No. 14813

Supreme Court of Illinois

Chicago & Rock Island R.R. Co.

vs.

Northern Ills. Coal & Iron Co.

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 167-145

J. W. Middleton & Co., Stationers, 196 Lake St.

Chicago, Pekin & Southwestern R. R. Co.

vs.

Northern Cent. Ins. Co.

1481?

167 – 145.

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

For the Third Grand Division,

APRIL TERM, A. D. 1865.

THE CHICAGO & ROCK ISLAND RAILROAD CO.
vs.
THE NORTHERN ILLS. COAL & IRON CO. OF LASALLE.

APPEAL FROM LASALLE.

This was an action of Assumpsit brought by Appellee *vs.* Appellant.

5 Narr. filed January 22d, 1861, common counts only.

15 To the 1st, 2d, 3d and 4th counts of plaintiff's declaration a demurrer was sustained.

7 5th Count. That defendant was indebted to the plaintiff in the sum of $3,000, for water furnished by plaintiff to defendant, and in a like sum for water pumped into a tank for defendant, and in a like sum for water furnished by the plaintiff for the locomotive engines of the defendant, and in a like sum for the money due on the act stated.

8 6th and 7th counts were each *quantum mervit* counts for
12 water furnished. To these counts the general issue was pleaded.

31 On the trial the following documents were introduced :

Filed Apl. 22. 1865
Melancthon

Deposition of EDGAR LOOMIS—Was in the employment of plaintiff as General Superintendant of the company from
31 Fall of '56 until June, '61; was appointed by the Directors of said company from year to year; the plaintiffs supplied the defendants with water at LaSalle for the purpose of watering their engines; defendants engine house was from
33 a half to three quarters of a mile from the place where the water was supplied; believes the defendants trains running on their road usually change engines at this engine
34 house. I believe all the through engines stopping at that engine house were furnished with water by the plaintiff. Sometime in the Spring of '51 John Conlough was Road Master of the Rock Island Railroad; called on me to make arrangement about putting a tank there to supply the company with water; I told him he could put a tank there by putting up a wall or rather furnishing a wall to put his tank on; we wanted to know what he would have to pay; I told him if he put a wall there he might have it that year without any compensation. He wanted me to give him the price of the water right along after that—that is, to make a contract for a term of years; I replied that I could not; I had no authority to give the price for longer than a year—the time of my election; after that we concluded to put the tank in a different place, and we made an arrangement to put it under the engine house. Mr. Conlough came to me frequently after the tank was placed there to fix upon some
35 rate that was right for the water; my answer was the same as before, that I had no authority to fix the price for longer than a year, as that my election was only for a year and it would not be binding. After the year was up the defendant was doing some switching for us—switching some cars of the Illinois Central on to the Rock Island Railroad. The pltff was dependant on the deft for loading the Illinois Central cars on their track, for which they charged us fifty cents a car; they claimed they did that switching at a less price than it was worth on account of our supplying them with water. After we got our side track in upon the Illinois Central Railroad, and was independant of them, we charged them for water; I made out the

amount; I think to the best of my recollection it was thirty-five dollars per month. Previous to our getting in our sideing on the Illi .ois Central Railroad, the Chicago & Rock Island Railroad Co. increased their switching from fifty cents to one dollar a car; they brought in their bill which I refused to pay. It went on in that way for two or three weeks or months; had several talks with their agent there, and told him we were furnishing them with water and I would not pay them more than fifty cents a car. They then commenced collecting one dollar per car for switching from the Illinois Central Railroad Co.; as soon as
36 I found it out I wrote to Mr. Tracy, the Sup't of the Chicago & Rock Island Railroad, it was not right and it was unjust to charge us a dollar a car while we were furnishing them with water; he did not answer my letter; I wrote him again that he had taken no notice of my letter about the switching, and that if he did not do so by return mail, I should cut off the water from them. In course of a day or two the Agent of the Chicago & Rock Island Railroad Co. at LaSalle showed me a telegram dispatch from Mr. Tracy to charge us fifty cents a car until further notice; I sent the amount to Mr. Tracy in winter of '59, I think, for supplying the engine with water. I had been running over a year at the time. He went to Col. E. D. Taylor, who was President of our company, and Robert Law, Treasurer; they wrote to me to let the amount stand until I came up to Chicago, and not to write to Mr. Tracy any more about it. I came up in Jan. or Feb., '60; Mr. Law and myself went to see Mr. Tracy at his office; Mr. Tracy told me in the interview that he was then furnishing Law & Strother, our agents here, with a coal yard; I forgot whether he said Law & Strother agreed to pay him or that the coal yard was worth forty dollars a month; he said one
37 or the other; I told him I did not know anything of it before, and if that was the case we would let the matter go against the coal yard; Mr. Law said that was right, and I gave Mr. Tracy a receipt in full for supplying water up to that date. Mr. Tracy gave us a receipt in full for rent of a coal yard to date; Law & Strother used the coal yard up to about the last of April, 1860; I don't recollect whether I ever presented Mr.

Tracy with an account for the use of the water after that.

Pltff furnished deft with water as long as I staid there; I left the 9th of June, 1861. I left LaSalle in October, 1861; they supplied deft with water till October, 1861, and were supplying them when I left; there was no other arrangement between the parties than that detailed by me above, while I was in the employ of the pltff, to the best of my knowledge. The receipt given by Mr. Tracy for the rent of the coal yard was taken by Mr. Law according to my best recollection; pltffs side-track on the Illinois Central in 1858, I think; deft did not switch any for pltff after that, I think; during the time deft was switching for pltff they switched ten or twelve cars a day, and some days less—averaged eight, I think. I wrote to Mr. Tracy that unless he reduced the rate of switching in consideration of our furnishing the water, we would cut off the water; he telegraphed the agent to reduce
39 and it was reduced.

Cross Examination—I think the railroad track was 20 to 25 feet from the chute that the pltff put up to load their cars; the tank of which I have spoken is about 60 feet from the rail-
40 road track: that tank was put up by deft; Mr. Conlough wanted to put tank there to supply the deft with water. We had commenced a wall in front of the shaft; Mr. Conlough and myself thought that would be the most suitable place to put the tank; I told him he could put it there, provided he would go on and finish up the tank; he did so. The water was pumped into the tank from the coal shaft of the pltff. It was necessary in working the mines to pump the water out of the shaft, and the pltff would have been obliged to pump the same amount of water whether the deft had taken it or not. I left LaSalle on the 1st of Oct., 1861; deft was using the water up to the time when I left. There was never any contract made to my knowledge by which the deft agreed to pay the pltff any money for water drawn from that tank; there was never any contract made except about the water for the first year.

I notified Mr. Tracy that unless he reduced the price of switching the Illinois Central cars fifty cents per car, I should cut

off his water; he did reduce it. I never notified deft to remove the tank or gave it any other notice about cutting off the
42 water than the one just referred to. Deft switched for pltff from the fall of '57 to the summer of '58; after the first year, averaged about eight cars per day. At the time I gave the receipt spoken of to Mr. Tracy, the defts did not pay us any money; it was given in consideration of the coal yard in Chicago. While deft was switching cars for us we did not collect any rent. I made the arrangement with John Conlough, Road Master, for the deft; I made no memorandum in writing of the arrangement, but state it from recollection.

44 *Re-examination*—Int. 1st. State whether or not your attention has been particularly called to this subject by frequent conversation with Conlough?

Question objected to by deft.

Ans.—Mr. Conlough and myself had several conversations during the first year in 1857; the arrangement was made for
45 the first year. The switching was done at LaSalle from the side track of the Chicago & Rock Island to the side track of the Illinois Central. At the end of the first year from the time of my agreement with Conlough there was no new
64 agreement made about the supply of water, nor was there any notice given to deft to cease using it. Deft objected to the first interrogatory upon the re-examination. The Court overruled the objection, and the deft excepted.

48 Eber Young testifies—I am engineer in the employ of the pltff, and have been ever since the tank was put up. We fill this tank from water pumped from the coal shaft, and there are from 8 to 10 locomotives of the deft that water at this tank every day. I think the water is worth $30 to $35 per month to the deft; they have watered there ever since the tank was
49 put up in 1857, I believe. We pump this water from a spring in the coal shaft, which we struck in sinking the shaft at about 60 feet below the surface of the ground; the top of the

tank is 4 feet above the surface of the ground, and the tank is located directly under the engine house. Before the tank was put up the company were intending to pump this spring water up 40 feet and then run a drift horizontally out to the canal, and let the water run out through that, and so save 20 feet of pumping. The pltff is obliged to pump this water several feet higher in order to supply the engine of the deft than would be necessary to supply their own engine.

Cross Examined—The coal company have two engines; one was used solely for pumping water from the shaft, and the other for raising coal; both of these engines get their supply of water from the tank put up by the deft; that is the only water they have to run with. If we had run the drift out from the shaft at the level of the canal and let the water run off through it, we should have had to get water somewhere else to run our
50 engines with. We propose to get water from the tank of the Illinois Central Railroad; it would cost us nothing but laying pipes from their tank down to our works, some 300 or 400 yards. I don't think the waste water of the Illinois Central Railroad Co. would cost anything—'twas running to waste. The railroad of the deft is on about the level of the bank of the canal, and the mouth of the coal shaft is near the top of the bluff and 20 feet above the surface of the canal. The railroad company put up this tank and also furnished a stone wall west of it to keep the bluff from sliding down; this wall was started by McFarran for the plff; I can't tell how much there was of it; 'tis in front of our works.

Questions by defendant:

State what 'twas worth to put up that tank and build that part of the wall that deft put up?

Objected to by pltff, and said objection sustained by the Court, to which ruling of the Court the deft excepted.

51 State what it would have cost said pltff to lay the pipes (to convey water to run its two engines) from said tank of said

Illinois Central Railroad to pltff's works, and to build a tank for the reception of such water ?

Objected to by the pltff, and said objection sustained by the Court, to which ruling of the Court the deft excepted.

State what it would have cost to have run the drift from the coal shaft out to the canal ?

Objected to by the pltff, and said objection sustained by the Court, to which ruling of the Court the deft excepted.

Witness further stated that the pltff was obliged to pump this water from its shaft to prevent its flooding their mine, and
52 'twould all run to waste except what they used themselves unless 'twas used by the deft.

L. H. SLAY—I am a railroad engineer in the employ of the Illinois Central Railroad Co.; I think water for eight engines per day, as good water as that is, would be worth $50 a month to the deft, if they could always have a supply there. I know the amount of water used by a locomotive, and the way in which water is generally obtained along a railroad; at LaSalle the Illinois Central get their water from a spring back on the high ground, and it is conducted by pipes into the tank and is forced up into it by the head at the spring; at other points it is pumped by a stationery engine, and the man that attends to it is paid from $30 to $40 per month.

Cross Examined—I form my judgment of what the water would be worth by what I have stated of the cost of getting it; don't know what it would cost per month to get it by means of a wind mill and pump.

If the coal company had to pump this water out of their
53 shaft to get rid of it, and if they wanted water for their

two engines, and the deft put up the tank for supplying the engines of pltff, and took the waste water only for their own use it would'nt be worth near as much, that is, they had'nt ought to pay near as much as if it was pumped expressly for them.

29 Question by deft :

State whether the furnishing of a tank at the coal shaft by the deft for the joint use of the pltff and deft, into which the pltff pumped the surplus water from their shaft would not be such an advantage to the pltff that it would be worth more or as much to them as the waste water from their shaft.

Objected to by the pltff, and the objection sustained by the Court, to which ruling of the Court the deft excepted.

