

No. 12942

Supreme Court of Illinois

Peters

vs.

Waggenerman

71641  7

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

JOHN WAGGEMAN }
 ^{vs.} } *Appeal from Peoria County Court.*
WILLIAM PETERS. }

APPELLANT'S BRIEF.

1. The books of plaintiff below were improperly admitted. They were not books of original entry. Nor was William Weis, who only settled by them as clerk for Tobey & Anderson, competent to prove them to be correctly kept. Further, one-third of the entries were made by a Clerk.

3 *Scam.*, 122. 15 *Ill.*, 275.

2. The proof of damage to defendant below, occasioned by delay in furnishing the machinery, should have been admitted. A contract to furnish it by the 1st of March was clearly proved, and, upon the case made, the proof offered was proper. What the mill was fairly worth per day, and would have rented for, with the machinery in, and the damage sustained by defendant from the want of such machinery, were legitimate matters of proof. 11 *Ill.*, 613.

3. The verdict is palpably against the evidence, and a new trial should have been granted. In any view of the evidence that can be taken, the verdict was not warranted. And if the jury have either mistaken the evidence or their verdict is manifestly against it, a new trial should be granted.

11 *Ill.*, 142; 13, 697; 12, 99, 460. 2 *Gilm.*, 595, 572.
COOPER, for Appellant.

186 79

John Waggoner

as

Millioner Petrus

Appellants Brief

Filed April 28. 1869

L. L. Linn
Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

JOHN WAGGEMAN, ^{*appellant*} ~~Plaintiff in Error,~~ } ^{*Error to appeal from*}
vs. ^{*appellee*} } *Peoria County Court.*
WILLIAM PETERS, ~~Defendant in Error.~~

ABSTRACT.

2, 3. Peters sued Waggeman in assumpsit on open account of \$1,320,16, for a steam engine and fixtures, to the September term, 1858, of said county court. The declaration contains the common counts, only for goods sold and delivered.

3, 4. Plea—General issue with notice.

1st of Payment.

2d. Set-off.

3d. Damages for breach of contract by plaintiff, with copy of specifications amounting to \$1,498,50. Issue joined.

5, 6. Trial at November Term, 1858; verdict for plff.; motion for new trial overruled. Judgment for \$350 and costs for plaintiff.

6, 7. Bill of exceptions ~~called for~~ ^{*called*} by S. A. Kinsey, by plaintiff, said, I know that defendant came to order engine and machinery sued for, in February or March, 1857. Know nothing of contract, as to price, time of delivery or otherwise; none made in my presence. Fire front charged, is worth 5½ cents per pound. Plaintiff's bill of items read to witness with prices, who said prices were fair, and that defendant had read them all with these exceptions, to wit:

7. Defendant got face plate and wrist, but witness dont know size or price. As to spring packing put at \$30, difference between cross-heads at \$15, and in rock shaft at \$12, defendant had before procured plaintiff to make for him certain parts of a steam engine and subsequently had them altered, returning cylinder and some other parts, by agreement for that purpose. The piston-head was first fixed for hemp packing, which defendant had altered with springs. Piston and fixtures worth \$75; dont fix value of alterations. The charge for difference in cross-heads, which were too large, and rock shaft arm, which was too long, arose in the same way. Nnow nothing about the alteration valve-rod, or of charge for 16 ¾ inch bolts and the four bolts for bed-frame. That time and expenses of a man

to go to Lewiston to take the measure for an engine were worth \$15. Said engine was delivered to defendant in April, 1857, and worth from \$800 to \$1,000. Defendant said he was well pleased with it. Defendant in Peoria about 1st March, and for two weeks, and continually making changes in engine as work progressed; changed check-valve and piston-head, from hemp to spring packing. These all the changes I recollect. Know the plaintiff's Ledger and Blotter, (these are they); that he keeps no clerk, and that same are correct. Am plaintiff's foreman. Copy from slate to Ledger and blotter, in evening, items put on slate during the day. One-third of charges on books, mine; and two-thirds plaintiffs handwriting. Have been in engine business 15 years.

9. *Cros-ex.*—No special time when engine was to be delivered; but was when some pulleys were to be made. Defendant came for engine about first March. Parties came to me during progress of trade and I made at their request, a draft of certain pulleys and shafts, in the order book of the shop and the accompanying memoranda.

Order-book of plaintiff, with drafts and entries, here shown to witness who said they were the same made by him and referred to above.

10. These drafts and entries call for 1 main shaft, eight feet long; one fly-wheel, one 48 inch pully, one 30 inch do., one 24 inch do., one wrought iron shaft ten feet long, with cranks, flange and excentric for cold and hot water pumps; one set grate bars and fire front for 48 inch boiler, all to be finished for defendant by the 1st of Mreh, 1857.

Samuel Steel was in and out of shop while defendant was engaging said engine.

11. Wm. Weis called by plaintiff: said that as clerk for Tobey & Anderson he had frequently settled by plaintiff's books and found them right. An account book of plaintiff was then offered, which witness said was the book he had settled by; but did not know whether it was the book of original entries or not. The book shown was plaintiff's ledger. Plaintiff having proved the delivery of several articles charged, offered said ledger and blotter in evidence; objected to by defendant. Objection overruled and accounts of plaintiff with defendant read in evidence from said books.

Defendant, to Plaintiff

Dr.

	To "Blotter,"		
11, 12		Account—vide record.	
13, 14	" " "Ledger,"	" " "	Total, \$1,324.78.
	"	Credit by Cash,	\$750.00.

15. Kinsey recalled; said the first engine was returned to plaintiff by deft. the last January or 1st Feb., 1857; had not been put up, and chief items of change was in the package; other changes were made in length of rods, new cross-heads and slides; iron instead of wooden frames; the new engine cheap at \$900. There was considerable finishing, not originally contemplated, two or three weeeeks work for one man with lathe, worth \$5 per day put on it. Never heard defendant speak of contract; he only requested that this, that and the other things be done on the engine. He said the engine *should* have been done long before. Did not use the word *ought*. Things named on order book were done before 1st of March 1857, but could not be used without the engine.

16. William Nichols.—Heard defendant say that the engine worked well. The plaintiff here rested his case.
16. The defendant then called Jacob Loker, who testified that defendant, in spring of 1857, got him to repair some copper pipe belonging to a steam boiler, and to make some more and fit the same to the heater. His bill for the same was \$45.50; the work done was worth that sum. The pipe was for a steam engine and necessary part of the machinery. I understood that plaintiff at the time was making an engine for defendant.
16. Samuel Steel next called by deft. Testified that he knew the parties to suit, came with defendant to Peoria about 1st February, A. D. 1857; plaintiff and defendant were some two days in making contract; I recollect well what was done; plaintiff had before furnished defendant some parts of an engine and machinery which had not been put up; and ~~well~~ *here* designed for a wooden frame with bed plates, and it was agreed between the plaintiff and defendant, that defendant should return to the shop of plaintiff in Peoria, so much of the engine and machinery as would require to be altered, and that plaintiff should make an iron frame and adapt the engine to it. This would require considerable alteration of the machinery. Plaintiff said he wanted to set it on an iron frame, and as it was a new thing with him, he would do it cheap. He asked \$550 for engine and fixtures to it if set on wood frame, and said he would only charge fifty dollars more for making an iron frame and setting it on it and defendant at length agreed to bring back the machinery at his own cost and give the \$600 for it made complete, with all the fixtures belonging to it and set on an iron frame, the whole to be ready for delivery to defendant by the 1st of March next following. This was stipulated and agreed on for the reason that defendant had agreed to let witness have the old machinery out of his mill at that time, provided he could supply its place immediately with new, and this thing was all talked over between plaintiff and defendant; the defendant refusing to contract with me unless he could get the engine and machinery from plaintiff by the time above mentioned. At the same time, defendant contracted with plaintiff for certain other steam apparatus and machinery which was to be delivered at the same time and for which defendant was to pay \$220, besides some pulleys for which he was to pay extra and at the rate of 5½ cents per pound. Said engine, and with it the machinery needing alterations, was returned to Peoria, and set on an iron frame according to this arrangement. There was the rim and eye of a fly wheel pertaining to this engine which were not brought back. This wheel was to have been made by plaintiff with iron arms; but he made it for wooden arms, which defendant got put in and paid for himself. The stuff was worth \$5; don't know how much it cost him to have it ~~cost~~ *him to have it* put in; this fly wheel was embraced in the \$600 contract, and is a necessary appurtenance to the engine, and belonged to the plff. to furnish complete. The matter of packing on the piston-head was specially talked of. I do not know what kind of packing was on the piston, as plaintiff first made it; but understood from the parties at the time the contract was made, that it was hemp packing. I advised defendant strongly, to have this changed, and after some talk, it was agreed that spring packing should be put in, if defendant wished it. When the bargain was completed, I paid the plaintiff \$100 for defendant, which was also to apply on my contract with defendant, for the machinery in his mill. Defendant had paid plaintiff some money before, as I understood from them, to apply on the \$600 which defendant was to pay for the engine under the new contract. Witness further testified 1st, that all the following items of

Plaintiff's bill belonged to and went with the engine and were embraced in the \$600 contract, to wit: 1 steam engine, 40 lbs. face plate, boring, drilling and wrist for same; 1 steel end face plate; 135 lbs. pump shaft; fitting same; 30 lbs. boxes for same, and babbitting; half cost excentric for pump; spring packing; difference in cross-heads; alteration valve rod; difference in rock-shaft arm; 4 collar bolts; 4 bolts for bed frame; 1 oil globe; 2 small pulleys, one of 20 and one of 30 inches, and boring same, amounting in all, as *charged in plaintiff's bill*, to \$979.32.

2d. That all the items of said bill following, to wit: List of articles charged in bill which were contracted for, at the round sum of \$220, to wit: 1850 lbs. fire front; 8 $\frac{1}{2}$ inch bolts; 4 $\frac{5}{8}$ inch do.; 1 feed pipe; one boiler stand; drilling pipe; check valve; blow off cock and fitting same; fitting check-valve, boring chambers &c.; safety valve stand; safety-valve and fitting and drilling same; 2 T headed bolts for fire fronts; back plate for flues; grate bars; 16 $\frac{5}{8}$ inch bolts; 20 $\frac{3}{4}$ inch bolts for pipe, amounting in all as charged in bill, to \$231.62, belonged to and were embraced in the \$220 contract, and that the 48 inch pully set in the bill at \$26.56, two of the 30 inch pulleys amounting as charged to \$17.64, and the 24 inch pulley charged at \$3.46, were to be paid for separately, at the rate of 5 $\frac{1}{2}$ cents per pound. Pulleys to be finished ready for use and 5 $\frac{1}{2}$ cents per pound was to cover everything, and includes the charge in the bill for cutting key seats and fitting and boring these pulleys. The copper pipe in the bill belonged to the engine fixtures, and was part of the \$600. Defendant had already the cold water pump included in the bill of machinery; plaintiff was to furnish this and it was agreed between the parties that defendant should be allowed for it \$15 to be deducted from the general amount. On 2d day of March, 1857, I went to Lewiston to get the machinery I was to have under my contract with defendant, and, on my insisting, he surrendered up the machinery and left his mill, which was then running, powerless. It lay idle for want of machinery, some time; don't know how long. I saw defendant load the engine at Liverpool considerable time after I took away his old machinery. I have seen the new machinery frequently, and examined it since it was put up; no extra work about it; an ordinary neat job, and not better than the one contracted for, which was to be a complete and finished job; this was spoken of particularly by defendant while making the contract, and plaintiff said it should be so, and that as it was the first job of the kind made at the shop, he meant it should not only be complete, but handsome to look at. There is no extra polishing or finishing on it; that is not necessary to make it work smoothly. There is one more pully than contracted for, as I think, the use of which I cannot see. There are two defects in this machinery; one in the governor, which is a necessary part and it would probably cost thirty or forty dollars to remedy this defect. The other the excentric, or camrod, six or eight dollars, perhaps something less would fix this. A heater is generally used, and the engine is constructed so as to require one.

