No. 8709

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

---

vs.

Wm. E.Middleton, et al,

State of Illinois }
Marion County } Pleas & proceedings had in the Circuit Court within & for the County of Marion & State of Illinois in a certain cause hereafter pending in said Court William C Middleton & Levi L Morgan were Plaintiffs and the Ohio & Mississippi Rail Road company were defendants

Be it remembered that heretofore to wit on the 23rd day of April AD 1856 the said plaintiffs filed in the Office of the Clerk of said Court his praecipe for a Summons against said defendants which praecipe is in the words & figures following to wit

"May Term of the Marion Circuit Court for the year 1856

William C Middleton & Levi L Morgan vs The Ohio & Mississippi Railroad Company } Trespass on the case on promises Damages $5000.

Mr Clerk

Issue summons in the above cause returnable to the May Term of said Court

[8709-1]

for the year 1856 Dated Sheriff to serve by leaving Copy with the agent (13 lines) of said Company Stationed at Salem

S L Boyer Atty for Pltff

Upon the filing of which Praecipe a Summons issued in the words & figures following to wit

"State of Illinois }
Marion County } The People of the State of Illinois
To the Sheriff of said County Greeting

We command you to Summon the Ohio Mississippi Railroad Company if to be found in your County to appear before the Circuit Court of said County on the first day of the next Term thereof to be holden at the Court house in the Town of Salem on the first Monday in the month of May next to answer William E Middleton & Levi L Morgan of a Plea of trespass on the case on promises to their damage as they say five hundred dollars. Thereof make return to our said Court as the law directs

Witness B F Marshall Clerk of said Court
Seal thereof this 23rd day of April A D 1856
B F Marshall Clk

Sheriffs Return "I have served the within writ by reading the same to Station Agent at Salem & giving him copy of Summons April 23rd 1856 James Chance Shff
By J Shultz Dep

And afterwards to wit

~~State of Illinois~~
~~Marion County~~ — ~~Be it Remembered~~
~~that in the Circuit Court~~
~~within and for the County of Marion and~~
~~State of Illinois in a certain cause then & there~~
~~pending in said Court between William~~
~~Middleton & Levi L. Morgan their Plaintiffs~~
~~and the Ohio & Mississippi Rail Road Company~~
~~was Defendant.~~

~~Be it remembered that~~
~~the said Plaintiffs to wit;~~ On
the 25th day of April A. D. 1856 filed in
the office of the Clerk of the Circuit Court
of said County his Declaration against said
Defendant which said Declaration is in
the words and figures following to wit.

Of the May Term of the
Marion Circuit Court for 1856

William E. Middleton &
Levi L. Morgan
vs
The Ohio & Mississippi
Rail Road Company

Trespass on the Case on
promises Damages $500—

William E. Middleton
and Levi L. Morgan of the County of Marion and
State of Illinois Plaintiffs in this suit by
J. L. Bryan their attorney Complain of the
Ohio and Mississippi Rail Road Company
Defendant in this suit being summoned of a

4

(2)

Plea of Trespass on the Case on promises, for that whereas heretofore to wit on the 14 day of February A.D. 1835 at the Town of Vernia that is to say at the County of Marion and State of Illinois by a certain agreement then and there made in writing and between the said Plaintiffs and the said Defendants by one B.B. Thomas their agent Wm P. Thille who executed said agreement in behalf of said Defts. The said Plaintiffs agreed to dig a well for the use of the Ohio and Mississippi Rail Road Com (said Defendants) at the side Track to be laid out by said Defendants (or their agent or other agents) in Marion County Illinois known as the Middleton Depot, said well was to be dug as follows; Twelve feet in diameter until work of sufficient strength is reached to support a wall one foot thick and of hight sufficient to reach the surface of the ground and was to be built as directed by the engineer in charge of the work at that the point as agent of said Defendants. Then the well was to be but ten feet in diameter until water was reached of sufficient quantity for the purpose aforesaid said well was to be dug and walled as required by the engineer (or agent) of said Defendant in Charge of the work then in progress that is to say the instructions of the Ohio & Miss R R by said Defendants and

5

for the following Consideration to be paid by the said Defendants to wit: Ten Dollars for each foot for the first twenty feet dug and walled as required by the Engineer And Twelve Dollars for the second twenty feet. Fifteen Dollars for the third twenty feet and three Dollars per foot additional for each twenty feet thereafter. And it was further agreed that the said Defendants were to furnish said Plaintiffs with a force Pump if it became necessary to keep the water out of said well while the work was progressing — a chain Pump was to be furnished. The supplying the pumps was to be a matter of discretion with the engineer aforesaid And it was further agreed that said Plaintiffs were not to go more than one hundred feet below surface in said digging and said Plaintiffs were not bound to finish said well if the damp or gass should endanger life this also was to be decided by the said Defendants their agent or agents all of which will more fully appear by reference to the said Articles of agreement herewith filed. And the said Agreement being so made as aforesaid afterwards to wit on the day and year aforesaid at the County of Marion and State of Illinois in consideration thereof and that the said Plaintiffs at the special instance and request of the said Defendants had then and there undertaken and promised the said Defendants to perform and fulfill the said

