

No. 13127

Supreme Court of Illinois

Springda^L~~x~~e Cemetery
Ass'n.

vs.

Smith et al

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 187.

1860

Springdale
vs

Smith

Deceased

Springdale
Cemetery, Ann,

vs
Smith et al

Springdale Cemetery } In the Supreme Court =
res. } April Term 1860
Smith & Reice } Appeal from Bevier
Circuit Court =

By permission of court I offer ~~some~~ additional remarks
for the Appellant herein upon points not spe-
cially noticed in the printed Argument of
Messrs. Manning & Merriam, on file =

As indicated in that Argument the Evi-
dence in this Case tends strongly to prove, if it
does not clearly establish that the Arched
Vault built by Appellees for the Appellant
and to recover for doing which they sue the ap-
pellant in the Court below, was grossly de-
fective in Materials or Workmanship
or both = By all the testimony it was the strong-
est form of Arch which can be built, and
if well built ought not to have fallen in as
it did = This Eney Effort whose opinion was
asked distinctly stated = Besides, which there
was positive testimony by at least three witnesses
one of them their own - I mean Ryer, Hall & Mc-
Nelson - of defects in the Work & to some extent in
Materials. as also corroborating Evidence, to the
same Effect, by other witnesses - Add to which
is the entire absence of any ~~cause~~ assignable
cause for its falling in, (which is non videtur)

on all hands) except as arising from defective construction, (in which I include materials & workmanship) and the conclusion is, to say the least, almost violent, that such defects occasioned its fall = But however this may be, as the case stands upon the record, the ~~defendants~~ ~~was~~ plaintiffs below were not entitled to recover by their contract - see page 12, of abstract. they were to furnish materials & finish the work. Nothing being specified as to the time of payment, they were not legally entitled to their pay till the work was complete, in good condition, & ready to be delivered, and tendered to the Company or its agents; This, in point of fact the Company did make them considerable payments in advance = This, they themselves, ~~do~~ so understood, as is evident from the conduct of Smith, hereafter noted = Now ~~the~~ ~~case~~ ~~did~~ have the vault was not only never accepted by the Company, but was never tendered to it, or its agents, in a complete & finished state, by Smith & Beice = It actually fell while it was still in their hands = This testimony of Loucks & McCoy, which is entirely uncontradicted, shows this = The testimony of Loucks - see answers to Int. 8, in chief p.p. 8 & 9 of abstract & to 1st Int. on Re-4. by Jeff. & Jeff. p.p. 10 & 11 = Shows that Smith, on behalf of his firm called on Loucks, who then acted for the Company, several times to settle - The first time Loucks refused

him to Mr. Lightner, the secretary, to which Smith said - the secretary objected to settling because the Cementing was not done, and Smith then agreed to Cement the Vault & when that was done, he, Smith, was to set a day, when Soucks & Lightner were to go & accept the job, if done according to Contract. Smith came a week or ten days after ~~that~~ the next day, for this purpose; when Lightner & Soucks were to go up with him to the ~~Vault~~ Vault - Smith failed to come on the day appointed, but came some days after, when Soucks refused to accept the Vault & settle, because the Vault had then fallen in - And it was at this last interview when ^{Smith} ~~he~~ agreed to rebuild the Vault, and, at which, McCoy was present. - See testimony of James McCoy, P. P. 7 & 8, of Abstract, ~~and~~ The statement of McCoy, so far as it goes, fully corroborates the testimony of Soucks:

Now, I submit, that on this showing, plaintiffs were not entitled to sue for & recover the unpaid balance of the price they were to receive for doing this work, until they had rebuilt it, after it fell in, and tendered it in a perfect state & good condition to the company; and this, wholly irrespective of the positive agreement of Smith, on behalf of his firm, to rebuild - The job was

one entire thing = It had to be finished & complete
and ready to be delivered to the defendant below,
in this state, and regularly tendered, ~~that an opportunity might~~ before the plaintiffs were entitled
to their pay = This is clearly the understanding
both parties had of it, at the time, and it would
be the law applicable to the case, in the absence of
any such positive understanding, provided always
the defendant below was in no way in fault, of
which there is now no pretence = But, as clearly,
the Vault never was finished by the plffs below
and tendered to the appellant in that state & in
good condition, or ready to be ^{so} tendered to
Very soon after it fell and while it was
still down, this suit was commenced, and
it never was rebuilt by said Plaintiffs; but
the cemetery Company itself, was obliged after
wards to have it done, at large Expense, and
under a new contract with Pierce, after
he & Smith had dissolved =

One or two points only in Dfts Brief will
be noticed = And first - It is said there, that "the
"promise or agreement claimed to have been made
"by Smith to repair the Arch, was not that Smith
"Pierce would rebuild it, but that he (Smith) alone
"would do it." And hence the inference that such con-
tract "could not be set up to defeat the action".
This is a mere quibble - It is true that the Unit =

Wesley, McCoy & Soucks generally speak of Smith alone & in the singular number; but this is evidently because the business was exclusively attended to, so far as making contracts, settling &c. for the firm, is concerned, by Smith: Peirce ostensibly took no hand in this - see answer of Soucks to Int. on Pre-Ex. at foot of p. 10. of Abstract. So the original contract itself was made by Smith & in the singular number, till he came to sign, when he attached the firm name - see Contract, p. 12 of Abstract: But it is manifest, as well from the fact that they were partners at this time, and did the ^{work} ~~work~~ together, as partners, as from the statement of Soucks himself, in relation to this very matter of rebuilding, (see answer to Int. 2. p. 11. of Abstract), that the firm of Smith & Peirce, and not Smith alone, was intended: The same thing is also apparent from other parts of the Evidence:

Again, it is said by Appellees, "Soucks did not on his part or for the company agree to pay anything for rebuilding the Vault. He only proposed to pay Smith & Peirce for building the one they did build, if Smith would rebuild the Arch." Except the inference perhaps intended to be deduced from the last clause of this statement, this is true, and confirms the position we assume =

As to the statement that ~~Hall~~ is the witness

Hall is contradicted in every important particular, it is simply untrue: There are some points of conflict, it is true, between his testimony and that of other witnesses, called by ~~plffs~~ below. But in almost every instance, ^{where} their testimony, when it conflicts with Hall's, is of a merely negative character, viz: that they did not see, what he swears he did see. While in altogether the most material parts of his testimony - that relating to loose bricks in the Key of the Arch, and the manner the Courses in the Arch were laid, he is corroborated in the fullest manner by both ~~Ulrickson~~ & Ryors:

So, the Statement that Soules "made no Claim that the Vault was defective" built, is without foundation: It is true that in answer to certain questions put to him by ~~plffs~~ counsel - see page 10 of abstract, ^{he says} that he "made no Claim then that the Vault was not built according to contract" - And did not deny in a certain conversation that the "job was ~~not~~ done". And for the very good reason that, at the times referred to, he did not know to the contrary.

A single remark further to prevent misapprehension. It is as to Soules connection with the oversight of this work: A laboured effort was made below to prove that the whole was done under his supervision.

and that whether well or ill done, pliffs
were not responsible, and this was much
insisted on before the jury, and it is not impro-
bable they may have misunderstood the evidence
on the subject. Whereas all the testimony, with-
out any conflict, shows that Soules's evi-
dence related simply to the plan and not
to the Execution of the work, and in the ~~testi-~~
~~mony~~ ^{words} of their own witnesses, "had nothing
to do with the Strength of the Arch." Besides,
he was not there after ^{a part of} the first courses of
the arch were laid, in which, as also in
the side walls, it is plain, the defects did
not consist, as these stood, and were
afterwards used to reconstruct the
arch =

Ottawa, Apr. 28/60 -

J. K. Cooper
for appellants:

¹⁸⁷
Springdale Cemetery
^{vs.}
Smith & Heice
Add^d. argument
for appellants =

Filed April 28, 1860
L. Leland
clerk

ARGUMENT FOR APPELLANT.

Supreme Court, Third Grand Division,

APRIL TERM, A. D. 1860.

Springdale Cemetery,
vs.
Job Smith and Hiram Pierce. } Appeal from Peoria Circuit Court.

The evidence in this case, shows that Smith & Pierce contracted with the appellant to build a cemetery vault, and to furnish the materials therefor, for the sum of \$525. Abstract, page 12. They built the vault. Directly after it was built, it fell in.

In the account filed, Smith & Pierce credit the appellant with the sum of \$345, (Abstract page 1,) but the appellant proved payments to the amount of \$399.32, which the appellees admitted, except \$20, which \$20, however, we think, is sufficiently proved. Abstract, page 6. These payments include no charge for re-building the arch. Then assuming that the payment of \$399.32 is proved, there remained due for building the arch, \$125.68; or, deducting the \$20, the sum of \$145.68.

It is proved by Hall, (Abstract 6,) that the re-building of the arch, cost the appellant over \$301, and the re-covering of it, \$35, making the cost of the construction over \$326. The jury found in favor of the appellees, \$150, something more than could have been actually due them, upon an accurate estimate, even if the work had been properly done, and the vault had not fallen in-

The evidence tends very strongly to prove (if it does not absolutely prove) that the falling of the vault was the result of defective workmanship, or materials. It cannot be reasonably accounted for, upon any other hypothesis. But, however that may be, it is shown that there was a dispute between the parties, as to whose fault it was that the vault fell in. There were just grounds on the part of the appellant, for contending that the appellees were liable for all the damages occasioned by the vault's falling. This was not a mere pretence, on the part of the appellants, for the purpose of extorting money, or services from the appellees. Such a motive is not to be presumed—certainly not, where the evidence shows such very sufficient grounds for so contending, on the part of the appellant.

This being the state of facts between the parties, the appellant refused to pay the residue of the contract price, unless the appellees would re-build the vault; and thereupon it was agreed between the parties, that they should re-build it, and that then the appellant should pay the original contract price for constructing the vault. The evidence upon this point, is clear, and uncontradicted.

James McCoy (Abstract, 7-8) testifies to this agreement. Peter O. Loucks (Abstract 9) says: "He (Smith) agreed to re-build it, and the defendant was to pay the contract price when that was done." Loucks, at that time, was acting as President and Agent of the association, and Smith was acting for Smith & Pierce, in regard to this very contract. Loucks states again, the contract to re-build, (Abstract 10-11,) and he says: "At the third interview, Smith proposed as stated in my second cross examination which I did not accept, but told him, that if he would go on and build the vault, we would settle then, with him, which he agreed to do, and was to do it the first thaw, or warm weather. There was no additional compensation to be paid Smith & Pierce for re-building the vault."

Smith & Pierce did not re-build the vault, as Loucks testifies,

but on the ninth day of January, A. D. 1857, commenced this suit against the appellant. In the summer following, the appellant re-built the vault at a cost of three hundred and thirty-six dollars.

There is one point in this case, which, as we conceive, must necessarily cause it to be reversed. This agreement to re-build, as a settlement of the controversy between the parties, was binding upon appellees.

Fitch, vs Haight, 4 Scam. 51.

McKinley, vs. Watkins, 13 Ill. 140.

Taylor, vs. Patrick, 1 Bibb, 168.

Russell, vs. Cook, 3 Hill, 504.

11 Mees & Wels, 641, 3 Serg. & R. 331.

5 Pet. 99, et passim.

The appellees, then, could not recover the residue of the contract price, until they had re-built the vault, which they have not done. Again, if they did not re-build, according to their agreement, which they did not, they were liable to the appellant for the damages resulting from that breach of contract. The measure of those damages would be the reasonable cost of re-building; which has been proved, *prima facie*, to be three hundred and thirty-six dollars, and this sum should have been allowed to the appellant in this action. The jury entirely disregarded this evidence, and the Court below, erred in not granting a new trial on that account.

Several of the instructions given for the appellees, are erroneous. The second instruction of the appellees is altogether objectionable. The substance of it is, that if Smith promised to re-build, for the purpose of getting his pay, then the promise is not binding, provided Smith & Pierce had built according to contract, in the first place. If that be so, then the compromise of a doubtful claim is not a good consideration for a promise. The authorities cited, show that such is a good consideration. It is immaterial, whether the vault was built according to contract in the first

place. If the vault soon fell in, and the appellant might justly believe it was from defects, and did, bona fide, so contend; and to settle this dispute, the agreement of settlement was made, it is valid. The instruction utterly ignores this principle of law.

The third instruction is not law. The latter portion of the instruction in effect, is, that if Smith, to settle the dispute, proposed to Loucks to re-build, on condition that the appellant would pay the amount due, admission so made, should be disregarded by the jury. Now, Smith did make such a proposition, and for that very purpose. So this instruction, in effect, directs the jury to disregard this proposition of Smith's, although it is proved that the proposition ripened into an agreement. A mere proposal of compromise, is not binding as a contract, unless accepted, it is true; but it is not law, and never before was conceived to be, that, as alledged in this instruction, "admissions of parties, with a view to settle, [are] not evidence." The entire instruction is grossly bad.

We think that the fourth instruction for the appellees should not have been given. The building of the vault was a work of skill. The appellant might have known how it was built, and promised to accept it. Still, if it fell down they would not necessarily be bound by that acceptance.

Van Buskirk, vs. Murden 22 Ill., 446.

The fifth instruction for appellees entirely evades the evidence, in regard to the agreement of settlement, and in effect, instructs the jury to disregard it. The sixth, is liable to the same objection, and to the further objection, that it directs the jury to find for the appellees, if at all, "the value" of the work and materials; when it is expressly proved, that the work was done under a contract for a fixed price.

The fourteenth instructs the jury, that if the vault was properly built, then, although it fell down, they must find for the appellees, still reiterating, in effect, that the jury must disregard the settle-

ment. The seventeenth is objectionable for the same reason, and it directly conflicts with the decision in *Van Buskirk, vs. Murden*.

There is one practice adopted by some Circuit Courts, which we consider very objectionable. It is qualifying the instructions given on one side, by instructions on the other, merely, without calling the attention of the jury to the qualification. Every instruction should contain a proposition of law in itself, and be given in such manner as to be applicable to the state of case made by the evidence; otherwise it is calculated to mislead the jury. It should direct the jury to the real points in controversy. In this case it may be said, as to several instructions given for the appellees, which are erroneous in themselves, that they are qualified by the twelfth instruction for the appellant. But the latter instruction does not profess to be a qualification of the instructions for the appellees. Each instruction stands by itself. The jury so read them, and so understand them. Upon the evidence, the instructions are a budget of contradictions. The consequence is, that the jury disregard all the law given, and decide by accident. We hope that this practice may be discountenanced by this Court.

