

No. **12252**

Supreme Court of Illinois

Oliver

vs.

Chicago & Aurora R. R. Co.

71641  7

1 United States of America
State of Illinois Kane County Pleas before the Honorable Isaac S.
Wilson Judge of the Thirtieth Judicial
Circuit in the State of Illinois and Presiding Judge
of the Kane Co Circuit Court at a Term of said
Court begun & holden at the Court House in Geneseo
in said County on the Thirtieth day of May in the
Year of our Lord One Thousand eight Hundred
and fifty six five

Present The Hon Isaac S. Wilson Judge
" Lawrence P. Barker Sheriff
Absent Luther Deaton, Clerk

Be it remembered that whereas heretofore to wit on the 16th
day of January 1853 there was filed in the office of the Clerk
of the Circuit Court of said County an Appeal Bond
of which the following is a copy, to wit:

Now all men
by these Presents that are the Chicago & Aurora Rail
Road Company and C. B. Allen, are held and firmly
bound unto John Oliver in the penal sum of Two Thousand
Dollars lawful money of the United States of America for
the payment of which, well and truly to be made we bind
ourselves, our heirs and administrators, jointly, severally
and firmly by these presents.

Witness our hands and seals this
Thirtieth day of January in the year of our Lord One

Thousand eight hundred and fifty five

The condition of the

above obligation is such that whereas the said John Oliver
did on the eighth day of January A.D. 1855 before A. R.
McWayne a Justice of the Peace in and for the County of
Kane several judgments against the above named Chi-
cago & Aurora Rail Road Company for the sum of One thousand
Dollars from which judgment the said Chicago and Aurora
Rail Road Company has taken an appeal to the Circuit
Court of the County of Kane and State of Illinois. Now
if the said Chicago & Aurora Rail Road Company shall
prosecute their appeal with effect and shall pay whatever
judgment may be rendered by the Court upon dismissal
or trial of said appeal, then the above obligation to be void
otherwise to remain in full force and effect.

Chicago & Aurora Rail Road Company

By Amos T. Hall Treasurer

Seal of
Company

In testimony whereof the Common Seal of the said
Chicago & Aurora Rail Road Company is here af-
fixed this 13th day of January A.D. 1855

Witnesses

W. H. Hawkins

Amos T. Hall Secretary

E. R. Allen

And

afterwards to wit on the 20th day of January A.D. 1855
a Supersedeas was returned by the Sheriff of said Kane
County bring in the words and figures as follows to wit
State of Illinois
Kane County The People of the State of Illinois to A. R. McWayne

beginning Justice of the Peace and a Constable
in and for said County. Greeting;

Whereas, you the said J.R. McWayne a Justice of the Peace as aforesaid, did on the
Eighth day of January Instant, render a judgment in a certain
suit before you, wherein, John Olson is plaintiff and Chicago
& Aurora Rail Road is defendant in favor of the said
John Olson and against the said Chicago & Aurora Rail
Road Company for the sum of One Hundred Dollars and
— cents — viz:

And whereas the said Chicago & Aurora
Rail Road Company have taken an appeal from the
said judgment to said court, and thereupon, executed
an appeal bond with security according to law, now on
file in the office of the Clerk of said Circuit Court. Therefore
I command and require you the said J.R. McWayne
Justice of the Peace, and you the said
Constable as aforesaid, that you do absolutely and entirely
suspend and abstain from proceeding and further in said
suit and all proceedings in relation thereto you do absolutely
by suspension until further order from said Circuit
Court

Witness Luther Deaton Clerk of said Court and
thereof at Aurora in said County this 16 day
of January A.D. 1883

Luther Deaton
Clerk

Great
City

And on the back of said Supersedeas, was the following endorsement, to wit—

Personally served by reading, to the within named C. R. McWayne January 20th AD 1853

L. P. Barker, Sheriff of Kane Co

By J. M. Merrill Deputy
And

afterwards, to wit on the 10th day of March 1853 a Transcript was filed in said case, being in the words & figures as follows to wit—

John Oliver

VS

Chicago & Aurora Rail Road Company,

Garnishes of James W. Kendall defendant
in execution, wherein John Oliver is Plaintiff

Demand \$100

November 24th 1854

Complaint & service 30

Docket 12 1/2

3 cont 37 1/2

2 subp 37 1/2

5 oaths 31

last pay 25

Making filing & maps 30

Const 1,35

Miscellaneous 2,30

On affidavit of William R.

Plaintiff's Agent Garnish summons issued return

37 1/2 Dec on the 2 day of December 1854 at one o'clock

37 1/2 P.M., returned to William R. Miller Plaintiff's Agent Nov

31 27 1854 Garnish summons returned whereby leaving

25 a copy thereof with William H. Hawkins Agent of the

Chicago and Aurora Rail Road Company by L. T. Brien

1,35 least fees 1,35— Dec 2^d Plaintiff appeared by D. L.

2,30 Leartonman, Atty & Garnishes by William H. Hawkins Agt

and cause continued by agreement until Dec 30th 1854 at

one o'clock P.M.— Dec 30th 1854 Plaintiff appeared, Gar-

nishes did not, and cause continued at Plaintiff's request

5

until January 6th 1833 at one o'clock P.M. Dec 30 1832
 subpoena issued at Plaintiff's request. January 6th Plaintiff ap-
 peared. Garnish did not, and case continued until January
 8th 1833 at 12 o'clock M. B. Detrick Plaintiff's witness claim-
 ing same date subpoena issued at Plt's request. January 8th 1833
 parties appeared. Plaintiff D.L. Beutman Attorney, Garnish
 by William, A. Hawkins agent. Hawkins agent admitted that
 the continuances in this case were made at his request, of Plain-
 tiff, by agreement, at that it be so entered, Garnish's answer filed
 subscribed and sworn to by William, A. Hawkins; William, D.
 Hawkins, Sidney McLean, Benjamin Detrick, Gilbertson sworn
 as witnesses for Plaintiff, and it appearing to me that the
 Garnishes were indebted to James M. Kendall as finders in
 execution, it is ordered by that the said Plaintiff have judgment
 against the said Chicago & Aurora Rail Road Company as
 Garnish herein for the sum of One hundred Dollars, and when
 collected the same shall apply upon the said judgment
 against said Kendall in favor of said Oliver. Witnesses claim for

March 2^d Transcript made to circuit Court.

State of Illinois

County of J. A. R. McWayne a Justice of the Peace in and for said County, do
 hereby certify that the foregoing Transcript and papers attached
 contain a full and perfect statement of all the proceedings had
 before me in the therein intitled suit.

Given under my hand this 2^d day of March 1833

A. R. McWayne

Justice of the Peace

6
State of Illinois /
Name County /

The People of the State of Illinois to any Constable
of said County, Greeting: Whereas on the Twenty second
day of September, A.D. 1854 a judgment was rendered before me
in favor of John Chion against James M. Kendall for the sum
of One hundred dollars and eight six cents costs of suit; and
upon said judgment execution has been duly issued and returned
by Jot. S. Randall a Constable of said County, no property found
And whereas affidavit has been made and filed before me setting
forth that said James M. Kendall has no property within the bound-
aries of the precinct in his possession, liable to execution, but that
the Chicago and Aurora Rail Road Company are indebted to
said defendant, or have the effects or estate of said defendant in
their hands, We therefore command you to summon the said
Chicago and Aurora Rail Road Company, to be and appear
before me at my office in St Charles on the 2 day of Dec next
at ten o'clock P.M. to answer as garnishees in said cause
and to abide such order or judgment as shall be made or
rendered in the premises. Given under my hand and
seal at St Charles this 24th day of November A.D. 1854

A. R. McWayne (Seal)

Justice of the Peace

and on the back of said summons was the following endorsement
to wit: "Served the within process, by leaving a copy thereof
with William H. Perkins, agent of the within named Chicago
and Aurora Rail Road Company Nov 27th 1854

Dec 1, 1854

M. Rivie, Constable.

7.

1854. Foster & Kendall

Dr

May 1 st	To cash as per estimate of this date	\$100,00
June 1 st	" " " " " " " "	400,00
July 1 st	" " " " " " " "	300,00
Aug 5 th	" " " " " " " "	120,00
Sept 1 st	" " " " " " " "	100,00
Oct 3 rd	" " " " " " " "	15,00
" "	" " " " " " " "	48,64
" "	" " " " " " " " Parker & Sons	35,00

\$101864

1854

Cr

Dec 1 st	By 5617 Rds of fence finished at 14 ^{cs}	\$786,38
" "	" 3375 " " posts at " 6 ^{cs}	212,50
" "	" 31. " " fence finished Aurora 14 ^{cs}	4,20
" "	" 260 " " " Boards nailed out 7 ^{cs}	18,20
" "	" 80 " " " " " " " "	56,00

\$101688

Balance \$176

State of Illinois

Kane County William A. Hawkins being duly sworn deposes and says that the above and foregoing is a true statement of the account between Foster & Kendall with the Chicago & Aurora Rail Road Co as far as the same is known to him, or between them and James M. Kendall

Subscribed & sworn to before me this 38th day of December 1854

L Dearborn

W. A. Hawkins
Ag't to C & A R R Co

Clerk Kane Co

(12253-2)

x

8 And afterwards, to wit on the 17th day of May 1853 the following motion to dismiss this suit was filed, being in the words & figures following, to wit,

John Oliver

VS

Chicago & Aurora Rail Road Co

And now comes the said defendants and moves the court to dismiss this cause for the reason that there was no service of process on the defendants and the justice had no jurisdiction over the person of the defendants

Plato - Atty for Defs

Y

And afterwards to wit on the 18th day of May 1853 a list of interrogations were filed, being in the words and figures as follows to wit,

State of Illinois, Kane Lemay, Jfs

John Oliver

VS

The Chicago & Aurora Rail Road Company

Of the May Term AD 1853

Will the the Chicago & Aurora Rail Road Company please to answer the following interrogations to wit

1st

Please to state whether or not you had on the 27th day of November AD 1854 any effects, choses in action, in your possession or power belonging to James M. Kendall, if you please to state the number, kind and value of such effects or choses in action,

2^d

Please to state whether or not you were indebted on the 27th day of November AD 1854 to James

9

M. Kendall in any manner or form, if you please state the nature and amount of such indebtedness fully and particularly

Eastman & Ferguson

Att'y for Pltiff

And afterwards to wit on the 24th day of May A.D. 1855 the answer of the Defendants was filed, being in the words and figures following, to wit:—

John Olson

vs

Same Circuit May Term 1855

Chicago & Aurora R.R. Co. as Garnished

The answer of the above named defendants to the interrogatories filed in this cause, taken under the common seal of said Corporation, as by the said Seal affixed appears, To the first Interrogatory the said defendants say,

That on the 27th day of November A.D. 1834 they had not any effects, choses in action, in their possession or power belonging to James M. Kendall.