[8709-3]

agreement in all things on the said Plaintiffs part and behalf to be performed and fulfilled. They the said Defendant undertook and then & there faithfully promised the said Plaintiffs to perform and fulfill the said agreement in all things on the said Defendants part & behalf to be performed and fulfilled And although the said Plaintiffs have done and performed their several undertakings and promises in this that they did dig said well at the place aforesaid to the depth of fifty four feet and walled the same as required by the Engineer in Charge & as required by the terms of said agreement. And said Plaintiffs aver that the digging of said well & the walling the same was under the inspection of the said engineer in Charge as agent of said Defendant and was approved by him. That said well was dug to a depth sufficient to supply the necessary quantity of water and was so determined by said Engineer and Plaintiff further aver that the whole of their work under said articles of agreement was approved by the Engineer in Charge of said Rail Road work as Agent for said Defendants and that said work was received for and on behalf of the Defts by said Engineer as completed in pursuance of said Articles of agreement And the Plffs further aver that the said William P Whittle was at the time of the execution of said agreement on this behalf the acting agent of the said Ohio & Mississippi Rail Road Company Defts & executed the said contract on their behalf by one B.B. Thomas

7. And whereas also the said Defts aforesaid to wit on the 16th day of February A. D. 1855. at Jonia Clay County Illinois to wit at the County of Marion in the State of Illinois made and executed, and delivered to the said Plaintiffs their Certain Their Contract in writing, bearing date the day and year last aforesaid, and which said Contract so made the said Plfs in fact say was executed on the part of the said Defts, and at the special instance and request of the said Defts by the agent of the said Defts William D. Whittle- signed abreviated thus "Wm D Whittle by B. B. Thomas" by which said Contract, in Consideration of the promises and undertakings thereon of and on behalf of the said Defts and at the special instance and request of the said Defts the said Plfs agreed "to dig a well for the use of said Defts to wit Ohio & Mississippi Rail Road Company at the side track to be laid out by said Defts by the said Wm D Whittle or his assistants at a place in Marion County Illinois known as the Middleton Depot." Said Well to be dug as follows Twelve feet in diameter until said Plfs should strike rock of sufficient strength to support a wall one foot thick and of sight sufficient to reach surface of ground and to be built as directed by the Engineer in charge of the work.

58709-47

8

Then sd Plfs were to dig but ten feet in diameter until water was found sufficient for the purposes named above (to wit for the use of the O & M R. R. Company) said well to be dug (by sd plfs) and walled as required by the Engineer in Charge for the Consideration following to wit: The sd Defts agreed to pay to the sd Plfs, in Consideration of the work and labor of the sd Plfs in the performance of said Contract on their part to be performed, Six Dollars for each foot, for the first twenty feet, dug and walled as required by the engineer, and Twelve Dollars, for the second twenty feet (to wit: $12. per foot for the second 20 feet) Fifteen Dollars for the third twenty feet (to wit $15. per foot for the 3rd 20 feet) and three Dollars per foot additional for each twenty feet thereafter (that is to say three Dollars per foot additional to the last named sum of fifteen Dollars per foot)

And by the said Contract it was farther agreed by the sd Defts that if the sd plfs found water sufficient to retard the digging of said well and not sufficient for the purposes named in the Contract (aforesaid) — Then the sd Defts or their said Agent was to furnish the sd plfs with a Chain Pump free of Charge — But in and by sd Contract it was understood and agreed between the parties Plf & Defts

9

That it should be left to the discretion of the
sd Defts or their sd agent when sd pump was
necessary. That is to say, the sd Defts were
to furnish sd pump at their discretion - And
it was further by the terms of the Contract
aforesaid understood and agreed between the
sd plf & Deft that the sd Plf should not be
bound to dig more than one hundred feet
below the surface of said ground and it
was thereby then & there by the terms of sd Con
tract further provided that the sd Plfs were
not bound to finish sd well if the damp or gass
should arise in said well sufficient to en
danger the lives of persons in performing the
work and that Defts or their sd agent
were to decide upon whether sd gass or damp
were of the danger aforesaid. All of which
will more fully appear by the said written Con
tract now here ready to be exhibited to the
Court in this behalf. And the sd plfs in fact
say that they at the special instance and request
of sd Deft, and upon the Consideration and under
taking and agreement of the sd Deft in sd Contract
exrented said Contract. And the sd plfs further
aver that they did in strict compliance with
the terms of said Contract on their part to be per
formed. And under the direction of the sd Defts
by their Engineer dig said well at the
place laid out by sd Defts Engineer at

[8709-5]

Middleton Depot aforsaid, to the depth of fifty four feet and that the sd ~~Deft~~ by their Plfs, were then and there directed and notified by the sd Deft by their Engineer in charge, not to dig any greater depth be cause the quantity of water in said well was sufficient for the purposes of the sd Deft on sd at sd aforsaid And that thereupon the sd Plfs as in and by the Terms of said contract on their part required did complete well and finish said well and delivered the posession of said well to the sd Defts and which was then and there afterward to wit; On the 1st day of November A.D. 1855 accepted and received by the sd Deft at this County aforsaid &c And the sd Plfs further aver that the sd Defts broke and violated the terms of said Contract on their part to be performed in this Court, that in the diging of sd well the sd plfs found water sufficient to retard greatly the digging of said well and not sufficient for the purposes named in said Contract; and that the sd Plfs notified sd Defts of the fact and that sd Defts then and there by their engineer in Charge declared that a chain pump was necessary to the prosecution of the work aforsaid and the sd Defts then & there promised to furnish to sd Plfs at Middleton Depot

