

12034

No. _____

Supreme Court of Illinois

Gillett
~~Mett~~, et al

vs.

Ellis

71641  7

United States of America
State of Illinois
County of Cook } ss

Hear before the Hon-
orable Giles Spring Judge of the Cook County Court
of Common Pleas within and for the County of Cook
and State of Illinois aforesaid at a Regular term
of said Court begun and holden at the Court
house in the City of Chicago in said County and
State on the first Monday being the fourth day
of February in the year of Our Lord one thousand
eight hundred and fifty and of the Independence
of the United States the Seventy third.

Present the Honorable Giles Spring Judge
Darius M. Gray Presenting Attorney,
Isaac Cook. Sheriff

Attor Walter Kimball, Clerk

Be it remembered that heretofore to wit on the
Eleventh day of ~~November~~ the year of our Lord one
thousand eight hundred and forty eight came Joel
Ellis and filed in the office of the Clerk of the Cook
County Court of Common Pleas his affidavit which
is in the words and figures following to wit,

State of Illinois
Cook County, ss

Joel Ellis of the City of Chicago
in the County of Cook & State of Illinois being first
duly sworn, deposes and says, J. Hille, H. Gaylord,
and C. Gaylord and C. T. Osterling of the County
of Cayahoga, in the State of Ohio, are justly in-
debted to him in the sum of One hundred and

1. Sixty Six dollars and Seventy Six cents being for
the value of a quantity of provisions belonging to said
Ellis consisting of Beef, Potatoes & pork shipped
by said Ellis on board of the propeller Clearland
whereof said Giltie, Gaylord and Sterling were
owners which they agreed to transport and deliver
to said Ellis, agent in Macinae, for a reasonable
freight which said Ellis agreed to pay to them
for the transportation thereof, which property said
defendants neglected to deliver at said Macinae,
whereby the same became wholly lost to said Ellis.
That said Giltie, W. L. Gaylord, and Sterling are
non residents of the State of Illinois and residents
of the State of ~~Illinois~~ Ohio so that process cannot be
personally served upon them and they have personal
property in the county of Cook in this State
Given & subscribed Joel Ellis
before me this 11th day
of Nov - 1848

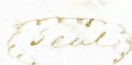
Samuel Curtis, Clerk

And on the same day to wit the Eleventh day of
November in the year last aforesaid there was filed
in the office of the Clerk of said Court an Attachment
Bond which is in the words and figures following to wit.

Know all men by these presents, That we Joel Ellis
Jonathan Westcott are held and firmly bound
unto J. Giltie, W. Gaylord, E. Gaylord & E. T. Sterling
in the penal sum of three hundred & thirty four
dollars - cents lawful money of the United States,
for the payment of which said sum, well and truly,

to be made, we bind ourselves, our heirs, executors
and administrators, jointly, and severally, by these
present, Sealed with our Seals, and dated, this Eleventh
day of November A.D. 1848.

The Condition of the above obligation is such, That
whereas the above bounden Joel Ellis has on the day
of the date hereof, prayed an attachment out of the
Circuit Court, County of said County, at the suit of said
Ellis against the estate of the above named J. Gillett
H. Gay lord, E. Gay lord, & E. T. Sterling, for the sum
of one hundred & sixty six dollars & seventy six cents,
and the same being about to be sued out of said
Court, returnable on the first Monday of February
next, to the term of the said Court, then to be holden.
Now, if the said Joel Ellis shall prosecute his said
suit with effect, or in case of failure therein, shall
well and truly pay and satisfy the said J. Gillett
H. Gay lord, E. Gay lord & E. T. Sterling all such costs in
said suit, and such damages as shall be awarded
against the said Joel Ellis his heirs, executors, or
administrators, in any suit or suits which may hereaf-
ter be brought for wrongfully suing out the said attach-
ment, then the above obligation to be void, other wise to re-
main in force and effect.

Signed, Sealed, and Joel Ellis 
delivered in presence of J. W. Steele 

Steele sworn as to his responsibility,

And on the same day, and year last aforesaid there was
issued out of the office of the Clerk of said Court an
Attachment writ, which is in the words and figures
following, to wit.

State of Illinois
Cook County, }
ss.

The People of the State of Illinois
to the Sheriff of Said County, Greeting.

Whereas Joel Ellis hath complained on oath, to James Martin Clerk of the Cook County Court of Cook County, that J. Gillett, C. Gaylord, H. Gaylord & E. P. Sterling are justly indebted to the said Joel Ellis to the amount of One Hundred & Sixty six dollars and Seventy six cents; and hath having also been made that the said J. Gillett, C. Gaylord, H. Gaylord & E. P. Sterling reside out of this State, so that the ordinary process of law cannot be served upon them, and the said Joel Ellis having given bond and security, according to the directions of the act in such case made and provided. We, therefore, command you, that you attach so much of the estate, real or personal, of the said J. Gillett, C. Gaylord, H. Gaylord & E. P. Sterling to be found in your County, as shall be of value sufficient to satisfy the said debt and costs, according to the said complaint; and such estate so attached in your hands be secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a term of said Cook County Court, to be holden at Chicago, within and for the County of Cook, on the first Monday of February, next; so as to compel the said J. Gillett, C. Gaylord, H. Gaylord & E. P. Sterling to appear and answer the complaint of the said Joel Ellis, and that you also summon or garnish to be and appear at the said Court on the said first Monday of next, then and there to answer to what may be objected against —

when and where you shall make known to the said Court, how you have executed this writ, and have you then and there this writ

Seal

Witness, the Honorable Hugh T. Dickler,
Judge of our said Court, this Eleventh
day of November in the year of our
Lord, one thousand eight hundred &
forty eight

James Courtis, Clerk

Said Writ was returned into the Office of the Clerk
of said Court on the aforesaid Eleventh day of November
A.D. 1848 with the following endorsement thereon and
Bond attached.

"Executed by attaching the propeller Clearland
and taking bond hereunto attached. Nov 11, 1848
I Cook, Sheriff"

Bond

Know all men by these presents, We, William Watts
and James Peck are held and firmly bound unto
Isaac Cook Sheriff of the County of Cook in the
State of Illinois in the legal sum of Three hundred
and thirty four dollars to be paid to the said Isaac
Cook his executor, administrators or assigns, for
the payment of which we bind ourselves our & each of
our heirs executors, and administrators firmly,

The condition of this obligation is such that whereas
Jesse Ellis has this day sued out an attachment against
J. Gillit, C. Gaylord & H. Gaylord & C. T. Sterling from the
Cook County, Court, returnable to the February term
of said Court A.D. 1849, by virtue of which writ the said
Isaac Cook has this day attached the propeller Clear-
land as the property of the said defendants in said suit

Now if the said Suit shall be decided against the said defendants, and the said Propeller shall be forth coming to answer the judgements of the Court in the said Suit then this obligation shall cease and be void otherwise to remain in full force and effect

Wm Watts *(Seal)*

James Rich *(Seal)*

And afterwards, to wit, on the twenty seventh day of April in the year of our Lord one thousand eight hundred and forty nine, came J Young Scamman Plffs Attorney and filed in the office of the Clerk of said Court a Narr which is in the words and figures following, to wit,

State of Illinois

Cook County Court,

Of May Term in the year of our Lord one thousand eight hundred and forty nine

Cook County ss. Joel Ellis, plaintiff in this suit by J Young Scamman his attorney, complains of Jonathan Girard, Henry Gay lord, Erasmus Gay lord and Eliza T Sterling, owners of the propeller Clearland, Defendants in this suit in a plea of Trepan on the case or promises

For that whereas the said defendants before and at the time of the making their said promise and undertaking hereinafter next mentioned, were the owners of the propeller Clearland and were common carriers of goods for profits and reward, by water to wit, from Chicago in the State of Illinois to Buffalo in the State of New York and from Buffalo in the State of New York to Chicago aforesaid, and from each of said ports to the intermediate ports between the same, and the

Said Plaintiff heretofore to wit on the day, of
in the year one thousand eight hundred and forty
eight to wit at Chicago in said County, of Cook
was possessed as of his own proper goods and chattels
of a large quantity, to wit, of one hundred barrels
of Beef, and of a large quantity, to wit, of one hun-
dred barrels of Pork and of a large quantity, to wit
of five hundred bushels of potatoes, of the value
in all of at least five hundred dollars, and at the
Special instance and request of the said defendants
then and there delivered to them, the said Beef, and
pork and potatoes, to be by them safely conveyed in their
capacity as common carriers on board said propeller
Clerland from Chicago aforesaid to an intermediate
port between said Chicago and Buffalo, to wit to
Macinae in the State of Michigan, and there to be delivered
to the agent of said Plaintiff, for a reasonable compen-
sation to be paid by the said Plaintiff to the said
Defendants, and in consideration of all and singular
the said premises, the said defendants then and there
undertook and faithfully promised to carry the said
Beef to wit one hundred Barrels of Beef, and the
said pork to wit, one hundred barrels of Pork, and
said potatoes to wit, five hundred bushels of potatoes
safely to be conveyed from Chicago aforesaid to Mac-
inae aforesaid and then and there safely to deliver
the same to the agent of the said Plaintiff to wit at
Macinae aforesaid, and the said Plaintiff then and
there in consideration of the promise and undertaking
aforesaid of the said defendants undertook and
faithfully promised to pay the said defendants a
reasonable reward and compensation for the said
services to be done and performed by the said