MANNING & MERRIMAN,
Attorneys for Appellees.

187
Springdale Cemetery

no

Smith and

Filed Apr 25, 1863

L. Deland

clerk

IN THE SUPREME COURT,

STATE OF ILLINOIS.

APRIL TERM, 1860.

THE SPRINGDALE
CEMETERY ASSOCIATION,

vs.

JOB SMITH, *et al.*

DEFENDANT'S BRIEF AND POINTS.

This suit was brought by the plaintiff's below, to recover the amount due for building a vault for the defendant below.

The plaintiff's below proved on the trial that they employed experienced workmen; good materials and used due care in building the vault and that the whole was done under the supervision of the president of the defendant. See testimony of Jeremiah T. Smith, Printed Abstract, page 2; William Thompson, Record, page 19; William Bennett, page 3, James Morris, page 4. There was 48,268 bricks used in the construction, worth \$12.00 per M., \$579 20

See Smith's testimony, page 1 and 2.

Add Cementing, see Card's testimony, record page 5,..... 20 00

Defendant's paid,..... \$599 20
379 32

See Abstract, page 6,..... 219 88

The Jury found for the Plaintiff below, \$150.

After the vault was finished, a portion of the arch fell down, and the main question in the case is whether the falling down was in consequence of any defect in the materials used, or in any want of skill or care on the part of the defendant.

1. POINT.—All the witnesses examined on the part of the plaintiffs below, unite in proving that the materials were good and the work well and properly done.

The defendants below called Ulrickson, who testified that the work was not well done. Also, Hall to the same point. It is to be observed that plaintiffs below done away with the evidence of both these witnesses, by showing that at the time Ulrickson made his examination, he could not see how the arch was built. The cement was on the in or under side of the arch, and soil on the out side.

See Thompson's testimony, Abstract 13. See Cyrus Pierce testimony, Abstract 13. and other to same point.

Hall was contradicted in every important particular.

The manner in which the vault was built was a question for the Jury. It was submitted to the jury fairly, and it is submitted whether this Court under the evidence will set aside the verdict.

The Record further shows that the arch was rebuilt by Pierce. The main walls of the vault were used. The arch built in the same manner by the same workman, and no fault found with it.

2d. POINT. The second error assigned upon the record, is that, portions of the deposition of Peter O'Loucks was suppressed. No such objection or ground was claimed or set forth on the motion for a new trial, and it is submitted that plaintiff cannot avail itself of such objection now.

The propriety of excluding that portion of the deposition will be apparent when the record shows that the defendants below claimed that Smith and Pierce entered into a written contract. See contract annexed to Louck's depositions, and see the 10th instruction asked by defendants below.

Now was it proper for Loucks to swear to the provisions of the contract when the Company relied on a written contract, and offered the same in evidence to the jury. Besides it does not appear when the objection to the suppression was made; whether at the time the order was made or afterwards. As a matter of fact, the motion to suppress was made before the case was called for trial. Besides all this the written contract offered in evidence proved the same thing in substance, so that no injury was done.

The third point relied on by the plaintiff in error, is that Smith promised to rebuild the vault. This conversation between Smith and Loucks took place after the arch fell down.

The Court will notice that Smith went three different times to Loucks to settle. No claim was made by Loucks that the vault was defectively done. Smith wanted his pay; and if the vault was built by Smith and Pierce according to contract he was under no legal liability to rebuild the arch.

1. The promise or agreement claimed to have been made by Smith to repair the arch was not that Smith and Pierce would rebuild it, but that he alone would do it. The agreement was not made by the two; and being made by Smith alone, it could not be set up to defeat the action brought by both.

2. If Smith and Pierce built the vault according to the contract and in a good workman like manner, and the arch fell down without fault or negligence on their part their was no consideration for Smith's agreement to rebuild the arch.

3. Loucks did not on his part or on the part of the Company, agree to pay anything for rebuilding the vault. He only proposed to pay Smith and Peirce for building the one they did build, if Smith would rebuild the arch.

4. This proposition was made for the purpose of settling the dispute and admissions or propositions made for the purpose of a compromise and not evidence against the party making theirs.

The case was tried before a Jury before the Justice, who found for the plaintiff \$180. On the trial before the Circuit Court, the verdict was for \$150. Substantial justice has been done. The whole case fully and fairly presented in the instructions to the jury; and it is submitted whether the Court will force the parties into another trial.

This Court has laid down the rule so clear and distinct, in so many cases that a verdict will not be disturbed, unless clearly against the weight of evidence, that it is not deemed necessary to refer to authorities.

The record shows a case where much necessarily must be left to a jury. Loucks resigned his Presidency and figures as the principal witness in the case; and while Smith and Peirce could not appear as witness; they believe they have showed good ground for the judgment below.

GROVE

For Defendant.

2017-52
Spring Male
Acquaintance Association
as
for Smith & al

Deft: Brief

Filed Apr 24, 1860
Shelton
Cary

IN THE SUPREME COURT,

STATE OF ILLINOIS.

APRIL TERM, 1860.

THE SPRINGDALE
CEMETERY ASSOCIATION,

vs.

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See Smith's testimony, page 1 and 2.

Add Cementing, see Card's testimony, record page 5, 20 00

Defendant's paid, \$599 20
379 32

See Abstract, page 6, 219 88

The Jury found for the Plaintiff below, \$150.

After the vault was finished, a portion of the arch fell down, and the main question in the case is whether the falling down was in consequence of any defect in the materials used, or in any want of skill or care on the part of the defendant.

1. POINT.—All the witnesses examined on the part of the plaintiffs below, unite in proving that the materials were good and the work well and properly done.

The defendants below called Ulrickson, who testified that the work was not well done. Also, Hall to the same point. It is to be observed that plaintiffs below done away with the evidence of both these witnesses, by showing that at the time Ulrickson made his examination, he could not see how the arch was built. The cement was on the in or under side of the arch, and soil on the out side.

See Thompson's testimony, Abstract 13. See Cyrus Pierce testimony, Abstract 13. and other to same point.

Hall was contradicted in every important particular.

The manner in which the vault was built was a question for the Jury. It was submitted to the jury fairly, and it is submitted whether this Court under the evidence will set aside the verdict.

The Record further shows that the arch was rebuilt by Pierce. The main walls of the vault were used. The arch built in the same manner by the same workman, and no fault found with it.

2D. POINT. The second error assigned upon the record, is that, portions of the deposition of Peter O'Loucks was suppressed. No such objection or ground was claimed or set forth on the motion for a new trial, and it is submitted that plaintiff cannot avail itself of such objection now.

The propriety of excluding that portion of the deposition will be apparent when the record shows that the defendants below claimed that Smith and Pierce entered into a written contract. See contract annexed to Louck's depositions, and see the 10th instruction asked by defendants below.

Now was it proper for Loucks to swear to the provisions of the contract when the Company relied on a written contract, and offered the same in evidence to the jury. Besides it does not appear when the objection to the suppression was made; whether at the time the order was made or afterwards. As a matter of fact, the motion to suppress was made before the case was called for trial. Besides all this the written contract offered in evidence proved the same thing in substance, so that no injury was done.

The third point relied on by the plaintiff in error, is that Smith promised to rebuild the vault. This conversation between Smith and Loucks took place after the arch fell down.

The Court will notice that Smith went three different times to Loucks to settle. No claim was made by Loucks that the vault was defectively done. Smith wanted his pay; and if the vault was built by Smith and Pierce according to contract he was under no legal liability to rebuild the arch.

1. The promise or agreement claimed to have been made by Smith to repair the arch was not that Smith and Pierce would rebuild it, but that he alone would do it. The agreement was not made by the two; and being made by Smith alone, it could not be set up to defeat the action brought by both.

2. If Smith and Pierce built the vault according to the contract and in a good workman like manner, and the arch fell down without fault or negligence on their part their was no consideration for Smith's agreement to rebuild the arch.

3. Loucks did not on his part or on the part of the Company, agree to pay anything for rebuilding the vault. He only proposed to pay Smith and Peirce for building the one they did build, if Smith would rebuild the arch.

4. This proposition was made for the purpose of settling the dispute and admissions or propositions made for the purpose of a compromise and not evidence against the party making theirs.

The case was tried before a Jury before the Justice, who found for the plaintiff \$180. On the trial before the Circuit Court, the verdict was for \$150. Substantial justice has been done. The whole case fully and fairly presented in the instructions to the jury; and it is submitted whether the Court will force the parties into another trial.

This Court has laid down the rule so clear and distinct, in so many cases that a verdict will not be disturbed, unless clearly against the weight of evidence, that it is not deemed necessary to refer to authorities.

The record shows a case where much necessarily must be left to a jury. Loucks resigned his Presidency and figures as the principal witness in the case; and while Smith and Peirce could not appear as witness; they believe they have showed good ground for the judgment below.

GROVE

For Defendant.

187
Spring State
Cemetery Association
vs
Jas Smith & Co

Deft's Brief

Filed Apr 24, 1860
S. Leonard
Clerk

For Defendant
GEOVH

Ground for the judgment.

Smith and Tenney could not appear as witnesses; they believe they have showed good reason for his Presidency and figures as the principal witness in the case; and while the record shows a case where much necessarily must be left to a jury. Tenney deemed necessary to refer to authorities.

This Court has laid down the rule so clear and distinct in so many cases that it can not be misunderstood, unless clearly against the weight of evidence; that it is not just; and it is submitted whether the Court will do so the parties into another trial has been done. The whole case fully and fairly presented in the instructions to the jury.

On the trial before the Circuit Court the verdict was for \$1500. Substantial justice. The case was tried before a jury before the Judge who found for the plaintiff \$1400. Tenney making them.

or propositions made for the purpose of a compromise and not evidence against the party making them. This proposition was made for the purpose of settling the dispute and admissions of the one they did build it. Smith would not build the arch.

3. Tenney did not on his part or on the part of the Company's agree to pay any thing for rebuilding the arch. He only proposed to pay Smith and Tenney for building the arch.

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APRIL TERM, 1860.

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The third point relied on by the plaintiff in error, is that Smith promised to rebuild the vault. This conversation between Smith and Loucks took place after the arch fell down.

The Court will notice that Smith went three different times to Loucks to settle. No claim was made by Loucks that the vault was defectively done. Smith wanted his pay; and if the vault was built by Smith and Pierce according to contract he was under no legal liability to rebuild the arch.

1. The promise or agreement claimed to have been made by Smith to repair the arch was not that Smith and Pierce would rebuild it, but that he alone would do it. The agreement was not made by the two; and being made by Smith alone, it could not be set up to defeat the action brought by both.

2. If Smith and Pierce built the vault according to the contract and in a good workman like manner, and the arch fell down without fault or negligence on their part their was no consideration for Smith's agreement to rebuild the arch.

3. Loucks did not on his part or on the part of the Company, agree to pay anything for rebuilding the vault. He only proposed to pay Smith and Peirce for building the one they did build, if Smith would rebuild the arch.

4. This proposition was made for the purpose of settling the dispute and admissions or propositions made for the purpose of a compromise and not evidence against the party making theirs.

The case was tried before a Jury before the Justice, who found for the plaintiff \$180. On the trial before the Circuit Court, the verdict was for \$150. Substantial justice has been done. The whole case fully and fairly presented in the instructions to the jury; and it is submitted whether the Court will force the parties into another trial.

This Court has laid down the rule so clear and distinct, in so many cases that a verdict will not be disturbed, unless clearly against the weight of evidence, that it is not deemed necessary to refer to authorities.

The record shows a case where much necessarily must be left to a jury. Loucks resigned his Presidency and figures as the principal witness in the case; and while Smith and Peirce could not appear as witness; they believe they have showed good ground for the judgment below.

GROVE

For Defendant.

Spence's Book
Remedy associated
with 187

Deft's Oath

Filed Apr 24, 1860
L. L. L. L.
Chick

SUPREME COURT OF ILLINOIS.

Third Grand Division.—To the April Term, 1860.

"SPRINGDALE CEMETERY ASSOCIATION."—
Appellant.

vs.

JOB SMITH & HIRAM PEIRCE.—Appellees.

Appeal from Circuit Court, Peoria County.

ABSTRACT.

Pages 1 & 2

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

s	"The Springdale Cemetery Association,		
	1856	To SMITH & PEIRCE.	Dr.
	Oct. and Nov.	To 48,000 brick, 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.	20.90
			\$642.00
	"	Credit at sundry times.....	345.00
			\$297.00."

Defendant below also filed an account, in substance, as follows:

4	"Smith & Peirce,		
		To Springdale Cemetery Association.	Dr.
	1856	For Cash paid L. Harman, for excavation.....	\$ 53.00
	Oct. 25th to Nov. 3d,	Cash paid—in all.....	345.00
	"	Damage for failure to perform contract.....	500.00
			\$898.00."

2 Trial was had before said Justice and a jury, on the 7th of Feb., 1857, and judgment rendered for plaintiffs for \$180.

1 Defendant appealed to Circuit Court.

13 The cause was tried at the November term, 1859, before said Court and a jury, and judgment rendered for plaintiff's for \$150 and cost, and defendant appealed to this Court.

14 15 & 16 The bill of exceptions shows, that on said trial, the plaintiffs below called Jeremiah T. Smith, who said, 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 Frederick Hartshorn, measured it after it was built: think it was 22 feet long in the inside, and 22 feet 8 inches from out to out. Front wall solid; the other walls hollow, and 20 inches thick. Meas-

17 urement 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 masons' measure; worth \$12 per thousand to furnish materials and build the vault, (admitted that plaintiffs' 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 2 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, 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.

18 Cr. Ex. Smith & Pierce 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 such wing was about \$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. Plan 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 plan. 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 staid 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.

