

No. 13426

# Supreme Court of Illinois

Moline Water Power & Manf'r.  
Co.

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vs.

Nichols

---

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

No. 213.

Moine Water  
+ Power Co

VS

Nichols

34-26



ARGUMENT

OF

J. B. HAWLEY,

IN BEHALF OF THE APPELLANT,

IN THE CASE OF

THE MOLINE WATER POWER AND MANUFACTURING COMPANY, *Appellant.*

*Filed Apr. 25-1861*

*L. Leland*

*Clerk*

vs.

LORAIN L. NICHOLS, *Appellee.*

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IN THE SUPREME COURT OF ILLINOIS  
*April Term, A. D. 1861.*

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LUSE, LANE & CO., PRINTERS, DAVENPORT, IOWA.

## ARGUMENT.

MAY IT PLEASE YOUR HONORS:

This was an action of assumpsit, brought in the Rock Island Circuit Court by the Appellee against the Appellant.

The declaration contained the common counts only, to which the general issue was pleaded. The plaintiff filed, with his declaration, the account set out at page 4 of printed Abstract.

On the trial in the Court below, the Court gave, at the request of the plaintiff, some twelve or fifteen instructions, all of which were lost from the files before the making up of the record in this case, and which, consequently, do not appear in the Bill of Exceptions. All the instructions given on the part of the plaintiff, were, at the time of the giving thereof to the jury, excepted to on the part of the defendant, and, as we believe that many of them were clearly erroneous, we regret much that we cannot have the benefit of them in this Court.

The main item of charge in plaintiff's account, was the item for "*one year's salary* as engineer of said company."

Now, to recover upon that item in his account, we insist that the plaintiff was bound to show and prove, 1st. That he was hired *by the defendant*; and 2d. That he was hired for a *fixed period*, to-wit: *one year*, and for a *fixed price*, to-wit: \$2,000.

The *first* of the above propositions the plaintiff sought to establish. The *second* he did not attempt to prove, and



the record shows, by an abundance of proof, that he was not hired or employed by any one, either for a fixed *time* or a fixed *price*.

Webster, in his Dictionary (unabridged), defines the word salary to be, "the recompense or consideration stipulated to be paid to a person for services, usually a fixed sum to be paid by the year." Crabb says, "A stipend and salary are paid yearly, or at even portions of a year." Crabb's Synonyms, page 164.

Now we insist that, upon that item of the plaintiff's account, he was not entitled to recover. He having charged the defendant with one year's salary, was bound to maintain and prove, that he was hired by the defendant for a year, and at a fixed price. His proof must sustain his account, or else he is not entitled to recover.

By filing his account, charging the defendant with *one year's salary*, he thereby notified the defendant that he claimed to recover upon a contract which was special, both as to *time* and *price*. And it having been shown by the plaintiff's own testimony, that there was no such hiring, the Court should have sustained the motion of the defendant, to exclude so much of the plaintiff's testimony as related to that item of the account.

We insist that the Court below erred in permitting the first witness, Hiram Pitts, to answer the question propounded to him by the plaintiff, to-wit: "Who of these stockholders lived in Moline?" because the counsel for the plaintiff, at the time of propounding said question, stated that it was for the purpose of showing an implied undertaking of defendant to pay for plaintiff's services. (See page 3 of printed Abstract.) Upon this point we refer to Angell and Ames on Corporations, page 215.

The witness, Hiram Pitts, was also asked by plaintiff, "Who of the company, if any, were present while the work was progressing?" And, against the objection of defendant, was permitted to answer, "The stockholders residing at Moline were present occasionally." (See page 3 of printed Abstract.) This, we think, was improper, and refer to the authority last cited.

While upon this point, permit us to say (which we think will not be denied), that the Court below, at the request of the plaintiff, instructed the jury, that if they believed, from the evidence, that while the plaintiff was engaged in the work of engineering and building the dam, that different officers of the defendant company were present from time to time while the work was progressing, and made no objection thereto, or to the sufficiency thereof, that then the jury might presume, from such fact, that the defendant approved the character and quality of the work done on said improvement by the plaintiff.

Now we insist, that no presumption of a hiring, or of an approval of the work done by the plaintiff, can be drawn from any such facts or circumstances.

The Court below should have sustained the motion of the defendant to exclude from the jury the testimony of Hiram Pitts and Cyrus Pitts, on the ground of interest.

It appears from the evidence, that Hiram Pitts, or Pitts, Gilbert and Pitts, employed the Plaintiff to come on from the East for the purpose of entering upon the work.

E. N. Parsons testified that he, as the agent of Pitts, Gilbert & Pitts, employed the Plaintiff to come on from the East, to enter upon the work, and that at the time of employing Plaintiff he did not know of any one other than Pitts, Gilbert & Pitts, wanting to hire Plaintiff, and told Plaintiff that Pitts Gilbert and Pitts wanted an engineer to do some work on the water power at Moline, *and Plaintiff said he would come*; Printed Abstract, page 17; see, also the testimony of Harvey Post, page 21, printed abstracts.

It also appears from the evidence, that all the money paid to plaintiff was paid by Pitts, Gilbert & Pitts, and that nothing was ever paid him by defendant below. We also refer particularly to the testimony of Cook and Davenport, upon this point.

We desire particularly to refer your Honors to the last interrogatory propounded by the Plaintiff, to the witness, Hiram Pitts, on re-examination, as also to his answer thereto. (See page 37 of Record.) The question propounded was this: "What is the cause of the feeling between you and



the present company?" To which he answered, (the Defendant objecting): "*Simply the failure, on their part, to perform their agreements, and the injustice they manifested toward us, their taking advantage of our necessities, and their breach of good faith between man and man, by which we lost thousands of dollars.*"

That it was proper for the Defendant to inquire of the witness, whether or not he harbored unkind feelings toward the Defendant, will not be denied, but that it was proper for him to state the cause of such feeling certainly is not true. That was raising a new and improper issue in the case.

It would scarcely be possible to introduce evidence which was calculated in a greater degree to injure the defendant than was that of which we are now speaking. It had no reference to the issue formed between the parties, and was directly calculated to prejudice the case of the Defendant, in the eye of the jury, and could have been offered for no other purpose. Certainly it could not have been proper to allow the defendant to introduce evidence to show that all the dealings between the defendant and Hiram Pitts, and between the Defendant and Pitts, Gilbert & Pitts, or either of them, had in all things so far as the Defendant was concerned, been conducted fairly and honestly, for that would have been raising an issue not raised on the record, and foreign to the question then being investigated.

The answer was calculated to impress the jury with the belief that the Defendant had been guilty of fraud and injustice in its transactions with others, and thereby excite their prejudices against the Defendant, and lead them to look upon the Defendant's case with disfavor.

That such testimony would be of great service for the Plaintiff and very detrimental to the Defendant, must be apparent to every one at all acquainted with jury trials.

It also appears from the record that the court below permitted the Plaintiff to read to the jury two letters written by one Samuel J. Goodwin to the Plaintiff.

It also appears that Goodwin, at the time of writing

such letters, was not either a member or agent of the Defendant Corporation, and yet these letters were introduced for the declared purpose of supporting the last item in the Plaintiff's account.

Your Honors will see by reference to the second letter of Samuel Goodwin, as set out in the Abstract, page 20, that Goodwin requested Plaintiff to make out an estimate for him, and send it to him as soon as possible.

But we repeat, there is no evidence in the record to show that he had any authority to bind the Defendant, but the contrary does appear. The evidence shows that Goodwin first became connected with the Defendant Corporation in October, and the letters were written in June and August previous.

That the Defendant should be bound by the acts of a person having no power to act on its behalf cannot be true, and no approval or ratification of the acts of Goodwin is shown.

The court should have sustained the objections of the Defendant's counsel, to the testimony of the witness, Stoddard, for the reasons stated on pages 13 and 14 of printed abstracts.

We submit to your Honors, that the motion of the Defendant to exclude the evidence of the Plaintiff from the jury, should have been sustained, for the reasons set out in the printed abstract, at pages 22 and 23.

In the trial of this cause in the court below, the defense was based upon two grounds: *First*, that the Defendant never employed the Plaintiff, but that he was employed and was to be paid by Pitts, Gilbert & Pitts; and *Second*, that his work was entirely worthless, and of no value to the Defendant.

It appears from the testimony of Peter A. Dey, B. B. Brayton, Charles Atkinson, and D. B. Sears, to whose testimony we desire particularly to refer, and all of whom are men skilled in such matters, that the work done by the Plaintiff, on the works of the Defendant, was of no value whatever, and that by reason of the unskillfulness of the



Plaintiff, the work done by him under his plan, had to be taken out and abandoned, the Defendant thereby losing the labor and materials expended and furnished for the works, which the evidence shows was a large amount.

The evidence on the part of the Defendant, upon the point of which we are now speaking, it seems to us, is full and complete, and that upon the evidence the Defendant was clearly entitled to a verdict in his favor.

It expressly appears from the evidence, that there was no agreement as to the *price* which the Plaintiff was to be paid for his services. He must recover, then, if at all, the real value of the service rendered, and no more; if the services were of no value, then, he could recover nothing.

Now, may it please your Honors, there is no evidence which shows, or tends to show, that the Plaintiff was *skilled* in his profession, or in any way competent to perform the services necessary for the proper planning and construction of the work in question.

It is his skill that gives value to his services, if anything, and if he did not possess the necessary skill to enable him properly to construct the works in question, and the labor performed by him was of no value whatever to the Defendant, then he was not entitled to recover.

He was not employed to build and construct the works, or to furnish materials for the same, but as a scientific man, to *plan* and *devise* a system of improvements for a certain purpose, and to superintend the work thereon, and see that it conformed to his plan of improvement.

Now it was contended on the trial of this case in the Court below, that because the officers of the defendant company were from time to time in and about the works constructed by the plaintiff, while the same were going forward, and knew what the *plan* was upon which the plaintiff was operating, that, therefore, the defendant was *estopped* to deny the sufficiency of the *plan* or the work done under it. And such, in substance, were the instructions given on the part of the plaintiff to the jury.

On such a proposition, we do not deem it necessary to

refer to authorities to show its want of foundation in the law.

Suppose, for illustration, that a surgeon, by reason of his unskillfulness or negligence, in setting a broken leg, should perform the duty so bunglingly that the person having the broken leg should thereby become a cripple for life, would the person thus wronged be prevented from maintaining his action against the surgeon because he *saw the work* of the surgeon performed and made no objection? Or, in case the surgeon should bring his action to recover the value of his services in setting the leg, would the person wronged, by reason of his unskillfulness, be prevented from showing that, for that reason, the surgeon's services were of no value? Certainly not. If not, then the plaintiff had no right of recovery in this case, because, as we have already shown by authority, the defendant was not bound, in any event, from the mere fact that its officers, at different times, *saw the work progressing*.

In this case, there is no evidence of any *acceptance* or *approval* of the work by the defendant. But the evidence does show, that the defendant *disapproved of the work*, and caused it to be taken out as insufficient.

The evidence shows that the defendant sustained great loss in materials and labor, by reason of the insufficiency of the work done by plaintiff, amounting in the aggregate to a much greater sum than the value of any services rendered by the plaintiff.

It also appears that the plaintiff had been paid \$400 or more for his services.

If the defendant sustained loss and damage by reason of the insufficiency of the plaintiff's plan or work, the defendant was entitled to *recoup* the same in this action.

*Low v. Forbes*, 14 Ill., p. 423.

*Higgins v. Lee*, 16 Ill., p. 500.

We think the Court below erred in refusing the first instruction for the defendant, for the reasons already stated.

We also think, that the Court should have granted the



defendant's motion for a new trial, for the reasons stated at pages 49 and 50 of printed Abstract.

We think the verdict clearly contrary to the instructions given on the part of the defendant.

We are aware, that your Honors will not reverse a judgment merely because a verdict is contrary to the evidence in light and trivial respects; but, in a case like this, where the verdict was clearly and manifestly against the evidence, we do not think your Honors would refuse to reverse the judgment and grant a new trial, if there were no other grounds to warrant such reversal.

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The jury rendered a verdict against the defendant and in favor of the plaintiff for \$1,397.22. Did the evidence support the verdict? We insist that it did not, and that the judgment ought to be reversed and a new trial granted.

J. B. HAWLEY, of Counsel for Appellant.

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E. N. Parsons testified that he, as the agent of Pitts, Gilbert & Pitts, employed the Plaintiff to come on from the East, to enter upon the work, and that at the time of employing Plaintiff he did not know of any one other than Pitts, Gilbert & Pitts, wanting to hire Plaintiff, and told Plaintiff that Pitts Gilbert and Pitts wanted an engineer to do some work on the water power at Moline, *and Plaintiff said he would come*; Printed Abstract, page 17; see, also the testimony of Harvey Post, page 21, printed abstracts.

It also appears from the evidence, that all the money paid to plaintiff was paid by Pitts, Gilbert & Pitts, and that nothing was ever paid him by defendant below. We also refer particularly to the testimony of Cook and Davenport, upon this point.

We desire particularly to refer your Honors to the last interrogatory propounded by the Plaintiff, to the witness, Hiram Pitts, on re-examination, as also to his answer thereto. (See page 37 of Record). The question propounded was this: "What is the cause of the feeling between you and



the present company?" To which he answered, (the Defendant objecting): "*Simply the failure, on their part, to perform their agreements, and the injustice they manifested toward us, their taking advantage of our necessities, and their breach of good faith between man and man, by which we lost thousands of dollars.*"

That it was proper for the Defendant to inquire of the witness, whether or not he harbored unkind feelings toward the Defendant, will not be denied, but that it was proper for him to state the cause of such feeling certainly is not true. That was raising a new and improper issue in the case.

It would scarcely be possible to introduce evidence which was calculated in a greater degree to injure the defendant than was that of which we are now speaking. It had no reference to the issue formed between the parties, and was directly calculated to prejudice the case of the Defendant, in the eye of the jury, and could have been offered for no other purpose. Certainly it could not have been proper to allow the defendant to introduce evidence to show that all the dealings between the defendant and Hiram Pitts, and between the Defendant and Pitts, Gilbert & Pitts, or either of them, had in all things so far as the Defendant was concerned, been conducted fairly and honestly, for that would have been raising an issue not raised on the record, and foreign to the question then being investigated.

The answer was calculated to impress the jury with the belief that the Defendant had been guilty of fraud and injustice in its transactions with others, and thereby excite their prejudices against the Defendant, and lead them to look upon the Defendant's case with disfavor.

That such testimony would be of great service for the Plaintiff and very detrimental to the Defendant, must be apparent to every one at all acquainted with jury trials.

It also appears from the record that the court below permitted the Plaintiff to read to the jury two letters written by one Samuel J. Goodwin to the Plaintiff.

It also appears that Goodwin, at the time of writing

such letters, was not either a member or agent of the Defendant Corporation, and yet these letters were introduced for the declared purpose of supporting the last item in the Plaintiff's account.

Your Honors will see by reference to the second letter of Samuel Goodwin, as set out in the Abstract, page 20, that Goodwin requested Plaintiff to make out an estimate for him, and send it to him as soon as possible.

But we repeat, there is no evidence in the record to show that he had any authority to bind the Defendant, but the contrary does appear. The evidence shows that Goodwin first became connected with the Defendant Corporation in *October*, and the letters were written in *June* and *August* previous.

That the Defendant should be bound by the acts of a person having no power to act on its behalf cannot be true, and no approval or ratification of the acts of Goodwin is shown.

The court should have sustained the objections of the Defendant's counsel, to the testimony of the witness, Stoddard, for the reasons stated on pages 13 and 14 of printed abstracts.

We submit to your Honors, that the motion of the Defendant to exclude the evidence of the Plaintiff from the jury, should have been sustained, for the reasons set out in the printed abstract, at pages 22 and 23.

In the trial of this cause in the court below, the defense was based upon two grounds: *First*, that the Defendant never employed the Plaintiff, but that he was employed and was to be paid by Pitts, Gilbert & Pitts; and *Second*, that his work was entirely worthless, and of no value to the Defendant.

It appears from the testimony of Peter A. Dey, B. B. Brayton, Charles Atkinson, and D. B. Sears, to whose testimony we desire particularly to refer, and all of whom are men skilled in such matters, that the work done by the Plaintiff, on the works of the Defendant, was of no value whatever, and that by reason of the unskillfulness of the



Plaintiff, the work done by him under his plan, had to be taken out and abandoned, the Defendant thereby losing the labor and materials expended and furnished for the works, which the evidence shows was a large amount.

The evidence on the part of the Defendant, upon the point of which we are now speaking, it seems to us, is full and complete, and that upon the evidence the Defendant was clearly entitled to a verdict in his favor.

It expressly appears from the evidence, that there was no agreement as to the *price* which the Plaintiff was to be paid for his services. He must recover, then, if at all, the real value of the service rendered, and no more; if the services were of no value, then, he could recover nothing.

Now, may it please your Honors, there is no evidence which shows, or tends to show, that the Plaintiff was *skilled* in his profession, or in any way competent to perform the services necessary for the proper planning and construction of the work in question.

It is his skill that gives value to his services, if anything, and if he did not possess the necessary skill to enable him properly to construct the works in question, and the labor performed by him was of no value whatever to the Defendant, then he was not entitled to recover.

He was not employed to build and construct the works, or to furnish materials for the same, but as a scientific man, to *plan* and *devise* a system of improvements for a certain purpose, and to superintend the work thereon, and see that it conformed to his plan of improvement.

Now it was contended on the trial of this case in the Court below, that because the officers of the defendant company were from time to time in and about the works constructed by the plaintiff, while the same were going forward, and knew what the *plan* was upon which the plaintiff was operating, that, therefore, the defendant was *estopped* to deny the sufficiency of the *plan* or the work done under it. And such, in substance, were the instructions given on the part of the plaintiff to the jury.

On such a proposition, we do not deem it necessary to

refer to authorities to show its want of foundation in the law.

Suppose, for illustration, that a surgeon, by reason of his unskillfulness or negligence, in setting a broken leg, should perform the duty so bunglingly that the person having the broken leg should thereby become a cripple for life, would the person thus wronged be prevented from maintaining his action against the surgeon because he *saw the work* of the surgeon performed and made no objection? Or, in case the surgeon should bring his action to recover the value of his services in setting the leg, would the person wronged, by reason of his unskillfulness, be prevented from showing that, for that reason, the surgeon's services were of no value? Certainly not. If not, then the plaintiff had no right of recovery in this case, because, as we have already shown by authority, the defendant was not bound, in any event, from the mere fact that its officers, at different times, *saw the work progressing*.

In this case, there is no evidence of any *acceptance* or *approval* of the work by the defendant. But the evidence does show, that the defendant *disapproved of the work*, and caused it to be taken out as insufficient.

The evidence shows that the defendant sustained great loss in materials and labor, by reason of the insufficiency of the work done by plaintiff, amounting in the aggregate to a much greater sum than the value of any services rendered by the plaintiff.

It also appears that the plaintiff had been paid \$400 or more for his services.

If the defendant sustained loss and damage by reason of the insufficiency of the plaintiff's plan or work, the defendant was entitled to *recoup* the same in this action.

*Low v. Forbes*, 14 Ill., p. 423.

*Higgins v. Lee*, 16 Ill., p. 500.

We think the Court below erred in refusing the first instruction for the defendant, for the reasons already stated.

We also think, that the Court should have granted the

defendant's motion for a new trial, for the reasons stated at pages 49 and 50 of printed Abstract.