aforesaid a chain pump as in and by the
Terms of said Contract they were bound to do
yet the sd plfs avers that the sd Defts wholly
failed and refused to supply the sd plfs with
a chain pump for the use and purpose afore-
said Whereby & by means of the premises
an action hath accrued to the sd plfs to
demand & have of and from the said Defts
a large sum of money to wit the sum of
four hundred Dollars aforesaid
And whereas also the sd Defts afterward to wit
on the first day of April A.D. 1856 at the County
of Marion and State of Illinois was indebted to
the sd plfs in the farther sum of five hund-
red Dollars for the work, and labor care
and diligence of the said Plaintiffs by
the sd plfs before that time done and
performed and bestowed in and about the
business of the said Defts to wit in digging
& walling a well and for the said Defts and
at their special instance and request.
And being so indebted they the sd Defts in
Consideration thereof afterwards to wit on
the day and year aforesaid at the County
aforesaid undertook and then and there
faithfully promised the said Plaintiff to
pay to them the said sum of Five hundred
Dollars. Nevertheless not regarding their
said several promises and undertakings

12 in this behalf hath not as yet paid the said several sums of Money in the said first second and third Count of this declaration above demanded, or any or either of them or any part thereof to the sd Plfs, but the sd Dfts to pay them the same, hath hitherto wholly neglected and refused and still do neglect & refuse to the damage of the said Plfs $300. & therefor they bring their suit &c

Bryan & O'Melveny
for Plfs

Marion Co Ills / April 1855
The O & M R R Co Dr to Wm
E Middleton & L L Morgan for an
Dr for work done in & about the digging of
a well at Middleton Station Marion County
Illinois $500

State of Illinois
Clay County

Articles of Agreement
Made and entered into the Fifth day
of January A D 1855 by and between
W E Middleton and L L Morgan of
the first part and Wm D Whittle (Asst Eng
O & M R R) of the second part, "Witness"

The Party of the first part hereby Covenant
and agree to dig a well for the use of the
O & M R R at the side track, to be
laid out by said party of the second part
or his assistants, in Marion County Ills.

known as the Middleton Depot. said well to be dug as follows. Twelve feet in diameter, until they strike rock of sufficient strength to support a wall, one foot thick and of hight sufficient to reach surface of ground (And to be built as directed by the Engineer in Charge of the work. Then the party of the first part shall dig but ten feet in diameter until water is found sufficient for the purposes named above.

Said well to be dug and walled as required by the Engineer in Charge for the following Consideration, to wit;

The Party of the second part hereby covenants and agrees to pay to the said party of the first part. Ten dollars for each foot, for the first Twenty feet dug and walled as required by the Engineer. And twelve Dollars for the second twenty feet. Fifteen Dollars for the third twenty feet and three Dollars per foot additional for each twenty feet thereafter. And the party of the second part further agrees that if the said party of the first part shall find water sufficient to retard the diging of said well and not sufficient for the purposes named in this Contract then said party of the second part will furnish said first party with a chain pumps free of Charge. But it is the understanding

14

of the said parties, that it shall be left to the discretion of the second party when said Pump is necessary, that he shall furnish it at his discretion, It being understood that the said first party shall not be bound to go more than one hundred feet below surface of Ground. Provided also that the said first Party shall not be bound to finish said well, if the damp or gas, shall arise sufficient to endanger the lives of Persons employed to do such work, said Party of the second part, shall decide whether or not such is the case or if it is or shall be dangerous for such hands.

Witness the hands of the Parties at Xenia this the sixteenth day of February A. D. 1855

C. J. Brown
W Elston
Witnesses

Wm C. Middleton
L. L. Morgan
Wm D Wittle
By B. B. Thomas

And afterwards to wit at the May Term of said Court 1856 said Defendants filed their Demurrer to the said Plaintiffs Declaration which is in the words & figures following

To Wit

15

Chic & Mississippi
Rail Road Co
Ats
Liddleton & Morgan

Demurrer

And the said Defts by Haynie their atty Comes and Defends the wrong &c when &c and pray the said instrument of writing in the Declaration of said Plff described to be shown to them and the same is done in the words &c following that is to say (here insert in hc verbis) and thereupon the said Defts say the Matters and things in the Declaration of said Plff & said instrument set forth in manner & form &c are not sufficient in Law for the said Plff to have or maintain his action against them & they are not bound in Law to answer the same. Wherefore they Pray Judgt &c

Haynie

The Plff 1st Count has no breach of the Contract assigned & Complains of nothing The 2nd Count assigns one breach where the act Complained of as not being done was by the terms of the Contract, discretionary 2nd Count is informal being partly in Debt & partly in Assumpsit.

L 9709-81

16

And afterwards to wit: At the May term of said Court 1856 the following order was made by the said Court in said cause and entered of Record to wit

William E. Middleton &
Levi L. Morgan
vs
The C. & M. R. R. Co — Assumpsit

And now at this day come the said Defendants by Haynie their attorney and it is ordered by the Court that the Demurrer filed by Defendants to Plaintiffs Declaration be sustained, and also come the said Plaintiffs by Bryan their attorney & asks leave to amend Declaration which leave is granted;

And afterwards to wit at the September term of said Court 1856 the following order was made by the Court and entered of Record to wit

William E. Middleton &
Levi L. Morgan
vs
The C. & M. R. R. Co — Assumpsit

Ordered by the Court that this cause be Continued until the next term of this Court

7

And afterwards to wit at the March Term A.D 1857 of said Circuit Court to wit on the 11th day of August 1857 the following order was made by the Court in said Cause to wit

"William E Middleton & Lewis L Morgan vs The Ohio & Mississippi Railroad Company } Assumpsit

Came the said plaintiff by Hoyne their atty and files his demurrer to the said plaintiffs declaration which said demurrer after being argued is overruled by the Court

And afterwards at the term of the Court last aforesaid to wit on the 13th day of March 1857 the said defendant filed his plea in the words & figures following viz

State of Illinois } Pleas
County of Marion }

Ohio & Miss RR Co
vs
Middleton & Morgan } Case

And the said deft comes and defends the wrong when &c

[8709-9]

and say they did not undertake and
promise in manner and form as the
said plaintiff hath above thereof complained
against them and of this they put themselves
&c on the Country &c.