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defendants, and although the said defendants then and there had received the said goods and chattels, to wit, one hundred barrels of Beef, and one hundred barrels of Pork, and five hundred bushels of potatoes to be carried, conveyed and delivered as aforesaid, and although a reasonable time for the carrying, conveying and delivering of the said goods and merchandize aforesaid hath long since elapsed, yet the said defendants not regarding their said promise and undertaking did not safely carry and convey said goods and merchandize from Chicago aforesaid to Macinac aforesaid, and there to wit, at Macinac aforesaid, deliver the same to the agent of the said plaintiff, but on the contrary, thereof, they the said defendants, so carefully, improperly, and negligently, behaved and conducted themselves with respect to the said goods and merchandize, that by and through the mere carelessness, negligence, and improper conduct of the said defendants and their servants, in this behalf, the said goods and merchandize being of the value aforesaid, to wit, of the value of five hundred dollars, afterwards to wit on the day and year aforesaid at Chicago in said County of Cook, became and were wholly lost to the said plaintiff, to wit at

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Chicago in the County of Cook aforesaid, and which also afterwards to wit on the day and year aforesaid at Chicago in said County of Cook, in consideration that the said plaintiff at the special instance & request of the said defendants, had then and there caused to be delivered to the said defendants divers other goods and merchandize of the like number, description and value as those in the first count mentioned to be taken care of, and safely and securely by

carried and conveyed by the said defendants on board
of a certain vessel to wit. from Chicago aforesaid to
Macinae aforesaid, and there to wit. at Macinae
aforesaid to be safely and securely delivered to the
agent of the said plaintiff, for certain freight & reward
to be paid to the said defendants, in that behalf, they
the said defendants undertook and then and there
faithfully promised the said plaintiff to take due and
proper care of the said goods and merchandize last
mentioned, and safely and securely to carry and deliver
the same as aforesaid, and although the said defendants
then and there had and received the said goods and
merchandize last mentioned, for the purpose aforesaid
and upon their promise and undertaking aforesaid,
Yet the said defendants not regarding their duty in
that behalf nor their said last mentioned promise
and undertaking, whilst they had the care and
custody of the said last mentioned goods and merchan-
dize for the purpose last aforesaid, took so little and
such bad care of the same, that through their want
of care, and their negligence in that behalf, the said
last mentioned goods and merchandize being of
great value to wit. of the value of five hundred
dollars, became and were wholly lost to the said
plaintiff, to wit. at Chicago in the county of Cook
aforesaid, and whereas also the said plaintiff after-
wards to wit on the same day and year aforesaid,
and at the place aforesaid was the owner and pro-
prieto of certain merchandize and chattels to wit.
three hundred and seventy nine pounds of Smoked
ham, six hundred and ninety pounds of Smoked
shoulder, twenty eight bushels of potatoes, Eight
barrels of Beef, one barrel of Lard, one hundred

and twenty one pounds of Bologna Sausages, Eighty eight pounds of dried beef, two quarters of fresh beef, one hog, and one other lot of dried beef, weighing one hundred and sixty two pounds, of great value, to wit of the value of two hundred dollars, then being in and on board a certain vessel of the said Defendants, and laden and placed on said vessel, to be carried and conveyed thereon for freight payable to the Defendants in that behalf on a certain voyage wherein the said vessel was then proceeding, to wit from Chicago to Macinae, and whereas also the said vessel at the time of the taking of the damages and loss hereinafter mentioned was a vessel employed in trading between Chicago and Buffalo and the intermediate ports, of which said Macinae is one, and the said property and merchandize so as aforesaid laden and placed on said vessel, was then a reasonable part in that behalf of the property and merchandize which the Defendants were then employed to carry by the said vessel on her then voyage from Chicago to Buffalo, and whereas also which the said vessel was sailing and proceeding on her said voyage with the said chattels and merchandize on board, to wit on the seventh day of April A.D. 1847, by storm, wind and tempestuous weather in order to preserve the said vessel, it then became expedient and necessary to throw and cast overboard the said chattels and merchandize being the property of the said plaintiffs of great value, to wit of the value of two hundred dollars, and the same were then and there accordingly cast and thrown overboard, and became and were

wholly lost to the said plaintiff, and the said
vessel was by means of the premises then saved
and preserved and afterwards to wit on the same
day and year aforesaid arrived safely to wit at
Macinae aforesaid of all of which last mentioned
premises the defendants afterwards to wit on the
same day and year aforesaid had notice, and
then in consideration of the last mentioned prem-
ises premises to pay the plaintiff so much money
as the defendants as owners of the said vessel,
and interested in the said freight were liable to
contribute to the said losses and damages in a
general average in request, and said plaintiff avers
that said defendants as owners of said vessel, and as
so interested in the said freight were liable to pay
and contribute to the said losses and damages in
a general average, a large sum of money to wit,
the sum of one hundred and ninety five dollars,
whereof the said defendant afterwards to wit
on the same day and year aforesaid and at the
place aforesaid had notice, yet the defendants
disregarding their said premises have not paid to
said plaintiff said sum of money or any part thereof
2. And also for that whereas the said defendants after-
wards to wit on the tenth day of November in the
year one thousand eight hundred and forty eight
were indebted to the said plaintiff in the sum of five
hundred dollars for the price and value of goods and
chattels, wares and merchandize then and there
bought and sold and sold and delivered by
the said plaintiff to the said defendants, and at
their special instance and request, and in the like
sum for money then and there received by the said

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defendants to and for the use of the said plaintiff and in the like sum for interest due from the said defendants to the plaintiff, for and in respect of the plaintiff having forborne and given day, of payment of money due from the defendants to the plaintiff at the defendants request, for a long time, then elapsed, and in the like sum for money found to be due from the defendants to the plaintiff on an account then and there stated between them - And Whereas the said defendants afterwards, to wit on the day and year last aforesaid, in this court, aforesaid in consideration of the premises respectively, promised to pay to the said plaintiff the said several sums of money, above mentioned when they should be thereunto afterwards requested, yet the said plaintiff says that the said defendants although often requested so to do, have not paid said several sums of money, above mentioned or either, or any ~~part~~ of them, or any part thereof, but to pay the same or any part thereof they have hitherto wholly neglected and refused, and still do neglect and refuse to the damage of the said plaintiff of Five Hundred dollars, and therefore he brings suit

I Young Scamman, Plaintiff,
Jonathan Gillette, Henry Gaylord, Crastus Gaylord,
& Oliver F. Sterling owners of Property to be sold
1848 To Joel Collins 10

For 100 barrels beef, delivered to you by me	
and not accounted for	\$ 500. 00
" 100 do of Pork	500. 00
" 500 bushels of Potatoes do	500. 00
" Money, had and received	500. 00

" " due on account. Stated 500.00
 " goods ware & Merchandize sold 500.00

And afterwards to wit, on the fifteenth day of May
 being one of the days of the May term of the Court Common
 Pleas for the year aforesaid the following order and
 proceedings were had and ordered to be entered of Record

Joel Ellis }
 vs }
 J. Gillette et al. } By agreement of parties it is ordered
 that this cause be continued at the said defendants cost

And afterwards to wit on the twentieth day of
 October in the year of Our Lord one thousand eight
 hundred and forty nine, there was filed in the
 office of the Clerk of said Court a plaint notice which
 is in the words and figures following to wit.

Cook County Court
 Jonathan Gillette, H. and }
 & Gaylord & J. Stirling }
 ad } October Term A.D. 1849
 Joel Ellis }

And the said defendants by
 Williams & Butterfield their attorney come & defend
 the wrong & injury whereof and say that they did
 not undertake and promise in manner as the said

7.

plaintiff hath above thereof complained against
them, & of this they put themselves upon the country &c

Williams & Butterfield
and the plaintiff doth the like. Dift. Altop

By Scammon & Mc Cagg

his atty.

The plaintiff in the above entitled suit will please take notice that the above named defendants on the trial of this cause will give in evidence & insist that the goods & merchandize in the said plaintiff declaration mentioned were shipped on board the propeller Clearland a vessel owned by said defendants at the port of Chicago in the State of Illinois to be conveyed on board said propeller to the port of Macinac in the State of Michigan, that said goods and merchandize placed in the deck of said propeller in the place where goods & merchandize of this description is generally placed on board said propeller and that after the said propeller had left the port of Chicago & before she reached the port of Macinac the said propeller encountered a very severe storm. That said propeller was greatly injured by said storm & was made to leak very badly, That while said storm was raging the goods and merchandize in the said plaintiff declaration mentioned were thrown overboard for the purpose of lightening said vessel and in order to save said vessel from sinking. That at the time when said goods and merchandize were thrown overboard, said propeller was driving before the wind, that she was leaking very badly & was much topped by the water, that the safety of the said boat & all her passengers & crew was greatly

indangered, & that it was for the sole and only purpose
of saving said vessel & her passengers & crew, that the
said goods & Merchandise were thrown over board,
and then defendants will further give in evidence
that it is the custom of Propeller & Steam Boats run-
ning from the Port of Chicago to the Port of Macinae
to carry goods & Merchandise of the kind in said
plaintiff's declaration mentioned on the decks of
said Propeller and Steam Boats in the place
and manner in which the goods & Merchandise of
said plaintiff were shipped on board said Propeller
& Clearland, That then defendants are common
carriers & received the merchandise of said
plaintiff for the purpose of conveying the same
as common carriers as aforesaid from the Port
of Chicago to the Port of Macinae aforesaid.

William & Butterfield

Deft. Atty.