George H. Losey—I am the Superintendent of the pltff's business, and have been since Mr. Loomis left them, and have known of the engines of the deft watering at the tank of the coal shaft ; I should think from 6 to 8 locomotives water there daily and have ever since I have been there ; the water is very nice and clear water—better than the river water for boiler use.

Cross Examined—The coal company would have to get rid of this water in some way, either by pumping it to the surface and letting it run to waste or by drifting out from the coal shaft at the level canal and pumping up to that level and letting it run off through the drift. In this latter case the coal company

54 would have to get water for their engines from somewhere else. The railroad company only have the waste water over and above supplying our own engines, though there is generally sufficient for both ; a few times during the last season and during the exceeding dry weather there was a shortage in the water, and we pulled in the check rope of the tank so that the deft could not get any, as there was then only about enough for ourselves.

DEFENDANTS TESTIMONY.

56 JOHN W. CENLOUGUE—I know the parties; was Road Master of C. & R. I. R. R. from '53 to '58. I made a con-
57 tract with Mr. Loomis, Sup't of the Coal Company in the year of '55 or '56, I am not positive which, by which the railroad company, this deft, were to put up a tub and a certain protection wall near the side of the railroad, and convenient to the shaft in the coal company's building which housed their engine at LaSalle, Ills., and the pltff was to pump the water from its shaft into the tub so provided for the use of the railroad company without charge. This agreement was verbal and never reduced to writing so far as I know, and in making it I acted
58 as agent for the deft. The railroad company did cause the protection wall to be built, a heavy foundation to be laid, and the tub to be erected as agreed.

Cross Examination—This agreement was not made in writing; cannot give the date of the contract precisely; think it was in '55 or '56. It was to continue as long as the railroad company wished and was to commence as soon as the tub and other fixtures could be put up.

61 EDWARD H. JOHNSON—I am Chief Engineer of the deft, and have entire charge of all repairs of road and stations and buildings, and of furnishing water for the use of the road. I have had such charge since the fall of '57; before that time, J. W. Conlogue, the Road Master, had charge of these matters. I know nothing of the agreement under which the tank was put up at the coal shaft, except what I heard from Conlogue. After the tank was put up and the wall was built, I went to see Loomis about the supply of water; I found him at the works of the coal company and was introduced to him as Superintendant. I told him that the watering at the tank there was very inconvenient for us, as it was so far from the station where we changed engines, (Peru,) and wanted to see if some arrangement could not be made so as to get a full supply at Peru, as we had some water there then, enough to water a large part of our locomo-

tives. He said the tank had been put up at the shaft and there was a plenty of water there if we chose to come and get it; that they had to pump it any way, and if we did not take it, it would run to waste; that 'twould not cost us anything except to
62 come and get it as long as we chose. After that I had the tank and fixtures repaired, and we kept on using water there for such of our locomotives as could not get water at Peru. I think the putting up of the tank by the railroad company, that held a supply of water for the use of pltff, was worth much more to them than the waste water. 'Twould not cost us anything like $30 per month to get a supply of water at the station. We generally pump by a wind-mill at such water stations on the road where water has to be pumped. A wind-mill and the machinery, etc., would not cost over $1500, and would not require any extra hands beside the ordinary ones at a station to tend it, and would be expense to run it. We have a number of them along the road. I do not think surplus water at the coal shaft worth any more to the company than the expense of maintaining the tank there for their use, and that of the coal company—we would not have continued to get water there at any greater expense, as it was a very inconvenient place and at a distance from any station.

This was all the evidence.

63 *Instructions on behalf of the Plaintiff.*

If the jury believe from the evidence that the deft reduced the price of switching cars from one dollar to fifty cents a car, and that the deft afterwards gave the pltff the use of a coal yard worth fifty dollars a month in consideration of the supply of water to the deft by the pltff, all the circumstances are proper for the jury to take into consideration in determining whether or not there was any arrangement made by which deft was to have the water without charge.

Objected to by the deft, and objection overruled by the Court, to which ruling of the Court the deft excepted.

64 Verdict for pltff, $1,000.

Motion for new trial overruled and exception by deft.

Motion in arrest of judgment overruled, and exception by deft.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1865, AT OTTAWA.

The C. & R. I. R. R. Co., Appellant,
vs.
THE N. ILL. COAL & IRON Co., Appellee. } *Appeal from La Salle.*

May it please the Court: I have searched carefully through the record in this case for some possible error, and have been unable to find any. The ingenious piecemeal statement of the facts by appellant's counsel, however, has a tendency to mislead the court, and but for that I should have remained silent, resting confident that no error could be found in the record. One of the most remarkable instances that I have ever seen, of the effect produced by combining a garbled or piecemeal statement of the testimony of different witnesses, is found on page 8 of appellant's argument, where the witness Johnson, by the ingenuity of Mr. Cook, is made to say that "if Loomis had told Tracy that plaintiff would have charged for the water, defendant never would have taken it." The court will see by reference to pages 9 and 10 of abstract, that Johnson never testified to any such thing. This is but one attempt out of many, where Mr. Cook has made similar attempts at legerdemain with the testimony of witnesses. In his zeal, before the jury, he might perhaps be excused for so doing, but here, before this court, it is entirely inexcusable.

II.

This court has frequently held, that no error will be considered except such as has been specially assigned.

Appellant's counsel spend much of their time in attempting to show that the jury found their verdict *against* the evidence, and hence the judgment ought to be reversed. *No such error is assigned.* The sole object in assigning errors is to inform the court and counsel of the points at issue.

But I shall have occasion, incidentally at least, before I close, to show that the verdict of the jury is supported by the *weight* of evidence.

III.

If counsel for appellant had given a consecutive history of the trial of the case below, he would have had but little on which to found his argument. Much, if not all that he had said, can be refuted by such a statement of the facts.

Loomis testifies that, in the spring of 1857, he made a contract with Conlogue, road master of defendant, by which defendant was to finish a certain wall and erect this tank, and the plaintiff was to furnish defendant with water for its engines for one year. That at the expiration of the year, the defendant continued to get water without any special agreement as to the price thereof, but that the defendant reduced the price of switching from $1 to 50 cents a car in consideration of the water; that after the defendant ceased switching for the plaintiff, Loomis, as superintendant for plaintiff, presented to defendant a bill for furnishing water, which was settled by rent of coal yard furnished plaintiff's agent, worth $40 a month. The switching was reduced and the coal yard finished after the year had expired with reference to which the special contract had been made, and the appellee is seeking in this suit to recover for supplying water to appellant after the use of coal yard had ceased.

This was the state of the case, as far as it tended to cast any light upon the arrangement under which the water was supplied, at the time of the rejection of the testimony complained of.

Keeping this fact in view, the court can readily see the irrelevancy of the refused questions.

At this time there was nothing before the jury contradicting, or tending to contradict the, testimony of Loomis. Neither did defendants counsel offer at the time to follow the interrogatories up with any other testimony that would *tend* to make them relevant; and after the testimony for defence was in; no attempt was made to introduce this testimony.

As far as the court could see or was informed, the case stood as follows:

The defendant was to finish a certain wall and erect a certain tank, and in consideration thereof plaintiff was to supply it with water for its

engines, for one year. After that year had expired the defendant reduced the price of switching from $1 to 50 cts. a car, making nearly or quite $4 a day for use of water; and after the switching had ceased, gave the plaintiff the use of a coal yard worth $40 a month, in consideration of the water.

At this point in the trial, in what possible view of the case could the first refused interrogatory (found on p. 6 of abstract) be relevant?

That interrogatory is as follows, viz:

"State what it was worth to put up that tank and build that part of the wall that defendant put up?"

Mr. Cook claims that that wall and tank cost $1,200; and that it tended to support Conlogue's testimony, and show, from the amount of its cost, that the contract was for a longer period than one year.

Now, I am informed by reliable authority, that Mr. Cook is sadly mistaken about the cost; that it did not probably reach, certainly did not exceed, the one-third of that sum. But let that question go. I simply desire the court to recollect that this was on the cross-examination of our witness. That Conlogue's testimony was not in, so there was no necessity to support it. The counsel did not state that they desired to follow up this interrogatory with any such testimony. No such offer was made.

The court was compelled to look at the relevancy of that interrogatory with reference to the light before it, with reference to the testimony already in.

That testimony showed that the tank and wall had been erected under an arrangement for the supply of water the first year.

That contract had already been consummated. It could make no possible difference, therefore, *what* it cost.

The plaintiff was seeking to recover upon an *implied* contract for the supply of water after the year had expired, when this testimony had reference, as the case then stood, to an *express* contract that had already been fulfilled. This testimony, at that time, would have had a tendency to mislead the jury if the wall and tank cost $1,200. As Mr. Cook claims, the jury might have taken it as the measure of damages, and compelled the defendant to pay an exorbitant price for the water: if it cost a mere song, the tendency would be to fix a mere nominal value to the supply of water, and induce the jury to give the plaintiff less than it was really entitled to.

If the defendant had desired to make that testimony relevant, it should have offered to introduce the same after it had some foundation on which to stand, after Conlogue's testimony was in, or else it should have offered to follow up the interrogatory with such testimony so as to show its competency.

I make these remarks with reference to this testimony upon the supposition that it would be competent under certain circumstances; but I utterly deny its competency in any view of the case. What possible light could it throw upon either the testimony of Loomis or Conlogue? But it is unnecessary to follow this argument further. I have shown that it was incompetent when the question *was* asked; that defendant never offered to follow it up so as to make it competent, even if its view of its competency is correct; and that when, in that view, it became competent, defendant never offered to introduce it. But Mr. Cook says, page 4 of his argument, "The only reason why the court should exclude evidence of this fact * * * is, that the court must have assumed that the contract was only for one year, and consequently it was no matter what the consideration was, and thus assumed the very fact in dispute."

I say, in reply, that at this time this fact was not in dispute. There was no testimony then in but Loomis'—nothing tending in the least to contradict him, and no offer made to do so. Hence, from Mr. Cook's own stand point, the court ruled correctly in excluding this testimony at that time.

The second and third refused interrogatories, asked the witness Young, (see pp. 6 and 7, abstract,) which sought to ascertain what it would have cost the plaintiff to lay down certain pipes,—not to conduct this, but other water, and what it would have cost the plaintiff to run a drift to the canal below the surface, were clearly incompetent and irrelevant, and could not be rendered otherwise in any possible contingency that could or did arise in the case. The plaintiff was seeking to recover upon the *quantum meruit:* the testimony then in, to say the least, had a *tendency* to show its right to recover. Mr. Cook has not deigned to tell the court what light that testimony, if in, could throw upon the case, or in what respect the defendant was injured by its rejection.

Suppose it would have cost the plaintiff $1,000 to lay those pipes, or to drive that drift, would that have a tendency to show what it was *worth* to supply defendant's engines with water? Suppose the laying of the pipes or driving the drift would have cost the plaintiff nothing, would that have a tendency to show the value of the water?

The same objections that were urged to the above interrogatories can, with the same force, be urged against the fourth refused interrogary, being the one asked the witness Stay, found on page 8 of abstract. It had no tendency to enlighten the jury upon the case as it then stood; no tendency to benefit the defendant or injure the plaintiff.

There was no testimony on which to found it, and no offer to follow it up with such testimony. But even if that interrogatory was improperly refused, the defendant is in no condition to complain, for they have shown by the witness Johnson what they sought to establish by it. (See page 10 of abstract.)

Johnson states fully and particularly what they sought by that interrogatory; so no harm has been done the defendant. The testimony was before the jury, and that too at the proper time.

The rule being, that when a party has shown by other witnesses what he sought to show by the excluded testimony, the judgment must stand, notwithstanding the testimony was improperly excluded.