To the second they say, that on the 27th day of November A.D. 1834 they were not indebted to James M. Kendall in any manner or form.

In testimony whereof the Common seal of said Corporation, is hereunto affixed this 21st day of May A.D. 1855

Amos T Hall Treasr

Charles C. R. Co.

Seal of company

Attest

Amos T Hall

Secretary C & A. R. R. Co.

10

and afterwards, to wit on the 29th day of May 1853
the defendant filed Plaintiff filed his motion for a new-
trial being in the words and figures as follows, to wit.

John Olion

15

Kane Co Circuit May 29th 1853

Chicago (and) Aurora

Rail Road Company

And the said Plaintiff here makes his ap-
plication for a new trial in the above entitled
cause, and for special causes files the following points

1st

The verdict of the jury was against the law and the
evidence

2^d

The verdict was against the right of evidence

3^d

The Plaintiff has discovered new evidence since the above
cause was submitted to the point that the Miller con-
tract of the parties was entirely cancelled by the said Rail
Road Company & Foster & Kendall and that the said com-
pany were indebted to the said James M. Kendall in the
sum of about \$250 on the last of October 1852

D. L. Eastman

Pltff's Atty

John Olion

to

Chicago (and) Aurora

Rail Road Company

Kane County Circuit Court

May Term A.D. 1853

John Olion on oath swears he has been informed
and believes he can prove by one Jeremiah Randall who
resides at Aurora Ill. that the contract between the said

above named Defendants said Foster & Kendall offered in evidence on the trial of the above cause by the Defendants was wholly annulled and cancelled by the said Defendants on or about the 1st day of July last; and that the said company employed James McKendall from the said 1st day of July 1854 till the last of September or first of October last to build fences for the said company and that there was due said James McKendall in November last for said work so done some two or three hundred dollars, the exact amount this affiant has not learned. Affiant further states that he did not learn of the testimony of said Witness until since the trial of this cause last week, although he had caused diligent inquiry to be made by his agent and attorney to ascertain all the proof proof he could relate to the annulling of said contract and had sent his agent to Aurora several times to obtain proof for the trial of this cause. Affiant resides at St Charles and said Remond at Aurora and is a stranger to affiant. Affiant further states that from the facts he has learned relative to what said Witnesses will testify to in this cause, which facts he believes to be true and have been learned as aforesaid, he can prove a full and sufficient case as aforesaid by said Witness, and he therefore asks that a new trial may be granted that justice may be done.

Subscribed and sworn to before me this 29th day of May A.D. 1853

John Oliver
 Seal
 Notary Public

Rolla French

Notary Public

12 State of Illinois
Name County

Name County Circuit Court, May Term
D. S. Eastman on oath saith that he has the was the counsel in the above entitled cause and has carefully read the contents of the affidavit of the said John Oliver herein before set forth, that the said material facts stated in said Oliver's affidavit so far as relate to the testimony of said Randall and that the existence of said testimony was wholly unknown to this affiant until since the trial of said cause last week.

Subscribed & sworn to before me this 29th day of
May 1855
A. M. Birmingham
Notary Public

D. S. Eastman

And afterwards, to wit, on the 25th day of June A.D. 1855, the Plaintiff filed his Bill of exceptions being in the words and figures as follows, to wit:

State of Illinois
Name County

John Oliver

Name County Circuit Court
May Term 1855

The Chicago & Aurora Rail Road Company

And now comes on to be heard the above entitled cause on the 25th day of May 1855 it being one of the days of the above named Term the parties appearing by their respective Attorneys General, and by order of the Court the jury came and were duly impaneled &c.
The Plaintiff called the following witnesses.

who after being duly sworn, testified as follows—

Sidney Welden stated as follows

I know James M. Kendall, worked for him and Foster, in the Spring and summer of 1834. I know of his building fence for the Chicago and Aurora Rail Road Company in 1834 Spring and summer, they made fence from Aurora West to the "A" some 23 or 24 miles. I worked for Kendall & Foster, began on the last week in March, 1834 and worked most sometime in June. Fence was made of cedar posts and boards, each side of the Rail Road. the posts were put into the ground two feet or more. The boards were 12 and 16 feet long. fence was 4 boards high, each board 6 inches wide, the panels were 6 and 8 feet long, about $\frac{1}{2}$ the boards were 12 feet the balance 16 feet long. average worth 15 cents per rod to build the fence, worth to set the posts 12 $\frac{1}{2}$ cts per rod, to nail on the boards 9 cents per rod. About $\frac{2}{3}$ of the whole length of fence was complete, balance posts only were set. Mr Kendall, Benjamin Dietrich, and myself worked on the this fence. A Foster, worked from Indian creek East to a saw mill. Went then to the junction and worked West to ^{near} Batavia. A Foster commenced work East of Aurora, I think the last of June. I never heard Foster & Kendall say they could not agree. Foster worked East of Aurora 5 or 6 weeks. I worked for Nathan Foster East of Aurora, Foster paid me. Kendall & Foster ceased working together in June. Foster had some timber men working for him while I was there. William A. Newkins superintended.

the selling of the lumber for the Rail Road company. I have seen Mr Hawkins pay Foster money. Foster gave me an order on Hawkins for my wages. Hawkins gave general directions about the lumber.

Joseph Lyman

I have seen Mr Hawkins pay

Kendall and Foster money. he has paid me money.

Wm. Lyman

Hawkins paid me about \$50 have seen him pay money to different hands, don't know how much.

Nathan Foster born,

And testified as follows. I know James M. Kendall and William H. Hawkins. Kendall and I worked together for the Chicago and Aurora Rail Road Company, from March till July 1854. Kendall and I then dissolved partnership. It was on the 7th day of July I think. Kendall and I disagreed and I asked Mr Hawkins if we could not dissolve partnership. and he said no, might. I tried to buy Kendall out. he would not sell; offered to sell out to Kendall and he would not buy. He could not agree. I went to Mr Hawkins and told him, I would not work any longer with Kendall; that we had tried to arrange our difficulty and could not. Mr Hawkins was the agent of the Rail Road Company in the General Department. He told me and Kendall to come down Sunday and he would fix it up. On Sunday the 7th day of July, I and Kendall went down to see Hawkins. found him at his house at Aurora. We were some two or three hours. we could not come to terms. Hawkins proposed that I should give up all the tools and interests I had in the work done.

and that Kendall should pay me fifty dollars for my interest therein, and that Kendall was to go on and finish up the work. I told Hawkins I was not willing to do that as Kendall had offered me \$75 the day before. I offered Kendall \$100 then \$200 if he would give up the work to me, but he would not do it. I finally agreed to take the \$50, and gave up all the work and tools to Kendall. Hawkins paid me \$38 and kept back \$12 which I owed Kendall on my private account. on old debt Hawkins said if I would do that he would give me work up in the woods. I asked him what price he would pay me, and he punched me with his arm and said he would pay me what it was worth. I saw him soon afterwards in Chicago. had another talk with him, about the price, he said he did not know what it was worth but he would pay me what was right. I went to work for the Leominster fencing. Due my orders to pay my men on Mr Hawkins, and he paid some of them, all except one or two. Kendall was at work at this time between Waukegan and Menasha, building fence for the Chicago and Aurora Rail Road Company. He had 3 or 4 men. I asked Mr Hawkins how Kendall was getting along and he said, well. I did not see him myself. Kendall and Foster, prior to the 7th of July 1854 drove 24 miles of posts, they put on 6 miles of boards in one place and 8 miles in another. 14 miles in all is worth from 10 to 12 cents per rod to sharpen and drive, the posts and 4 cents per rod to nail on the boards. He (Kendall & Foster) dissolved the 7th day of July 1854.

Hawkins paid me \$50 on Monday following for Kendall for my interest. There was at that time one Kendall & Foster from the Rail Road Company between \$2000 & \$4000 which was to go to Kendall, I had no more to do with Kendall, he could not agree and I was determined to get clear of him.

Crop Examination — Kendall and I looked the Books all over, he calculated the fence completed at 14 cts per rod and 10 cts for setting the posts. Hawkins agreed to pay us 14 cts. The contract price was 13 1/2 cts per rod. He agreed to be paid monthly, about six weeks after, we commenced to get \$90 in 5 or 6 weeks after that we got \$400 and \$25 in debts owed ^{around} town. Kendall got \$50 or \$100 in Chicago, not for sale, which, Hawkins paid Kendall \$200 for part of August. Hawkins said he paid \$48 to 4 Posthumans. Hawkins said when we first talked about dissolving he would divide us up. In the first place I finally offered to take \$100 and give all up to Kendall. Kendall offered \$75. I told him, once in heat of conversation, to give me a woman and I would leave all to him. We then dissolved and I was released from building the fence, some two months after the 1st of July. Hawkins told me for the first time he intended to hold me on the contract. He told me a dozen times I should be made good. said he should take off of Kendall's note and put on to mine, he told me this first in August last past. Which he did not tell me so till first of September. said he did not want Mr Johnson, to know about it. The first time he talked about

the written contract was in September He wanted I should keep it still. He told me very often, when I desired to know what he was willing to pay me, to go on and do the work and I should have my pay, let it cost what it would. He paid me \$50 or \$55 in cash at the Junction the next morning after, in disbursements. Mr. Kendall was present.

George W. White sworn.

I have been ~~employed~~ engaged as an engineer for the past three or four years. I am acquainted with the land West of Aurora where the Chicago & Aurora Rail Road crosses mine. I had a contract to build some fence for the company West of the village some three years ago. I then hired the witness Foster to testify. I was to build such fence as he describes. They were to pay me 15 cents per rod for building it & on the 4th of 1833 it is worth 14 cents per rod to build the fence it is worth 10 or 11 cents to set & sharpen the posts. It is worth more to build fence last year than in 1833. Labor is higher, & boards is higher, if it was worth 11 cents then to set posts per rod it was worth more in 1834. if it was worth 15 cents per rod to complete the fence in 1833 in 1834 it was worth 17 cents to build the same fence.

Cross Examined

No questions

Plaintiff here rested.

The Defence called the following witnesses, to wit: William A. Hawkins was sworn.