And afterwards to wit on the Eleventh day of October
A.D. 1849, being one of the days of the October term of
the said Cook County Court, Court for the year aforesaid
the following order & proceedings were had and entered
of Record to wit,

Jos. C. Ellis

vs

Atty

J. Gillett et al. } On motion of the said defendants
and on affidavit filed it is ordered that this cause
be continued to the next term of this Court at the
said defendants' cost.

And afterwards to wit, on the Ninth day of February
A.D. 1850, being one of the days of the February term of
the Cook County Court of Common Pleas the following

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proceedings were had in said Court and ordered to be entered of Record, to wit:

Joel Ellis

vs

Att

I Gillett et al } and now comes Scamman
Attorney for the plaintiff and on his motion leave
is granted to the plaintiff to file an additional
count.

And afterwards do sit on the twenty third day
of February, in the year aforesaid being one of the
days of the February term of said Court the following
Order and proceedings were had and ordered to
be entered of Record, to wit:

Joel Ellis

vs

Att

I Gillett, H Gaylord

E. Gaylord & E. T. Sterling

And now again comes the
said parties by their attorneys and upon being joined
in this cause let a Jury come, and thereupon comes
the Jurors of a Jury of good and lawful men to wit:

John Ward

John McHale

Thomas Conney

P. O. Matney

James King

Thomas O. Sullivan

E. D. Robinson

E. T. Bogue

Martin Diamond

John Brannon

John O. Meera

J. R. Wilcox

who being duly elected tried and sworn well and
truly to try the case joined as aforesaid, and
after hearing the evidence adduced, arguments
of counsel and instructions of the Court, retire
under the charge of an officer of the Court to consider

All

To Gaylord & Co & Sterling

This day, again, came the said Parties by their attorneys and after argument heard on the said defendants motion for a new trial in this case, the court being now fully advised in the premises doth order that said motion be overruled.

Therefore it is considered that the said plaintiff do have and recover of the said defendants his damages of One hundred and Seventy four dollars and sixty three cents in form aforesaid apportioned and also his costs and charges by him in this behalf expended and have execution against the property attached to wit, The Propeller ^{Charles H.} Clearland to satisfy the same.

And thereupon the said defendants enter their exceptions to the opinion of the Court overruling the said motion for a new trial herein, and pray an appeal herein which is granted upon their entering into a Bond in the usual form, and conditions in the penal sum of Five hundred dollars with James Peck as security to be filed in the office of the Clerk of this Court within forty days after the day of the adjournment of this court.

And afterwards to wit, on the Ninth day of April A.D. 1850, there was filed in the office of the Clerk of said Court a Bond which said Bond is in its words and figures following to wit,

"Know all men by these presents that we Jonathan Hill, et Henry L. Gaylord, Erastus F. Gaylord, and Elisha T. Sterling of the City of Clearland in the

State of Ohio and James Peck of the City of Chicago
in the State of Illinois, are held and firmly bound
unto Joel Collis of the City of Chicago in the Penal Sum
of Five Hundred dollars for the payments of which
Sum well and truly to be made we bind ourselves
our heirs, executors and administrators jointly, and
severally, firmly by their presents. Sealed with
our seals and dated this 5th day of March A.D. 1850.

Whereas at the February Term of the Court Count,
Court of Common Pleas held in and for the County
of Cook in the State of Illinois in the year of our
Lord one thousand eight hundred and fifty, in a
certain action of trespass upon the case upon prom-
ise in which the said Joel Collis is plaintiff and the
said Jonathan Gillett, Henry L. Gaylord, Corcoran
P. Gaylord, and Elisha T. Sterling are defendants,
the said plaintiff obtained a judgment against
the said Defendants for the sum of One hundred
and Seventy four dollars and Sixty three cents
damages and costs of suit, and the said defend-
ants have prayed an appeal to the Supreme Court
of the State of Illinois.

Now therefore the condition of this obligation
is such that if the defendants shall pay the judgment,
costs, interest, and damages, in case the judgment
shall be affirmed and shall not prosecute their
said appeal then this obligation to be void otherwise
to remain in full force and virtue.

Corcoran P. Gaylord (Seal)

Henry L. Gaylord (Seal)

Jon^l Gillett (Seal)

Elisha T. Sterling (Seal)

James Peck (Seal)

And afterwards, to wit, on the first day, of March A.D. 1850. Came the said defendants, by Williams & Butterfield their attorney and filed in the office of the Clerk of said Court their Bill of Exceptions, which said Bill is in the words and figures following, to wit,

State of Illinois
County of Cook
Cook County, Court of Common Pleas

Jonathan Gillett, Henry Gaylord,
Elias Gaylord & Oliver T. Sterling }
vs }
Doct. Ellis }

Be it remembered that on the 23rd day of February, in the February term of the Cook County Court of Common Pleas, in the year of our Lord one thousand eight hundred and fifty, this cause came on to be heard before the Hon. Giles Spring Judge of said Court and a jury duly impanelled to try the issue & upon the trial of the issue and to maintain the same the plaintiff's attorney introduced the deposition of William Saxton as a witness examined on the part of the plaintiff who testified as follows.

Cook County Court

Doct. Ellis

Gillett, Gaylord & others.

It is stipulated and agreed

between the parties to this suit, that the testimony
of William W. Galtensdale a witness sworn and
examined on the part of the plaintiff herein,
shall be competent and legal evidence to be
read on the trial thereof, as though the same had
been taken before a commissioner or Justice of the
peace, and was in all respects legally taken and
certified to, and shall be subject to no objections
except such as may arise with regard to its
competency, and relevancy.

Chicago Oct 8. 1849.

Scammon & McLaughlin
Offt. atty

Williams & Butterfield

Deft. atty

P
Preliminary Exam. William W. Galtensdale being first duly sworn
by Deft. Counsel says, I have no interest in the event of this suit, I
was not to have a portion of the profits of the article
shipped by Ellis from this port to Macinae, I never
said to Capt. Watts or any one else that I was inter-
ested any farther than conducting his business was
Orick. I was agent for said Ellis during all the summer
of the year 1848. and in April of that year took
charge of goods shipped on board the Propeller
Clearland by said Ellis for the Port of Macinae.
The goods were put up by me & shipped by me -
they were 379 lbs. Smoked Ham 49th Smoked Shoulders
28 bush Potatoes 3 Barrels of Beef, 1 Barrel of Lard
portion in Hog Head 121th Bologna Sausages 38th
dried Beef, 2 quarters fresh beef weighing 427th
1 Hog (head) 162th of dried Beef which I think
was put with the rest but I cannot swear positively
by that it was, amounting in value to One Hundred

& fifty eight dollars and seventy six cents. I selected the articles weighed them & packed them and put them in packages of the officers of the Boat who received them & put them on board. I saw most of them on board afterwards and they told me they had all been put on board. The amount which I have mentioned as the value of the goods was if any thing less than their real value about their value I should think. I spoke to the officers about taking the goods and they said they would take them. They were shipped to be taken from Chicago to Macinae. They were never delivered at Macinae, those goods that I saw after I went on board were on the main deck. I do not know what the custom is as to shipping such goods in the hold or on deck. I have seen large quantities of beef on the deck of Steam boats at different times have seen them in the hold also. The ship the propeller Clearland was engaged in the carrying trade on the lakes. This was her first trip in the season. She had been so engaged the season before. I do not know how the goods were stowed ~~on~~ in the hold of the Clearland. The goods were not delivered at Macinae because they were thrown into Lake Michigan. I was on board at the time they were so thrown over. The Clearland was at that time I think some where between Milwaukee & Sheboygan. The first port we entered after the goods were thrown over board was the port of Milwaukee. I can't say positively whether any thing was said by the Capt after we entered the Port of Milwaukee about making a general or particular average - I think I spoke to him about it but I cannot recollect

the time, I think I mentioned it more than once; He told me they had wrote on to the insurance office in New York to know how they did in similar cases before they did any thing in the premises. The Hatches were opened at Milwaukee, I think no part of the cargo was discharged at Milwaukee, I saw none taken off. I was on board of the vessel at the time, I left the Clearland at Milwaukee, at that time. The Officers of the boat were to be paid for carrying the goods, I do not think there was any definite bargain. There was no bill of lading, I mailed to Messrs. Little & Co. at Clearland a letter containing an invoice of the goods, which invoice was sworn to & duly authenticated by Sid Collins. It was mailed to me at Macinae; at the request of Capt. Watts I sent it on to Clearland. He requested me to send on to Clearland the necessary evidence of the goods being lost. The Capt. told me who to direct to & the letter was directed accordingly. I never received a reply, I wrote for a reply, but never received one. There never was any compensation made for the goods that I know of. I have had no subsequent communication with Capt. Watts or the owners of the Boat in regard to this matter.

