, arising in this cause are submitted to the Court for trial, without the intervention of a jury. The Court having heard the evidence of the parties respectively do find that the said defendant did assume and promise in manner and form as the plaintiffs have in their declaration alleged and do assess the plaintiffs damages at the sum of one hundred and seventy three dollars and eighty seven cents. The defendant moves the Court to grant a new trial in this cause for the following reasons; 1st The verdict is against law. 2nd The verdict is against evidence 3rd The Court erred in admitting as evidence on behalf of plaintiffs the depositions of Clark and Wahn. 4th The Court erred in overruling the defendants motion to exclude said depositions. 5th The Court erred in admitting the plaintiffs account attached to the depositions of Clark and Wahn. 6th The Court erred ⁱⁿ admitting improper testimony. 7th The verdict is against law and evidence. The Court overruled said motion for a new trial, therefore it is considered that the plaintiffs have and recover of the said Almiran S. Cole the sum of one hundred and seventy three dollars, and eighty seven cents their damages aforesaid by the Court assessed and also their costs and charges by them about their suit ^{in this behalf} expended and that they ^{have} execution therefor. The defendant prayed an appeal in this cause to the Supreme Court of this State which is allowed him on his filing in the office of the Clerk of this Court in thirty days an appeal bond, payable to the plaintiffs in the penal sum of two hundred and fifty dollars with John Hamlin or William Kellogg as surety and conditioned according to law.

(6)

And afterwards to wit: on the 15th day of December A.D. 1855 there was filed in said Cause on the part & behalf of the defendant his bill of exceptions in said Cause which is as follows:

Pierre Chouteau & al } Circuit Court
vs } Nov. Term
Admiral S. Cole } A.D. 1855

Be it Remembered, that on this day the defendant filed his affidavit in the following words and figures to wit:

Pierre Chouteau & al }
vs } Circuit Court Nov Term 1855
Admiral S. Cole }

State of Illinois }
Peoria County } vs Admiral S. Cole ^{having been} ~~being~~ duly sworn says,
that prior to the last term of this Court he caused the deposition of Nathan Cole of St. Louis Missouri to be taken and filed as evidence in his behalf in this cause. That the main object of taking said deposition was to prove an agreement between plaintiffs and defendant at the time of the purchase of the iron for the price of which this suit is brought, that plaintiffs would manufacture and deliver said Iron within a limited period of time, and that they had failed to do so whereby ~~defendant~~ ^{defendant} had suffered great damage. That since the taking of said deposition and about three days before the commencement of this term the said witness Cole informed defendant in said St. Louis, that he had misapprehended the interrogatories propounded to him of in said deposition, at the time of taking the same, and that his answer thereto did not disclose the whole truth in the

(7)

premises; and that if said witness were again interrogated in regard to said agreement between plaintiffs & defendant at the time of the purchase of said Iron, he would state substantially (which would be the truth) that defendant and witness went together to the office of plaintiffs to purchase said Iron (witness going merely to introduce affiant) that plaintiffs informed defendant that they could and would manufacture and ship the said Iron to defendant at Peoria in four weeks from that time, which was during the latter part of the month of October or first part of November 1853. That defendant at the time of said purchase insisted that plaintiffs should fix as early a period as possible for the delivery of said Iron (because he could not put his distillery in operation without it) and plaintiffs thereupon agreed to the period above named viz: four weeks from the time of said purchase. That said Iron was not shipped by plaintiffs untill some time in the latter part of December 1853.

Affiant believes that he can prove the foregoing statements of facts by said witness who resides ⁱⁿ St. Louis Missouri, and knows of no other witness by whom he can prove the same, and believes he can procure his testimony by the next term of this court.

That immediately after said Leole had informed affiant as above, affiant left said St. Louis for Peoria and arrived here on the first day of this term and thereupon informed his counsel in this suit of the same, that said counsel in this suit as he is informed and believes, in the same way proposed to plaintiffs counsel to issue a new Commission to take the testimony of said witness, provided said counsel would waive the ten days notice or would agree to delay the trial of said cause a reasonable time

(18)

after the expiration of said ten days, so that affiant might have said deposition returned during this term of court, but that said plaintiffs counsel refused to make any agreement in the premises.

That affiant did not therefore give such notice because from the position of this cause on the docket he could not expect and did not believe said deposition would be returned in time for the trial.

Affiant refers to the deposition of said Cole in this cause for explanation of this affidavit; that this affidavit is not made for delay, but that justice may be done, he having sustained damages by the neglect of the plaintiffs in the premises in a much larger amount than the ~~sum~~^{sum} sued for.

Affiant further says, that he had not seen said witness for two years & before said time first above mentioned and did not know before that he would testify differently from his said deposition, affiant having come to the conclusion after reading said deposition that said witness had forgotten the facts in relation to said agreement until informed otherwise as abovesaid.

A. S. Cole

Subscribed & sworn to before me

this 19th December 1855. D. Blakeley JP.

And thereupon moved the court to continue this cause until the next term of this court upon the hearing of which motion the defendant introduced and showed to the court the docket of causes pending for trial at this term of this court, prepared by the clerk thereof and on which docket this cause was set down among causes for trial on the fourth day of this term.

And the plaintiffs introduced and read to the court

9

the deposition of Nathan Colles taken under a commission caused to be issued by the defendant and filed in this cause, which deposition is in the words following to wit:

"State of Illinois

Peoria County

{^{ss} The People of the State of Illinois to S. J. Levi Esq. of the City of St. Louis in the State of Missouri, as Commissioner to take depositions Greeting: We having confidence in your skill and fidelity, have appointed you, and by these presents do authorize and require you, at a certain time and place, to be by you appointed for that purpose, to cause the witnesses whose names are mentioned in the caption of the annexed interrogatories to come before you, and then and there diligently and faithfully to examine them on oath upon the said interrogatories, in the order in which they are propounded, and you will cause the answers of the witnesses thereto to be reduced to writing in the order in which they shall be proposed and answered, and you will then cause the witnesses to sign their names to the same in your presence. You will also annex a certificate, subscribed by yourself, at the foot of the depositions, stating that they were sworn to and signed by the deponents, and the time and place when and where the same were taken. The depositions thus taken and subscribed, and all exhibits produced, or referred to, by the witnesses together with this commission and the annexed interrogatories, you will inclose seal up and direct to the clerk of the Circuit Court of the County of Peoria in the State of Illinois, with the names of the parties litigant endorsed thereon: Witness Jacob Gale, clerk of the Circuit Court of the County of Peoria, and the seal of said Court this ninth day of May in the year of our Lord one thousand eight hundred and fifty five

Jacob Gale, Clerk

(10)

Interrogatories to be propounded to William L. Ewing, ———
Cole and Albert G. Edwards, residents of the City of Saint Louis
witnesses to be produced sworn and examined in a certain cause
of Pierre Lehousteau, James Harrison and Felix Valli, against
Admiral S. Cole, pending in the Circuit Court in and for the County
of Peoria in the State of Illinois.

On the part and behalf of the defendant as follows to wit:

Question 1

Where do you reside & how long have you resided there?

Question 2

Are you acquainted with the above named parties & how long have
you known them & where?

Question 3.

Do you know anything of an agreement between plaintiffs and
defendants for the manufacture by the former for the latter of a
lot or quantity of Hoops iron of specific size, and shipping the
same to defendant at Peoria Illinois? If so, state about what
time & when said agreement was made & by whom. Whether the
defendant required the said iron to be made & shipped within a
limited period, what was that period & whether plaintiffs agreed
to do so, state fully what occurred at time of making the con-
tract and what the contract was.

Question 4

Do you know any other matter of benefit to defendant in the
premises. If so, state the same fully.

Cross interrogatories to be propounded to witnesses Ewing,
Cole & Edwards, called by defendant.