18 Nathan Giles, called by plaintiffs, said: Am brick-maker: sold the brick to
 19 plaintiffs to build this vault. Helped load two loads. These were good brick. Was paid something extra, don't know how much, for good brick. Judging, from general appearance, the kiln from which the brick came was good. There were soft brick in it, but don't know if taken. Plaintiffs bought hard brick.

19 David Burns, next called, said: Hauled sand for vault; same I furnished other builders, think some better. My teams hauled the brick; I helped load one or two loads; have no particular recollection, but think they were good; saw them at vault, did not examine particularly.

Cr. Ex. My teams hauled all the brick for this vault, but two loads ; hauled 30 or 40,000 : got one dollar per thousand. My bill was between \$30 and \$40, about \$35. Loads ranged from 500 to 800 or 900 bricks each.

William Thompson, next called, said : Am a brick-mason, and have been from 14 to 18 years ; helped build the vault ; materials good, so far as I know ; laid about first and last brick ; men all pretty good workmen. Loucks there, off and on, pretty much all the the time, and gave some directions about the pilasters. Wings built something larger, and sides 4 to 6 inches higher, by his direction. Work well done, so far as I know. Loucks appeared pleased, found no fault with work or materials, that I heard. We went straight through with the work ; were 7 or 8 days at it ; outside cemented as wall was laid. Centre piece in when I left.

20 Cr. Ex. Had cement enough for outside. Loucks directions had nothing to do with turning arch, or manner of doing work, except as to plan, and made it no harder to build. This arch, a half circle ; as strong a form as any : if well built and materials good, ought to stand.

20 William Bennett.—Helped to build front of this vault, and worked about two hours on arch. Have been brick-mason 16 or 18 years. Loucks there several times, gave directions as to front. Had a plan. Would come round and figure out from it, and make suggestions. Materials pretty good so far as I recollect. Work well done. Loucks' directions regarded only the plan or style of building, not the manner of executing the mason work. The front had nothing to do with strength of arch. Plan used by Loucks here identified by witness as the same attached to deposition of Loucks.

On Re. Ex. This witness stated : There are no specifications on this plan ; don't know whether the other plan there or not.

21 Cyrus Peirce.—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, 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 1 foot thick.

Gozen L. Ryor.—Am carpenter. Made centre pieces for this arch ; made in the usual way Worth \$25 to make and take them up. Smith paid me. The arch is semicircle. Saw vault after arch was taken down. Side walls not injured. Not cemented inside then. Water, in case of rain, could not flow to any extnet on the top of the arch from the hill behind. Saw loose bricks in arch at this time : one whole & two or three pieces were loose, and one which might be called the key brick had fallen down one-half to three-fourths of an inch, John Hall called my attention to it, said he thought arch would fall. I did not think so. Hall pushed loose brick up with stick, and it would fall back.

Re. Ex. Hall told me he had taken out the arch. Hall keeper of ground, and in attendance. The brick could not have been rendered loose by taking out centres. The loose brick particularly spoken of, was from 7 to 9 feet back from front and right in top of centre of arch. Walls not dry at this time. Side walls 6 or 7 feet high when I put it centres. Hall raised the brick to let me see it was loose. The other bricks referred to, as loose, I could see were below the others, one before and one behind the one Hall raised. All appeared to be in top or centre course. I made 5 wooden centres for this arch. Laid common fencing board on them. A man of ordinary capacity might take out centres; though the arch might be injured by the process, by getting the timbers on a ballance. Saw no injury that could have resulted from taking down these centres. The damage, if any, would have been to front wall, in forcing it out. The brick referred to were not loosened by taking down these centres.

22 James Morris.—I cemented inside of this arch on 26th November, 1856. Did the work properly. Materials good. The centres had been taken out. Smith helped me a little at the start. If any bricks loose I should have noticed it. Saw none. Could not have cemented over loose brick without putting it in. Am a brick-layer and have been 16 years. Arch looked like good job.

Cr. Ex. I commenced at top or centre. Smith put some on. I was out several times during the day, say one-half dozen times. My attention not called to the way the arch was built, nor to what Smith was doing. My back was often turned 23 to him. If any holes in the top, except for ventilation, did not see them.

Re. Ex. Don't know Smith & Peirce cemented any while I was out. After we started, Smith was smoothing inside of arch. Worth 20 cents per square yard to furnish materials and cement arch inside, about \$13 in all.

Patrick Harman.—I dug foundation for vault. Smith employed me. When finished, Loucks and Lightner came, and wanted it dug 3 feet deeper, and agreed to give me \$20 for it. Whether charged to Smith don't know. Lightner paid me. Smith employed me first, and gave an order on Lightner, for amount of original 24 bill and the \$20, for deepening, some \$53 in all, which Lightner paid. The direction to me was to dig 3 feet deeper. Talked first of setting vault further into hill but concluded to make it deeper.

Re. Ex. Loucks and Lightner said the vault should be set further back.

Patrick Harman, Jr.—I helped dig foundation. Dug it 3 feet deeper afterwards. This brought roof of wall nearer level of ground above. Smith showed us stakes to dig by. Hall, and I think Loucks was there.

William Giles.—Am brick-maker. Smith bought brick of us to build said vault. Bargained for as good a lot as we could furnish. Gave him good lot. Got 7000 extra brick for front. Helped load brick.

24 Plaintiffs here rested.

Defendant then called James Hazzard, who said: Am brick-mason, and have

been since 1833. Saw this vault after it fell in. Have built a good many arches. Unless broken down in some way, this arch, if properly built, should not have fallen; It was a semicircle, the strongest form of arch. About one-third of the arch, the back end, was standing when I saw it. The side walls were not sprung, when they do not give, scarcely any weight on top should throw the arch down; nor would rain & water, flowing on it from above, effect it, if properly cemented.

Cr. Ex. About two-thirds the length of the arch, along the centre, had fallen when I saw it. It had not fallen clear down at the sides. One side was higher than the other. The rain and frost should not have thrown it down; nor should the door being open effect it. The cement on the inside was then firm, and covered all the arch not down.

Re. Ex. Saw some soft brick in the arch. Once in a while one pretty soft.

Luther Card: Am bricklayer, and have been long time at the business. Saw this vault after it fell. This was in February, three years ago. Its form is the strongest that can be built; and, if well built, should not have fallen. When sides do not give way, scarce any weight on top should throw it down.

Cr. Ex. There is near 100 yards cementing on inside and out of this arch. Worth 20 cents per square yard to furnish materials and cement it. One-third to one-half the arch was standing when I saw it. The cementing was on the inside of that part of the arch then standing. Cannot state why it fell; no reason for it if well built.

John Hall: Know this vault. Was there all 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 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 recovering 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 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 Pierce 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 at 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 plaintiffs were building it. It was rebuilt by Pierce in latter part of June and beginning of July, 1857.

Charles Ulricson : I know the vault in question ; saw it after part of the arch had fallen. Am an architect, and have been for 21 or 22 years. Am conversant with the different modes of building arches. Saw this arch in January or February : one-half or some more had then fallen : understood it fell in December preceding. I examined the masonry of the arch where not covered : The cement had fallen off a number of square feet, which could be seen. There was a length of six or seven feet along the top or centre of that part of the arch still standing, from the aperture where broke, back, and running down the sides about two feet which was uncovered. There were also some other spots from which the cement was off. The course of brick in this arch did not run in parallel lines : At the key course they were wider apart behind than forward. What constituted the key was as much as two courses wide behind, and tapered forward so as to be only one course wide where it broke off, and seemed to have come together or nearly so in front. To be strong, an arch should be so constructed that all the brick should verge directly toward the centre. As built, the brick in this arch were not so laid, but were laid irregularly, verging toward different points. Two diagrams made by witness were here exhibited to the jury. for which see page 30 of record.

31 The upper diagram, witness said, shows how the brick in a well-built arch should be laid, the lower one the manner the brick in this arch were laid, as could be plainly seen where the arch was broken. On the sides and for some distance up the arch was pretty well built, but toward and at the centre it was not well built. The brick were so laid as hardly to form a key at all. It became necessary to fill up with spauls and broken brick to close the arch. This arch was a semicircle, the strongest form of arch, and very hard to break, unless the sides or abutments give way. I did not form a distinct idea of the cause of its falling. Had it been well built, it should not have fallen. There was no weight of dirt on it to throw it down. It was a foot thick, and the weight such an arch should carry could hardly be calculated. When an arch is well built it is best to take out the centres soon, and while the wall is green, thus giving the brick in settling an opportunity to press together more regularly. If poorly built it is best to let the centres stand till mortar is well set to brick and become indurated, when, if mortar is good and has time to become hard and chrystalize, it will become almost as hard as brick, and may hold up the arch however irregularly laid. There was snow on the ground when I went up.

31 James McCoy next called, said : I was present in the fall this arch was built, at a conversation in Peter O. Loucks' store in Peoria, between said Loucks and
32 Smith, one of the plaintiffs, about said arch. Smith came to get Loucks to accept it. Loucks said he heard it had fallen down. Smith wanted company to pay for building it. Loucks said company would not pay for it unless Smith would rebuild it, then they would pay according to contract. Smith said he

would fix it up the first fair weather, but wanted the company to furnish materials, to which Loucks would not agree. Loucks seemed to convince Smith, and I understood Smith to agree to furnish materials and rebuild the arch the first fair weather.

Cr. Ex. Smith asked Loucks at first to go up and accept the vault, and said the falling in was not his fault. Loucks insisted that it was his fault; and finally the agreement to rebuild was made as before stated.

33 Deposition of Peter O. Loucks.

34 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 the company a little north of the city. Don't remember date; think was in October or November, 1856. I negotiated it for the company with Smith. Smith & Peirce 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 \$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 pages 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.

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.

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 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 wrong, and they took it down and rebuilt it to conform to the plan.

33 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 the 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 :

33 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 the wings. Don't know whether 40 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 ballance 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.

41 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 I so 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 more for it. Smith agreed to have it done, the company to pay Harman and charge Smith.

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.

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. He 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.

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 he offered to repair the vault.

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

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 :

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 that 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.

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 farther or fuller answer to interrogatory last above.

Ans. Not with any certainty.

Int. 3d. How many private conferences 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.

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 anybody else say anything in that conversation? If they did, state who it was, and what they said.

Ans. I don't know of anything being said by any one 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 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 Smith's expense, and which he said he would do the first warm weather.

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

down centres. It was properly done, and as I should have done it. No possible injury could result to this arch from the manner of doing it.

Gozen L. Ryors next called: Heard Hall's statement about taking down centres. It was done right. Arch not hurt by it.

Defendant here rested.

Rebutting evidence by plaintiffs.

James Morris recalled: Did not see Smith chinking loose brick in arch, when cemented. If he had, should likely have seen it if looking that way. The arch looked well—as well as last one—when I cemented it. Courses as straight and brick laid as well in one as the other.

Cr. Ex. My attention not called to fact whether courses straight or not.

Thompson recalled: Heard Hall's testimony. Did not mix common mortar with cement for this arch. Saw none mixed. Think should have seen it if done. Think had plenty cement. Think some chunks in soil Hall covered vault with, but didn't notice particularly. Didn't hear Hall or Loucks complain of soft brick. This arch a half circle, and row locked. Some binders put in. Each tier was separately keyed. One looking on inside couldn't tell whether arch well built or not. Opening at key course narrower in front than behind. Less than one-half inch wide before, something over a course behind. We split the brick in front and put in mortar and spauls behind to key it. Have built several arches just like this. Courses as straight as we could lay them without a line.

Cr. Ex. All the courses in an arch should be properly laid, and support each other, and the arch sprung on same pitch throughout. Tenders mixed the cement, but don't know who. Saw part but not all of it mixed. Arch finished Saturday before election.

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

If ties all laid straight and each properly keyed, could'nt tell from inside how it was built.

Think courses come out about same in last as in first arch. Cant say if opening wider behind than before. Took no more pains with second than first arch.

L. Harman, recalled :—The dirt dug for covering the arch was strong sift dirt. Some lumps in it. Did not hear Smith agree to second digging. We talked of setting it further back. Lightner and Loucks thought it was not far enough back. Cr. Ex. Don't know who set stakes first time. Thought Smith was to pay me for first digging. The brush and timber were cleared off where I was to dig. I did not dig as far back as the ground was cleared.

Re. Ex. No complaint that foundation not dug where was to be.

26 R. Scofield, next called, said:—It began to rain Dec. 1st, 1856. Dec. 2d the wettest day I ever saw. It froze on night of second. Cant say how long it continued frozen. Was heavy rain on Tuesday or Wednesday before, but not sure of this. I Remember the rain on Dec. 1st and 2d, as I was married about then.

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. 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.

57 Cr. Ex. Never knew arch thrown down by frost. Not workmanlike to have loose brick in arch. Pressure should be equal in all parts of the arch. Can be no perfect kep 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 spaul 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.

Wright, next called by plaintiffs, said :—If work in an arch defective, & centres taken out while green, the arch more likely to fall then than after.

Plaintiffs here again closed.

58 Defendant then read in evidence the summons issued in this case by the Justice, showing that suit was commenced on the 9th of Jan. 1857.

Charles Ulricson, recalled by defendant, said :—Hall's way of taking out these centres, as good as any that can be adopted for a semicircle arch. The diagram, first exhibited before alone shows how an arch *should* be buit. The example below

2d. If the jury believe from the evidence that such contract was made and afterward partially deviated from, as to plan, by consent of plaintiffs without any stipulations as to price, such deviation would not entitle plaintiffs to more than the contract price, unless they have proved it to be worth more; and in that event the contract price must govern in regard to all work done in pursuance of it, and forms the rate by which to estimate the value of such deviation.

65 3d. 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, plaintiffs are liable to defendants in this suit for all such damages as have been proved to be thereby occasioned.

4th. Although a contract by a mechanic to do work and furnish materials in his line of trade is silent as to degree of skill to be exercised, the law, nevertheless, obliges him to do the work in a workmanlike manner, and so as to answer the end for which it was designed.

5th. If the jury believe from the evidence that the plaintiffs agreed to furnish materials and build a vault for defendant and on a plan furnished by defendant, for an agreed price, without any expressed stipulation as to skill in the workmanship, and that the same, soon after being finished, fell down, without fault on part of defendant, or defect in the plan, the plaintiffs are answerable for the damages thereby occasioned.