Virginia

And the said plff doth the like

Bryan & O'Flaherty

2d

1st Special Plea

And for a further plea as to the said
third count in plffs declaration mentioned
the said defts say that the work and
labor therein mentioned if any such
was done by plff was done under and
in pursuance of a certain contract, whereof
said plff were parties of the first part
and one Wilson D White (then at the date
of said agreement resident engineer of the
O & M R R) was party of the second part
bearing date the 16th day of February 1858,
and not by or under any contract with defts
and defts aver that if other than under and
by virtue of said contract the said plff
hath not at any time done labor & services
or labor in digging any well at Middleton
Station for defts or any other person in
and about digging wells or walling the
same for the use of said road. Ready &c
are ready &c to verify wherefore they pray

Judgment &c

19

Hayne

3rd

2nd Special Plea

And for a further plea by leave &c defts as to said first count say actio non because that the costs and labour &c in plffs Declaration mentioned if any such was done was under and by virtue of a certain contract or agreement entered into by the said plffs and one William Whittle by his agent B B Thomas and not under or by virtue of any other contract with this deft, and this he is ready to verify wherefore he prays judgt &c

Hayne

4th

3rd Special Plea.

And defts by leave &c further say actio non because he says as to said second count that the agreement to furnish said Chain pump if any such was made was entered into by and between one Wm White & plffs the former executing it by his agent B B Thomas and that by the terms of said agreement the said Whittle was to furnish said Chain pump at his discretion and was not bound to do so on demand of Plffs, and only at his own option & was not to be furnished by defts & this they are ready to verify &c wherefore &c

Hayne for defts

[81104-10]

And afterwards to wit on the 13th day of March 1857 the said plaintiff filed their Replication to said defts pleas in the words & figures following to wit:

Middleton & Morgan
vs
The O & M R R Co

And the said plff as to the 1st 2.3 & 4 pleas of the 1st deft by them above pleaded saith that the said plff by reason of any thing by the 1st defts in 1st pleas alledged ought not to be barred from having & maintaining his aforesaid action thereof against the 1st defts because he said that by virtue of the said contracts in the 1st plaintiffs Declaration mentioned in manner & form as therein stated and set forth the 1st Defts did undertake and promise as alledged therein in the 1st Declaration and of this they the 1st Plff put themselves upon the Country &c

Ryan & Mulvey
Attys for Plff

And afterwards to wit: at the August term 1857 the following order was made by the Court in the said Cause and entered of record to wit:

21

William E Middleton &
Levi L Morgan
vs
The Ohio & Mississippi
Rail Road Company

Wednesday August 19th
1857
Assumpsit

And now at this day come again the parties Plff & Defendant by their attorneys and issue being joined let a jury come & thereupon Came the Jurors of the Jury to wit: N. W. Pace, Wm R. Black, John W White, Isaac M Clelland, Robert Smith, Miles Sanders, Wm Smith, Rutherford Duncan, George Davidson, John Carter, Elijah Dickens, & Robert Clark Twelve good & lawful men Chosen &c who being duly sworn to try the issue joined; and having heard the evidence in the cause the argument of Counsel & instructions of the Court, retired to Consider of their verdict and afterwards returned into Court the following as their verdict "We the Jury find for the Plff and assess the damages at $633— Whereupon Defts enter their motion for a new trial, and in arrest of Judgment & Plffs enter their remittitur for the sum of $332 cts And the Court having heard the argument of Counsel of Deft & Plff on motion for new trial & in arrest, and being sufficiently advised in the premises orders that the same, and each of them be overruled & the same is done And Judgment rendered for the sum of $303 cts

$.8709-10

22

Whereupon it is adjudged that said Pltff recover the said sum of $303cc from the said Deft his damages together with his costs &c in this behalf expended & may have Execution &c

And afterwards [redacted] The said Defendant filed in the office of the Clerk of said Court his Bill of exceptions duly signed by the Judge of said Court which Bill of exceptions is in the words and figures following to wit:—

23

Be it Remembered that at the august term of the Marion circuit court AD 1857 a certain Suit at Law Wherein Williams E Middleton and J D Morgan were Pltffs and the Ohio and Mississipi Rail Road Company were defendants came on to be Tried and was then and there tried before his Hon. Sidney Breese (Judge) and a Jury upon the trial whereof the said Plaintiff to Sustain his cause introduced the following Persons to testify to Wit B B Thomas being Sworn Stated that in December 54. and January 1855 he was the assistant Engineer on the Ohio and Mississipi Rail Road under Williams & Whittle, and that said Whittle authorized Witness to Sign his (Whittles) name to an agreement with Plaintiffs to dig a Well at Middleton Station on the Ohio and Mississipi Rail Road that he (Witness) did not write the the agreement Except the latter clause Witness had a minute in a Memorandum Book on a scrap of Paper of What he wrote as Mr Whittle did not Give Witness Written authority — The Witness then Was asked for Whom he Executed the Contract Said or Whether for Whittle or the Company. defts. Deft objected to Said Question & the Same Was overruled and Said Witness allowed to answer Said Question & he accordingly Stated that he