(11)
1 If in answer to the 3d direct interrogatory you say, you know any thing of an agreement between the plaintiffs and defendant for the making & shipping by plaintiffs to defendant of a lot of Hoops iron of specific size, state what that size was, whether said iron was made and shipped as agreed on; and if not, why it was not done. State every thing pertaining to the matter fully, and how you know it.

2. Do you know anything else of benefit to the plaintiffs, in this suit? If yes, state the same fully.

Pierre Chouteau, James Harrison
and Felix Valle, Plaintiffs
vs
Almiran L. Cole, Defendant
{ In the Circuit Court of
the County of Peoria

Depositions of witnesses taken on the 15th day of May A.D. 1855 between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon in the County of St Louis and State of Missouri by S. J. Levi a Notary Public in and for said County duly commissioned and qualified and upon the annexed interrogatories and by virtue of the enclosed Commission to be read in evidence in a certain cause now pending in the Circuit Court Peoria County in the State of Illinois described in said Commission and interrogatories wherein Pierre Chouteau et al are plaintiffs and Almiran L. Cole defendant.

Nathan Cole, of lawful age, produced sworn and examined to the following interrogatories deposes & says.

(12)

1st Interrogatory. Where do you reside & how long have you resided there

Answer, to the 1st question deponent says, I reside in the City of St. Louis State of Missouri, have resided there twenty one years & am a member of the firm of Wm L Ewing & Co.

2nd Question: Are you acquainted with the above named parties, & how long have you known them & where?

Answer to the second question deponent says, I know James Harrison and Almira S. Cole have known former one year or more, latter three or four years.

3rd Question. Do you know anything of an agreement between plaintiffs & defendants for the manufacture by the former for the latter of a lot or quantity of hoops iron of specific size, and shipping the same to defendant at Peoria Illinois? If so state about what time & where said agreement was made, and by whom, whether the defendant required the said iron to be made and shipped within a limited period - what was that period & whether plaintiffs agreed to do so. State fully what occurred at time of making the contract and what the contract was?

Answer to the third Question deponent says, I do know of an agreement between plaintiffs and defendant it was in the fall of 1853 it was either in October or November of that year the contract was made by Charles P. Chouteau and Almira S. Cole they the plaintiffs did to the best of my recollection and belief make a contract with A. S. Cole the defendant,

(13)

who desiring quite a lot of large Hoop Iron - I think $4 \times \frac{1}{4}$ inch and 30 odd feet long, the plaintiffs had not the Iron of suitable length but Mr. ~~Chas~~ P. Chouteau agreed to have the same rolled in a reasonable time and sent up to defendant - before the time fixed satisfied Mr Cole who was apparently very anxious to have the Iron as ordered. I think the order was duly taken down by either Mr. Charles P. Chouteau or one of the clerks of the house and was to be made at or by the time agreed. I am not certain if they the plaintiffs agreed to ship the same.

Question 4th Do you know any other matter benefit to defendant in the premises. If so state the same fully.

Answer to question fourth deponent says he knows no more than already stated.

Cross Interrogatories. If in answer to the 3^d direct interrogatory you say you know any thing of an agreement between the plaintiffs and defendant for the making and shipping by plaintiffs to defendant of a lot of Hoop iron of specific size state what that size was, whether said iron was made and shipped as agreed on, and if not, why it was not done. State every thing pertaining to the matter fully and how you know it.

Answer to 1st Cross Question deponent says he knows no more than already stated which he fully described at his knowledge of the transaction by reference to his answer to the 3^d Question in chief.

(14)

2. Do you know anything else of benefit to the plaintiffs in this suit. If you state the same fully.

Answer to the second question Cross. I have stated all I know concerning the matter and further this deponent sayeth not

Nathan Cole

Dea) Sworn to and subscribed

before me this 15th day of May

1855

L. J. Levi, Notary Public.

State of Missouri

County of St. Louis { J. Solomon J. Levi, a Notary Public

in and for said County do hereby certify that the said witness, Nathan Cole prior to taking of said deposition on the 15th day of May 1855, was by me duly sworn to testify the truth in relation to the matter in controversy in the suit mentioned in the caption to these depositions and in the enclosed Commission, so far as he might be interrogated in relation thereto and that the said deposition was on the 15th day of said May A.D. 1855 at St. Louis, ^{County} at my office in the State of Missouri taken and reduced to writing & signed and sworn to by the said Nathan Cole, witness in my presence. In testimony whereof I have hereunto set  my hand and affixed my official seal this 15th day of May 1855

L. J. Levi, Notary Public

And the said motion having been heard by the Court & argued by counsel, the Court thereupon overruled the same and refused to continue said cause.

To where decisions of the Court in overruling said motion for continuance and refusing to continue this cause

(15)

the defendant then and there excepted.

And now the defendant made his motion to the court to suppress reject and exclude the depositions of John W. Clark and Ferdinand Hahn in the words following to wit;

" Chauteau & al.
vs } Circuit Court
Cole } Nov. Term 1855

The defendant moves to suppress, reject and exclude the depositions of John W. Clark and Ferdinand Hahn for the reason

1. That said witnesses have wholly failed to answer a material part of the 4th interrogatory propounded to them respectively

2 That a material part of the 4th interrogatory in said depositions is wholly unanswered, or evasively answered by said witnesses respectively. Bryan for deft."

which motion having been argued by counsel and heard by the Court was thereupon overruled by the Court, and the Court refused to suppress reject or exclude said depositions. To which decision of the Court in overruling said motion and refusing to suppress reject and exclude said depositions the defendant then & there excepted.

And now at this day the said cause coming on for trial the plaintiffs to sustain the issue joined on their behalf offered in evidence the said depositions of John W. Clark and Ferdinand Hahn to the admission and reading in

(16)

evidence of which depositions the defendant then and there objected (for reasons hereinbefore stated in said motions to suppress and reject the same) which objection was overruled by the court and said depositions were thereupon read in evidence by the plaintiffs. To which decisions of the court in overruling said objection and in admitting said depositions the defendant then and there excepted.

The plaintiff also at the same time offered in evidence the said bill or account of plaintiffs against the defendant attached to said depositions of Clark & Glahn and marked "A". To the admission of which bill or account in evidence the defendant then and there excepted & moved the court to exclude the same on the ground of variance from the "account" declared on and filed by plaintiffs with their declaration in this cause and which is in the following words to wit:

"Mr. A. S. Cole

To Chouteau Harrison & Vallé

1853

Octr	29	To Mdge	c 6 mos.	90	21.63
Novr.	1	" do	6 "	92	23.54
Deer.	8	" do	6 "	371	128.70
Int! to Jan. 1 st 1855				553	5.53 <u>179.40</u>
E. G. E					<u>\$179.40</u>

St Louis Dec. 25 1854 "

Said last mentioned account being the only account filed in this cause except said account attached to and filed only with & as part of the said depositions. Which objection & motion were overruled by the court and the plaintiffs thereupon read in evidence said Bill or account attached to said depositions of Clark & Glahn

(17)

and marked "A". To which decisions of the Court in overruling said objection and motion and admitting said account in evidence the defendant then and there excepted.

This was all the evidence in the cause.

The Court thereupon rendered a verdict in favor of plaintiffs and against the defendant.

The defendant then made his motion for a new trial, in the words and figures following to wit:

"Chouteau & al.

vs

Cole

} Circuit Court

Nov. Term 1855

The defendant moves the Court to grant a new trial in this cause for the following reasons

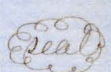
- 1 The verdict is against law,
- 2 The verdict is against evidence
- 3 The Court erred in admitting as evidence on behalf of plaintiffs the depositions of Clark and Hahn.
- 4 The Court erred in overruling defendants motion to exclude said depositions
- 5 The Court erred in admitting the plaintiffs account attached to the depositions of Clark and Hahn
- 6 The Court erred in admitting improper testimony
- 7 The verdict is against law and evidence

Bryan for deft."