66 6th. Unless the jury believe from the evidence that the witness, Hall, removed the centres from the vault by the request or under the direction of defendant, the defendant is not responsible for that act whatever might have been its effect.

7th. If the jury believe from the evidence that the plaintiffs undertook to build the vault in question without any agreement as to time of payment, the law implies that payment was not to be made till the work was finished or ready to be delivered to defendant in good condition. And if the jury further believe from the evidence that after said work was done and before delivery to defendant, the arch of said vault fell down without any fault on part of defendant, and that the same was not rebuilt by plaintiffs under their original contract, when this suit was commenced, the plaintiffs are not entitled to recover.

8th. If the jury believe from the evidence that after the arch fell down plaintiff, Smith, agreed to rebuild it upon terms that were accepted by defendant, and that defendant stood ready to comply with the terms so agreed on, and that plaintiffs failed to comply on their part, plaintiffs are not entitled to recover in this action.

67 9th. If the jury shall believe from the evidence that the arch of the vault fell in only a few days after it was finished, that fact is proper for the consideration of the jury in determining whether the same was built in a good and workmanlike manner.

10th. That the plan and specifications by Loucks, with the writing thereunder, is in evidence before the jury, and is a valid contract between the parties until proved to have been set aside by a subsequent agreement between said parties, and it is not material that it should be signed by both parties—if signed by one party, and acquiesced in by the other, and acted on by both, it is sufficient.

11th. If the jury believe, from the evidence, that plaintiffs built an arched vault for defendant, under the contract given in evidence; that said arch fell in, and that plaintiffs afterward were to rebuild it, without further compensation than that specified in the original contract, within a certain time, and that plaintiffs did not rebuild it within that time, and that defendant rebuilt it afterward, then defendant is entitled to have a reasonable compensation for so rebuilding it, set off against what plaintiffs would be otherwise entitled to recover.

12th. 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 upon 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.

13th. If the jury believe, from the evidence, that defendant has suffered damage from default or want of care and skill of plaintiffs, in performing their contract for building vault mentioned by witnesses in this cause, and that such damage exceeds the amount which plaintiffs would otherwise be entitled to recover, the jury should find for defendant the amount of such excess, as shown by the evidence.

14th. If the jury believe, from the evidence, that the arch of the vault fell down after it was built, and before it had been used and accepted by defendant, it is incumbent on plaintiffs to show, by satisfactory evidence the cause of such falling down, or that the falling down was not caused from any defect in materials or workmanship, and if they have failed to make such proof, the law will imply that it was because of improper construction or materials, that the vault fell in: and in that event plaintiff cannot recover.

Which instructions were given by the court:

Verdict for plaintiffs of \$150.

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

1st. Verdict is against the weight of evidence.

2d. Verdict is against law.

3d. Court gave erroneous instructions to the jury, for plaintiff.

Motion over-ruled, and judgment for plaintiffs, and defendant excepted.

ASSIGNMENT OF ERRORS:

1st. In excluding proper evidence offered by defendants below.

2d. In instructions given to the jury for plaintiffs below.

3d. In overruling motion of defendant for new trial.

4th. In rendering judgment for plaintiffs, upon the verdict.

J. K. COOPER,
MANNING & MERRIMAN. } For Appellant.

187-52

SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1860.

“Springdale Cemetary Assaciation,” Appellants,

vs.

Job Smith & Hiram Peirce, Appellees.

**APPEAL FROM CIRCUIT COURT. OF
PEORIA COUNTY.**

ABSTRACT.

H. Couch, Printer, Peoria, Ill.

Filed April 17. 1860

*Leland
Clerk*

1
State of Illinois
Peoria County } ss 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 Peoria County in the State of Illinois, a Transcript of a
judgment from Bernard Bailly a Justice of the Peace of
Peoria County, which with the papers therewith filed is in
the words and figures following to wit:
Job Smith
Hiram Pierce

vs . In Assumpsit
The Springdale Cemetery Association demand \$270.00
Summons issued on the 29th

2)

day of February A.D. 1857 returnable on the 6th day of February next at 10 o'clock A.M. and returned by Saml. Crouse Const. served by reading to the defendant on the 31st inst. Subpoenas issued for Frederick Hartshorn, William Burnett, Josiah Smith, Wm. Thompson, Jas. Morris, Nathan Giles, Francis Mulhollen, John H. Hall, Jas. McLeay, Joshua Ridgley and Edward Hudson and returned by Saml. Crouse Const. served. The plaintiffs demanded a jury. Verire issued and returned by said Crouse served on the following named jurors Presley Mc. Comegys, Samuel Moore, L. Mc. Doup, David D. Snyder, Elias Winchell and A. Mc. Brady - By consent of the parties the cause was continued to the 4th at 8 o'clock A.M. Subpoenas issued for John Armstrong, Wm. Bush, Lawrence Hannan, James Hazzard, Luther Ward - Ryers L. Armstrong, Charles Aldrickson & Lewis Howell - On the 4th the parties appeared by their attorneys. The jurors all appeared but L. Mc. Doup who was indisposed and Charles E. Greenleaf was taken in his place. The jury was empaneled and sworn. The parties proceeded to the trial of the cause and after hearing there proofs and alligations the jury retired and after deliberation returned into Court with the following verdict: "We the jury find for the plaintiffs and assess the damage at one hundred and eighty dollars signed. M. Moore Foreman" It is therefore ordered and adjudged that the plaintiffs recover One hundred and eighty dollars and costs of suit.

State of Illinois

Peoria County } ss

J. Bernard Bailly one of the acting Justice of the peace in and for said County of Peoria & State

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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 Bailly J. P. Seal

(Plaintiffs account)

The Springdale Cemetery Association

To Smith & Pierce

Dr.

1856

Oct. & November

To 48000 Brick, furnishing lime & mortar
& laying up vault at 12¢ per thousand
Cementing vault & furnishing materials
furnishing center for arch

576.00

46.00

20.00

\$ 642.00

Cr. at sundry times

345.

\$ 297.00

(Summons)

State of Illinois
Peoria County

} The People of the State of Illinois to
any constable of said County greeting. You are hereby com-
manded to summon the Springdale Cemetery association
to appear before me at my office in Peoria on the sixth
day of February at 10 o'clock A.M. to answer the complaint
of Job Smith and Hiram Pierce for a failure to pay them
a certain demand not exceeding \$300 and hereof make due
return as the law directs. Given under my hand and seal
this twenty ninth day of January 1857

Bernard Bailly J. P. Seal

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(Endorsed)

Served on Harry Lightner, Peter O. Louks, & Louis H. Howell by reading to them this writ this January 31st 1857

Saml. Crouse Const;

(Defendants account)

"Smith & Pierce

		To Springdale Cemetery association	
For cash pa.	L. Harman for excavation	\$ 53.00	
Oct. 25, 1856.	Cash paid	50.00	
Nov. 1	" do	75.00	
" 3	" do	220.00	
Damage for failure to perform contract		500.00	
		<u>\$ 8.98.</u>	

(verdict of jury)

"We the jury find for the plaintiff and assess the damage at One hundred and eighty dollars
J. C. Moore Foreman.

And afterwards to wit on the 22nd day of October 19, 1857 there was issued out of the office of the Clerk of the Circuit Court in and for the County of Peoria in the State of Illinois & under the seal thereof a Summons in said cause which is in the words and figures following to wit:

Summons

"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

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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 prosecute their suit against the Springdale Cemetery Association lately appealed to our Circuit Court from the decision of Bernard Baily 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 his ^{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 22nd day of October in the year of our Lord one thousand eight hundred and fifty seven.

Enoch P. Sloan, clerk

Which summons was afterwards returned by the said Sheriff endorsed as follows to wit;

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

J. W. Smith Sh.

Proceedings in the Circuit Court at a term thereof began and held at the Court house in the City of Peoria in and for the County of Peoria and State of Illinois on the second Monday of May in the year of our Lord one thousand

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eight hundred and fifty seven it being the eleventh day of
said month. Present the Honorable Elihu N. Powell, Judge
of the sixteenth Judicial Circuit in said State, Francis W.
Smith Sheriff and Enoch P. Sloan Clerk to wit:

Monday May 11th A.D. 1857
Job Smith
Hiram Pierce

vs
Drumfrit - Appeal
Springdale Cemetery Association app.

This day came the plaintiffs
by Grove & McCloy their attorneys and entered a motion herein
to dismiss this appeal.

Thursday May 28th A.D. 1857
Job Smith
Hiram Pierce

vs
Appeal
Springdale Cemetery Association

This day came Henry Grove
and entered the appearance of the plaintiffs in this cause
and on his motion this cause is continued to the next term
of Court.

Proceedings in the Circuit Court at a term thereof began
and held in the Court house in the City and County of
Peoria in and for said County and State of Illinois on the
third Monday of November in the year of our Lord One
thousand eight hundred and fifty seven, it being the

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sixteenth day of said month. Present the Honorable,
Elihu N. Towell Judge of the 16th Judicial Circuit in the
State of Illinois, Francis W. Smith Sheriff and Enoch P.
Hoan Clerk to wit:

Thursday December 3rd A.D. 1857
Job Smith
Hiram Pierce

vs
Appeal from J.P.
Springdale Cemetery Association

This day came the plaintiffs
by Grove their attorney and the defendant by Bryan and
Cooper its attorneys and it is ordered by the Court that a
jury be enfranchised to try the issues in this cause. The
plaintiffs by their attorney renewed their motion to the Court
to dismiss this appeal for reasons on file, which motion on
consideration of the Court was overruled. Whereupon came a
jury of twelve good and lawful men to wit: William G. Huey,
Edwin Matthews, Alpheus Richardson, Daniel Bristol, Joel B.
Gillet, James Delano, Anderson Grimes, G. W. Morris, Henry
Keach, William Vinson, Matthew Taggart and Thomas P.
Reed, who being duly chosen, tried and sworn to well and truly
try the issues joined in this cause and a true verdict give
according to the evidence were adjourned to meet the Court
at nine o'clock to morrow morning

Friday December 4th A.D. 1857
Job. Smith & Hiram Pierce

vs
Springdale Cemetery Association

Appeal from J.P.

This day again came the

parties to this suit by their attorneys and also came the jury empannelled and sworn on yesterday to well and truly try the issues joined in this cause and a true verdict give according to the evidence. And the ^{said} jury not having heard all the evidence in this cause were adjourned to meet the Court to morrow morning at nine o'clock

Saturday December 5th A.D. 1857
Job Smith
Hiram Pierce

vs
Springdale Cemetery Association

Appeal from J.P.

This day again came the parties to this cause by their respective attorneys and also came the jury empannelled and sworn on Thursday last to well and truly try the issues joined in this cause and a true verdict give according to the evidence. And the said jury having heard all the evidence in the case the argument of counsel and the instructions of the Court, retired to consider of their verdict.

Monday December 7th A.D. 1857
Job Smith
Hiram Pierce

vs
Springdale Cemetery Association

Appeal from J.P.

This day came the parties to this cause and also came the jury empannelled to try

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this cause on Thursday last and sworn to give a true verdict according to the evidence do say through their foreman that they are unable to agree upon a verdict. Therefore it is considered by the Court that the said jury be discharged from further consideration of the subject.

Proceedings at a term of the Circuit Court began and held in the Court house in the City of Peoria in and for the County of Peoria and State of Illinois, on the first Monday of March in the year of our Lord One thousand eight hundred and fifty eight, it being the first day of said month. Present Honorable Elihu N. Powell Judge of the sixteenth judicial Circuit in said state, Francis W. Smith Sheriff and Enoch P. Sloan, Clerk to wit:

Wednesday March 3rd A.D. 1858

Job Smith
Hiram Pierce

vs
Springdale Cemetery Association

Assumpsit = Appeal

continued.

By agreement this cause is

Proceedings at a term of the Circuit Court began and held at the Court house in the City of Peoria, County of Peoria and State of Illinois on the second Monday of May in the year of our Lord one thousand eight hundred and fifty eight it being the tenth day of said month. Present the Honorable Elihu N. Powell, Judge of the sixteenth

judicial Circuit in said State, Francis W. Smith, Sheriff
and Enoch P. Sloan Clerk to wit-

Wednesday May 12th 1858

Job Smith
Hiram Pierce

vs
Springdale Cemetery Association

Appeal from J. P.

On motion this cause is
passed out of its order upon the docket - at the costs of
defendant up to date of this term. Therefore it is considered
that the said Job Smith and Hiram Pierce have and
recover of said Springdale Cemetery association their costs
and charges by them about their suit in this behalf expended
at this term of Court up to this date and that they have
execution therefor.

Tuesday May 18th A.D. 1858
Job Smith
Hiram Pierce

vs
Springdale Cemetery Association

Appeal from J. P.

By agreement of parties this
cause is submitted to Luther Ward Joseph Wright, and
James M. Cunningham to arbitrate, and it is further agreed
that the judgment given by said arbitrators shall be made a
rule of this Court.

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

Friday December 3rd A.D. 1858.
 Job Smith
 vs
 Hiram Pierce

Appeal from J. P.
 Springdale Cemetery Association

This day came the plaintiffs by Groves their attorney and moves the Court to vacate the Order of reference heretofore entered in this cause; and on consideration said motion is allowed. And it is ordered that this cause stand for trial in this cause, and this cause is on motion continued.

Proceedings at a term of the Circuit Court began and held at the Court house in the City of Peoria in and for the County of Peoria in the State of Illinois on the first Monday of March in the year of our Lord one thousand eight hundred and fifty nine it being the seventh day of said month. Present the Honorable Elisha N. Powell Judge of the 16th judicial Circuit in the State of Illinois, John Boyner Sheriff and Enoch P. Sloan Clerk to wit;

Tuesday March 8th A.D. 1859
 Job Smith & al

vs
 Spring Dale Cemetery Association

Appeal

By agreement this cause
 is continued.

Proceedings at a Special term of the Circuit Court began
 and held at the Court-house in the City and County of Peoria
 in the State of Illinois on the second Monday in the month
 of June in the year of our Lord one thousand eight hundred
 and fifty nine it being the thirteenth day of said month.
 Present the Honorable Elisha N. Powell, Judge of the
 16th Judicial Circuit in the State of Illinois, John Boyner
 Sheriff and Enoch P. Sloan Clerk to wit:

Tuesday June 14th A.D. 1859
 Job Smith & al

vs
 Spring Dale Cemetery Association

Appeal from J.P.