I know Mr. Foster, & Kendall. They built fence for the Chicago and Aurora Rail Road Company as

follows, between the last of March and last of November 1884 to the amount of \$1016.88 -

They have two statements, West of Aurora they have \$1016.88
East of Aurora " " 133.55

Foster has also made some crop signs amounting to \$4.50

I allowed 14 cents per rod for fence finished

\$617 rods of finished fence \$786.80

30 rods " " 4.20

3375 posts set I allowed 6 cents per rod \$202.50

260 Rods of boards nailed on 7 cents 18.20

80 " " " " " " 5.60 = \$1016.88

I have paid Kendall & Foster, West of Aurora not done \$1016.64
leaving balance over paid by the company of \$1.76

They were to be paid monthly - They had begun work the last of March - they had difficulty the last of June - Foster & Kendall came to me to make some arrangement, to buy each other out, or have an estimate, or devise some means to settle - Foster seemed to be determined to be released from Kendall they wanted I should allow them to do their own work separately and to draw their pay separately - I told them if you won't agree let Kendall take the work below Aurora and Foster give up the work - I told them that I should hold them responsible to the company - they talked a good while, but went away and came to no definite settlement - I next saw them at the Junction the next morning, they came to the cars, said they had agreed on a sum, I was to pay Foster, that I should pay him \$30, or rather I should pay him \$28 and account to Kendall for \$12 which was due Kendall from Foster

19

on account and Kendall was to have all the tools. I paid Foster the money. Kendall went on to his work and Foster went to Chicago with me. nothing was then said about written contract, nor at Chicago about it, did not see them at the Junction more than five minutes. A week or ten days after, Foster was to go to the woods east of Aurora to put up fence, told him I would allow him a proportionate wage, told him I should take from Kendall's account and add to his, as it was proportionally worth. A week or two after, Foster wanted to know what was going to allow him on his fence, - told him I would allow him what was right. - I refused to release them, I did not settle with Kendall. I allowed Mr Kendall 14 cents per rod after this disposition, was not as much fence as I had thought I allowed Foster east of Batavia Aurora in premium. 33 rods 14 cts = \$4.59.20 Woods per rod ~~was~~ 35 cts per rod 34 33 rods \$11.85. I supposed it was worth 14 cents per rod. worth to set posts 6 cents. I paid balance of posts at 6 cents.

Crop Examination. Saturday Morning

After the 7th of July 1854 there was of the 5.6 17 rods of fence built 1/4 of it was finished. one half of the 3375 posts above referred to, one half were set after the 7th of July 1854. Mr Kendall superintended the work west of Aurora after the 7th of July. He had other men engaged with him, I paid men that worked with him for the company.

Kendall drew orders in his own name - He drew some \$400 East of Aurora. Prairie at 28 rods at 14 cents 2,480 was at 25 cents per rod - Foster, superintended building this fence. I paid his men. He drew orders on me in the name of Nathan Foster, drew five or six hundred dollars - There were no orders drawn after the 1st day of July in the name of Foster ^{and} Kendall, having usually set same price for nailing on boards as for setting posts. I have not paid Kendall and Foster any money since July 1st 1834 I paid James M. Kendall Sept 18 - 1834 \$100 Oct 21st \$150 \$48.64 was paid to Dentonman on orders drawn in James M. Kendall's name. Balance of orders of \$200. was not accepted. I have since settled with Nathan Foster, and paid him ^{for} the work East of Aurora -

Mr Parker, Swm -

I have been engaged in building fence, I done some work for Mr Kendall. last of September, commenced sharpening posts and setting on boards - was to have 5 cents per rod for nailing on boards, driving posts ^{and} 7 cents per rod for driving posts nailing on boards. I heard Kendall say he was going to quit the work said he had quit work on the first end, as he did not what I would do or for, told him I would do it for 12 cents as I was near home. This was first of November, he gave me 8 cents to nail on boards and 6 cents for driving posts, said that was what he had for doing the work. Kendall said he had a partner who was at work in the

Big Woods. It was worth to build this fence what I could get. I have a contract with the company to finish what Kinsdale did not do. I can make as much a day at setting posts at 6 cents as nailing on boards at 8 cents although it is much harder work to set posts. The Deft's then offered in evidence the contract between The Rail Road Company & Kinsdale & Foster, the execution of which was duly proven, the plaintiff objected the Court overruled the objection and allowed said contract to be read as follows, to wit:

This Article of Agreement
Made this 10th day of April A.D. 1834 Between, Nathan
Foster and O. M. Kinsdale of St Charles Boone County
and State of Missouri of the first part and the Chicago and
Aurora R.R. Co. of the second part

Witnesseth that the
said party of the first part agree to build and construct
40 miles or more if said R. R. Co. shall require of Posts and
Board Fence along the line of said R. R. Tract, to be
built of 12-14 and 16 ft Boards, said posts to be
set in the ground two & 1/2 ft substantial and perma-
nent, the boards to make joints on each post
to be four boards high, six nails in each board
to diverge from the main line of said fence (which
is main road to be fifty feet from the
centre of said R. R. Tract) to said Rail Road track at
all crossings as may be directed by the agent of said
company said work to be performed, as fast as

ten men can do the same, or as said Company may direct said work to be commenced as soon as said company shall furnish the materials for the same, and all the work as above mentioned to be done in a good workman like manner.

For which said R. R. Co^s agree to pay to said Foster & Kendall Thirteen and 1/2 cents per Rod, and said Co are to lay said posts and boards along said R. R. Track in car loads or parts of car loads as the case may be, and for the work as done by said Foster & Kendall, said R. R. Co^s are to make payment as above mentioned rates monthly or as soon thereafter as estimates may be made - meaning 10 per cent on each estimate until said work is finished and when the post are now set the said parties of the first part are to put on the boards and finish the same for seven cents per rod, and if said company shall decide to batter and cap said fence it shall be done under the directions of the agent of said company and the party of the first part is to have for all such batter and cap fence two cents extra per rod.

In presence of

Holmes Miller

W. Johnson Sup^y of R. R. Co^s
Nathan Foster agent
S. M. Kendall

to which decision of the Court in allowing the same to be read the Plaintiff excepted.

The above was all the evidence in the case.

Whereupon the Plaintiff asked the following instructions, which was given by the Court to the jury together with a qualification asked by the Defendants.

That if the jury believe from the evidence there was justly due James M. Kendall any sum from the Chicago & Aurora Rail Road Company on the 27th day of November 1834, that the said Plaintiff is entitled to a judgment for such amount so and not exceeding One thousand dollars.

Qualification to Plff's Inst.

That it is wholly immaterial whether the original contract between Foster, & Kendall and the defendant was cancelled or not, except so far as it may tend to show whether the Def's were indebted to Kendall, & the jury must find for the Defendants, unless the Plaintiff has proved that the

Defendants were indebted to James M. Kendall on the 27th day of Nov 1834, and under the issue in this case the burden of proof is on the plaintiff.

Thereupon the jury retired to consider of their verdict, and afterwards came into court and rendered their verdict against the plaintiff.

Whereupon the said plaintiff entered his motion for a new trial and filed his points in writing therefor, and filed his support affidavit in support thereof, being in the words and figures as follows, to wit,

John Quinn
vs
Chicago & Aurora
Rail Road Company

Have been plaintiff May Term 1835

And the said Plaintiff here makes his application for a new trial in the above entitled cause, and for special causes files the following points

- 1st The verdict of the jury was against the law and the evidence
- 2^d The verdict was against the weight of evidence
- 3^d

The Plaintiff has discovered new evidence since the above case was submitted to the point that the written contract of the parties was entirely cancelled by the said Rail Road company & Foster & Kendall, and that the said company were indebted to the said James M. Kendall in the sum of about \$350 in the last of October 1834

W. S. Constantine

Att'y

23 John Oliver

vs.

Chicago & Aurora Rail Road Company

Hancock County Circuit Court
May Term AD 1855

John Oliver on oath saith he has been informed and believes he can prove by one defendant, Randall who resides at Aurora Ill. that the contract between the above named defendants and Foster and Kendall offered in evidence, on the trial of the above cause by the defendants, was wholly annulled and cancelled by the said defendants on or about the 7th day of July last, and that the said company employed James M. Kendall from the said 7th day of July 1854 till the last of September or first of October last to build fence for the said company and that there was one said James M. Kendall in November last for said work to some two or three him and Dollars, the exact amount this Affiant has not learned.

Affiant further states that he did not learn of the testimony of said witness until since the trial of this cause, last week, although he had caused diligent inquiry to be made by his agent and attorney to ascertain all the proof he could relative to the annulling of said contract and had sent his agent to Aurora several times to obtain proof for the trial of this cause. Affiant resides at St. Charles Mo. said Kendall at Aurora, and is a stranger to affiant. Affiant further states that from the facts he has learned relative to what said witness Wilkes will testify to in this cause which facts he believes to be true, and has ~~been~~ learned as aforesaid, he can prove a full and perfect case as

affirmed, by said returns, and he therefore asks that a new trial may be granted that justice may be done.

Subscribed and sworn to before me this 29th

day of May AD 1833 - Rolie French

Notary Public

John Oliver

State of Illinois ss. Name County Circuit Court May Term
Name County ss.

D. L. Eastman on oath saith that he was the counsel in the above entitled cause and has carefully read the contents of the affidavit of the said John Oliver herein before set forth, that the material facts stated in said Oliver's affidavit so far as relates to the testimony of said Russell and that the existence of said testimony was wholly unknown to this affiant until since the trial of said cause last week.

Subscribed and sworn to before me this

29th day of May 1833 - A. M. Huntington

Notary Public

D. L. Eastman

and after argument of counsel the Court overruled said motion, to all of which ruling of the court the said plaintiff by his counsel then and there excepted, and prayed his appeal to the Supreme Court, as the Law in such case points out and by agreement of the parties are allowed 30 days from the adjournment of the court to perfect his bill of exceptions and perfect his appeal.

Isaac S. Milson, Esq.