Which motion was submitted without argument and having been heard by the Court, the Court thereupon overruled the same and rendered judgment upon said verdict in favor of plaintiffs and against the defendant. To which decision of the Court in

(18)

overruling said motion and rendering said judgment the defendant then and there excepted, and prayed the Court to sign and seal this his bill of exceptions, which is accordingly done

Onslow Peters 

State of Illinois,
County of Peoria, J. S. James S. Bartman, Clerk of
the Circuit Court in and for said County of Peoria, in
said State do hereby certify that the foregoing is a
correct transcript of proceedings in a certain cause
in said Court in which cause judgment was had and
obtained on the 14th day of December A.D. 1855, wherein
Pierre Chouteau, James Harrison and Felix Valli are
Plaintiffs and Almurin S. Cole are defendants, as the
same appear of record and on file in my office.

In witness whereof I have hereunto
set my hand and affixed the seal
of said Court at my office, at Peoria,
this 16th day of June A.D. 1856,
James S. Bartman, Clerk.

1887 54

Almon J. Clark

W. ———

Pierre Chouteau Falls.

Record =

Filed June 18. 1886.

L. Leland
Clerk

[61-54+54]

Page 1

Be it remembered that heretofore to wit: on the sixth day of April A. D. 1856 there was filed in the office of the clerk of the Circuit Court of Peoria County in the State of Illinois by the Plaintiffs in a certain cause therein pending wherein Pierre Chouteau, James Harrison and Felix Vallé are plaintiffs and Admiral S. Cole ^{defendant} and plaintiffs notice to take depositions, which said Notice, together with interrogatories & defendants acknowledgment of receipt of copy of notice & interrogatories are as follows

"Pierre Chouteau
James Harrison
Felix Vallé

vs

Admiral S. Cole

In the Circuit Court
Peoria County Illinois

Take notice that we shall apply to the clerk of the said Circuit Court immediately on the expiration of ten days from the service of this notice for a *dedimus potestatem* to be issued to some Commissioner ^{therein} to be named to take the depositions of John W. Clark and Ferdinand Hahn, witnesses residing in the City of St. Louis & State of Missouri in answer to the interrogatories copied below, to be read in evidence on behalf of the plaintiffs on the trial of the above entitled cause and you can file with said clerk, crossinterrogatories to go out with said Commission if you deem proper

To William F. Bryan Esqr.
Atty for deft

Cooper & Reynolds
Attys for plffs.

Int 1. Do you know the firm of Chouteau Harrison & Vallée? Who compose said firm? In what business is said firm engaged? And do you know the defendant, Almiran L. Cole, and what is his business and where does he reside & carry on business?

Int 2. Did or not said plaintiffs at any time to your knowledge sell any goods & merchandize to said defendant? If yes state at what time or times, and to what amount, and on what credit, if any, were they sold?

" 3. Look at the paper attached to this commission marked 'A' dated January 10th 1855, and purporting to be a bill of goods, sold by said firm to said defendant, and state whether the goods in said bill mentioned are or are not the same referred to in your answer to the preceding interrogatory, and are or are not the prices annexed the usual & customary prices for goods of that description and are or are not the other charges in said bill correct?

" 4. What arrangement or understanding, if any was there about the delivery or shipment of said goods? where and when were they ^{or shipped and were they or not so shipped or delivered?} to be delivered? State fully and particularly all you know on the subject; your situation at the time, and means of knowledge in the premises.

5. If you know any other matter or thing of benefit to the plaintiffs in this suit, please state the same fully.

Cooper & Reynolds
for plffs.

Recd copy of the above this
6th day of April A.D. 1855
Bryan for dft.

(3)

Make David W. Hill Comr.

l. & R.

State of Illinois

Peoria County

{²⁰ The People of the State of Illinois, Do
David W. Hill of Saint Louis in the State of Missouri, as
Commissioner, to take depositions Greeting: We having confidence
in your skill and fidelity, have appointed you, and by these
presents do authorize and require you, at a certain time and
place, to be by you appointed for that purpose, to cause the
witnesses whose names are mentioned in the caption of the an-
nexed interrogatories, to come before you, and then and there
diligently and faithfully to examine them on oath upon the
said interrogatories, in the order in which they are propounded
and you will cause the answers of the witnesses thereto, to be
reduced to writing in the order in which they shall be proposed
and answered, and you will then cause the witnesses to sign
their names to the same in your presence. You will also annex
a certificate, subscribed by yourself at the foot of the depositions
stating that it was sworn to and signed by the deponents
and the time and place when and where the same were taken.
The depositions thus taken and subscribed and all exhibits
produced or referred to by the witnesses, together with this commis-
sion and the annexed interrogatories, you will inclose seal up
and direct to the clerk of the Circuit Court of the County of

(4)

Peoria, in the State of Illinois with the names of the parties litigant
endorsed thereon; Witness Jacob Gale, Clerk of the Circuit Court
of the County of Peoria and the seal of said Court this
twenty third day of April in the year of our Lord one
thousand eight hundred and fifty five.

Jacob Gale, Clerk

"A"

St. Louis Jan'y 10th 1855

Mr A. S. Hale, Peoria

Bought of Chouteau Harrison & Vallé
Proprietors of the St. Louis Rolling Mills

No 110 and 112 second street

1855

Octo	29	6 ms.	31	Pairs	2 1/2 x 3/16	B Iron	502	11 1/4	21	38
Nov	1	6 m	33	"	2 1/2 x 3/16	" "	Drayage 548	11 1/4	23	25
							Drayage			25
Dec	8	6 ms.	38	"	4 x 1/4	" "	2564	5	128	20
							Drayage			50
									\$	173.87

Interrogatories to be propounded to John W. Clark and Ferdinand
Kahn witnesses residing in the City of St. Louis and State of
Missouri, to be produced sworn and examined in a cause at
law pending in the Circuit Court of Peoria County in the State
of Illinois wherein Pierre Chouteau, James Harrison and
Pelie Vallé are plaintiffs and Almiran S. Hale is defendant.
On the part and behalf of the said plaintiffs as follows to wit:

(5) Int 1. Do you know the firm of Chouteau Harrison & Vallé?
Who compose said firm? In what business is said firm engaged
And do you know the defendant Almiran S. Leale, and what is
his business and where does he reside & carry on business?

Int 2. Did or not said plaintiffs at any time to your knowledge
sell any goods or merchandise to said defendant? If yes, state
at what time or times and to what amount, and on what credit,
if any, were they sold?

3. Look at the paper attached to this commission marked "A"
dated January 10th 1865 and purporting to be a bill of goods
sold by said firm to said defendant, and state whether the
goods in said bill mentioned are or are not the same referred to
in your answer to the preceding interrogatory and are or are not
the prices annexed the usual and customary prices for goods
of that description, and are or are not the other charges in said
Bill correct?

4. What arrangement or understanding, if any, was there about
the delivery or shipment of said goods? Where & when were
they to be delivered or shipped? and were they or not so shipped
or delivered? state fully & particularly all you know on the
subject your situation at the time and means of knowledge
in the premises

5. If you know any other matter or thing of benefit to the plain-
tiffs in this suit, please state the same fully.

(6)

Depositions of witnesses produced, sworn and examined diligently & faithfully on oath upon the annexed interrogatories in a certain cause now pending in the Circuit Court of the County of Peoria in the State of Illinois, between Pierre Chouteau, James Harrison & Felix Vallé plaintiffs and Admيران S. Cole defendant.

John W. Clark, of lawful age, being produced, sworn and examined on the part of the plaintiffs in the said cause deposes and saith in answer to the first interrogatory as follows: I know the firm of Chouteau Harrison & Vallé, Pierre Chouteau, James Harrison & Felix Vallé compose said firm, said firm is engaged in the manufacture and vending of iron I have seen the defendant, he was engaged in the distillery business in the fall of 1853 & I believe is so now engaged in the County of Peoria & State of Illinois, where I believe he also resides.