On motion this cause is
 continued at defendants costs of this term of Court. Therefore
 it is considered by the Court that the said plaintiffs have and
 recover of said defendant their costs and charges by them
 about their suit in this behalf expended at this term of Court
 and that they have execution therefor.

Proceedings at a term of the Circuit Court of Peoria County
 began and held at the Court-house in the City of Peoria

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in said County and State of Illinois on the ~~first~~^{third} Monday
in the month of November in the year of our Lord One
thousand eight hundred and fifty nine it being the
twenty first day of said month. Present the Honorable
Elihu N. Powell Judge of the 16th judicial Circuit in
said State, John Bryner Sheriff and Enoch P. Sloan, Clerk
to wit:

Monday November 21st A.D. 1859
Job Smith
Hiram Pierce

vs
Spring Dale Cemetery Association

Appeal

This day came the plaintiffs
by Groves and Davidson, their attorneys and also the defendant
by Cooper Bryan & Manning its attorneys and it is ordered by
the Court that a jury be empanelled to try the issues in
this cause, whereupon came a jury of twelve good and lawful
men to wit: Daniel Frank, Peter Oline, J. A. Block, P. Haulon,
Ezra Sprague, Joseph Armstrong, J. D. Klingery, J. H. Patterson,
J. D. Bromwell, J. H. Torrey, Jerome H. Lease and James
Kellar, who were duly chosen tried and sworn to well and
truly try the issues joined in this cause and a true verdict
give according to the evidence. And the ^{said} jury not having
heard the evidence in the case were adjourned to meet the
Court at nine o'clock to morrow morning.

Tuesday November 22nd A.D. 1859
 Job Smith
 vs
 Hiram Pierce

Appeal from J.P.
 Spring Dale Cemetery Association

This day came the parties by their respective attorneys and also came the jury sworn on yesterday to try this cause and the said jury not having heard all the evidence in the case were adjourned to meet the Court at nine o'clock to morrow morning.

Wednesday November 23rd A.D. 1859
 Job Smith
 vs
 Hiram Pierce

Appeal from J.P.
 Spring Dale Cemetery Association

This day came the parties to this suit by their respective attorneys and also came the jury empaneled and sworn on Monday last to try the issues in this cause and the said jury having heard all the evidence in the case, the argument of counsel and the instructions of the Court, retired to consider of their verdict.

Thursday November 24th A.D. 1859
 Job Smith
 vs
 Hiram Pierce

Appeal from J.P.
 Spring Dale Cemetery Association

This day came the parties

to this suit by their respective attorneys and also came the jury empanelled and sworn on Monday last: to well and truly try the issues joined in this cause and a ~~tr~~ true verdict give according to the evidence and the said jury upon their oaths aforesaid do say, we the jury find the issues for the plaintiffs and assess their damages at the sum of one hundred and fifty dollars. Therefore it is considered that the said Job Smith and Hiram Pierce have and recover of the said Springdale Cemetery Association the said sum of One hundred and fifty dollars their damages aforesaid and also their costs and charges by them about their suit in this behalf expended and that they have execution therefor.

Monday December 5th A.D. 1859
 Job Smith & al
 vs
 Springdale Cemetery Association

Appeal from J. P.

This day this cause came on to be heard on the motion of the defendants for a new trial of this cause and the Court being satisfied in the premises overruled said motion.

Thursday December 8th A.D. 1859
 Job Smith & al
 vs
 Springdale Cemetery Association

Appeal from J. P.

This day come defendants by their attorneys and prayed an appeal to the Supreme Court of this State, which is allowed on their filing

in the office of the clerk of this Court - in 30 days an affidavit bond payable to the plaintiffs in the penal sum of one thousand dollars, with Hervey Lightner, William A. Hall and Isaac Underhill or any two of them as security, conditioned as the law directs.

And afterwards to wit on the 11th day of January A.D. 1860 there was filed in the office of the Clerk of said Court a bill of exceptions which is in the words and figures following to wit:

" Job Smith & al

vs

The Springdale Cemetery Association

In the Circuit Court Peoria
County Ill.

November term A.D. 1859

Be it remembered that on the coming on of this cause for trial before said Court & a jury the plaintiffs to maintain the issues on their part called Jeremiah G. Smith who being duly sworn testified - that was a brick mason by trade & had been for ten years, that he knows the pffs & the Cemetery grounds on which said pffs built a vault for defendant three years ago this fall. Witness together with Frederick Hartshorn measured it after it was built. Thinks 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~~ The measurement all round 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 -

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There were 118,268 brickⁱⁿ it by masons measure - It was worth \$12. per M. to furnish the materials & build the vault (It was here admitted that plaintiffs furnished all materials I helped to build said vault - Peter O. Loucks was there - He said some things wanted change - the wings 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 from the wall & were altered from 8 inches wide to 12 - I was there at the start of the mason work - Cyrus Pierce, Hiram'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 Burn's bank and was good - The brick were from Giles' Kiln & were A. No. 1 - Plffs. paid \$7 per M - an extra price for the brick - the mortar was made from Wilson's 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 saw the materials & made no objection that I heard - if he had I would likely have known it - he told us about the front and Smith told us to make alterations as Loucks directed. The hands employed were good experienced

workmen.

Mr. Cr. 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 ^{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 of 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-ex - The plans were referred to only to get at size of walls & arch - The walls were hollow - Loucks directed about putting in ties - think the sidewalls were built some briches 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 - He was 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 stayed till Morris finished the job - The centerpiece was taken out - about a month after the brick work was done - In my judgment the job was well done & was then finished.

Nathan Giles - also called by folks said I am a brick maker and sold the brick to the folks to build said vault - I helped to load two loads - there were good bricks - I was paid something extra, don't know how much for good brick - judging from the general appearance, the

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Kiln from which these brick came was good. There were soft brick in it - don't know whether these were taken - The filffs bot hard brick.

David Burns - next called by filffs - said - I hauled the sand for this vault - It was the same I furnish other builders in town and think none much better. My teams hauled the brick - think I helped to load one or two of the first loads - I have no particular recollection of the brick, but think they were good - ^{saw them on the ground at the vault} but did not examine them particularly -

Cr. Et. I hauled that is my teams hauled all the brick for this vault but two loads - my teams hauled between 30 & 40 thousand in all - I got one dollar per thousand for hauling them - and ^{my} bill for hauling said brick was about - \$35. = somewhere between \$30 & \$40 - the loads ranged from 500 to 800 or 900 bricks each.

William Thompson next called by filffs, said: I am a brick mason & have been from 14 to 18 years - I helped to build said vault - the materials were good so far as I know - I laid about the first and last brick - The men were all pretty good workmen - Loucks was there off & on pretty much all the time - he gave some directions about the fillasters - the wings were built something longer & the sides from four to six inches higher by his directions - the work was well done so far as I know - Loucks appeared pleased, found no fault with the work or materials that I heard ~~the~~ We went straight through with the work & were 7 or 8 days doing it - The cementing on the out side was done

20- as the wall was laid - The center piece was in when I left.
+ Cr. Ex. We had cement enough for the outside - Loucks directions had nothing to do with the turning of the arch or the manner of doing the work except as to plan, and made it no more difficult to build - The arch was a half circle which is as strong a form of arch as any - and if well built & the materials good such an arch ought to stand.

William Bennett next called by plffs said: I helped to build part of this vault, have been a brick mason 16 or 17 years - I only helped to build the front, except about 2 hours on the arch the last day - Loucks was there several times and gave directions as to the front - He had a plan & would come around & figure out from it & make suggestions - the materials were pretty good so far as I recollect - The work was well done - Loucks directions regarded only the plan or style of the building & not the manner of executing the mason work. The front had nothing to do with the strength of the arch. The plan used by Loucks was here shown & identified by the witness and is the same attached to the deposition of Loucks below.

On Re. Ex. This witness stated there are no specifications on this plan - Don't know whether the other plan there or not.

Cyrus Peirce next called said: I am a brick mason & helped to build this vault - As far as I know the materials were good & tho't the workmanship very good - I think the work was done under Loucks directions & to his satisfaction - I helped to finish the arch but not to cement it on the inside - The cement on the out side was

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good & properly put on - It was an inch thick - Loucks was there more or less - Don't 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

Gazen L. Ryors next called by folks, said: I am a cooper & made the center pieces for this arch, they were made in the usual way. It was worth 25 dolls to make & take them up - Smith paid me for them, the arch is semicircular.

X= I saw the vault after the arch was taken down - The side walls were not injured - It was not cemented on the inside then - on account of the shape of the ground the water in case of rain could not flow to any extent upon the top of the arch from the hill behind it. I saw some bricks loose in the arch at this time - one whole brick & two or three pieces were loose - one of these which might be called the key brick had fallen down $\frac{1}{2}$ to $\frac{3}{4}$ of an inch - John Hall called my attention to this & said he tho't the arch would fall - I did not think so then - Hall pushed this loose brick up with a stick & would fall back.

Re - Ex - Hall told me he had taken out the arch - Hall was keeper of the grounds & in attendance there - The loose brick could not have been rendered so by the taking out of the centers. The loose brick particularly spoken of above was from 7 to 9 feet back from the front & right in the top or center of the arch - The walls were not dry at this time - the sidewalls

were 6 or 7 feet high when I put in the centers - Hall merely raised the brick to let me see it was loose - the other bricks referred to as loose I could see were below the others, one before & one behind the one Hall raised - all three appeared to be in the top or center course - there were 5 wooden centers made by ~~the~~ me for this arch - I laid the boards on them & used for this purpose common fencing boards - a man of ordinary capacity might take out these centers - tho' the arch might be injured in the process by getting the timbers on a balance -

2nd X - I saw no injury that could have resulted from taking down these centers - the damage if any would have been to the front wall in forcing it out - the brick referred to could not have been loosened, as they were by taking down these centers -

James Morris next called by plffs said, I cemented the inside of this arch on the 26th of November 1856 & did the work in a workmanlike manner - the materials were good - the centers were taken out at this time - Smith helped a little at start of the cementing - if any bricks were then loose I should have noticed it - & I saw none - If a brick had been out - I could not have cemented without putting it in - Am a brick layer have worked at that trade 16 years - tho't the arch well built - it looked like a good job -

X I did not put all the cement on - commenced at at top or center - Smith put some on - I was out several times during the day - say 1/2 doz. times - my attention was not called to the way the arch was built, nor to what Smith was doing - my back was often turned toward him - If there were any

holes in the top, except for ventilation I did not notice them.
 Re - Ex - Don't know whether Smith & Peirce put on any cement while I was out - after we got started Smith was employed in scraping of the mortar & smoothing the inside of the arch - worth 20 cts per square yard to furnish materials & cement the arch on the inside - worth about \$13 in all.

Patrick Harman next called said - I dug the foundation for this vault - Smith employed me - when I had finished Loucks & Lightner came & wanted it dug 3 feet deeper - I did so & they agreed to give me \$20 for it - whether this was charged to Smith I don't know, Lightner paid me.
 X Smith employed me in the first instance ^{and gave me my order on Lightner} for the whole amount of my original bill for digging the foundation & the \$20 for making it deeper - some \$53. in all which Lightner paid.
 The direction to me was to dig the foundation 3 feet deeper - We talked at first about setting the vault further back into the hill but concluded to make it deeper instead.

Re - Ex - They - that is Loucks & Lightner talked in this way that the vault should be set further back.

Patrick Harman Jr. next called, said - I helped to dig the foundation of this vault - We dug it 3 feet deeper afterwards than at first - This bro't the roof of the vault nearer to the level of the ground above - Smith showed us the stakes to dig by - Hall & I think Loucks was there.

William Giles next called said - I am a brick - maker - Smith bought brick of us to build said vault - He bargained for as good a lot - as we could furnish - We gave him a good lot - he got 7000. extra brick for front -

Helped to load the brick.

Peffer here rested.

Deft. then called James Hazard, who testified as follows: I am a bricklayer & have been since 1833 - I have seen the vault in question after it fell in - I have built a good many arches - this arch if properly built should not have fallen in unless broken down in some way - It was in form of semi-circle which is the strongest that can be made - part of the arch at the back end about $\frac{1}{3}$ was still standing when I saw it - the side walls were not sprung - and when the side walls do not give, no weight scarcely on the top should throw the arch down - nor would rain & water flowing on it from above affect it if properly cemented on the outside.

Cr. Ex. About $\frac{2}{3}$ the length of the arch at the center had fallen when I saw it - But it had not fallen clear down at the sides - It was left standing higher on one side than the other - The rain and frost should not have thrown the arch down - the door being open ought not to have affected it. The cement on the inside of the arch was then firm & covered all the arch that had not fallen down.

Re-Ex. I saw some soft brick in this arch - once in a while a brick that was pretty soft.

Luther Ward next called said: I am a brick layer - and have been a long time at the business - I saw this vault after it fell in - This was in February 3 years ago - The form of this arch is the strongest that can be built, and if well built it should not have fallen - scarcely any weight upon the top should have thrown it down if the sides did

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not give way
 Cr. Ex. There is near 100 yards cementing inside & out on the vault - worth about 20 cts per square yard to furnish the materials & cement it - from $\frac{1}{3}$ to $\frac{1}{2}$ of the arch was standing when I saw it - The cementing was all in that part of the inside of the arch that was still standing. I cannot state what caused the arch to fall - there was no reason why it should have fallen if well built -

John Hall next called said; 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 workmen so - some of these soft brick were put in the side walls & some in the arch. The 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 out side 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, and 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 hill in which the vault is built upon the vault, for the ground above 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 centers out of the vault about the latter part of the week after the arch was closed and 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 centers I first dug out at the foot of the posts along on one ~~end~~ 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 centers 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 centers came regularly down - I saw no disturbance of the arch except a piece of brick which 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 filled the centers down - the vault was rebuilt by Peirce 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 recovering it cost \$35 and some cents. (here receipts, payments to the plffs. to the amount of \$399 $\frac{32}{100}$ were offered by deft. & admitted by plffs.) But this sum includes the whole amount paid Harman for digging & deepening foundation, twenty dollars of which plaintiffs claim defendants should pay, but does not include the above sum paid by Deft. for rebuilding the arch.