And afterwards, to wit on the 30th day of July there was filed in the office of the Clerk of the Circuit Court for said Kane County an "Appel Bond," being in the words and figures as follows, to wit:

Now all men by these presents that we John Oliver as Principal ^{and} William R. Miller as surety of the County of Kane and State of Illinois are held and firmly bound unto the Chicago & Aurora Rail Road Company in the sum of One Thousand Dollars to be paid to the said Rail Road Company or assignee, for which payment well and truly to be made we bind ourselves our heirs, executors and administrators, and each of them firmly by these presents, Witness our hands and seals this 30th day of July A.D. 1853

The condition of this obligation is that whereas at the May Term of the Kane County Circuit in the State of Illinois, held at Genoa ~~A.D. 1853~~ 1853 Judgment was rendered by the said Court against said John Oliver and in favor of said Rail Road Company in an appeal suit wherein said John Oliver was Plaintiff and the said Chicago and Aurora Rail Road Company were Defendants from which judgment an appeal was prayed by the said Oliver. Now if the said condition of this said Bond be such that if the said John Oliver shall pay or cause to be paid the judgment appealed from and all costs in, case, judgment shall be affirmed and shall also duly prosecute said appeal, then this obligation to be void, otherwise of full force and effect

28 Signed and sealed the day first above written,
Approved the 30th day of August 1 John Olm
1853 Isaac S. Wilson, Judge of the Wm R. Miller seal

United States of America

State of Illinois Peace Court, I was before the Honorable Isaac S. Wilson
Judge of the Thirtieth Judicial Circuit in the State
of Illinois and presiding Judge of the Kane's Circuit
Court at a Term of said Court begun and held at the
Court house in Geneva in said County on the
Twelfth day of May in the year of our Lord One
Thousand eight hundred and fifty five

Present The Hon Isaac S. Wilson, Judge
Samuel P. Parker Sheriff

Attest Luther Deaton, Clerk

Whereas heretofore to
wit on the 27th day of February 1855, it being one of the
days of the February Term of said Court the following among
the proceedings were had to wit,

John Olm

vs

The Chicago & Aurora Rail Road
Company

Appeal

This day comes D. S. Eastman
and enters the appearance of Plaintiff

And afterwards to wit on the 18th day of May AD 1855 it
being one of the days of said the May Term of said Court the

27 following among other proceedings were had, to wit:

John Olson

Chicago & Aurora Rail Road Company

Appeal

This day comes the Defendant by Plea their Attorney and moves the Court to dismiss this suit, after argument of counsel the Court being fully advised overrules said motion, & thereupon the Defendant by his counsel accepts. And thereupon on motion of Plaintiff the Defendant is ruled to answer by Barstow to the Interrogatories filed herein by Thursday morning, next.

And afterwards to wit on the 3rd day of May being one of the days of aid day, then the following among other proceedings were had to wit:

John Olson

The Chicago & Aurora Rail Road Company

Appeal

This day comes the Defendant ^{Plaintiff} by lastman his Attorney & accepts to the answer of the Defendant and denies the truth thereof. after argument of counsel, the Court being fully advised, overrules said exception, to which ruling of the Court the Plaintiff by his counsel accepts. And thereupon on motion of Plaintiff it is ordered by the Court that a jury come whereupon came a jury of good and lawful men, to wit: Seth Sherwood, Art Knight, Nathaniel Grant, A. B. Anderson, John R. Robinson, A. P. Coy, James Rose, Simon, Drake, P. F. Kimball, J. S. Chamberlain, M. P. Hancock, J. P. Garfield who being solemnly elected, tried and sworn also come and after hearing

a portion of the evidence it is agreed that the jury may separate until the court to morrow morning at 8/9 o'clock

And afterwards to wit on the 26th day of May it being one of the days of said May Term the following among other proceedings were had to wit

John Allison

The Chicago & Aurora Rail Road Company

{ Appeal

This day comes the Parties to this suit, and the jury heretofore empaneled herein also came and after hearing the argument of counsel and instructions of the court retire under charge of a sworn officer of the court to consider of their verdict & subsequently return into court for a verdict upon their oaths says the jury find the issue joined in favor of the Defendant, and thereupon comes the Plaintiff by Beasman his attorney, & moves the court for a new trial herein

And after words to wit on the 31st day of May 1883 it being one of the days of said May Term of said Court the following among other proceedings were had to wit

John Allison

The Chicago & Aurora Rail Road Company

{ Appeal

This day comes on to be heard the Plaintiffs Motion for a new trial heretofore entered herein after argument of counsel the court being fully advised overrules said motion to which ruling of the Court the Plaintiff by his counsel excepts It is therefore considered by the Court that the Defendants

have and recover from the Plaintiff their costs in this behalf expended & have execution thereon. And thereupon the Plaintiff prays an appeal to the Supreme Court which is allowed. Plaintiff give bond in penal sum \$100 by 1st of August to be approved by the Judge in vacation, on condition that Bill of Exceptions to be made in thirty days by Agreement.

State of Illinois
Humboldt

Jes I Luther Dearborn

Clerk of the Circuit Court in & for
Said County in the State aforesaid do hereby certify
that the above foregoing is a full perfect and
complete copy of all the papers in the above
entitled cause & of the orders of Court & Bill of
Exceptions as appears from the files & records of
said Court

Witness my hand and Seal of said Court
at Genoa in said County this 26th day
of May A.D. 1836

Luther Dearborn
Clerk

Supreme Court Record

John Oliver

✓
Chicago & Aurora
Rail Road Company

Filed May 29, 1856
Skeland
D. H.

\$ 9.⁰⁰

State of Illinois,
KANE COUNTY, SS.
JOHN OLIVAR

IN CIRCUIT COURT,

May Term, 1855.

vs.
CHICAGO & AURORA RAIL ROAD COMPANY. } Appeal from A. R. McWayne, J. P.

An appeal bond, by the defendants in the above entitled cause, was filed in the Clerk's Office of said Court, January 16th, 1855.

3 & 4. On the same day a *supersedeas* issued to stay proceedings in the court below, and returned, served, Jan. 20, 1855.

A transcript in said cause was filed in said Circuit Court, May 10, 1855, certified to by said Justice, which transcript is in the following form:

4 & 5. JOHN OLIVAR
vs.
CHICAGO & AURORA RAIL ROAD COMPANY.
Garnishee of James M. Kendall, Defendant in execution wherein
John Olivar is Plaintiff. } Demand \$100.
November 24, 1854.

By which said transcript it appears that on the 8th day of January, 1855, judgment was had in favor of said plaintiff vs. Chicago & Aurora Rail Road Co., as garnishee, for the sum of \$100—the same when collected to be applied upon judgment against said Kendall.

6. And with said transcript, on the same day was also filed, the garnishee process, issued from the justice court vs. said defendants, on which was the following endorsement, to wit:

"Served the within process by leaving a copy thereof with William H. Hawkins, agent of the within named Chicago & Aurora Rail Road Company.—November 27, 1854.

J. T. BEVIER. Constable."

7. Also the answer of said defendant, sworn to and subscribed by said W. H. Hawkins, as agent of the C. & A. R. R. Co., in which it appears Foster & Kendall were indebted to said defendant in the sum of \$1,018.64 and credit had been given them in the same sum.

28. Afterwards, to wit: the 27th day of February, 1855, it being one of the days of February term of said court, came D. L. Eastman, attorney, and entered the appearance of plaintiff.

Afterwards, to wit: the 17th day of May, 1855, it being one of the days of the May term of said court, came Plato, attorney for def'ts, and entered a motion to dismiss this cause, for the reason that there was no service of process on the defendants, and the justice had no jurisdiction over the person of the defendants.

Afterwards, to wit: the 18th day of May, 1855, the plaintiff by his attorneys filed a list of interrogatories, in words and figures, as follows, to wit:

8. "Will the Chicago & Aurora Rail Road Company please to answer the following interrogatories, to wit:

1st. Please to state whether or not you had on the 27th day of November, A. D. 1854, any effects, choses in action, in your possession, or power belonging to James M. Kendall; if yea, please to state the number, kind and value of such effects, or choses in action.

2d. Please to state whether or not you were indebted on the 27th day of November, A. D. 1854, to James M. Kendall, in any manner or form; if yea, please state the nature and amount of such indebtedness, fully and particularly."

29.

And on the same day, after argument, etc., the court over-ruled the said motion to dismiss, and thereupon the defendants by counsel except. And thereupon, on motion of plaintiff, the defendants were ruled to answer the interrogatories herein filed, by Thursday morning next.

And afterwards, to wit: the 24th day of May, 1855, the answer of said defendants was filed, in words and figures as follows, to wit:

The answer of the above named defendants to the interrogatories filed in this cause, taken under the common seal of said corporation, as by the said seal appears.

To the first interrogatory the defendants say,

That on the 27th day of November, A. D. 1854, they had not any effects, choses in action in their possession, or power belonging to James M. Kendall.

9.

To the second they say,

That on the 27th day of November, A. D. 1854, they were not indebted to James M. Kendall in any manner or form.

SEAL OF
COMP'Y.

In testimony whereof, the common seal of said corporation is hereunto affixed, this 21st day of May, A. D. 1855.

Attest,

AMOS T. HALL,

Secretary C. & A. R. R. Co."

AMOS T. HALL, *Treasurer,*
C. & A. R. R. Co."

29.

And afterwards, to wit: the 25th day of May, 1855, the plaintiff by Eastman, his attorney, comes and excepts to the answer of the defendants, and denies the truth thereof; after argument, etc., the court advised, overrules said exception, to which ruling of the court the plaintiff excepts; and thereupon on motion of plaintiff, it is ordered by the court that a jury come, whereupon a jury came, and after hearing a portion of the evidence, it is agreed that the jury separate and meet the court to-morrow morning.

30.

And afterwards, to wit: the 26th day of May, it being one of the days of said May term, the parties to this suit come, and the jury heretofore empaneled herein also come, and after hearing arguments, etc., and instructions of the court, retire to consider of their verdict, and subsequently return into court, and for a verdict, upon their oaths say, "we, the jury, find the issue joined in favor of the defendant;" and thereupon comes the plaintiff by his attorney, and moves the court for a new trial herein.

10.

And afterwards, to wit: on the 29th day of May, 1855, the plaintiff by his attorney files his motion for a new trial, and for special causes files the following points:

1st. The verdict of the jury was against the law and the evidence.

2d. The verdict runs against the weight of evidence.

3d. The plaintiff has discovered new evidence since the above cause was submitted to the point, that the within contract of the parties was entirely cancelled by the said Rail Road Company and Foster & Kendall, and that the said company were indebted to the said James M. Kendall in the sum of about \$250 on the last of October, 1854.

11.

And with said special causes were filed the following affidavits.