22. Defendant then offered to prove by witness that he, the witness, is acquainted with steam machinery and mills, and has been engaged in running a steam mill for a number of years; that he knows the mill of defendant in Lewiston, in which the machinery purchased of plaintiff was to be and is put, and what it was worth per day with the machinery in, and in running order at the time the engine and machinery were to have been delivered as testified by witness, and what it would have readily

rented for at that time, and the damage it was to the plaintiff not to get said machinery at the time. All which evidence was objected to by the plaintiff and excluded by the court for the reasons assigned by the court, that it would only lead to speculative damages, and that no foundation was laid in the testimony for such proof, and that unless witness had worked in this particular mill, he could not be permitted to testify on the subject. Witness then stated that defendant was engaged in the milling business, making flour in Lewiston, in the winter and spring of 1857, and until witness took out the machinery pursuant to contract, on the 2d and 3d of March, 1857; defendant had no other business, and was thrown out of employment for some time. Ordinary labor was worth one 25-100 dollars per day.

23. On cross-examination, witness said, I came to Peoria with defendant in the fore part of January; my contract for defendant's machinery was not completed then. I and defendant had agreed provided defendant contracted with Peters, and on the same day that defendant and plaintiff closed their contract, defendant and I closed ours. It was the second time we came to Peoria that the engine and fixtures were contracted for; I think the draft in the order book was made the second time we came.

24. Defendant next called Edmond Moore, who testified that he knows the defendant, who owns a steam flouring mill in Lewiston, Fulton county, and got an engine and fixtures with some other apparatus for it at Peoria, in the spring of 1857. The engine came about the last of April or 1st of May. The mill had been idle since about the 1st of March, the machinery having been taken out by Mr. Steele. I put the arms, which were of wood, into the fly-wheel which came from Peoria and was designed for the new engine, for which defendant paid me what it was worth, to wit: \$25. Am a carpenter and pattern maker by trade and acquainted with machinery of this sort. Was about mill from time machinery came and considerable work had to be done on it before it could be got together and put up. There were not bolts enough, and a good deal of Black smithing, I suppose from \$10 to \$15 worth was required. Holes were needed in bed frames which should have been cast in; these had to be drilled out; a key seat had to be cut in the fly wheel; this last, worth about 50cts to \$1.00. The fire front would not fit and come together, and had to be chipped off and fitted; this was worth \$6.00. The heater did not come until I left, and is necessary to this engine; could not get along without it.

Defendant here offered to make the same proof by this witness as to his knowledge of defendant's mill and the damage sustained by the debt. by the delay in getting the machinery, as by witness Steele, which was 25-26. objected to by plaintiff and objection sustained, to which defendant excepted. Defendant then read in evidence, plaintiff's receipts to him for moneys paid on account engine as follows:

November 25, 1856, \$150.00; Feb. 4, 1857, \$100.00; March 9th, \$200.00.

26. Also, the following, "Letters of plaintiff to defendants:" "Sept. 14, 1856. I think I will give you a fly-wheel made in segments, for wood arms."

27. Oct. 3d, 1856. "We shall be obliged to give a fly-wheel with wood arms. You say it is hard to get the arms there; I suppose we can get them here."

28. Oct. 21, 1856. "If you prefer I would get them (the wood arms) here, I will do so."

Peoria, Dec. 10th, 1856.

J. Waggeman, Lewiston; Dear Sir:—Yours of the 5th is received; *Fire front, grate bars, stand pipe, pumps, copper pipe* will cost about \$220.00.

Yours, in haste,

WILLIAM PETERS.

Sept. 2d, 1857, "Draft of \$300 received."

Plaintiff then offered in evidence this letter of defendant to plaintiff.

30 Oct. 27, 56. Dear Sir:—"I cannot get an ash log here for fly-wheel arms, so I conclude that you better get them there."

30. Thomas Scholey called by plaintiff, who testified that an engine of 10 inch bore and 4 foot stroke, with all the fixtures complete and *full finish* was worth \$1,000. With black finish the engine alone would be worth \$600; if polished all over it would add \$150 to the costs. That copper pipe except pipe into the heater, did not necessarily go with the engine, unless there was a special contract.

31. Kinsey recalled, testified that the engine defendant got of plaintiff was 10 inch bore and 4 feet stroke; all the engine was not polished, only about the arms and joints; was about when defendant and Steele came. The draft in the order book made January 14th 1857. None of the items in this draft belong to the engine, except the main shaft. The engine was brought back to be set in iron frame and altered, in February. Was worth \$300 with fixtures, as first made; without fly-weel it was worth \$230 to \$250. Defendant was in Peoria some two weeks waiting for engine, which was delivered to him on the 16th day of April. This was all the evidence.

Verdict for plaintiff \$350.

32. Motion for new trial by defendant for reasons following.

1st. Improper evidence admitted on part of plaintiff.

2d. Proper evidence for defendant excluded.

3d. Verdict against evidence.

4th. Verdict against law.

5th. Verdict against law and evidence.

33. Motion overruled and judgment rendered for plaintiff upon the verdict, to which defendant excepted.

ERRORS ASSIGNED ON THIS RECORD.

1. In admitting improper evidence for plaintiff below.
2. In excluding proper evidence offered by defendant.
3. Overruling motion for new trial.
4. Rendering judgment upon the verdict.

J. K. COOPER,
For Plaintiff in Error.

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Waggoner vs Petus

Abstract

1894 ✓

Filed April 27, 1859

L. Leland

clerk

19

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

JOHN WAGGEMAN,
vs.
WILLIAM PETERS.

} APPEAL FROM PEORIA COUNTY COURT.

BRIEF OF APPELLEE.

1. The books of the plaintiff below were *properly* admitted, as manifestly appears by the authorities cited by the appellant.

3 Scam. 122.

15 Ill., 275.

*See minutes of argument 1. 2. 3. 8.
10. 11. 15.*

2. The evidence does not show any definite contract to furnish the machinery by the 1st of March. It was only understood that the machinery would *probably* be completed ABOUT that time. *But it very clearly appears from the evidence that the delay in completing the machinery was at the special instance of the appellant, and in consequence of a large amount of extra work ordered by him.*

Nor is this all. It also appears that the mill was not stopped by any act or omission for which the appellee is responsible. The witness SAMUEL STEELE, who evidently testifies under strong prejudice in favor of the appellant, was not entitled to the old machinery until the new was received by the appellant. The taking out of the old machinery on the 2d March was a mere *hocus posus* arrangement to lay a foundation for getting damages from the appellee. Both the court and the jury so regarded this matter, and the court properly refused to allow the proof of damages offered. It is always for the jury to determine the CREDIBILITY of the witnesses.

*See minutes of argument 4. 5. 6.
7. 9.*

3. *Substantial justice has been done.* Even on the showing of the appellant, the jury found by their verdict simply that *the appellee was entitled to recover the REAL VALUE of the articles furnished.* Is there any *injustice* in this? The judgment should be affirmed.

Leigh v. Hodges, 3 Scam. R. 18.

"It does not always follow that a new trial will be granted, even if the jury find against the weight of the evidence, against the instructions of the court, or through the misdirection of the court on a point of law, provided the court is satisfied that justice has been done."

Smith v. Shultz, 1 Scam. R. 491.

Nor "though the law arising on the evidence would have justified a different result."

Gillett et al., v. Sweet, 1 Gil. R. 490.

Re-affirming the doctrine of Leigh v. Hodges.

*See minutes of argument 3. 10.
16.*

CHARLES C. BONNEY,
Counsel for Appellee.

In the Supreme Court

John Waggenman

vs.
William Peters

Appeal from Peoria County Court.

Brief of Appellee -

State of Illinois
In the Supreme Court at Ottawa
Of the April Term A.D. 1859 -
John Waggenman
William Peters Appeal from
Peoria County
Court.

Minutes of Argument for
Appellee -

In addition to the matters stated in
his printed brief, the Appellee makes
the following suggestions to the Court.

- 1 It is objected that the clerk had personal knowledge of most of the matters shown by the books &c. But if the books were thus corroborated by the living witnesses, there could be no error in their admission.
- 2 If the prices of nearly all the articles were proved to be correct, then it might certainly be presumed that the prices of the other articles were so.

2
3 It does not appear what particular items were allowed by the jury, or how the verdict was made up. It is sufficient to sustain the judgment below, that this court cannot clearly see, not only that the verdict is manifestly wrong, but also what the finding ought to have been.

4. If the jury, who heard Steele testify, ~~who~~ scrutinized his manner, and weighed the influence of his prejudice in favor of the appellant, doubted the credibility of his story, surely this court will not interfere to reverse the judgment, in order that another jury may hear a witness that the first jury refused to believe. He overacts his part. His testimony is too minute, and very suspiciously strong! He seems to know a great deal more about the machinery, than the man who superintended its construction.

5 It is not a little curious that during the "two or three weeks" that the appellant spent at Peoria, after the first of March, and while the machinery was being made, he does not appear, ever to have suggested that the appellee had been guilty of a breach of any contract.

6 But it is not necessary to discredit the witness Steele, in order to uphold the verdict. Suppose there was a contract. It may have been abandoned by mutual assent. That if any contract was made, it was ~~so~~ abandoned, sufficiently appears from the following facts:

1. The machinery made and accepted was much more expensive ^{than} that for which it is pretended a contract was made.
2. The appellant remained at Peoria "two or three weeks" after the first of March, "continually making changes in the machinery," but making no complaint that any contract had been broken.

And that the claim of the appellant for damages is a mere afterthought, "trumped up for

the occasion, manifestly appears from the following considerations.

1. The acceptance of the machinery when completed, and the promise to pay for it without objection, was a waiver, if any contract existed.

2. The acts of the parties show that neither of them understood that there was any specific contract as to time.

3. The appellant evidently consented to give up the old machinery, and ~~let~~ the mill stop, because he wanted to be at Pioria, super-
=intending the construction of the new machinery.

4. There was no foundation laid for any proof of damage to the appellant. On the contrary, it would have been error for the court to have admitted such evidence.

5. The appellant was having other machinery made elsewhere and he does not show that if the appellee had furnished all that was made by him, on the first day of March, the mill could have been kept in operation -

6. Although the appellant had given up the old machinery to the witness Steele, and thereby stopped the operations of the mill, he does not appear to have even mentioned this circumstance, or to have suggested any damage thereby during the whole time he remained at the foundry of the appellee, superintending the construction of the machinery. As above stated, the enforcing of a contract to furnish the machinery at a specified time, and the collection of damages for a failure to comply with a condition of time, must be regarded as a mere after-thought — as a defence, "trumped up" for the occasion after the action below was brought, or at least after litigation was expected by the appellant.