Cross examined, I cannot say why the goods were thrown overboard, I assisted in throwing them overboard, part of them, I can't say at whose request, there was a request for assistance and I assisted, the Engineer was the only one whom I heard say any thing about throwing the goods overboard, there were not many engaged in throwing over the goods, I was in the quarter, there were few or five so engaged there, can't say how many in the forward part, The Clearland

Had water in her engine room at that time, cant
 say how deep, there was a severe storm at the time,
 it was blowing very hard. It was snowing some, I
 dont think it froze on, it might have froze in the
 night, I dont think it did in the day time, the latter
 was very rough, the Clear land was drifting with
 the wind, the water had put out her fire, the
 passengers were engaged in bailing the boat.
 cant say with regard to the hands, the water
 decreased I think while they were bailing, at
 the time I was on the main deck I think three
 four or five were engaged in bailing, cant
 speak positively, the boat was rolling very badly,
 I cant tell whether she had sprung a leak, there
 was considerable alarm, they were all pretty well
 frightened, I think the storm was the evening of the
 17th or the day of the 18th day of April, I think it com-
 menced in the evening of the 17th, the last watches in one
 of her quarters were store in, I believe it was the
 same storm in which the propeller Manhattan
 went ashore, as far as my knowledge goes it was
 the worst storm of the season, that was the only
 time I was on the latter until fall, I left the Clear-
 land to get hat, coat & Boots, and to look for
 my baggage that had been thrown over board,
 I had not put hat, coat & boots on when I got up
 in the night, I think the hands on board the Clearland
 were not benumbed by the cold, I was on her deck
 all the time without any hat, coat, or boots on,
 I never told Mr. Gouman that the water was two
 or three feet over the deck, I never said to him that
 the water was mid thigh, never had any conversation

12 1/2

Throw over.

with him about the water on her deck. I recollect saying to him that I saw my trunk go over, and would not attempt to save it. I should say, my trunk was pushed over, there was no baggage washed over, it was all thrown over. I did not see any freight washed over, it was all thrown over in that part of the river where I was. I don't know positively that all of Ellis' freight was thrown over we never got any of it. I have seen freight of this description on the decks of Steam boats, I won't say with regard to propellers, I have been very seldom aboard of them the freight that I have received at Macinae has been generally carried on the decks of Steam Boats, I never had any carried on the hold from this port to Macinae, I have been in the habit of receiving Beef & cattle from Chicago at Macinae, not much of other kinds of goods, I presume it was my calculation that the owners of the Clearland were to be paid in money for carrying these goods, I did not know that the goods were on deck until after I saw them there, there was no contract made that they should be put in the hold, these goods were on her main deck, what I call the main deck is the deck the hatch is on, I don't know what nautical men may call it, I call that her main deck the other I call her cabin, her cabin was above this deck. The Clearland was driven by the storm into the vicinity of Little Port, I don't know whether a protest was made or not, I understood he was going to make a protest, I do not know that any letter sent to Little Port was ever received, it was put in the mail at Macinae, I can't recollect the time that I spoke to Capt Wall, about

making an average, I spoke to him about it at different times, I am not sure that I spoke to him about it at Milwaukee, I think I did, but I can't recollect positively, it has been some time since. In my estimate of \$158.76 I have included the 142^{lbs} of dried beef, that beef was worth seven (7) cents per pound, I think the dried Beef was put with the other goods in the wharf but am not sure, I don't know whether it was put on board, I did not at any time make any objection to the storage of the goods.

Ques. Did you think at the time of the storm that the boat would be lost.

Objected to

Ans. Well Sir I did,

Direct Ex resumed

There was nothing lost from the hold, all the goods there were saved, after the storm we made the port of Milwaukee by steam, The Engineer and one of the passengers said that the cause of the water in the engine room was a cock or plug coming out or breaking off. They were bailing all the time out of the fire hold during the storm, and after we came near Little Port, I went into the fire hold & worked there all night till the water got below the fire grates & the fires were started, we bailed with pans or tin buckets, I forgot which, after the fires were started I went into the cabin & stayed there for I was pretty much tuckered out, there was some bailing done out of the fire hold at Milwaukee but from no other place that I know of, The fire hold is separated from the hold where

freight is stowed. The only remark I heard made about throwing over the freight was when the engine made her last revolution. The Engineer said then, now boys for the freight.
Cross Examination resumed.

I do not know that the Clearland was greatly injured by that storm. I know nothing about the extent of the injury only what I saw. I don't know when the mast was broken off.
Affidavit taken

The Plaintiff then called Mr. Wright who being sworn testified, That he was on board the Clearland in April 1848, saw freight on deck, on main deck between the hatches, that is between the main and hurricane deck. A Propeller has two decks. Saw a hoghead of Ham & shoulders, some potatoes & beef. Saw the hatches of the Clearland opened at Milwaukee. The hold was not full. When at Milwaukee after the storm the Clearland took on some flour which after the Propeller left that lot was put into the hold. Did not see the goods in question thrown overboard but did not see them after the vessel left Milwaukee subsequent to the storm.
Cross Examination.

The storm was awful, beyond description. I have followed the water some 15 years but never in rivers, never witnessed such a storm before. It was the 18th of April. I should think it was necessary to the saving of the vessel & freight & the lives of the passengers that the goods should have been thrown overboard.

as having two decks is acquainted with the custom as to shipping on board Propellers.

The Defendants then introduced the deposition of William Watts who testified as follows

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The Plaintiff then called Mr. Talmadge, who being sworn testified, That he saw the goods thrown overboard, Heard the Captains order it to be thrown overboard, & considered it necessary that the Freight should be thrown overboard, to save the lives of the crew and passengers & to save the ship & the balance of the freight.

R. C. Bristol being called on the part of the Plaintiff testified, That he is acquainted with Propellers & knows the custom of shipping & stowing goods on board of them, has owned one, They have become in use very often in the Lakes, Thinks there has been a discrimination between goods stowed in the hold & on deck, or between decks, but such discrimination has generally been to suit the convenience of the Master, It has been the custom to stow goods between decks.

I have been the custom for the last two or three years to place valuable goods between decks, From the general custom on the Lakes goods stowed between decks are considered as stowed in the hold, A Propeller is a double decked vessel.

cross Examined, Considers goods stowed between decks as safe as goods stowed in the hold.

The Plaintiff then called John R. Chapin, who testified

That goods on board Propellers were stowed indiscriminately in the hold or on deck to suit the convenience of Masters & such witness understands such to be the custom, He is the owner of a Propeller & knows the Propeller Clearland & he is a double decked vessel, most Propellers are registered

STATE OF ILLINOIS,
COUNTY OF *COOK* } ss.

THE PEOPLE OF THE STATE OF ILLINOIS,

To *George A. Benedict, James W. Mather, and*
Robert B. Danner, Attorneys at law, or either of them
of the County of Cook, State of Ohio

WHEREAS, it has been represented to us that *William Mather, James W. Mather, John Commings, and John Neal*

are material witness *in a certain cause now depending in our Circuit Court, in and for the county of*
COOK aforesaid, between *Paul Collins*

Plaintiff, and *Amathias Bennett, Henry Gaylord, Cora L. Gaylord, and Eliza F. Sterling*

witness *reside at* *Clearland in the State of Ohio* aforesaid,
without the said State of Illinois, and that *their* 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 *in*, and do therefore authorize and require you to cause the said witness *in* to come
before you at such time and place as you may therefor designate and appoint, and diligently to examine the said
witness *in*, on the oath or affirmation of the said witness *in* by you first duly in that behalf administered, and
faithfully to take the deposition of the said witness *in* upon all interrogatories inclosed with or attached to these
presents, both on the part of the said Plaintiff 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 *W. Kimball* Clerk of our said Court, and seal thereof,
at Chicago in said county, this *Eighteenth* day
of *September* A. D. 184 *9*
Walter Kimball CLERK

I SUBScribe TO THE DEPOSITION

Signature of Illinois

INSTRUCTIONS

INSTRUCTIONS

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

I. CAPTION TO 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 forty _____, 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 POTESTATEM OR COMMISSION issued out of the Clerk's office of the Circuit Court of _____ county, in the State of Illinois, bearing TESTE in the name of _____ Esq. clerk of the said Circuit Court, with the seal of 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 Circuit 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 the 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 assents 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 as such commissioner (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 at 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. 184 _____; 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 the 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.," &c. and enclose 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 names, one on each of the outside seals; or if three commissioners then each one will write his name across one of the seals in manner aforesaid. The commissioner (or commissioners) will also endorse 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 depositions 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 make it applicable to the number of witnesses to be 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," &c. 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 witnesses in the said cause," &c. 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 follow:—"

"Interrogatory 1st." (Here insert the first interrogatory.)

"Answer to 1st 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 ribband, and using wax, or wafers when necessary.

Jonathan Giltner, Henry
 Gaylord, Cranstun Gaylord
 and Eliza T. Sterling
 owners of Propeller Cleatland } State of Illinois
 ad.
 Fort Collins

Gent.

Please take notice that an
 application will be made to the Clerk of the Cook
 County Court at his office in Chicago on the 18th
 day of September instant at 10 o'clock a.m. of that
 day for a commission to be issued to George A.
 Benedict, Samuel A. Mather, and Robert B.
 Dinnin, Attorneys at Law of Cleatland in the
 State of Ohio, authorizing the person above na-
 med or either of them to take the testimony of
 William Watts, Samuel W. Mathaway, John Cum-
 mins and John Phoebe, now resident witnesses
 residing at Cleatland aforesaid in interroga-
 tions copies of which are herewith annexed and
 herewith served.

Sept 7. 1849

Yours Hc

Butler, Filds & Williams

To Messrs. Gammeter & McLaughlin

plffs Atty.

Cook County, Conn.

Jonathan, Gittler, Henry Gaylord
 Charles Gaylord, and Elisha
 J. Sterling, owner of the propeller Clearland

ads

Foot Ellis

} State of Illinois

In testimony to be administered to William
 Watts, James W. Mathaway, John Cunningham and
 John Cheat, non resident witnesses to be produced
 sworn and examined in the case of the Defendants.