We think the verdict clearly contrary to the instructions given on the part of the defendant.

We are aware, that your Honors will not reverse a judgment merely because a verdict is contrary to the evidence in light and trivial respects; but, in a case like this, where the verdict was clearly and manifestly against the evidence, we do not think your Honors would refuse to reverse the judgment and grant a new trial, if there were no other grounds to warrant such reversal.

*Higgins v. Lee*, 16 Ill., p. 500.

The jury rendered a verdict against the defendant and in favor of the plaintiff for \$1,397.22. Did the evidence support the verdict? We insist that it did not, and that the judgment ought to be reversed and a new trial granted.

J. B. HAWLEY, of Counsel for Appellant.



## ARGUMENT

OF

J. B. HAWLEY,

IN BEHALF OF THE APPELLANT,

IN THE CASE OF

THE MOLINE WATER POWER AND MANUFACTURING COMPANY, *Appellant.*

Filed Apr 25-1861 vs.

*L. Ireland  
Clark*LORAIN L. NICHOLS, *Appellee.*IN THE SUPREME COURT OF ILLINOIS  
*April Term, A. D. 1861.*

## ARGUMENT.

MAY IT PLEASE YOUR HONORS :

This was an action of assumpsit, brought in the Rock Island Circuit Court by the Appellee against the Appellant.

The declaration contained the common counts only, to which the general issue was pleaded. The plaintiff filed, with his declaration, the account set out at page 4 of printed Abstract.

On the trial in the Court below, the Court gave, at the request of the plaintiff, some twelve or fifteen instructions, all of which were lost from the files before the making up of the record in this case, and which, consequently, do not appear in the Bill of Exceptions. All the instructions given on the part of the plaintiff, were, at the time of the giving thereof to the jury, excepted to on the part of the defendant, and, as we believe that many of them were clearly erroneous, we regret much that we cannot have the benefit of them in this Court.

The main item of charge in plaintiff's account, was the item for "*one year's salary* as engineer of said company."

Now, to recover upon that item in his account, we insist that the plaintiff was bound to show and prove, 1st. That he was hired *by the defendant*; and 2d. That he was hired for a *fixed period*, to-wit: *one year*, and for a *fixed price*, to-wit: \$2,000.

The *first* of the above propositions the plaintiff sought to establish. The *second* he did not attempt to prove, and



the record shows, by an abundance of proof, that he was not hired or employed by any one, either for a fixed *time* or a fixed *price*.

Webster, in his Dictionary (unabridged), defines the word salary to be, "the recompense or consideration stipulated to be paid to a person for services, usually a fixed sum to be paid by the year." Crabb says, "A stipend and salary are paid yearly, or at even portions of a year." Crabb's Synonyms, page 164.

Now we insist that, upon that item of the plaintiff's account, he was not entitled to recover. He having charged the defendant with one year's salary, was bound to maintain and prove, that he was hired by the defendant for a year, and at a fixed price. His proof must sustain his account, or else he is not entitled to recover.

By filing his account, charging the defendant with *one year's salary*, he thereby notified the defendant that he claimed to recover upon a contract which was special, both as to *time* and *price*. And it having been shown by the plaintiff's own testimony, that there was no such hiring, the Court should have sustained the motion of the defendant, to exclude so much of the plaintiff's testimony as related to that item of the account.

We insist that the Court below erred in permitting the first witness, Hiram Pitts, to answer the question propounded to him by the plaintiff, to-wit: "Who of these stockholders lived in Moline?" because the counsel for the plaintiff, at the time of propounding said question, stated that it was for the purpose of showing an implied undertaking of defendant to pay for plaintiff's services. (See page 3 of printed Abstract.) Upon this point we refer to Angell and Ames on Corporations, page 215.

The witness, Hiram Pitts, was also asked by plaintiff, "Who of the company, if any, were present while the work was progressing?" And, against the objection of defendant, was permitted to answer, "The stockholders residing at Moline were present occasionally." (See page 3 of printed Abstract.) Thus, we think, was improper, and refer to the authority last cited.

While upon this point, permit us to say (which we think will not be denied), that the Court below, at the request of the plaintiff, instructed the jury, that if they believed, from the evidence, that while the plaintiff was engaged in the work of engineering and building the dam, that different officers of the defendant company were present from time to time while the work was progressing, and made no objection thereto, or to the sufficiency thereof, that then the jury might presume, from such fact, that the defendant approved the character and quality of the work done on said improvement by the plaintiff.

Now we insist, that no presumption of a hiring, or of an approval of the work done by the plaintiff, can be drawn from any such facts or circumstances.

The Court below should have sustained the motion of the defendant to exclude from the jury the testimony of Hiram Pitts and Cyrus Pitts, on the ground of interest.

It appears from the evidence, that Hiram Pitts, or Pitts, Gilbert and Pitts, employed the Plaintiff to come on from the East for the purpose of entering upon the work.

E. N. Parsons testified that he, as the agent of Pitts, Gilbert & Pitts, employed the Plaintiff to come on from the East, to enter upon the work, and that at the time of employing Plaintiff he did not know of any one other than Pitts, Gilbert & Pitts, wanting to hire Plaintiff, and told Plaintiff that Pitts Gilbert and Pitts wanted an engineer to do some work on the water power at Moline, and *Plaintiff said he would come*; Printed Abstract, page 17; see, also the testimony of Harvey Post, page 21, printed abstracts.

It also appears from the evidence, that all the money paid to plaintiff was paid by Pitts, Gilbert & Pitts, and that nothing was ever paid him by defendant below. We also refer particularly to the testimony of Cook and Davenport, upon this point.

We desire particularly to refer your Honors to the last interrogatory propounded by the Plaintiff, to the witness, Hiram Pitts, on re-examination, as also to his answer thereto. (See page 37 of Record). The question propounded was this: "What is the cause of the feeling between you and



the present company?" To which he answered, (the Defendant objecting): "*Simply the failure, on their part, to perform their agreements, and the injustice they manifested toward us, their taking advantage of our necessities, and their breach of good faith between man and man, by which we lost thousands of dollars.*"

That it was proper for the Defendant to inquire of the witness, whether or not he harbored unkind feelings toward the Defendant, will not be denied; but that it was proper for him to state the cause of such feeling certainly is not true. That was raising a new and improper issue in the case.

It would scarcely be possible to introduce evidence which was calculated in a greater degree to injure the defendant than was that of which we are now speaking. It had no reference to the issue formed between the parties, and was directly calculated to prejudice the case of the Defendant, in the eye of the jury, and could have been offered for no other purpose. Certainly it could not have been proper to allow the defendant to introduce evidence to show that all the dealings between the defendant and Hiram Pitts, and between the Defendant and Pitts, Gilbert & Pitts, or either of them, had in all things so far as the Defendant was concerned, been conducted fairly and honestly, for that would have been raising an issue not raised on the record, and foreign to the question then being investigated.

The answer was calculated to impress the jury with the belief that the Defendant had been guilty of fraud and injustice in its transactions with others, and thereby excite their prejudices against the Defendant, and lead them to look upon the Defendant's case with disfavor.

That such testimony would be of great service for the Plaintiff and very detrimental to the Defendant, must be apparent to every one at all acquainted with jury trials.

It also appears from the record that the court below permitted the Plaintiff to read to the jury two letters written by one Samuel J. Goodwin to the Plaintiff.

It also appears that Goodwin, at the time of writing

such letters, was not either a member or agent of the Defendant Corporation, and yet these letters were introduced for the declared purpose of supporting the last item in the Plaintiff's account.

Your Honors will see by reference to the second letter of Samuel Goodwin, as set out in the Abstract, page 20, that Goodwin requested Plaintiff to make out an estimate for him, and send it to him as soon as possible.

But we repeat, there is no evidence in the record to show that he had any authority to bind the Defendant, but the contrary does appear. The evidence shows that Goodwin first became connected with the Defendant Corporation in *October*, and the letters were written in *June* and *August* previous.

That the Defendant should be bound by the acts of a person having no power to act on its behalf cannot be true, and no approval or ratification of the acts of Goodwin is shown.

The court should have sustained the objections of the Defendant's counsel, to the testimony of the witness, Stoddard, for the reasons stated on pages 13 and 14 of printed abstracts.

We submit to your Honors, that the motion of the Defendant to exclude the evidence of the Plaintiff from the jury, should have been sustained, for the reasons set out in the printed abstract, at pages 22 and 23.

In the trial of this cause in the court below, the defense was based upon two grounds: *First*, that the Defendant never employed the Plaintiff, but that he was employed and was to be paid by Pitts, Gilbert & Pitts; and *Second*, that his work was entirely worthless, and of no value to the Defendant.

It appears from the testimony of Peter A. Dey, B. B. Brayton, Charles Atkinson, and D. B. Sears, to whose testimony we desire particularly to refer, and all of whom are men skilled in such matters, that the work done by the Plaintiff, on the works of the Defendant, was of no value whatever, and that by reason of the unskillfulness of the



Plaintiff, the work done by him under his plan, had to be taken out and abandoned, the Defendant thereby losing the labor and materials expended and furnished for the works, which the evidence shows was a large amount.

The evidence on the part of the Defendant, upon the point of which we are now speaking, it seems to us, is full and complete, and that upon the evidence the Defendant was clearly entitled to a verdict in his favor.

It expressly appears from the evidence, that there was no agreement as to the *price* which the Plaintiff was to be paid for his services. He must recover, then, if at all, the real value of the service rendered, and no more; if the services were of no value, then, he could recover nothing.

Now, may it please your Honors, there is no evidence which shows, or tends to show, that the Plaintiff was *skilled* in his profession, or in any way competent to perform the services necessary for the proper planning and construction of the work in question.

It is his skill that gives value to his services, if anything, and if he did not possess the necessary skill to enable him properly to construct the works in question, and the labor performed by him was of no value whatever to the Defendant, then he was not entitled to recover.

He was not employed to build and construct the works, or to furnish materials for the same, but as a scientific man, to *plan* and *devise* a system of improvements for a certain purpose, and to superintend the work thereon, and see that it conformed to his plan of improvement.

Now it was contended on the trial of this case in the Court below, that because the officers of the defendant company were from time to time in and about the works constructed by the plaintiff, while the same were going forward, and knew what the *plan* was upon which the plaintiff was operating, that, therefore, the defendant was *estopped* to deny the sufficiency of the *plan* or the work done under it. And such, in substance, were the instructions given on the part of the plaintiff to the jury.

On such a proposition, we do not deem it necessary to

refer to authorities to show its want of foundation in the law.

Suppose, for illustration, that a surgeon, by reason of his unskillfulness or negligence, in setting a broken leg, should perform the duty so bunglingly that the person having the broken leg should thereby become a cripple for life, would the person thus wronged be prevented from maintaining his action against the surgeon because he *saw the work* of the surgeon performed and made no objection? Or, in case the surgeon should bring his action to recover the value of his services in setting the leg, would the person wronged, by reason of his unskillfulness, be prevented from showing that, for that reason, the surgeon's services were of no value? Certainly not. If not, then the plaintiff had no right of recovery in this case, because, as we have already shown by authority, the defendant was not bound, in any event, from the mere fact that its officers, at different times, *saw the work progressing*.

In this case, there is no evidence of any *acceptance* or *approval* of the work by the defendant. But the evidence does show, that the defendant *disapproved of the work*, and caused it to be taken out as insufficient.

The evidence shows that the defendant sustained great loss in materials and labor, by reason of the insufficiency of the work done by plaintiff, amounting in the aggregate to a much greater sum than the value of any services rendered by the plaintiff.

It also appears that the plaintiff had been paid \$400 or more for his services.

If the defendant sustained loss and damage by reason of the insufficiency of the plaintiff's plan or work, the defendant was entitled to *recoup* the same in this action.

*Low v. Forbes*, 14 Ill., p. 423.

*Higgins v. Lee*, 16 Ill., p. 500.

We think the Court below erred in refusing the first instruction for the defendant, for the reasons already stated.

We also think, that the Court should have granted the

defendant's motion for a new trial, for the reasons stated at pages 49 and 50 of printed Abstract.

We think the verdict clearly contrary to the instructions given on the part of the defendant.

We are aware, that your Honors will not reverse a judgment merely because a verdict is contrary to the evidence in light and trivial respects; but, in a case like this, where the verdict was clearly and manifestly against the evidence, we do not think your Honors would refuse to reverse the judgment and grant a new trial, if there were no other grounds to warrant such reversal.

*Higgins v. Lee*, 16 Ill., p. 500.

The jury rendered a verdict against the defendant and in favor of the plaintiff for \$1,397.22. Did the evidence support the verdict? We insist that it did not, and that the judgment ought to be reversed and a new trial granted.

J. B. HAWLEY, of Counsel for Appellant.



**SUPREME COURT OF ILLINOIS,**

*April Term, A. D. 1861.*

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**THE MOLINE WATER POWER AND MANUFACTURING COMPANY.--Appellant.**

VS.

**LORRAIN L. NICHOLS, Appellee.**

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**ABSTRACT OF THE RECORD.**

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**PLEAS, &c.**

<sup>1</sup> August, 31st, A. D. 1859. The appellee, sued out of the Rock Island Circuit Court, his summons in assumpsit, against appellant, returnable to September Term following. Damages claimed \$2000.

<sup>2</sup> On the same day the Sheriff returned the writ served.

<sup>2</sup> On the same day the appellee filed his declaration in  
<sup>3</sup> assumpsit, containing the common counts in the ordinary form.

<sup>5</sup> On the 19th of September, appellant filed its plea of the general issue.

<sup>6</sup> At the May Term, A. D., 1860, a jury was empannelled, and trial had, and on the 15th day of June, a  
<sup>7</sup> verdict was rendered for the plaintiff in \$1397.22: defendant entered its motion for a new trial and in arrest of judgment.

<sup>7</sup> June 22nd. The defendant's motions in arrest of judgment and for a new trial, were heard and overruled, and final judgment was rendered for the plaintiff. Defendant prayed an appeal. Defendant required to file his Bill of Exceptions, and bond in \$2,000, with  
<sup>8</sup> Stillman W. Wheelock, as surety within ninety days.

<sup>8</sup> August 8th. Defendant filed its bond in due form in \$2,000, with Stillman W. Wheelock as security.

<sup>9</sup> August 18th. Defendant's bill of exceptions, duly signed and sealed by the Judge.

*Bill of Exceptions.*

The Bill of Exceptions shows that on the trial plaintiff called as a witness HIRAM PITTS, who testified as follows:—

H. PITTS' TESTIMONY. <sup>10</sup> I live at Moline, and have since 1850, was elected Sec'y of def't. company in May 1857, and continued until Fall of 1858; pl'ff served def't as a hydraulic engineer during that time; the Co. were making improvements—the work commenced in May or June, 1857, and continued until cold weather; plaintiff superintended the work—surveyed the river—made plans and specifications, and the monthly estimates of the work done. Pl'ff continued subject to order of the Co., sometime after the work closed; he went East sometime in the winter, expecting to return; he remained subject to order of the Co., until about the 18th or 20th  
<sup>12</sup>of Oct. 1858.—He notified us when he went East, that he did not get into any other business.—

Plans for the improvement were submitted to pl'ff by different members of the Company, and he and they finally settled upon one. A contract for the work was let to Williams and Parsons; they commenced in June  
<sup>13</sup>or July, 1857, and worked until about Nov. 1st. The work was not resumed the next Spring on account of high water, and in June a proposition was made for a purchase of the whole property of the Co., by Reed & Goodwin, for themselves and others; In Oct. 1858,



the then stockholders transferred to Reed & Goodwin, all their stock; previous to this transfer the stockholders were Hiram Pitts, D. B. Pitts, Elias S. Gilbert, John P. Cook, John Deere, H. F. Sickles, and I think, Cook & Dillon; these were the principal ones.

<sup>14</sup> Witness was then asked, "Who of these stockholders lived at Moline," for the purpose as plaintiffs' counsel stated of showing an implied undertaking of defendant to pay for plaintiff's services. Defendant's counsel objected, for the reason that the law will not from this circumstance alone, imply a promise of the defendant to pay; *The Court overruled this objection, and defendant excepted.*

Witness replied, "Most of these parties lived at <sup>15</sup>Moline." Witness continued:—"I employed plaintiff representing myself to be the Co's. agent. No written contract was entered into to pay—*We set him to work, and told him we should want him until the job was completed.* I should say the Co. employed him, that the directors and nearly all the stockholders were present when he was employed. There was an executive committee appointed to do all this: J. P. Cook, Cyrus Pitts and John Deere.

Witness was asked by plaintiffs' counsel, "Who of the Co., if any were present while the work was progressing?" Defendant's counsel objected. Because the fact that members of the corporation were present while the work was progressing doth not show or tend to show a liability of defendant, to pay for same. Court overruled the objection. Defendant excepted. Witness answered, "The stockholders residing at Moline were present, occasionally."

<sup>17</sup> Witness continued, "Cook and Dillon resided at Davenport, Iowa,—about four miles from Moline:—they were there occasionally, the price to be paid for plaintiff's services, was never agreed upon. I have some experience in such matters—from having em-

ployed men in my own business sometimes. Witness was here shown the

ACCOUNT FILED WITH PLAINTIFF'S NARR,  
as follows:—

17. 18. "1857. Moline Water Power and Manufacturing Co., To LORAIN H. NICHOLS,		Dr.
May 11.	To traveling expenses from Rochester to Moline,	\$ 20.00
25.	" stationery for use of Company,	2.00
June 23.	" price of one axe,	.75
Nov. 7.	" Amount paid D. Pagin for assistance,	3.00
" 22.	" money advanced for board,	100.00
" "	" traveling expenses,	25.00
1858.		
May 15.	" one years salary as engineer of said Company,	2,000.00
Sept. 3.	" making out estimate by request of S. J. Goodwin, Treas.	20.00
		<hr/>
By cash,		2,170.75
		170.75
Balance due,		<hr/> 2,000.00

13 Witness continued: I should think was a reasonable bill for plaintiff's services for such a time,—it is customary to pay expenses of engineer exclusive of salary.

13 Witness was then asked by plaintiff's counsel, "Please state what you know as to each item of the balance of the bill." Def'ts counsel objected, because as to the items of said account charged for board and traveling expenses, there was no evidence to show that def't had promised to pay the same. Nor as to the other items of said account, had it been shown that 19 Def't authorized Pl'ff to purchase same. Court overruled this objection. Def't excepted. Witness answered, "Pl'ff bought an axe worth 75 cts, he paid Pagin \$300, he paid his own board, at least he engaged it,—should think \$100 a reasonable charge for it;—the charge for traveling expenses is reasonable and correct. I understood from these parties that they employed him to make an estimate. In my judgment \$2,500 would be a reasonable salary for an engineer per year."

Witness was asked by counsel for pl'ff, "While this work was progressing did the directors hold meetings? if so, when and how frequently?" Def't's counsel objected; 1st, Because the question is leading; 2nd, Because it is irrelevant.

20 The Court overruled the objection, defendants excepted. Witness answered, "They held regular and



special meetings frequently."—Witness was asked by pl'ff's counsel, "Was pl'ff present at these meetings if so what did he do, if any thing." Def'ts counsel objected to this question as irrelevant, and as leading. Court overruled the objection, def't excepted.

<sup>21</sup> Witness answered: "He was frequently present, he made his reports, and was consulted as engineer."