It seems that both the court and the jury below so regarded it, and it is presumed that this court will find no sufficient

season for interfering with their determination.

7 At page 8 of the Record, the witness Kinsey says the appellant "was continually making changes on the machinery as the work progressed" &c. The witness specifies some of the changes, it would not be expected that he could remember all.

8 As to the introduction of the Ledger, the witness states on page 9 of the record, that the entries were sometimes transferred directly from the slate, to the Ledger, without going into the Blotter.

9 At page 10 of the Record, the memorandum shows that the machinery was "to be finished on or about the first of March &c. And immediately below, are added these words, "Terms of agreement, one half cash, the other half, sixty days.

after the work is delivered." Now, if the first day of March had been a material point of time in the "agreement", would not the payments have been regulated by it?

10 At page 7 of the Record, the witness Kinsey states clearly and distinctly that "the prices annexed to each item in said bill, were fair, and the usual and customary prices for work and articles of the description named". If then the appellant is charged only with the real value of the machinery, how is he wronged?

11 At page 15 of the Record, the witness states that the new engine would be cheap at \$900. The finishing on it not originally contemplated would require the labor of a man 2 or 3 weeks at \$5. per day. Yet the appellee charges but \$850. He said he would do

7
the work cheaply. He did so.

12 The testimony of Loker is not connected with the case.
Record page 16.

13 The appellants witness Moore, in his zeal to serve the party calling him states that the engine was not delivered till "the last of April, or the first of May." (Record, page 24.) But the engine was in fact delivered on the 16th day of April. (Record page 31.)

14 The letters written in 1856, long before the subject matter of this controversy arose, cannot affect the case. But they contain nothing to show that the finding of the jury was wrong.
Record, pages 25. 26. 27. 28. 29. 30.

15 At page 30 of the Record, the witness Scholey, who is certainly a competent judge, says such an engine and fixtures would

8
be worth \$1000.

16 There were no instructions asked or given, nor was the case argued before the jury. There was nothing to prevent the jury from doing substantial justice, ~~and~~ ~~has~~ ~~the~~ and the appellant has failed to show any manifest and material violation of their duty. The ^{court} is not asked in this case, to settle a principle, or establish a rule, but simply to relieve the appellant against an alleged error of the jury in determining the weight and effect of the evidence in the case.

The cases cited in the printed brief of the appellee show that the judgment of the ~~appellee~~ court below should be affirmed.

Charles C. Borney
attorney for appellee
"

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John Waggeman

v
William Peters -

Minutes of Argument
for Appeller -

Filed May 4, 1835
L. Leland
Clerk

Charles C. Bonney

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

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Nor is this all. It also appears that the mill was not stopped by any act or omission for which the appellee is responsible. The witness SAMUEL STEELE, who evidently testifies under strong prejudice in favor of the appellant, was not entitled to the old machinery until the new was received by the appellant. The taking out of the old machinery on the 2d March was a mere *hocus posus* arrangement to lay a foundation for getting damages from the appellee. Both the court and the jury so regarded this matter, and the court properly refused to allow the proof of damages offered. It is always for the jury to determine the CREDIBILITY of the witnesses.

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Re-affirming the doctrine of Leigh v. Hodges.

CHARLES C. BONNEY,

Counsel for Appellee.

¹⁸⁶
In the Supreme Court

John Waggenman

v.

William Peters.

Appeal from Poria County Court.

Brief of Appellee -

Filed May 4. 1859

L. Leland
Clerk

John Waggenman = app^t } Supreme Court. 3^d division:
vs. } April Term A.D. 1859:
William Peters = appellee } appeal from Peoria County Court

The counsel for Appellant asks to submit the subjoined re-
marks, in writing, for the consideration of the Court in this case.
155 = An inspection of the Record makes it apparent that the
Books of acct. of p^{ty} below, were offered & allowed in evidence
mainly, ~~to~~ not solely, to fix the prices of the work done
& articles charged, and to prove that one J. E. Moore made
a trip to Lemington, for which p^{ty} had a right to charge
d^{ty}: These Books were offered & admitted generally, while,
except two small items & the charge for said trip, the per-
formance of all the work & the delivery of every article charged
in the Bill were proved by the witnesses Kinsey & Steele, and
called by p^{ty} & the other by d^{ty}, and in fact, not disputed
at all by d^{ty} below except the trip of said Moore: The
controversy was not as to the doing of the work & the delivery
of the articles charged, but wholly as to the price: Now,
it is submitted, that the Books were not evidence either to
fix prices or to prove the making of said trip by Moore: They
were not the best evidence for either of these purposes:
Moore should have been called to prove the one & some one ac-
quainted with the value of such work & machinery, to prove
the other: The necessities out of which the admission of
Books of acct in evidence arose, did not exist; and to
allow a party to fasten upon his opponent, by his Books, any
prices he may see fit to annex to articles sold, would be of

Most dangerous tendency: The attention of the Court is
the more specially called to this matter here, for the reason that it
is not indicated in the printed brief:-

2nd 11 On the case made, dft below should have been allowed
to make the proof he proposed, of damages sustained by
reason of the non delivery of the machinery by the ~~time~~ first
of March 1857: Whether the contract to deliver by that
time was sufficiently ^{proved} or not, was for the jury & not
for the Court to decide: as was done, when the Court
undertook to say that no foundation for the introduction
of such evidence was laid in the testimony - the
pleadings confessedly admitting it. There was, incon-
testably, evidence tending to prove such a contract. And
the party was entitled to ^{have the jury} pass upon it: But I go further,
and insist, that such a contract was established to con-
cluding that the jury could not reasonably have found
otherwise: The testimony of Steele, on this point, ^{is as distinct & positive}, as it is
possible to make it, and given under circumstances which
show he could not be mistaken: He had a contract with
the dft for the old machinery in his Mill, to be delivered on
or about the first of March 1857; provided dft could get
other machinery in place of it, by that time: The two came
to Peoria twice on that demand: The second time, dft & Peters
closed their contract, and with particular reference, as to
time, to the contract of dft with Steele. The matter being
all talked over between the parties, and dft refusing to
close with Steele, unless Peters would stipulate to furnish

I should be admitted Waggenman must have expected to get the Machinery about the first of
March, or he would not have come to Peoria at that time =

him the New Machinery by that time = This, Steele swears,
Peters did do. Then Steele paid him \$100, ^{in advance,} for Waggenman,
which was also to apply on the purchase of witness from
the latter, which was then immediately closed: Next, is the
^{Made by Kinsey by request of the Parties,}
entry in the Order Book of Jeff, shown by the book
itself, copied into this Record, by the witness Kinsey, pro-
viding expressly for the delivery of a part of this same
Machinery, (which Kinsey testified, or rather reluctantly
admitted, could not be used without the Engine &
the other Machinery) on or about the first of March
1857: It is clear then, that Peters understood the contract
in this respect, just as Waggenman did, who man-
fully stood up to his bargain, & permitted Steele to
take the old machinery out of his Mill & leave
it powerless, when the latter came on the 2nd March
1857, & claimed this Machinery under his contract =
One or two other things in the testimony of Kinsey (certainly
not a witness in the interest of Waggenman) are signifi-
cant on this head: viz: that Waggenman came to Peoria
about the first of March 1857, & staid two or three weeks
waiting on the Machinery; and when asked whether
Waggenman did not claim that the work ought
to have been finished sooner, he replied, that "he said it
"should have been done sooner. he did not use
"the word ought." # That upon such proof & under such
circumstances the Ct should have been permitted to prove
his damages, as asked, (the Machinery not being furnished
till some two months or more after the contract time - The Engine

(as shown by the apt itself)
not being ready till the 16th of April, & the heater, a ne-
cessary part, without which this engine could not be work-
ed, as shown by witnesses Steele & Edmund Moore, not
coming till after Moore left, which was sometime after
the first of May, and the Mill of apt being, in the mean-
time wholly powerless) seems too plain for argu-
ment; provided the fair value of the Mill per day, & what
it would have readily rented for, at the time, were legiti-
mate modes of showing that damage - on which points
the case in 11th Ills. referred to in printed brief, is deemed con-
clusive - Always providing however, that the ruling of the
court below - that nobody who had not worked in that
particular Mill, was a competent witness, is not law -

The fair ordinary earnings of a Mill, after deducting
expenses of running, constitute the measure of damages occasioned
by breakage or defects in machinery, warranted good: Davis
vs. Talcott, 14 Barb. 611 =

The party in default liable for losses going to be con-
sidered as being in contemplation of the parties when the
contract was made = Sedg. on Meas. Dam. 112 = 26 Pick. Law
Law & Eq. Rep. (Hadley vs. Baxendale) 401 = See also 10 Ills. 164 =

In the case before the court Peters must have known that
the entire loss of the use of apt's Mill would necessarily accrue
after the 1st of March, if apt faithfully complied with his
contract with Steele, entered into on the faith of Peters
compliance with his - And shall the apt be the sufferer
because he was faithful & Peters unfaithful to his
agreement? =

3rd The verdict of the jury is so against the evidence that a new trial should have been granted =

Except the item for trip of ^{J.E.} Moore to Lewistown. (not proved to have been made, except by the entry in plffs Books) the acct sued on is wholly for steam machinery & work, done & furnished by plff below to deft. Now, except the item just named, & four small charges at the foot of the Bill, amounting together to seven $\frac{04}{100}$ dolls, the testimony of Samuel Steele proves indisputably that every remaining item of said acct is covered by a special contract, as to price, mutually stipulated, in advance, between the parties. There were three several contracts touching the matter of price. By one, deft was to pay Peter the round sum of \$600, for the engine proper, & certain machinery pertaining to it, specially detailed by the witness, to be finished & furnished complete. By another contract, the further sum of \$220, was to be paid for certain other machinery, also named in said Bill & specifically enumerated by the witness; and under still another contract, deft was to pay at the rate of $5\frac{1}{2}$ cts per lb. for certain other parts of the machinery & apparatus, also specifically enumerated by the witness, & charged in the acct. These items last referred to

are =

1. One 48 in. Pulley = 483 ^{lb.} , which at $5\frac{1}{2}$ cts is =	\$26.56
2. Two 30 " " = 321 " " " " " " " "	17.65
3. One 24 " " = 63 " " " " " " " "	3.46

and amount in all to ~~~~~ \$47.67

Now, noting the fact, that the charges for boring, drilling, cutting Key seats, &c. are shown by this witness to be all included in & covered by the

above charges & contracts - a careful analysis of plff's
acct & comparison with Steele's testimony, shows that
every item of said acct (except as before stated) falls within
one or the other of said contracts:

On this basis therefore, the true state of
the acpts between the parties is as follows = viz:

Isln Waggenman

To William Peters

Dr.

To Work & Machinery contracted for at \$600.00 = \$600.00

" " " " " " " " " " \$220.00 = 220.00

" " " " " " " " " " per ft. " 47.67

" Items at foot of Bill not specially contracted for 7.04

Whole amount of plff's Bill = \$874.71

contra Cr.