Witness then further stated - 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.

Gr. Ex. When Loucks 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 and 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 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 December - When Peirce 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 spauls 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 4 masons at work - The opening in this arch when they came to the key course was narrowest in front - Smith consented to having the foundations dug deeper rather than go further back into the hill -

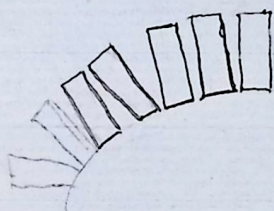
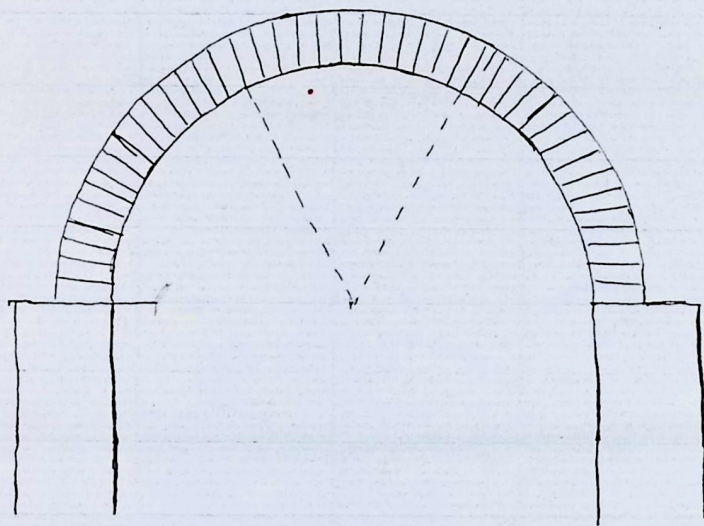
On re-examination this witness said - the plans for this vault were on the ground and referred to white pliffs.

were building said vault - The vault was rebuilt by Peirce in the latter part of June & early part of July 1857.

Charles Ulricson next called by aft. said. I know the vault in question - said after a portion of the arch had fallen down - Am an architect and have been for 21 or 22 years - I am conversant with the different modes of building arches - about one half or some more of this arch had fallen when I saw it, which was in the winter, in January or February, a month or two after it fell - I understood it fell in December preceding - I examined the masonry of the arch where it was not covered - the cement had fallen off a number of square feet, which could be seen - there was a length of six or seven feet along the top or center of that part of the arch which was standing from the aperture where broken back and running down the sides about two feet, which was uncovered. There were also some other spots from which the cement was off - the courses of brick in this arch did not ~~run~~ run in parallel lines - at the key course they were wider apart behind than forward, - what constituted the key was as much as two courses wide behind and tapered forward so as to be only one course wide where it broke off and seemed to have come together or nearly so, in front - To be strong an arch should be so constructed that all the brick should verge directly towards the centre - as built the brick in this arch were not so laid but were irregularly laid verging toward different points. Two diagrams, ^{made by witness} were here exhibited to the jury -

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which said diagrams are in form as follows:



The upper one of which witnesses said, showed how the brick in a well built arch should be laid and the lower one was designed to represent & did represent the manner the brick in this arch were laid as could be plainly seen where the arch was broken - on the sides and for some distance up this arch was pretty well built - but toward & at the centre it was not well built - there the brick were so laid as hardly to form a key at all - it became necessary to fill up with spauls & broken brick to close the arch - This arch was a semicircle which is the strongest form of arch and very hard to break unless the sides or abutments give way - I did not form a distinct judgment in the exact cause of this arch's falling - but if it had been well built it should not have fallen - there was no weight of dirt upon it to throw it down - It was a foot thick and the weight such an arch should carry could hardly be calculated - When an arch is well built it is best to take out the centers soon & while the wall is green - this gives the arch an opportunity to settle and the brick to press together more regularly - If the arch is poorly built it is safest to let it stand with the centers in till the mortar is well set to the brick & becomes indurated in which case if the mortar is good & has time to become hard & crystallize it will become almost as hard as the brick and may hold up the arch however irregularly laid There was snow on the ground when I went up.

James McCloy next called by aft said: I was present in the fall this arch was built at a conversation in Peter O. Loucks' store in Peoria between said Loucks & Smith

one of the plaintiffs about said arch - Smith came to get Loucks to accept it - Loucks said he had heard it had fallen down - Smith then wanted the Company to pay for building it - Loucks said the Company would not pay for it, as it then was, but if he Smith would go on & rebuild it, the Company would pay according to contract. Smith then said that he would fix it up the first fair weather but wanted the Company to furnish the materials. Loucks would not agree to this and they were arguing a long while who should furnish the materials. Loucks seemed to convince Smith and I understood Smith to agree to furnish the materials and the first fair weather to go & rebuild the vault.

Cr. Ex. Smith asked Loucks at first to go up & accept the vault and said the falling in was not his fault. In this conversation Smith insisted that it was not his fault that the vault fell. Loucks insisted that it was his fault and finally the agreement to rebuild was made as before stated.

Next offered in evidence the deposition of Peter O. Loucks which is in the words & figures following:

"Job Smith et al
vs
The Springdale Cemetery Association } Circuit Court - Peoria County
Ills. - 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 hour of 8 o'clock A. M. and 6 o'clock P. M. of said day at the

office of Bryan and Stone in the City of Peoria in said Court 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 plaintiff can appear and cross examine said witness if you deem proper.

Bryan & Stone & Cooper
for defendant.

To Henry Grove Esqr. atty }
Peter Davidson Esqr. for plffs }

Recd. 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 Wilmot Notary Public in and for the City of Peoria and State of Illinois at the office of Meersers, 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 22nd days of October A.D. 1859 pursuant to the annexed notice. Said depositions to be read in evidence on the part of the defendant 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 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 or 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 on the ground of the Company a little north of the City - I don't remember the date, but I think it was in the year 1856, it was in the fall, think in October or November but am 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 denoted 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 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} to that; I then erased 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 -

Answer objected to

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.

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 on the papers now shown you and marked A & B the same plans in question, you then had before you. —

Answer. The plans A and 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 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.

Answer: I do, it is Smith's and was made at the time we made the agreement.

Interrog.^y 6th. Was or not said writing designed to evidence to any extent and how far the contract then made between you and said Smith and Pierce. —

Answer. It was so evidenced 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 an 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

Interrog. 7th. State whether or not, Smith & Peirce did go to work immediately on said contract,

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

Interrog. 8th. State what you know about the completion of the work under said contract by said Smith & Peirce 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 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

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that time, but he came a week or ten days after and set a day - May 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 to with me to rebuild the arch, and we were to pay him the amount specified in contract, when that was done. It was never rebuilt according to my knowledge by them.

Q. What extra work if any, was done by said Smith & Pearce upon said vault.

A. He built those wings longer, but I don't know how much, it could not have exceeded two or three feet longer and the additional costs 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 this was because it had been put up wrong and they took it down themselves & put it up again to conform to the plan.

Q. What kind of material did Smith & Pierce agree to use in construction of said vault & what was the character of the material actually used.

A. They agreed to put in good hard brick, in the springing of the arch, they put in a good many bats and soft bricks, to which I objected & told the workmen, when they were springing the arch that they were using too many

lghts and 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 and paid for hard brick & he would go and see about and started for that purpose.

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

Ans^r. I have not. My interest therein has ceased for two years or more.

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

Cross examination by plaintiffs

Interrogatory 12th. 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, when did you cease to act as President and why - what share or interest or part had you in that company or in the capital stock thereof at the time you made 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 parol - 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, was it before or after the road
 was made. 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
 Hannan to dig the foundation as last decided upon,
 where the Company to repair or make the road over
 which the brick 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 Edw^d 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 suspected 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 Harmon. I don't know whether the company was to make or repair the road over which the brick was hauled, but the company did make the road over which the brick was hauled.

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Examination of chief returned.

Interrog. 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.

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 would be as well set then.

Interrog. 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 as far as you know.

Answer. There was an alteration made ^{either} by Smith or Harman who was in Smith's employ - the effect of this 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 on in the morning that John Hall said the excavation was not deep enough into the bank and when I got there found it so and showed Smith it was not done as the stakes had been set.

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Harmon 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 & Harmon 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 Harmon & charge Smith in the settlement of his account.

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 Neal 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.

Interrog. 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.

Interrog. 5th. Would you or not have probably known

it, if they had done so.

Answer. I think I should.

Inty. 6th. Did or not Smith know 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 roads.

Second Cross Examination by plaintiffs

Inty. 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.

Inty. 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 of to the contrary at that time.

Inty. 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.

Inty. 4th. State how long after that conversation it was until he came the second time to you to settle.

Answer. From about seven to ten days.

Inty. 5th. Did he say in that second conversation that the job was done or the vault was finished or words to that effect.

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Answer. I think he did.

Inter. 6th. Did you deny it in that conversation?

Answer. I did not.

Inter. 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. 8th. Was that the time you told him the arch had fallen in?

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

Inter. 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.

Answer. He did say it was not his fault but it was caused by the rain and water running down the bluff.

Inter. 10th. Is that the conversation in which he offered to repair the vault?

Answer. It was at the same time.

Inter. 11th. Did he offer to repair the vault if you would furnish him the materials to do it?

Answer. He did.

Inter. 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?

Ans. Yes that was part of his proposition.

Inter. 13th. How soon did he propose to repair the vault if the materials were found him by yourself or the company?

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Answer. The first warm weather.

Inty. 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.

Answer. I did not.

Inty. 15th. Was there anything said by him about repairing the vault that winter in that conversation.

Ans^r. There was.

Inty. 16th. State the precise words he used if you recollect them.

Ans^r. 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.

Inty. 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. He did not.

(Re-examination by defendants)

Inty. 1st. How many interviews had you in all with Smith or Smith & Pearce 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 Pearce with regard to settling, but had three interviews with Smith on that subject; the first time he called he stated the job was nearly complete 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 ~~etc~~ 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 everything to rebuild the vault - he agreed to it.

Inty. 2. If any additional compensation was to be paid by the company to Smith & Pearce for rebuilding the vault - please state what it was.

Ans. There was not any.

Inty. 3. Do you know who set the coping that you state was not on the 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. I agreed with Mr. Hayes 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 A. Loucks will you now state upon oath all that was said by Mr. Smith and by yourself in the

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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 & fairly, so help you God, state where the conversation took place, when and who was present.

Answer. 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.

Interrog. 2nd. Do you upon your oath state that you can not make any further or fuller answer to above interrogatory last above.

Ans^r. Not with any certainty

Interrog. 3. - How many private conferences have you had with the attorneys of the defendants, since the commencement of this prosecution.

Ans^r. They have spoken to me several times but I can not tell how many as I have not kept account.

Interrog. 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^r. I have already stated what I recollect of the matter and cannot tell who spoke first.

Inty. 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.

Inty. 6. Did Smith in that conversation say anything if he did state what he said repeat his words.

Ans. I can't repeat his words any nearer ~~that~~ ^{than} I have already done.

Inty. 7. Please repeat now what he said in that conversation.

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

Inty. 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.

Inty. 9. Did anybody else say anything in that conversation if they did state who it was & what they said.

Ans. I don't know of any thing being said by any one else.

Inty. 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.

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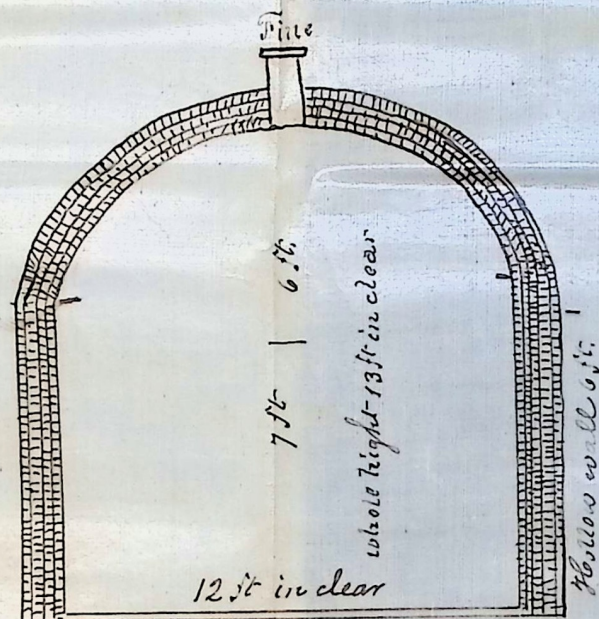
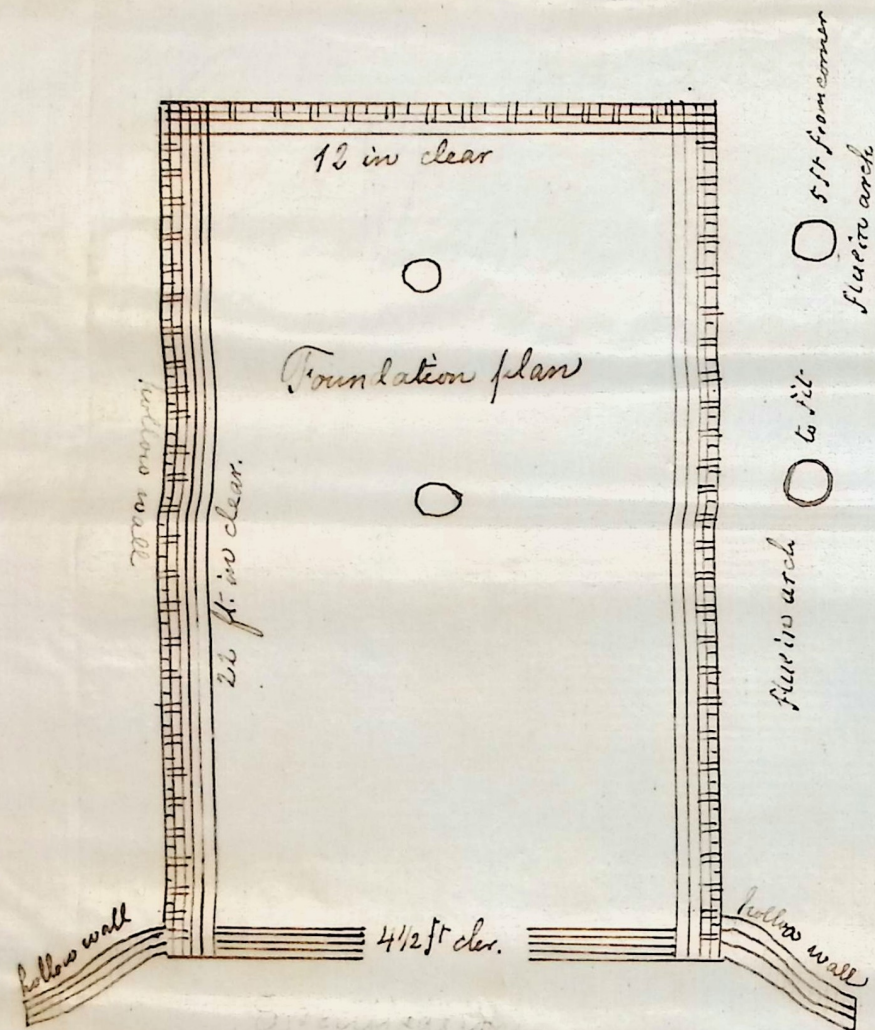
Ans. Mr. Smith being in my store at that time and after a great deal of conversation on both sides, and which I do not recollect sufficiently to state the very words, but Mr. Smith did at first propose to rebuild the vault providing the Company would furnish the materials, and in reply to this proposition 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 Smith's expense and which he said he would do the first warm weather