Bull vs. Griswold, 19 Ill. 632.
Weidler vs. Farmer's Bank, 11 Serg. & Rawle, 134.
1 Vol. Gra. & Wat. on New Trials, 255.
2 " " " 603, Note 1, 648, 669 & 693.

I think the interrogatory was improper at any time, particularly in the form in which and the time when it was put. It was not a cross-examination of our witness. It was seeking to make out the defendant's case by the introduction of new testimony. It had no relevancy to the issues joined, none to the case then made by plaintiff.

Nothing but the general issue had been pleaded. It was not competent then to show a set-off, as a set-off must be specially pleaded before it can be shown; but, if it ever was or ever could be competent, it was not so when asked and refused, and could only be competent at the time it was asked the witness Johnson, and *then* it was answered.

IV.

But it is claimed, the instruction given (see p. 10 of abstract) had a tendency to mislead the jury. This objection to the judgment is urged with as much seriousness and apparent honesty as the other objections. Some of the other objections, by a careful, judicious and ingenious statement of the evidence, piece by piece, and entirely ignoring the time and the circumstances under which the exceptions were taken in the court below, by the skillful argument of able counsel, have the show, and *only* the show, of plausibility; but this one can not be supported even by sophistry.

There was a conflict between Loomis and Conlogue with reference to the original contract, Loomis testifying that it was limited to the first year, and Conlogue that it extended through all time to come. How was this conflict to be seltled? If the defendant had, by that contract, an absolute right to this water for *all* time to come, will any sane man believe they would consent to reduce the price of switching cars one-half, and thereby pay at the rate of $4.00 a day for the use of water, or that they would furnish a coal yard to plaintiff, worth $40 a month, for the water? Were not these circumstances eminently proper ones for the jury to take into consideration in determining which of the two witnesses were mistaken? No man, but more especially no railroad company, would pay for anything at those rates that they had an absolute right to as a matter of contract, without any charge.

There can be no possible error in the instruction of the court.

V.

A large portion of Mr. Cook's argument would be exceedingly proper and appropriate if addressed to a jury as a reason why they should find a verdict for the defendant, particularly if he desired to divert their attention *from the real* point of dispute, and I mistrust he forgot himself when he wrote it, and argued the case upon grounds that he thought would have weight with a jury, losing sight of the real points at issue between us in this court. The errors he assigns must make the points in issue and the only ones to be argued here. Those errors are, (1) the reception of illegal and incompetent testimony. This he virtually abandoned in the argument, and has pointed out no such testimony, at least none that was objected or excepted to in the court below. I conclude he does not desire to press *that* point, and shall not therefore notice it further. (2.) The second error assigned is the rejection of proper and competent testimony. (3.) The third is the giving of improper instructions. These two I have already noticed. (4.) The 4th, 5th and 6th errors hinge on the first three. They are general in their terms; are such as are universally assigned by counsel, and are simply intended as statements that the court erred in overruling a motion for new trial, in arresting judgment, or in entering judgment, for the reasons given in the errors previously assigned. If such is not the rule, all that it will be necessary for counsel to do will be to make the general assignment of errors similar to the last three made by appellant, and under such assignment make any point and argue any question that the ingenuity of counsel can suggest.

In such case no benefit would be derived from the assignment of errors, and counsel might just as well file the transcript of record and pitch into it on general principles. No issues could be joined in this court. No points made or argued that would give the court or counsel an idea of the errors complained of. If I am correct, and the practice of this court undoubtedly sustains me, the major part of Mr. Cook's argument is irrelavant and improper. The burden of it is, that the verdict is against the evidence. As I have already remarked, it would have been proper addressed to the jury, but, under the errors assigned, is highly improper here.

But, as Mr. Cook has said so much upon this point, I hope the court will indulge me, notwithstanding my view of its impropriety, in briefly calling the attention of the court to the fact that the weight of evidence is decidedly with appellee. Loomis testifies, that the contract for the supply of water was confined to one year; and, in support of the correctness of his testimony, can be cited the facts, that, after the first eray expired, defendant reduced the price of switching and then gave the use

of a coal yard for the supply of water. The original contract was made in spring of 1857. (See Loomis' testimony, page 34 of record; the abstract is erroneous.) It is true that Conlogue says the contract was made in 1855 or 1856, but the witness Young testifies (see bottom of page 48 and top of 49 of record) that the tank was erected in 1857. So he corroborates Loomis as to the time the contract was made. And, as a matter of history, outside of the record, the plaintiff never commenced the sinking of their shaft until *after* the time fixed by Conlogue for the commencement of the contract. So all the testimony on these minor points and these corroborating circumstances tend to sustain the testimony of Loomis, and to show in what a loose manner Conlogue gave his evidence.

In the fall of 1857, Johnson testifies, he saw Mr. Loomis, and Loomis said the water would cost defendant nothing; their tanks were all up, &c. The water certainly would cost the defendant nothing further under the contract for that year, and it certainly is fair to presume that Loomis intended to confine it simply to that year, for his testimony and the testimony of Locey both show he had no authority to bind the plaintiff for any longer period. Loomis was undoubtedly talking with reference to the contract as he understood it. But Johnson's testimony was improper and irrelevant. He sought to give in evidence the declarations of an agent disconnected from all transactions having any reference to his agency. The plaintiff could not be bound in this way.

But Conlogue's deposition is not without internal evidence that he understood the limitations placed on Loomis' power, and that he had made no contract that was binding on the plaintiff for longer than one year. Conlogue says, (see page 58 of record,)—

"That Loomis said, when the plaintiff's board met he would bring the matter (*i. e.* the subject of the contract) up, and it would be, or he had no doubt it would be, reduced to writing."

So that it seems to me that the weight of evidence was with the plaintiff. The jury weighed all these circumstances, all this evidence, and determined what weight should be given the testimony. This was their peculiar province; and this court will not interfere with their finding, unless the same is manifestly wrong, *and then only when such finding is expressly assigned for error*, neither of which contingencies arise in this case.

The circumstances that defendant had reduced the price of switching for plaintiff after the year was up and had furnished this coal yard, were very strong ones, having a tendency to show most conclusively that the defendant understood that they were to pay a reasonable compensation

for the supply of water, and would raise an implied promise to pay for such supply after the use of the coal yard had ceased.

The fact that Conlogue was so vague and indefinite in his testimony, and so uncertain as to time, were circumstances tending to show that he was mistaken. The manner and appearance of Johnson upon the stand may have been weighed by the jury; and all taken together show, I think, conclusively that the verdict of the jury was supported by the weight of the testimony; and, if that point was before the court, I should have no fear of the result; but, as it is not properly before the court, it certainly cannot affect the decision in this case.

It makes no difference how the jury arrived at the result they did. The only questions are, (the error assigned for the reception of illegal testimony having been abandoned, and that too for good reason,)—

(1.) Did the court err in excluding proper testimony? And (2.) Did the court err in improperly instructing the jury?

The plaintiff had an undoubted right to charge for the supply of water. The water was of very superior quality for engine purposes—the best in that vicinity. The supply was of incalculable value to defendant. The fact that it would run to waste, if not used by the defendant, does not lessen its value. The coal under the ground, the ore in the earth, the timber in the forest, are all of no value where they are placed by nature; and the same argument that would allow defendant to use this water without charge, would permit one man to mine another's coal or ore, or to cut down his timber. It is of no use to the owner, they say, and therefore they will take it without charge.

Railroad companies are not in the habit of rendering gratuitously favors of this value—there is no reason why the plaintiff should.

If the plaintiff had a stream of water running across its land of sufficient volume and with sufficient fall to turn the machinery of a grist mill, and had no desire to use the same themselves, but were allowing the water to run to waste, would that be any reason why they should not be allowed a reasonable rent or compensation for the use thereof, if some one else did desire to use it?

But in the case at bar they pump the water several feet higher than is necessary to supply their own engine and over twenty feet higher than necessary to get rid of it. So much the more then should the plaintiff receive compensation from the defendant. Mr. Cook, however, seems to think that, out of the kindness of our heart, we should continue to render this good office to the defendant for all time to come with-

out charge, for the defendant, ever since the erection of this tank, has been getting water of the plaintiff.

The court below then did not err in excluding proper and competent evidence; and, even if it did, the appellant has shown by other witnesses what it sought to show by the testimony excluded; and the judgment must therefore stand.

Bull vs. Griswold, 19 Ill. 632.
1 vol. Gra. & Wat. on New Trials, 255.
2 vol. Gra. & Wat. on New Trials, 648.

Neither did the court err in instructing the jury; and, as substantial justice has been done by the verdict and judgment, they must stand.

Smith vs. Schultz, 1 Scam. 490.
Gillett vs. Sweat, 1 Gill. 490.

For these reasons, I most respectfully ask of the court the affirmance of the judgment below.

E. F. BULL,

For Appellee.

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The Ches. & Ohio R. R. Co.

vs

The Northern Ala. R. R. Co.

Appellees Argument

Filed May 1. 1865

L. Leland Clk.

State of Illinois } ss
La Salle County }

Pleas before the Honorable Madison E. Hollister, the Judge of the Ninth Judicial Circuit, of the State of Illinois, and the Presiding Judge of the La Salle County Circuit Court, at a Term of said Court, commenced and held at the Court House, in Ottawa, in said County on the first day of February A. D. 1864. the same being the first Monday in said Month of February, and of the year of the Independance of the United States of America the Eighty Eighth.

Present The Honorable Madison E. Hollister, Presiding Judge
Absalom B. Moore Clerk
David P. Jones States attorney
William R. Milligan Sheriff

Be it Remembered.

That heretofore to wit: on the 21st day of January A.D. 1864. a precipe was filed in a certain cause hereinafter named, in the words and figures following to wit;

State of Illinois } ss
La Salle County } Circuit Court for said County February Term thereof A.D. 1864.

The Northern Illinois Coal and Iron Company of LaSalle
vs
The Chicago and Rock Island Rail Road Company

} Assumpsit
Damages $3000.

A.B. Moore Esq. Clk said Court.

Please issue Summs, as above to Shff. LaSalle Co & oblige

Buell & Nash Plffs Attys

dated LaSalle Jany 21st 1864.

On the said 21st day of January A.D. 1864. there issued out of and under the Seal of said Court a Summons. in the words and figures following to wit;

"State of Illinois } ss
LaSalle County }

The People of the State of Illinois,
To the Sheriff of said County: Greeting

We command you to, (that you) Summon The Chicago and Rock Island Rail Road Company, if it shall be found in your County, personally to be and appear before the Circuit Court of said LaSalle County on the first day of the next Term thereof, to be holden at the Court House in Ottawa, in said LaSalle County on the first Monday of February 1864. to answer unto the Northern Illinois Coal & Iron Company of LaSalle in a plea of assumpsit to the damage of said Plaintiffs as they say. in the sum of Three Thousand Dollars. And (you) have you then and there this Writ with an indorsement thereon, in what manner you shall

3

have executed the same,

Witness Absalom B. Moore Clerk of our said Court, and the Seal thereof at Ottawa aforesaid this 21st day of January A. D. 1864.

Seal U.S. Stamp 50 Ct. A. B. Moore Clerk

which summons was returned by the Sheriff with an endorsement on the back thereof, in the words and figures following, to wit,

"State of Illinois } I have duly Executed the within
La Salle County } ss writ by reading the same to
Frederick Tavernier agent of the within named Chicago and Rock Island Rail Road Company, and also by leaving him personally a true copy thereof = the President of the within named Rail Road Company not found in my County on this the 22nd day of January A. D. 1864.

Fees Service & Ret 60
Mileage 1 5
Copy 1. 50
$1.15

"

5

Be it remembered that on the 22d day of January A.D 1864 the Plaintiff in said cause filed its declaration therein, in the words and figures following to wit;

State of Illinois } Circuit Court for said County
La Salle County } ss February Term Thereof A. D. 1864.