Affidavit of John Olivar, plaintiff herein, who on oath, says, he has been informed and believes he can prove by one Jeremiah Randall, resident of Aurora, Illinois, that the contract between the defendants herein and Foster & Kendall, offered in evidence in trial by said defendants, was annulled and cancelled by said defendants on or about the 7th day of July last; that said company employed said Kendall from the said 7th of July, 1854, till the last of September or first of October last; that there was due said Kendall, in November last, for work done, some \$200 or \$300. Affiant further says that he did not learn of the testimony of said witness until since the trial of this cause, although he had caused diligent inquiry to be made to ascertain proof in relation to the annulling of said contract—had sent his agent to Aurora several times to obtain proof for the trial of this cause. Affiant resides at St. Charles—said Randall at Aurora, and is a stranger to affiant—and that from facts, he has learned the said witness will testify to, which facts he believes to be true, he can prove a full and perfect case, and therefore asks a new trial to be granted, that justice may be done.

12.

Affidavit of D. L. Eastman—who on oath says, that he was the counsel in said cause, and has read carefully said Olivar's affidavit, and that the facts therein narrated, as far as relates to the testimony of said Randall, and the existence of said testimony, were wholly unknown to affiant until since the trial of said cause.

30.

31.

And afterwards, to wit: the 31st day of May, 1855, the plaintiff's motion for a new trial heretofore entered herein comes on to be heard, and after argument, etc., the court overruled said motion, to which ruling of the court the plaintiff by his counsel excepts. It is therefore considered by the court that the defendants have and recover from the plaintiff their costs in this behalf expended, and have execution therefor. And thereupon the plaintiff prays an appeal to the supreme court, which is allowed—plaintiff file bond in penal sum of \$100 by 1st of August, to be approved by the judge in vacation, on condition that bill of exceptions to be made in thirty days by agreement.

12.

And afterwards, to wit: the 25th day of June, 1855, plaintiff filed his bill of exceptions in said cause.

WITNESSES FOR THE PLAINTIFF:

13.

Sidney Walden being sworn, stated—knows said Kendall; worked for him and Foster in spring and summer of 1854; knows of his building fences for said defendants in spring and summer of 1854—they made fence from Aurora West to the "Y," some 23 or 24 miles—began to work for Foster & Kendall last week in March, 1854, and worked till some time in June—fence made of cedar posts and boards, each side of rail road—posts put in ground 2 feet or more—boards 12 and 16 feet long—fence 4 boards high—panels 6 and 8 feet long, about $\frac{1}{2}$ boards, 12 feet long—balance 16 feet—average worth 15 cents per rod to build fence—to set posts $12\frac{1}{2}$ cents—to nail on boards 3 cents per rod—about $\frac{2}{3}$ of whole length of fence completed; balance, posts only were set. Kendall and myself worked on fence—Foster worked from Indian Creek East to Saw Mill—went then to Junction and worked West to near Batavia. Foster commenced work East of Aurora, last of June—never heard Foster & Kendall say they could not agree. Foster paid me—Kendall & Foster ceased working together in June—Foster had some ten men working for him. Wm. H. Hawkins, superintended delivery of Lumber along line of rail road—have seen Hawkins pay Foster money—Foster gave me an order on Hawkins for my wages.

14.

Cross-examined.—have seen Hawkins pay Kendall & Foster money—has paid me money—seen him pay money to different hands.

15.

Nathan Foster being sworn, stated—knows Kendall and Hawkins—Kendall and himself worked together for C. & A. R. R. Co., from March till July, 1854, then dissolved partnership, 7th day of July, witness thinks. Witness and Kendall disagreed, and asked Hawkins if they could dissolve, who said they might. Witness tried to buy Kendall out—he would not sell—offered to sell out to K., and he would not buy—they could not agree—witness went to Hawkins and told him him he would not work any longer with K.—Hawkins was agent of R. R. Co., in fencing department—he told witness and K. to come down on Sunday and he would fix it up. July 7th witness and K. went to see Hawkins, could not come to terms—Hawkins proposed witness should give up all the tools and interest in the work and K. pay \$50 for same, and K. go on and finish the work—witness finally agreed to accept proposition; Hawkins said if witness would do that he would give him work in the woods, and as to price, would pay him what it was worth. Saw Hawkins again in Chicago—had another talk about price—Hawkins said he would pay what it was worth—went to work fencing for Co.—drew his order to pay men on Hawkins, who paid some of them. Kendall was at work at this time between Waverly and Mendota, building fence for said company—had 3 or 4 men.

Kendall and Foster, prior to July 7, 1854, drove 24 miles of posts—put on 6 miles of boards in one piece and 8 miles in another—worth from 10 to 12 cents per rod to sharpen and drive posts—4 cents per rod to nail on boards. Kendall & Foster dissolved July 7, 1854.

16.

Hawkins paid witness \$50 for Kendall for his interest. At this time said rail road company were owing Kendall and Foster between \$300 and \$400, which was to go to Kendall—had no more to do with Kendall.

17.

Cross-Examined.—Kendall and witness looked books over—calculated the fence completed at 14 cents per rod—10 cents setting posts—Hawkins agreed to pay 14 cents—contract price was 13½ cents—paid monthly—about 6 weeks after they commenced, got \$90; in 5 or 6 weeks more got \$400, and \$25 in debts owed around town—Kendall got \$50 or \$100 in Chicago—Hawkins paid Kendall \$200 fore part of August—said he paid \$48 to 4 Dutchmen—Hawkins said, when we talked of dissolving, he would divide us up—they dissolved, and witness was released from building the fence. Some two months after the 7th of July, Hawkins told witness for the first time he intended to hold him on the contract—told witness a dozen times he should be made good—should take off of Kendall's work and put it on to his—told this in September—did not want Johnson to know it—first talked of written contract in September—wanted witness should keep it still—told witness very often he should have his pay.

George W. Waite being sworn, stated: he had been engaged as an engineer for the past 3 or 4 years—was acquainted with land West of Aurora where C. & A. R. R. runs—had a contract to build some fence for company West of village—heard the witness, Foster, testify—was to build such fence as he described—company was to pay me 15 cents per rod—worth 14 cents per rod to build the fence—10 or 11 cents to sharpen and set posts—worth more to build fence last year than in 1852—labor is higher and boards are higher—if it was worth 11 cents to set posts per rod then, it was worth 12 cents in 1854; if it was worth 15 cents per rod to complete the fence in 1852, in 1854 it was worth 17 cents.

Cross-examined.—No questions.
Plaintiff here rested.

WITNESS FOR THE DEFENCE.

18.

Wm. H. Hawkins being sworn, stated: Knows Foster and Kendall—they built fence for C. & A. R. R. Co., as follows: between last of March and last of November, 1854, to amount of \$1,016.88.

They have two statements; West of Aurora they term	\$1,016.88
East of Aurora " "	833.58
Foster has also made some cross signs, amounting to	54.50
Allowed 14 cents per rod for fence finished:	
5617 rods of finished fence,	\$786.36
30 " " " "	4.20
3375 posts set; allowed 6 cents per rod,	202.50
260 rods of boards nailed on, 7 cents,	18.20
80 " " " " " "	5.60
Have paid Kendall and Foster, West of Aurora, work done,	1,018.54
Leaving balance overpaid by the company, of	\$1.76

19.

They were to be paid monthly—began work last day of March—had difficulty the last of June—Foster and Kendall came to witness to make some arrangement about buying each other out, to have an estimate, or devise some means to settle—Foster seemed to be determined to be released from Kendall—they wanted witness should allow them to do the work separately and draw their pay separately. Witness told them, if you won't agree, let Kendall take work below Aurora, and Foster give up the work—told them he should hold them responsible to the company. They talked a good while and went away without any definite settlement; saw them next morning at Junction; they said they had agreed on a sum; witness was to pay Foster \$50 for Kendall, and Kendall was to have all the tools. Kendall went on to his work and Foster to Chicago with witness.

Nothing was then said about written contract, nor at Chicago. A week or ten days afterwards Foster was to go to the woods East of Aurora to put up fence; told him he should allow him a proportionate average; he should take from Kendall's account and add to his, as it was proportionably worth. Week or two afterwards Foster wanted to know what witness was going to allow him on his fence; told him he would allow him what was right. Witness refused to release them; did not settle with Kendall; allowed Kendall 14 cents per rod after *this dissolution*. Allowed Foster East of Aurora on prairie 228 rods, 14 cents per rod, \$13.92; woods, per rod, 25 cents; 2433 rods, \$608.25. Supposed it was worth 14 cents per rod—to set posts, 6 cents. Hired balance of posts at 6 cents.

Cross-examined.—Saturday morning;

After the 7th July, 1854, of the 5.617 rods fence built, $\frac{1}{4}$ of it was finished; one-half of the 3375 posts above referred to, were set after said date. Kendall superintended work West of Aurora after said date; paid men that worked with him for company; Kendall drew orders in his own name. He drew some \$400, East of Aurora; prairie 228 rods at 14 cents—2433 rods at 25 cents. Foster superintended building this fence, paid his men; he drew orders on me in name of Nathan Foster, drew \$500 or \$600—no orders drawn after July 7 in name of Foster & Kendall. Have not paid Kendall and Foster any money since July 7, 1854. Paid James M. Kendall, Sept. 18, 1854, \$100; Oct. 21st, \$15, and \$48.64 was paid to Dutchmen, in orders drawn in James M. Kendall's name; balance of orders of \$200 not accepted; since settled with Foster and paid him for work East of Aurora.

Mr. Parker being sworn, stated: he had been engaged in building fence; worked for Kendall last of September; was to have 5 cents per rod for driving posts, and 7 cents for nailing on boards. Heard Kendall say he was going to quit work; said he had quit work on west end; asked witness what he would do it for; told him 12 cents per rod, as he was near home; this was Nov. 1st; he gave witness 8 cents to nail on boards, and 6 cents for driving posts; said that was what he had for doing the work; said he had a partner who was at work in Big woods; had contract with company to finish what Kendall did not do; could make as much at setting posts at 6 cents, as nailing on boards at 8 cents, although it is much harder work.

Defendants then offered a contract between said Rail Road Company and Kendall & Foster, the execution of which was duly proven. The plaintiff objected; the court overruled the objection and allowed said contract to be read, as follows, to wit:

This article of agreement, made this 10th day of April, A. D. 1854, between Nathan Foster and J. M. Kendall, of St. Charles, Kane County, and State of Illinois, of the first part, and the Chicago & Aurora Rail Road Co. of the second part,

Witnesseth, that the said party of the first part agrees to build and construct 40 miles (or more if said Rail Road Co. shall require) of posts and boards, fence along the line of said R. R. track; to be built of 12, 14 and 16 foot boards; said posts to be set in the ground $2\frac{1}{2}$ feet, substantial and permanent; the boards to make joints on each post, to be four boards high, six nails in each board, to diverge from the main line of said fence (which is understood to be fifty feet from the center of said R. R. track) to said R. R. track at all the crossings, as may be directed by the agent of said company; said work to be performed as fast as ten men can do the same, or as said company may direct; said work to be commenced as soon as said company shall furnish the materials for the same, and all the work so done as above mentioned, to be done in a good workmanlike manner.