Interrogatory 1st

What is your age, occupation and place of residence
 and are you acquainted with the Parties Plaintiff
 and defendants in this suit? If acquainted with
 any, which of them

Interrogatory 2nd

Have you at any time sailed upon the Propeller
 Clearland, If so, when, and how long and in
 what capacity? Between what ports did said
 Propeller run?

Interrogatory 3rd

Did the said Plaintiff to your knowledge Ship any
 Brigs, Barks, or provisions or property of any kind
 on Board said Propeller from Chicago to Mac-
 inac in the year 1848? If so, what were the provisions
 taken were they shipped?

Interrogatory 4th

Were you on Board said Propeller Clearland when
 certain property belonging to the said Plaintiff
 was thrown over from said vessel. If so, when

and where was the property thrown overboard?
and what was the property? State particularly,
what was its name?

Interrogatory 5th

Why was said property thrown overboard, and who
assisted in throwing over the same? State whether
the weather was at the time very stormy, and the
latter very rough, or other wise? Was there a strong
wind blowing at the time? State particularly,
the condition of said vessel at the time the freight
was thrown overboard?

Interrogatory 6th

Did you consider said vessel at the time above
mentioned in any danger of being lost? if so, State
particularly what the danger was, what was your
position with reference to the land?

Interrogatory 7th

Was the property of said plaintiff thrown overboard
for the purpose of lightening said Propeller and to
save her from sinking? Was other freight thrown
over at the same time?

Interrogatory 8th

Where was the property of said plaintiff placed
upon said vessel at the time the same was taken
on board at Chicago? Was the same removed from
the place where it was first stored? If yes, where?
Was said property previous to being thrown over
board stored in the place where freight of that
kind is generally stored on board of Propellers,
If not, please State why it was not stored in the
usual place?

Interrogatory 9th

[2034-15]

Do you know of any other matter or thing which

may be of benefit or advantage to their defend-
ants? If yes, State the same as particularly
as if specially interrogated thereunto.

Butler, Field & Williams

Deft. Attys

Cook County Court

Just. Ellis

Jonathan Gittell, Henry Taylor,
Erastus Taylor, Pelisha L. Sterling
owners of Propeller Clearland

Cross Interrogatories to be administered to William
Watts, James M. Hathaway, John Commins, and
John Phet; and each of them, witnesses to be
examined in the part of the defendants in the
above entitled case on a commission to be issued
out of the Cook County Court, to be directed to
George H. Benedict, Samuel A. Mather, & Robert B.
Dennis, Commissioners, to take said depositions.

The said plaintiff not making any objection to the
competency of said witnesses or either of them, or to
the legal sufficiency of said direct Interrogatories,
propounds the following cross interrogatories.

1st Cross Interrogatory

State particularly, if in answer to the second di-
rect interrogatory; you have not already done so,
in what capacity, you were acting on board said
propeller Clearland at and about the time said
property (if any) was thrown over board?

2nd Cross Interrogatory

After said storm, what was the next part of entry

made by said Propeller Clearland, was any protest entered, if so before whom, at what time, where, and who were the witnesses to the same

3rd Cross Interrogatory,

At the time you was overtaken by said Storm what was your port of destination, upon your arrival there, or upon your arrival at any other place after said Storm, was any account taken of the several losses which had ensued in consequence of said Storm, or any account of the value of other articles on board said vessel or Propeller, that were saved, or were any steps taken to settle upon a general average, or a contribution to be made by all parties interested, towards the loss sustained by the persons whose property had then been destroyed?

4th Cross Interrogatory,

If you answer yes, in regard to the contribution mentioned in the 3rd Cross interrogatory, state full, and particularly, what was done, who was notified by whom and in what manner such notification was made, whether the same was full, done and completed?

5th Cross Interrogatory,

State particularly, whether the Storm was so violent as to endanger the said vessel and cargo, and whether said property thrown overboard (if any) was thrown over for the purpose and with the intent of securing the safety of said vessel and the balance of her cargo.

6th Cross Interrogatory,

If a general average was adjusted what was the amount settled upon to be contributed by the plaintiff in this cause, and the amount settled upon as his loss

7th Cross Interrogatory,

18.

What was the value of Said Propeller and her appurtenances, and what was the value of the cargo on board of her, at the time said property was thrown overboard.

8th Cross Interrogatory,

Do you know of any other matter or thing of benefit or advantage to the Plaintiff in this case? if yes state the same fully and particularly, as if here specially interrogated thereto.

Scamman & M^{rs} Coag

Plffs Atty

Depositions of Witnesses produced & sworn on the 28th day September 1848 at Clearland by virtue of a Commission issued from the Court County Court, State of Illinois, to me directed for the examination of Witnesses in a certain cause pending in said Court wherein Jonathan, Gillett, Henry, Gay, Lord, Erastus Gaylord and Elisha T. Sterling, owners of propeller Clearland, are Defendants and Joel Ellis is Plaintiff.

William Watts of lawful age, being first duly sworn on part of the defendants, depose and say: In answer to the first direct Interrogatory,

I am 36 years of age, my residence is at Clearland, Ohio. My occupation is that of Sailor. I am acquainted with the parties to this suit.

Answer to Second direct Interrogatory,

I have, in the year 1848, in the capacity of Master, Buffalo & Chicago.

Answer to third direct Interrogatory,

The Plaintiff did not to my knowledge ship

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any property in said vessel, but a quantity of
Pork & Beef was shipped by a man by the name of
Suttonsall to Macinae, about the middle of
April 1848, I dont know what quantity, not having
any Bill of lading.

Answer to fourth direct Interrogatory,

I was on board when the property shipped as
above was thrown overboard, On the 18th of April 1848
in Lake Michigan, not far from Milwaukee as I
think. It was snowing and blowing very hard at
the time, I cannot say what the value was.

Answer to fifth Interrogatory,

For the preservation of the lives and property aboard
lover and passengers. It was very stormy and the
lake was very rough, more so than I ever saw it.
There was a very strong one. She was in a leaky con-
dition, with four feet of water in the hold, so much
water as to put out the fires out, and we were at the
mercy of the wind & waves.

Answer to Sixth direct Interrogatory,

I did. She was in great danger of sinking - on
account of her leakings rapidly & the violence of the
waves.

Answer to Seventh direct Interrogatory,

The above mentioned property was thrown over-
board for that reason. There was other freight thrown
overboard at the same time.

Answer to eighth Interrogatory,

Between decks It was not, that I know of -
It was,

Answer to Ninth direct Interrogatory,

If the property above mentioned and other property
had not been placed between decks, where it

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could be got at easily, the Propeller and all on board must have been lost.

The said William Watts in answer to the ^{cross} first Interrogatory says, I have already stated that I was acting in the capacity of Master of said propeller

Answer to 2^d Cross Interrogatory,

Milwaukee was the first port of entry, a Protest was entered on the 19th of April 1848, I think before whom I do not know or recollect, The Witnesses were James W. Mathaway, John Cummins, John Watts & Charles M. Carly.

Answer to third Cross Interrogatory,

Buffalo, no account was taken of the property above referred to, that I know of, There was a Bond of general average made out at Milwaukee, but nothing further was done to make a general average that I know of.

Answer to fourth Cross Interrogatory,

Nothing was done in regard to making a contribution.

Answer to fifth Cross Interrogatory,

It was, and the property was thrown overboard to save the vessel, remaining property & lives on board.

Answer to 6th Cross Interrogatory,

No general average was made.

Answer to 7th Cross Interrogatory,

I should think the Propeller worth about fifteen thousand dollars (\$15,000.) appurtenances included, The value of the cargo I cannot state.

Answer to 8th Cross Interrogatory,

I know of nothing else that will benefit the Plaintiff

William Watts

I hereby certify that the above deposition of William
Watts was sworn to and subscribed by said deponent,
at Cleveland, Ohio, this 28th day of September A.D. 1849
before me.

Robert B Dennis
Commissioner.

The Defts also introduced the deposition of Leonard
H. Burger, who testified as follows.

DEDIMUS. - Democrat Print.

STATE OF ILLINOIS,

COUNTY OF *Cook* } ss.

THE PEOPLE OF THE STATE OF ILLINOIS,

To *George A. Benedict, Emanuel A. Mathew, & Robert A. Deamies, Esq's or either of them,*

Attorneys at Law, Clearland, State of Ohio.

WHEREAS, it has been represented to us that

John Pheat, Leonard F. Burgons, John Cummings, and Michael Barrows,

are material witness *in a certain cause now depending in our Circuit Court, in and for the county of* *Cook* *aforesaid, between* *Soil & Co.*

Plaintiff, and *Jonathan Gidney, Henry Gaylord, Charles Gaylord, and Charles F. Sterling owners of the* *Propeller Clearland*

witness *reside at* *Clearland in the State of Ohio* Defendant, and that the said witness *reside at* *Clearland in the State of Ohio* aforesaid, without the said State of Illinois, and that *their* 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*, on the oaths or affirmations 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 Plaintiff and of the said Defendant 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 *Walter Kimball* Clerk of our said Court, and seal thereof, at Chicago in said county, this *19th* day of *January* A. D. 18*57*

Seal

Walter Kimball

CLERK.