1 The Northern Illinois Coal and Iron Company of La Salle the plaintiff in this suit by Bull & Nash and D L Hough its attorneys complains of the Chicago and Rock Island Rail Road Company, the defendant in a plea of Assumpsit; for that whereas heretofore to wit; on the Twenty eth day of January A D 1864, at, to wit; said County of La Salle, said difendant was indebted to said plaintiff in the sum of three thousand dollars for the use and occupation of certain lands tenements and possessions of the said plaintiff, by the said defendants at the special instance and request and by the suffrance and permission of said plaintiff for a long time before then elapsed held and occupied possessed and enjoyed.

2 And also for that whereas on to wit; the day and year aforesaid at to wit; the County aforesaid in consideration that the said

6 plaintiff at the like special instance and request of said defendant had before that time suffered and permitted the said defendant to have use occupy and possess certain other lands and possessions of the said plaintiff and said defendant had according to the last mentioned sufferance and permission of the plaintiff used possessed and enjoyed the same for a long space of time then elapsed. it the said defendant undertook and then and there faithfully promised the plaintiff to pay it. such sum of money as it there for reasonably deemed to have of the said defendant when said defendant should be thereunto. afterwards requested. And said plaintiff avers that it reasonably deemed to have therefor the further sum of three thousand dollars. of said defendant

3 And also for that whereas on to wit: the day and year aforesaid. He at to wit: the County aforesaid. the said defendant was indebted to said plaintiff in the further sum of three thousand dollars for the use and occupation of a certain water privilege. of the said plaintiff. then and there and occupied and possessed by the said defendant by the sufferance and permission of the plaintiff and at the request of the defendant. for a long space of time then elapsed—

4 And also for that whereas on to wit: the day and year aforesaid at to wit: the County aforesaid in consideration that the said plaintiff at the like

7 special instance and request of said defendant had suffered and permitted said defendant to have hold use occupy and possess a certain other water privilege of the said plaintiff & said defendant in accordance with said last mentioned permission and sufferance had used occupied held and possessed said last mentioned water privilege for a long space of time then elapsed it the said defendant then and there undertook & faithfully promised said plaintiff to pay it therefor such sum of money, as it said plaintiff reasonably deemed to have on request and said plaintiff avers that it reasonably deserved to have therefor the further sum of three thousand dollars—

5 And also for that whereas, on to wit: the day and year aforesaid, at to wit: the County aforesaid said defendant was indebted to said plaintiff in the further sum of three thousand dollars for water then and there furnished by the plaintiff to the defendant at the like special instance and request of the defendant.

And in the like sum for water then & there pumped into a certain tank by the plaintiff for the defendant at the like special instance and request

And in the like sum for water then & there furnished and supplied by the plaintiff, for the use motive engines of the defendant at the like special instance and request of the defendant.

And in the like sum for work and labor then and there done and materials for the same provided

8 by the plaintiff for the defendant at its like special instance and request.

And in the like sum for money then and there found to be due from the defendant to the plaintiff on an account then & there stated between them.

6 And also for that whereas to wit: the day and year aforesaid, at to wit: the County aforesaid in consideration that said plaintiff at the like special instance and request of said defendant had before that time, kept a certain tank supplied with the water of said plaintiff, for the use of said defendant and of the locomotive engines of said defendant, and it the said defendant having for a long space of time then elapsed, and the said water so supplied by the said plaintiff and supplied its locomotive engines from the said tank if the said defendant then and there undertook and faithfully promised said plaintiff to pay it so much money therefore as it reasonably deserved to have on request and said plaintiff avers that it therefore reasonably deserved to have the further sum of three thousand dollars

7 And also for that whereas, on to wit: the day and year aforesaid, at to wit: the County aforesaid in consideration that the said plaintiff, at the like special instance and request of said defendant had before that time furnished and supplied a certain tank with water for the use of said defendant and

9 of the locomotive engines of said defendant. & the said defendant undertook and faithfully promised to pay said plaintiff, so much money, as the same was reasonably worth, so on request and the said plaintiff avers that the same was reasonably worth the further sum of three thousand dollars

Yet the said defendant not regarding its said promises hath not paid said sums of money to the plaintiff, or either of them or any part thereof although often requested so to do. To the damage of the plaintiff three thousand dollars and therefore it sues &c.

Bull Nash and
D L Haugh
Pffs Attys

Copy of account sued on the Chicago & Rock Island Rail Road Co.

To the Northern Ill. Coal & Iron Co. Dr.

To use and occupation of premises		$3000 —
" do	do	of water privilege 3000
" work & labor & materials furnished		3000
" Supplying Water Tank		3000
" money due on a/c stated		3000
" Water privilege		3000

11 On the 11th the same being one of the days of Feby Term of said Court in said year day of Febuary 1864, a certain Bill of Particulars was filed in said cause in the words and figures following, to wit;

"The Chicago & Rock Island Rail Road Co.

To Northn Ill. C & I. Co. of La Salle Dr.

To Water furnished from their Coal Shaft Situated in the City of La Salle, a Short distance West of the Ill. Cent R.R. and near the intersection of the Ill Cent & Chi & R.I.RR. for the use of the Locomotive engines of Deft $3.000

" Pumping the water above referred to $3.000

" Use of Water privilege from said Coal Shaft $3.000

" Use of Tank Situated near said Shaft and in the proximity of Dfts R.R. $3.000

" Work & labor in pumping said water $3.000

" Use of premises on which said Tank is " Situated and the approaches thereto, not " Exceeding one acre $3.000

The above bill of Particulars is filed in lieu of the original bill filed in the above entitled cause. "

On the 12th day of Febuary 1864, the same being one of the days of the Febuary Term of said Court for said year the defendant in said Cause files a certain demurrer and plea in said cause, in the words and figures following to wit;

12

"The Ch + R. I. R. R. Co.
Vs
The N. Ill, Coal + Drain Co. of La Salle

La Salle County Circuit Court February Term A. D. 1864.

And now Comes the said defendant by Glover, Cook and Campbell its attorneys, and to the 1st 2nd, 3rd, 4th counts of Plaintiffs Declaration and each of them Severally Defendant says, actio non, because it says that said Counts and each of them Severally are not sufficient in law for Plaintiff to maintain his action, and that it is not bound by law to answer the same, and this it is ready to Verify, wherefore it prays judgment &c

And as to the 5th " + 6th " + 7th " counts of said declaration Defendant says actio non &c because it says, that it never promised the Plaintiff in manner and form as the Plaintiff hath above thereof complained against it, and of this it puts itself upon the country.

Glover Cook & Campbell.
Ptf for Defendant. "

On the 15th " day of March 1864. the Plaintiff filed in said cause an affidavit in the words and figures following to wit;

"State of Illinois } ss
La Salle County }

Circuit Court for said County
June Term A. D. 1864.

13

The Northern Illinois Coal & Iron Company of La Salle
v
The Chicago & Rock Island Rail Road Company
} Assumpsit.

E. F. Ball of counsel for said plaintiff being first duly sworn on oath says, he is informed & believes that Edgar Loomis is a material witness for said plaintiff on the trial of said cause that said Loomis is not a resident of the said County of LaSalle but is a resident of the County of Cook in said State

E. F. Ball

Subscribed & sworn to before me
this 14th day of March A.D. 1864

Willis M. Hill Notary

U.S. Stamps 5 Cts

Seal

On the 15th day of March 1864 the defendant filed with the clerk of said court a notice in the words and figures following to wit;

"The Northern Illinois Coal & Iron Company of La Salle
v
The Chicago & Rock Island Rail Road Company
} State of Illinois
La Salle County
And Circuit Court thereof
To June Term A.D. 1864.

The above named plaintiff will take notice that on the 24th day of March A.D. 1864 we shall sue out of the office of the Clerk of said Circuit court a Commission to be directed to a

14 Commissioner to be named by said Clerk in Terre Haute Indiana to take the deposition of John W. Carlogue a witness to be produced and examined before said Commissioner said deposition to be read in evidence on the trial of the above entitled cause,

Glover, Cook & Campbell
Defts attys:

Interrogatories to be propounded to said witness,

1st State your age, place of residence & occupation:

2d " Do you know the parties to this suit, if so were you Ever in the employ of defendant, if yea, in what capacity & when.

3d " Did you as agent for the Chicago & Rock Island Rail Road Company make any agreement with the plaintiff in relation to the water pumped from the plaintiffs Coal Shaft in La Salle if so State fully what that agreement was, with whom it was made and if the person with whom it was made was an agent or officer of the plaintiff and when it was made, state all of the contract fully and particularly and whether the defendant performed its part of the contract. "

(Memoranda on back of said notice)

"Received copy of this notice March 12th " 1864
Bull & Nash Plffs atty "

15 The following are the several Cross-interrogatories on the part of Plaintiff.

"Cross-Int. 1st = If such agreement was made as is referred to in last direct Int. was same in writing?

Cross. Int. 2nd. If not in writing give the date on which the same was made the time when it Commenced, and the length of time it was to continue - State how long after the same was made before it was to go into effect.

Bull & Nash Pltffs attys."

Be it remembered that on Tuesday June 14th 1864 the same being one of the days of the June Term A.D. 1864, a certain order was entered of record in said cause in the words and figures following, to wit;

"The Northern Illinois Coal and Iron Company of La Salle
vs
The Chicago and Rock Island Rail Road Company
} Assumpsit

This day came the defendant by its attorneys, Glover, Cook & Campbell and Demmis to the first, second, Third & fourth counts of the Plaintiffs declaration herein, Thereupon came the Plaintiff by Bull, Nash & Mough its attorneys and after hearing the arguments of counsel the court

sustains the demurrer of the defendant to the said counts of Plaintiffs declaration. It is therefore considered by the Court That Judgment be entered herein against the Plaintiffs, and in favor of the defendant, on Demurrer to the said First, Second Third & Fourth Counts, of Plaintiffs declaration. "

On Thursday June 16th 1864, the Same being one of the days of the June Term of said Court for said year, a certain over was entered of record in said Cause and figures following, to wit;

"The Northern Illinois Coal & Iron Company of La Salle
89 vs
The Chicago and Rock Island Rail Road Company } Assumpsit.

By agreement of parties this cause is set for trial on Wednesday of the Second week of the present term of this court.

On Monday June 20th 1864. the Same being one of the days of the June Term of said Court for the year 1864, the defendant filed a certain affidavit in said Cause, as follows to wit;

"

17

The Illinois Coal & Iron Co. of La Salle

vs

The Chicago & Rock Island Rail Road Company

State of Illinois
La Salle County &
Circuit Court thereof
June Term A.D. 1864

D. C. Cook being duly Sworn states on oath that he is one of the attornies of defendant in the above entitled case and has had the Charge of preparing the defence, That John Colough who resides as affiant is informed & believes in Terre Haute in the State of Indiana is a material witness for defendant on the trial of this cause without whose testimony he can not safely try the same. very Soon after the filing of the declaration in this case affiant wrote to said witness in Terre Haute and received an answer from said witness but not in time to take the deposition of said witness before the last February term of this court.