For which said R. R. Co. agrees to pay to said Foster & Kendall, thirteen and one-half cents per rod; and said Co. are to lay said posts and boards along said R. R. track in car loads or parts of car loads as the case may be, and for the work so done by Foster & Kendall, said R. R. Co. are to make payments as above mentioned; rates monthly, or so soon thereafter as estimates may be made—reserving 10 per cent. in each estimate until said work is finished; and where the posts are now set, the said parties of the first part are to put on the boards and finish the same for seven cents per rod; and if said company shall decide to batten and cap said fence it shall be done under the directions of the agent of said company; and the party of first part is to have for all such batten and cap fence two cents extra per rod.

In presence of. }
HOLMES MILLER. }

W. S. JOHNSON, Sup., by W. H. HAWKINS, Ag't, [SEAL.]
NATHAN FOSTER. [SEAL.]
J. M. KENDALL. [SEAL.]

To which decision of the court in allowing the same to be read the plaintiff excepted.

The above is all the testimony in the case.

Whereupon plaintiff asked the following instruction which was given by the court to the jury, together with a qualification asked by the defendant.

“That if the jury believes from the evidence there was justly due James M. Kendall any sum from the Chicago & Aurora Rail Road Company on the 27th day of November, 1854, that the said plaintiff is entitled to a judgment for such amount so due, not exceeding one hundred dollars.

Qualification to plaintiff's instruction :

24. "That it is wholly immaterial whether the original contract between Foster & Kendall and the defendant was cancelled or not, except so far as it may tend to show whether the defendants were indebted to Kendall, and the jury must find for the defendants unless the plaintiff has proved that the defendants were indebted to James M. Kendall, on the 28th day of November, 1854, and under the issue in this case, the burthen of proof is on the plaintiff.

Whereupon the jury retired to consider of their verdict, and afterwards came into court and rendered their verdict against the plaintiff.

26. Whereupon plaintiff entered his notice for a new trial, filed his special reasons therefor, and affidavits, &c., as appears above, which motion of plaintiff, after argument, &c., was overruled by the court, to all of which ruling the plaintiff excepted, and prayed an appeal to the supreme court, and by the agreement of parties, 30 days were allowed from the adjournment of this court for the plaintiff to prepare his bill of exceptions and perfect his appeal.

27. And afterwards, to wit: the 20th day of July, there was filed in the clerk's office of said circuit court, an Appeal Bond signed by said John Olivar as principal, and William R. Miller as surety, and approved by Isaac G. Wilson, judge, &c., August 30, 1855.

31. To all of which bill of exceptions and record is the following :

STATE OF ILLINOIS, }

Kane County, ss. } I, Luther Dearborn, clerk of the circuit court in and for said county, in the State aforesaid, do hereby certify that the above and foregoing is a full, perfect and complete copy of all the papers in the above entitled cause, and of all orders of court and bill of exceptions, as appears from the files and records of said court.

Witness my hand and seal of said court, at Geneva, in said county, this 26th day of May, A. D. 1856.

[SEAL.]

LUTHER DEARBORN, Clerk.

John Oliver

vs

Supreme Court

June Term 1866

Chicago & Aurora Rail
Roads Company

Appeal from Kane

This was a case arising before A. B. M. W. M. a Magistrate. Execution had been issued and returned unsatisfied against J. M. Kendall. Garnish process issued under the statute against Defts - as Garnishers of Kendall, Deft in execution. M. M. Co. appeared by their agent W. H. M. W. and put in his answer under oath denying indebtedness to Kendall & Foster, but was silent as to Kendall. On trial of issue, judgment was given as Defts, for \$100. & costs. Defts appealed to Circuit Court - where cause was tried at May Term A.D. 1866, Defts filed new answer, under corporate seal, returned to by Pltffs, overruled by Court excepting by Pltffs, trial by Jury, verdict for Defts.

The first point made in this case is, that the Court erred in ruling Pltffs to file written interrogatories, and sustaining Defts answer under corporate seal.

The Statute expressly provides. If any garnisher shall appear at the time and place required by the Constable as aforesaid, and shall upon oath deny all indebtedness to the Deft in execution, the Justice will forthwith discharge the Garnisher. The statute nowhere provides that Pltff in execution shall file his interrogatories in writing, before a Magistrate, and the statute nowhere allows the answer of the Garnisher to be made except under oath. This process being the creation of a statute

such statute must be strictly complied with, and an answer under the common seal of a corporation is in no sense a compliance therewith,

In this case the rule, "ob. inconsequenti" cannot obtain, in fact much less in law. The Company did answer by that agent under oath, and from that answer it most clearly appears that such agent was furnished with the whole matters between the Septs & Kendall Porter & each of them - and he there makes no answer as to James M Kendall alone, on which answer the case was determined before the magistrate, from which decision Septs appealed, and the Circuit Court, decided that such answer as filed below was no answer, although filed by Septs - and ruled new pleadings and a new answer in writing - which last answer was wholly and entirely different - from the first - thus in practice trying on appeals new issues and new facts, other than what was tried in the court below, against the express statute upon this point,

Could this case be likened to a Bill for discovery, the rule established by this court could not obtain, for in Bills for discovery, it has been repeatedly held, that no injunction will be dissolved, (in cases of corporations) except the proceedings are founded upon the oath of some officer against a person acquainted with the offices and facts contained in such proceedings (1 Paige Chancery Reports 811) (Dutton Bank vs W. B. Sharon counsel for.) This is the true rule, as it only puts corporations on the same footing with other persons -

If there is any force in the statute requiring
that Gomushus to answer under the oath, gave
oath. They could the rule be extended by an
exception to an incorporation! They are not
such "honest persons," as to be allowed, a
greater benefit than the private individual,
unless the "dictum" is in our country to prevail
that the "Prohibitory" are to answer upon their
Honors, while the common people must answer
under oath, I trust the "Case" of N. H. Co. has
not yet become so elevated, as to revive a rule
so long buried by Justice; The principle in the
Statute is double, it not only seeks facts only
supposed to exist in the Knowledge of the "Gomushus"
(whether individual or corporate) but it also
adds relief - hence the reason of the statute that
such answer shall be by oath, and I know
of no rule or reason for a rule of Law, which
shall place a corporation in a better position
than other persons, and there is nothing in
the present case that even calls for an extension
rule could it ever obtain, as one answer
was filed by the act of the depts. under oath
and when issues have once been formed and
tried upon such an answer, the law will
not allow an appellate court to form
new issues and try new facts, as did the
court below in this case, and that too, on
an answer materially different and without
the least sanctity of an oath, which our statute
expressly requires, It cannot be said that an
incorporation shall possess greater privileges
than private individuals, as such a proposition
must bore upon its face manifest injustice to every
legal mind —

The second point is: The verdict of the jury was
clearly against the weight of the evidence,

I desire to call your Honor's attention to the testimony
of W. M. Hopkins - The "man of all things to all men"
in this case. His answer first made, as agent
of the Defts. discloses the whole detail & credit between
Kendall & Foster the Defts. as appears from said answer
amounting to the sum of = \$1118,64
In his testimony page 18, he states whole amt - \$1904, 96
making a difference by his own statement of \$886,32
in whole amt of work done by these parties, to say
nothing of his testimony as to the dissolution where
he at one time calls them partners indirectly, and
at the same time treats and deals with them as
separate individuals - after "such dissolution" which
took place on the 7th of July 1854.

The only solution is contained in Foster's testimony,
which is corroborated by Hopkins in every main feature.
Foster testifies, that on the 7th of July 1854, the partnership
of Kendall & Foster was dissolved, which is corroborated
by every relation shown to exist between said Foster &
Kendall after that date, as well as the relation which
each of said parties sustained to the Defts. Hopkins
says that after "such dissolution" he never paid
any orders of Foster & Kendall - that they have no
more work together - that he settled with each
alone so far as he made any settlement - that
he has fully settled with Foster, and has never
made any final settlement with Kendall, all
of which clearly establishes the fact, that the
dissolution as stated by Foster took place the 7th day
of July 1854. & as to the simple question remained -
was the Defts. indebted to Kendall the 27th of Nov -
if so - how much?

The evidence shows that on the 7th day of July, the debts owed Kendall & Porter for work done West of Aurora, from \$200. to \$300, all of which was to go to Kendall except \$38, which by terms of dissolution was to be Kendall's property and assets. It therefore appears that on the 7th day of July, 1854, by the most liberal calculation to the debts - they were indebted to the debts in the sum of \$212, which sum the evidence nowhere shows, was overpaid by debts and the work done by Kendall after that date more than equals all money by him received from said debts, after said date, and the most favorable obtestimate nowhere shows a less indebtedness hence if my position be true, and it will clearly appear by a glance at the testimony, the verdict of the jury was manifestly against the weight of the testimony, and at "first blush" must strike every mind that has carefully observed the testimony as being against the weight of the evidence, and should have been set aside at once by the Court -

The Third point is, That the Court erred in qualifying the instruction asked by the Plaintiffs. This instruction was clearly the Law, without any qualification, and as qualified was directly calculated to mislead the jury, from the real point in the case, to wit, that the partnership between Kendall & Porter was dissolved the 7th of July, from which it must have followed that the debts were indebted to Kendall in a sum exceeding \$200.

The Smith point is clearly decisive of this case, On the question of Newly discovered evidence it will not be controverted by saying that such evidence is not made by the parties - The only question being "is the evidence, relevant and decisive of the case" It must certainly, be for it must appear from the evidence that if the partnership between Kendall & Porter was dissolved on the 7th of July, that the debts were his debtors some \$2120 upwards by the most positive proof, and although there was evidence on this point, yet the newly discovered evidence is decisive of this case, The Plaintiff swears he is informed and verily believes he can prove by one Kendall that the contract between Kendall & Porter the defendants was cancelled about the 7th of July 1854, that there was due said Kendall 27th day of Nov. upwards of \$200. This is not cumulative testimony, This is positive and conclusive evidence in this case (and the jury must have been misled on this point) The doctrine is fully established. "It is true that it is not a fatal objection to a new trial, that newly discovered evidence is cumulative, as where it is decisive and conclusive of itself, without the aid of other evidence to the same point - and where that point was not satisfactorily made out on the former trial;" 11 S. & C. 487.