By Amount payments proved & admitted \$750.

" Copper pipe paid for by opt, but to be paid for
by plff & embraced in \$600. contract = 45.50

" Cost of Wheel Arms, also furnished by opt
& belonging to same contract = 30.00

" Cold water pump, which opt had at
ready for which he was to be allowed = 15.00

" Bolts, blacksmithing &c. required to put up
machinery of it together - say = 15.00 = 855.50

Which, deducted from debits, leaves just = \$19.21

If allowance, of say \$40, be made for defects in
Governor & Cam rod, shown to opt, the bal.

ance of acct will be the other way - And yet the verdict
is for \$350, against the dept =

The evidence touching the account
of credit will be found in the
testimony of Steele, Baker & Edmund
Waggenman

A few words as to the testimony of Steele relative to these contracts:

And 1st His statements on this subject are uncontradicted by anything in the Record, except so far as the charges in p^lff's Books & the Evidence of Kinsey & Schaley indicating that the Machinery was worth more, look in that direction. No other witness, except Kinsey, refers to the matter of these contracts; and Kinsey only says, he knows nothing of any contract as to price, time of delivery or otherwise. That none such was made in his presence. A statement hardly consistent with the fact that he, himself, actually made the entry in the Order Book, above noted. But as Kinsey occupied a particular apartment in the Factory & only saw the parties together when they came occasionally into his room to consult him as to how certain parts of the Machinery could be best constructed, and have him make diagrams, his negative statement is, of course, of no weight to discredit the direct & positive testimony of Steele, who, according to Kinsey, was there, in & out with the parties:

2nd Steele's means of knowledge were as perfect as they well could be. The parties seem to have been careful & close dealers: they were two entire days in concluding their bargain: Steele was with them all the time; and being manifestly thoroughly conversant with Machinery of the kind, was repeatedly applied to by Waggoner for advice: and the days "it was talked over so much that I recollect well what was done". Under these circumstances, it is impossible to conceive that he was innocently mistaken, in the unusually precise, circumstantial & intelligent testimony which he gave: Either

that testimony is true, or he swore deliberately & coolly to what he knew to be false: And standing as he clearly does, corroborated in other material parts of his testimony, and contradicted in none, the jury could not reasonably disregard his testimony on this: But —

3² The Record is not without evidence of the truth of Steele's testimony on this point: Not to dwell on the proposal in one of Re-ter's letters (or what amounts to a proposal), to furnish for the sum of \$220, the same articles (with a slight difference, by substitution of one article for another), as those stated by Steele to have been contracted for at that price; Kinsey, on being recalled, puts the price of the Engine, as at first made, with the fixtures, at \$300: This, it will be noted, is the same Engine sued for, which was bro't back, adapted to an iron frame, and ^{with} the machinery pertaining to it, otherwise altered, and for which engine & apparatus ~~this~~ altered & modified, the \$600, according to Steele, was to be paid: Now, I think, the Record will be searched in vain, for items of charge, based on these alterations & changes, which can bring the cost of this Engine & fixtures much, if anything, above the contract price named by Steele: ~~Further~~ Not unduly to swell this argument by a detailed analysis of the acpt & evidence to sustain this view, it will only be necessary to ask the attention of the court to the testimony of Kinsey, on page 15⁴³¹ of the Record, to see that the inference I draw is not strained: On the ~~last~~ page, he says, "the Engine, with fixtures, as first made, was cost \$300. without the Wheel, \$230, to \$250." and on page 18.

he shows what these fixtures consisted in: In the enumeration
there made, is, of course, to be added, the piston with
its appropriate apparatus, doubtless embraced in
the term Cylinder. as, without this, it could not be
an Engine at all, and besides, this piston was one
^{thing} of things requiring change, and which was brought
back, for that purpose, ~~without~~ the engine: Making
all due allowance for the difference in cost between
the iron & the wooden frame - put by Peter himself
in this case, at \$50, according to ^{for any extra polishing,} Steele - and for the alter-
ations consequent on this, and the other changes contem-
plated, ~~and~~ \$300, will cover the whole additional cost &
leave a margin for profit: And yet, in the face
of this testimony of his own witness, Peter has venture-
d to charge in his Books, and ⁱⁿ his accepted account,
\$850, for the engine, and to charge also for most of the
machinery connected with it, and the work done there-
on (as will be seen by the Bill), in addition: I have dwelt
on this the longer, because it is in this item that the chief
difference between the parties will be found - tho' they
do not entirely agree in some of the other charges - as, for
instance, ~~where~~ the charges for drilling, boring, cutting key seats
&c., which the apt claimed & proved by Steele, were covered by the
~~pieces to be paid~~ ^{for the articles on which the work was done,}
which he was to have in a finished & not an unfinished
state: The loose statement of Kinsey as to the
value of the engine, when taken in connexion with the
foregoing, is entitled to little consideration - And the

estimate of Scholey, if applicable at all to such an engine as this, will hardly pass for much more. Besides, if a special contract is proved, what the engine was really worth, is immaterial, except for the purpose of discrediting the testimony, upon which the certainty of that contract rested. But where there is no other circumstance to discredit ~~a fact~~ ^{an} ~~unim~~ ^{unim} reached & intelligent ^{distinct} witness who testifies directly to the fact, this can surely be of little weight. It does ~~not~~ ^{not constitute} that conflict of testimony, which makes it the peculiar province of the jury to decide.

The attempt is however made to get round the proof of the contract, ^{as to price,} ~~in~~ another way - viz: by showing that Mag. German directed changes to be made, which absolved Peters from compliance with the original contract. And to this end Kinsey is again applied to, who says - that Opt was about Bosnia two or three weeks & in & out of the shop & "continually making changes". That he "requested" this, that & the other thing to be done" &c. But when called to name the changes directed by Opt, he can only specify two - one in a mud valve, and the other in the packing of the Piston Head - both manifestly embraced in the changes specially contracted for & contemplated, ~~when~~ before the machinery was hove back for alteration. This is all that need be said on this point:

Jona. K. Coe
for Appellant.

Attama, May 3/59.

¹⁸⁶⁼⁷⁹
Waggenaur
vs. =
Peters

Argument for
appellant =

Filed May 3, 1859
L. Leland
Clerk

Be it remembered, that on the 26th day
of August A.D. 1858, there was issued from the
Clerk's office of the County Court of Peoria
County, State of Illinois, a Summons, in
words and figures as follows, To Wit:

" State of Illinois. }

" Peoria County }

" The People of the State of Illinois.
" to the Sheriff of Fulton County: Greeting;

" We command you that you summon John
" Waggerman if he shall be found in your county,
" personally to be and appear before the County Court of
" said Peoria County on the first day of the next
" Term thereof, to be holden at the Court House in
" Peoria, in said Peoria County, on the first
" Monday of September 1858, to answer unto Will-
" iam Peters in a plea of Trespass on the case
" on Promises to the damage of the said plaintiff
" as he says in the sum of Two Thousand Dollars.
" And have you then and there this Writ with
" an endorsement thereon, in what manner you shall
" have executed the same.

" Witness, Charles Kettelle, Clerk of our said
" Court, and the seal thereof, at Peoria, aforesaid,
" this 26 day of August A.D. 1858.

" Seal

" Charles Kettelle, Clerk
" By Geo. H. Kettelle, deputy clerk.

Endorsed on the back.

"
"
"
"
"
"
"
"
"
"

" County Court Summons.

Peoria County Court

Peter
vs

Waggoner

State of Illinois, }
Fulton County, }

I have duly served the within by
reading the same to the within named
John Waggoner, this 4th day of Sept
-tember 1858, as I am therein commanded
Wm Mc. Standard
Sherriff

Fees. Service .50

Challage. .05

Return Postage 3

\$.68

Filed in County Court this 3^d day
of November 1858 C. Stettin Clerk.

Johnson Attorney.

And afterwards, To. Wit. on the 27th day of
August A. D. 1858. there was filed in the Clerk's
office of said Court. a "Narration" in words and
figures as follows. To Wit:

" State of Illinois } Peoria County Court,
" Peoria County. } September Term 1858,
" Action of Assumpsit
" Dam. \$2000. —

" William Peters, plaintiff in this suit complains
" against John Waggoner defendant in this suit
" in a plea of trespass on the case on promises, for
" that the said defendant heretofore, to wit, on the
" first day of August A. D. 1858, at the County
" of Peoria aforesaid being indebted to the said
" plaintiff in the sum of Two Thousand dollars
" for goods wares and merchandise before that
" time sold and delivered by the said Plaintiff to
" the said defendant at his special instance
" and request and for ~~labors~~ work and labor

and mechanical services rendered by the said Plaintiff for the said defendant at his like instance and request in consideration thereof then and there promised to pay the said Plaintiff the said sum when he should be thereunto afterwards requested. yet though often requested, the said defendant hath ~~often~~ ever since that time refused to pay the same or any part thereof.

Also in a further plea of trespass on the case on promises for that heretofore to wit on the day and year last aforesaid the said deft. at Peoria aforesaid being indebted to the Plaintiff in the further sum of two thousand dollars for goods, wares and merchandise, castings, iron, and iron work of various description before that time sold and delivered by the said Plaintiff at Peoria aforesaid to the said defendant at his the said defendants special instance and request and for the services, labor, mechanical skill and work of the said Plaintiff for the said defendant at Peoria aforesaid for all of which the said defendant then and there promised to pay the plaintiff what the same should be reasonably worth on demand and the Plaintiff avers the said goods, wares and merchandise and services and property were reasonably worth two thousand dollars, and that the said several causes of action in said two counts mentioned accrued, arose and originated in the County of Peoria and that the pay for the same was to be made to Plaintiff in the County of Peoria and that the said defendant hath never paid the same or any part

part thereof to his the Plaintiff damage the
 sum of two thousand dollars for the recovery
 of which he brings suit
 E. G. Johnson Atty. for
 Plaintiff

John Waggerman

To Wm Peters Dr.