In answer to the second interrogatory he saith as follows: The plaintiffs did sell to the defendant goods & merchandize in the months of October, November or December 1853 to the amount of one hundred and seventy three dollars and eighty seven cents. There was no specific credit given on the bill, when that is not the case all goods bought on open account on or after the first of July in any year fall due on the first of January following by the custom of that firm of Chouteau Harrison & Vallé.

(7)

In answer to the third interrogatory he saith as follows:
The goods mentioned in the paper marked "Exhibit A" and attached to the interrogatories are the same referred to in my answer to the preceding interrogatory; the prices annexed to said bill are the usual and customary prices for goods of that description; the other charges in that bill are correct.

In answer to the fourth interrogatory he saith as follows:
The understanding was that the goods were to be delivered on board of a steam boat bound for Peoria as fast as they could be manufactured, there being but a small portion of them on hand at the time of the purchase. I know of no specific time in which they were to be delivered other than I have stated above. The goods were shipped as fast as they were manufactured on steam Boat bound for the Port of Peoria; I do not recollect the names of any of the Steam boats except one which was the Excel on which the second lot of Iron was shipped. I was acting as clerk for Lehoultan Harrison & Valle at that time and from my situation as such had cognizance of the transaction between plaintiffs and defendant.

In answer to the fifth Interrogatory he saith as follows.
I do not now recollect anything further.

John W. Clark

Ferdinand Hahn, of lawful age being produced sworn and examined on the part of the plaintiffs says in answer to the first interrogatory as follows: I know the firm of Lehoultan

(8)

Harrison & Valle, Pierre Chouteau, James Harrison & Felix Valle compose said firm; said firm is engaged in manufacturing and vending iron. I have seen the defendant, I don't know whether I would know him now or not. He was engaged in the distillery business in the fall of 1853 in Peoria County Illinois near the town of Peoria, where he also resided.

In answer to the second interrogatory he saith as follows: The plaintiffs sold in the months of October, November & December 1853, iron to the defendant to the amount of one hundred & seventy three dollars and eighty seven cents on a credit till the first of January following.

In answer to the third Interrogatory he saith as follows: The goods in "Exhibit A" attached to the interrogatories in this case are the same referred to in my answer to the preceding interrogatory and the prices annexed to said bill are the usual and customary prices for goods of that description, and the other charges in said bill are correct.

In answer to the fourth interrogatory he saith as follows: [The goods were to be delivered on a Steam Boat at the port of St. Louis, bound for Peoria as fast as the were manufactured, and the goods were shipped at the times specified in bill marked "A" [according to the understanding] I was at that time clerk in the House of Chouteau, Harrison & Valle the plaintiffs and in any capacity as such I sold and delivered & shipped the said goods to the defendant.]

(9)

Ferdinand Wahn

I, David W. Hill, Commissioner appointed, by the annexed Commission to take the depositions of John W. Clark and Ferdinand Wahn in said cause, do hereby certify that said witnesses whose names are mentioned in the caption of the annexed interrogatories were diligently and faithfully examined on oath upon the said interrogatories & none others, in the order in which they are propounded, and that the answers of the said witnesses were reduced to writing in the order in which they were proposed and answered, and that the said witnesses signed their names thereto in my presence. And I do hereby further certify that the said depositions were taken sworn to and signed by the said deponents at my office in the City of ^{St. Louis} ~~St. Louis~~ in the State of Missouri, on the twenty seventh day of April eighteen hundred and fifty five, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day

David W. Hill

Commissioner

St. Louis in the State of Missouri

Copy of direction and endorsement on the envelope enclosing the foregoing depositions:

"The Clerk of Circuit Court
of the County of Peoria

State of Illinois"

(10)

Pierre Chouteau
James Garrison
Pelie Vallé

vs

Almiran S. Cole

In the Circuit Court
Peoria County Illinois

Jacob Gale, called ~~by plaintiff~~ who stated, that he is the clerk of said Court that he took said depositions at Peoria, that they came to said Post Office directed to him as such clerk and sealed up out of the Post office, ~~sealed up~~. That the same were kept in his possession till Court, where they were opened ^{by him} under a general order of Court to open depositions and then by him filed with the papers in said cause, upon ascertaining to what case they belonged.

And afterwards to wit: on the 27th day of November A. D. 1855 the Defendant filed his exceptions to the depositions of John W. Clark & Ferdinand Hahn, which are as follows

Pierre Chouteau & als

vs

A. S. Cole

Circuit Court

Nov. Term 1855

The defendant moves the Court to suppress the depositions of John W. Clark, Ferdinand Hahn, witnesses on behalf of Plffs for the following reasons viz:

1. There was no legal or sufficient notice given of the intention to issue depositions.
2. There is no Commissioner or officer named in notice before whom the depositions were to be taken.

(11)

- 3 It does not appear that the witnesses were sworn before testifying.
 - 4 It does not appear that the witnesses were "non resident" at the ^{time} of testifying or notice.
 - 5 The names of "parties litigant" were not "endorsed" on the depositions when sealed up & directed to the clerk of the Court.
 - 6 The 3d interrogatory is leading, and the answers of both witnesses to the same are therefore objected to and moved to be suppressed.
 - 7 The 2d interrogatory and answers of both witnesses thereto are too general and indefinite.
 - 8 The answers of both witnesses to 4th interrogatory are too general, indefinite and evasive, showing a manifest bias in favor of Plffs, and yet not responsive to the question.
 - 9 Exhibit "A" is not sufficiently identified to make the same part of said depositions.
 - 10 Said depositions are otherwise informal loose indefinite vague and altogether unsatisfactory.
- Bryan for deft.

Proceedings at a term of the Circuit Court begun and held at the Court house at the City of Peoria in and for the

(12)

County of Peoria in the State of Illinois on the third Monday of November in the year of our Lord, one thousand eight hundred and fifty five it being the nineteenth day of said month, Present the Honorable Ouslow Peters Judge of the sixteenth Judicial Circuit in the State of Illinois to wit;

Tuesday December 11th A. D. 1855

Pierre Chouteau

James Harrison

Pelie Wallé

vs

Almiran S. Cole

Assumpsit

This day came on to be heard the exceptions of the defendant to the depositions taken on behalf of the plaintiffs, and the Court being fully advised in the premises overruled the 1st 2nd 3rd 4th 5th 6th 7th 9th & 10th exceptions of the defendant but sustained exception 8th to so much of the said deposition of John W. Clark as states that "the understanding was that the goods were to be delivered on board of a steamboat bound for Peoria as fast as they could be manufactured, there being but a small portion of them on hand at the time of the purchase" and also to so much of the deposition of Ferdinand Wahn as states that "the goods were to be delivered on a steam boat at the port of St. Louis bound for Peoria as fast as they were manufactured" and that they were shipped "according to the understanding" and ordered that those parts of said depositions be suppressed, but overruled said 8th exception to the remainder of said depositions.

(13)

And afterwards to wit, on the 14th day of December A. D. 1855 the defendant in said cause filed in said clerk's office his motion to suppress, reject and exclude depositions of John W. Clark and Ferdinand Hahn, which said said motion, together with the reasons are as follows, to wit:

"Chouteau & als

vs

Cole

Circuit Court

Nov. Term 1855

The defendant moves to suppress, reject and exclude the depositions of John W. Clark and Ferdinand Hahn for the reason

1. That said witnesses have wholly failed to answer a material part of the 11th interrogatory propounded to them respectively.
2. That a material part of the 11th interrogatory in said depositions is wholly unanswered or evasively answered by said witnesses respectively.

Bryan for deft."