P. O. Loucks

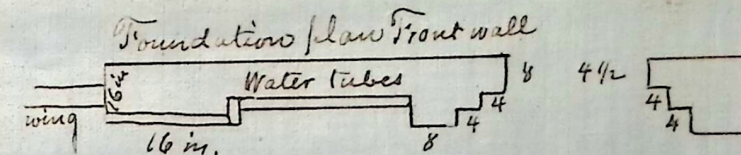
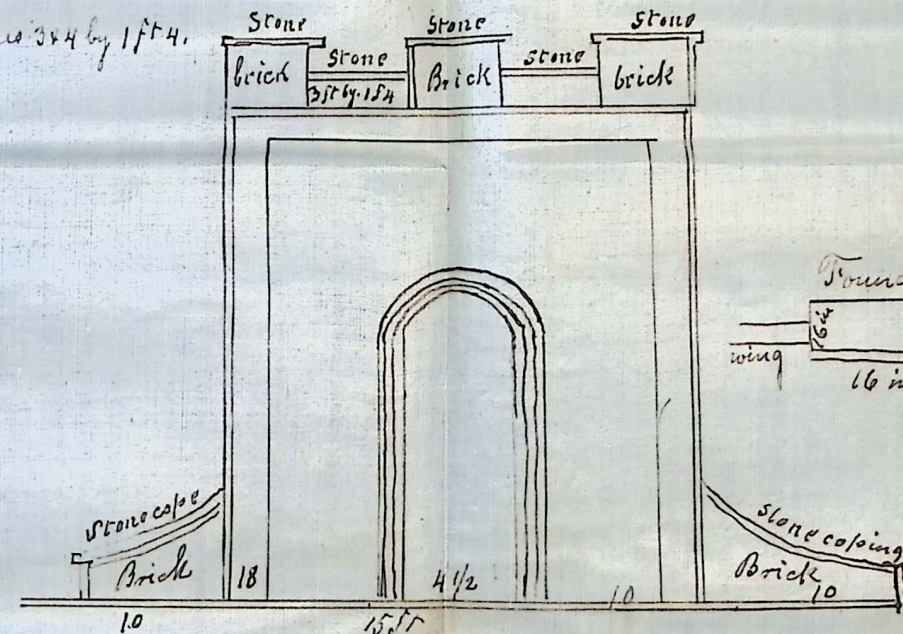
(Certificate)

State of Illinois
City & County of Peoria } I, George Wilmut 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 and 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} ~~having~~
~~been~~ so taken & carefully read over to said witness the
said depositions was subscribed by him in my presence.
In witness of all which I have hereto subscribed my name and affixed
my material seal at said City of Peoria this twenty second day of
October A.D. 1859
George Wilmut, Notary Public

This is the paper referred to marked D 8 in
the deposition of P. O. Loucks. George Wilmet, N.Y.



Size coping 3x4 by 1 ft 4.



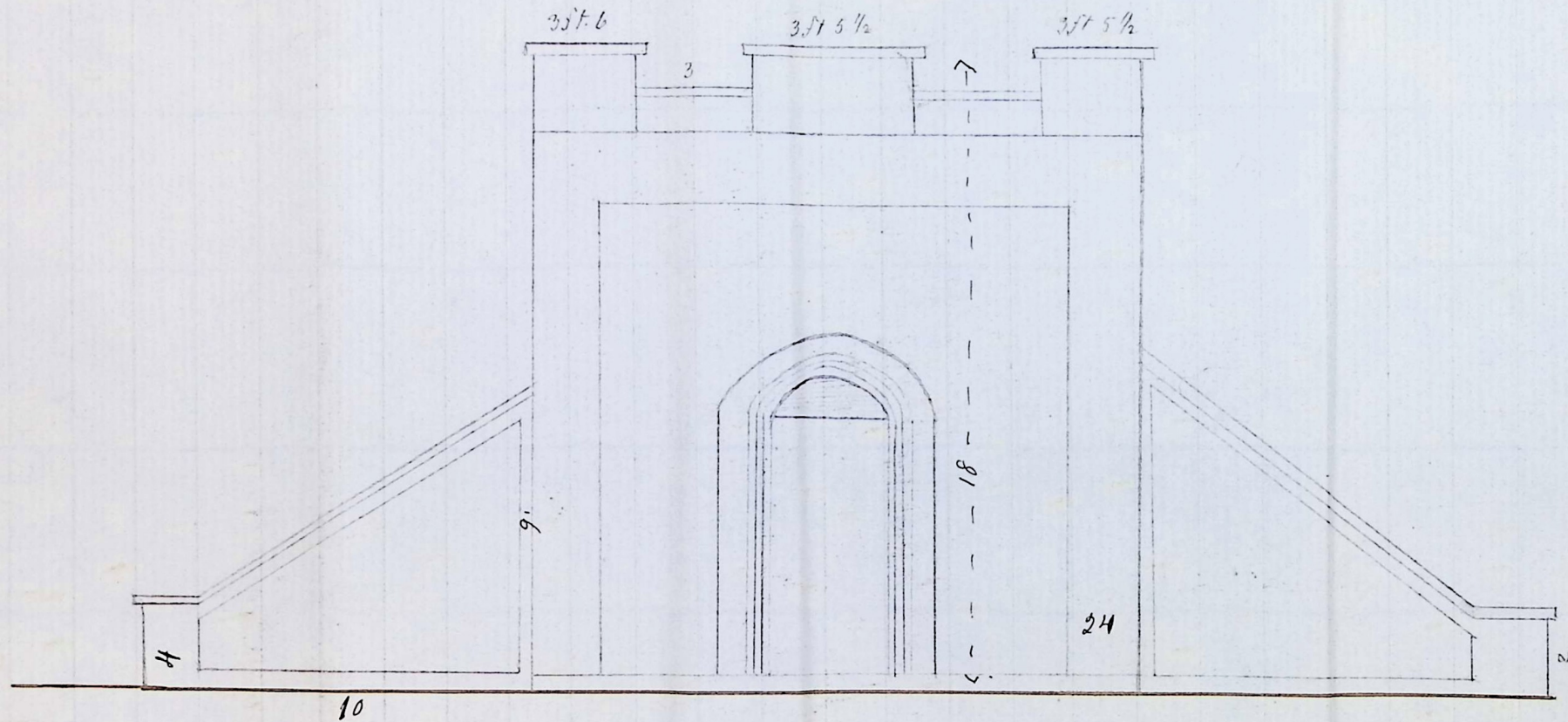
Contractor to furnish all materials & finish work except front door & stone cill & copings, walls to be of good hard brick
20 in in breadth walls to be laid hollow to the height of 10 feet excavation to be made by contractor in old well to be plastered
to finish with stone coping forming a front arch to cover top of balustrade & pieces 3 ft 4 in by 1 ft 4 in & two 3 ft 4 in coping to project 2 inches on all sides of the wall to furnish door sill 2 ft. long 2 in wide & in
with coat cement on the out. side 1/2 in thick front of foundation to 18 in below surface, banistrade for front about 16
arch to 12 in thick, the floor to be cemented also the inside walls, the arch to be 12 in thick
I agree to furnish material & do the work in the above plan & specificate for the sum five hundred & twenty five & fifteen
dollars
Smith & Pierce

thick Stone lime Stone

Diagram A

Handwritten notes and a small musical staff sketch are visible on the left margin of the page.

(B)
 This is the paper marked B referred to in the deposition
 of P. O. Loucks. George Walnut, N. J.



To the reading in evidence of certain parts of which deposition selfs by their counsel objected, and the Court then and there sustained said objection and excluded the following parts of said deposition from the jury

"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 denoted 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 five hundred and fifteen dollars"

+ + + + +
 "They agreed to put in good hard brick"

To which decisions of said Court in sustaining said objection and excluding said parts of said deposition aft; by its counsel then and there excepted.

Defendant then read the said deposition except the parts excluded in evidence to the jury.

Deft then recalled Luther Card who said. I have heard Hall's statement as to the method employed by him in taking down the centers from this arch - It was properly done and the way I should have done it - No possible injury could have resulted to the arch from the manner of taking down these centers.

Gozen L. Ryors was then called by Deft; who said, I heard Hall's statement about taking down these centers. It was done the right way - the arch was not hurt in the taking down of said centers.

Defendant here rested,

Plffs. then called as rebutting evidence said James Morris who said, I did not see Smith chinking up any loose brick in this arch when it was cemented - If he had I should likely have seen him, if looking that way - the arch looked well when I cemented it - It looked as well as the last arch when I cemented it - the courses were as straight and bricks laid as well in the one as the other.

Co. Ex. My attention was not called to the fact whether the courses were straight or not.

Mr. Thompson recalled by plffs said. I heard Hall's testimony - I did not mix any common mortar with the cement - for the arch of this vault - saw none mixed with it - think I should have seen it if done - I believe we had plenty of cement. I did not notice particularly the soil with which Hall covered the vault - But think there were some chunks among it - I did not hear Hall or Loucks complain of soft brick - should have heard it if made in my hearing. The arch of this vault was a $\frac{1}{2}$ circle - it was now locked - some binders were put in - each tier was separately keyed. A man looking on the inside could not tell whether the arch was well built or not. The opening at the key course was narrower in front than behind. It was not quite a half brick wide in front and something over a course wide behind. We split the brick in front & put in mortar & spawls behind to key it - have built & put in several arches just such as this - The courses were laid as straight as we could lay them, without a line.

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Br. Ex. All the courses in an arch should be laid properly and should support each other - and the arch should be sprung on the same pitch throughout - some of the tenders mixed the cement, but I don't know who - I saw a part but not all of it mixed.

Re-Ex = The arch was finished the Saturday before election. Jeremiah T. Smith recalled said: I helped to rebuild this vault - saw no soft-brick dug out of sides and I think I should if done - don't remember any complaint by Loucks or Hall about soft-brick, while first arch 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 two by 6-inch scantling - It was very firm - could not see whether the courses were straight or not - The cement was over the inside and dirt on the outside.

X 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. Ulricson 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 Peirce recalled - said - I helped to rebuild 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 centre - don't remember seeing strip along the centre, 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.

Whicson 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.

X Think the courses of brick came out about the same in last arch as in first - can't say if the opening was wider behind than before - took no more pains with the second than with the first arch.

L. Harman recalled said said - the dirt I dug for covering the arch was a kind of strong sift dirt - there were some lumps among it - Smith did not agree to the second digging in my hearing - We talked of setting it further back after the first digging - Lightner & Loucks thought it was not far enough back in the bank.

X I don't know who set the stakes the first time - I thought Smith was to pay me for the first digging - The brush & timber were cleared away where I was to dig - I did not dig as far back as the ground was cleared, Re - Ex - There was no complaint by Loucks & Lightner that the foundation was not dug where it was to be

R. Scofield called by plffs. said - It began to rain on the first of December 1856 - the next day Dec. 2nd was the wettest day I ever saw - It froze up on the night of the 2nd - can't say how long it continued frozen - there was a heavy rain on the Tuesday or Wednesday evening before, but I am not so sure about this - about the rain on the first & second December I remember as I was married about that time.

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 courses are laid straight - The Low Lock arch is the strongest kind - if the courses 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 centers are taken out, than afterwards - If this arch stood two or three weeks this was long enough to test the workmanship - frost may 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 the 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.

Mr. E. - I never knew an arch thrown down by frost. - It is not workmanlike to have loose brick in an arch - the pressure should be equal in all parts of the arch - there can not 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 chaul pressing above & soft mortar below, the key can not be good. - If the brick in this arch were laid as shown by Ulricson the arch could not be keyed.

Wright next called by pliffs, said: I am a builder - If the work in an arch be defective and the centers are taken out while it is green the arch is more likely to fall than afterwards.

Here ^{the} pliffs again rested.

The deft then offered ^{& read} in evidence without objection the summons issued by the justice in this cause to show the time of commencing suit which is in words & figures as follows:

" State of Illinois

Peoria County

{ " The People of the State of Illinois
to any constable of said County Greeting: You are hereby
commanded to summon the Springdale Cemetery
Association to appear before me at my office in Peoria
on the sixth day of February at 10 o'clock A M. to answer

the complaint of Job Smith and Hiram Pierce for a failure to pay them a certain demand not exceeding \$300. and hereof make due return as the law directs. Given under my hand and seal this twenty ninth day of January 1857

Bernard Bailey J. P. Seal

Defendant next recalled said Charles Ulricson who testified as follows = Hall's method of taking out the centers from this arch, as described by him is as good a method as any that can be adopted for a semicircular arch - the first diagram above exhibited by me shows how an arch should be built; the example below shows how the brick in this arch were laid - If the mortar is good & the arch stands long enough to let it get hard this may do - In keying an arch where the courses are irregular the brick should be clipped and properly tapered the whole length of the brick, so as to press equally above & below - in this arch instead of clipping the brick in this way, mortar was thrown in and then bats or spawls driven in, which only made a key at the top - that I saw where this arch was broken off.