COMMISSION TO THE DEPOSITION

State of Illinois

INSTRUCTIONS

12-23-19

INSTRUCTIONS

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

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I. CAPTION TO 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 forty _____, 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 POTESTATEM or COMMISSION issued out of the Clerk's office of the Circuit Court of _____ county, in the State of Illinois, bearing TESTE in the name of _____ Esq. clerk of the said Circuit Court, with the seal of 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 Circuit 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 the 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 assents 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 as such commissioner (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 at 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. 184 _____; 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 the 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.," &c. and enclose 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 names, one on each of the outside seals; or if three commissioners then each one will write his name across one of the seals in manner aforesaid. The commissioner (or commissioners) will also endorse 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 depositions 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 make it applicable to the number of witnesses to be 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," &c. 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 witnesses in the said cause," &c. 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 follow:—"

"Interrogatory 1st." (Here insert the first interrogatory.)

"Answer to 1st 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 riband, and using wax, or wafers when necessary.

Cook County Court of Common Pleas
Jonathan Gillitt, Henry Gaylord, }
Erastus Gaylord, & Elsie T } State of Illinois
Sterling owners of the Property }
Clearland }

admn
Joel Ellis
Gent.

Please take notice that
an application will be made to the Clerk of the Cook
County Court of Common Pleas at his office in Chicago
on the 19th day of January instant, at 10 o'clock A.M.
of that day for a commission to be issued to George
A Benedict, Samuel A. Mathew, & Robert B Dennis
Attorneys at law, at Clearland in the State of Ohio,
authorizing the persons ^{above} named or either of them to take
the testimony of John Pheat, Leonard F Burgess,
John Cummins & Marshall Barrow non resident
Witnesses residing at Clearland aforesaid on inter-
rogatories, copies of which are herewith annexed and
herewith served

Yours &c
January 8th A.D. 1880. Williams & Butler filed
To Defts attys
Messrs Scammon & McCagg
Plffs attys

Cook County Court of Common Pleas
Jonathan Gillitt, Henry Gaylord } State of Illinois
Erastus Gaylord & Elsie T Sterling }
owners of Property Clearland }
admn
Joel Ellis

Interrogatories to be admin=

21

entered to John Wheat, John Cummings, Leonard F. Burgess & Marshall Barrows non-residents, Witnesses to be produced, sworn and examined on the part of the defendants.

Interrogator, 1st

What is your age, occupation and place of residence, and are you acquainted with the parties, plaintiff and defendants in this suit? If acquainted with any, which of them?

Interrogator, 2^d

Have you at any time sailed upon the propeller Clearland. If so, when, and how long, and in what capacity. Between what ports did said propeller run?

Interrogator, 3^d

Did the said plaintiff to your knowledge ship any Beef, pork or provisions, or property of any kind on board said propeller from Chicago to go to Macinae in the year 1848. If so, what were the provisions & when were they shipped?

Interrogator, 4th

Were you on board said propeller Clearland when certain property belonging to the said plaintiff was thrown over from said Propeller. If so, when and where was the property thrown over board, and what was the property? State particularly! what was its value?

Interrogator, 5th

Why was said property thrown over board? and who assisted in throwing over the same? State whether the weather was at the time very stormy, and the lake very rough, or otherwise? was there a strong wind blowing at the time? State particularly the condition of said same at the time the freight was thrown overboard?

Interrogator, 6th

Did you consider said vessel at the time above mentioned in any danger of being lost? If so, State particularly what the danger was? What was your position with reference to the land?

Interrogator, 7th

Was the property of said plaintiff thrown overboard for the purpose of lightening said vessel and to save her from sinking, and was the throwing over of the said property necessary to save the lives of the passengers & crew? Was other freight thrown over at the same time?

Interrogator, 8th

Where was the property of said plaintiff placed upon said vessel at the time the same was taken on board at Chicago? Was the same removed from the place where it was first stowed? If yes, where? Was said property up to the time of its being so thrown overboard stowed in the place where freight of that kind is generally stowed on board of Propellers? If not, State why it was not stowed in the usual place

Interrogator, 9th

Do you know of any other matter or thing which may be of benefit to these defendants? If yes, State the same particularly?

Williams & Butterfield

Drafts etc

Local County Court of Common Pleas

Joel Ellis

J. Guinn et al

1st Corp Interrogator, By whose direction were the

22

Said goods thrown overboard? Did the master of the vessel direct the throwing over of the same?

2 Do you know of any thing that can be of use to plaintiff in the trial of this cause? If yes, please state the same fully.

3^d The plaintiff requires full answers to each of the defendants interrogations.

Summarized & Mr. Cagg.

Plff. Atty

The Depositions of John Pheat and Leonard F. Bergen of Cuyahoga County, in the State of Ohio,

Witness of lawful age produced sworn and examined on their respective corporal oaths on the several interrogatories and cross interrogatories inclosed with and attached to the didimus Potestations or commissions here to annexed on the 30th day of January & the 1st day of February, 1850, at the office of Horace Peete in Clearland, in said Cuyahoga County, by me George A. Benedict a Commissioner duly appointed by the didimus Potestations or commissions aforesaid.

The said John Pheat & Leonard F. Bergen being first duly sworn respectively by me the said Commissioner as Witnesses in the cause mentioned in said Commission previous to the commencement of the 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 plaintiff & defendants in said Cause so far as they should be interrogated, testified & deposed as follows to wit,

The said Leonard F. Bergen deposes & says as follows to wit

1st To the 1st Interrogator, he answers & says

I am 27 years of age, I am a merchant & reside

in Clearland Ohio, am acquainted with the defend-
ants to this suit, but not with the plaintiffs.

2^d

To the 2^d Interrogatory, He answers & says

I have never sailed upon the Propeller Clear-
land except as a passenger, In the Spring of 1848.
I sailed upon her from Clearland to Milwaukee
and from thence to the place where she encountered
the gale and which was in the month of April, I
sailed upon her once since from Milwaukee to
Chicago in Dec. 1848, I should think, but at no other
time have I been on her as I recollect. The Propeller
was running from Buffalo to Chicago, and at intermediate
ports.

3^d

To 3^d Interrogatory, He answers and says, I don't know
that Joel Collins shipped any pork, Beef or other prop-
erty from Chicago on the Propeller, I only know of
there being some beef & pork aboard at the time of the
gale. But who shipped it or where it came from I
know nothing.

4th

To Interrogatory, 4th. He answers and says

I was on board at the time of the gale & know that
such property, as beef & pork was thrown overboard
I can't say particular, what the property was, or
what was its value.

5th

To 5th Interrogatory, He answers & says, The property
was thrown over to save the vessel, I assisted in
throwing over a portion of the property, Two other
passengers assisted and perhaps more. The mate and
engineer were also assisting. The wind blew hard,
the weather was very bad, and the lake rougher
than I before or since ever saw it. It was snowing
hard. The vessel was in the trough of the sea with-
out any canvas or steam and somewhere from

2 to 4 feet of water in the fire hold, whether there was any water in the Stowage hold I can't say. The deck freight of the vessel was inclined considerably to one side by the rolling of the vessel & the action of the waves and every time she rolled the water would come nearly up to the hatches.

6th To the 6th Interrogator, he answers and says, I considered the vessel in danger of being lost. I should think she was in danger of foundering. The vessel was headed towards the shore, and drifting up the shore.

7th To the 7th Interrogator, he answers & says The property that was thrown over board was thrown over for the purpose of keeping the vessel afloat. The throwing over in my opinion was ^{necessary} to save the lives of the passengers & crew. There was other freight thrown over at the same time.

8th To the 8th Interrogator, he answers & says At the time the property was shipped I know not where it was put in the vessel, nor whether it was moved after it was put aboard. I think the property as I found it when I assisted in throwing it over was properly stowed, and was in the place where it was customary to stow such ^{property} on a propeller. It is customary to stow property either in the hold or on the deck of a propeller.

9th To the 9th Interrogator, he answers and says For the last six or eight years I have been engaged in furnishing freight to and receiving freight from Propellers, and I have never known any distinction between stowing property on deck or in the hold. I have always understood that the rates for carriage were the same whether the property was stowed either in the one place or the other. Nor have I ever

understood that the rates of insurance were different upon property stored in the one place or the other, I know nothing further which can be of benefit to the defendants.

1st To the first Cross Interrogator, he answers & says
I think the Master of the Propeller ordered the property to be thrown over board. He came down the companion way, & ordered the decks to be cleared.

2^d To 2^d Cross Interrogator, he answers & says
I know nothing further than I have stated

Leonard H. Burgers

The Defendants then introduced the deposition of John Sheatr. as follows

The said John Sheatr. deposes and says as follows viz. to the

1st Interrogator,

Ans, I am forty years of age, I am an Engineer. My residence is Ohio City, Cuyahoga County, State of Ohio. I am acquainted with all the parties to this suit.

To 2^d Interrogator,

Ans, I have sailed upon the Propeller Clearland in the year 1848, about 5 months in the capacity of 1st Engineer. The Boat run between Buffalo & Chicago & intermediate ports.

To 3^d Interrogator,

Ans, I have no knowledge of the plaintiff shipping any part, but or other property while I was on board the Boat. There were provisions shipped at

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Chicago, but who were the shippers or owner I know not. The provisions consisted according to my recollection of Ham, in hog heads, & Beef or pork. These provisions were put on board the boat about the 14th or 15th of April 1848.

To 4th Interrogatory

Ans. I was on board the Propeller Clearland when certain property, was thrown over board. The provisions that were shipped at Chicago were all thrown over board. They were thrown over on the 18th of April. They were thrown over off Milwaukee 4 or 5 miles out, the article, I remember were Ham, Pork or Beef. I don't know that any of it belonged to Joel Collier, & don't know the value of any of it.