That within a very few days after the adjournment of that term of Court, affiant on the 12th day of March 1864 caused to be Served on plaintiffs counsel a notice, a copy of which is on file in this case and is made a part hereof. That on the 24th day of March 1864, a commission was issued directed as affiant is informed by the Clerk of this court to any Justice of the Peace of Said

18 Terre Haute, affiant did not know then the name of any person to act as commissioner in Terre Haute Ind. but according to affiants best recollection and belief he requested said Clerk to direct said Commission to the Clerk of the Circuit Court of the County in which Terre Haute is situate, That as affiant has been informed for the first time this day and which information he verily believes to be true said commission was duly received by N. Musgrave a justice of the Peace in Terre Haute, but that the deposition was not taken because said witness had left a few days before the Commission was received. Where said witness went affiant has not yet learned nor did he know the fact of his having left Terre Haute until this day nor does he now know whether such absence was temporary or permanent, affiant was informed by said witness in the letter from Terre Haute aforesaid that said witness made an agreement with plaintiff that said defendant should build a certain Stone wall called protection wall, inside of the building of the plaintiff at its Coal mines in La Salle and also build a Stone foundation inside of said building and put up a water Tank thereon for holding water pumped from plaintiffs Coal Shaft, and in

19 consideration thereof defendant should have the exclusive use of the water pumped into said tank without further charge and that the defendant did erect the said protection wall foundation and tank, and that said witness was the agent of defendant and authorized to make said agreement for it, and affiant expects & believes that defendant can prove all the above facts by said witness and he knows of no other witness by whom he can prove the same facts, affiant states that as he understands this case this suit is brought to recover payment for water used by defendant from said ~~tank~~ tank being water pumped from plaintiffs coal shaft into the tank erected by defendant, and that this application is not made for delay except for the purposes of Justice.

B. C. Cook.

Subscribed and Sworn to before me this 18th day of June A.D. 1864.

Sam C. Walker
Notary Public.

On Monday the said 20th day of June, the same being one of the days of the June Term of said Court for the year AD 1864 a certain order was Entered of record in said Cause in the words and figures following, to wit.

20

"The Northern Illinois Coal & Iron Company of La Salle
89 vs
The Chicago & Rock Island Rail Road Company
} Assumpsit

It is ordered by the Court that this cause be continued at defendants costs to be taxed. "

On the Fourteenth day of October A.D. 1864 a Dedimus Potestatum or commission to take the deposition of John W. Conlogue, issued out of and under the seal of said Court in the words and figures following. to wit;

Culver, Page & Hoyne, Stationers, 128 and 130 Lake Street, Chicago.

CIRCUIT COURT DEDIMUS.

21

STATE OF ILLINOIS, }
La Salle County, } ss.

The People of the State of Illinois: To Stanley Matthews of Hamilton County State of Ohio.

Greeting:

WHEREAS it has been represented to us that John W. Cartagus is a material witness in a certain cause now depending in our Circuit Court in and for the County of La Salle aforesaid, between The Northern Illinois Coal and Iron Company of La Salle are Plaintiffs and The Chicago and Rock Island Rail Road Company are Defendants, and that the said witness resides ~~at~~ in Hamilton County Ohio aforesaid, without the said State of Illinois, and that his personal attendance cannot be procured at the trial of the said cause: Now know ye that we, in confidence of your prudence and fidelity, have appointed you Commissioner to examine the said witness and do therefore authorize and require you to cause the said witness to come before you at such time and place as you may therefor designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said Plaintiffs and of the said Defendants and none others; and the same when thus taken, together with this Commission and the said Interrogatories, to certify into our said Circuit Court with the least possible delay.

WITNESS Absalom B. Moore Clerk of said Court, and the seal thereof, at Ottawa in said County, this 14th day of October A. D. 1864

A. B. Moore Clerk.

W. F. Whitman Deputy

DEDIMUS.

Circuit Court.

vs.

]]]

1 in Circuit Court, this 10 day of Dec

of Dec

Clerk.

INSTRUCTIONS

As to the mode of taking, certifying and returning Depositions according to the Statute Laws of Illinois.

I. CAPTION OF THE DEPOSITION.

"THE DEPOSITION of ..... of the County of ..... and State (or Territory) of ..... a witness of lawful age, produced, sworn and examined, upon his corporal oath, on the ..... day of ..... in the year of our Lord one thousand eight hundred and fifty at the office (or house) of ..... in the town (or city) of ..... in the County of ..... and State (or Territory) aforesaid, by me ..... a commissioner (or "by us," if more than one commissioner, inserting all the names of the commissioners), duly appointed by a DEDIMUS POTESTATUM or COMMISSION issued out of the Clerk's Office of the County Court of ..... County, in the State of Illinois, bearing TESTE in the name of ....., Esq., Clerk of the said County Court, with the seal of the said Court affixed thereto, and to me (or "us," if more than one), directed as such Commissioner (or "Commissioners") for the examination of the said ..... a witness in a certain suit, and matter in controversy, now pending and undetermined in the said County Court, wherein ..... is plaintiff, and ..... is defendant, in behalf of the said ..... as well upon the cross interrogatories of the ..... as on the interrogatories of the ..... which were attached to, or inclosed with the said COMMISSION, and upon none others. The said ..... being first duly sworn by me (or "by ..... one of said Commissioners," if more than one) as a witness in the said cause previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant so far as he should be interrogated, testified and deposed as follows:"

"Interrogatory First; (here insert the first interrogatory).

"Answer to first interrogatory," (here insert the answer), and so on successively in the order in which the interrogatories may be propounded and answered. Then follow "CROSS interrogatories and answers thereto, by the witness, on the part of the defendant," (or plaintiff as the case may be). (Here again write down the interrogatories and answers successively in the order aforesaid).

After the deposition is taken, the interrogatories and answers should be read over to the witness, and if he asserts to the truth of the answers as written down, the witness will then sign his name at the bottom of the deposition, and swear to the truth of it before the commissioner (or before one of the commissioners, if more than one). This oath is in addition to the preliminary oath, which is administered previous to the commencement of his examination

The Commissioner should then certify as to the time, place and manner of taking the deposition, as follows:

I, ... of the County of ..... and State (or Territory) of ..... a Commissioner duly appointed to take the deposition of the said ..... a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said ..... as a witness in the said suit between the said ..... plaintiff, and the said ..... defendant, he was duly sworn by me (or "by ..... one of said Commissioners," if more than one), to testify the truth in relation to the matters in controversy between the said ..... plaintiff, and the said ..... defendant, so far as he should be interrogated concerning the same; that the said deposition was taken in my office (or "at the house of .....") in the city (or "town") of ..... in the County of ..... and State (or "Territory") of ..... on the ..... day of ..... A. D. 185 ; and that after said deposition was taken by me (or "us") as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness; and that thereupon the same was signed and sworn to by the said deponent ..... before me (or "us"), the oath being administered by ..... one of said Commissioners, (where there are more than one as such Commissioner) at the place, and on the day and year last aforesaid.

(Signed,) ..... *Commissioner.*

[The foregoing certificate of commission should be at the foot, or bottom of the deposition, immediately following the signature of the witness]

The Commissioner should then fold up the deposition as thus taken and certified, together with the commission and interrogatories, and all exhibits (if any) produced on the examination, properly marked or lettered, as "exhibit A," "exhibit B," etc, and inclose the whole in a suitable wrapper or envelope, and then seal up the same securely with three seals, writing his name transversely across the middle seal; or if two commissioners they will each write their name, one on each of the outside seals; or if three commissioners, then each one will write his name across one of the seals, in the manner aforesaid. The Commissioner [or Commissioners] will also indorse the names of the parties to the suit, transversely across one end of the package thus sealed up, according to the proper title of the suit, and direct the same to the proper address of the Clerk who may issue the commission, and transmit the same by mail to the proper Post-office. Neither of the parties to the suit, or their attorneys or agents, or any person at all interested in the event of the suit, are permitted by law to dictate, write or draw up any part of the deposition required to be taken as aforesaid.

N. B—It is important to the validity of the deposition, that these requirements and instructions should be strictly attended to.

P. S—One caption will answer for the deposition of several witnesses, where they are all taken at the same time and place, to be read as evidence in the same suit, by so modifying the form here given, as to be applicable to the number of witnesses examined—as for instance, at the commencement say:

"The depositions of A. B., C. D. and E. F., of the County of ..... and State of ..... witnesses of lawful age, produced, sworn and examined on their respective corporal oaths," etc., and then in the latter part of the caption say, "The said A. B., C. D. and E. F., being first duly sworn by me as witness in the said cause," etc. Then, at the commencement of each deposition, say, "Interrogatories propounded to the said A. B, a witness produced and sworn as aforesaid, on the part of the said ..... and his answers thereto, as follows:

"Interrogatory First." (Here insert interrogatory.)

"Answer to first interrogatory." (Here insert the answer.)

And so on successively with all the interrogatories to be propounded to that witness. Then insert the cross interrogatories as before directed. The deposition should then be read over to the witness, and signed and sworn to by him before the next witness is examined. Then proceed with the second and third witnesses in like manner to the end.

One certificate as to the time, place and manner of taking such depositions, and that each one was signed and sworn to by such witnesses, respectively, will be sufficient, provided due care be taken to insert the names of ALL the witnesses, and the certificate in other respects be in conformity with the form given in the first instance.

Great care should always be taken to attach such depositions firmly together by means of tape or ribbon, and using wax, wafers, or eyelets when necessary.

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23 On Thursday November 10th A.D. 1864. the Same being one of the days of the November Term of Said Court for the year 1864, a certain order was entered of record in Said Cause in the words and figures following, to wit;

"The Northern Illinois Coal & Iron Company of Lasalle
66. vs
The Chicago & Rock Island Rail Road Company } Assumpsit.

By agreement of parties it is ordered by the court that this cause be set for trial Wednesday of the third week of the present term of this Court."

On Monday November 21st 1864, the Same being one of the days of the November Term of Said Court an order was Entered of record in said Cause in the words and figures following, to wit;

"The Northern Illinois Coal & Iron Company of La Salle
66 vs
The Chicago and Rock Island Rail Road Company } Assumpsit

By agreement of parties it is ordered by the court that this Cause be continued."

On the 23d day of November A.D. 1864, the same being one of the days of the November Term of said Court for the year 1864 the Plaintiff filed exceptions to the deposition of John W. Culoque in the words & figures following to wit;

"The Northern Ill. Coal & Iron Co.
v
The Chicago & Rock Island Rail Road Co } In Circuit Court La Salle Co. Ills. Nov Term 1864.

And now comes said Plff and moves the court to suppress the deposition of Jno. W. Culoque, taken by deft. and each and every part thereof for the following reasons viz;

1st The Comn was not issued in pursuance of agreement or notice.

2nd The certificate have no U.S. Rev Stamps

3rd The direct Int & each of them are leading

4th The Ints and ans. are in other respects improper

Bull & Nash for Plff.

On Thursday February 9th 1865, the same being one of the days of the February Term of said Court for the year 1865, a certain order was entered of record in said cause in the words and figures following, to wit;

25

"The Northern Illinois Coal & Iron Company of La Salle
53. vs
The Chicago & Rock Island Rail Road Company } Assumpsit.

This day the plaintiff comes by its attorneys and moves the Court to suppress the deposition of John W. Conlogue."

On Friday February 10th 1865, the same being one of the days of the February Term of said Court for said year an order was entered of record in said cause in the words and figures following to wit;

"The Northern Illinois Coal and Iron Company of La Salle
53 vs
The Chicago & Rock Island Rail Road Company } Assumpsit.

This day the motion to Suppress the deposition of John W. Conlogue came on to be heard, and after argument of Counsel, it is ordered by the court that the motion be overruled, to which decision of the Court in overruling said motion the plaintiff by its Counsel Except.

20 On Monday Febuary 13th 1865. the Same being one of the days of the Febuary Term of said Court for the yeadr 1865, a certain order was entered of record in the words and figures following, Vizt;

"

The northern Illinois Coal & Iron Company of La Salle
vs
The Chicago & Rock Island Rail Road Company

Assumpsit.