This was all the evidence in the case
The Court thereupon on application of the plaintiffs instructed the jury for said plffs as follows:

1. The degree of credit to be given to witnesses is a matter for the determination of the jury, and it is for the jury to determine, whether the testimony of masons who work at their trade is entitled to the same weight.

59 as those of men that are not practical workman

2 If the jury believe from the evidence that the plaintiffs built the vault with good materials and in a good workmanlike manner and in all other respects complied with their undertaking, they were entitled to their pay, and if the vault afterwards fell in from no fault of theirs and if the jury so find and believe from the evidence, then if the jury further believe from the evidence that Smith did promise to rebuild the vault in order to get his pay for what plaintiffs had done, such promise was not and is not binding in the plaintiffs for want of a sufficient consideration.

3 Admissions made by parties with the view of settling adjusting or compromising their differences are not evidence against the party making such admission. And if the jury believe from the evidence that Smith to settle the matter proposed to Lucks that he would rebuild the vault if they would pay him the amount his due, such admissions if so made, should be disregarded by the jury.

4 If the jury believe from the evidence that the defendant by her agents or servants accepted of the vault, or if the jury believe that the defendants with a knowledge of the manner with which the vault was built agreed & promised to accept the vault, such acceptance or

promise to accept the vault would bind the defendant and the jury should find for the plaintiffs, unless the jury shall further believe from the evidence that the vault was defective either from defect in the materials or workmanship.

5 Unless the defendants have proved by a preponderance of the evidence that the work was carelessly and unskillfully done, or that the materials were not of a suitable quality, the jury should find for the plaintiffs.

6 If the jury believe from the evidence that the plaintiffs built the vault with good materials and done the work in a good and workmanlike manner, the jury should find for the plaintiffs the value of such work and materials although the vault did fall down, if the falling down was not caused by want of skill on the part of the plaintiffs.

7 If the Jury believe from the evidence that Smith, one of the plaintiffs, after the falling of the arch, offered the defendants that if they would pay him for his previous work on the vault, he would then go on and rebuild the vault and that the defendants have not paid him (Smith) the amount then due him for building the vault, he - Smith - was not bound to go on and rebuild the same.

61 8 Qualification to the above instruction of the plaintiffs
Provided the jury shall believe from the evidence that when the alleged agreement was made to rebuild the arch the payment of the money was to be made, before the arch was to be rebuilt.

9 If the jury believe from the evidence that the plaintiffs built the vault of good materials & in a good substantial and workmanlike manner, they said plaintiffs are not bound to account for the falling of the vault in order to recover against the defendant.

10 If the jury believe from the evidence that the vault in controversy was fully completed and built of good materials & in a good and workmanlike manner, or in accordance with the terms of the contract, the said plaintiffs are entitled to recover against said defendants in this suit although defendants never accepted the vault in controversy, unless it was specially stipulated in the agreement or bargain at the time the contract was made that defendants were to accept said vault before plaintiffs could recover.

11 If the jury believe from the evidence that the plaintiffs built a vault for the defendant in a good and workmanlike manner and furnished the materials for the same of good quality, the jury should find for the plaintiff the value of such labor and materials

after deducting the payments made by the defendant. Unless there was a special contract for the building of the vault for a stipulated price, in that case the contract price would govern.

12 The jury should decide the case according to the weight of evidence.

13 If the jury believe from the evidence that pliffs built the vault in controversy in a good and workmanlike manner and of good materials the jury will find for the pliffs, the amount of such labor and materials as proved, after allowing the defendant credit for payment actually made by them. Unless there was a special contract fixing a stipulated price for the building of the vault. In that case the contract would govern.

14 If the jury believe from the evidence that after the vault was completed, that it fell down. Yet if the jury further believe from the evidence, that the vault was built of good materials & in a good and workmanlike manner & that the vault did not fall on account of defective materials or workmanship the jury will find for the plaintiffs, notwithstanding the arch fell down.

15 If the jury believe from the evidence that the parties made a written contract and that afterwards the parties

abandoned the written contract entirely and proceeded under a new contract or understanding and nothing said as to the price of the labor or materials, the presumption would be that the plaintiffs should be allowed a reasonable price for such labor and materials.

16. If the plaintiffs contracted to build a vault for the defendants upon the ground of the defendants in a certain way, then as soon as the work was completed according to the agreement by the plaintiffs, the defendants became liable for the price of the vault to the plaintiffs and no special acceptance was necessary unless specially agreed for in the contract at the time it was made, to enable the plaintiffs to recover.

17. If the jury believe from the evidence that Loucks and Hall were authorized by the defendant to act as her agent and that while Loucks and Hall were acting as such agents the plaintiffs furnished materials and built the vault at the place designated by Loucks & Hall and if the jury further believe from the evidence that the plaintiffs built the vault under the personal supervision and direction of said Loucks & Hall or either or both of them, and if said Loucks & Hall or either of them approved of the materials & work as it progressed the defendants are bound by such approval if fairly made, and if the jury believe from the evidence that the whole was approved by the agent of the defendants

the plaintiffs are entitled to recover the value of such labor & materials (deducting all payments made thereon, even if the vault did fall down, unless it has been proved that there was some defect in the work or materials that caused the vault to fall."

To the giving of which instructions for the plffs, deft. by its counsel then & there objected & excepted.

Ofc. then asked the following instructions to wit:

1. "If the jury believe from the evidence that a special contract was made between the plaintiffs and the defendant as to the price of the work and materials sued for, that contract must govern as to the amount which the plaintiffs can in any event recover in this action.
2. If the jury believe from the evidence that such contract was made and afterwards partially deviated from as to plan by consent of plaintiffs without any stipulation as to ~~the~~ price such deviation would not entitle the plaintiffs to more than the contract price, unless they have proved it to be worth more, and in that event the contract price must govern in regard to all work done in pursuance of it and forms the rule by which to estimate the value of such deviation.
3. That whenever 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 to be answered by it and if the jury believe from the evidence that the plaintiffs undertook to build an arched cemetery vault for defendant, and that either from defect of materials, or in the work done upon such vault, the arch fell in, the plaintiffs are liable to the defendant in this suit for all such damages as have been proved to be thereby occasioned.

4 Although a contract by a mechanic to do work & furnish materials in his line of trade is silent in regard to the degree of skill to be exercised, the law will nevertheless oblige him to perform the work in a "workmanlike manner" and so as to answer the purposes for which the work was designed.

5 If the jury believe from the evidence that the plaintiffs agreed & furnished materials to build a vault for defendant and on a plan furnished by defendant for an agreed price, without any expressed stipulation as to skill in the workmanship, and that the same soon after having been finished fell down, without any fault on the part of the defendant or any defect in the plan, the plaintiffs are answerable for the damages thereby occasioned.

6 Unless the jury believe from the evidence that the witness Hall removed the "centers" from the vault-

by the request or under the direction of the defendant, the defendant is not responsible for that act, whatever may have been its effect.

- 7 If the jury believe from the evidence that the plaintiffs undertook to build the vault in question without any agreement, as to time of payment, the law implies that payment was not to be made till the work was finished or ready to be delivered to the defendant in good condition and if the jury further believe from the evidence that after said work was done and before delivery to defendant, the arch of said vault fell down, without any fault on the part of the defendant and that the same was not rebuilt by the plaintiffs under their original contract, when this suit was commenced the plaintiffs are not entitled to recover.
- 8 If the jury believe from the evidence that after the arch fell down the plaintiff Smith agreed to rebuild it upon terms that were accepted by the defendant, and if the jury further believe from the evidence that the defendant stood ready to comply with the terms so agreed on, and that the plaintiff failed to comply on their part, the plaintiffs are not entitled to recover in this action.
- 9 If the jury shall believe from the evidence that the arch of the vault in controversy fell in only a few days after it was finished, that fact is proper for the consideration of

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the jury in determining whether the same was built in a good and workmanlike manner

10 That the plan and specifications by Loucks, with the writing thereunder is in evidence before the jury, and is a valid contract between the parties until proved to have been set aside by a subsequent agreement between said parties, and it is not material that it should be signed by both the parties, if signed by one party and acquiesced in by the other and acted on by both parties, it is sufficient.

11 If the jury believe from the evidence that the plaintiffs built an arched vault for the defendant under the contract given in evidence, that said arch fell in and that the plaintiffs afterwards agreed to rebuild the said arch without further compensation than that specified in the original contract within a certain time, and that said plaintiffs did not rebuild it within that time, and that the defendant did rebuild it afterwards, then the defendant is entitled to have a reasonable compensation for so rebuilding it, set off against what the plaintiffs would otherwise be entitled to recover in this cause.

12. 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 plaintiff (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 would be liable to the defendant for the damages which the defendant suffered by reason of the vaults being not so rebuilt by the plaintiffs.

13. 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.

14. If the Jury shall believe from the evidence that the

69 arch of the vault fell down soon after it was built and before it had been used by or accepted by the defendant, it is incumbent on the plaintiffs to show by satisfactory evidence the cause of such falling down or that the falling down was not caused from any defect in the materials or workmanship, and if they have failed to make such proof the law will imply that it was caused by improper construction or material that the vault fell and in that event the plaintiffs cannot recover."

Which were given by the Court.

The jury then retired and brought in the following verdict:

"We the jury find a verdict for the plaintiffs of One hundred and fifty dollars in the above cause."

And thereupon left moved the Court for a new trial in said cause for reasons following:

"State of Illinois, Peoria Circuit Court -
Peoria County } ss November term A.D. 1859
Job Smith
Pierce

vs
The Springdale Cemetery Association

On appeal

And now comes the said defendant and moves the Court to set aside the verdict rendered in said cause and grant a new trial therein for the following reasons.

1 The said verdict is against the weight of evidence given in said cause.

2 The said verdict is against the law governing said cause.

3 The Court gave erroneous instructions to the jury in said cause at the request of said plaintiffs, which were objected to by the defendant.

Cooper & Bryan

Manning & Merriman, Attys for deft

Which said motion was overruled by the Court, and said Court then and there proceeded to render judgment upon said verdict, to which decisions of said Court, in overruling said motion for new trial and rendering judgment upon said verdict the dft. by its counsel then & there objected & excepted, and pray that this their bill of exceptions may be signed & sealed by the Court which is done

E. N. Powell Seal

And afterwards to wit on the 15th day of December A.D. 1859 there was filed in the Clerk's office of said Court, an appeal bond in the above cause which is in the words & figures following to wit:

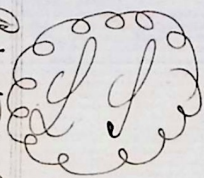
Appeal Bond

"Know all men by these presents that we the "Springdale Cemetery association" as principal and Isaac Underhill Hervey Lightner and William J. Hall as sureties are held & firmly bound unto Job Smith and Hiram Peirce in the penal sum of one thousand dollars for the payment whereof well & truly to be made we bind ourselves our heirs and personal representatives jointly & severally, firmly by these

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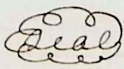
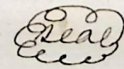
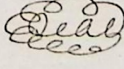
presents. But on this condition, that whereas at the November term A.D. 1859 of the Circuit Court of Peoria County Illinois in a certain suit then pending in said Court wherein the said Smith & Pierce were plaintiffs and the said Springdale Cemetery Association was defendant a judgment was rendered by said Court in favor of said plaintiffs & against said defendant for the sum of One hundred and fifty dollars for debt or damages & for costs, from which said judgment the said Springdale Cemetery Association has prayed & taken an appeal to the Supreme Court of said State. Now if the said Springdale Cemetery Association shall well & truly prosecute said appeal, and shall pay all such judgments, costs, interest & 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, Hervey Lightner & William A. Hall, have signed & sealed this instrument this 15th day of December A.D. 1859.



By

"The Springdale Cemetery Association"
William A. Hall, President
H. Lightner Secy.

Wm. A. Hall 
Isaac Underhill 
Hervey Lightner 

{ Private seal no public seal yet being provided }

State of Illinois }
 Peoria County } ss I, Enoch P. Sloan Clerk
 of the Circuit Court in and for the County of Peoria
 in the State of Illinois, do hereby certify that the forego-
 ing is a full and correct transcript of all the papers
 filed & of the proceedings of our said Court had in
 a certain cause wherein Job Smith & Hiram Pierce
 are plaintiffs and "The Springdale Cemetery Association"
 is defendant, as fully as the same remain on file
 and of record in my office

Given under my hand and
 the seal of said Court at
 my office in Peoria this
 second day of March in
 the year 1860
 Enoch P. Sloan, clerk

And now comes said Appellant, by J. K. Coopers
 & Manning & Meriman, its attys, and say
 that Manifest Error in the record, proceed-
 ings & Judgment of said Circuit Court
 in this Cause hath intervened to its prej-
 dice, in this, to wit:-

1st

Said Court erred in excluding portions of the
 deposition of said Peter C. Soucks, offered
 by defendant below, and which were proper
 evidence in said Cause -

2nd Said Court ^{erred} in the instructions given to the jury on the part of plaintiffs below =

3rd Said Court erred in overruling the motion of Defendant below, ^{to set aside said verdict &} for a new trial in said Cause =

4th Said Court erred in rendering judgment for plffs below on said verdict =

5th

Wherefore & for other good & sufficient reason appearing in said Record Appellant prays that the judgment of said Circuit Court herein may be set aside, reversed & wholly for naught esteemed =

J. H. Cooper
Manning & Merriam
for Appellant =

Joh Smith
& Hiram Peiris
ats
The Springfield
Lumber Co } In the Supreme Court
April Term 1860

And the Defendants come and say there is no error in the record proceedings or in the above cause & say said judgment may be affirmed

Green for defts

187-52
Springdale Cemetery

Association

vs

Gov Smith and

Winn Peice

Filed April 12, 1860
L. Deland
Clerk

\$22.00