*Cross Examination.*

<sup>21</sup> On cross examination, witness testified as follows:—

About the time we proposed to commence work, I was requested to write to New York, to get an engineer;—think I wrote first to Col. Reed, saying we were about re-organizing and should want an engineer—he corresponded with me and recommended this man. I wrote individually to Reed before the reorganization; the Co., had been organized some three or four years before and the property had been in litigation;—the charter was finally, in Fall of 1856, transferred to Pitts, Gilbert & Pitts; the Co., which employed pl'ff was organized in fore part of May, 1857. The charter previously belonged to Pitts, Gilbert & Pitts.

Witness was here shown a letter marked "A." This is a letter addressed by myself to Col Reed. I wrote it for the purpose of procuring an engineer; don't know how the pl'ff was employed except by means of my correspondence with Reed; Reed, through my request, got others to send pl'ff down. Defendants thereupon read to the Court the letter last above mentioned and shown to the witness, as follows:

<sup>22</sup> "A." Moline, ILLS., March 23d, 1857.

*Dr Cousin:*—I just drop you a line saying that if the gentleman you spoke of as engineer is unengaged and you can obtain him, we think he had better come up at once, as the weather at length looks as though we might have Spring. Nothing new, etc.,——"

Yr Cousin,

P. R. Reed, Esq.,

H. Pitts."

<sup>23</sup> Def'ts counsel then moved to exclude the testimony

of said Hiram Pitts from the jury, on ground of interest. The Court overruled the motion, and def'ts counsel excepted.

Witness continued on cross examination:—

Pl'ff got here about middle of May; he came to our office,—the office of Pitts, Gilbert & Pitts,—which was likewise the office of the Co., at Moline:—he introduced himself as Mr. Nichols;—we discussed the plan of improvement at a meeting of the Directors—pl'ff was present part of the time; John Deere, J. P. Cook, Cyrus Pitts, H. F. Sickles, and perhaps myself, were Directors; don't recollect what was said, at this meeting, think full board was present,—we recognized pl'ff as Co's engineer, and set him to work.

The Executive Committee were not appointed until after we made the contract with Parsons & Williams.

At the first meeting we requested pl'ff to present some ideas for a plan of improvement; the Directors entered into no contract with him, *they set him to work, and told him they would want him till the job was completed.*

Don't know that any resolution was passed employing him. No conditions in writing were made as to the taking of any stock. I know of no conditions in the taking of any stock except in the case of Mr. Deere, who made a condition as to payments. He gave his note for stock taken by him. It was cashed at Cook & Sargent's.

Pitts, Gilbert & Pitts owned the stock of the Co., and the whole concern up to the fore part of May, 1857;—there were then additional subscriptions. I was present when Mr. Cook and Mr. Deere agreed to take stock.

26 Don't know that the condition on which they agreed to go in was that Pitts, Gilbert & Pitts should raise money to finish the improvement. This firm was composed of those persons who held the stock of the Co. I was a member of the firm.



I never knew of any agreement, as an inducement to Cook & Deere to go in, that Pitts, Gilbert & Pitts should raise money to finish the improvement, and should pay the engineer and contractors. I did not mean to say in my direct examination, that there was any express authority for continuing pl'ff subject to Co's order after he went away,—don't know that there was. I corresponded with him as Sec'y of the Co.

When pl'ff came on we set him to work. Don't know that there was any resolution passed employing him. The directors made a verbal contract with him; all there was of it, was that they set him to work; all the Directors were present,—we told him to go on until the job was completed. I presume I told him this myself. The firm of Pitts, Gilbert & Pitts did not employ Plaintiff, to my knowledge.

I should have known it if they had. I think we paid pl'ff some \$200 to \$300.

Witness was here shown an account marked "B."

Have seen plaintiff write—know his hand writing, this is his writing:—*The credit for board there, Taylor's bill, I know nothing of.* I was served with a subpoena to produce it but didn't find it. Said account, "B" is as follows :

29 "The Moline Water Power and Manufacturing Co., To L. L. NICHOLS,				Dr.	Cr.
Dr.					
May 11.	Travel expenses,	\$ 20.00	June 23, 1857.	Cash,	\$ 2.00
" 25.	Stationery,	2.00	July 4 "	"	20.00
June 23.	Lux,	75	" 24. "	"	32.00
Nov. 7.	Aect of D. Pagin,	3.00	" 30. "	"	100.00
" 22.	Board,	100.00	Aug. 29. "	"	10.00
" "	Travel expenses,	25.00	Oct. 4. "	Clothing store	
Sept. 3. 1858.	Making out an		" 16. "	bill,	30.40
	estimate by request of		" 16. "	Cash,	10.00
	S. J. Goodwin,	20.00	Nov. 7. "	Order on Sick-	
	One year salary,	2,000.00	" 22. "	les,	42.50
		\$2170.75		My order in fa-	
				vor of Mrs.	
				Taylor,	100.00
					\$ 346.90
				Balance,	1823.25
					\$2170.75
					"

30 Think pl'ff, when he went away mentioned a board bill at Mrs. Taylor's which he wanted paid—Taylor then owed Pitts, Gilbert & Pitts for rent:—he contest-

ed our claim. We settled with him as well as we could. This order was not brought into the settlement. Plaintiff superintended the building of the dam at Moline—the one def't contracted with Parsons & Williams to build.

<sup>31</sup> Pitts, Gilbert & Pitts owned considerable land about Moline: Mr. Gilbert owned a place in Iowa, opposite:—

The pl'ff did two or three little jobs for Pitts, Gilbert & Pitts, outside of the Co.'s works—: During the time, he has charged for here, he surveyed a town plat for Pitts, G. & Pitts. We expected to pay him or the Co.,—it might have taken him two or three days—; he also went over the river, to see about some matters for Mr. Gilbert.

<sup>32</sup> The contractors, Parsons & Williams, were paid by Mr. Gilbert, the Treasurer of the Co., and sometimes by me. [Here witness was shown a promissory note of Pitts, Gilbert & Pitts. to Parsons & Williams, for \$578—, dated August 30th, 1858—due in sixty days.]

<sup>33</sup> Witness continued, this note was given in payment of what was due Parsons & Williams on the work engineered by pl'ff. We thus settled with them at their request; we were under no obligations to them, it was entirely gratuitous. Before this I think they never got any payments from Pitts, Gilbert & Pitts.

<sup>34</sup> The Co., which existed when pl'ff was employed, sold out to Reed & Goodwin about 18th of October, 1858; Sale was consummated at our office in Moline. Reed & Goodwin were present; for the Co., there were present members of firm of Pitts, Gilbert & Pitts, Mr. Deere and John P. Cook; Mr. Davenport, a brother-in-law of Mr. Reed, was also present. Don't recollect that Reed objected to closing up the sale, on account of Nichols' claim.

Witness was then asked —“Did not Mr. Reed object to closing up the bargain on account of this very claim of Nichols', and did you not at the interview at which  
<sup>35</sup>the bargain was finally consummated at your office in.



Moline, about the 18th or 19th of October, A. D. 1858, in the presence of Mr. John P. Cook and Mr. Davenport, or in the presence of them and others, say to Mr. Reed, that you, Pitts, Gilbert & Pitts, had employed Mr. Nichols, and that you, and not the Water Power Company, were responsible to him, or words to that effect?"

35 Witness answered, "I don't recollect that I did. I have no recollection that Nichols' claim was specially mentioned,—it came in and was talked of with the rest: he required us to pay off all the indebtedness of the Co., before he would make the contract."

35 Witness was then asked: "Did you not, at the interview at which the bargain with Reed & Goodwin was finally consummated at your office in Moline, in the presence of Mr. John P. Cook, and Mr. Davenport or in the presence of those and others, say to Mr. Reed, that Pitts, Gilbert & Pitts, and not the Water Power Company, employed Nichols as Engineer, and that you had paid him up, or words to that effect?"

36 Witness answered, "I don't recollect anything of it. —I don't recollect saying anything to that effect."

Witness continued. I told them then, that he had been paid something, don't recollect that I told them we had him nearly all paid up, and would soon pay him the balance—don't recollect that I said anything to that effect. They required *that all the indebtedness of the Co., should be paid before they would consummate the contract.*

Think I represented to them then that something had been paid Nichols and something was due him. We did not represent it to be a large matter of course, as we were interested, not to make it look worse than it really was:—didn't tell Reed that the Co. did it over pl'ff, anything. I have the books of Pitts, Gilbert & 37 Pitts here. [These books shown witness]. These are their books—their Ledger, Day Book, and Journal. I have no very friendly relations with the present Co.

I consider that they have not acted very manly—, and I don't feel good toward them.

*Re-Examination.*

37 On re-examination by pl'ff's counsel, witness was asked, "What is the cause of the feeling between you and the present Company?"

Def'ts counsel objected,—Because the matter inquired of was immaterial and irrelevant: Court overruled the objection, and def't excepted.

Witness answered: "The failure on their part to perform their agreements, by which we lost thousands of dollars."

Witness continued. The pl'ff was very attentive to the work of the Co., and never absent when wanted.

*Second Cross Examination.*

38 On second cross examination, witness said the debt to contractors, Williams & Parsons, was paid by a sale of property under a chattel mortgage given by Pitts, Gilbert & Pitts, to secure it.—

*Third Cross Examination.*

We called upon the other stockholders to help pay this debt:—they refused to do anything—we called for twenty-five per cent upon their subscriptions.

40 I called upon Mr. Cook, for money upon his subscription, and not as a favor to Pitts, Gilbert & Pitts:—also upon Mr. Deere;—he gave his note for \$1250, twenty-five per cent of his subscription.

43 Also pl'ff's counsel called as a witness CYRUS PITTS, who testified as follows:

I live at Moline—and have some four years—first I knew pl'ff in Spring of 1857—I became President of the Co., in May of that year and held the office until we sold to present Co.: pl'ff became engineer of Co., in June: [Witness describes duties of pl'ff.] Was with him at meetings of Co.—His office was the office of the Co., and also of Pitts, Gilbert & Pitts. Couldn't say who set him at work. It was by a common un-



derstanding that an engineer should be sent for,— could not say that the Co., was organized at that time.  
 42 The plan of improvement drawn up, and presented by pl'ff, was adopted by the Co., the work was afterwards commenced by Parsons & Williams, and prosecuted by them—pl'ff superintended it. Pl'ff was engaged thus until November, when he left—. Work was not then complete—it was expected to re-commence it in the Spring. I understood pl'ff was retained.

This I understood from my knowledge of Co.'s operations.—

43 The Co., did not resume the work—a proposition was made for a sale in June, 1858,—and the sale was consummated in October following;—This was a sale of the stock and property of the Co., and of land adjoining. The stock was transferred to Messrs. Reed & Goodwin, and other parties in New York.

*Cross Examination.*

There was no written contract between Co., and pl'ff—Think at a meeting, when plans were discussed, and when Williams & Parsons were employed, some talk was had about an engineer; and I think pl'ff was recognized as the engineer of the Co.;—Think Mr. Cook was present at this meeting; I don't know of any employment of him prior to this, understood this meeting as a recognition of him as engineer. I know of no agreement by which he was employed before this; he had previously presented his plans in public, and it was talked over then. It was finally decided to adopt his plan. The pl'ff was recognized as an engineer, what he had done was accepted. He superintended the work as long as it was carried on that Fall, and was to continue until it  
 45 was completed. Don't know of any further agreement to employ him, except that he continued and was recognized as such; Don't know that anything was done to retain him when he went away,—that any meeting was held:—don't know of any person who was authorized to employ him to return, having done so. I was one of the Executive Committee;—don't know that

they, by any vote, employed him to return, or of any meeting, formal or informal, at which he was so employed, or of any assent of the Executive Committee to his being so retained; all I know of it is, by a conversation between him and myself.

45 Before pl'ff came out here there was an old dam across the river at Moline—; it is not now there, nor is the one engineered by plaintiff: the dam built by pl'ff. was the second one that was built there.

46 Plaintiff did some work for Pitts, Gilbert & Pitts—and laid out a road up the bluff for me—I did not pay him for it.

*Re-Examination.*

There was no meeting in Fall of 1858, to turn pl'ff off.

Pl'ff's counsel also called H. F. SICKLES, who testified as follows:

47 I know the parties, have lived at Moline about six years:—Have known pl'ff since the time he commenced as engineer of the Water Power Co., in May or June, 1857. The first meeting of the Directors which I attended, was held to consider plans for the improvement.

48 They received the plan presented by the pl'ff, and after discussion, adopted it: couldn't say whether the Board was full then or not;—think no work had been commenced before this. Should think pl'ff had been at work there about a month before this: think that about this time a contract for the work was let to Williams & Parsons; Think pl'ff was at that meeting, by a resolution, retained as the engineer of the Company, to superintend that work. He did superintend it as long as it was continued, which I think was until November.

I was a Director of the Co., until about Oct. 1858. Don't know that pl'ff was ever discharged,—should probably have known it, if he had been; Pl'ff was generally present at the meetings of the Co., and we always consulted him as engineer.



In June 1857, myself and my brother purchased of the Co., the Moline Mills, and took a deed of it. [Witness here shown a deed.] This is the one.

*Cross Examination.*

48 I became a member of the Co., in June or July: think it was shortly after this that the first meeting of the Directors, of which I have spoken was had; there were present, Hiram Pitts, E. S. Gilbert, John P. Cook, Cyrus Pitts, John Deere, and myself; these are all I remember. This was the time pl'ff was recognized as engineer.

49 My memory is that plaintiff was employed as engineer of the Board, by vote and resolution.

Plaintiff's counsel also called as a witness E. N. PARSONS, who testified, &c.,

49 I am of the firm of Williams & Parsons, referred to here—; have lived at Moline three years:—know the parties—have known pl'ff since 1855. He came to Moline about the middle of May, 1857. was engaged in taking survey's of the river, for the purpose of creating a water power.

50 Pl'ff was engaged thus from middle of May, until the tenth of November. After our contract was made, he had general supervision of the work; we worked under his direction as the engineer of the Co.; work was not completed when we stopped.

50 Pl'ff also called CHAS. H. STODDARD, who testified as follows:—

51 I am a surveyor and civil engineer—have been about sixteen years. I am not acquainted with hydraulic engineering; have been engaged in it some little; I know something about the Moline Water Power: have seen it.

Witness was asked by pl'ff's counsel, "What in your opinion would be a fair compensation for the services of a civil engineer for a year?"

Def't's counsel objected, because the witness hath not shown himself to be acquainted with the matter in

question ; and, because, The question is irrelevant—, it not having been shown that the pl'ff was employed for a year, or by the year. The Court overruled the objection, def't excepted.

52. Witness answered, "I should say from \$1,000 to \$10,000, according to his ability, and the importance of the work---; not very often so high as the latter. I know very little about this work."

Pl'ff's counsel then asked : "From your knowledge of this work, how much in your judgment, would be a fair compensation for a good competent civil engineer engaged in it by the year?"

Def't's counsel objected ; because It had not been shown that pl'ff was a "good competent civil engineer," or that he was employed for a year, or by the year.

53. Court overruled the objection ; Def't excepted.

53. Witness answered, "I should not expect to get the services of a competent engineer for such a work as that for less than from \$2,000 to \$3,000 at the time when this work was done."

Pl'ff then asked witness, "What would the work of such an engineer be worth from May to December."

Def't's counsel object, because The question is irrelevant to the issue.

54. The Court overruled this objection ; defendant excepted.

Witness answered, "More than half the salary."---

#### *Cross Examination.*

Witness testified on cross examination, as follows :

I have practiced my profession in New York, Iowa, Illinois, Pennsylvania ; I regard the reputation of an engineer as affecting the amount of the salary. Persons who have not much reputation, do not, in general, command so high a price for their services, as others.  
55 I should charge two thirds of a year's salary, for a Summer's work : don't know that this is the usual custom. My engineering has been mostly railroad engineering.



Plff then offered, and read without objection, a certain contract between Nelson L. Williams & Elizur W. Parsons, of the first part, and the Defendant, of the second part, dated July, 10th, A. D. 1857—and by which in consideration of certain sums of money agreed to be paid them. The parties of the first part agree to construct for the party of the second part, certain piers, walls, and other works mentioned in the specifications attached thereto —, and which specifications are as follows:—

64. The improvement to be made by constructing a dike composed of stone piers placed forty-five feet apart from centre to centre, and of timber and plank. The first pier to be placed at the intersection of the line of the East side of Sickles' Mill, with the line of the North side of Chamberlin & Dean's saw mill; the direction of the dike for one hundred and eighty feet to be parallel with the North end of Sickles' Mill; thence curving to the right with a radius of 1400 feet, a distance of 405 feet;—thence on a straight line, tangent to the last mentioned curve, a distance of 450 feet; thence curving to the right with a radius of 300 feet, a distance of 45 feet; and thence by the most practical direction to connect with the shore. A connection to be made at the upper end with the south side of Chamberlin & Deans' Saw Mill, by the most practical way, &c.

The height of these piers will be about 18 feet; the top of each to be one foot lower than the level of the door sill of the basement of Shaw & Reed's Store. The piers to be four feet by twelve feet on top; the front end to be vertical, the sides to batter one inch to the foot, and the rear end to offset five inches to the foot, increasing in size downwards.

The masonry to be laid in courses of not less than twelve inches in thickness, the sides to be rock dressed, but the front end of each to be face to  $\frac{1}{4}$  inch joint. The breadth of bed of the face stone, shall not be less



than 18 inches, but if the thickness of the course shall exceed 18 inches, it shall have as much breadth of bed as height. Each course shall have a bend with the course on which it rests, of at least six inches, and each course except the bottom one shall have at least two headers on each face extending back from the face two thirds of the thickness of the walls. The beds and end joints to be dressed to one fourth of an inch joint; the whole to be laid in mortar made of the best quality of hydraulic lime and clear sharp sand, in such proportion as the engineer shall direct, &c.

A sill nine inches by fourteen inches, shall be bedded and bolted to the rock immediately in front of the piers the whole length of the dike with bolts of one inch diameter, entering the rock from 18 to 20 inches, once in four and a half feet. The top of the sills to be 17½ feet below the top of the piers. Into these sills, posts 8 by 12 inches, are to be framed once in 4½ feet, 16 feet and 11 inches long from shoulder to shoulder, the face of each post to be 2 inches back of the face of the sills. On the rear side of each post two boxings, one inch deep, and two feet lengthwise of the post to be made to receive the supporting beams and braces. Each beam to be bolted to each alternate post between the piers with two bolts of one inch iron; and to the intermediate posts with one bolt in each. Each alternate post to have two braces at an angle of 45 degrees, the lower ends set into the rock, and the upper ends bolted to the posts with one inch bolts. Each post to be secured to the sill by a mortice, and tennon, and by a wrought iron T., bolted to each side of the sill and to the sill in such manner as to allow the bolts to be withdrawn and the post removed, and another inserted, whenever it becomes necessary for repairs.—

The top of the posts to be capped with a plate 8 by 12 inches running the whole length of the dike, the front side of the posts to be planked with two inch plank, leaving 8 gateway spaces. 46 by 48 inches be-



tween each pair of piers." Then follow specifications in regard to excavation; as to which no question is raised.