State of Illinois,
County of Peoria, I, James S. Barkman, clerk of the Circuit Court in and for said County of Peoria, in said State of Illinois do hereby certify that the foregoing is a correct transcript from the Records of certain proceedings had in the Circuit Court in & for said County of Peoria, in said State of Illinois, in a certain cause wherein Pierre Chouteau, James Harrison & Felix Vallé were plaintiffs and Almiran S. Cole was defendant as the same appears of record and on file in my office. In witness whereof, I, James S. Barkman, clerk of said

Circuit Court have hereunto set my hand & affixed the seal thereof at Peoria, this 27th day of June A. D. 1856,
James S. Barkman, clerk

It is agreed that the foregoing transcript shall be admitted as part of the Record, on Appeal in this cause, and the Exceptions therein contained considered by the Court, the same as though a Bill of Exceptions regularly signed & sealed by the Judges who tried said Cause, in the Circuit Court were produced & duly certified into the Supreme Court. But on condition that this Cause shall be submitted to said Supreme Court, for trial at its present Term. It is further agreed to submit the same in written argument. Defendants in Error waiving Abstract

Wm. G. Pryor
Atty for Appellts
Coeper & Reynolds
for appellees

○ Cole 54
vs
Chouteau

Additional
Record -

○ Filed July 4, 1856,
L. Leland
Clerk.

Whiran S. Cole } Supreme Court
vs
Pierre Chouteau } Term Decr 1886
Juls

Appellants Brief

1st & 2d Errors assigned

1. Depositions only admissible when
taken in conformity to the Statute
Rev. Stat. Chap 40 Sec 13.

2. The Statute requires "two days
notice"— Of what?— The witness
es to be examined and the officer
before whom the examination is
to be made, are named in
the same connection. Why
require notice of the names of
one and not of the other?—
Manifestly the notice should be
of every thing which the party
giving it intends to do under
it— Idem Sec 10.

The name of the "Commissioner"
should have been inserted in
the Notice. He may have been
Attorney for Plff below, or otherwise
in competent—

Northam & Goar 4 Port. 241
Rhoades & Selin 4 Wash. 6.6 715

A "Commissioner" is not, like a
"Clerk", "Judge" or "Justice" an officer
— therefore sufficient designated
by his official name, — as in

Ways & Means 1 Silm 66

A party should have opportunity to object
to Commissioner before filing cross in-
terrogatories. He is estopped afterward
Boykin & Collins, 20 Ulat. 688

It is nowhere stated, that Duties
R. were performed before examination
— unless inferentially. — Might not
the "oath" have been administered
after taking depositions consistent
with the Act? —

In 3 Scam 457 (Ballou
& Hueshile) & 12 Ill. 272 (Brewer
& Hodson) the persons taking the
depositions were Judicial officers
and therefore presumed to have
acted according to law.

4. There is no proof whatever in the
record that Clark and Hoar,
were "non resident witnesses" at the
time of taking the depositions.

Rev. Stat Ch. 40 Sec 10

In the case of "resident witnesses" a

(Testimony of Boykin & Collins 30
14 & 5. 264. 5. 6)

different provision is made

Ohio. Sec 11

Not to require direct proof of "non-residence" (by the oath of the witness himself or otherwise) may open a wide door for fraud. A witness is more easily managed at a distance from, than in presence of a Jury. Cross Examination is a very powerful weapon of defense when the witness may have it all before him, before answering in chief.

The witness must have the qualification prescribed by law - i.e. non-residence - Will the Court presume this to exist?

5
The "Names of parties litigant" should have been endorsed in the Deposition.

The Statute (Sec 12 Ch 40) requires it. The fact that they were received, opened & filed by the Clerk, cannot alter the express requirements of the law. If this fact could render such endorsement unnecessary, then the requirement would hardly be of any avail. Depositions are

are usually addressed to the Clerk
and if not inserted would natu-
rally be kept by him until dis-
posed of by the Court.
? Forsyth or Baxter 2. Scam. 12 ?

6. The declaration is for goods "Sold
and delivered." The "2d Inter-
rogatory" to Clark & Baker, and
the answers of both witnesses, relate
simply to the Sale of goods to
B. So far as this Interrogatory
is concerned, the proof does not
correspond to the Allegation.

But, unless followed up by more
definite proof, this Interrogatory
& answers are too general and
vague to authorize a recovery.
It is no more definite than a
Common Count for goods bargain-
ed and sold. It gives no infor-
mation to the defence, of what
he is to defend, nor to the Court
of what they are to try. The
witnesses do not even say that
the goods were sold "at defendant's

7th Page to Depositions
Exhibitional Record p. 11.)

Auto request

Our Practice Act (Sec 8)
has improved the common law
rule, by requiring Plaintiff to file
their "Pleas of particulars" ten days
before the Term. This would
be unmeaning unless the proof
be restricted to the "Account" filed.
— not merely to the Aggregate, but
to the Elements of that Aggregate.

¶ The ~~Answer~~ 3d Interrogatory, is
leading — could not fail to sug-
gest the Answer desired.

There was no reciprocity for depost-
ure from the rule, in this cause —
The witnesses, were neither hostile,
reluctant, nor oblivious. — They
were Clarks of Pp (below) — of course
had access to Pp's books — quite
willing — I seemed to have distinct
recollection what they did tes-
tify to.

See 1 Greenl. Ev. Sec. 434-437

6th exception
Adm. Record p. 11

Instead of being asked whether the Account shown was correct, they should have been required to state particularly from their own memory & knowledge, what goods were sold, when, and their value.

Richardson vs Golden, 3 Wash C.C. 109
(Cited 3 U.S. Hig. p 708 & 524)

Putting the question in the alternative does not remove the objection

People vs Mather 4 Ken 247
155. Meslin vs Thorp 3 Mich. 415

Clark vs Hof 6 Eng. 736. 740

Hooper vs Bonum 6 Brat. 684

3d Error - Assigned

§. The "Subject" of the 4th Interrogatory is a supposed "arrangement or understanding" in regard to the "delivery or shipment of the goods." The Court below sustained so much of the Exception ^{the answers to} to this Interrogatory as to "suppress" all those parts ~~and~~ included within [brackets]. — but overruled the remainder. —

Omitting those parts of the

Answers, it will be seen, that the
Entire Subject Matter of the
Interrogatory, remains wholly
unanswered. What remains
throws no light upon and is
not "responsive" to the question.

If the Court below was
right in Suppressing part - and
that cannot be questioned here
- it Erred in overruling the Excep-
tion to the remainder. If at the
time of the Exception taken, these
Answers, were "too general, unde-
finite, evasive & not res-
ponsive to the question," - they
are without doubt more prob-
ably obnoxious to that Exception now.

The 4th Interrogatory being
virtually answered, the whole
Disposition should have been
Suppressed -

Stewart & Rip 2 Dall 157

Hittand vs Bissett 1 Wash 6144

Richardson vs Golden 3 W 109

~~St. P. R.~~
At all Events, the answers, as they now
stand, being clearly not responsive, but
introducing new matter, not inquired
of, should have been suppressed

4th Error

9. The Affiant of defendant below showed sufficient ground for continuance

1. The matters shown to were material to the issue - showing a specific, express contract, and an express breach by Pffs below

2. It proposed to state only what was expected to be proved by the witness Cole - not the entire defense.

Record
75

3. It stated further that the damages resulting from the breach exceeded the claim sued for. - Pff "because he could not put his distillery in operation without the iron" - Record p 7

4. If Pffs below had deemed the matters shown to immaterial they might have admitted it, & thus freed defendant to trial

5. It should "due diligence", after discovery of the facts. Sierra to - and that the only practicable mode of obtaining the testimony - by consent of the adverse party - has been tried without effect.

6. It would have been impracticable to obtain the deposition in time for trial, in the ordinary way - and the law does not require an attempt to perform an impossibility.
Court will take notice of distance - Lyon vs Bail
21 W. 2d 629

7. If the witness had been examined orally before the Court, the defendant below would have been permitted to show surprise, and that the evidence was contrary to a previous examination of witness, preparatory to trial 1 Greenl. Ev. Sec 444.

Or if a witness had inadvertently or through forgetfulness, misstated a fact, & upon reflection, discovered his mistake, the Court would permit him to be re-called.

Walker vs Walker 14 Geo 2d 257

And if in Ester Case, circumstances should require it, a Juror would be withdrawn & continuance granted.