1857

March	7	To 1750 th fire front for Boiler	5 1/2	96 250	
		8 1/2 in bolts 15 th 4 5/8 in do.	1.20	1 80	
	14	290 th 1 fed pipe	5 1/2	15 95	
		206 th 1 Boiler Stand	"	11 33	
	27	20 - 3/4 in bolts for pipe	20	4 00	
		Drilling pipe		1 50	
April	4	Boring 48 in. Pulley		2 50	
	"	483 th (1-48 in) Pulley	"	26 56	
	"	481 th (3) 30 in Pulleys		26 46	1/3 in 600. clastic con- tract 42 1/2 in Contract for pulleys per round
	2	Boring same (3)		6 00	
	"	63 th 1-24 in Pulley		3 46	
		Boring same large hole		2 00	
		120 th 1-20 in Pulley	"	6 60	
		Boring same & turning off Rim		2 50	
		85 th 1 check valve	5 1/2	4 67	
		fitting same (boring Chambers & Co.)		20 00	
		Cutting Key seats in 7 Pulleys & Shafts		10 00	
		40 th face plate for Pump	5 1/2	2 20	
		Boring, Drilling & wrist for same		6 00	
		1 stub end for same face plate		7 00	
		55 th 1 Blow off Cock	2.02	10 52	
		fitting same	7.50		
		135 th wrought pump shaft a 8		10 80	

debt sued on

Specification and Copy of

		fitting same	1 1/2 day	6 00	✓
		30 th boxes for same	1.80	3 30	✓
		One half cost for Eccentric for pump	1.50	5 00	✓
		60 th Safety valve stand	5 1/2	3 30	✓
		Valve (5 lbs) fitting & Drilling		6 00	✓
		Spring Packing Extra (old one laid aside)		30 00	✓
		Difference between Cross Heads		15 00	✓
		Alteration Valve Rod		12 00	✓
		Difference in Rock Shaft. arm &c		8 00	✓
		4 collar bolts \$1.50 = 4 Bolts for Bed frame	1.60	3 10	✓
		17 th 2 T headed bolts for fire front	.20	3 40	✓
		145 th Back plate (for flues)	5 1/2	7 97	✓
		1270 th Grate Bars	a 5 -	63 50	✓
		time & Expense of T. E. Moore going to Lewistown to take measure for Engine	3 1/2 day	15 75	not paid
April	16	Repairing Oil Globe		1 00	✓
"	"	1 Steam Engine Del'd this day		850 00	✓
May	13	16 - 5/8 in bolts	a 15 -	2 40	✓
1858.				\$ 1313 72	
May	13	1 Rock Shaft. Stand 44 th	5 1/2	1 54	✓
"	"	Paid Wm Moore for fitting		2 50	✓
"	"	Drayage to & from Moors Shop		50	✓
"	17	back Paid Augustin 5 th brass gibbs	.50	2 50	✓
				\$ 1320.76	

Endorsed on the back.

William Peters

vs.

John W. Haggeman

Narr.

Filed August 27, 1858.

C. Kettelle att.

per Geo. Kettelle

dpty.

Johnson

And afterwards To. Wit. on the 3^d day of November A.D. 1858. there was filed in the Clerk's office of said Court. a "Plea & Notice" in words and figures as follows to Wit;

" William Peters

1857.
May

	To	John Wagge-man	Dr.
"	To putting in fly wheel arms		\$ 30.00
"	" Blacksmithing & Bolts for Machinery		15.00
"	" 3 days work fitting fire front		6.00
"	" fitting heater. to pipes		3.00
"	" Copper pipes furnished		50.00
"	" fitting same in & for heater & Exhaust pipes.		4.50
"	" Cold Water pump furnished		15.00
"	" Expense of Men & Teams to Peoria for Engine when it was not ready as agreed on		25.00
"	" Damages for delay in not furnishing Engine &c. as per Contract	3	600.00
"	" Sundry Payments made you to date		750.00
			<u>\$ 1498.50 "</u>

Aug. 3

" William Peters } In the County Court
 " as } Nov. Term 1858.
 " John Wagge-man }

" And the said defendant by
 " Cooper his atty. comes & defends the wrong &
 " injury. when &c. and says actio non. because
 " he says he did not assume & promise as the
 " said plaintiff hath in his said declaration
 " alleged. and of this he puts himself upon the
 " Country. Wherefore &c.
 " Cooper for Dft."

4 " And the Plaintiff doth the like
" by his atty. E. G. Johnson.

" The said Plaintiff will take notice that
" the defendant will in addition to the general
" issue. offer in evidence under the same
" 1st payment of the amount due.
" 2nd Matters in Set off. against the claim of said
" plaintiff and
" 3^d Said defendant will set up in proof & claim a
" judgment in his favor for damages sustained
" by him over & above any amount which may
" otherwise appear to be due said plaintiff. by
" reason of the non-performance by said plaintiff
" of his contract with defendant. about which
" this suit is brought for a more particular specifi-
" cation of which matters designed to be offered
" in proof under the above plea. defendant refers
" to his his account attached hereto & made part
" of this notice

Cooper
for plff.

Endorsed on the back.

" Peters vs. Hagerman

Plea & Notice

Filed Nov. 3^d 1888.

C. K. Little clerk

per Geo. W. Little

Verdict of " \$350.
the Jury. "

Oke the Jury find for the Plaintiff
in the sum of Three Hundred
fifty dollars

John Congleton Foreman
James Delano
William B. Stewart
John Ramsey
S. Winchester
John White
Edwin Mathews
Jacob Darst
Johnson Updike
Richard E. Elkin
John S. Hornbaker
D. W. C. House "

Endorsed on the back.

" Peters
vs
Waggonman

Filed Nov. 8.
1858.
C. Kettelle clk.
per Geo. W. Kettelle

Record

" Proceedings of the County Court of Peoria
County. State of Illinois. began and held at the
Court House in the City of Peoria in said County
for judicial and other business on Monday.
September 6th 1858.

Present. Hon. Wellington Loucks Judge
Charles Kettelle Clerk^{2nd}
Francis W. Smith Sheriff

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Monday. September 6. th 1858.

William Peters

vs.

Assumpsit

J. Waggenerman

On Motion of Plaintiffs Attorney.

this cause is continued with Alias Summons to
Fulton County.

Proceedings of the County Court of Peoria County, State of Illinois, began and held at the Court House in the City of Peoria, State of Illinois, on Monday November 1st 1858, for Judicial and other business. Present Hon. Wellington Loucks, Judge. Charles Kettell, Clerk, and Francis W. Smith, Sheriff.

Friday. November 5th 1858.

William Peters

vs.

Assumpsit

John Waggenerman

This day came the said Plaintiff by E. G. Johnson his attorney and the said defendant by J. R. Cooper his attorney and it is ordered by the Court that a jury be called to try said cause. Whereupon came a jury of twelve good and lawful men, to wit: John Ramsey, Jacob Darst, Johnson Updike, John White, Edwin Mathews, Stephen Winchester, De Witt C. House, Richard Elkins, James Delano, W. B. Stewart, John Congleton, and J. Kornbacker, who were duly chosen tried and sworn.

11
" Saturday. November 6th 1858.

" William Peters

" ^{vs.}
" John Waggerman

Assumpsit.

" This day came again both parties to this suit and also the jury empaneled yesterday and having heard the evidence in the case and the arguments of counsel retired to consider of their verdict.

" Monday. November 8th 1858.

" William Peters

" ^{vs.}
" John Waggerman

Assumpsit.

" This day came both parties to this suit and the jury empaneled in this suit and returned into the Court the following verdict.
" We the jury find for the Plaintiff and assess his damages at (\$350.00) Three Hundred and Fifty dollars." Thereupon the said defendant entered his motion for a new trial of this cause. The Court being sufficiently advised in the premises doth overrule the said motion. Therefore it is considered by the Court that the said William Peters do have and recover of and from the said John Waggerman the aforesaid sum of (\$350.00) Three Hundred and Fifty dollars. his damages aforesaid and also his costs and charges by him about this suit in his behalf Expended and that he have Execution therefor.

" Thereupon the said defendant entered his motion for an appeal of this cause to the

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" Supreme Court of this State, which is ordered
 " to be allowed on his entering into Bonds,
 " within thirty days in the penal sum of Seven
 " Hundred Dollars, conditional according to law,
 " By agreement of parties the security to be approved
 " ed by the Court. "

And afterwards, To Wit: on the 29th day
 of November A.D. 1858. There was filed in the
 Clerk's office of said Court, a "Bill of Exception
 in words and figures as follows, To Wit:

" William Peters } In the County Court,
 " vs. } November Term A.D. 1858
 " John Wagge-man }

" Be it remembered, that on
 " the coming on of this cause for trial, before said
 " Court and a jury, the plaintiff to sustain the
 " issues on his part, introduced S. A. Rinsey, who
 " being duly sworn, testified as follows - That he
 " knew the parties to this suit - that he was in the
 " employ of plaintiff as foreman, and had been for
 " two years and 3 mos. - That he knew when defendant
 " came to order the Engine & Machinery sued for & charged
 " for in the Bill of particulars filed in this cause, it
 " was in February or March 1857. - know nothing of any
 " contract between plaintiff & defendant, as to price of
 " the machinery, time of delivery or otherwise, none
 " made in my presence. When defendant came we were
 " working on a fire front for Spurck & Dobbins. He
 " was pleased with this and wanted one like it. These
 " fronts are made of different weights - from 500 to
 " 4000 pounds - 5¹/₂ cts. per lb. the price at which
 " this is charged is a fair price. The items of

" plaintiffs Bill were then read over to the witness
 " seriatim. with the prices annexed, and witness
 " testified that. with the exceptions below stated, the
 " articles charged therein & work done, had all been
 " received by defendant. at or about the times
 " charged in said Bill. and that the prices annex-
 " ed to each item in said Bill were fair, and
 " the usual & customary prices for work & articles
 " of the description named. The exceptions refer-
 " red to are as follows - Face plate for pump. put
 " at \$2.20 & Boring. Drilling & Wrist for same. about
 " which witness said. Deft. got the face plate & wrist,
 " but he did not know the size, nor cost of same.
 " as to the charges for Spring packing extra. put at
 " \$30.- Difference between Cross Heads. at \$15. and
 " difference in Rock Shaft arm. at \$12. Witness sta-
 " ted that defendant had before procured plaintiff to
 " make for him certain parts of a Steam Engine.
 " that subsequently by arrangement between the plff.
 " & Deft. deft. brought back the cylinder part of the
 " Engine & some part of the apparatus belonging to it and
 " had them altered. That when first obtained the
 " piston head of the Engine was fixed for hemp pack-
 " ing. this, deft. had altered & fixed with Springs
 " for a different kind of packing. That the whole
 " piston. including Rod. Head. rings. Springs. &c all
 " complete. was worth \$75. The value of the altera-
 " tions made witness did not fix. That the
 " charge for difference in cross heads arose in
 " the same way. The cross heads returned were
 " too large & would not do. Deft. had them alter-
 " ed. but as to the price charged witness could

24
X 8 " not say, so with regard to the difference in
" Rock Shaft, arm. The former were too long &
" had to be cut but witness did not know the
" price, about the alteration valve Rod, witness
" did not know. So also of the charge for 16 5/8 inch
" Bolts, ^{and the 4 bolts for bed frame.} witness knew nothing. This witness then
" stated that it would take a man one day to
" go to Lewistown & another to return & that it
" would take him a part of a day to take the meas-
" ures for an engine, and that the time, service &
" expenses of a man going to Lewistown for that pur-
" pose would be worth \$15. Whether T. E. Moore
" had gone to Lewistown for this purpose, witness did
" not know, as it took place, if at all, before he,
" Witness, came. Witness further stated that
" the Engine was delivered to the defendant in the
" month of April 1857, at the shop of plaintiff, in
" Peoria. That it was worth from \$800. to \$1000.
" That deft. hauled it off in a wagon, told witness
" then that he was well pleased with it, told me
" the same afterwards, at Lewistown. That deft.
" came to Peoria about the beginning of March,
" and was about Peoria for two or three weeks &
" in & out of the shop from time to time. That he
" was continually making changes on the machinery
" as the work progressed, one of the these changes was
" in a check valve or mud valve, which deft. thought
" was too large & it was by his direction altered and
" made smaller. Another change was in the piston head,
" It was adapted for Hemp packing, and deft. had
" it changed & made with Spring packing. These
" are all the changes I recollect. Whether witness
" left Peoria & came back a second time, I do not