[8709-12]

24

believed he Executed or Signed Whittle
Name for the ohio & Mi. R. Road Co or
the Will was for the use of that Company
to which decision in overruling said objection
& admitting said testemony to go to the Jury
deft at the time Excepted
And thereupon the said Pltffs offerd
in Evidence the following instrument of
Writing being the contract above alluded to
by Witness as testemony in this cause to wit
State of Illinois }
Clay County } An article of agreement
Made and Entered into the fifth day
of January A D 1855 by and between
W. E Middleton and L. L Morgan
of the first part and William P Whittle
Resd Engeneer on O & M. R. Road of the
Second Part Testify. the Party of the first
Part hereby Covenant and agree to dig a
Well for the use of the ohio & M R Road
at the Side track to be laid out by
said Party of the Second Part or his
assistant in Marion County Illinois Known
as the Middleton Depot, Said Well to be
dug as follows Twelve feet in Diameter
until they strike Rock of Sufficient
Strength to Supot a Wall one foot
thick and of Sufficient hight to reach

Surface of Ground (and to be built as
directed by the Engineer in charge of the work)
then the Party of the first Part shall dig
but ten feet in diameter until Water is
found Sufficient for the Purposes named
above, Said Well to be dug and Walled as
Required by the Engineer in Charge for the
following consideration to Wit

The Party of the Second Part
hereby covenant and agree to pay to the
Said Party of the first Part ten dollars
for Each foot for the first Twenty feet
dug and walled (as required by the
Engineer, and Twelve Dollars for the Second
Twenty feet fifteen dollars for the third
Twenty feet and three dollars Per foot
additional for Each Twenty feet thereafter
And the Party of the Second Part further
agrees that if the said Party of the first Part
Shall find Water Sufficient to Retard the
digging of Said Well and not Sufficient
for the Purpose Named in this Contract
then Said Party of the Second Part Will
furnish said first party with a chain Pump
free of Charge, but it is the understanding
of the said Parties that it Shall be left to
the discretion of the Second party when said
Pump is Necessary that he shall furnish it at
his discretion it being understood that

26

that the Said Party of the first Part Shall not be bound to furnish Said Will if the damp or Gas Shall arise Sufficient to Endanger the lives of Persons Employed to do such Work Said Party of the Second Part Shall decide Whether or not Such is the case or if it is or shall be dangerous for such Hands

Witness the hands ~~and~~ of Said Parties at Xenia this the Sixteenth Day of February A D 1855

Witness
Lid V Brown
Wm Elston

Wm. E Middleton
L L Morgan
Wm P Whittle
by B B Thomas

To the introduction of Which Said instrument of Writing in testimony to Said Jury the dft objected, but the court overruled Sd objection and allowed the Same to be Read as Evidence to the overruling of Which Said objection and admitting Sd testimony to Go before the Jury defendant at the time Excepted

Witness Thomas then Stated that he Made Two Estimates of Work as Engineer on the Ohio & M R R Road they were returned by Witness to Mr. Whittle & I Suppose they Should Go to Mr Walker the Engineer in Chief, I believe the Work Was done by Pettijohn on

27

On sd Well cannot State. How deep the well was sunk the diamter at the Surface was 12 feet cant tell how far that diamter went down— I Suppose I Estimated the work in the same way as I did other work— the Pltffs then asked Witness what was Paid by dft— or offered to be Paid by them on this contract. Question objected to & objection Disallowed, testimony (admitted) to go to Jury. dfts counsel then Excepted to the Ruling of the court— and witness said he remembered no payment but Presumed I made a Payment— I might have taken a Receipt & it might have went to Whittle— I Received the money from him, Whittle was not properly the Person to pay money for said Stone company and & work the Question was then asked is it not common for men to do work outside of their Employment dft objected & Court Sustained objection— Witness Proceeded I Made payments Several times for Whittle on contract for O & M R Road Co and other Payments, Mr Whittle told me to do So I Paid Some on trestle work for the company I believe of money Received of this Whittle, I dont remember the dimensions of Well,— to all of which testimony dft objected and Thereupon moved the court to Exclude the Same but the court

[8709-14]

Dep-28

overruled said objections and refused to Exclude the Same and denied defts motion to all of which deft at the time Excepted

Cross Examined by Witness testified.

I Signed the instrument at Request of Wm. P. Whittle - I Put his name there at his request he told me to sign it as it is signed & I did so, The Ohio & Mississippi railroad Co never authorized me to sign their name to it - Engineers Sometime takes contracts to do work themselves and Sub let - I took a contract to do work - I Know Mr Whittle took a contract to Get wood, about the time the railroad was finished - When Engineers take contracts they Make Estimates, they make and return Estimates and receive the money themselves and then Pay it out to their Sub contractors - dont Remember that I Ever received money from dft - to be Paid to pltff, if I Paid money Mr Whittle Gave it to me and I paid it - I dont know what became of any receipts from Pltff for money, dont know that I Ever received any or how they were Given - When work was done for the railroad Co. the receipts are Made out in the form of Vouchers - Mr Whittle was not the proper Person to make Payments of Money on contracts with the Company - it is not