8. But this is a stranger case for the defendant below. The Mistake was discovered before the Jury was empanelled, and all diligences made to correct it, in time. It was no fault of defendant that witnesses did not discover his Error Sooner

9. The Affidavit is to be regarded as true. The defendant below therefore had a valid defense against the whole of Plffs (below) account, and a right claim of Set off. This defense rested exclusively in the memory of the witness Cole, who (certainly without any default of defendant below) forgot it until three days before Court. It was absolutely & palpably impossible to re-take his deposition, in the only mode in which it could be taken, in time for trial. The ruling of the Court cut off all defense. Plffs below would not have been injured by a continuance

- 10 The 2d Motion to suppress the Deposition of Clark & Mahan was based upon the fact that after the Court had struck out the substance of the answers to 4th Interrogatory, that interrogatory was destitute of answer — It being well settled that a failure to answer a material interrogatory is fatal to the whole deposition.

All the events the answers as expurgated, being without meaning or pertinency, to the Interrogatory should have been wholly suppressed.

6th Error

- 10 Assuming the objections to these depositions to have been well taken, they ought not to have been admitted in evidence at the trial — Rev Stat Ch 40 S. 13.

8th Error

- 11 And as no other evidence was offered in the case — (the deposition of Nathan Cole was not offered) — judgment should have been for defendant below.

7th Error

12 And as the testimony was in-
properly received a new Order
should have been granted

N.B. Most of the authorities above
referred to are taken from the L.S.
Digest, - the Reports themselves not
being accepted in Review

Jm G. Ryan
Atty for Appl

Book 54

Q

Christians

Appellant
Pierce

Filed July 4, 1886

L. Leland
Clerk

State of Illinois, ss.

Supreme Court, Third Grand Division, at Ottawa :

The People of the State of Illinois,

To the Clerk of the Circuit Court of *Peoria* County, GREETING :

WHEREAS, in a certain plea between *Perre Chouteau*
Plaintiff and *Almoran &*
Co defendant, lately depending in the Circuit Court
of said county, wherein judgment was rendered for the said *Plaintiffs*
and against the said *Defendant*

and the said *Defendant* having *appealed* the judgment
of said Court, rendered against *him* as aforesaid, to the Supreme Court, held at
Ottawa, on the *second Monday in June AD 1856* and in pursuance of the said
Appeal a transcript of the record and the proceedings in the plea afore-
said was transmitted. And, also, whereas it hath been suggested, on the part of said

Defendant that the said record has been diminished, inasmuch as
a certain motion by said defendant to suppress Deposi-
tions, as contained in a Bill of Exceptions certified by the Judge of
Said Circuit Court

hath not been sent up; and forasmuch as the said Supreme Court are not satisfied that
there is a sufficient record sent in the plea aforesaid, but in the record there is a diminu-
tion: YOU ARE, THEREFORE, HEREBY COMMANDED, that, without delay,

the said *record* therein you cause to be transmitted to the Supreme Court, *now in*
session at Ottawa, on the *forthwith*.

next, without any diminution or addition whatsoever, to the end that speedy justice may
be done in the premises. according to law; whereof you are in no wise to fail; and send
you then there this writ.

WITNESS, the Hon. SAMUEL H. TREAT, Chief Justice of
said Court, and the seal thereof, at Ottawa, this *23^d*
day of *June* in the year of our Lord one thou-
sand eight hundred and fifty-*six*.

S. Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy

State of Illinois,
County of Peoria, ss. I, James S. Parkman clerk of the
Circuit Court of said County of Peoria, in said State of
Illinois hereby certify and return to the within writ that I
have made out and duly certified from the records and
files of my office a transcript of all the motions of the
defendant ^{in the} within mentioned cause to suppress depositions,
on file in my office and have attached the same to
this writ.

In witness whereof I hereto set my hand
and affix the seal of said Circuit Court
at office in Peoria, this 24th day of June
A.D. 1856. James S. Parkman, Clerk



Amirou S. Cole } In the Supreme Court.
vs. }
Pierre Chautauq & al. } Appeal from Florida.

Pleints & Argument for appellees.

Of the several errors assigned on this record, only the 1st, which arises on the refusal of the court below to grant the continuance prayed for, will, it is presumed, be insisted on.

All the other errors charged, grow out of or depend on the admission of evidence, no part of which is embodied in the Record, and upon which, therefore, this Court cannot pass.

The Cause was tried on the 14th of December 1855, on which day or the day preceding, appellant filed his affidavit & moved for a continuance, on the ground of absent testimony deemed material to his defence, and which he supposed he could obtain by the next term of Court.

This testimony was that of Nathan Cole, of St. Louis, Missouri, whose deposition, taken by the defendant himself, was on file & not expected to - but not being satisfactory to him, he desired time to have it retaken. This the court refused, and, we think, properly.

And -

1st Because if entitled to retake it, due diligence was not used.

The affidavit shows that the deposition referred to was taken, opened & read by Appellant at the preceding term of Court, which was held in May & June - so that six or seven months were suffered to pass, by Appellant, after he knew what the witness testified, without any effort to produce that witness or retake his deposition. And only now, when the case

is reached for trial, does he apply for time to do so =

To excuse this neglect, Appellant sets up that he had not seen the witness for two years, till within about two days of the sitting of Court, & only then learned that said witness would swear differently, if examined: It is not pretended that the witness was absent from St. Louis, or inaccessible to the Appellant, by letter or otherwise, during any part of the time: Nor ~~was~~ ^{did} the testimony desired to be elicited, relate to facts which Appellant then, for the first time, discovered that the witness knew or could testify to; but were the same facts which Appellant always knew the witness was going to, and which it was the express object of the first deposition to establish by that witness: Under this aspect of the case, in further excuse, Appellant alleges that having read the deposition of the witness, he concludes ~~he~~ ^{the witness} must have forgotten the facts, and that Appellant acted in this belief, until he saw the witness in St. Louis & talked with him on the subject. And this is all that is attempted, by way of justifying the delay. We submit that it is wholly insufficient. It shows no such diligence as the law requires.

If on reading the deposition, Appellant found, or believed, the truth had not been elicited, it was incumbent ^{upon him} immediately to institute inquiries to ascertain whether the purpose of the interrogatories had been fairly understood, and the evidence such, as the witness, upon due recollection, & full understanding of the case, meant to give: That the inquiry should have been postponed till within two days of the next term, is, to say the least, a little suspicious - and is inexcusable on the score of diligence:

2. The deposition of this witness (which is referred to in the affidavit, made part of the record) discloses the fact that there is another witness by whom the same facts could be proved, and of whom appellant could not have been ignorant, especially after the matter was thus again brought to his knowledge: This is Charles P. Chouteau, with whom the witness Cole states the whole transaction, so far as she himself had any knowledge of it, took place: No attempt whatever is made to take the deposition of the witness here referred to, nor any reason given why it is not done:

3. The purpose for which the continuance was sought, relates to a matter wholly within the discretion of the Court, to allow or refuse to be done - And, if so, whether properly or improperly exercised, will not be reconsidered in this Court.

The avowed object was to retake the deposition of a witness already taken by the party himself, on file in the cause & re-examine him upon the same matters which formed the subject of his previous examination. Now, we apprehend, it was a matter within the discretion of the Court to allow or refuse this application, as it would be to allow or refuse a party to recall a witness who has been once upon the stand & re-examine him upon the same points. And the power of the Court to decide finally, a case of the latter kind, will not be questioned.