This day again comes the plaintiff by Messrs Bull, Nash & Waugh its attorneys and the defendant by Messrs Glover, Cook & Campbell its attorneys, and thereupon come the following jurors of a jury, to wit; William Moore, John Johnson, N. S. Wattles, George Galloway, Samuel Tharp, J. W. Ball, Charles Lathrop, John M. Harris, George Nodine, Isaac Drake, W. W. Taggart and Henry Mayhew, who are duly elected, tried and Sworn to well and truly try the issues herein according to the evidence, and after hearing the testimony adduced it is ordered by the Court that the further hearing of this cause be postponed until the coming in of the Court tomorrow morning. "

27 Be it remembered that on Tuesday February 14th 1865, the same being one of the days of the February Term of said court for the year of said Court AD 1865, a certain over was entered of record in said Court in the words and figures following, to wit;

"The Northern Illinois Coal and Iron Company of LaSalle
53
The Chicago & Rock Island Rail Road Company } Assumpsit,

This day again come the parties hereto, together with the jury sworn herein, and after hearing the arguments of counsel the jury retire to consider of their verdict and after due deliberation thereon had, the jury return into open court the following verdict, to wit;

"We the jury find the issues joined in favor of the plaintiff, and assess its damages at the sum of one thousand dollars.

The defendant by its attorneys now enters a motion for a new trial."

On Tuesday March 7th 1865, the same being one of the days of the February Term of said Court for said year a certain further and final over was entered of record in said Cause in the words and figures following to wit;

28

"The Northern Illinois
Coal & Iron Company
of La Salle
53 vs
The Chicago and
Rock Island Rail Road Company
} Assumpsit.

The court this day overrules defendants motion for a new trial herein, whereupon the defendant by Glover Cook & Campbell enters a further motion in arrest of judgment which motion is likewise overruled by the court.

It is therefore considered by the court that the plaintiff have and recover of the defendant the sum of one thousand dollars for its damages. also its costs and charges by it in this behalf expended and that execution issue therefor.

On further motion of the defendant by its attorneys it is ordered by the court that said defendant be allowed an appeal herein to the Supreme Court of this State, upon condition that said defendant enter into a bond payable to the plaintiff in the penal sum of Two thousand dollars, with Joseph O. Glover as security — said bond to be filed within twenty days from this date."

29

On Saturday March 11th 1865, the same being one of the days of the February Term of said Court for the year 1865, the defendant filed his certain bill of exceptions therein in the words & figures following, to wit;

"The Northern Illinois Coal and Iron Company of La Salle
v
The Chicago & Rock Island Rail Road Company
} State of Illinois
La Salle County
Circuit Court thereof
of February Term
A.D. 1865.

Be it remembered that on the trial of this cause defendants counsel asked the witness L. W. Stacy the following question -

State whether the furnishing of a tank at the coal shaft by the defendant for the joint use of the plaintiff & defendant into which the plaintiff pumped the surplus water from their shaft, would not be such an advantage to the plaintiff that it would be worth more or as much to them as the waste water from their shaft.

The Plaintiff objected to the question the Court sustained the objection, and refused to allow the question to be answered to which ruling of the defendant at the time excepted and prays that this bill of exceptions be signed sealed & made a part of the record.

M. E. Hollister (Seal)
Judge

31 Be It remembered That on the 9th day of March A.D. 1865. the Same being one of the days of the February Term of said Circuit Court for the year 1865. the defendant filed in said cause his certain bill of exceptions in the words and figures following, To wit;

State of Illinois } ss And Circuit Court Thereof
La Salle County } To February Term A D 1865

The Northern Illinois Coal and Iron Company of La Salle
V.S.
The Chicago and Rock Island Rail Road Company } Assumpsit

Be it remembered that upon the trial of said cause the said plaintiff to maintain the issues on its part offered in evidence the deposition of Edgar Loomis which was and is as follows.

State of Illinois
Cook County } ss. The deposition of Edgar Loomis of the City of Chicago in said County and State, a witness produced sworn and examined upon his corporal oath on this thirtieth day of March A. D. 1864 at my office at four o'clock in the afternoon

Before me, Azariah T Galt, a Notary Public for the City of Chicago in said State & County, in a certain suit and matter in controversy now pending and undetermined in the Circuit Court of La Salle County wherein the Northern Illinois Coal and Iron Company of La Salle is Plaintiff and the Chicago and Rock Island Rail Road company is Defendant, in behalf of the said Plaintiff.

Said Edgar Loomis being first duly sworn by me as a witness in said cause, previous to the commencement of his examination to testify the truth as well on the part of the Plaintiff as the Defendant in relation to the matter in controversy between the said Plaintiff and the said Defendant in the said suit, testified and deposed as follows

1st Int. What is your name, age, occupation and place of residence?

Ans My name is Edgar Loomis, age fifty two, occupation is a Wholesal Grocer & live in Chicago.

Second Int Were you ever in the employment of the Plaintiff if so in what capacity, and when did such employment commence and terminate?

Ans I was in the employment of Plaintiff. I was the General Superintendent of the Company at the Mines. It commenced in the fall of 1856 and terminated in June 1861.

3rd Int. By whom were you appointed and for how long did your appointment continue, was the appointment for the whole of said time or was it from year to year.

Ans I was appointed by the Directors of said Company from year to year

4th Int. State whether or not the Plaintiff supplied the Defendant with water and if so, for what purpose was the water supplied?

Ans The Plaintiff supplied the Defendant with water at La Salle for the purpose of watering their Engines.

5th Int. Where is the Defendants Engine House situated with reference to the place where the water is supplied?

Ans I should think it was from a half to three quarters of a mile ~~from~~ ther down on the road in the Town of Peru.

6th Int.

6th Int. State whether or not the trains running on the Defendants road usually change Engines at this Engine House?

Ans Yes sir I believe they do.

7th Int. State what proportion of the Engines passing through La Salle and stopping over at the Engine House referred to obtained their supply of water from

the Plaintiff

Ans I believe all the through Engines stopped there or did stop there, and were furnished with water by the Plaintiff. All the through engines on the road, both those running on the lower end and the upper end stopped there and got water.

8th Int State, if you please in detail and particularly what arrangement at any time was made between Plaintiff and Defendant in reference to this matter?

Ans Sometime in the Spring of 1857, I think Mr John Conlogue, road master of the Rock Island Rail Road, called on me to make arrangement about putting a tank there to supply the Company with water. I told him he could put a tank there by putting up a wall or rather finishing a wall to put his tank on and then he wanted to know what he would have to pay. I told him if he put a wall there, he might have it that year without any compensation. He wanted me to give him the price for the water right along after that, that is to make a contract for a term of years. I replied that I could not, I had no authority to give the price for longer than a year, the time of my election. After that we concluded to put the tank in a different place and we made an arrangement to put it under the Engine House.

Mr Conlogue came to me frequently after the tank was placed there to fix upon some rate

35 that was right for the water — My answer was the same as before that I had no authority to fix the price for longer than a year, as that my election was only for a year and it would not be binding — After the year was up, the Defendant was doing some switching for us, switching some cars of the Illinois Central on to the Rock Island Rail Road. The Plaintiff was dependent on the Defendant for loading the Illinois Central cars on their track for which they charged us fifty cents a car. They claimed they did that switching at a less price than it was worth on account of our supplying them with water — After we got our side track in upon the Illinois Central Rail Road and was independent of them, we charged them for water — I made out the account, I think to the best of my recollection it was thirty five dollars a month — Previous to our getting in our siding on the Illinois Central Rail Road the the Chicago & Rock Island Rail Road Company increased their switching from fifty cents to one dollar a car; they brought in their bill which I refused to pay.

It went on in that way for two or three weeks or a month. ~~That~~ Had several talks with their Agent there and told him we were furnishing them with water, and I would not pay more than fifty cents a car — They then commenced collecting one dollar per car for switching from the Illinois Central Rail Road Company — As soon as I found it out I wrote

to Mr Tracy the Superintendent of the Chicago & Rock Island Road. it was not right and it was unjust to charge us a dollar a bar while we were furnishing them with water. He did not answer my letter — I wrote him again that he had taken no notice of my letter about the switching & that if he did not do so by return mail I should cut off the Water from them — In course of a day or two the Agent of the Chicago & Rock Island Rail Road Company at La Salle showed me a telegraph despatch from Mr Tracy to charge us Fifty cents per bar until further notice — I sent the account to Mr Tracy in Winter 1859. I think for supplying the engines with Water. It had been running over a year at that time. He went to Col. E D Taylor who was President of our Company and Robert Law Treasurer. They wrote to me to let the account stand until I came up to Chicago and not to write to Mr Tracy any more about it I came up in January or February 1860. Mr Law and myself went to see Mr Tracy at his office Mr Tracy told me in the interview that he was then furnishing Law & Strother, our agents here with a Coal yard I forget whether he said Law & Strother agreed to pay him or that the coal yard was worth forty dollars a month — He said more the other I told him I did not know anything of it

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before and if that was the case, we would let the water go against the coal yard — Mr Law said that was right and I gave Mr Tracy a receipt in full for supplying water up to that date — Mr Tracy gave us a receipt in full for rent of a coal yard to date. Law & Slusher used the coal yard up to about the last of April 1860. I don't recollect whether I ever presented Mr Tracy with an account for the use of the water after that.

9th Inst — State whether or not the Plaintiff continued to supply the Defendant with water after the first of May 1860.

Ans — Yes, the Plaintiff furnished the Defendant with water as long as I staid there. I left the Eighth of June 1861 — And I left La Salle in October 1861. They supplied the Defendant with water till October 1861, & were supplying them when I left.

10th Inst — State whether or not any other arrangement was made between the parties, than that detailed by you above, while you were in the Plaintiff's employ.

Ans — There was no other, to the best of my knowledge.

11th Int — What became of the receipt given by Mr Tracy for rent of Coal Yard

Ans — My best recollection is that Mr Law took it, having charge of the yard.

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12th Int. At what time was the Plaintiff side track complete on the Illinois Central.

Ans. I think it was in 1858

13th Int. Did Defendant switch any for Plaintiff after that time

Ans I think not.

14th Int. During the time the Defendant was switching for Plaintiff, about how many cars did they switch a day on an average?

Ans I should think some days they would switch ten or twelve, some days less. I should think it would average about eight.

15th Int. State whether or not the Defendant reduced the price of switching for the Plaintiff from one dollar to fifty cents a car in consideration of the Plaintiff supplying the Defendants Engines with Water?

Ans I never heard Mr Tracy say anything about it. That was the view I took. I wrote to Mr Tracy that unless he did reduce it, in consideration of our furnishing the water, we would cut off the water.

16th Int. What was the result of that communication

Ans. He Telegraphed to the agent to reduce it and it was reduced

39 Cross Examination by B Babcock Esq.

1st X Int Is the Plaintiff a joint Stock Company.

Ans Yes. they are working under a charter obtained from the Legislature of Illinois.

2nd X Int. Do you own any of the stock of that Company

Ans No. Sir.

3d X Int. Have you ever owned any. if so. when did you transfer it?

Ans I have owned some I dont recollect when I transferred it. It was a number of years ago when I transfered the last.

4th X. Int How near to the Rail Road track is the Plaintiffs works?

Ans I should think it was twenty to twenty five feet from the shoot they shut up to load their cars

5th X Int How far from the Rail Road is the tank of which you have spoken

Ans I never measured it. but should think it was about fifty feet

6th X Int Was that Tank put up by the Defendant.

Ans yes sir.

7th X Int. Did the Defendant at the time the tank was erected, erect a wall upon which the tank was placed

Ans No Sir.

8th X. Int Did he erect any portion of a wall, in connection with any part of Plaintiffs works, at your suggestion?