69 The witness, E. N. PARSONS, was then recalled, and on cross examination testified as follows:

*I knew of the hiring of the plaintiff. I saw him in New York before he ever came out here, and told him Pitts, Gilbert & Pitts wanted an Engineer to do some work on the water power at Moline; he said he would come; I then sent word to Pitts, Gilbert & Pitts. I waited some time without hearing from them, and then came on to Moline. Mr. Gilbert and Mr. Pitts told me to write to pl'ff to come on, and I did so; he came pretty soon after. Hiram Pitts gave me these directions; He came on and after that they made their own bargains; —I don't know that any new bargain was made; he went to work for Pitts, Gilbert & Pitts: I say so because I know of no one else that employed him.*

*Re-Examination:*

70 I was living in same town with the pl'ff; I employed him by Mr. Reed's request; Reed is now President of the Co. *I didn't then know of the existence of this corporation, the Water Power Co.: I didn't when I employed the pl'ff, know or speak of anybody but Pitts, Gilbert & Pitts: I employed pl'ff to make a survey of the Water Power—this was probably in March or February, 1857.*

71 Here def't moved to exclude all the testimony of witnesses Hiram Pitts, and Cyrus Pitts from the jury, on the ground of interest; The court overruled the motion, and def't excepted.

71 Pl'ff then called DANIEL GORDON; who on direct examination testified as follows:

I have lived at Moline several years—; in fore part 72 of the summer of 1857—I became acquainted with pl'ff; saw him at work there as an Engineer, from time to time until fall. Don't know the value of his services.

72 AMOS STILLMAN for pl'ff testified as follows :

I am a civil engineer and surveyor ; have been actively engaged as such since 1835. Think \$2,000 per year, a fair price for an engineer's services in 1857.

73 G. T. TAYLOR for the pl'ff testified that the services of a competent engineer, on a work like the water power at Moline, would be worth per year from \$2,000 to \$2,500.

73 CYRUS PITTS, being recalled testified on direct examination, as follows :

The pl'ff was the Co.'s engineer at the time the work was being carried on by Parsons & Williams.

75 Pl'ff's counsel then recalled the witness HIRAM PITTS, who on direct examination, testified as follows :

[Witness was here shown two letters addressed to the pl'ff] These are in my handwriting. I wrote and sent them to the pl'ff. [Witness was here shown two other letters] I know the handwriting of S. J. Goodwin: these two letters last shown me are in his handwriting—Goodwin was not Treasurer of the Co., when these letters were written. He is reported to be now;—when I wrote these letters I was Sec'y of the Co.

75 Pl'ff's counsel thereupon offered in evidence the two letters last mentioned written by the witness to 76the pl'ff. Deft's counsel objected. 1st. For want of authority in said Pitts to write said letters;—2nd. That the writing thereof had not been proven to the Jury, but only to the Court. 3rd. That the letters were irrelevant.

The court overruled said objection, and defendant excepted. Thereupon said letters were read as follows :

MOLINE, Ill., Feb'y 19, 1858.

"L. L. Nichols, Esq.,

Dr Sir :

77 Yours of 13th is rec'd ; we are now waiting the arrival of 3 or 4 gentlemen from N. Y., with whom we



have been negotiating, to decide in regard to our operations the coming year. We hope to sell them a portion of the property, so as to provide means for the improvement.—Will write you the result. If we succeed we shall of course want your assistance.—

Yours Truly,

H. PITTS."

—  
"MOLINE, ILL., April 2nd, 1858."

"L. L. Nichols, Esq.,

Dr Sir: Your favor of Feb. 13. was rec'd and laid away for answer, and I had supposed I answered it about 2 weeks after, but Mr. Post rec'd a letter since, and from that, and from his recollection I think I must have been in error. In regard to the improvement we had supposed we should have been ready to commence before this time. We have had P. R. <sup>79</sup>Reed making arrangements in N. Y. for some two months past, so as to be prepared to go on the coming season.—We feel very confident that he will succeed, but do not know how long it may take to perfect the arrangements, and shall want your services whenever we can ascertain. We do not think you will run any risk in moving out here at once.—

Your's Truly,

HIRAM PITTS, Sec'y.,

Water Power, Co."

<sup>80</sup> Pl'ff's counsel also offered to read to the Jury the letters of Goodwin to the pl'ff. Def'ts counsel objected, 1st, That the writing thereof had not been proven to the Jury. 2nd, That said Goodwin was not, at the time of writing the same, a member, officer, or agent of the Co., defendant. The Court overruled the objection, and def't excepted.

The letters were then read as follows:

CHICAGO, ILL., June 19th, 1858."

<sup>81</sup>"L. L. Nichols, Esq.,

Dear Sir: I have just returned from Moline, where I have been together with Mr.

Reed of Onondaga Co., the past week, negotiating with Messrs. Pitts, Gilbert & Pitts, for the Moline Water Power and Man., Co., property. I should like to see you and have some conversation with you about your returning there soon to take charge as engineer of the unfinished part of the improvement contemplated by your specifications; and for that purpose would like to meet you at Rochester. If convenient for you to come there, I would see you in the office of the Depot.

Respectfully Yours,

SAMUEL J. GOODWIN."

"MOLINE, ILL., Aug., 29th '58.

<sup>82</sup>"L. L. Nichols, Esq.,

Dear Sir:

On my arrival here I find the water is altogether too high to do any work at present except to get the stone and timber ready; we have made a new bargain with Messrs. Williams & Parsons, which is that you are to make a new estimate of the work which we propose to do; and the price you fix is to be the price they agree to do the work for, as in consequence of the difference in the money market now, from what it was when you made your former estimate, the work can be done for much less than it could then.—Now we want you to make out a full estimate of the entire cost of doing the work.—Please make this out and send it to me as soon as you possibly can.—Just as soon as the water is down, so that the work can be done, we will send for you.—

In haste Yours,

SAM. J. GOODWIN."

<sup>84</sup> Pl'ff's counsel then produced a deed of the Defendant to H. F. Sickles, *et. al.*, dated June 20th, A. D. 1857—, and read therefrom, a covenant of the grantor therein, to furnish to the grantee a quantity of water, "predicated upon a seven foot head, in accordance with the survey's, plans, specifications and esti-



mates of Lorain L. Nichols, the engineer of the party of the first part, etc."

<sup>84</sup> The plaintiff then called HARVEY POST, who on direct examination testified as follows: I have lived at Moline since 1857; was present at a stockholders meeting of this Co., in fore part of that year; they called for the Engineer's Report, which Mr. Nichols read. I had assisted the pl'ff in making the surveys. I was <sup>85</sup>clerk for Pitts, Gilbert & Pitts that season, and kept their books. Know of payments having been made to him by Pitts, Gilbert & Pitts.

*Cross Examination.*

<sup>85</sup> I was present at first meeting of the stockholders of the Water Power Co., after I came to Moline,—say in May or June 1857; There were present Pitts, Gilbert & Pitts, Sickles, Deere, and a large number of others, who afterwards became stockholders; that was a public meeting of the citizens interested in the work.

<sup>86</sup> Assisted pl'ff perhaps two or three weeks, in determining capacity of the water power, and fixing a plan for the improvement; after that I took charge of Pitts, Gilbert, & Pitts' books, and that occupied all my time. *I was not employed by pl'ff, and was not paid by him. I was employed by Pitts, Gilbert & Pitts, and paid by them—and the time I worked with pl'ff was charged to the Co.*

Witness was here shown books of account of Pitts, Gilbert & Pitts, and requested to refer to the account of the Defendant in the Ledger, and having made such reference, said I do not find the charge made here to the Water Power Co. I was directed so to charge it. Witness also referred to his own account in said Ledger, and stated that he did not then find any credit for the time during which he assisted the pl'ff; *but that this was included in his year:—*

Witness then read to the Jury, the account of the pl'ff in the aforesaid Ledger as follows:—

Dr. L. L. NICHOLS,			Cr.		
1857.			1857.		
June 23	To Cash,	\$ 2 00	Dec. 31	By real estate,	\$ 3 00
July 11	" "	20 00			
" 31	" "	132 00			
Aug. 28	" "	10 00			
Oct. 5	Susan Berlzheimer,	30 10			
Nov. 21	To Sickles & Bro.,	42 50			
Oct. 6	" Cash,	10 00			
1858.					
Jan. 1	" "	50 00			

Witness being requested to turn to the account of the Def't in said Ledger, referred to the same, and having examined the same deposed that none of the items so charged to the pl'ff in the foregoing account between said pl'ff and Pitts, Gilbert & Pitts, were charged over to the Co.

88 Pl'ff's counsel then recalled HIRAM PITTS—and asked him to explain the manner in which the books were kept with Nichols and the Def't.

88 Def't's counsel objected, That the books for themselves show this. Court overruled the objection, and def't excepted.

89 Witness said, The Treasurer was often absent:—the business of the Co.; therefore, to a large extent went through the hands of Pitts, Gilbert & Pitts; this was why so large an account was opened between our firm and the Co; these entries were made there because the Co., had no books,—the Co.'s books were in course of preparation.

90 The witness was permitted, under the objection of def't's counsel to testify that abstracts of payments were made monthly, and presented to the Co.,—and kept with the Co.'s papers.—Thereupon, the Court said that as these abstracts appeared to have been in writing, these writings must be produced or otherwise this testimony of the witness must be stricken out.

*The abstracts were not produced:—*

90 The plaintiff thereupon rested his case.

91 Def't's counsel then moved to exclude from the jury



so much of the evidence on the part of the plaintiff, as relates to each of the items of the plaintiff's account, filed with his declaration; and also the whole of said evidence. Because, 1st. As to the first and sixth items of said account there was no evidence tending to show a liability of the plaintiff, therefor, 2nd. As to second, third, fourth, and fifth items of said account, there was no evidence to show that def't had ever authorized pl'ff to purchase said axe, or stationery, or to employ said D. Pagin; or that def't had ever undertaken to pay for the same; or that pl'ff had ever advanced any money for board; or that def't had ever undertaken to pay the same. 3d. That as to the seventh item of said account, it had been clearly shown, that said pl'ff never was employed either for a year, or by the year, and that no undertaking was ever made to pay said pl'ff any specific salary; and that this was the whole of the evidence touching said seventh item. 4th. That as to the eighth item, there was no evidence to show that pl'ff had ever made any such estimate as therein charged for.

53. The Court overruled the mo.;—def't excepted.

*Defendant's Case.*

Def'ts counsel called as a witness JOHN P. COOK, who testified as follows:

I know the def't and pl'ff.

93 I know Hiram Pitts, Cyrus Pitts, E. S. Gilbert, John Deere and H. F. Sickles of Moline; Witness then testified that prior to the Spring of 1857, there had been a law suit pending in regard to the water power in which Pitts, Gilbert & Pitts were def'ts; which was settled—, Pitts, G. & Pitts purchasing the stock of the corporation; that during this litigation, witness as counsel became familiar with the Co.'s charter, and with the business of Pitts, G. & Pitts; that afterwards, about Feb'y, 1857, witness at the solicitation of Pitts, Gilbert & Pitts, went to work to re-organize the Co.; That in June, 1857, he first acquired an in-

98 interest in Co.; That his subscription was merely nominal, for the purpose of making him eligible as a Director—that in June, 1857, Pitts, Gilbert & Pitts, witness, John Deere and H. F. Sickles, were chosen Directors.

My subscription was in writing—don't remember precisely what was in it—all conditions were out side of the subscription.

95 Witness was then asked, "Was there at the time of your taking stock in this Co., any parol agreement made by you with the firm of Pitts, Gilbert & Pitts, as an inducement to your taking stock."

Plff's counsel objected: Court overruled the objection.

Witness said, "There was."

Def'ts counsel then asked, "What was that agreement?"

96 Plff's counsel objected; objection overruled.—

Witness answered, that after the settlement of the law suit before spoken of, he was repeatedly importuned by the Pitts' to take stock in the Co.:—

97 That he declined doing so unless they would make the improvement contemplated, either by borrowing money, or by issuing bonds and selling them for the money; that if they would do so then witness and his partner, Mr. Dillon, would take stock, this agreement was talked of twenty times. It was agreed that they should furnish the material aid to carry on the improvement. My contract was that Cook & Dillon 99 would take \$5000 of the stock, in part payment of what Pitts, Gilbert & Pitts owed us, in case they succeeded in completing the improvement; this contract was with Pitts, Gilbert & Pitts, and not with the Co.; I didn't pay anything for the stock which I took to render me eligible as a Director, and didn't get anything for it, when, in Nov. 1858, I transferred it to the present Co; I was at Moline when pl'ff first came on here; I don't know of the adoption of any plan by the Direc-



tors, or Executive Committee.

The witness was here shown a book of record, and testified that it was the records of the proceedings of Director's and Stockholder's meetings of the Def't Co.

100 Def't then read to the jury—under objection by pl'ffs counsel, overruled by the Court—a certain by-law, or resolution of the Co., from said book—as follows:

“At a meeting of the Board of Directors of this Company held at Moline, June 30, 1857—present, all the Directors.—

101 On motion, it was unanimously ordered that the President of the Co., together with John Deere, and John P. Cook, constitute an executive committee, who be and are hereby authorized in their discretion to make contracts and transact such business as they may deem necessary for the interests of the Co., provided that their action shall be unanimous.

CYRUS PITTS, Pres't.

Hiram Pitts, Sec'y.

Witness continued. I don't remember of any meeting at which the plaintiff came forward as engineer; there may have been such; I remember when Williams & Parsons were employed; the contract with them was approved at a special meeting held July 20th, 1857.

102 Witness referring to the Co.'s records said, that, as appeared thereby the witness H. F. Sickles was not present at that meeting. I drew the proceedings of the meeting at which the Co. sold Sickles the mill; nothing was done then to recognize pl'ff as the Co.'s engineer. At a meeting of the Directors held May 16th, 1857, he was recognized as the engineer in charge of the work; I drew up the record of that meeting. There never was any formal or informal order of the directors, or of the executive committee employing the pl'ff. I had repeated conversation with the pl'ff in reference to how he was hired there.

103 I told him just how I stood in reference to the matter, &c.

*as I have already stated*; in this or some other conversation he told me he came on here at the request of Mr. Reed, the agent of Pitts, Gilbert & Pitts; they were the owners of the stock and charter of the Water Power Co.

I knew of the sale by this Co., to Reed & Goodwin; it began to be negotiated in the summer of 1858, and was consummated somewhere between Oct. 15th and Oct. 20th, 1858. They negotiated for a long time—they stuck on the Williams & Parsons' claim, and this one.

<sup>104</sup> Reed wouldn't buy until they removed these liabilities. I mean by "they," Pitts, Gilbert & Pitts; neither myself, Deere, or Sickles, were consulted.

The proposition was to purchase, the charter and real estate of the Co., and additional real estate which belonged to Pitts, Gilbert & Pitts. I had no interest in it. About 20th of October, I went to Moline at the request of Mr. Pitts, or Mr. Gilbert;—found there Mr. Cable, Mr. Reed, Mr. Davenport as his Atty, Mr. Deere, and Mr. Sickles.

I was there on two or three different days. I recollect when Mr. Reed agreed to close up the bargain; there were then present both the Pitts', Mr. Gilbert, Mr. Reed, Mr. Davenport, and myself. Mr. Sickles and Mr. Deere, were in and out occasionally. There were difficulties which I went out to try and arrange.

<sup>105</sup> One of them was the claim of Mr. Nichols—: it came up, Mr. Reed objected to trading—that plaintiff might have a claim against the Co., and he wanted to be satisfied about it.—I asked Hiram Pitts how much he owed Mr. Nichols, and he said "not much if anything, it certainly couldn't exceed three or four hundred dollars." I went back to Reed & Davenport with Pitts and Gilbert, there were present the parties I have named and perhaps others. I said to Mr. Reed it was a very small matter that was splitting them; then Mr. Hiram Pitts made this remark, "It don't make any



206 difference any how: We employed Mr. Nichols, and if we owe him anything we are responsible to him, and not the Company;" he said either "the Company" or "the Moline Water Power and Manufacturing Company;" I have stated his language as nearly as I can. I turned to Mr. Davenport—he said that was satisfactory. Couldn't say exactly who were present; I have stated them, as nearly as I can. I went up there as the Attorney for Pitts, Gilbert & Pitts; they, or some one of them sent for me.

*Cross Examination.*

107 I think the first business I ever did for Pitts, Gilbert & Pitts, was in the suit with Atkinson, before spoken of—; I don't think I was employed in this negotiation as an Attorney. This declaration of Hiram Pitts, that they employed the pl'ff, was made in the front part of Pitts, Gilbert & Pitts' office; it was a public place, quite a number were there at times.

It was in the back part of the office that I had the private conversation. At the time of this statement there were present, Hiram Pitts, Mr. Reed, Mr. Davenport and myself, and I think it probable Mr. Gilbert, Mr. Sickles, and Sylvester Reed, were also there. When we went into the front office, after I made the remark that it was a small matter which split them, Hiram Pitts said "We employed Mr. Nichols, we owe him little or nothing anyhow, and we are responsible to him and not the Moline Water Power Company," or "the Company."—

108 I think I didn't vote for issuing bonds to raise money to complete this improvement. I wasn't then a member of the Co.; they had been voted, and a form drawn up; I was made Trustee in the bonds for certain purposes. This was to raise funds to complete this improvement.

I knew pl'ff was recognized as the Engineer of the Co., there in charged by one of the Co.'s records. I wanted to know that the water power should be improved. I became possessed of some stock, which I

think I bought of Pitts or Gilbert; I did not pay for it; as between them and myself I wasn't bound to pay for it; as between the world and myself, I suppose I was an absolute stockholder. I never was to advance any money—never agreed to pay anything until it was certain this improvement could be completed. This agreement was with Hiram Pitts, and E. S. Gilbert.—They never pretended that we had to pay any assessment on stock; and we never did pay any, though we let them have thousands of dollars and took as security this very stock. I contracted with the firm of Pitts, Gilbert & Pitts, because they owned all the stock: never saw or made any contract with Cyrus Pitts, or D. Benton Pitts, individually. While this negotiation for a sale to the present Co., was going on, H. Pitts called on me and obtained my consent to the sale, not as a stockholder, but because I held and controlled these liens.

*Re-Examination.*

110 What Hiram Pitts called on me for, was to reduce liens which I held and controlled on the property, and which the new Co., was to assume from some \$21,000 to \$19,000: when we lent money to them, we always contracted with Hiram Pitts, and E. S. Gilbert; the notes were always given in the name of the firm.

110 Def'ts counsel then called GIDEON W. DAVENPORT, who on direct examination testified as follows:

I know the def'ts; know of the sale of the stock, and charter to Reed and others, in Fall of 1858; was present at the sale; the trade had been negotiated, but they wanted to counsel me in regard to closing it up. I was present when it was finally agreed to consummate the sale; it was in the office of Pitts, Gilbert & Pitts in Moline. I think it was a little after the 11 middle of October; Mr. Reed, Mr. Cook, Hiram Pitts, and E. S. Gilbert were present, and I think S. B. Reed also; believe everything had been cleared up before that except this Nichols matter; When Mr. Cook came up, I stated to him the difficulty; he was acting for



the Pitts', I supposed for he consulted with them; Hiram Pitts and Mr. Cook came into the office where we were sitting; Mr. Cook said it was a small matter that was preventing a settlement, and we had better go on with it; Hiram Pitts then said in substance that there was little or nothing due Nichols, anyway; I think he said he had been mostly paid, and that he had been employed by Pitts, Gilbert & Pitts, and that they alone were responsible; in this way the bargain was closed up.