To 5th Interrogatory

Ans. The Property was thrown over board to keep the Boat from sinking, myself the 2^d Engineer 2 or 3 Deck hands, and some of the passengers assisted in throwing over the property, the latter was very rough and the weather very stormy, a strong wind was blowing, and surpassed any thing I ever saw during the time I have been sailing for 26 years. At the time the freight was thrown over board the boat lay nearly on her beam end, rolling in water very fast and was beginning to sink.

To 6th Interrogatory

Ans. I considered the boat in danger of being lost. She was in imminent danger of sinking. We were 4 or 5 miles off from ^{the} land, and were missing the shore. The Boat was perfectly unmanageable, and was drifting.

To 7th Interrogatory

Ans.

24 1/2 The provisions thrown over were to lighten the Boat & save her from sinking. The throwing over was necessary to save the lives of passengers & crew, other freight was thrown over at the same time, and for the same purpose.

To 8th Interrogatory

Ans

The provisions that were thrown over board, were placed on the after deck abast the engine. The provisions were not removed from the place where they were first stowed. My knowledge, until thrown over. They were stowed in the usual place for storing such property on a Propeller. It was the customary place. It is customary to stow such property, any where on the deck when convenient, on board a Propeller. Such has always been the custom since the commencement of Propeller navigation. I was on board the first Propeller that ran on the lake & have been engaged on them ever since, a period of about 16 years.

To 9th Interrogatory

Ans

Captain William Waller was master of the Propeller Cleveland when these provisions were thrown over and they were thrown over by the direction of Captain Waller. I consulted with him respecting the throwing them over. The water at the time this freight was thrown over was about five feet in the hold, and she was taking in water fast, the vessel was rolling & pitching with great violence. I have nothing further that can be of benefit to the Defendants.

To the 1st Cross Interrogatory, he deposes and says

The goods were thrown over by direction of Capt Wm Waller & he was master at the time.

To 2^d Cross Interrogatory

Ans. I know nothing more than what I have said

John Phiatt

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I George A. Benedict of the County of Cayhoga & State of Ohio, a Commissioner duly appointed to take the depositions respectively of the said Leonard F. Burgen & John Phiatt witnesses whose names are respectively attached and subscribed to their respective foregoing depositions, do hereby certify that previous to the commencement of the respective examinations of the said Leonard F. Burgen & John Phiatt as witnesses in the said suit between the said Joel Ellis Plaintiff and the said Jonathan Giltett, Henry Gaylord Corantm Gaylord & Elisha T. Sterling owners of the Propeller Clearland Defendants: They were duly sworn by me as such Commissioner to testify the truth respectively, in relation to the matter in controversy between the said Joel Ellis Plaintiff, and the said Jonathan Giltett, Henry Gaylord Corantm Gaylord, & Elisha T. Sterling owners of the Propeller Clearland Defendants, so far as they should be respectively, interrogated concerning the same: That the said depositions were taken at the office of Horace Harte in the City of Clearland in the County of Cayhoga & State of Ohio on the 30th day of January & the 1st day of February A.D. 1850. and that after said Depositions were ^{Respectively} taken by me as aforesaid, the interrogatories & answers thereto as written down, were read over to the said Witnesses respectively; and that thereupon the same were signed & sworn to respectively by the said Deponents John Phiatt & Leonard F. Burgen before me the oath being administered by me as such Commissioner at the place and on the days & year last

54/5

aforsaid: and that said Depositions were reduced
to writing at my request by John F Newton, who
is not Attorney or agent of either of the Parties to
said Suit or in any way interested in the event
thereof

Geo A Benedict
Commissioner

It was admitted in evidence that the Defendants
were the owners of the Propeller at the time of the
~~action~~^{accident}. The foregoing was in substance of the
evidence given in the case.

The Court then gave the jury the following in-
structions.

The Court instructed the jury, that if they believe
from the evidence that the Plaintiff shipped goods
on the Propeller and that during the passage it
became necessary to preserve the life of the
passengers, and to save the vessel & the ballance
of the freight, the property of the plaintiff was
thrown overboard & was lost by the owner or the
Master of the propeller and that the goods were
placed between the decks of the propeller, and that
it ^{has been} ~~was~~ the custom ever since the introduction of
propellers on the lake to pack or stow freight
indiscriminately between the decks & under the Hatches
and that this custom was generally known by Ship-
pers and that the plaintiff neglected to make a
general average and delivered the ballance of the
freight without making a general average, and
never made the same, that the plaintiff were
entitled to recover the value of the goods at the
port of shipment, together with the interest on the

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Same from the time of the loss up to the present time by the way of damages.

To which instructions defendants except.
After the instructions of the Court the jury retired to consider of their verdict, & on the same day returned into Court & rendered their verdict in favor of the plaintiff for the Sum of One Hundred and Seventy four Dollars & Sixty three cents & there upon the defendants filed their notice for a new trial upon the following grounds

1st That the Court erred in the instructions given to the jury;

2^d That the verdict of the jury was against law and evidence. After hearing the argument of counsel upon said motion for a new trial the Court overruled said motion. To which decision of the Court the defendants excepted and prayed the Court to sign & seal their bill of exceptions according to the Statute in such case made & provided which is done

Giles Spring (Seal)

State of Illinois
Cook County

J. Walter Kimball

Clerk of the Cook County Court of Common
Pleas within and for the County and State
aforesaid. I hereby certify that the foregoing is
a full true and correct copy and transcript
of the Papers and Records of said Court in the Case
of Joel Ellis vs Jonathan Gillet, now on
file in my office.

In testimony whereof I have hereunto
set my hand and the Seal of said
Court this 4th day of June A.D. 1850

Walter Kimball

Clerk

17
Cook County Court
of Case Pleas

Paul Ellis
J. Gillett et al

Transcript

Filed as of the 10th day
of June 1850 as per stip-
ulation annexed -
June 21. 1850, /
L. Leland Clk.

\$5.00. Clk.

Due - \$17.75

Supreme Court.

Jonathan Gillett,
Henry Gaylord, Esq.,
J. Gaylord, & Eliza
J. Sterling, Appellants

vs
Isaac Ellis,
Appellee

State of Illinois

June Term in the year
of Our Lord One Thou-
sand Eight Hundred
And fifty.

Afterwards, to wit on
the 10th day of June in this same term before
the Justices ~~thereof~~ of the People of the Supreme
Court of Judicature of the State of Illinois at
Ottawa in the County of La Salle in said State
came the said Plaintiffs by Williams & Butter-
field their attorneys & say that in the record
& proceedings aforesaid & also in giving
the judgment aforesaid there is manifest
error in this, to wit, that the declaration a-
foresaid & the matters therein contained are
not sufficient in law for the said Defendant
to have or maintain his aforesaid action there-
of against the said plaintiffs, there is also error
in this, to wit that the record aforesaid it
appears that that the judgment aforesaid
in form aforesaid given was given for
the said Defendant against the said Plaintiffs

whereas by the law of the land the
said judgment ought to have been
given for the said ~~defendant~~^{plaintiff} against
the said defendant. And the said
defendants pray that the judgment afore-
said for the errors aforesaid & other
errors in the record & proceedings afore-
said may be reversed annulled & al-
together held for nothing & that they
may be restored to all things which they
have lost by occasion of the said
judgment &c

The plaintiffs further say, that

The Court erred in instructing the
Jury that if they believed from the
evidence that the ~~the~~ plaintiff in the Court
below shipped goods on the Propeller &
that during the passage it became neces-
sary to preserve the life of the passengers
& to save the vessel & the balance of
the freight, & the property of the plaintiff
was thrown overboard & was lost by the
owner or the Master of the Propeller, and
that the goods were placed between the
decks of the Propeller & that it has been
the custom ever since the introduction
of Propellers on the Lakes to pack or

Stores freight indiscriminately between
the decks & under the hatches and
that this custom was generally
known by Shippers & that the ~~plaintiff~~^{defendants}
^{before} requested to make a general average
& delivered the balance of the freight with-
out making a general average & even
made the same that the plaintiff was
entitled to recover the value of the
goods at the port of shipment together
with interest on the same from the
time of the loss up to the present time by
the way of damages.

Williams & Butterfield
attys for ~~the~~ appellants

And the said Appellee comes and says that
in the records and proceedings aforesaid
and in the rendition of the judgment
aforesaid, there is no error; wherefore he
prays that said judgment may be in all
things affirmed.

And Jlls,
By Longsamm, his atty.

State of Illinois
Supreme Court

Jonathan Gillett, Henry
Gaylord, Erastus Gaylord,
and Elisha T. Sterling
Appellants

June term
A. D. 1850.

^{vs}
Joel Ellis,
Appellee

Appeal from
Cook County
Court of Common
Pleas—

It is hereby understood & agreed by &
between the parties hereto that the transcripts
of the record of the Cook County Court of
Common Pleas may be filed in the office
of the Clerk of the Supreme Court as
of the first day of the present term said trans-
cript to be delivered to said Clerk at
Ottawa on or before the 21st
Chicago June 10, 1850.

Williams & Butterfield
for plffs—

J. Young Scammon
Atty. to Joel Ellis,
Appellee.

Springfield Aug. 19th 1850

Dr Sir.

I return you the record in the case
of Gillett et al vs Ellis. I send the
opinion to Judge Eaton. You need
not send the papers or opinion
to the Reporter, as I have prepared
the case for the Reports.

Yours truly

A. A. Heath.

L. Leland Esq.

L. Leonard Ay.

Chicago Nov 1. 1880.