But, if this be not so, & reference to the affidavit & deposition filed in this case, will, we think, satisfactorily show that the action of the Court was proper:

The facts which it is alleged in the affidavit this witness can prove, are - that the plaintiffs undertook not only to manufacture, but to ship to the defendant the iron in question, within 4 weeks, and that they failed to do so. And the affidavit assumes that the witness failed to prove these facts before, because his attention was not sufficiently called to them by the interrogatories put. If this were true, it was the fault of the defendant himself, and would not entitle him to a continuance. But the deposition itself shows that the witness testified on these very points and really told all he knew about them, or refused to do so, when questioned specifically thereto, on cross examination by the plaintiffs. In answer to the 3^d direct interrogatory, he

Says. "Mr. Charles P. Chouteau agreed to have the same" (viz: the iron) "rolled in a reasonable time & sent up to defendant." But afterwards says, "I am not certain if they" the plaintiffs, agreed to ship the same". And to a cross interrogatory, in which he is asked, in case he knows of any such agreement as referred to above, "whether the iron was made & shipped as agreed on, and, if not, why it was not done", and to "state every thing pertaining to the matter fully and how you know it" = he answers that, "he knows no more than already stated, which he fully described all his knowledge of the transaction by response to his answer to the 3^d question in Chief" =

And to the 2nd cross-interrogatory, he again answers = "I have stated all I know concerning the matter" = From all which, it must appear, either that the witness did tell all he knew on the subject, or that he wilfully refused to answer the cross-interrogatories put to him by the plaintiff. On the first hypothesis it could be of no service to the defendant to take his deposition. ~~Admitted~~ - and on the 2nd, we think, it would be ~~set off~~ almost an unsafe practice to allow the witness to be re-examined by deposition, after a private interview with the defendant, and an explanation of the sort of evidence which he must give in order to support the case: ~~Admitted~~ that, as the evidence stands, the witness might perhaps not inconsistently explain what he meant by the reasonable time spoken of. ~~But~~ this fact could only avail in connection with the other facts, all which the same witness, or no other, was expected to prove. And neither of which, it is plain, he could prove without directly contradicting what he had before sworn to =

It may not be improper to remark also, in this

own

connection, that this witness does not appear from his deposition
to have known anything of any agreement directly between the plaintiff
the defendant, or that they ever ran them together. On the con-
trary he says expressly that "Charles P. Chouteau agreed
H., and it nowhere appears that Charles P. Chouteau was
authorized to make any such agreement, or was the
agent of the plaintiff for any purpose:

The court is referred to 38 am. 483:14 Ill. 139.

4. It is not sufficiently shown that the evidence was really material to the defendant. The ground of materiality alleged, is as the delay of the plaintiffs in dipping the iron to him within the time named. Another there is a recital that damage accrued. yet it is not shown how the delay occasioned that damage, nor that the defendant had any notice so, by whom he expected to prove it. The materiality of the evidence then, depending on other facts to be proved, there should have been shown to the court. Bailey vs. Hardy 12 Ills. 459 =

But however this be, the Appellant is not specially prejudiced. As the pleadings stand & the case went to the jury, he is not precluded from his action for any damage which he may have sustained. And as there has clearly been a want of proper diligence to prepare for trial in this case, we think, he is now fairly driven to his remedy in that way:

Cooper & Kynard
for Appellees

The foregoing is submitted upon the supposition that no further Record will be allowed to be filed in the cause. In case the Appellant shall entitle himself to file ~~or~~ him anything additional into the case, then the Appellees, ~~if they deem it important~~, may file such further written argument, as they desire =

Ottawa, June 24/56 = } Cooper, for Appellees =

} Ryan
for App

Colas Thoutan +
all. ~~AB~~ 54

Argument vs. for
appeals:

Filed June 25 1854
L. Leland
Clerk

1. *Phacelia*
 2. *Phacelia*

Alvin S. Gale } Supreme Court =
vs. } April Term 1857.
Pierre Chouteau & al. }

Brief No. 2. for ~~defendants~~ =

The errors assigned on the additional Record filed by appellant herein refer mainly to the ruling of the Court below in admitting the depositions of Clark & Hahn, witnesses residing in St Louis, who were examined by the plaintiff below =

A motion was made to suppress these depositions altogether upon the following grounds

1. That no Commissioner is named in the Notice =
2. That the witnesses are not shown to have been sworn before testifying =
3. That it does not appear they were non-residents =
4. That the names of the parties litigant were not endorsed on the depositions when returned by the Commissioner to the Clerk =

It is also stated generally in the motion to suppress that the Notice of intention to apply for the ~~de~~ ^{decree} ~~decree~~ was insufficient = But ~~it~~ ^{this} is not understood to apply to any thing except the Commissioner to name the Commissioner in the Notice = ~~And on this point the~~ ~~remains that the statute does not~~ The Notice is in all other respects sufficient, and, as shown by the Record, was, with a copy of the interrogatories intended to be put, served on the attorney of the defendant in due season = But no Commissioner is named = The Notice is, of that application will be made "for a decree or protestation to be issued to some Commissioner therein to be named" = So far from the statute requiring the Notice to name & designate the Commissioner, it is submitted, that it is neither ~~the~~ ^{the} right nor duty ^{of the party} to do so = The Commissioner is the officer of the Court, appointed by the Clerk for the occasion

And neither party is entitled to dictate who he shall be. Nor can either party question the appointment before the clerk. The custom it is true ^{is} for the clerk to appoint whoever the party desiring the commission may name to him. But it is presumed he may disregard this nomination and appoint some one else. If an improper person is made commissioner, the only relief which either party has is by application to the court, or by a proceeding against the clerk if he acts corruptly in the matter.

Upon the 2nd point. That the witnesses are not shown to have been sworn before testifying, it is only necessary to remark, that both in the caption & certificate annexed to the depositions the witnesses are shown to have been sworn, and it will be presumed that this was done in due season. And on this subject we refer to 3 Scam. 453 = 12 Ill. 267, where the point is settled =

As to the 3^d objection. That the witnesses do not appear to have been non residents at the time they were examined. The remark that the objection is without in fact. The Notice expressly states that the witnesses reside "in the city of St. Louis in the State of Missouri". To that place the Commission is directed, and there the depositions are taken, as shown by the certificate of the Commissioner. If this does not show prima facie where the witnesses reside, it is difficult to tell what would do it.

~~But the residence of~~ In *Hays vs. Doreas* 1 Gil. 64, ~~the court~~ held that the notice need not state the residence of the witnesses. But in that case the affiant ^{pleaded} showed the fact. Hence the inference that where no affidavit is required, the recital in the notice is sufficient =

The next point presents a greater difficulty, but, the

We think is not Unaccountable = The Statute directs the names of the "parties litigant" to be endorsed, when the depositions are sealed up, & directed to the clerk, and that was not done in this case = But this will not vitiate if the court can see from the record that the objects of the law have still been accomplished = The evidence of the clerk, Mr. Gale, shows that the depositions came to him by mail & sealed up - that he took them from the post office, and kept them in his possession till court, when they were opened by him under a general order of court, and filed in the cause, on ascertaining where they belonged = From which it is apparent that the purposes of the law were as fully answered, as they could have been by a literal compliance by the Commissioner, with its terms = And in every such case when the thing complained of relates to matter of form & not substance, the court will construe the law liberally, so as to effectuate the ends of justice =

This provision of the statute is of the same character with that requiring the officer taking the deposition to "cause the interrogatories, with the answers of the witness thereto, to be reduced to writing in the order in which they shall be proposed & answered" People's Stat. 1.543-S.12 = An omission to do which the court may deem material, if the court can see from the deposition itself that it was fairly taken = *Hankins v. Sanders*, 3 Gil. 227 =

So, if it is stated in the caption of the deposition that the witness was sworn, it need not be repeated at the close = *Co. of Queens v. Bledsoe* = 12 Ill. 271 = Now the statute directs that the certificate at the foot of the deposition shall state that it was sworn to by the deponent =

So, the omission of the Magistrate to state the

time & place of taking the deposition, will not
initiate = Phelps vs. Young - Breese 256. Tho the
same law expressly provides that the time & place
of taking the deposition shall appear in the certificate
annexed =