*Cross Examination.*

- 112 I am an Attorney at Chicago; came to Moline as the Attorney of Reed & Goodwin. I am a brother-in-law of Mr. Reed.
- 112 Def'ts counsel then read, [under objection by pl'ff, overruled by Court.] The account marked "B," which was shown to the witness, Hiram Pitts, and by him proven to be in the handwriting of the plaintiff, (the same set out on page 7 of this Abstract,) and also 113. 114. the letter marked "A," which was proven by the same witness, to have been by him written, as therein directed, (the same set out at page 5 of this abstract.)
- 114 Def'ts counsel then called JOHN DEERE, who on direct examination testified as follows:
- I know the parties; became acquainted with pl'ff in Spring of 1857. I own no stock now in this Co.; I did take \$5000 in the old Company; there was a condition annexed to my subscription, but there was no condition in the subscription book; there was a written agreement between myself and the Pitts' about it; (witness here produced a writing.) This is it.
- This writing was then read to the jury, as follows:
- Bond of Hiram Pitts and Cyrus Pitts, to John Deere, 115 in \$10,000:—Condition that whereas Deere had taken an interest in the Moline Water Power Co. "Now if the said John Deere shall at any time after one year from this date, wish to withdraw from said Company, and said Hiram Pitts & Cyrus Pitts shall take said

Deere's stock, and refund to said John Deere, all mon-  
 eys paid out, or costs expended by the said John  
 Deere, in and for said Company, then this obligation  
 to be void :—otherwise," etc., dated June 30th, 1857.

Witness continued :

116 I never executed any note for stock, or for assess-  
 ments on stock; I did execute a note, but it was for the  
 accommodation of Hiram Pitts and E. S. Gilbert. It  
 wasn't given at the time I took the stock; Hiram Pitts,  
 and E. S. Gilbert, gave me a bond to indemnify me for  
 signing the note. (Witness produced a writing). This  
 is it :

Said bond of indemnity was then read to the jury as  
 follows :

116 Bond of Hiram Pitts and E. S. Gilbert, to John  
 117 Deere, in penalty of \$2500. Condition "if the said  
 Hiram Pitts, and E. S. Gilbert, shall indemnify the  
 said John Deere, against all loss, cost, &c., to which he  
 may be subjected, by reason of his signing a note of  
 even date herewith for \$1250, payable to the order of  
 E. S. Gilbert, at their request, then this obligation is  
 void."

117 This note was not given for an assessment on stock,  
 or anything of the kind; This is the only note, I ever  
 signed for them, or with them.

*Cross Examination.*

This note was given to help Pitts, Gilbert & Pitts  
 118 raise money. My recollection is that it was given as  
 an accommodation note for them to raise money on to  
 complete the improvement of the water power.

*Re-Examination.*

When this note was given, there was no talk about  
 stock.

*Sec2nd Cross Examination.*

119 I thought this note was given to raise money for the  
 improvement, because I knew they were bound to raise it.

119 Defendant's counsel then called PETER A DEX, who  
 on direct examination testified as follows :.



I know Mr. Nichols, and the President, and one or two of the stockholders of the defendant; am a civil engineer; have been in the business 14 years, and have been occupied all the time. I have been employed on the Erie Canal, the Cayuga, and Seneca Canal, the N. Y. & Erie Railroad, the N. Y. Central railroad, the Michigan Southern Railroad, the C. & R. I. Railroad, and the Mississippi & Missouri Railroad; I have had some practical experience in hydraulic engineering;—have paid considerable attention to the subject. I engineered the system of improvements last adopted and carried out by the defendant corporation, at Moline in this County. I know of the race built under the supervision of the plaintiff there; I saw it while  
 120 the wall was still standing, and spent some time in examining it with a view to using it in carrying on the improvement. I examined it for that purpose. Mr. Nichols came to me one day and explained, in general terms, the plan; and said he would send me the plans and papers; I afterwards received them; I came to Moline a few days after and saw it; Mr. Parsons, Mr. Williams, and Mr. Deere showed it to me, as the work built by Mr. Nichols. This was at Moline in May and  
 120 June, 1859. (Here witness was shown a Map, whereof a true copy is set out in the Record at page 123, and referred to the same in his testimony.)

124 Mr. Nichols sent this map to me, the double line across the river at a—b represents the old dam; the work in question was a wall running down the river from the old dam to k.— The black line with dots on it, represents the one which was shown me as having been engineered by plaintiff, and which I examined; the old dam extended across the slough; until you got near the Moline slough and then there was a race and a bridge over it—a flume down which the water ran to the mills; on the old dam was a mill which is marked J —on this map. This new race commenced at the mill J, and a wooden structure connecting with the old dam near the mill, was erected running down on—



the South side of the mill to some little distance below the mill; it then turned at d— to the North; at the corner, d—where it turned, there was the same wooden structure continued; from d, it was forty feet into the river to a stone pier at e, as marked on this map with which it connected.

125 (Witness here described this wooden structure from the old dam down to e, and the wooden structure between each pair of piers, substantially, as set forth in the specifications to the contract between the Company and Parsons & Williams, set out on pages 15, 16, and 17 of this Abstract.) The only discrepancy being in regard to the size of the posts, and the number of the braces in the frame between the piers and above the first pier.

126 All I know of the manner in which the power was to be applied, is what Nichols told me; he said they intended to put in the wheels between the stone piers,—and shaft from there over the pond to the mills on the shore,—the water was to be let out at openings left in the plank; the mills are on the Illinois shore; the distance from Sickles' mill to the long pier at e was two hundred and fifty feet; I paced it out on the old dam, the dots on the line running down the river from d to k represent the piers; the plan was to complete the wall represented in this map running down the river, to k, and there run a bulkhead to the shore—; the water was to be let out opposite the mills all along the line of the wall. The structure was up as far as the fourth pier marked f. That was the end of the work as I saw it.

127 I advised the Co., to take the wall out; my opinion of the work has not changed since then.

*Cross Examination.*

My father owned a water power, and I planned out, and helped them build races; have built two races to run water mills, one at Seneca Falls, N. Y. I was a long time employed on the Erie Canal. I think I did



say to Mr. Sickles that I knew little or nothing about hydraulic engineering.

*Direct Examination Resumed.*

I have paid some attention to hydraulic engineering; in studying the building of bridges, canals and races, one has to study the principles of hydraulics. I don't pretend to know anything about the application of power to water-wheels and this was what I referred to when I told Mr. Sickles I knew nothing of hydraulics.

128 I furnished the plan for the improvement of the water power at Moline, which has been built there by the present Co.; I examined the location, the ground and the river for that purpose.

For the purpose of creating a water power, I do not think Nichols' plan a good one. My first objection was that timber structure wasn't strong enough. I thought the supports, or braces, liable to accident from any floating body striking them, as from ice in the season of the rivers breaking up.

This structure was so high that it depended upon the braces materially for its strength; the braces butted against the rock. The ice in the Spring of the year when the river rose, would be apt to knock them out.

Another objection was that the shafting was too long;—being so long, would materially increase the expense of it; and it would be much more liable to get 129 out of order. I am satisfied the plan was a bad one, and I think the work which was done, was of no benefit to the Company.

*Cross Examination.*

139 The improvement engineered by me at Moline, is located about as marked on the map, by the dotted red line; it commenced about 160 feet South of where the race built by Nichols, connected with the dam; My plan was to use the power by letting out the water on the side toward the mills, and shafting over the tail race—: the wall is built of masonry; a piece of this wall went out last winter; I think about thirty feet of

it. I couldn't say exactly how much; it was a full break in the masonry; it broke toward the Moline shore; this improvement has two walls, one on the Moline side, and one toward the Island, connected by a bulkhead. I furnished the plans and specifications for this work, but did not superintend the building of it.

My idea of Nichols' plan, was that the ice, when the river froze up, and before it was entirely closed, would be moved about by the wind and currents, and would knock out the braces on the river side, which supported the wall; *most of the braces were knocked out when I saw it.*

*Re-Examination.*

I don't think the plaintiff's work was of any benefit to the Co.

131 I ordered the whole work to be taken out, not on account of any defect in the execution of the work, but on account of the defect in the plan. I don't think the work was of any value to the Co.; not even the pl'ff's superintending it. *That part of the wall built under my plan which went out, fell, not on account of any defect in the plan, as I think, but on account of the defective execution of the work. I didn't superintend the work; the defect was in not getting the wall down to the rock. They didn't entirely take off the clay at that place, and when that washed out the wall fell.*

The shafting to Sickles' mill was according to Nichols' plan, 250 feet long; iron is generally used for such shafting; shafting of this length would have to be supported in the middle in some way, and according to Nichols' plan the supports would have to be in the pond in still deep water, and the ice freezing around them would be apt to throw them out of line, if it moved at the breaking up of the river; the supports for the shafting according to my plan, are in some two feet water.

132 In Nichols' plan they would be in some ten feet of water; they would have to be stronger standing in deep water than in shallow.



*Second Cross Examination.*

Plaintiff's counsel asked witness, "Supposing a good engineer was retained and kept in the employ of a party 18 months, to the exclusion of his being employed elsewhere, and during that time performed twelve months labor, what would his services be worth?"

Defendant's counsel objected. 1st, That there was no evidence to show that plaintiff was a good engineer, or that he had been employed as is supposed by the question, or had performed 12 months labor, as supposed by the question. 2nd, That the subject matter of the question was not proper upon cross-examination.

This objection the Court overruled; def't excepted.

Witness said, "About \$150 per month." I worked from the pl'ff's survey of the river in preparing my plan for the improvement; I thought him competent to make a survey. I think his dam wasn't strong enough; I didn't approve of the work done on my wall; didn't give Williams & Parsons a certificate that it was well done; didn't see the foundation laid on that part which went out; Never saw Nichols' wall tried; don't know of any breaks in the bulkhead of my work; there were no repairs of it required. There was some stone and dirt put in there after the water was let in, but that was a part of my plan; on a part of the work, the bulkhead was not built as I directed, this omission I directed to be supplied; Nichols' wall was pulled down before mine was built.

Defendant's counsel then called B. B. BRAYTON, who on direct examination, testified: I am a civil engineer, live at Davenport, Ia.; have been engaged in engineering twenty-four years. I have been continuously employed about 19 years of that time; have been employed as engineer on the Erie Canal, Hudson river Railroad, Chicago & Rock Island Railroad, Mississippi and Missouri Railroad. Have'nt given hydraulic engineering much attention.

<sup>135</sup> I have built some bridges, but never had much to do with building dams; I never designed any; I superintended the building of the railroad bridge over the Mississippi at this point; My attention has necessarily been called to the force of currents, and the power of water when confined. I know the Moline Water Power. (Here the witness was shown the map referred to by the witness, Dey, in his testimony, and the testimony of said witness was read to him and he was asked to give his opinion upon that work.)

Witness continued. I was at Moline before this structure was removed, and saw some part of it standing, and when I saw it, I thought the plan of shafting so far from the wheels to the shore was a bad one; it would require heavier shafting, and an extra expense in supporting it. I thought the timber work wasn't sufficiently strong to support the pressure of the water, and that it was liable to be carried away. I should suppose the freezing of ice around the braces when there was a gorge below the Island of Rock Island, and <sup>136</sup>the river rose would carry those braces out, and throw the whole down. I didn't see it tried, but I have seen operations like it tried; it would cost more to brace the shafting in deep water than in shallow, and the supports to the shafting would be more liable to be injured by ice moving in the dam. I saw the plaintiff's plans in Pitts, Gilbert & Pitts office at Moline, before any work was done. I went and examined them with a view to bidding for a contract. I didn't think then it was a good plan. My opinion is not at all changed. I don't think the plan was worth anything to the Co.; so far as they used Nichols' surveys for the other engineer, I should think he ought to be paid for them. Such a survey would take about a month, and be worth I think about \$150.

*Cross Examination.*

<sup>137</sup> To make a plan for such a work as this, a man ought to make a survey of the river for half a mile. I don't



know how strong this wall was; it didn't look strong enough to me. I have had no practical experience in putting in shafting.

Defendant then called CHARLES ATKINSON, who on direct examination testified as follows:

I live at Moline; have lived there about seventeen years. I am well acquainted with the river, and water-power there; and have been during all my residence there; I built a mill there in 1846; the mill marked J. on this map; (the same exhibited to the witness, Dey.) I had the superintendence of it; I am well acquainted with the action of the water there, and of the ice, when the river opens and closes up. I have frequently seen and examined the work enginseed there by Mr. Nichols. This map seems to indicate it pretty accurately. I lived at Moline, and was frequently there looking at the work as it was going on; I examined it frequently; I never built but one dam before I came here; that was in Vermont on a mountain stream. The dam at Moline has frequently been changed during my residence there; and I have thus had opportunity to observe the force of the water there. I was familiar with the old dam, and with the bulkhead, which extended from Sickles' Mill to the old mill, and with the work built there by Mr. Nichols. The description of the work given by the witness Dey, is substantially correct; I regard the wooden part of his work as entirely insufficient; the whole of it; the braces on the out side were not sufficient to support the pressure of the water; they <sup>139</sup>laid too nearly flat, so that the ice which always forms more or less below the dam would lift them up; the braces lay too flat, giving the ice more lift; if the ice had lifted the braces out, it would have let the whole thing down: Some of the braces I saw broken nearly in the middle during the latter part of the winter of 1857—8. I suppose they were broken by the ice, but don't know—; should think the piers were good enough; the wood aside from the braces, was entirely



insufficient. I have seen the ice below the dam, where there was a gorge in the river below the Island, rise from three to six feet in an hour. The first movement of the ice in the slough there is back and up; it frequently acts in this way when the river breaks up. I cannot see how, according to Mr. Nichols' plan, the shafting could be supported without great expense. Putting in shafting is not my business, but I know something about it; I am quite familiar with mills, and with the manner of working them; according to this plan of improvement, proposed by Nichols, the shafting would have to run across the pond, it might perhaps be supported, but it would require a great outlay.

140 I think it would require heavy stone piers, that would not be affected by the moving of the ice, which always forms in still water; it forms in the pond above the dam at Moline from  $1\frac{1}{2}$  to 2 feet thick; and if this plan had been carried out, and the supports for the shafting had been large enough, and heavy enough, and enough of them, they would have materially interfered with the flow of the water to the wheels; that part of the wall engineered by Mr. Dey, which went out, was not put down upon the rock; I saw the water before it fell, working through at the bottom, and after it fell and went out, I took a chisel on a long pole, and worked down where it had stood, and found clay.

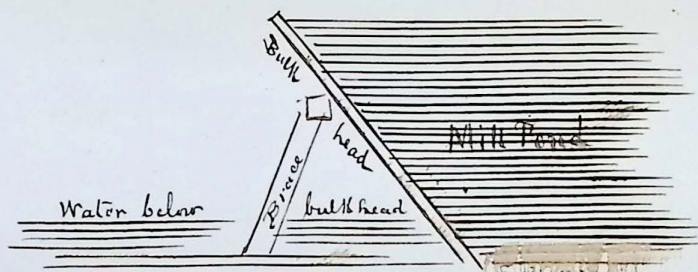
*Cross Examination.*

I don't know a great deal about shafting; I shouldn't think a small pier in the centre of the Pond, and a timber laid along on that would be sufficient to keep shafting as still as it ought to be; The pier needn't be close 141 in front of the water wheels; I know Mr. Dey's bulkhead; think it will answer a better purpose, than the wall built by Mr. Nichols, because the braces stand more nearly perpendicular; It is true that a brace at an angle of  $45^\circ$  is the strongest that can be.

The ice I think would not lift out the braces put in to support Dey's bulkhead—it would slide up on them.



Dey's bulkhead is about in this position.—Witness here describes it as in the following figure :



And the water in the pond keeps the bulkhead down—the braces are nearly perpendicular.

Defendant also called AMOS STILLMAN, who on direct examination testified as follows :

I am a civil and hydraulic engineer ; never saw the work erected by plaintiff ; heard the testimony of the witness Dey, I understand the plan ; think the work was very light to retain the head of water—; have built similar flumes and always found it necessary to cover the braces so as to protect them, think these braces unprotected would be very apt to be swept away—the shafting would have to be very long, and very heavy ; the wall was too light to hold ten feet of water, if he had put in three braces, and planked them over, it might have done.

*Cross Examination.*

If there was only a seven foot head of water, and there were two braces, they might do.

Defendant also called DAVID B. SEARS, who on direct examination testified as follows :

143 I live at Moline in this Co. ; have lived at and near there for nearly twenty-five years, have been practically engaged in building dams for many years ; as much as twenty-five years ; have built dams for myself, and for others ; I have seen and examined the work engi-

reered by plaintiff at Moline; saw it very frequently while it was in progress; Mr. Nichols exhibited his plans to me; the plan was that this wall built under the supervision of the plaintiff should hold the water between itself and the shore; the wooden structure between the piers was built of pine timber: I don't think the work sufficient for the purpose.

My first objection to it is that the shore forms one side of the race; whatever head there is in the dam, necessarily rises against the buildings on the shore, destroying the basement story of all the mills there; the next objection is the extra cost of shafting; I calculated that it would have cost more, than it would to have built another wall there; the plan of the wood work down to the first stone pier was imperfect—though the work was well executed. The pressure of water upon a perpendicular dam, braced by a brace standing at an angle of  $45^{\circ}$ , serves to lift the dam up, then the foot being loose is carried forward, and the whole thing goes down. Mr. Patterson put in one for me near the same place with this work, in the Fall of 1843, upon the same principle, and it went out, when there was only about a five foot head: Patterson and Kalbaugh put up two dams on Rock River, on the same principle, and the water with only a three foot head, racked them so that they went out. The work was equally as well done as the dam of Mr. Nichols', and better: The work on this dam was well done, all except putting in these braces; instead of being framed in, they were sawed forked, and rested against a cross timber bolted on to the post, and when the ice rose, that winter, they split and tipped, and the wooden work racked and leaned over. This was in the winter of 1858, about nine months after it was put up. The foot of these braces was let into the rock; the rock is brittle and shelly there; it is not sound, and the upper braces came out by the lifting of the ice. The plan I think was a bad one: the getting it up, and superintending was utterly worthless.



145 Think it would break any Co. that hadn't large means, to work on it.

*Cross Examination.*

Millwrights it is said are always in dispute; don't know of any two engineers who agree as to the best mode of improving that power; don't know anything about whether they do agree or not: I have conversed with engineers and I never agreed with any of them.

Plff's counsel then asked, "While this work was progressing did you see any of the officers or stockholders of this Co. present?"

Def't counsel objected: 1st, That it did not relate to any matter drawn out on the direct examination of this witness. 2nd, That the question is irrelevant: The 146 Court overruled the objection. Def't excepted. Witness answered, I saw Sickles, Deere, Hiram Pitts, and Mr. Cook there frequently.

The timbers constituting the sides of the dam were perhaps strong enough:—they were very good size; but there was not enough of them; size of posts was right, there were timbers enough to hold the head if it were not for the tendency of the dam upwards; the extreme head there is 7 feet; it varies from that to 147 4 feet: the top of the top brace was nine feet, and the top of the lower one five feet, from the rock.

Def't then recalled JOHN DEERE, who on direct examination testified as follows:

Pl'ff told me this was his plan: the one on which he 148 afterwards worked. If this plan had been carried out, it would have ruined the use of the first floor of my plow factory, and of Sickles', and Wheelock's mills.

Def't then called JEFFERSON TAYLOR, who, on direct examination, testified as follows:

I know the pl'ff. He boarded with me while at Mo-line; when he left he gave me an order on Hiram Pitts; I gave Pitts credit for the amount of it, in my account with him.