Clerk of Supreme Court
Ottawa, LaSalle Co
Illinois

Dear Sir

Will you please
send to us a transcript of the judgment
in the case of Ellis vs Gillett & Co. decided by
the sup Court at the last term. We wish
to get execution. At the same time send us
fee bill of costs in sup Court in same matter.
Your prompt attention will much oblige

Your obedient servants

Scammon & McCagg

850
350
400
250

Σ 203430

12034-31



Clerk of Supreme Court

Ottawa

Ill.

Gillett et. al. vs Ellis.

This was an action brought by Ellis against Gillett and others, owners of the Propeller, *Cleveland*, to recover the value of certain goods shipped on board the Propeller, at Chicago, for Macinae, which were never delivered, but were cast overboard and lost in a storm during the voyage. The declaration contained two counts against the defendants as common carriers; also a count for general average, and the common money count. The defendants pleaded the general issue; and gave notice, that the goods were shipped on the deck of the Propeller, and were necessarily thrown overboard in a storm, for the safety of the vessel and crew.

It appeared on the trial, that the plaintiff, in April 1848, at Chicago, shipped on board the Propeller *Cleveland*, owned by the defendants and bound for Buffalo, goods of the value of \$158.76, to be delivered at Macinae. These goods were placed on the main deck, between the hatches of the Propeller, and were necessarily thrown overboard in a tempest, by the order of the master, for the preservation of the vessel and crew. Some other goods were cast overboard at the same time, but neither the quantity nor value was in evidence. Propellers are double-decked vessels, and goods placed between the main and hurricane decks are considered as safe, as those stowed in the hold, — are in fact regarded as under hatches. It is the general custom on the Lakes, in reference to this class of vessels, to stow the cargo indiscriminately in the hold and on the main deck, as best suits the

convenience of the master. In this respect, there is no distinction made in the rates of carriage and insurance. No account of the property lost was ever taken by the master; nor was any general average made by him at the port of destination or elsewhere. The vessel was worth \$15,000; but it did not appear what was the value of the cargo saved, or the earnings of the vessel for the voyage.

On this state of case, the jury returned a verdict in favor of the plaintiff, for \$174.63. The court refused to grant a new trial, to which the defendants excepted. The court gave an instruction at the instance of the plaintiff, which is now complained of; but the record fails to show that an exception was taken at the time it was given, and it need not therefore be otherwise referred to or noticed. The defendants prosecuted an appeal from the judgment entered on the verdict.

The defendants were not liable as common carriers. The evidence showed a clear case of a jettison of the goods in question. They were cast overboard by the express directions of the master; and all of the witnesses concurred in the opinion, that the sacrifice of the goods preserved the vessel and crew from destruction. The law is well settled, where goods are necessarily thrown overboard in a tempest, to preserve the ship and crew; that it is a loss by inevitable accident, or, as it is usually termed, the act of God, which excuses the carrier. 2 Kent's Com. 604; Story on Bailments, §. 525 & 531; Angell on the Law of Carriers, §. 215.

Are the defendants liable for a general
average? It is insisted, that the plaintiff cannot
claim contribution, because his goods were
stowed on the deck of the vessel. The general
rule undoubtedly is, that the owner of goods,
which are stowed on the deck of a vessel, and
are swept overboard by the action of the
wind, or waves, or cast into the sea by the
command of the master, for the protection of the
vessel and crew, is not entitled to the benefit
of a general average. Goods on deck, from their
situation, increase the difficulties of navigation,
and are more exposed to peril, than those under
cover; and, if swept away or cast overboard,
the owner must bear the loss, without contribu-
-tion from the owners of the vessel and the
remaining cargo. 3 Kent & Com. 240; *Smith v*
Night, 1 *Caines Rep.* 44; *Senon v Insurance Co.*
3 *Johnson's cases*, 178. But this case does not fall
within the operation of this rule. Propellers are
a class of vessels, but recently introduced in the
navigation of the Lakes, to which, from the
peculiarity of their construction, and the usage
respecting them, this general rule is not applica-
-ble. They are double deckers, with two holds. By
the general custom prevailing in reference to
them, goods stowed on the main deck or upper
hold are regarded as under hatches, and as
safe as those stowed in the lower hold, or where
the cargo in ordinary vessels is only considered as
under cover. The master is allowed, by this
general custom, to stow the cargo either in the
hold, or on the main deck, at his convenience.
No distinction is made in the rules of transpor-

tion by the carrier, or in the rules of insurance by the underwriters. The cargo below and between decks is put on the same footing. This universal usage, resulting from the character of the vessel, must govern the rights and liabilities of the owners of the vessel and cargo. The owners of goods, which are stowed on the main deck of a ship, and necessarily cast overboard by the direction of the master to preserve the vessel and crew, is therefore entitled to the benefit of a general average, as much as the owners of goods that are stowed in the hold would be under like circumstances.

Where the ship and cargo are saved by the voluntary destruction or abandonment of a portion of the cargo, the owners of the vessel and the residue of the cargo are bound to make contribution to the loss. The loss is incurred for the common benefit of all interested in the ship and cargo, and it should be borne equally by them, in the proportion of the value of the property saved. The goods sacrificed are considered as the price of safety of the vessel and the remaining cargo. Abbott on Shipping, 344; 3 Kent's Com. 233. In the adjustment of a general average, the owners of the vessel contribute according to the value of the vessel at the port of destination, and the net amount of her earnings for the voyage. The owners of the cargo saved contribute according to the value of their property at the port of discharge, after deducting the freight due thereon. The price which the goods lost would have fetched at the port of delivery is likewise to be ascertained, and the amount

* See also *Wilson*,

of freight chargeable on them deducted, so that the owner will bear his proportionate share of the loss. In this way, and to this extent, is the owner of the goods sacrificed to be reimbursed for the loss he has sustained. 3 Kent's Com. 242; Abbott on Shipping, 356 & 8. It is the duty of the master to make a general average, so that those whose property has been saved shall contribute ratably to the owners of the goods, which were sacrificed for their common benefit. For the purpose of expensing the payment of this general average, the master has a lien on the cargo, which he may detain until the average is paid. He cannot be compelled to deliver the cargo to the owner or consignee, until the amount properly contributable in respect of it is paid, or secured to his satisfaction. 3 Kent's Com. 244; Story on Insurance Co. 11 Johnson, 324; United States vs. Wilson, 3 Sumner, 308; *3 Barnwell & Adolphus, 523; Simonds vs. White, 2 Barnwell & Crispwell, 805.

The plaintiff's goods having been sacrificed for the common benefit of the owners of the vessel and the remaining portion of the cargo, it is clear that he was entitled to contribution from them. It was the duty of the master to have caused a general average to be made, and expensed the payment of the part due from the owners of the cargo. He was bound to adjust an average, and he had the right to detain the cargo until the average was paid. It results from this obligation of the master to settle an average, and this right to require payment from the consignees, that the defendants, for whom he was acting, are responsible to the plaintiff. The latter has the right to

never from them whatever he might have received, under a general average fairly and honestly made. Where the law imposes an obligation on a party, and confers upon him the power of enforcing it, as in this case, by a lien, it equally imposes a liability for the neglect of the obligation. But, it may be said, that there was no tribunal on the Lakes, before which an average could have been adjusted, that would bind the parties. Admit that this was so; it neither excused the master, nor exonerated the dependants. The latter were liable to the plaintiff in any event for their proportionate share of the loss. The master, having all of the evidence within his control, should have had a general average settled, upon the principles before stated, by discreet and competent men selected for that purpose. In most cases, the adjustment of an average, thus made, although not conclusive on the parties interested, would be acquiesced in by them. And in the absence of fraud, error and unfairness, it would become the proper basis for determining the rights of the parties in any subsequent litigation. The effect of the failure of the master to make an average, and insist on payment before the delivery of the cargo, may be to embarrass, if not wholly defeat, the plaintiff in the collection, except from the dependants, of the sum contributable on account of the cargo. The parties liable for its payment may be insolvent, or domiciled in other states, so that his remedy against them, if subsisting, is not worth pursuing. Reasonable diligence on the part

of the master - in other words, the simple performance of his duty - would have avoided all difficulty in the matter. It would be wrong now to permit the defendants to defeat the plaintiff in the recovery of his just share of an average, because this agent, who was bound to make the average, failed to discharge that duty. There is, indeed, some uncertainty in the case as to the true amount the plaintiff was entitled to receive in the way of contribution; but this uncertainty results chiefly, if not entirely, from the negligence of the master. We cannot say affirmatively, that the jury have erred in their apportionment of the damages. The plaintiff was clearly entitled to recover from the defendants the price which his goods would have brought at Macinal, if the same had safely arrived there, after deducting the freight thereon from the cost of shipment, and his relative share of the loss occasioned by the jettison. We cannot say, that the verdict exceeded the actual value of the goods at the port of delivery, after making the proper deductions. This is emphatically one of those cases, in which every reasonable presumption should be indulged to sustain a verdict. The master had all the means within his control of ascertaining the extent of the loss, and the amount of contribution, ^{Amphibolion} the plaintiff was entitled to receive, and it was his duty to have measured the willow of these facts for the benefit of all concerned. On setting to do that, and thereby depriving the parties of the benefit of the ^{evidence} ~~fact~~, the plaintiff might well be excused for not making precise proof

of the extent of his claim.

The judgment of the court below will
be affirmed, with costs.

Giles et al. vs Ellis

Ellis vs Giles

Opinion

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Gillett & al. vs Ellis

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