"No is evidence necessarily cumulative, because it tends to support a point to which some sort of evidence was given on former trial, 4 Wend, 579"

A new trial will not be refused solely because the newly discovered evidence is cumulative, if it will make a doubtful case clear. (18 Ct Rept. 460)

In cases when newly discovered evidence is material and it is doubtful how, in connection with other testimony it might affect the jury, a new trial should always be granted - 3 Humph Rept 222, 1. Harrington 410

#2 Rept 138,
6 Miss 600
2 Ark 69

and 18 Rept 500
85-
8 Texas Rept

331

The affidavit of the party, setting forth the newly
discovered facts - and by whom he can prove
them, taken in connection with other concurring
appearances and the applicability of such evidence
towards changing the verdict will be sufficient
to justify a new trial - without the affidavit of the
witness by whom the facts are expected to be proved.
1 Grant Iowa Repts 186, see 1 John Repts 59, 2d
Nichols Iowa Repts 184, 14 John Repts 186 -

Having thus brought before your Honors
the present case We submit it for determination
with every confidence that the Law will
be established and justice secured between
the parties interested D. L. Garrison Atty for
Pltf

John Collins

Chicago & Aurora N. Co

Agreed by
D. H. Harrison
atty for
D. H. Harrison

Filed June 17 1886

L. Leland
Clerk

State of Illinois, }
KANE COUNTY, SS.
JOHN OLIVAR

IN CIRCUIT COURT,

May Term, 1855.

vs.
CHICAGO & AURORA RAIL ROAD COMPANY.

} Appeal from A. R. McWayne, J. P.

An appeal bond, by the defendants in the above entitled cause, was filed in the Clerk's Office of said Court, January 16th, 1855.

3 & 4.

On the same day a *supersedeas* issued to stay proceedings in the court below, and returned, served, Jan. 20, 1855.

A transcript in said cause was filed in said Circuit Court, May 10, 1855, certified to by said Justice, which transcript is in the following form :

1 & 5.

JOHN OLIVAR
vs.
CHICAGO & AURORA RAIL ROAD COMPANY.
Garnishee of James M. Kendall, Defendant in execution wherein
John Olivar is Plaintiff.

} Demand \$100.
November 24, 1854.

By which said transcript it appears that on the 8th day of January, 1855, judgment was had in favor of said plaintiff vs. Chicago & Aurora Rail Road Co., as garnishee, for the sum of \$100—the same when collected to be applied upon judgment against said Kendall.

6.

And with said transcript, on the same day was also filed, the garnishee process, issued from the justice court vs. said defendants, on which was the following endorsement, to wit :

"Served the within process by leaving a copy thereof with William H. Hawkins, agent of the within named Chicago & Aurora Rail Road Company.—November 27, 1854.

J. T. BEVIER, Constable."

7.

Also the answer of said defendant, sworn to and subscribed by said W. H. Hawkins, as agent of the C. & A. R. R. Co., in which it appears Foster & Kendall were indebted to said defendant in the sum of \$1,018.64 and credit had been given them in the same sum.

28.

Afterwards, to wit : the 27th day of February, 1855, it being one of the days of February term of said court, came D. L. Eastman, attorney, and entered the appearance of plaintiff.

Afterwards, to wit : the 17th day of May, 1855, it being one of the days of the May term of said court, came Plato, attorney for def'ts, and entered a motion to dismiss this cause, for the reason that there was no service of process on the defendants, and the justice had no jurisdiction over the person of the defendants.

Afterwards, to wit : the 18th day of May, 1855, the plaintiff by his attorneys filed a list of interrogatories, in words and figures, as follows, to wit :

8.

"Will the Chicago & Aurora Rail Road Company please to answer the following interrogatories, to wit :

1st. Please to state whether or not you had on the 27th day of November. A. D. 1854, any effects, choses in action, in your possession, or power belonging to James M. Kendall ; if yea, please to state the number, kind and value of such effects, or choses in action.

2d. Please to state whether or not you were indebted on the 27th day of November, A. D. 1854, to James M. Kendall, in any manner or form ; if yea, please state the nature and amount of such indebtedness, fully and particularly."

29.

And on the same day, after argument, etc., the court over-ruled the said motion to dismiss, and thereupon the defendants by counsel except. And thereupon, on motion of plaintiff, the defendants were ruled to answer the interrogatories herein filed, by Thursday morning next.

And afterwards, to wit: the 24th day of May, 1855, the answer of said defendants was filed, in words and figures as follows, to wit:

The answer of the above named defendants to the interrogatories filed in this cause, taken under the common seal of said corporation, as by the said seal appears.

To the first interrogatory the defendants say,

That on the 27th day of November, A. D. 1854, they had not any effects, choses in action in their possession, or power belonging to James M. Kendall.

9.

To the second they say,

That on the 27th day of November, A. D. 1854, they were not indebted to James M. Kendall in any manner or form.



In testimony whereof, the common seal of said corporation is hereunto affixed, this 21st day of May, A. D. 1855.

Attest,

AMOS T. HALL,

Secretary C. & A. R. R. Co."

AMOS T. HALL, *Treasurer,*
C. & A. R. R. Co."

29.

And afterwards, to wit: the 25th day of May, 1855, the plaintiff by Eastman, his attorney, comes and excepts to the answer of the defendants, and denies the truth thereof; after argument, etc., the court advised, overrules said exception, to which ruling of the court the plaintiff excepts; and thereupon on motion of plaintiff, it is ordered by the court that a jury come, whereupon a jury came, and after hearing a portion of the evidence, it is agreed that the jury separate and meet the court to-morrow morning.

30.

And afterwards, to wit: the 26th day of May, it being one of the days of said May term, the parties to this suit come, and the jury heretofore empaneled herein also come, and after hearing arguments, etc., and instructions of the court, retire to consider of their verdict, and subsequently return into court, and for a verdict, upon their oaths say, "we, the jury, find the issue joined in favor of the defendant;" and thereupon comes the plaintiff by his attorney, and moves the court for a new trial herein.

10.

And afterwards, to wit: on the 29th day of May, 1855, the plaintiff by his attorney files his motion for a new trial, and for special causes files the following points:

1st. The verdict of the jury was against the law and the evidence.

2d. The verdict runs against the weight of evidence.

3d. The plaintiff has discovered new evidence since the above cause was submitted to the point, that the within contract of the parties was entirely cancelled by the said Rail Road Company and Foster & Kendall, and that the said company were indebted to the said James M. Kendall in the sum of about \$250 on the last of October, 1854.

11.

And with said special causes were filed the following affidavits.

Affidavit of John Olivar, plaintiff herein, who on oath, says, he has been informed and believes he can prove by one Jeremiah Randall, resident of Aurora, Illinois, that the contract between the defendants herein and Foster & Kendall, offered in evidence in trial by said defendants, was annulled and cancelled by said defendants on or about the 7th day of July last; that said company employed said Kendall from the said 7th of July, 1854, till the last of September or first of October last; that there was due said Kendall, in November last, for work done, some \$200 or \$300. Affiant further says that he did not learn of the testimony of said witness until since the trial of this cause, although he had caused diligent inquiry to be made to ascertain proof in relation to the annulling of said contract—had sent his agent to Aurora several times to obtain proof for the trial of this cause. Affiant resides at St. Charles—said Randall at Aurora, and is a stranger to affiant—and that from facts, he has learned the said witness will testify to, which facts he believes to be true, he can prove a full and perfect case, and therefore asks a new trial to be granted, that justice may be done.

12.

Affidavit of D. L. Eastman—who on oath says, that he was the counsel in said cause, and has read carefully said Olivar's affidavit, and that the facts therein narrated, as far as relates to the testimony of said Randall, and the existence of said testimony, were wholly unknown to affiant until since the trial of said cause.

30.

31.

And afterwards, to wit: the 31st day of May, 1855, the plaintiff's motion for a new trial heretofore entered herein comes on to be heard, and after argument, etc., the court overruled said motion, to which ruling of the court the plaintiff by his counsel excepts. It is therefore considered by the court that the defendants have and recover from the plaintiff their costs in this behalf expended, and have execution therefor. And thereupon the plaintiff prays an appeal to the supreme court, which is allowed—plaintiff file bond in penal sum of \$100 by 1st of August, to be approved by the judge in vacation, on condition that bill of exceptions to be made in thirty days by agreement.

12.

And afterwards, to wit: the 25th day of June, 1855, plaintiff filed his bill of exceptions in said cause.

WITNESSES FOR THE PLAINTIFF:

13.

Sidney Walden being sworn, stated—knows said Kendall; worked for him and Foster in spring and summer of 1854; knows of his building fences for said defendants in spring and summer of 1854—they made fence from Aurora West to the "Y," some 23 or 24 miles—began to work for Foster & Kendall last week in March, 1854, and worked till some time in June—fence made of cedar posts and boards, each side of rail road—posts put in ground 2 feet or more—boards 12 and 16 feet long—fence 4 boards high—panels 6 and 8 feet long, about $\frac{1}{2}$ boards, 12 feet long—balance 16 feet—average worth 15 cents per rod to build fence—to set posts 12 $\frac{1}{2}$ cents—to nail on boards 3 cents per rod—about $\frac{2}{3}$ of whole length of fence completed; balance, posts only were set. Kendall and myself worked on fence—Foster worked from Indian Creek East to Saw Mill—went then to Junction and worked West to near Batavia. Foster commenced work East of Aurora, last of June—never heard Foster & Kendall say they could not agree. Foster paid me—Kendall & Foster ceased working together in June—Foster had some ten men working for him. Wm. H. Hawkins, superintended delivery of Lumber along line of rail road—have seen Hawkins pay Foster money—Foster gave me an order on Hawkins for my wages.

14.

Cross-examined.—have seen Hawkins pay Kendall & Foster money—has paid me money—seen him pay money to different hands.

15.