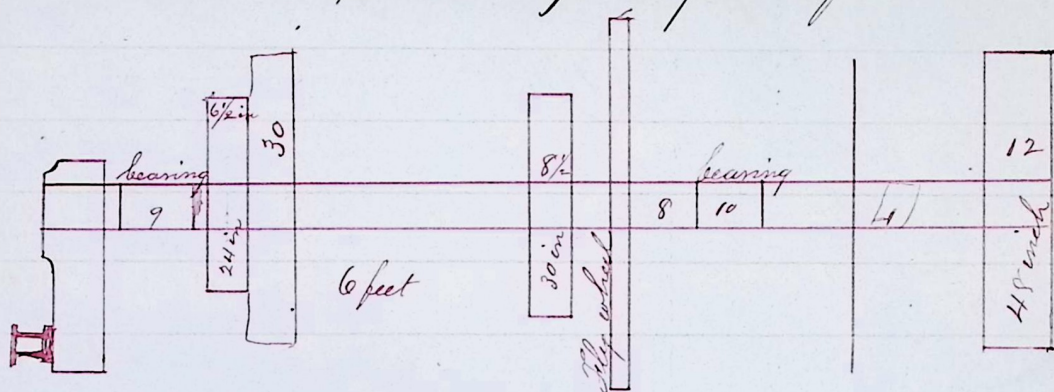
9 " know. Certain acpt. Books were then produced &
" exhibited to witness, who said, these are the Books
" of the plaintiff. One of these Books is his Ledger
" and the other is the Blotter or Day book - plaintiff
" keeps no clerk. I have had acpts. with plff. &
" settled by these Books & found them to be correct
" The practise about the shop was to set down
" the items of work &c. during the day on a slate.
" and in the Evening copy them off into the Books.
" Occasionally this was done directly ⁱⁿ to the Ledger,
" but generally into the Blotter and then, from the
" Blotter into the Ledger. I usually set down the
" work on the Slate, and did a part of the copying
" into the Blotter. about one third of the Entries in
" the Blotter are in my hand writing & 2/3 in the
" hand writing of plaintiff. Witness has been en-
" gaged at Engine making about 15 years.

" Cross Exam. - There was a specified time
" when some pulleys were to be made. but nothing said
" about when the Engine was to be delivered - Defendant
" came to Perria for it about the first of March and
" I suppose expected to get it then, or he would
" not have come. There was a sketch made by me
" of certain pulleys & shafts & their relative position,
" in an order Book kept at the shop. at the time
" the contract for this work was done. the parties came
" to me frequently during the progress of the trade to
" know how certain work should be made, and at
" their request I made the draft. referred to in the order
" Book and the memoranda. in pencil. accompany-
" ing the same. Said Order Book was here presen-
" ted to witness and the draft & entries on page

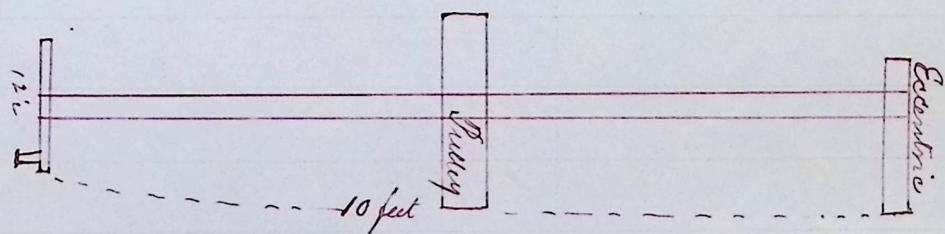
10 \$ 8 " "

shown to him and stated by him to be the same made by him and referred to above. These entries & drafts are as follows.

" " Bill of work for J. Waggermans Mill. One main shaft. 8 feet long. Bearings six feet from center to center. fly wheel Eight inches from center of bearing to face of wheel



One 48 inch pulley 12 inch face to go on end of main shaft. One 30 in 8 1/2 face pulley to go on main shaft. one 24 inch 6 1/2 face pulley to go on main shaft. One wrought Iron shaft 10 feet long with crank flanch on one end to work cold water pump 4 inch stroke. Eccentric on the other end to work hot water pump



one set of Grate Bars & fire front for 48 inch Boiler - bars to be not less than 5 inches in Centre all to be finished on or about the first of March 1857

Ordered by Mr. J. Waggerman

Terms of agreement one half cash. the other half sixty days after the work is delivered

11 2 This Witness further stated that Samuel Steel
was with Defendant when he engaged the Engine
& fixtures of Plaintiff = That is. he was at Peoria
with him and in & out of the shop while the
talk was going on =

Plff. next called William Wier. who
stated that he knew plff. That as clerk & Book-
keeper for Tobey & Anderson he had frequently set-
tled accounts with Plff. and by his Books. and
found them to be correct. An acpt. Book of plff.
was here exhibited to witness which he said was
the book he settled by. but whether it was the
Book of original entries witness did not know.
The Book shown to witness was the Ledger of
Plff. =

3 Plff. then having proved the delivery of several of
the articles charged offered said Books in Evi-
dence to the Jury. Viz. Said Ledger & Blotter, to the
giving of which in evidence Deft. objected, but
the Court overruled the objection and allowed the
accounts of plaintiff with Deft. as shown by said
Blotter & Ledger, to be read in evidence to the
Jury. (which said accounts as appeared on said
Books are as follows = "Blotter."

4 "March 7. 1857.
J. Waggener Dr.
To 17 50 lbs. of fire front
8 1/2 in bolts
4 5/8 " "

1.20
.60 "

12 7

" March 27, 1857

Mr. Waggenman Dr.

To 20, 3/4 bolts 20 @ \$4.00 "

" April 4th 1857.

Mr. Waggenman Dr.

To Drilling feed pipe \$1.50

To boring out 48in Pulley 2.50

To. " " 3 30 inch " 6.00

" " " 1 24 " " 1.50

" fitting up check valve 20.00

Brass valve & chamber 10 1/2 lbs 5.25

Check valve Cham 65 " 5 1/2 3.57

Wrought Iron arch 5 " 100 50

\$35.82 "

" Ledger "

" J. Waggenman Dr.

1857

March	7	To 1750 ^{lb} fire front	5 1/2	96	25
		8 - 1/2 in bolts	15	1	20
		4 - 5/8 in. "	"		60
"	14	290 ^{lb} 1 feed pipe	5 1/2	15	95
"	"	206 ^{lb} 1 Boiler stand	"	11	33
"	27	20 - 3/4 bolts pr pipe	20	4	00
		Drilling pipe		1	50
April	4	Boring 48 in. Pulley		2	50
"	"	483 ^{lb} (48 in.) Pulley	5 1/2	26	56
		481 ^{lb} (3) 30 in Pulleys		26	46
		Boring Same (3)		6	00

63 ^{lb}	1-24 in	5½	3	46
Boring Same	large hole		2	00
120 ^{lb}	1-20 in	5½	6	60
Boring & cutting of Rim			2	50
85 ^{lb}	1 Check Valve	"	4	67
fitting Same	valve &c		20	00
cutting Key seats in	(7) Pulleys & Shafts		10	00
40 ^{lb}	face plate for pump	5½	2	20
Boring Drilling & wrist for same			6	00
1 Stub end fitted for same			7	00
55 ^{lb}	Blow off cock		3	02
Boring & fitting same			7	50
135 ^{lb}	Wrought Pump Shaft.	8 ^{10.80}	7	42
fitting Same	1½ day		6	00
Bore same	30 ^{lb} 180	lining 1.50	3	30
One half cost excentric for Pump			5	00
60 ^{lb}	Safety valve stand	5½	3	30
Valve (5 ^{lb})	fitting drilling		6	00
Difference between Pistons			30	00
Difference between Cross Head			15	00
Alteration in valve Rod			12	00
Difference in Rock Shaft			8	00
4 collar bolts wrought Shaft.			1	50
4 bolts for Bed.	8½ in say	40	1	60
17 ^{lb}	2- I bolts for front	20	3	40
145 ^{lb}	Back Plate	5½	7	97
1270 ^{lb}	(14) grate Bars	5	65	50
time & Expense for More to Lewiston	4 days		14	75
April 16	To Repairing oil Globe		1	00

14	"	To Steam Engine complete per agmt. sold this day	850	00	
"	"	2 Cast steel Drills	1	50	
		^{Taps & Drills returned} 1 Screw Tap	3	00	
May	13	16 - 5/8 bolts 2 1/2 say	3	20	
1858.			\$	1317	74
May	13	28 lbs 1 Rock Shaft. Stand 5 1/2	1	54	
		Paid Wm More fitting same	2	50	
		Drayage to & from Shop		50	
	17	Paid Augustine 5 lbs Brass Gibbe ^{50.}	2	50	
			\$	1324	78 "

1856 J. Waggerman Cr.

Nov.	25	Cr. By Cash towards Engine	150	00	
Feb.	4/57	" " "	100	00	
Marh	17	" " Certificate of Deposit	200	00	
Aug	8	Cr. By Draft Payable in Chicago	300	00	750 00

To which ruling of the Court in
overruling said objection & permitting said
Books to go in Evidence. deft. by his
Counsel Excepted.

Plff then recalled said Kinsey, who stated that the first Engine made by Plff. for deft. Embraced the Cylinder. The Slides. Rock Shaft. Cross Heads. Eccentric. Eccentric Rods. Valve. Valve Rods. & fly wheel. This Engine was never put up or used, but returned to Plff. and the Changes on it made as before stated, which made the machinery more expensive. The chief item of change was the difference in Packing, the other changes made as the altering the length of the Rods. making new Cross Heads & slides or guides for the Cross Heads to work in - and adapting the Engine to an iron frame instead of a wood frame on which it was before built.

5 It was this that made most of the changes necessary - The machinery first obtained was returned to Plff. about the last of January or first February 1857. The new Engine cheap at \$900. There was considerable finishing put on it not originally contemplated - This gave two or three weeks work for one man at a turning lathe. worth \$5. per day = Never heard defendant say anything about a contract. He only requested this, that & the other thing to be done on the Engine.

6 He said the Engine should have been done long before. He did not use the word ought = The things named on the Order Book were done before the first of March 1857. the time named, but could not be used without the Engine = "

10 William Nichols called next by plff. said, he knew defendant. saw him in the

shop of Peters some time after he got the work. but could not tell when, and he said the Engine worked well.

The Plaintiff here rested his case =

The defendant then called Jacob Loker, who testified - That he knew the parties plaintiff & deft. That defendant bro't to the shop of witness, (who is a coppersmith in Peoria,) in the Spring of 1857. some Copper pipe belonging to a steam Boiler, and procured witness to repair the same & make a lot more in addition and fit the same to the heater. That the Bill of witness for what he did was \$45.50. which Defendant paid - The work done & materials furnished by witness were worth the sum of \$45.50 =

7 That pipe was for a Steam Engine & was a necessary part of the machinery - I understood at the time that Plff. was making an Engine for deft. Defendant next called Samuel Steel, who said he knew the plaintiff & defendant - That he came with defendant to Peoria twice, about the purchase of a Steam Engine & other Steam apparatus - first in the month of January 1857. & next about the beginning of February following - That deft. resides in Lewistown. Fulton Co. Ill. & owns & runs a Steam Flouring Mill at that place - Witness also has a Steam mill in said Fulton County for which he wanted to procure an engine & other machinery. That the Engine & fixtures deft. had in his Mill were not of sufficient power to do the work he wanted, and he agreed with

~~with~~ witness to sell & deliver to witness by the first of March 1887. a certain portion of the machinery he had in his Mill. including the old Engine which he had in use. provided he could replace the same by new machinery by that time. and witness came with him to Peoria. either to assist him in contracting for machinery of the kind he had agreed to sell to witness. otherwise witness designed buying new machinery on his own account. if Deft. failed in making the contract he desired. The first time we came to Peoria we did not close any bargain. The next time a contract was made between Plff. & Deft. for the machinery Deft. wanted - we spent two days in concluding the matter. and it was talked over so much that I recollect well what was done - Plff. had before this furnished to Deft. some parts of an engine & the accompanying apparatus which had not yet been put up.