So whenever the court can see that no injury
has resulted, or in the nature of the case, could result to the
opposite party from the omission, this court will
treat it as a substantial compliance with the law =
"If the substance of the statute has been complied
with, the depositions should not be rejected, although
the literal provisions of the law have been de-
"parted from" = 12. Ill. 272 =

As all the other exceptions to these depositions, tho
numerous, ^{chiefly} go to the substance of the questions or
answers of the witnesses, it is deemed unnecessary to notice them
much in detail, as the court will necessarily have to in-
spect the depositions themselves in order to pass upon
them, and would not probably be much aided by any
comments here made = The principal objections
raised below were that the questions are leading & the
answers loose, vague & unsatisfactory. We think it will
be seen that there is not much in the objections and that
the ruling of the court below was sufficiently strong
against the plaintiffs =

It was also objected that
the account attached as Exhibit "A" to the depositions
and referred to in the answers of both witnesses to the
3^d interrogatory, is not sufficiently identified =

We think the objection not well taken. And besides the whole matter of the account is sufficiently proved by the answers to the preceding interrogatory =

Upon the second motion to exclude the depositions for the reason that the witnesses have failed to answer a material part of the 4th interrogatory, it is sufficient to remark, that the objection is not true in fact = The witnesses answered fully, but on motion of the defendant a part of their answers was stricken out by the court = This constituted no reason for suppressing the whole deposition, if there was anything left which could be evidence = Besides the court will not suppress the deposition of a witness, who even declines to answer a particularly inquiring unless it appears that he is acting perversely or corruptly in the matter. - Savage vs. Burkhead 20 Pick. Rep. 172 =

It is further to be noted that there was no cross-examination of the witnesses by the defendant. And it seems hardly to lie in his mouth to object that the questions of the plaintiffs are not answered =

Upon the exception taken to overruling the motion for a new trial it is unnecessary to remark, except to say that, if what remained of the depositions was properly admitted in evidence there was sufficient to sustain the verdict, and the judgment was rightly entered upon it =

Not having the argument or points ^{for} the appellant before us we may have omitted other particulars, which an examination of his brief might claim attention =

Cooper & Reynolds
for appellees =

Cole vs. Chouteau & al.

Briefs

For Defendants

Filed April 24. 1887
L. Leland
Clerk

Almiran S. Cole } Supreme Court
vs
Perris Chouteau } June Term
et al } Ad. 1886

State of Illinois }
La Salle County } William J.

Phy and having been duly sworn
says that the record in the case
is not complete: That affiant
was the Attorney of defendant
below and managed the case
in the Court below, on the part
of the defense: - That prior to the
motion for a continuance of the
case (which is the commence-
ment of the present Bill of Excep-
tions) Affiant filed Exceptions in
writing to the Depositions of Clark
and Maher, taken by Commissioner
on behalf of the Plaintiffs below, all
of which, except two, were over-
ruled by the Court, at the same
Term: - That affiant believes
he then up and presented to Plain-
tiffs Counsel and the Court a Bill
of Exceptions, immediately after
said overruling, embodying
simply said written motion to
suppress said Depositions, and
said ruling of the Court, and that

Said Bill of Exceptions was then
Signed and Sealed by the Court
Judge:— That Said Bill of Ex-
ceptions contained nothing but
what was in writing and in the
files of the Court, and its contents
could not therefore have been
the Subject of Controversy:— That
appellant afterwards, and during
the same Term, drew up the Bill
of Exceptions (now of record) which
he endorsed "2d Bill of Exceptions"
— That appellant always believed un-
til a few days before the present
Term of this Court that Said Bill
of Exceptions first named was in
file, and had given orders to the
Clerk of the Circuit Court of Perry
County to make out the Transcript
of the whole record soon after the
adjournment of the November Term
of that Court AD 1885, and believed
that the same had been done, until
as above said, when in examina-
tion of the files, he could find only
said "2d Bill of Exceptions":— Appi-
ant feels confident from all the
circumstances of the case that
that said Bill of Exceptions first
above mentioned was drawn up
by him as above stated, and can
entertain no doubt that the same

Filed June 21, 1886
L. Selove
Clerk

was signed and sealed by the
Judge of said Circuit Court, be-
cause it contained nothing in regard
to which any controversy could have
arisen. Affiant refers to the record
on file in this cause as corroboration
in some degree of his recollection in
the premises, and states that he
does not believe that he could
have been guilty of the blunder of
drawing up a Bill of exceptions in
the shape of that now of record
unless he had previously drawn up
and had signed the Bill of ex-
ceptions first mentioned.

Affiant further says
that he does not desire to pro-
pose this cause longer than is
may be necessary to ascertain
whether said record can be com-
pleted. — He prays that a certio-
rari be issued to the Clerk of the
Circuit Court of Perin County,
requiring him to send up to this
Court, the remainder of the record
in this cause, and that if necessary
the hearing of this cause be con-
tinued until the return of said
writ.

Submitted from John G. Pryor

to begin the 21st

day of June 1887.

By J. B. Rice Deputy

133.
Cole 54
Chouteau

affd at.

Filed June 21, 1886
S. Leland
Clerk

Whirran S. C. & }
 vs } Sup. Court
 Rene Montemayor }
 & al. } Jan Term
 AD 1886

Assignment of Errors

1 The Court Erred

In overruling motion of defendant below to suppress Depositions of Clark & Mahan

2. In overruling the 1st 2^d 3^d 4th 5th 6th 7th 9th & 10th Exceptions of Defendant below to said Depositions.

3 In overruling the 8th Exception to said Depositions in part.

4 In overruling motion of Defendant below for continuance.

5. In overruling ^{2d} motion by defendant below to suppress, reject and Exclude said Depositions

6. In overruling motion to Exclude and in admitting in Evidence the Bills attached to Depositions of Clark & Mahan

6x In overruling motion to Exclude

and in admitting in Evidence
said Depositions.

78. In overruling Motion for and re-
fusing to grant a New Trial

89. In making judgment for Plain-
tiff below

Geo. J. Ryan
for Plaintiff

And now come the said appellees and say that
there is no such error as is now claimed as is above
alleged, and this they pray may be enjoined of
by the Court -

Cooper Reynolds
for Appellees:

Note
to
Chou taw h
Erms

Filed July 4. 1856
L. Leland
Clerk

Almiran S. Cole }
 Pierre Chouteau } Sup Court
 & al } Same Term

State of Illinois }
 La Salle County } William J.

Ryan having been duly sworn says
 that upon further reflection since
 the making of his first affidavit
 in this cause, he is now able to
 and does state positively that he
 did draw up a Bill of Exceptions
 in this cause of the character
 stated in his said affidavit
 and prior to the Bill of Exceptions
 contained in the Record now on
 file in this Court: - That said
 Bill was drawn up and present-
 ed to and signed by the Judge
 of said Circuit Court, imme-
 diately after the ruling of the
 Court on the premises, and prior
 to the signing of said "2d Bill of
 Exceptions: - That since the is-
 suing or order for the testimony
 in this cause, affiant has caused
 search to be made in the office
 of the Clerk of said Circuit Court
 for said Bill, but has been in -

found and believes that the same
has not been found:— and be-
lieves that the same cannot be
returned to the present Term of
this Court:— But that by a thor-
ough Examination of the files
of said Circuit Court, and the
papers of the late Judge Peters,
the same may be found in time
to be returned to the next Term
of this Court:— That if lost, the
contents thereof can easily be
proved:— and that he believes
the same essential to a right
decision of this cause

He therefore prays that
an Alias Returnari be issued
returnable to the next Term of this
Court, and that the cause be
continued, for the purpose of
enabling the Plaintiff to ~~make~~ have
a more thorough Search for said
lost Bill read, or to supply its
def by proof before said Circuit
Court.

Jos. G. Ryan

before me

Subscribed Sworn to, this 25th
day of June 1856

L. Leland Clerk

By J. B. Rice Deputy

Almiran L. Cole

^{or}
Pierre Chouteau et al.

Aff. Dot.

Filed June 24, 1856
L. Leland
Clerk.