Ans Mr Coulogne wanted to put a tank there to supply the Defendant with water. — We had commenced a wall in front of the shaft. Mr Coulogne and myself thought that would be the most suitable place to put the tank — I told him he could put it there, provided he would go on and finish up that wall. He did so.

9th X Int. Was the Water pumped into that tank from the Coal shaft of the Plaintiff, and was it necessary in working the mines of the Company to pump the water out of the Shaft & would not the Plaintiff have been obliged in working its mine to have pumped the same amount of water. Whether the Defendant had taken it or not?

(Question objected to by Mes Bull)

Ans The water was pumped into the tank from the Coal shaft of the Plaintiff — It was necessary in working the Mines to pump the water out of the shaft, and the Plaintiff would have been obliged to to pump the same amount of water whether

41 Defendant had taken it or not.

10th Int At what time did you leave La Salle and cease to have any personal Knowledge as to the supply of water?

Ans. I left La Salle in first of October 1861. and the employ of the Company in June 1861- The Defendant was using the water up to the time I left La Salle I saw them using it up to that time

11th Int. Was there ever any contract made to your Knowledge, by which the Defendant agree to pay the Plaintiff any sum of money whatever for water drawn from that tanks.

Ans There never was any contract made, except about the wall for the first year

12th Int Did the Plaintiff to your Knowledge ever notify the Defendant to remove said tanks or cease drawing water from the same

Ans I notified the Superintendent. Mr Tracy unless he reduced the price of watering of the Illinois Central cars fifty cents per car. I should cut off his water. He did reduce it. I never notified them to remove the tanks, or gave them any other notice about cutting off the supply of water than the one just referred to

13th Int. For what length of time did the Defendant switch for the Plaintiff the cars of the Illinois Central Rail Road.

Ans I think it commenced some time in the fall or summer of 1857 and terminated in the summer of 1858

14th Int. About how many cars were switched per day or per week?

Ans To the best of my recollection after the first year it would average about eight cars a day — some days more some less.

15th Int At the time you gave the receipt to Mr Tracy you have spoken of. did the Defendant pay the Plaintiff any money or was the receipt given in consideration of the switching of the cars for fifty cents a piece and the Coal yard which the Defendant had furnished to the Plaintiff

Ans He did not pay us any money — It was given in consideration of the Coal yard here in Chicago; while he was switching cars for us. we did not collect any rate or rent.

10th Int During what time has Col. E D Taylor been President of the Plaintiff.

Ans All but one year ever since the Company was organised from June 1850 to 1851. he was not President.

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17th X Int. Do you know of any agreement between Col. Taylor and any of the Officers of the Defendant, by which said Taylor received a family pass over Defendants road in consideration of permission given to Defendant to use water from this tank?

Ans No Sir.

18th X Int Did you ever hear Col. Taylor say that there was such an arrangement.

(Question objected to by Mr Bull)

Ans I never heard Col Taylor say that they had given him a pass. He said he had applied for a pass or a commutation ticket which had been refused

19th X Int Did he say if they would not give him a pass or commutation Ticket, that he would make them pay for the water or words to that effect?

(Question objected to by Mr Bull)

Ans I dont think I ever heard him say so.

20th X Int. Was it John W Coulogne, with whom you made the bargain spoken of

Ans I knew him as John Coulogne. He was road master for the Company I think

21st X Int Did you make any memorandum in writing of the agreement you made with him

Ans I did not.

22nd Int Do you state the agreement from your recollection of conversation at the time, or have you any particular thing to refresh your recollection?

Ans I state the agreement from recollection, which has been refreshed by frequent conversation about it with our Directors – It is a subject that has been talked up a good deal between the Rail Road and our Company

Re examination by Mr Bull

1st Int State whether or not your attention been particularly called to this subject by frequent conversations with Conlogue

(Question objected to by Mr Cook)

Ans Mr Conlogue and myself had several conversations during the first year in 1857.

2nd Int How long did this arrangement with Mr. Conlogue continue?

Ans The arrangement was made for the first year

3d Int State if you know whether or not if there was any controversy between Col E & Taylor & the Defendant in regard to the Defendants right of way through his land and whether he claimed or received a pass for himself and family towards the settlement thereof

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And. There was a controversy between them about it — He claimed more than was awarded him & he told me they gave him a pass for himself and family for a year to settle it.

(Answer objected to by Mr Cook)

4th Int. State whether or not this was in the same conversation referred to by you, in which the Col. stated, that he had applied for a pass or commutation ticket which was refused,

(Question objected to by Mr Cook)

Ans. I think not.

5th Int. I will ask you Mr Loomis to refresh your recollection in reference to the pass, if you can, and state whether it was not for two years instead of one, and if for two years, State for what two years

Ans. My impression is that the pass they gave him for to settle the right of way was for one year. I think it was for 1860.

6th Int. State where this switching was done

And. It was done at La Salle from the side track of the the Chicago and Rock Island ~~Rail~~ Road to the side track of the Illinois Central Railroad

Re cross Examination by Mr. Cook.

1st Int. At the end of the first year from the time of your agreement with Coulogne was there any new agreement made about the supply of water or was there any notice given to Defendant to cease using it.

(Question objected to by Mr. Bull)

Ans. None that I am aware of

Edgar Loomis

State of Illinois } ss
Cook County }

I, Azariah T. Galt a Notary Public for the City of Chicago in said County and State do hereby certify that previous to the commencement of the examination of the said Edgar Loomis as witness in the suit between the Northern Illinois Coal and Iron Company of La Salle, Plaintiff and the Chicago and Rock Island Rail Road Company Defendant he was duly sworn by me to testify to the truth, the whole truth and nothing but the truth in relation to the matter in controversy in said suit between the said Plaintiff and the said Defendant that the said deposition was taken at my office in the said City of Chicago in said County and State, at four o'clock in the afternoon on this Thirtieth day of March A.D. 1864, and that after said deposition was taken by me as aforesaid and the same by me writ-

47 — sew down. It was read over to the said witness and that thereupon the same was signed and sworn to by the said Witness, at said time and place

I further certify that the said deposition was taken in pursuance of a notice and that E F Bull Esq one of the Attorneys for the Plaintiff appeared and conducted the examination in Chief and that B C Cook Esq Attorney for the Defendant, appeared and cross examined the said witness

In witness whereof I have hereunto set my hand and seal Notarial this Thirtieth day of March A. D. 1864

Seal

U S Stamps 5 ₵

Azariah T Gale
Notary Public

Notarys fee (paid by Plaintiff atty) $12.
Witness one days attendance 1.
$13.

And before the said Deposition was read, the said Defendant objected to the reading of the same or any part thereof in evidence, the Court then and there overruled said objection and allowed the said Deposition to be read in evidence to which ruling of the Court said Defendants then and there excepted.

The said Defendant also then and there objected to the 1st & 4th of the Interrogatories of said Plaintiff upon the Re Examination of said witness, and also to the answers to the 3d " Interrogatory of said Plaintiff upon the Re Examination of said Witness, The Court then & there overruled said objection and permitted said questions put to said witness and the answers thereof to be read in evidence and also the said answer to said 3d " Interrogatory to be read in evidence to which said ruling of the Court the Said Defendant then and there excepted.

The said Plaintiff then called as a witness Eber Young who testified as follows;

I am an Engineer in the Employ of the Plaintiff and have been Ever since the Railroad Tank was put up We fill this Tank from water pumped from the Coal shaft & there are from 8 to 10 Locomotives of the Defendant that water at this tank Every day. I think the water is worth $30. to $35- per month to the defendant- they have watered

There ever since the tank was put up in 1857, - I believe, We pump this water from a Spring in the Coal Shaft which we Struck when Sinking the Shaft at about 60 feet below the Surface of the ground the top of the Tank is 4- feet above the Surface of the Ground & the Tank is located directly under the Engine House. Before this Tank was put up The Company were intending to Pump this Spring water up 40 feet & then run a drift horizantally out to the Canal and let the water run out through that and so Save 20 feet of pumping. The Pelf. is obliged to pump this water Several feet higher in order to Supply the Engine of the deft. than would be necesary to supply their own Engine.

Cross Examined

The Coal Company have two Engines, one solely for pumping the water from the Shaft & the other for raising Coal, both of these Engines get their supply of water from the Tank put up by the Defendant, that is the only water they have to run with.

If we had run the drift out from the Shaft at the level of the Canal and let the water run off through it we Should have had to get water some where else to run our Engines with - We proposed to get water from the

50 Tank of the Illinois Central Railroad would cost us nothing but laying pipes from their Tank down to our works some 300 or 400 yards —

I dont think the waste water of the Illinois Central Railroad company would cost any thing, 'twas just running to waste.

The Railroad of Defendant is on about the level of the bank of the canal and the mouth of the coal shaft is near the Top of the Bluff and Twenty feet above the Surface of the Canal — The rail road Company put up this Tank and also finished a Stone wall West of it to Keep the Bluff from sliding down, this wall was started by Mc Farran for the Plaintiff I cant tell how much there was of it, as in front of our works —

Question by defendant. —

State what 'twas worth to put up that Tank and build that part of the wall that Defendant put up —

The Plaintiff then & there objected to said question, and the Court sustained said objection & refused to allow said question to be put to said witness by said defendant, to which ruling of the Court said defendant then & there excepted.

The defendant then asked said witness what it would have cost said Plaintiff to lay the Pipes (to convey water to run its two engines) from said Tank of said Illinois Central Rail Road to Pltffs works and to build a Tank for the reception of such water.

The said Plaintiff objected to the said Question being put to said witness, The court then & there sustained said objection and refused to allow said question to be put to said Witness and to the said ruling of the court the said Defendant then and there excepted —

Said Defendant then asked said witness the following Question —

State what it would have cost to have run the drift from the coal Shaft out to the canal —

The Plaintiff then & there objected to the said question and the Court sustained said objection and refused to allow said question to be put to Said Witness to which ruling of the Court said Defendant then & there excepted.

Witness further stated that the Plaintiff was obliged to pump the water from its Shaft to prevent its flooding their mine, and would all run to waste except what they used them-

52 selves, unless it was used by the defendant —

The said Plaintiff then called as a witness L. N. Stay, who testified as follows —

I am a railroad Engineer in the Employ of the Illinois central Railroad Company, I think water for Eight Engines per day, as good water as that is, would be worth $30. a month to the defendant if they could always have a Supply there — I Know the amount of water used by a Locomotive, and the way in which water is generally obtained along a railroad — at La Salle the Illinois Central get their water from a Spring back on the high ground, and it is conducted by pipes into the Tank and is forced up into it by the head at the Spring,

At other Points it is pumped by a Stationary Engine and the man that attends to it is paid from $30 to $40 per month

Cross Examined

I form my judgment of what the water would be worth by what I have stated of the cost of getting it. Dont Know what it would cost per month to get it by means of a wind mill & pumps.

If the Coal Company had to pump this water out of their Shaft to get rid of

it, and if they wanted water for their two Engines, and the Defendant put up the Tank for Supplying the engines of Plaintiff and took the waste water only for their own use it would not be worth, near as much, that is they had not ought to pay near as much as if it was pumped Expressly for them.