29

not often that men pay outside of their employment

Re Examined by Pltffs

Question: What instructions did Whittle give you at the time letting you to make the contract— defts. counsel objected to the Question being put or answered, but the court overruled the objection and deft at the time Excepted & Witness Stated— I have a memorandum of instructions given me as follows (reads from a paper the following) "Instructions Given by Whittle to Thomas to Draw up contract

$10cts per foot for 1st 20 feet

12cts " " 2nd 20 feet

15cts " " 3d 20 feet

3cts foot additional for Each 20 feet

Chain Pump to be furnished by company at discretion of Engineer" It is my Belief (Witness Speaking) that he told me to sign his name on behalf of the company

Re cross Examined by dfft

I only State the last from impression on my mind I signed it as he instructed me or Time to Question by Pltffs— he answered it was always my opinion that it was done for the company or the Mill was on their roadway to which dfft— objected— at the time— but was overruled and he Excepted to the Same

[8709-15]

D. J. Maddaton testified for Pltff

30 It was in 1855 - I think that Paddock commenced work on the Well for Pltff - Diameter 12 feet - it struck rock 10 feet afterwards went 10 feet Struck rock - Well was 53 or 4 feet deep from Surface of the Ground I think they Struck Water at 27 to 30 feet. I think water came in Stronger from the time we first Struck it, on the day we left before we left it we made a calculation of the No. of tubs of water we drew up - It was thirteen in little less than an hour and a Quarter - We Bailed with two buckets, it was difficult to keep the water out, Maddaton Employed hands to Bail water in the night Near a month before he Quit - they were to come on Saturday night and bail Saturday night and Sunday but did not - and we bailed it out on Monday - dont know how long it took them on Monday - it had been wet in Spring but was tolerable dry then - A man came there I cant say he was Engineer did not know him, he put his tape line down in the Well, Said it was 47 feet My Idea was that he was an Engineer, he said he wanted to measure the Well - did so and left - I saw no other person there - did not See B B Thomas there - It was

31

dficult to dig the well it took one hand all the time most to bail the water while he was picking — and half his time while we were hoisting it up — Will was walled above the rock with sandstone Two men worked at windlass to keep water out

George W. Middleton testified — I worked some time at the well it was 64 feet deep — at latter part of work we lifted 6 Buckets full of water to one of Stone Will was walled with Stone — a man came one day & measured well — dont know him — we quit digging well because there was so much water — A Pump was furnished and Taken away and then returned

W. H. Block testified Mr. Middleton ordered me to go and get a Pump I did so & Put it in it is not Paid for yet — Middleton told me to put it in. I made the contract with Middleton — the Price of the pump was $23.00 defts. counsel objected to the above testimony the court overruled the objection — and allowed it to go to the Jury & the defendants counsel at the time Excepted.

B. B. Thomas recalled and testified I have heard the Witnesses State about the Quantity of water I dont know that I can

[8709-16]

52

Say how much water would take sufficient—
that would depend upon the number of trains
running— Should rather think there was
not Enough— I dont know who authorized
Middleton to let the pump— I had some
talk with Pettit about the Pump—
know nothing about the force pump—
I received pay as Engineer out there to June
6th 1855 then left and went to Missouri
at that time the tract was laid down— Mr
Gordon then went on the road as Engineer

James Huggins testified

I dont know anything about the acceptance
of the Well; one Wyman the Paymaster on the
road and agent of the O & Mi R.R. Co told
Middleton to come out to Venia & put work,
and he would send an Engineer and have
it Measured and settle for it— Deft objected
to this Evidence, but the Court overruled the
objection & allowed it to go to the Jury & Deft
Excepted at the time

Charles Huggins testified

I Was at the Well when a man came out
there on the Cars of the Ohio & Mi R.R. Co with
a force Pump & left it the Cars and went off on
the cars he said that it would be sufficient
to take the water out— This was while they were
at work there dont know who the man was

83

Pleasant Maddaton testified I was here in Salem in Sept 1855 the man was here Selling and Giving notes for debts — dont Know Who he was — he Proposed to Give Billy Maddaton $200 and Quit off Even and Billy would not do it this man Gave me a note, and also others at the same time, I heard the next day about the same — dont Know but they were looking over Papers — this man seemed to be acting as agent Selling debts for the company think they were, Witness could not read, he said the mill was not measured and $200 was all he would Give to Settle it, — I think this mans name was Wenger, he was not an Engineer, Corp — dont know that he had any acpts there for Maddaton I did not See Maddatons name on the Books — the man merely offerd to Give $200 to Settle it — dft then moved to Exclude the testimony of above Witness Relative to the offer to Pay $200, Court overruled motion and dft Excepted,

Nelson C Merrel testified, I have seen the mill but cant say how much Water there is in it I met Mr Tripp a (Road master on the Raad) once he told me they were going to put up a Station at Maddatons Station, and clear out the Mill and Put a tank there, this was told me to induce me to Put up a Store

there I was 12 talking of doing so, ~~I was~~
I was agent of Sanger camp & laid the
towns of the town laid out at Middleton
Station at the time - I told Tripp I would
see my Principals and see if they would do
anything - This was the last of the matter
Tripp never done anything about the matter
and nothing has been done since four or five
weeks ago I saw Mr Clements the Superintendent
of the Road - he said they were going to put up
a tank at middleton this is all I know
to all of which Evidence Given by Mr Pine
deft objected at the time and moved the
Court to Exclude from the Jury the
conversation of said Witness with Tripp &
Clements but the Court overruled the defts
objection and disallowed the motion
and Permitted said Evidence to go to Jury, to
all of which rulings of the Court deft at the
time Excepted