This engine was designed to be set on a wooden frame with bed plates. and it was agreed between the parties that Defendant should return to the shop of Plff. in Peoria. so much of the the Engine & Machinery as would require to be altered. and that Plff. should make an iron frame and adopt the Engine to it. This would dispense with the bed plates. and would require considerable alteration of the machinery.

Plff. said he wanted to set it on an iron frame. and as it was a new thing with him he would do it cheap. He asked \$550. for the Engine & fixtures pertaining to it. if set on a

18 ~~18~~

wood frame & said he would only charge \$50. more for making the iron frame & setting it on it and Dept. at length agreed to bring back the machinery at his own cost, and to give the \$600. for it made complete with all the fixtures belonging to it & set on an iron frame - the whole to be ready for delivery to Defendant by the first of March next following - This was stipulated & agreed on, for the reason that Dept. had agreed to let witness have the old machinery out of his Mill at that time provided he could supply its place immediately with new and this thing was all talked over between Plff. & Dept. the Defendant refusing to contract with me unless he could get the Engine & Machinery from Plff. by the time above named. At the same time that the Contract for the Engine & fixtures pertaining to it was made. Dept. contracted with Plff. for certain other steam apparatus & machinery, which was to be delivered at the same time, & for which defendant was to pay \$220. besides some pulleys for which he was to pay Extra and at the rate of 5 1/2 Cts. per pound. In accordance with this arrangement dept. bro't back to Peoria the Engine Plff. had before made for him & such parts of the machinery belonging to it as required alteration, and it was set on an iron frame & otherwise altered for him by Plff. There was the rim & Eye of a fly wheel pertaining to this Engine which was not bro't back - This was to have been made by plaintiff with iron arms but he made it for wooden arms, which dept. had put in & paid for himself - He got the stuff from me, which was worth five dollars. I don't know how much it

cost him to get them put in. This fly wheel was embraced in the \$600. Contract. and is a necessary appurtenance to the engine & belonged to the plaintiff to furnish complete. The matter of the packing on the piston head was specially talked of. I did not see the inside of the Cylinder and do not know of myself what kind of packing was on the piston as plff. first made it. But I understood from the parties at the time the contract was made that it was Hemp packing. Having a good deal of experience in things of the sort I advised the Deft. strongly to have this changed & have spring packing. and after some talk it was agreed that spring packing should be put in. if defendant wished it. When the bargain was completed I paid the plff. \$100. for defendant, which was also to apply on my contract with defendant for the machinery in his mill. Defendant had paid plff. some money before, as I understood from them. the amount of which I either did not know or do not remember. but whatever it was. it was to apply as part of the \$600. Deft. was to pay for the Engine & fixtures under the new contract. Witness then testified that all the following items of plff.'s Bill. belonged to & went with the Engine & were embraced in the \$600. Contract To wit.

"The following list of articles Enumerated in Plffs' Bill were specially contracted for with the Engine & belonging to it.

- 1 The Engine itself - put at \$850. in the Bill.
- 2 40" face plate for pump. put at $5\frac{1}{2}$ per #

20	12	3	Boring. Drilling & twist for same. put at \$6.00.	
		4	1 Stub End for face plate - put at \$7.00	
		5	135 th wrought pump shaft. put at \$10.80	
		6	fitting pump shaft " " 6.00	
		7	30 th Bores for same & Babbiting 3.30	
		8	half Cost Eccentric for pump " " 5.00	
		9	Spring packing " " 30.00	
		10	Difference in Cross Heads " " 15.00	
		11	Alteration valve Rod " " 12.00	
		12	Difference in Rock shaft arm " " 8.00	
		13	4 Collar Bolts - 150 - 4 Bolts for Bed frame 160 = 3.10	
		14	1 Oil Globe - repairing - put at - 1.00	
		15	2 Small pulleys 1 - 20 in & 1 - 30 inch = } and boring same - put at, in all } 19.92. "	

That all the items of said Bill. following. To Wit:

"List of articles charged in Bill which were contracted for. at the round sum of - \$ 220.00

1	1750 th fire front for Boilers - put at - 76.25.	
2	8-1/2 in Bolts & 4-5/8 in Dr. - put at - 1.80	
3	1 feed pipe - 290 th " " 15.00	
4	1 Boiler Stand - 206 th " " 11.33	
5	Drilling pipe - " " 1.50	
6	1 Check Valve 85 th " " 4.67	
7	1 Blow off Cock & fitting same " " 10.50	
8	fitting Check Valve. Boring Chambers &c. " " 20.00	
9	Safety Valve Stand 60 th " " 3.30	
10	Safety Valve 2.50 - fitting & drilling same " " 6.00	
11	3 T. headed Bolts for fire fronts - 17 th " " 3.40	
12	Back Plate for flues - 145 th " " 7.97	
13	Grate Bars. 1270 th " " 63.50	
14	16-5/8 in. Bolts " " 2.40	
15	20 3/4 in. Bolts for pipe " " 4.00 "	

belonged to & were embraced in the \$220.- Contract. and that the 48 inch pulley, set in the Bill at \$26.56. two of the 30 inch pulleys, amounting, as charged, to \$17.64. and the 24 inch pulley, charged at \$3.46, were to be paid for ~~repairing~~ separately, at the rate of 5 1/2 cents per pound.

The pulleys were to be finished, ready for use, and the 5 1/2 cents per pound was to cover everything & includes the charges in the Bill for cutting key seats & fitting & boring these pulleys = The Copper pipe in the Bill belonged to the Engine fixtures & was part of the \$600. Contract. There was also a cold water pump included, which would have belonged to plff. to furnish. Defendant had this already, and it was agreed between him & the plff. that he should be allowed \$15. on this account, to apply in part payment on the general amount, which would be due to the plaintiff =

On about the 2nd day of March 1857. I went to Lewistown to get the machinery I was to have under my contract with Deft. He had not received his engine & machinery from the plaintiff. I had made my arrangements & could not wait - Deft. was running his mill with the old Engine & machinery he had sold to me. On my insisting on my contract he surrendered it up to me & I took it out of his mill & left it powerless - It lay idle for want of machinery for some time, but I do not know how long. I saw Deft. when he landed the Engine at Liverpool from

2^d 14

a Boat. It was some considerable time after I took away the machinery from Dfts. mill, but how long I cannot say. I have seen the machinery frequently and Examined it, since it has been put up. There is no extra work on it beyond what was contracted for that I can discover. It was to be a finished job. This was spoken of particularly while making the Contract. Deft. said he wanted a complete and well finished job - and plaintiff said it should be so, and that as it was the first job of the kind made at the shop he meant it should not only be complete, but handsome to look at. as to appearance it is an ordinarily neat job. but there is no Extra finish or polishing on it. and no finish that is not necessary to make it work smoothly.

There is however one pulley more than was contracted for, as I think, and the use of which I cannot see. There are two defects in the ~~man~~ working of the machinery. One is with the governor. This works badly - so much so, that the machinery is about as well without it. There should be a governor to all machinery of the kind. I do not know how much it ^{would} cost to remedy this defect but thirty or forty dollars would probably furnish a new governor. The other defect is the Eccentric or Cam rod - six or eight dollars & perhaps something less would fix this. A heater is generally used, and this Engine is so constructed as to require one.

Defendant then offered to prove by witness, that he, witness, is acquainted with Steam

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machinery & Steam Mills & has been engaged in running a Steam Mill for a number of years - That he knows the Mill of Deft in Lewistown in which the machinery purchased of plaintiff was to be & is put - and knows what it was worth per day with the Machinery in & in running order, at the time the Engine & machinery was to have been delivered, as testified by witness - and what it would have readily rented for at that time, and the damage it was to ~~be~~ the plaintiff not to get said machinery at the time - all which evidence was objected to by the plaintiff & excluded by the Court, for the reasons assigned by the Court, that it would only lead to speculative damages - and that no foundation was laid in the testimony for such proof - and that unless witness had worked in this particular Mill he could not be permitted to testify on the subject =

Witness then stated that Deft. was engaged in the milling business - making flour, in Lewistown in the winter & spring of 1857. & until witness took out the machinery pursuant to his Contract, on the 2nd or third of March 1857, Deft. had no other business, and was thrown out of Employment for some time - Ordinary day labor was then worth one $\frac{25}{100}$ dollars per day =

On Cross Examination, witness said - I came to Peoria with defendant in the forepart of January - my contract for Deft's machinery was not completed then - I & Deft. had

VH X-

24 X

agreed, provided deft. contracted with Peters, and on the same day that deft. & plff. closed their contract. Deft. & P. closed ours = It was the second time we came to Peoria that the Engine & fixtures were contracted for = I think the draft in the Order book was made the second time we came =

Defendant next called Edmund Moore, who testified that he knew the defendant. He, deft. owns a steam flouring Mill in Lewistown, Fulton County. and got an engine and fixtures, with some other apparatus, for it, at Peoria in the Spring of 1857. The Engine came about the last of April or first of May. The mill had been idle since about the first of March. the Engine & a part of the other steam fixtures with which deft. before run the Mill having been taken out by Mr. Steele. Deft. had the Rim & Eye of a fly wheel which came from Peoria and was designed for the new Engine. I put the arms into this fly wheel for defendant. The arms are of wood. The work of putting them in was worth Twenty five dollars and this sum deft. paid me for the job = I am a carpenter and pattern maker by trade, and am acquainted with machinery of this sort = I was about the Mill from the time the Engine and fixtures came till they were put into the Mill. Considerable work had to be done on the machinery before it could be got together and put up. There were not bolts enough, and a good deal of Blacksmithing was required. I should suppose

this Blacksmithing to be worth from ten to fifteen dollars - but can't state definitely. what it was worth - There were holes needed in the Bed-frames which should have been cast in, and which had to be drilled out - a key seat had to be cut in the fly wheel - This last was worth .50 cents to \$1.00 The fire front would not fit & come together - and had to be chipped off & fitted. This took considerable time & labor, and was worth six dollars - Deft. did this himself - I don't know about fitting the pipe to the heater - There was delay about getting the Heater - It did not come with the other machinery - nor until after I left - The heater is necessary to this Engine - could not get along without it -

Defendant here offered to make the same proof in regard to witness knowledge of Deft's Mill - its value what it would have rented for, & was worth per day in running order, and the damage to the defendant occasioned by delay in getting the machinery, as by the witness Steele. All which was objected to by plff, and excluded by the Court for reasons before given & deft. Excepted -

Deft. next read in Evidence to the jury the following receipts, to wit:

Received Peoria Nov. 25/56. one hundred & fifty Dollars of J. Haggerman in Part pay for a steam Engine
Jm Peters

26 X

"Received Peoria, Feb 14" 1857.
One hundred Dollars of J. Waggerman on
account

Wm Peters."