*Cross Examination.*

140 This order was reckoned in the settlement of an account for the rent of the house we occupied.

Def't then called NELSON L. WILLIAMS, who testified on direct examination :

In June, 1859, by the request of Mr. Reed I went to the pl'ff, who was then in Iowa, and inquired for his soundings and measurements : he said he hadn't them, but would go and get them, and furnish the papers if they would pay his bill ; think he said it was \$60 or \$70. I paid him \$60, for the Water Power Company ; this was when Mr. Dey wanted the papers.

*Cross Examination.*

The plaintiff was then at work in Iowa ; He had to go to N. Y. for the papers.

150 He was to come on here again. He said when he went after the papers, that he wanted to go home.

Def't then recalled PETER A. DEY—who testified that he received the papers which Nichols sent him, by express.

Thereupon defendant also rested.

Plaintiff moved to exclude the testimony of John P. Cook touching the conditions upon which he took stock in the defendant company—:This motion the Court overruled.

Plaintiff, rebutting, read from the record of the defendant, the following :

251 "We the undersigned do hereby subscribe for the number of shares set opposite our names, in the Moline Water Power and Manufacturing Company,——— and do agree to pay for the stock respectively subscribed by us, in installments, in such amounts, and at such times as may be prescribed by the Board of Directors of said Company—or by the rules and regulations of said Corporation.

Dated April 28th, 1857.

NAMES.	NUMBER OF SHARES.	DOLLARS.
Hiram Pitts,	375	18.750



E. S. Gilbert,	375	18.750
D. Benton Pitts,	375	18.750
Cyrus Pitts,	375	18.750

At a special meeting of the Board of Directors of this Company held at the house of Cyrus Pitts in Moline, the 15th day of May, A. D. 1857, present, all the Directors, to wit: Cyrus Pitts, D. Benton Pitts, Elias S. Gilbert, and Hiram Pitts.

The President reported that since the last meeting of the Board he had procured the proper title papers from Messrs. Pitts, Gilbert & Pitts, for the real estate, and Water Power described on the proposition of said Pitts, Gilbert & Pitts, at the last meeting of the Board, which are now here produced and accepted. At the request of Messrs. Pitts, Gilbert & Pitts, it is ordered that three thousand shares of full paid stock, be issued to the following named persons, having the amounts respectively subscribed by them to the stock of this Company, and which will be in full payment to them (Messrs. Pitts, Gilbert & Pitts,) for the consideration expressed in the deed of Hiram Pitts, Cyrus Pitts, D. Benton Pitts, and Elias S. Gilbert, to said Company for said real estate, water power, &c.

Hiram Pitts,	750 shares.
Elias S. Gilbert,	750 "
Cyrus Pitts,	750 "
D. Benton Pitts,	750 "

Attest,

H. Pitts, Sec'y.

3000 shares.

Cyrus Pitts, Pres't."

"And now upon this 16th day of May the Directors, to wit: Cyrus Pitts, D. Benton Pitts, Elias S. Gilbert, and Hiram Pitts, meet at the house of Cyrus Pitts in Moline, for the transaction of such business as might come before them. E. S. Gilbert offered the following resolutions which were unanimously adopted:

[The resolution is that the Co., now proceed to im-

prove the water power, "and that upon the report of Mr. Nichols, the engineer now in charge,—we adopt such plan as may be deemed most desirable.""]

HIRAM PITTS, Sec'y.

CYRUS PITTS, Pres't."

Plaintiff's counsel then called for the stock book of the defendant corporation, admitted that the defendant had been verbally notified to produce it, and Hiram 154 Pitts testified that he had delivered to Peter R. Reed, President of the Company, all the books of the Company:—and the stock book not being produced, the plaintiff's counsel recalled H. F. SICKLES, and put to him this question: "Did you ever see the names of John P. Cook, or Cook & Dillon, and John Deere—or either of them in the stock book of this Co., as subscribers, for stock? if so, was there any condition to such subscription?" Def'ts counsel objected, *that no written notice to produce the stock book had been given*: The Court overruled the objection; Def't excepted.

155 Witness answered, that he saw the names of all three parties, on the stock book, but didn't see any condition to the subscription. I was one of the Directors while this work was going on.— No fault was ever found with the plan, nor was plaintiff directed to follow any other.

I have had considerable to do with mills, and water power the last 12 or 14 years; have operated water mills: and employed dams to be built; have been acquainted with the work at Moline, the past six years; the piers and wood work of this work were not as strong as I should have liked, but it was such as we directed in the meetings of the Company.

156 The flume to my mill from the old dam, was of wood; it stood some five years; it wasn't exactly like this of Nichols'.

*Cross Examination.*

This flume was a double frame, two frames of timber set at a distance from each other, and braced to--



gether. The shore made one side of it, and this frame was about sixty feet off; the frame was made of timber bents; the timbers of the bents were some 10 or 12 inches square, and the two frames were braced together, and there were also braces against the rock to keep the water from pressing it out; the flume was floored over, at the bottom; timbers were laid down on the bottom, and then planked over; this flooring extended over the whole surface of the pond; the framing on the side was joined to this, and the weight of the water kept the floor down; there was a good deal more timber and stronger timber in this race, than in the work done by Mr. Nichols, in proportion to the water it held.

*Re-Examination.*

157 The timber structure between the piers was made light because our flumes were intended to go back of this, which would double and quadruple its strength.

This was all of the evidence, &c.—

158 [The defendant excepted to the instructions given on the part of the plaintiff—but these having been lost from the files are not inserted in this record.]

The defendant asked the following instruction:

158 1st. "The plaintiff in this case having by the account filed with his declaration charged the defendant with 'a years salary' the jury must (unless they believe from the evidence that the defendant employed the plaintiff for a year, or by the year, and at a fixed sum to be paid for his services), as to that item of the account paid for the defendant."

159 "Although the jury may believe from the evidence that the plaintiff has before the beginning of this action made surveys and devised a plan for the improvement of the water power belonging to the defendants, and may have superintended the work upon such improvement as engineer, yet unless the jury believe that the defendant was employed to make such surveys and per-



form such other services as engineer either by the defendant, or by some of its officers having authority so to employ him, or by some authorized agent of the defendant; or that such services of the plaintiff were performed with the knowledge of the officers of the defendant and with the understanding on the part of the plaintiff that the same were to be paid for by the defendant, they will as to so much of the plaintiff's account as to refer to such services find for the defendant.

160 "3. If the Jury believe from the evidence that the plaintiff was employed by the firm of Pitts, Gilbert & Pitts, and not the defendant to perform the services as engineer, for the value of which the plaintiff in his account has charged the defendant, and that such services were by the terms of such employment to be paid for by said Pitts, Gilbert & Pitts and not the defendant, they will as to so much of the plaintiff's account as refers thereto find for the defendant."

160 4. In order to determine, by whom the plaintiff was employed, and by whom his services as engineer were to be paid for the jury may consider any evidence as to whether the person by whom the plaintiff was directly retained to come from his residence to Moline, was, in making such retainer, acting as the agent of the defendant, or of the firm of Pitts, Gilbert & Pitts,—all admissions of the plaintiff as to whether he was employed by said firm or by the defendants,—all evidence as to whether such payments, if any, as were made to the plaintiff, on account of said services, were made by the defendant, or by said firm,—or any one of said firm, for the firm—giving to such evidence that weight, to which together with the other evidence in the cause it may in the opinion of the jury be entitled.

161 "5. If the jury believe from the evidence that before the performance of the services, as engineer, for which the plaintiff seeks to recover in this action, said plaintiff was employed by the witness Parsons, acting as the agent of Pitts, Gilbert & Pitts, and then disclosing



such agency to the plaintiff, to come from New York to Moline for the purpose of performing such services, and that by reason of being so employed by said Parsons, the plaintiff came to Moline for the purpose of performing such services, then the plaintiff can not recover therefor of the defendant, although such services were performed upon and about the works and property of the defendant—unless the jury further believe from the evidence, that after the plaintiff came to Moline, a new contract was made, and the plaintiff was employed as the engineer of the defendant.”

“6. The deed of the defendant naming the plaintiff as the engineer of the defendant is only evidence that the plaintiff was the engineer of the defendant, at the time of the execution of the deed in question; and even as to that is not conclusive as against the defendant, and if the jury believe from the other evidence in the cause that the plaintiff was in fact in the employment of Pitts, Gilbert & Pitts, as engineer, and not in the employment of the defendant, then the jury will, as to all charges and claims of the plaintiff for services performed as such engineer find for the defendant.”

162 “7. If the jury believe from the evidence that the witness Hiram Pitts has in giving his testimony, knowingly sworn falsely as to any material fact, or has falsely denied his recollection of any material fact, then the jury may disregard all the testimony of said witness Hiram Pitts.

“8. Although the jury may believe from the evidence that the plaintiff was in fact employed by the defendant as engineer to make surveys and levels of the river and water power at Moline, and to devise a system for the improvement of the said defendant's said water power, and that in fact the plaintiff did make such surveys and levels, and did devise a plan for said improvement, and did superintend the partial construction of the water, therefor; yet if the jury believe

from the evidence that the plan or system of improvements so devised by said plaintiff, was insufficient for the purpose, and that the said services of the said plaintiff as engineer, were entirely worthless to the defendant, they will as to so much of plaintiff's account as relates to said services, find for the defendant."

103 "9. Although the jury may believe from the evidence that the plan or system devised by the plaintiff for the improvement of the defendant's water power was *approved* by the officers and members of the defendant corporation, and the work ordered to be erected according to that plan; yet if the jury believe from the evidence that the plaintiff was employed as engineer and claimed to be a scientific person, skilled and experienced in such matters, and that the said plan or system devised by him was approved by the officers and members of the defendant by reason of the plaintiff's representations to them that the same was sufficient and by reason of their confidence in the assumed skill and experience of the plaintiff, and relying upon the same, and that in fact the said plan was insufficient and the services performed by the plaintiff in devising the same, and in superintending the partial prosecution thereof, were entirely valueless to the defendant, then the jury will not in their verdict allow the said plaintiff for his services.

104 "10. If the jury believe from the evidence that the testimony of the witness Hiram Pitts has been contradicted in any material point by one or more credible witnesses, then the jury may consider this fact in determining the weight to which the testimony of said witness Hiram Pitts is entitled whether they believe that said witness Pitts has as to the point in which he has been contradicted sworn falsely, through defective recollection or wilfully."

164 "11. Unless the plaintiff has proved a contract or agreement between plaintiff and defendant to pay the >



traveling expenses and the board of the plaintiff, the jury will find for the defendant as to those items of pl'ff's acct. unless pl'ff has proven that it was customary in employing engineers to pay traveling expenses and board in addition to the salary of the employee.

105 "12." The jury will find for the defendant as to the item of \$20,—charged in pl'ff's account for making out estimate by request of Goodwin unless the plaintiff has proven that said Goodwin did request such estimates and that he was authorized by the defendant to request the same from plaintiff; and unless the jury further believe from the evidence that said plaintiff did make such estimate.

The first of which said instructions was refused by the Court, and the remainder of which were severally marked "Given" by the Court and read to the jury, and to the aforesaid ruling and decisions of the said Court, refusing the said first instruction prayed on the part of the said defendant, the said Defendant by its counsel, then and there excepted.

165 Verdict for the Plaintiff in Thirteen Hundred and Ninety Seven 22-100 Dollars.  
\$1397 22.

166 Pl'ff on the same day filed in writing and suggested to the court his motion for a new trial, assigning causes as follows:

167 1st. Because the court improperly and erroneously instructed the jury at the request of the plaintiff.

167 2nd. Because the verdict of the Jury is contrary to the instructions of the Court.

3d. Because the said verdict is contrary to the law and the evidence.

4th. Because the Court admitted improper evidence on the part of the plaintiff.

5th. Because the Court excluded proper evidence offered on the part of the Defendant.

6th. Because of improper conduct on the part of the Jury.

7th. Because the Court improperly and erroneously refused the first instruction prayed on the part of the defendant.

10th. Motion overruled, and defendant excepted.



The Moline Water Power  
& Manufacturing Company

vs

A. d. Nichols

Abstract

Filed Apr 16. 1861

A. d. Nichols  
Clerk



213

The Motine Water Power and Manufacturing Co.

Lorain E. Nichols.

Record

The Motine Water Power  
Manufacturing Company

vs

Lorain E. Nichols

Filed April 16. 1861

A. Ireland  
Clerk

213-13



Agreed and read as the Court room within and  
for the county of Rock Island on the second Monday  
the fourth day of May 1860.

Present Honorable John N. Moore Judge  
Moses D. Merrill Sheriff  
Junius McNeil clk

Samuel S. Nichols

vs  
The Moline Water Power &  
Manufacturing Company }

Assumpsit

Be it remembered that hereupon writ on the  
twenty first day of August A. D. 1859. the above named  
plaintiff sued out of the clerk's office of the court  
aforesaid his certain writ of summons in assumpsit  
which is as follows to wit

State of Illinois } The People of the State of Illinois  
Rock Island County } To the Sheriff of Rock Island County  
Greeting: We command you to summon  
the Moline Water Power and Manufacturing Company  
if to be found in your county personally to be  
and appear before the circuit court of said county  
on the first day of the next term thereof to be holden  
at the court house in Rock Island on the second  
Monday of September next then and there to answer  
unto Samuel S. Nichols of a plea of trespass on



the care upon promises to his damages in the  
sum of Two thousand dollars as he says: and  
have you then there this writ and make due return  
thereon in what manner you execute the same  
Within Twenty M'Neil clerk of our circuit court

*E. B.*

and the seal thereof affixed this 31<sup>st</sup> day  
of August in the year of our Lord one  
thousand eight hundred and fifty nine

Twenty M'Neil clerk

And afterwards to wit on the 31<sup>st</sup> day of August 1859 the  
Sheriff returns the said writ into the clerk's office affixed  
into his return of service thereon and reads which is as follows

'I have served this writ by reading the same and delivering  
a true copy hereof to Peter B. Reed President of the Moline  
Water Power and Manufacturing Company this 31<sup>st</sup> day of  
August 1859

W. D. Merrill Sheriff

By C. A. McLaughlin deputy

And also on the said 31<sup>st</sup> day of August 1859  
the said plaintiff by his attorneys filed in the  
clerk's office of the court aforesaid his declaration  
in assumpsit which is as follows to wit,

State of Illinois } Rock Island County Circuit Court  
Rock Island County } Of the September Term A.D. 1859  
Lorraine L. Nichols plaintiff in error vs  
Webster and Beardsley and Smith his



attorneys complains of "The Moline State  
Power and Manufacturing Company" defendant  
in this suit, ~~Summons~~ of ~~the~~ ~~plaintiff~~  
on the case on promises. For that whereas  
the defendant on the tenth day of August  
in the year of our Lord one thousand eight  
hundred and fifty nine at the county of Rock  
Island aforesaid, was indebted to the plaintiff  
in Two Thousand Dollars for goods bargained and  
sold by the plaintiff to the defendant at his request.

And in Two Thousand dollars for work done  
and materials ~~furnished~~ for the same provided  
by the plaintiff for the defendant and at his  
request.

And in ~~Two~~ thousand dollars for money paid  
by the plaintiff for the use of the defendant at his  
request.

And in Two thousand dollars, for money  
received by ~~the~~ defendant for the use of the plaintiff

And in Two thousand dollars for money  
due due from the defendant to the plaintiff on  
account stated between them.

And whereas the defendant afterwards went  
on the day and year and at the place last aforesaid  
in consideration of the premises respectively, promised  
to the plaintiff to pay him the said last mentioned  
several moneys respectively, on request, Let  
the defendant has disregarded his promises and



has not paid to the plaintiff any of the  
aforsaid moneys or any part thereof to the  
plaintiff damages of two thousand Dollars  
and thereupon he brings suit, &c

Wolsten, Boudshy & Smith  
Plaintiff's attorneys

(Account filed)

Moline Water Power & Manufacturing Company

To Lorenzo S. Nichols Dr

1857		
May 11.	To traveling expenses from Rochester to Moline	\$ 20.00
" 25.	Stationery for use of Company	2.00
June 23.	Price of One Axe	75
Nov 7.	Paid D. Page for assistance	3.00
" 22.	Money advanced for board	100.00
" "	Travelling expenses	25.00
1858		
May 15.	One year salary as engineer of said Company	1000.00
Sept 3.	Making out estimate by request of S. J. Goodwin Treasurer	20.00
		<u>2170.75</u>

Contra Cr

By Cash

170.75  
Balances Due 2000.00

and afterwards went on the 19<sup>th</sup> day of  
September A D 1858 the defendant filed its  
certain plea in the above entitled cause  
which is as follows to wit



State of Illinois } At September Term A. D. 1859  
Rock Island County } of Rock Island County Circuit Court

The Moline Water Power  
and Manufacturing Company  
Ads.

Lorrain L. Nichols

And now on this day comes the  
said defendant - by Lindlay & Clarke & E. F. Wells  
its attorneys and defends the wrong and injury  
when &c, and says that it did not meddlesome  
or presume in manner and form as the said  
plaintiff hath in his declaration complained  
against it, and of this the said defendant  
puts itself upon the country for trial

E. F. Wells &

Lindlay & Clarke

Defendants' attys

And afterwards writ on the eighth day of  
June 1860 and at the May term of the Court  
aforesaid the following proceeding was had  
to wit,

Lorrain L. Nichols

vs

The Moline Water Power  
and Manufacturing Company

Assumpsit



6

This day came the parties by their attorneys and the issues being joined came a jury of jurors to wit. Jonathan Mosher, Joseph M. Linn, A. N. Lambert, Samuel Bruner, Jeremiah L. Hardy, Robert Johnson, B. F. Baker, P. B. Schmier, Daniel Buttermore, William A. Johnson, J. D. Taylor, and Arthur Roberts, who were each and severally sworn to well and truly try the issue joined and having heard a part of the evidence, the court instructed the jury not to converse with ~~any~~ each other or with any other persons upon the subject matter of this suit and were allowed to retire to meet the court ~~on~~ Monday morning next.

And afterwards to wit. on the 15<sup>th</sup> day of June A. D. 1868 and at the June term of the Court aforesaid the following proceeding was had

Lorrain L. Nichols

The Moline Water Power  
and Manufacturing Company

} Assumpsit

This day again came the parties by their attorneys and the jury hereinbefore impaneled returned their verdict which is as follows to wit "We the jury find for the plaintiff and assess his damages at the sum of <sup>Five</sup> hundred and



sum of Seventy Seven dollars and twenty two cents"  
Shurpfun defendant enters its motion for a  
new trial and in arrest of judgment.

And afterwards tried on the 22nd day of June  
aforesaid and at the term of the court aforesaid  
the following proceeding was had tried

Lorrain S. Nichols  
vs  
The Moline Water Power  
and Manufacturing Company } Assumpsit

This day again came the parties  
by their attorneys and this cause came on to  
be heard upon defendant's motion for a new trial  
and in arrest of judgment; And the court  
having heard the said motion and being fully  
advised in the premises overrules the same.

It is therefore ordered by the court that Plaintiff  
have and recover of the defendant the said sum  
of Seventy Seven hundred and ninety Seven dollars  
and twenty two cents together with his costs and  
that he have execution therefor.