And this was all the testimony in
this cause Whereupon the Court instructed the
Jury (for Plaintiff) as follows, 1st That However the Signature may
be made to the Contract Sued on in this cause
the Jury may decide from all the Evidence
whether it is or is not the Contract of the
a & m R. R. Co

2nd That if the Jury (believe) from the Evidence
that the Contract (Sued on) was made on behalf of defts

85

by Wm. P. Whittle with authority of defts to make it, and that Pltffs have performed their contract on their Part they must find for the Pltffs taking the contract Price per foot as the measure of Damages 3d That if the Jury believe from the Evidence that the work was done by the procurement and at the instance of the defts, and in the Manner agreed upon and that the work so done, was accepted by defts they must find for the Pltffs, being Governed by the contract price

4th

That the defendants to be bound by an acceptance of the Mill. Were not bound to use the Mill but were at liberty to use or not use as they might choose

5th That if the Jury believe from the Evidence That the Ohio and Mississipi Rail Road company accepted the Mill in Question as the Work of Pltffs then they should find for the Plaintiffs under the Third count in the declaration, and in arriving at the Question of acceptance the Jury are at liberty to consider the circumstances, and declarations of the legally constituted agents of the defendants

6th

The court is asked to instruct the Jury on behalf Pltffs, that if they believe from the Evidence that during the Progress of the Work the defendants were bound by contract

36 to give instructions and direction as to the character and Extent of the Work, and that the defendants failed to do so and Pltffs conducted and completed the work under the contract as Prudent men should have done, that then the Jury should find for the Plaintiffs and fix the damages according to the Stipulations in the contract

7th That although the Jury may believe from the Evidence that the Pltffs did not dig the Well to a sufficient debth to supply all the water for the purposes intended yet if they believe from the Evidence that it was the duty of the defendants to decide how deep the Well should have been sunk to supply the Quantity of Water required, and the defendants failed or refused to give instructions as to the matter and that the Plaintiffs did dig as long as they could conveniently do so, and were impressed with the honest conviction that the Well was sunk deep enough to supply all the water required under the contract, then the Jury should find for the Plaintiffs

to the Giving of Each & all of which said instructions by the court the defts for the Pltffs at the time Excepted

37

Whereupon the court instructed the Jury for defendant as follows to Wit,

1st The court instructs the Jury for defendants in this case that before the Pltff can recover on the Written contract they must Prove a (substantial) compliance (in Pursuance of the contract) with it in all its terms (or show some good excuse for non compliance) and if they do not so do they cannot find for them on the Special contract,

2nd Further that before they can find for the Plaintiff on the General count for work and labor done the Plaintiff must Prove that the labor was done, and acceptably defendants, and if the Plaintiff has failed to prove a compliance with the terms of the Written contract (or a sufficient excuse therefor) and has not shown that the work has been accepted by defendants then the Verdict must be for the defts

4th

4th If the Jury believe from the testimony that the Mill built at Middleton was done under a Written contract and that said contract was signed by, and Entered into by William P Whittle by his agent in his own name, then his being an Engineer of

of the Road would not make defendants
38 liable at all - and the Verdict should be
for defendants (unless the act was sanctioned
and ratified by defts. and this can be
determined by the circumstances)

6th Asks nine proposition or offer by Wiman
to pay Middleton $200 to Settle the matter, if the
Plaintiff refuses to accept it, it is not binding
on defendants (if offered by way of compro
mise) and the Jury should disregard such
testimony for a man has the right to make
an offer to buy his Peace without being bound
by the offer unless it is accepted when made

The court refused to give Each and all of
the above instructions as asked by defendants,
but amended them by adding the words
underscored & in Parenthesis thus (same) in Each,
to which refusal to Give them as asked and the
addition of said amendments, and Giving
the same as amended the dft at the
time Excepted

5th The following instruction was then
asked by dft - to wit, the court instructs
the Jury further that if the said Wm P.
Whittle was the Engineer of the road and
had authority from defts to sign and

39

and Execute contract in their name he Should Execute them himself and if any agent of his Should ever at his request attempt to Execute a contract in Writing the defendants ~~he~~ would not be bound by it (because an agent cannot authorize another to Execute delegated authority and if Thomas signed Whittles name as Whittles agent, and not by authority from the defts then the defendants are not bound by the contract)

The court refused to give said instructions as asked, but struck out all that Part enclosed in Parenthesis and added the following words as an amendment to Wit (after the words by it) unless afterwards Sanctioned and ratified by the company and this Sanction and ratification can be Judged of by circumstances

To the refusal of Which said instructions as asked and the Striking out Portions of same, and adding other words in lieu thereof the defts at the time Excepted

Whereupon the Jury having returned to Consider of their Verdict afterwards returned into court the following Verdict Viz the Jury find in favor of the Plaintiffs and

40

assess his damages at Six Hundred and Sixty five dollars Whereupon the Plaintiffs entered Their remittitur of the Sum of Three Hundred and Thirty Two dollars, and defts moved the court for a new trial for the following reasons and also in arrest of Judgt—