The said Plaintiff then called as a witness George N. Losey —

Who testified as follows —:

I am the Superintendant of the Plaintiffs business and have been since Mr. Dennis left them & have known of the Engines of the defendant watering at the Tank at the Coal Shaft. I should think from 6 to 8 Locomotives water there daily and have ever since I have been there, the water is very clear, nice water better than the River water for boiler use —

Cross Examined —

The Coal Company would have to get rid of this water in some way, either by pumping it to the Surface and letting it run to waste or by drifting out from the Coal Shaft at the level of the Canal and pumping up to that level and letting it run off through the drift — In this latter case the Coal Company

would have to get water for their Engines from some where else — The Railroad company only have the waste water over and above supplying our own Engines, though there is generally sufficient for both, a few times during the last season and during the exceeding dry weather there was a shortage in the water and we pulled in the check rope of the Tank so that the Defendant could nt get any, as there was then only about enough for ourselves). The tank was put up, and also some retaining wall, but by whom I do not know as I was not in pay Employ at the time. I dont Know how much, and the water for our Engines is taken from the tank and all the Surplus water from the Coal Shaft is pumped into the tank.

The Plaintiff here rested his case —

And said Defendant to maintain the issues on his part then read in evidence the deposition of John W. Carlogue in the words and figures following: —

The deposition of John W. Cologne of the County of Hamilton and State of Ohio a Witness of lawful age produced sworn and Examined upon his corporal Oath on the first day of November in the year one thousand eight Hundred and sixty four at the office of S & S. R. Matthews in the City of Cincinnati in the County of Hamilton and State aforesaid by me Stanley Matthews a commissioner duly appointed by a Dedimus potestatum or Commission issued out of the clerks office of the Circuit Court of Lasalle County in the State of Illinois bearing date A.B. Moore Esq Clerk of the said County Court with the seal of the said Court affixed thereto and to me directed as such commissioner for the examination of the said John W. Cologne a Witness in a certain suit and matter in controversey now pending and undetermined in the said Circuit Court wherein the Northern Illinois Coal and Iron Company of Lasalle are plaintiffs and the Chicago and Rock Island Rail Road Company are defendants in behalf of the said Defendants as well upon the cross interrogatories of the plaintiffs, as on the interrogatories of the defendants which were attached to or enclosed with the said commission and upon none others. The said John W. Cologne being first duly sworn by me as a Witness in the said cause previous to the

commencement of this Examination to testify the truth as well on the part of the Plaintiff as the defendant in relation to the matters in controversy between the said Plaintiff and defendant as far as he should be interrogated testified and deposed as follows.

Interrogatory First

State your age place of residence and occupation?

Answer.

I am forty two years of age am a resident of this place (Cincinnati) and my occupation is that of Superintendant of the Ohio and Mississippi Rail Road.

Interrogatory Second

Do you Know the parties to this suit if so were you ever in the employ of the Defendant if yea in what capacity and when

Answer;

I do Know the parties to this suit and was in the employ of the Defendant as road Master of the Chicago and Rock Island Rail Road from 1853. to 1858.

57 Interrogatory Third

Did you as agent for the Chicago and Rock Island Rail Road Company make any agreement with the Plaintiff in relation to the water pumped from the Plaintiffs Coal Shaft in LaSalle if so state fully what that agreement was with whom it was made, and if the person with whom it was made was an agent Officer of the plaintiff and when it was made state all of the contract fully and particularly and whether the Defendant performed its part of the contract.

Answer.

I made a contract with Mr Loomis Superintendant of the Coal Company in the year 1855. or 1856. I am not positive which= by which the Rail Road Company this De= fendant were to put up a tub and a certain protection Wall near the side of the Rail Road and convenient to the Shaft in the Coal Companys building which housed their Engine at LaSalle Illinois= and the plaintiff was to pump the water from its Shaft into the tub so provided for the use of the Rail Road Company, without charge This agreement was verbal and never reduced to writing so far as I Know, and in making it I acted as Agent for the defendant

The Rail Road Company did cause the protection wall to be built a heavy foundation to be laid and the curb to be erected as agreed.

Cross Interrogatory First;

If such agreement was made as is inferred in last direct but was same in writing?

Answer;

Not to my Knowledge; This agreement as made by me with Loomis was verbal but he Loomis said that when the Plaintiffs Board met he would the matter up and that it should be or he had no doubt but what it would be reduced to writing.-

Cross Interrogatory Second

If not in writing give the date on which the same was made the time when it commenced and the length of time it was to continue; State how long after the same was made before it was to go into effect;

Answer

I am not able to give the date of the contract precisely I think it was

59 in 1855 or 1856: It was to continue as long as the Rail Road Company wished and was to commence as soon as the tub and other fixtures could be put up

J. W. Conlogue

I Stanley Matthews of the County of Hamilton and State of Ohio a commissioner duly appointed to take the deposition of the said John W. Conlogue a witness whose name is subscribed to the foregoing deposition do hereby certify that previous to the commencement of the examination of the John W. Conlogue as a witness in the said suit between the said The Northern Illinois Coal and Iron Company of Lasalle Plaintiffs and the said the Chicago and Rock Island Rail Road Company defendant he was duly sworn by me to testify the truth in relation to the matters in controversy between the said The Northern Illinois Coal and Iron Company plaintiffs and the Chicago and Rock Island Rail Road Company defendant so far as he should be interrogated concerning the same; that the said Deposition was taken in my office in the City of Cincinnati in the County of Hamilton and State of Ohio on the first day of November A.D. 1864. and that after said Deposition

was Taken by me as aforesaid the interrogatories and answers thereto as written down were read over to the said Witness; and thereupon the same was signed and sworn to by the said deponent John W. Caulagne before me at the place and on the day and year last aforesaid,

Stanly Matthews
Commissioner

Court Fee $5.00
Pd by J.W. Caulagne
for Defts Addys

U. S. Cts
W. D. Tenn.

To the reading of which the Plff then and there objected, which objection was overruled by the Court and Plff then and there excepted,

61 Said defendant then called as a witness Edward M. Johnson, who testified as follows:—

I am Chief Engineer of the Defendant and have Entire Charge of all repairs of road & Stations & buildings & of furnishing water for the use of the Road — I have had such Charge since the Fall of 1857, — before that time J.W. Conlogue the road Master had Charge of these matters. I know nothing of the agreement under which the Tank was put up at the Coal Shaft, except what I heard from Conlogue after the Tank was put up and the retaining wall built I went to see Loomis about the Supply of water — I found him at the works of the Coal Company and was introduced to him as Superintendant. I told him that the watering at the Tank there was very inconvenient for us as it was so far from the Station where we changed Engines (Penn) and wanted to see if some arrangement could not be made so as to get a full supply at Penn, as we had some water there then, enough to water a large part of our Locomotives he said The Tank had been put up at the Shaft and there was a plenty of water there if we chose to come and get it, that they had to pump it any way & if we did not take it, it would run to Waste, that would not Cost us anything except to come and get it

as long as we chose, —

After that I had the Tank & fixtures repaired & we kept on using water there for such of our Locomotives as could not get water at Penn-

I think the putting up of the Tank by the Rail road Company, that held a supply of water for the use of Plaintiff was worth much more to them than the waste water —

It would not cost us any thing like $30. per month to get a supply of water at the Station

We generally pump by a wind mill at such water Stations on the road where water has to be pumped —

A wind mill and the machinery &c would not cost over $500 — and would not require any extra hands beside the ordinary ones at a Station to tend it & would be no expense to run it — we have a number of them along the road — I do not think surplus water at the coal shaft worth any more to the Company than the expense of maintaining the Tank there for their use, and that of the Coal Company — we would not have continued to get water there at any greater expense as it was a very inconvenient place & at a distance from any Station.

This was all of the evidence

63 The said Plaintiff then requested the Court to give to the Jury the following instruction —

The Jury are instructed on behalf of the Plaintiff as follows —

If the Jury believe from the Evidence that the Defendant reduced the price of switching cars from one dollar to fifty cents a car, and that the Defendant afterward gave the plaintiff the use of a Coal Yard worth forty dollars a month in consideration of the supply of water to the Defendants by the Plaintiff all these Circumstances are proper for the Jury to take into consideration in determing whether or not there was any arrangement made, by which Defendant was to have the water without charge

To the giving of the said Instruction to the Jury the said Defendant then and there objected the Court then and there overruled said objection and gave said Instruction to the Jury, and the said Defendant then and there excepted —

The Court then at the request of said defendant then instructed the Jury as follows —:

64 That the Burden of proof in this case is upon the Plaintiff, and they must make out their case by a preponderance of Evidence and if the jury find that the evidence in this case is Equally balanced, and does not preponderate in favor of either party they must find for the defendant

2 The Jury are instructed as a matter of law it makes no difference whether Defendants pay taxes or not—

The Jury found a verdict for said Plaintiff and assessed his damages at the sum of $1000.—

The Defendant then Entered its motion for a new trial in said cause which said motion was over-ruled by the Court to which ruling the said Defendant then and there excepted.

The said Defendant then entered a motion in said Cause in arrest of Judgment—

Which said motion was overruled by the Court, to which said ruling the said Defendant then and there excepted.

And said Defendant prays that this his Bill of Exceptions be Signed sealed and made a part of the record in said Cause which is done.

M. E. Mollison (Seal)
Judge

65 — On March 21.te A.D. 1865. the Defendant filed its Appeal Bond which is in the words and figures following to wit;

Know all men by these presents that we, the Chicago and Rock Island Rail Road Company as principal and Joseph O. Glover as security are held and firmly bound unto the Northern Illinois Coal & Iron Company of LaSalle in the penal sum of Two Thousand Dollars for the payment of which well and truly to be made the said Rail Road Company binds itself, and the said Glover binds himself his heirs Executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated this 16.te day of March A.D. 1865.

The Condition of this Obligation is such, that whereas the said The Northern Illinois Coal & Iron Company of LaSalle did at the February Term A.D. 1865. of the Circuit Court of LaSalle County State of Illinois recover a Judgment against the said Rail Road Company in said Circuit Court for the sum of One Thousand Dollars besides costs from which Judgment the said Rail Road Company has taken an Appeal to the Supreme Court of State.

Now if the said Rail Road Company shall

prosecute his said appeal with effect and shall pay the said Judgment with all costs interest and damages that may be adjudged against it in case the said Judgment shall be affirmed then this obligation shall be void otherwise in force.

The Chicago Rock Island Rail Road Company by W. L. St John Seal
General Superintendant.

J. O. Glover Seal

State of Illinois } ss.
La Salle County }

I Herman Silver clerk of the Circuit court in and for said County in said State do hereby certify that the above and foregoing is a true full and complete copy of the record of the proceedings had, and of the papers on file in said Court, in a certain cause wherein "The Northern Illinois Coal and Iron Company of La Salle is plaintiff and The Chicago and Rock Island Rail Road company is defendant.

Witness my hand and the seal of said Court at Ottawa this 5th day of April A. D. 1865.

H. Silver clerk



Clerks fees $15.00

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Now comes the said Chicago and Rock Island Company appellant herein and says that in the Record and proceedings aforesaid and in the rendering of the judgment aforesaid in manner and form aforesaid there is manifest Error in this to wit

1st The Court Erred in admitting improper and incompetent evidence offered by said Plaintiff below

2d The Court erred in excluding proper and Competent Evidence offered by said Defendant below

3d The Court Erred in giving to the Jury the said Instruction asked by said Plaintiff

4th The Court erred in overruling said Motion for a new trial

5th The Court Erred in overruling said Motion in arrest of Judgment

6th The Court erred in rendering the Judgment aforesaid in manner & form aforesaid

And Now for these & other Errors in said Record and proceedings said Appellant prays that said Judgment be reversed & said Cause remanded

Glover, Cook & Campbell
for Appellant

And now comes said Appellee by Bull & Nash his attys and says there are no such errors in the above record as above set forth and prays that said Judgt. may be affd. with Costs &c

Bull & Nash
Attys for Appellee

Received April 10 1873
D. Solomon Clk.

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The Northern Illinois Coal & Iron Company
vs
Sarah Sale
The Illinois Middle Ds. R.R. Co