Shurpfun the defendant prayed an  
appeal to the Supreme court, which is granted  
on condition that defendant file in the clerk's  
office of this court its bill of exceptions, and  
bond in the sum of Ten thousand Dollars



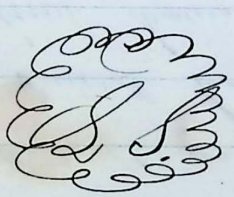
with Stillman W. Wheelock as its security  
in ninety days from this date,

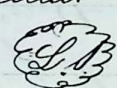
And afterwards took on the 8<sup>th</sup> day of August 1860  
the said defendant did file in the clerk's office  
of the court aforesaid its appeal bond which  
is as follows to wit

Know all men by these presents That  
The Marine Water Power and Manufacturing  
Company as principal and Stillman W. Wheelock  
as security are held and firmly bound unto  
Sorrain S. Nichols in the penal sum of Two  
thousand Dollars, lawful money of the  
United States, for the payment of which  
well and truly to be made, the said company  
and the said Wheelock do hereby bind themselves  
their successors and their heirs executors and administrators  
of the said Wheelock jointly severally and firmly  
by these presents. Witness the corporate seal of  
said company and the hand and seal of the said  
Wheelock hereto affixed this 25<sup>th</sup> day of June  
A.D. 1860. The condition of the above obligation is  
such that whereas at the May term A.D. 1860.  
of the Rock Island Circuit Court for the county of  
Rock Island and the State of Illinois the said  
Nichols recovered a judgment against the said  
above bounden company for the sum of Fifteen



hundred and ninety seven dollars  $\frac{22}{100}$  Dollars  
 from which said judgment the said company  
 hath payed an appeal to the Supreme court  
 of said state of Illinois; Now if the said  
 Moline Water power and Manufacturing  
 Company shall prosecute said appeal and  
 shall <sup>pay</sup> the judgments <sup>costs</sup> interest and damages in case  
 the judgment of said circuit court shall be  
 affirmed then the said obligation shall be void  
 otherwise in full force and virtue.

In witness whereof the said Moline  
 Water power and Manufacturing company by  
 their president Peter R. Reed have  
 hereunto set their name and the  
 corporate seal and the said Wheelock  
 hath hereunto set his hand and seal  
 the day and year above written

The Moline Water power & Manufacturing  
 Company By P. R. Reed President  
 S. W. Wheelock 

And afterwards to wit on the 18<sup>th</sup> day of August  
 A. D. 1860. the said defendant filed its bill of  
 exceptions in the clerk's office aforesaid which is  
 in the words and figures following to wit.



State of Illinois  
Rock Island County

Lorrain S. Nichols plaintiff

vs  
The Moline Water Power and  
Manufacturing Company Defendant

Of May term A.D. 1860  
Rock Island Circuit Court

Be it remembered that on the 9<sup>th</sup> day of June A.D. 1860, at the aforesaid term of said court came on to be tried by a jury of the body of said county the issue heretofore joined by the parties to the above entitled cause; and the said plaintiff as well as the said defendant by their respective counsel being now here in court and the said jury being duly impanelled chosen and sworn well and truly to try the issue aforesaid; the said plaintiff by his counsel to maintain and prove the said issue on his part produced as a witness

William Potts who being sworn testified as follows upon the direct examination,

I live at Moline in this county and have lived there the last ten years, since 1850 I know the parties to this cause. I was a member of the defendant company in 1857. I was elected Secretary of the company in May of that year, I think, and continued to act as such until the



fall of the year 1858. The plaintiff performed work for the defendant as a civil engineer during that time, as a hydraulic engineer; He took the level of the water and drew plans and specifications for the improvement of the water power there; He drew a plan and specifications for the construction of a dam or wall, the company were making improvements to extend the power. I think plaintiff commenced his work about the last of May or first of June 1857. The work was continued until cold weather, The plaintiff gave his personal superintendence to the work during the season. He made the monthly estimates of the work done by the contractor. He continued then until sometime in November, when the work closed for that season. After this he continued subject to the orders of the company for sometime. He remained in Moline until sometime in the winter, and then went east expecting to return.

By my request he corresponded with me. The plaintiff remained subject to the orders of the company until the next season. He was to return when notified. About the middle of June 1858 Col. Reed proposed to purchase out the company and an arrangement was consummated in the fall of the season. The plaintiff's connection ~~ceased~~ with the company ceased about the 18<sup>th</sup> or 20<sup>th</sup> of October 1858.



When he went east, he did not get into any other business at least - he so notified the company he was subject to our orders so that he could not engage in any other business.

The plaintiff leveled the river from the foot of Campbell's Island down to the foot of Rock Island, a distance of some six or seven miles, to ascertain the depth of the water and the amount of head which could be obtained preparatory to making his plan for the improvement. He next surveyed the whole water from the head to the depth of the channel, this was preparatory to making the improvement. The work on the improvement commenced about the first of July. The first estimate of work for the payment of the contractors was made about the first of that month; this was only a small estimate.

There were several plans before the company after the survey was made which were submitted to Mr Nichols - different members of the company then plans; he and they together finally settled upon a plan for the improvement of the Illinois River.

A contract for the work was let to Messrs Williams & Parsons, by the company, and they commenced the work as soon as the water would permit; which was about the last of June or first of July.

The work was not completed that season but they



worked on that plan until cold weather came  
sometime about the first of November.

It was then agreed to clean up the work for that  
season the work was not resumed until the  
Spring of 1858. The water continued high until  
the proposition was made for a sale, in June

The proposition was for a sale and transfer  
of the stock and the whole interest of the company.  
Before this Pitts Gilbert and Pitts were the owners  
of the larger part of the stock. Their proposition  
was for a transfer to Peter R. Reed & S. J. Goodwin  
for themselves and others.

The work on the improvement was  
suspended pending this proposition, partly on  
account of high water and partly because the  
financial concerns of the company were involved.  
The work was suspended from June till October.  
The then stockholders transferred the stock to  
Reed, Goodwin and others in October 1858.

The plaintiff was not at Moline during the  
Summer of 1858 but was under the control of  
the company. I am not positive but think he  
did not return until the fall or winter.

Previous to this transfer of stock the members  
of the company were Amos Pitts, D. B. Pitts  
Elias S. Gilbert John P. Cook and I think Cook  
& Dillon, John Deere & N. H. Satchers. These  
were the principal stock holders, though there may



have some small owners whose names I have not mentioned, D. B. Pitts was dead before this transfer so that the stock which stood in his name belonged to his estate,

The witness was then asked the following question by plaintiff counsel court

"Who of these stockholders lived at Moline for the purpose as was admitted of showing an implied undertaking of the defendant to pay the plaintiff for the services so by him rendered,

To which question the defendant by his counsel then and there objected, for the reason that the law will not imply a promise of the defendant to pay for said services from the mere fact that the individual members of the corporation knew of the performance of such services. But the court having heard the argument of counsel overruled the said defendant's objection and permitted the witness to answer the said question. To which decision and ruling of the court overruling said objection and permitting the witness to answer said question, the said defendant by its counsel then and there excepted.

Witness said in answer to said question "Most of these parties lived at Moline"

Thereupon the witness continued, I employed the plaintiff, representing that I



was authorized by the company to employ him. I was secretary of the company.

I did not employ him wholly of my own act, it had the sanction of the company.

I think all of the directors were present when he was recognized as the company's engineer.

No formal contract was entered into as to his services; by this I mean no written contract as to the pay; he was recommended to us by Mr P. R. Reed, and we set him to work and told him we should want him until it was completed. This improvement was going on in Moline.

I should say the company employed him, that the directors and nearly all the stockholders were present when he was employed. There was an execution committee appointed to do all this consisting of John P. Cook, Cyrus Pitts, and John Deere.

I did not myself as secretary assume power to employ him without the knowledge of the company. I think this committee were all present at every important proceeding.

The witness was then asked by counsel for the plaintiff the following question.

Question

"Who of the company if any were present while this work was progressing?"

Objection

To which question the defendant by its counsel then and then objected because the fact that



members of the defendant corporation were present during the progress of the work, do not show or tend to show an undertaking of the defendant to pay for the same.

**Objection** But the court having heard the arguments of counsel overruled the said objection and permitted the said question to be asked by counsel and answered by the said witness, to which ruling and decision of the court the said defendant by its counsel taken then and there excepted

**Answer** The stockholders residing at Moline were present occasionally, some of them almost every day, while the work was progressing and also where the defendant was employed; all but two of the stockholders resided at Moline.

Witness continued.

The other stockholders Cook and Dillon resided at Davenport, Iowa, distant from Moline, about four miles.

**Question** The witness was asked by plaintiff's counsel the following question "Were they there?"

**Objection** And to this question also the defendant by its counsel then and there objected for the same reason assigned for the



objection to the last interrogatory above set forth.

Obj. overruled

But the court having heard the argument of counsel overruled the said objection and permitted the said question to be asked by counsel and answered by the witness.

Exception.

And to this ruling of the court overruling the said objection and permitting the said question to be put and answered the defendant by its counsel then and there excepted.

The witness in answer to said question, said:

Answer

"Mr Cook as one of the directors and one of the Executive committee was frequently there, Mr Dillon only occasionally."

Witness continued

The price to be paid for plaintiff's services, was never agreed upon. I have had experience in such matters. I do not assume any particular knowledge of the value of an engineer's services except from having had some experience in such matters. I have frequently employed men on my own business.

Witness was here shown the account or bill of particulars filed with the plaintiff's declaration which was and is in the words and figures following to-wit:

"1857

Moline Water power and Manufacturing Company To Lorrain L. Nichols Dr

May 11. To travelling expenses from Rochester to Moline \$20. 00

25 - Stationery for use of company

2. 00



June 23.	"	Price of one axe	.75
Nov 7	"	Amt paid D. Page for assistance	3.00
" 22	"	Money advanced for board	100.00
" "	"	Travelling expenses	25.00
1888 May 15	"	One year Salary as Engineer of said Company	2000.00
Sept 3.	"	Making out estimate by request of S. J. Goodwin & Co.	20.00
			<u>2170.75</u>

By Cash \$170.75- 170.75

Balance due 2000.00

I should think that was a reasonable bill for plaintiff's services for such a time. It is customary to pay expenses of engineer exclusive of salary.

Question The witness was then asked by counsel for the plaintiff this question "Please state what you know as to each item of the balance of the bill?"

Objection To which question the defendant's counsel then and there objected; for the reason that as to the items of said account charged for board and travelling expenses there was no evidence to show that the defendant had ever undertaken to pay the said plaintiff ~~his~~ board or travelling expenses; nor as to the other items of said account charged had it been shown that the defendant had ever authorized the plaintiff to procure the articles therein charged.



Obj. overruled But the court having heard the argument of counsel overruled the said defendants objection and permitted the said question to be put by counsel and answered  
Exception taken by the witness, and to this ruling and decision of the court the said defendant by its counsel then and there excepted

Witness in answer to said question said "Plaintiff  
Answer "bought a small axe worth .75 cts. he paid Pagein \$3.00 for assistance. He paid his own board - at least he engaged it; I should think \$100. a reasonable charge for it. The charge for travelling expenses is reasonable and correct. I know nothing as to his making out an estimate as charged in his bill; I understood from these parties that they employed him to make out an estimate. In my judgment - \$2500. - would be a reasonable salary for an engineer per year"

The witness was then asked the following question by counsel for the Plaintiff

Question "While this work was progressing did the directors hold meetings; and if so when & how frequently?"

Objection And to this question defendant by its counsel then and there objected First because the same was leading in form Second because the matter of the said question was irrelevant to the issue

Overruled But the court having heard the arguments of counsel



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overruled the said objection, and permitted the said question to be put by counsel and answered by the witness. And to this ruling of the court the said defendant by its Exception taken counsel then and there excepted

Witness in answer to said question said.

Answer "They held meetings at Moline, regular meetings were held frequently, and special meetings whenever any thing of importance came up which was frequently"

The witness was then asked by plaintiffs counsel the following question

Question "Was the plaintiff present at these meetings and if so, what did he do if anything?"

Objection And to this question the defendant by its counsel then and there objected because the matter thereby inquired of, was irrelevant to the issue.

Overruled But the court having heard the arguments of counsel overruled the said objection and permitted the said question to be put by counsel and answered by the witness.

Exceptions. And to this decision and ruling of the court the defendant by its counsel then and there excepted



Answer

Witness in reply to said question said,

"He was frequently present at these meetings, more particularly the special meetings. These special meetings were called at times for the purpose of getting reports from him as to projected improvements. He made his reports and was consulted by the board at these meetings as engineer.

Upon a cross examination by said defendants counsel witness testified as follows.

I was secretary of defendant corporation in May 1857 and acted as such until October 1858

About the time we proposed to commence the work of improvement I was requested to write to New York for the purpose of getting an engineer. I think in the first place I wrote to Col Reed saying we were just about reorganizing and should want an engineer.

He corresponded with me and finally recommended this man to come on. In the mean time our election had been held, I think I individually wrote to Reed before the reorganization. This company had been organized some three or four years before that and the whole property had been in litigation. The estate was finally in the fall of 1856, <sup>transferred to</sup> Pitts. Gilbert & Pitts.

The company of which I have spoken as having employed the plaintiff, was organized in the fore part of May 1857 and new officers were elected throughout.



We had received into the company some new stockholders, I had before this myself written to Col Reed saying we wanted an engineer; he then sent back some recommendations and promised to look up one. I think I have the letter Col. Reed sent me.

This company was organized in May 1857. The charter had previously belonged to Pitts Gilbert and Pitts.

It originally belonged to other parties, & had been transferred to Pitts Gilbert & Pitts, and we held the first meeting in May ~~1857~~ or first of June 1857.

[Witness was here shown a letter]

This is a letter addressed by myself to Col. Reed, I wrote it for the purpose of procuring an engineer.

I don't know how the plaintiff was employed except by means of my correspondence with Reed.

Reed through my request got others to send Mr Nichols down. Nichols came through my writing to Reed and it was through Reed's recommendation that we employed him.

And thereupon the said defendants  
 Letter Read Counsel read to the court the letter last above mentioned, as having been shown to the witness and which is in these words and figures to wit

"A"

"Moline Ills. Mch 23<sup>d</sup> 1857"

"Dr Cousin

"I just drop you a line saying that if the gentleman you spoke of as engineer is unengaged and you can obtain him



we think he had better come up at once, as the  
"weather at length looks as though we might have  
"Spring. Nothing new. Have recd several letters  
"from 1 Benton. He wrote last from New Orleans Mo  
"y<sup>th</sup> wrote nothing about his health. The friends here  
"as well as usual" "Yr Cousin"  
"P. R. Reed Esq" N. Pitts "

Motion to Exclude And thereupon the said defendant by its counsel moved  
to exclude <sup>the testimony</sup> of said William Pitts from the jury for the reason  
that the said witness being manifestly interested in the  
result of this suit in favor of the said plaintiff  
is not competent to testify in behalf of said plaintiff  
herein.

Mrs. Overman But the court having heard the arguments of  
counsel overruled the said motion to exclude the testimony  
of said witness. And to this ruling and decision  
Exceptions of the said court the said defendant by its  
counsel then and there excepted.

Witness continued in cross examination  
Plaintiff got out here about the middle of  
May. He came to our office which was likewise  
the office of the company at Mobile; I refer  
to the office of Pitts, Gilbert & Pitts; the company books  
& papers were kept there. He came and introduced  
himself to us as Mr Nichols - We counselled  
together at the meeting of the directors; and discussed



the plan of improvement. - he was present part of the time. John Deere, John P. Cook, Cyrus Pitts, St. F. Sicks and perhaps myself were directors, I think there were five, I think there was a full board present at this meeting. I don't particularly recollect what was said - some consultation was had, and we recognised him as the company's engineer, and we set him to work. I don't think anything was done until we had a directors meeting.

The executive committee were not then appointed they were not appointed until after we had made a contract with Messrs Parsons and Williams. At the first meeting we had some discussion as to a plan and requested Mr Nichols to <sup>present</sup> ~~give us~~ some ideas ~~of~~ as to improvement. Nothing was <sup>then</sup> said as to any bargain with him. The directors entered into no contract with him and told him they would wait until the job was completed; they set him to work. I don't know that there was any resolution passed, employing him. We first wanted him to get up some plans or data to present to the public respecting this improvement. The wish of the company was passed at this first meeting, about employing him. Think that we recognised him as the company's engineer.

The witness was then asked by counsel for the defendant



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Question "Did any of the stock holders save Pitts, Gilbert & Pitts, take stock except conditionally?"

Objection To which question the plaintiff by his counsel objected, and the court having heard the argument of counsel in the matter sustained the said plaintiff's overruled objection, and refused to permit said question to be put by Counsel.

The witness on further cross examination  
Said, that no conditions were made in writing as to the taking of any stock, and thereupon the court permitted the question last above set forth to be put to the witness. In answer to said question witness said - I know of no condition in the taking of any stock except in the case of Mr Deere, who made a condition as to payments. He gave his note for stock taken by him, - It was cashed by Cook and Sargent.

Witness continued on cross examination  
The old company sold their charter to the firm of Pitts, Gilbert and Pitts in the fall of 1856. They had had some litigation which settled by this sale. Pitts, Gilbert and Pitts, owned the stock and the whole concern up to the first part of May 1857. There were early in that month additional subscriptions. I don't recollect when or where Mr Cook first proposed to go in and take stock - I heard of it from Mr Gilbert. I was present afterwards when Mr Cook agreed to take stock; also when Mr Deere agreed to do so - it was



at Moline in the spring of that year. The firm of Pitts Gillett & Pitts, was composed of the persons who before that held the stock of the company; I was a member of that firm. I don't know what the condition on which Cook & Deere agreed to go in was that Pitts Gillett and Pitts should raise money to finish the improvement. Pitts, Gillett & Pitts were desirous to get others to go in so as to strengthen them and carry on the improvement.

Question The witness was then asked by counsel for the defendant this question "Was it not agreed as an inducement to Mr Cook & Deere to go in, that Pitts Gillett and Pitts should raise a sufficient amount of money to finish the improvement, and should pay the engineer and contractors?"

Objection And to this question the plaintiff counsel objected, but the court having heard the arguments of counsel overruled the said Plaintiff objection

Answer In answer to said question witness said "I never knew of any such agreement. I remember when and where Mr Cook & Mr. Deere agreed to go in. It was at our office in Moline in the fore part of May 1857"

Witness continued on further cross examination

By saying in my <sup>direct</sup> ~~cross~~ examination that plaintiff was subject to ~~say~~ orders, I didn't mean to say that there was any express authority for continuing subject to the orders of the company. I don't know that



there was, I corresponded with him as Secretary of the company, I have two or three letters from him I think, - but not with me. When he left here in the winter he said he wished I would write to him what the prospect was, whenever we were ready to resume work, I think the first letter I wrote to him was in answer one he wrote me

Motion to  
Exclude

And therefore the said defendant by its Counsel moved the Court to exclude from the jury so much of witnesses testimony as related to the situation of the plaintiff subject to the order of the defendant.

Over-ruled

But the Court having heard the arguments of Counsel overruled the said defendant's said motion, and refused to exclude from the jury the said testimony, and to this ruling and decision of the Court, the defendant by its counsel then

Exceptions taken and there excepted.

The witness on further cross-examination, continued,

When plaintiff came on here, it was understood that he came as the Company's Engineer. We set him to work. Don't know that any resolution was passed employing



him - Don't know of any written contract having been made with him - There was with the Contractors.

The Directors made a verbal contract with him, at our office in May 1887. All the directors were present. All the contract they made was, that they set him to work, to make out his specifications and plans.

There was a recognition of him as Engineer of the Company in contract made with others.

All the contract made with him was that we told him to go to work as Engineer of the Company, and go on until that job was finished.