X
"Rec'd two hundred Dollars of J. Wag-
german on account
Peoria March 19/57.

Wm Peters"

Also the following letters of J. W. to W. P.
to wit:

"Peoria Sept 14" 1856

X
J. Waggerman Esqr
Lewistown Ill.

Dr. Sir

We are getting your
Engine pretty well along -
I would like to know whether you want a
new heater - Mr. Moore thinks you need a
larger one -

Please write me a line about it

X
I think I will give you a fly wheel made
in segments. for wood arms 11 ft &
weights 1700^{lbs} - I have just put one to an
Engine of this & Does well -

hope to hear from you soon &

Oblige Yours Truly

Wm Peters."

"Peoria Oct. 3^d 1856

X
Mr J. Waggerman
Lewistown

Dr. Sir

Yours of 19th Sept. is

recd. I suppose you begin to think that we are pretty long winded, but I hope you will be as easy as you can. I have had sickness amongst the hands which has kept back your work. We shall be obliged to give you a fly wheel with wood arms. which I think is the best for this size - we have 2 to make of this kind. You say it is hard to get the arms there - I suppose we can get them here, & have them fitted so they will be only to put together, when you get them on the ground. the work is nearly done. I will write when to come, as soon as I hear from you. The arms will be 5 ft. long $6\frac{1}{2}$ in wide $2\frac{1}{2}$ in thick.

Wheel without arms about 1700^{lbs}
I think we shall have a job that will suit you. Yours Truly
O. Peters."

"Peoria Oct 10"/56

J. Waggerman

Dr Sir

Yours of the 8th is Recd.
the weight of your whole Engine will be about 3000^{lbs} probably some less - the work is nearly done & will be completed next week.

You did not say whether you would get your fly wheel arms there. I gave you the size & length in my last letter. It will be better for you to get them there if you can, as it will save the transportation. as for Steam

28 ~~7~~

Boats, they are a scarce article in these parts. & it would not be of any use of thinking of getting your work down in that way. Have you got a good Mill Wright that can fit the arms to fly wheel - Please answer, whether you want me to get your arms - & whether you will want to set the work up as soon as you get it on the ground -

Yours in haste
Jm Peters "

"Peoria Oct 21" 1856

J. Waggerman }
Lewistown }

Dr. Sir. Yours of the 16th is recd. your work is about done except some bolts for fly wheel - as regards the fly wheel arms, I have looked about Town for some. I cannot find any thing that will do, but some plank sawed for plow beams (ash) at \$40. per thousand. & then at a great waste. I saw two men from your place last week, that own a saw mill in your place - they said they could saw your arms most any day. If they have a ash log, & can lay one week before they are put in, after "they are sawed, that will do.

Though if you had rather I would get them here I will do so. but will wait for an answer -

Mr. Moore thinks it will take about one week to start the Engine after it is on the ground - when all is completed you can

send for it. & when you get ready to put it
up. you can let me know & I will send a
man to do it. Yours in haste
Wm Peters "

"Peoria Dec. 10." 1856

J. Waggerman }
Lewistown }

Dr Sir

Yours of the 5th is rec^d.
I have seen the Boiler makers, they tell
me that a 4 flue Boiler size you speak of
will be worth about \$900. = 2 = 12 in & 2 = 15 in
flues. terms $\frac{1}{3}$ ^d when ordered $\frac{1}{3}$ when del^d.
 $\frac{1}{3}$ in 4 months. Fire front = grate bars =
stand pipe. Pumps Copper pipe will
cost about \$220. - your new cilinder is
not quite wright to go on to Iron Bed -

We shall not be able to engage any
more work at present.

Yours in haste

Wm Peters "

Peoria Sept 2^d 1857.

J. Waggerman Esqr }
Lewistown Ill. }

Dr Sir Yours of the 3^d

Aug. was Rec^d in due season - & sup-
posed it had been answered until to day -
at that time I was not fit to attend to
business - the Draft Rec^d of \$300. has
been sent to Chicago & paid - & I have give

30 X
you Credit for the same - I shall Come or
send a man before long to see to that
Governor & settle up

Yours Truly

Wm Peters²²

and here dft. rested -

Plff then offered in Evidence the
following letter of Dft. to plff., viz:

"Sewistown Octo 27. 1856

Mr Peters

Dr Sir I can not git a ash
log here for fly wheel arms so I concluded
that you better git them there

there is no chang to git seasond timber
here for that purpose. Pleas to git it
ready by next thursday the 30 Octo and
I shal send two teams for the engine
and the apparatus thereto belonging and I
will write you when to come to put it up.

If you send any one man send Mr.
Moore to put it up, he is better acquaint
-ted whal the workes here

Yours in Haste

J. Waggenman²²

- which was read to the jury with^{out} objection -

Plff. then called Thomas Scholey - who
stated that an Engine of 10 inch bore &
4 foot stroke with all the fixtures complete
& full finish, was worth \$1000. = With
Black finish the engine alone would be worth
\$600. if polished all over it would add

\$150. to the cost = That Copper pipe. Except pipe into the heater. did not necessarily go with the engine - unless there was a special contract =

Plff. next recalled the witness Kinsey, who stated that the Engine deft. got of plff. was 10 inch Bore & four foot stroke - all the Engine was not polished - only about the arms & joints - was about when Deft. & Steele came. The Draft in the Order Book made Jan 14/57. None of the items in this draft belong to the Engine except the main shaft - This shaft necessary to work the Engine - the Engine was bro't back to the shop by deft to be set on the iron frame & altered. in February. It was worth \$300. with fixtures as first made = without a fly wheel it was worth \$230. to \$250 - Deft. was in Peoria some two weeks waiting for the Engine - He got a Boiler of Wilson & Howard. in Peoria. This he took away with him, at the same time he took the Engine. The Engine was delivered on the 16th of April. and was taken by Deft. as soon as ready = Deft. took the Engine & other machinery by Steam Boat to Liverpool. and all at the same time = The Engine could not be used without the Boiler. nor the Boiler without the Engine =

This was all the evidence in the case. The cause was then submitted without argument or instructions to the jury. who

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returned the following verdict.

\$350. We the jury find for the Plaintiff
in the sum of Three Hundred fifty
dollars

John Congleton Foreman
James Delano
William B. Stewart
John Ramsey
S. Winchester
John White
Edwin Mathews
Jacob Darst
Johnson Updike
Richard E. Elkin
John S. Hornbaker
D. W. C. House "

and thereupon doth moved the Court for
a new trial. for the following reasons.
To Wit:

William Peters } In the County Court
vs } November Term
John Waggoner } A.D. 1858.

The defendant in this
Case moves the Court for a new trial
for the reasons -

- 1st The Court admitted improper evidence
on the part of the plaintiff =
- 2nd The Court excluded proper evidence
offered by the defendant =
- 3^d The verdict of the jury is against the weight
of Evidence in the case -

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4th The verdict of the jury is against law.
5th Said verdict is against the law & the evidence

J. K. Cooper
Atty for Deft "

- which motion was overruled by the Court
& judgment rendered by the Court upon the
Verdict. To which decisions of the Court
in overruling said motion & rendering judg-
ment for plff on said verdict, dft. by his
Counsel then & there excepted - and it was
thereupon by agreement of parties ordered by
the Court, that the Bill of Exceptions in
this case might be made up & signed
& sealed by the judge in Vacation, which
is done =

Wellington Loucks Seal,
County Judge "

Endorsed on the back.

" Peters vs.
Waggenman
Bill of Exceptions

Filed Nov. 29. 1888.

C. Kettelle clk.
per G. H. T. "

And afterwards. To Wit. on the
2nd day of December A.D. 1888,
there was filed in the Clerk's office
of the said Court, an "appeal
Bond." in words and figures as follows

To Wit:

"Know all men by these presents, that we John Waggeman and C. C. Vandyke are held & firmly bound unto William Peters in the penal sum of Seven Hundred dollars for the payment whereof well & truly to be made, we bind ourselves, our heirs, executors & administrators, jointly & severally, firmly by these presents =

But on this condition, That whereas the said William Peters, did, at the November Term A.D. 1858, of the County Court of Peoria County, Illinois, recover judgment against the above bounden John Waggeman for the sum of Three Hundred & fifty dollars, in a certain suit then pending between said parties in said Court, from which said judgment the said Waggeman has prayed an appeal to the Supreme Court - now if the said Waggeman shall duly prosecute his said appeal, and shall pay whatever judgment, costs, interest & damages shall be awarded, in case the said judgment shall be ~~affirmed~~ affirmed, then this obligation to be void, otherwise to be & remain of force & virtue in the law = In witness whereof the said obligors have hereto set their hands & seals, this 29. day of November A.D. 1858,

John Waggeman Seal
C. C. Vandyke Seal

Endorsed on the back.

Peters vs Waggerman

Bond

Approved December

2nd 1858

Wellington Doukes

County Judge

Filed Dec. 2d 1858.

C. Kettelle clk.

*per G. Kettelle
Spty.*

*State of Illinois, 3d.
Peoria County. 3*

*I, Charles Kettelle, Clerk of the
County Court of Peoria County, in the State of Illinois,
do hereby certify that the foregoing is a full,
true and ^{perfect} Transcript from the files and records
of my office in a certain cause in said
Court wherein William Peters is Plaintiff
and John Waggerman is Defendant.*

*In witness whereof, I have hereunto
set my hand and the seal of said Court, at
Peoria, this 21st day of February A.D. 1859.*

*Chas. Kettelle Clerk
per Geo. H. Kettelle
Spty. clerk.*

And now comes the said John Waggeman the plaintiff in Error herein, and says that Manifest Error in the Record, proceedings & judgment of said County Court, in this Cause, hath intervened to his prejudice in this Court;

1st Said County Court permitted improper Evidence for the plaintiff below, to go to the jury on the trial of said Cause =

2nd Said Court Erred in Excluding proper Evidence of fact on the part of the defendant =

3rd Said Court Erred in overruling the motion of said defendant for a new trial of said Cause =

4th Said Court Erred in rendering judgment for said plaintiff upon said verdict =

Wherefore & for other good & sufficient reasons appearing in said Record, said plaintiff in Error & defendant below pray that the judgment of said Court herein may be set aside, reversed, & wholly for naught esteemed =

J. K. Cooper, atty
for plff in Error

And the said William Peters by Charles B. Bonney his attorney comes into court here and says that there is no error, either in the record and proceedings aforesaid, or in the matters

aforsaid, above assigned for error,
and prays that the judgment
aforsaid, in form aforsaid given,
may be in all things affirmed,
xc,

W E Johnson Charles C. Boreney
attorney for appellee

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William Peters

vs.

John Waggenerman

Transcript

From the County Court

Peria County

Illinois.

Filed April 11, 1837

L. Leland

Clerk

Fee Transcript \$14.50

paid by appellant.

Chas. H. H. H.