Nathan Foster being sworn, stated—knows Kendall and Hawkins—Kendall and himself worked together for C. & A. R. R. Co., from March till July, 1854, then dissolved partnership, 7th day of July, witness thinks. Witness and Kendall disagreed, and asked Hawkins if they could dissolve, who said they might. Witness tried to buy Kendall out—he would not sell—offered to sell out to K., and he would not buy—they could not agree—witness went to Hawkins and told him him he would not work any longer with K.—Hawkins was agent of R. R. Co., in fencing department—he told witness and K. to come down on Sunday and he would fix it up. July 7th witness and K. went to see Hawkins, could not come to terms—Hawkins proposed witness should give up all the tools and interest in the work and K. pay \$50 for same, and K. go on and finish the work—witness finally agreed to accept proposition; Hawkins said if witness would do that he would give him work in the woods, and as to price, would pay him what it was worth. Saw Hawkins again in Chicago—had another talk about price—Hawkins said he would pay what it was worth—went to work fencing for Co.—drew his order to pay men on Hawkins, who paid some of them. Kendall was at work at this time between Waverly and Mendota, building fence for said company—had 3 or 4 men.

Kendall and Foster, prior to July 7, 1854, drove 24 miles of posts—put on 6 miles of boards in one piece and 8 miles in another—worth from 10 to 12 cents per rod to sharpen and drive posts—4 cents per rod to nail on boards. Kendall & Foster dissolved July 7, 1854.

16.

Hawkins paid witness \$50 for Kendall for his interest. At this time said rail road company were owing Kendall and Foster between \$300 and \$400, which was to go to Kendall—had no more to do with Kendall.

17.

Cross-Examined.—Kendall and witness looked books over—calculated the fence completed at 14 cents per rod—10 cents setting posts—Hawkins agreed to pay 14 cents—contract price was 13½ cents—paid monthly—about 6 weeks after they commenced, got \$90; in 5 or 6 weeks more got \$400, and \$25 in debts owed around town—Kendall got \$50 or \$100 in Chicago—Hawkins paid Kendall \$200 fore part of August—said he paid \$48 to 4 Dutchmen—Hawkins said, when we talked of dissolving, he would divide us up—they dissolved, and witness was released from building the fence. Some two months after the 7th of July, Hawkins told witness for the first time he intended to hold him on the contract—told witness a dozen times he should be made good—should take off of Kendall's work and put it on to his—told this in September—did not want Johnson to know it—first talked of written contract in September—wanted witness should keep it still—told witness very often he should have his pay.

George W. Waite being sworn, stated: he had been engaged as an engineer for the past 3 or 4 years—was acquainted with land West of Aurora where C. & A. R. R. runs—had a contract to build some fence for company West of village—heard the witness, Foster, testify—was to build such fence as he described—company was to pay me 15 cents per rod—worth 14 cents per rod to build the fence—10 or 11 cents to sharpen and set posts—worth more to build fence last year than in 1852—labor is higher and boards are higher—if it was worth 11 cents to set posts per rod then, it was worth 12 cents in 1854; if it was worth 15 cents per rod to complete the fence in 1852, in 1854 it was worth 17 cents.

Cross-examined.—No questions.

Plaintiff here rested.

WITNESS FOR THE DEFENCE.

18.

Wm. H. Hawkins being sworn, stated: Knows Foster and Kendall—they built fence for C. & A. R. R. Co., as follows: between last of March and last of November, 1854, to amount of \$1,016.88.

They have two statements; West of Aurora they term	\$1,016.88
East of Aurora " "	833.58
Foster has also made some cross signs, amounting to	54.50
Allowed 14 cents per rod for fence finished:	
5617 rods of finished fence,	\$786.36
30 " " "	4.20
3375 posts set; allowed 6 cents per rod,	202.50
260 rods of boards nailed on, 7 cents,	18.20
80 " " " " "	5.60
	\$1,016.88
Have paid Kendall and Foster, West of Aurora, work done,	1,018.54
Leaving balance overpaid by the company, of	\$1.76

19.

They were to be paid monthly—began work last day of March—had difficulty the last of June—Foster and Kendall came to witness to make some arrangement about buying each other out, to have an estimate, or devise some means to settle—Foster seemed to be determined to be released from Kendall—they wanted witness should allow them to do the work separately and draw their pay separately. Witness told them, if you won't agree, let Kendall take work below Aurora, and Foster give up the work—told them he should hold them responsible to the company. They talked a good while and went away without any definite settlement; saw them next morning at Junction; they said they had agreed on a sum; witness was to pay Foster \$50 for Kendall, and Kendall was to have all the tools. Kendall went on to his work and Foster to Chicago with witness.

Nothing was then said about written contract, nor at Chicago. A week or ten days afterwards Foster was to go to the woods East of Aurora to put up fence; told him he should allow him a proportionate average; he should take from Kendall's account and add to his, as it was proportionably worth. Week or two afterwards Foster wanted to know what witness was going to allow him on his fence; told him he would allow him what was right. Witness refused to release them; did not settle with Kendall; allowed Kendall 14 cents per rod after *this dissolution*. Allowed Foster East of Aurora on prairie 228 rods, 14 cents per rod, \$13.92; woods, per rod, 25 cents; 2433 rods, \$608.25. Supposed it was worth 14 cents per rod—to set posts, 6 cents. Hired balance of posts at 6 cents.

Cross-examined.—Saturday morning;

After the 7th July, 1854, of the 5,617 rods fence built, $\frac{1}{4}$ of it was finished; one-half of the 3375 posts above referred to, were set after said date. Kendall superintended work West of Aurora after said date; paid men that worked with him for company; Kendall drew orders in his own name. He drew some \$400, East of Aurora; prairie 228 rods at 14 cents—2433 rods at 25 cents. Foster superintended building this fence, paid his men; he drew orders on me in name of Nathan Foster, drew \$500 or \$600—no orders drawn after July 7 in name of Foster & Kendall. Have not paid Kendall and Foster any money since July 7, 1854. Paid James M. Kendall, Sept. 18, 1854, \$100; Oct. 21st, \$15, and \$48.64 was paid to Dutchmen, in orders drawn in James M. Kendall's name; balance of orders of \$200 not accepted; since settled with Foster and paid him for work East of Aurora.

Mr. Parker being sworn, stated: he had been engaged in building fence; worked for Kendall last of September; was to have 5 cents per rod for driving posts, and 7 cents for nailing on boards, Heard Kendall say he was going to quit work; said he had quit work on west end; asked witness what he would do it for; told him 12 cents per rod, as he was near home; this was Nov. 1st; he gave witness 8 cents to nail on boards, and 6 cents for driving posts; said that was what he had for doing the work; said he had a partner who was at work in Big woods; had contract with company to finish what Kendall did not do; could make as much at setting posts at 6 cents, as nailing on boards at 8 cents, although it is much harder work.

Defendants then offered a contract between said Rail Road Company and Kendall & Foster, the execution of which was duly proven. The plaintiff objected; the court overruled the objection and allowed said contract to be read, as follows, to wit:

This article of agreement, made this 10th day of April, A. D. 1854, between Nathan Foster and J. M. Kendall, of St. Charles, Kane County, and State of Illinois, of the first part, and the Chicago & Aurora Rail Road Co. of the second part,

Witnesseth, that the said party of the first part agrees to build and construct 40 miles (or more if said Rail Road Co. shall require) of posts and boards, fence along the line of said R. R. track; to be built of 12, 14 and 16 foot boards; said posts to be set in the ground $2\frac{1}{2}$ feet, substantial and permanent; the boards to make joints on each post, to be four boards high, six nails in each board, to diverge from the main line of said fence (which is understood to be fifty feet from the center of said R. R. track) to said R. R. track at all the crossings, as may be directed by the agent of said company; said work to be performed as fast as ten men can do the same, or as said company may direct; said work to be commenced as soon as said company shall furnish the materials for the same, and all the work so done as above mentioned, to be done in a good workmanlike manner.

For which said R. R. Co. agrees to pay to said Foster & Kendall, thirteen and one-half cents per rod; and said Co. are to lay said posts and boards along said R. R. track in car loads or parts of car loads as the case may be, and for the work so done by Foster & Kendall, said R. R. Co. are to make payments as above mentioned; rates monthly, or so soon thereafter as estimates may be made—reserving 10 per cent. in each estimate until said work is finished; and where the posts are now set, the said parties of the first part are to put on the boards and finish the same for seven cents per rod; and if said company shall decide to batten and cap said fence it shall be done under the directions of the agent of said company; and the party of first part is to have for all such batten and cap fence two cents extra per rod.

In presence of.)
HOLMES MILLER. }

W. S. JOHNSON, Sup., by W. H. HAWKINS, Ag't, [SEAL.]

NATHAN FOSTER. [SEAL.]

J. M. KENDALL. [SEAL.]

To which decision of the court in allowing the same to be read the plaintiff excepted.

The above is all the testimony in the case.

Whereupon plaintiff asked the following instruction which was given by the court to the jury, together with a qualification asked by the defendant.

"That if the jury believes from the evidence there was justly due James M. Kendall any sum from the Chicago & Aurora Rail Road Company on the 27th day of November, 1854, that the said plaintiff is entitled to a judgment for such amount so due, not exceeding one hundred dollars.

Qualification to plaintiff's instruction :

24. "That it is wholly immaterial whether the original contract between Foster & Kendall and the defendant was cancelled or not, except so far as it may tend to show whether the defendants were indebted to Kendall, and the jury must find for the defendants unless the plaintiff has proved that the defendants were indebted to James M. Kendall, on the 28th day of November, 1854, and under the issue in this case, the burthen of proof is on the plaintiff.

Whereupon the jury retired to consider of their verdict, and afterwards came into court and rendered their verdict against the plaintiff.

26. Whereupon plaintiff entered his notice for a new trial, filed his special reasons therefor, and affidavits, &c., as appears above, which motion of plaintiff, after argument, &c., was overruled by the court, to all of which ruling the plaintiff excepted, and prayed an appeal to the supreme court, and by the agreement of parties, 30 days were allowed from the adjournment of this court for the plaintiff to prepare his bill of exceptions and perfect his appeal.

27. And afterwards, to wit: the 20th day of July, there was filed in the clerk's office of said circuit court, an Appeal Bond signed by said John Olivar as principal, and William R. Miller as surety. and approved by Isaae G. Wilson, judge, &c., August 30, 1855.

31. To all of which bill of exceptions and record is the following :

STATE OF ILLINOIS, }

Kane County, ss. { I, Luther Dearborn, clerk of the circuit court in and for said county, in the State aforesaid, do hereby certify that the above and foregoing is a full, perfect and complete copy of all the papers in the above entitled cause, and of all orders of court and bill of exceptions, as appears from the files and records of said court.

[SEAL.] Witness my hand and seal of said court. at Geneva, in said county, this 26th day of May, A. D. 1856.

LUTHER DEARBORN, Clerk.

76
John Oliver
vs

Chicago & Aurora
Rail Road Company

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X