I presume I told him this myself it was a general agreement - I think the whole board of Directors was present. I am not positive that any record was made of employing him. Don't know that any vote was taken - My recollection is that they all assented with - they tacitly assented with.

The first thing he did was to get up contract to do the work of the improvement, it was between the Motive Water Power Company and Parsons and Williams. He was ordered to do this by the Directors - I think this order was by vote, as appears by records.

The firm of Pitts, Gilbert and Pitts did not employ the plaintiff to do this engineering



to my knowledge. I should have known it if they had; I was then an active member of the firm, as well as of the Water Power Company [witness here shown the plaintiffs account filed herein] The estimate <sup>shaken or</sup> was made, to pay the contractors by - I think we paid Nichols some \$200. or \$300.

[The witness was shown an account, marked "B"]

I know the Plaintiffs handwriting - I have seen him write - I think this is in his handwriting - I think the credit of \$346 <sup>90</sup> given here, is more than we paid him - The Credit for board there Fay's bill, I know nothing nothing about. I was served with a subpoena duces tecum to produce the order mentioned in this bill in favor of Mrs Faylor, but I don't find it.

Said account so shown witness is in the following words and figures. to wit

" B				"
" The Motive Water Power and Manufacturing Co.				"
" Do L. L. Nichols			Dr.	"
" Dr.	Contra		Cr.	"
" May 11 Travel Expenses	\$20.00	June 23, 1857	Cash	\$2.00 "
" " 25 Stationery	2.00	July 4 "	"	20.00 "
" Jan, 23 1857	0.75	" 24 "	"	32.00 "



Nov 7 Account of D. Pajin	3.00	" 30 " "	100.00
" 22 Board	100.00	Aug. 29 " "	10.00
" " Travel Expenses	25.00	Oct 4 Clothing Store Bill	30.40
Sep 3. 1858		" 16 " Cash	10.00
Making out an estimate		Nov 7 Order on Pickles	42.50
by request of S. J. Goodwin \$20.00		Nov 22 Pay order in favor of	
One Year Salary	\$ 2000.00	Mrs Taylor	\$ 100.00
	\$ 2170.75		\$ 346.90
		Balance	\$ 1828.85
		"	\$ 2170.75

Witness continued in further cross-examination

I haven't the order in favor of Mrs Taylor here - I don't know any thing about it - I think plaintiff when he went away mentioned a board bill at Taylor's which he wanted paid. Taylor I think at that time owed Pitts; Gilbert and Pitts for rent; he contested our claim, and we settled it by an ejectment suit. This order wasn't brought into the account. We settled with Taylor as well as we could - I don't recollect that this account of Mr. Nichols was brought into the settlement. I have looked at Taylor's account and at Nichols' account on our Books, and I don't find anything of it.

Plaintiff superintended the building of the dam at Mohine, (the one which defendants



contracted with Parris and Williams to build and build and measure the river was certain the head of water. Pitts Gilbert and Pitts owned considerable real estate around Motine. The dam which plaintiff

superintended was one running down the river and not across it. Mr. Gilbert owned a place on the other side of the River in Iowa. The firm was not interested in that.

The plaintiff did two or three little jobs for Pitts, Gilbert and Pitts outside of the Water Power Company's works. During the time he has charged for in this case he superintended a survey for Pitts, Gilbert & Pitts of a town-plat or rather altered one. We expected to pay for it, either to him, or to the company, but we made no bargain about it - he did not go up on the bluff in making this survey - I think this matter of Pitts, Gilbert and Pitts must have taken him two or three days.

I recollect also that during this time, for which he has charged here, he went over the river to Gilbert's, to see about running a spring, down to the Starch factory. I don't know how long he was about it:

I know also of his going to Watertown to make a survey of the river to see how much head we could get by running a wall up there.



this was in connection with this improvement. I think Plaintiff did never go to Galena, where there was a contract let for building a rail road bridge there.

The buying of the lots for Pitts Gilbert and Pitts and the matter over the river had nothing to do with the Water Power Company.

The Directors of the Company contracted with Parsons and Williams to build the dam, engineered by the plaintiff: they were paid by Mr. Gilbert the Treasurer of the Company, and sometimes by myself in Gilbert's absence. Pitts Gilbert & Pitts were not to pay anything of the expense of this improvement, as an inducement to Mr. Cook & Mr. Doore to go into the Company. The Company provided ample means, as we supposed, independent of Pitts, Gilbert and Pitts to complete the improvements.

[Here the witness was shown a certain promissory note which is in the following words and figures, to wit:-

" Motive August 30<sup>th</sup> 1858 "

" Sixty days after date for value received we promise to pay to the order of Williams & Parsons the sum of Five Hundred and Seventy Eight dollars with interest @ ten percent per annum being the highest rate "



"for money loaned.

" \$578 00

Pitts Gilbert & Pitts

" ]

This note was given in payment for what was due the contractors on their work which was engineered by plaintiff. In the fall of 1858 after the Company's means had failed the contractors came to us and said they were ruined unless we did something for them. We then settled up with them and raised the money to pay them up. - This note was the winding up of it. - There was no obligation on our part to pay them up. - it was entirely gratuitous on our part.

I think that before this they never got any payments from Pitts Gilbert & Pitts. Mr. Gilbert the Treasurer of the Company lived on the other side of the river, and being frequently absent, he made, or to speak Treasurer of the Company. We received the rents which were coming to the Company, and he deposited these in a particular place in our safe, with what he called the Water Power Company's Papers. These rents were received on leases made by Pitts Gilbert & Pitts when they were the owners of the property. Some of the receipts given by Parsons & Williams for money paid them for work may have been



since sometimes to Pitts Gilbert & Pitts.

The Company which existed when the Plaintiff was employed sold out to Reed & Goodwin about the 18<sup>th</sup> or 19<sup>th</sup> of October A.D. 1858. The consummation of this sale was had at No. 101 at one office. Reed & Goodwin were present for themselves and the others, whom they represented. For the Company were present the members of the firm of Pitts Gilbert and Pitts, Mr. Dure and Mr. John P. Cook. Outside of these there was present Mr. Davenport a brother-in-law of Mr. Reed, his first name I don't know. Sylvester Reed may have been present, I don't recollect. I don't recollect that Mr. Reed objected to closing up the matter on account of this claim of Nichols. I do remember of his objecting to closing the matter up, until some arrangement should be made about the claim of the Contractors, though he knew very well we had settled with them, he required us to do so before he would consummate the bargain.

The witness was then asked by Counsel for the defendant the following Question,

Question? Did not Mr. Reed object to closing up the bargain, on account of this very claim of Nichols, and did you not at the —



interview at which the bargain was finally consummated, at your office in Moline, about the 18<sup>th</sup> or 19<sup>th</sup> of October A.D. 1858, in the presence of Mr. [redacted], John P. Cook and Mr. Davenport, or in the presence of them and others, say Wm. Reed, that you, Pitts Gilbert and Pitts had employed Mr. Nichols, and that you and not the Water Power Company were responsible to him? or words to that effect?

Answer In answer to which question witness said -  
Answer I don't recollect that I did. I have no recollection of it; I don't recollect that Nichols' claim was specially mentioned - it came in & was talked of with the rest; he required us to pay off all the indebtedness of the Company before he would make the Contract.

The Counsel for the defendant then put to the witness the following Question

Question? Did you not at the interview at which the bargain with Reed & Goodwin was finally consummated, at your office in Moline, in the presence of Mr. John P. Cook & Mr. Davenport or in the presence of those and others, say Wm. Reed, that Pitts Gilbert & Pitts and not the Water Power Company employed Nichols as engineer, and that you had paid him up,



in words to that effect?

Within in answer to said question said:  
Answer. I don't recollect anything of it: don't  
recollect saying anything to that effect.

Within continued in further Cross-Examination

I told him, then, that he had been paid  
something. I don't recollect that I told him  
we had paid him nearly all up, and would  
soon pay him the balance. I don't recollect that  
I said anything to that effect. I don't recollect  
of ever agreeing to pay the claim.

They required that all the indebtedness  
of the Company should be paid, before they  
would consummate the contract. There may  
have been something said as to what was due  
Nichols. I think we represented to them that  
something had been paid him, & that some-  
thing was still due him; we didn't represent it  
to be a large matter, of course we were interested  
not to make it look worse than it really was.

I didn't tell Reed in presence of John P. Cook  
& Mr. Danforth that the Company didn't owe  
the plaintiff anything. I never at any time  
made any such declaration. I have the  
Ledger, Day Book & Journal of Pitts & Gilbert & Pitts



here. [The books shown witnesses] There are their books - their Ledger, Day Book and Journals.

I have no particularly friendly relation with present Company. I consider that they have not acted very manly, and I don't feel very good with them.

Then the defendants' Counsel replied the cross-examination of the witness, and on a

Re-examination by plaintiffs Counsel witness was asked the following question:-

Question: "What is the cause of the feeling between you and the present Company?"

Objection. And with this question defendants' Counsel objected - and assigned for cause of said objection that the existence of the feeling being shown, the occasion of it is entirely immaterial.

Overruled But the Court having heard the arguments of Counsel overruled the said objection, and permitted said question to be put by Counsel, and answered by the witness.

Exemption And with this ruling and decision of the Court defendant by its Counsel then and there excepted.

Answer witness in answer to said question said, "Simply the failure on their part to perform"



"their agreements, and the injustice they manifested toward us; their taking advantage of our necessities, and their breach of good faith; between man, and man, by which we lost thousands of dollars."

Witness continued in further examination. The work Plaintiff did for Pitts Gilbert & Pitts, was at a time when he had nothing to do for the Company; he was very attentive to the interests of the Company, so far as my knowledge extends, and very faithful and never absent when wanted. The Plaintiff drew the contract between the defendant and Williams and Parsons; think Plaintiff is recognized as the Engineer of the Company in that contract; but I am not positive. At the time of the consummation of the Contract between Reed & Gordon, and the Company, Reed represented himself and others. I don't know that he represented us; he was then purchasing from us, and had interests adverse to us. Reed is President of the Company now, - up to the Summer or Fall of 1858, he was acting as our confidential agent at a high salary; he was paid.

upon a second cross-examination by defendant's Counsel, witness testified as follows:-



I don't know of Reed going to Washington for us, at my request. In 1800 he went to Washington for us. I performed other services for him, which I thought balanced the demand. I went up the De Moines River for him, and to Quincy to secure a claim.

I think Reed did endorse the paper of our firm for some \$12000. or \$15000. When the sale was consummated in 1858, by the Company to Reed and others, we did not regard him as acting for us. The debt of the Company to the Contractors, Williams and Parsons, was paid by a sale of personal property, belonging to P. & B. Hilbert and P. & B. upon a chattel mortgage given by us to secure it.

Upon re-examination by Plaintiffs counsel, witness said,

we tried to get the other members of the Company to join, and assist us in paying this claim, but couldn't succeed.

3<sup>d</sup> Cross Exam

Upon further cross examination witness deposed as follows:-

We went to the other stockholders to try to raise money to pay this debt; we called on them for twenty five per cent of the stock. We went to Cook & Dillon two or three times, and always



40.

claimed it as due of them, and not as a favor to Pitt, Gilbert and Pitt. I saw Mr. Cook, about it any way, and perhaps Mr. Dillon, at the office of Cook & Dillon. Cook and Dillon refused to do anything. This was in the fall of 1857. I also saw Mr. Deere about it, at Moline, he gave his note for \$1250. twenty five percent of his subscription.

To pay Parsons & Williams, which, the next August, Reed & Goodwin compelled us to do, we gave them this note (within shown the note of Pitt, Gilbert & Pitt to Williams and Parsons, mentioned and set out in his first cross-examination), and another. This one was secured by a chattel mortgage of Pitt, Gilbert & Pitt property. The last was a firm note: it is not paid.

Thereupon, also, plaintiff produced as a witness, one Cyrus Pitt, who being duly sworn, upon direct examination by plaintiff counsel testified as follows:-

I live at Moline in this County, have lived there some four years continuously, I lived there before that, occasionally. I know the parties to this action; first became acquainted with the plaintiff, in the Spring of 1857, when he became the Engineer of the Company.

During the Spring of 1857, I was a member of



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the Company, and President of it. I became President sometime in May 1857. I held the office about a year and a half, and until we sold out to the Present Company.

The plaintiff became the Engineer of the Company in the month of June 1857 I think. His services were leveling, sounding, ascertaining the head of water that could have been obtained at Mohine, and to make an acquaintance with the stream so as to enable him to make a plan for the improvement of the water power.

I was not with him, in making these measurements, but understood that that was his business from other members of the Company. I saw occasionally at the river. Was with him at meetings of the Company, and of those interested in the improvement. I was occasionally at these meetings. His office was the office of the Company, and also of P. B. Litch & P. B. He had the rear apartment in that office. I could not say who set him at work.

It was by a common understanding, than an Engineer should be sent for, and I should say he was set to work by a common understanding of those interested, the stockholders and members of the Company.

I could not say that the Company was organized at that time. It was in process of organization.



After plaintiff had got such information as was satisfactory to him, and made such measurements as he saw fit, concerning the proposed plan, he drew up one, and presented it, after consideration by the Company, the plan he drew up, and presented was adopted by the Company. The improvement was afterwards commenced, according to this plan by Williams and Parsons; the plaintiff was to take charge of the work, and make estimates; he did do so, gave his attention to it, and made estimates monthly, of the amount of work done, for the payment of the Contractors, which payment, the Company were to make monthly.

The plaintiff was engaged this way until October or November when he left off. I was away during three weeks of this time. The work was not completed that fall: it was expected to recommence in the next spring. I understood that he was retained: this I understood from my knowledge of the Company's operations, which was such that I could, not but have known it if he had been discharged.

He left to come back, when we wrote to him that we wanted him to resume operations; so that he would be subject to our call. I was President of the Company during all this time. He didn't leave until sometime in the winter.



I don't recollect when he came back. The Company did not resume their improvements. A proposition was made for a sale in June 1858. The sale was consummated in October 1858. This was a sale of all the property of the Company, the dam improvements, and land adjoining & the stock. The Stock was transferred to Messrs. Red, Goodwin, and I believe other parties in New York, or to them or others.

On Cross-examination by defendant's Counsel witness testified as follows:-

There was no written contract between plaintiff and defendant. At a meeting when the plans for the improvement were discussed, and I believe where the contract was made with Williams & Parsons some talk was had about the Engineer, and I think the plaintiff was recognized as the Engineer of the Company. It was a pretty full meeting of the Directors.

I think Mr. Cook was present and knew of the Contract with Williams & Parsons. I think that at that meeting plaintiff was engaged as Company's Engineer. I don't know that there was any vote taken on it. I don't know of any employment of him prior to this, except that he was at work for the interests of the Company, but I understood this meeting as an acceptance



of his previous work, and a sort of a ~~ratification~~  
 or recognition of him as Engineer - I know of  
 no agreement by which he was employed pre-  
 vious to this. I think plaintiff was present  
 at this meeting; I don't know that the recog-  
 nition of plaintiff as Engineer of the Company  
 was by a vote. - there was some talk, about it. -  
 I suppose all talked. I think the question  
 of whether the plaintiff should be the Company's  
 Engineer came up at that time - he had pre-  
 sented his plans in public before that. I don't  
 know that the plan was formally before the  
 meeting at that time; different opinions were  
 presented and talked over. The Company had  
 heard of & seen his plan before that, and it was  
 talked over then; various opinions were presented.  
 some thought the dam ought to be where it was,  
 and some below that. It was finally decided  
 to adopt his plan. The Plaintiff was recognized  
 as an Engineer, what he had done was accept-  
 ed. - His work before that had all been to  
 set up a plan, and he was then recognized as  
 an Engineer, and he superintended the work  
 as long as the work was carried on that fall, and  
 was to continue until it was completed. It  
 was deemed important that he should re-  
 main, and see his plan carried out. - and  
 look after the interests of the Company; so that



the work was done in a workmanlike manner.

I don't know of any further agreement to employ this plaintiff as Engineer. Except that he continued and was recognized, and treated as Engineer; occasional meetings were held, and the estimates presented and approved.

I don't know of anything that was done in the way of employing him to return, when he went away. The work was not going as they don't know that any meeting of the board was held then. I made no bargain with him to return. The Company had not authorized me to do so. I don't know of any person who was authorized to employ him to return, having done so. I was one of the Executive Committee. Don't know that the Executive Committee by any vote employed him to return.

Don't know of any meeting, formal or informal of the Executive Committee, at which he was so employed. Nor of any assent formal or informal of the Executive Committee to his being so retained. All the way I know of it is by a conversation between him and myself.

Before plaintiff came out here, there was an old dam across the river, at Mobile; it is not now there, nor is the one which was engineered by plaintiff. The dam engineered by plaintiff was the second one that was built. The



plaintiff did some work for P. B. Gilbert and P. B. some little. I don't know how long he was at it. He laid out a road up the bluff for me. I didn't pay him for it & haven't paid him yet. He was perhaps half a day at it. I know nothing of his having done any surveying over the river.

On Re-examination by plaintiff's Counsel  
Witness said, there was no meeting of the board in the fall of 1858 to turn the plaintiff off.

The said plaintiff also produced as a witness one W. F. Siddle who was duly sworn and testified as follows, on direct examination.

I know the parties to this suit. I have lived at Moline, Illinois, about six years. I have known the plaintiff since about the time he commenced his labors, as engineer of the Water Power Company, about May or June 1857. I was not a member of the Company when I first saw him, nor until sometime in the summer.

After I became a member of the Company, and a Director, which I think was the last of June or first of July 1857, the first meeting of the board of Directors which I attended was to consider the plans presented for the improvement. They received the map of a plan, which



was presented by plaintiff, the subject was discussed, and the plan was adopted, I think by a resolution - I couldn't say whether the board was full then or not - I think no work had been commenced before this. I know nothing of him before this officially. I knew he had been at work about there before. Should think he had been at work there, about a month before that. I live right there. I think plan and specifications was discussed for letting the work to contractors, and about that time I think, a contract for the work was let to Williams & Parsons, by the Water Power Company.

Plaintiff, I think by a resolution of the board was at that meeting retained as the Engineer of the Company to superintend that work, (as I think will appear by the Company's records.). He did superintend it, as long as it continued, which was I think until November. It was the engineer's duty to make monthly estimates of the Contractor's work. I was a member of the Company, and a Director until about October 1858; when the charter was transferred. I don't know that the plaintiff was ever discharged; I should probably have known it, if he had been. While this work was progressing there were meetings of the board of

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Director. I couldn't say how often, plaintiff was present generally. We always consulted him as Engineer in reference to the progress of the work in all its departments.

Myself & my brother purchased property of the defendant in June 1857; I think it was June 20<sup>th</sup>. the property purchased is known as the Mohie Mills property, consisting of a mill, and some real estate. I took a deed of it from the Company, to myself and my brother Horace H. Sickle (Witness was here shown a certain writing.) This is the deed. It is signed by Cyrus Pitt as President, and Hiram Pitt as secretary. I saw them sign it. The seal of the Corporation is affixed. This is the same deed. I should not be a good judge of the value of the plaintiff's services.

On Cross-examination said witness deposed, as follows:-

I think it was in June or July that I became a member of the Company - I think it wasn't very long after this, that the first meeting of the Directors of which I have spoken was held. There were present at that meeting Hiram Pitt, Elias S. Gilbert, John P. Cook, Cyrus Pitt, John Deen and myself. These are all that I remember, and I think this is all there was. This was the time when plaintiff was