1st the Verdict of the Jury is contrary to law 2

2nd the Verdict of the Jury is contrary to Evidence

3 the Verdict of the Jury is contrary to law & Evidence

4. the court gave improper instructions to the Pltffs

5 the court refused Proper instructions for the defts

6 the court admitted improper testimony for Pltffs

7 the court refused to admit Proper testimony for the defts

In arrest of Judgt

1st the record does not authorize or Justify a Judgement against defts

But the court overruled the said motions for a new trial & in arrest and Entered Judgement for the Plaintiffs for $303.00 Three Hundred and three dollars to which ruling of the court and Entering Judgement defendants at the time Excepted and now Pray this Bill of Exceptions be signed and sealed and allowed which is done &c

Sidney Breese (Seal)

41

State of Illinois }
Marion County } I H W Eagon Clerk
of the Circuit Court within & for said
County do hereby certify that the
foregoing is a full complete and
correct transcript of the Record & pro-
ceedings in the above entitled cause
as appears by the Records & proceedings
in the same now on file in my Office

In Testimony whereof I have
hereunto set my hand & affixed
the Seal of said Court at
my Office this 10th day of
November A.D. 1857

H.W. Eagon Clk

42

O M & R Co vs Middleton et al

The said Plaintiff Comes and Says there is manifest error in the record of the above cause of pleading and for an assignment of the same sets down and shows the following Errors to wit

1st The Court improperly admitted testimony objected to which should have been excluded & Erred in not doing so.

2nd The Court improperly refused to sustain the motion of defts below to exclude testimony & erred in so doing

3 The Court Gave improper instructions to pltff below although excepted to, by defts below, and Erred in so doing

4 The Court refused proper instructions to defts below & made improper erasures, alterations, and additions to those asked. Although defts Objected thereto, and Erred in so doing.

5 The Court below erred in refusing to allow the defts motion for new trial below

6 The Court below Erred in refusing to allow the defts motion for arrest of judgment

7 The Court below Erred in Entering judgment for pltff below & against defts below.

Wherefore Pltff in Error prays that the judgment of the Circuit Court in this cause be set aside annulled made void & for nothing Esteemed and that judgment in said Cause may be now arrested or new trial granted to Pltff in Error &c

J Caperton for Pltff in Error

X 8 The Court Erred in proceeding to trial without due issue on defts Special Plea. below

X 9

Defendants in error Come and
Say that there is no error in the
foregoing record requiring the same to be
reversed Silas D Bryan Atty for Defts

~~No 55~~

8

Ohio & Mississippi
Rail road Company
vs
William E. Middleton &
L. L. Morgan

Ennis Mann

Filed 23. Nov. 1857.
F. Schuster Clk
Prepaid by Jury & Haynie
$5.00. 23 Nov. 1857.

The Ohio & Miss RR Co
plff. in Error
vs
W E Middleton & Morgan
defts in Error

1st Error — Page 42 Record

The Court admitted improper testimony &
Page 23 Record. Of Witness Thomas and allowed him to give oral
Evidence as to Who he Executed the Contract for,
The Contract itself is the Evidence by which it must
be shown for Whom it was Executed — or at least that
it was Executed for some one else than the person
negotiating —
Again before he can be allowed to State or prove that
he Executed it for the Company the authority from the
Company to him to do so must be shown

But so far from this having been done there is
not even any pretence that such is the case, Thomas
avows his authority & the from Whittle, & not from
Story Agency P. 15. Defts below = "Delegata potestas non potest delegari" is
a principal universally allowed — Mills by express authority
But it is not even shown that Whittle was an
an agent of the Company or had authority
to bind them by any Contract. So that
If an agent could delegate authority the Evidence

was inadmissible for failing to show Whittle authority to do himself that which he (as is alleged) could do by his Substitute - and bind the Company — The court could perhaps infer from Thomas Testimony that Whittle was an Engineer on the road - But if he were, it does not follow that he could bind the Company by any Contract. the Onus is on the pltffs below to show that Such an Authority grows out of Such a relation or position. — Unless they do show it - the authority of Whittle to make the Contract in hoc casu does not appear & if he could not do so, his Substitute could not.

1 Cranch 105.
19 John 62
13 " 307
15 " 2
8 Cowen 191
8 " 585
3 Hawk 98-9
8 " 494

2nd. The Court however erred again by admitting the instrument signed by Thomas (vide Record P. 24-25) to be read as evidence against defts below.

Because 1st It is entered into by & between the Pltffs below of the first part, & "Wm P Whittle of the Second part"

2nd The first party agrees to beg a bill be not for the Company - but for the use of the Ot & N Railroad -

3rd It is to be dug at a place Laid out by "the party of the Second part or his assistant - The word his refering to the Second party clearly points to Whittle as the Contracting party

4th the party of the Second part. Clearly means himself & none else to pay the party of the first part - to finish pump at discretion of Second party — and reserves to himself the right to buy Whittles

there be sufficient Posts to Endanger life — at the same time requiring the Rail to be dug as required by the Engineer in charge — Clearly showing that ~~the~~ Whittle was Contracting for himself but binding the Posts below to the Work in such a manner that the Engineer of the Company would accept it who ever he might be —

5th The Contract is Signed "Wm S Whittle by BB Thomas" + is not Signed by Defts below at all — from all these indications I Construe the instrument to be the individual Contract of Whittle Executed by him in his name by his agent — his authority & not for the Railroad Company though the Rail was for the use of the said road — And Parol Evidence is not admissible to show that Whittle made the Contract as agent for this Wood Contradict the instrument itself + this cannot be done

13 Ills 137 Vide Story on Contracts 712 Sec 669, where it

Story Contracts — Sec 669 — is said down that if a party make a Written Contract in his own name he cannot as Against himself by Evidence that he acted as agent Because this would Contradict the terms of the instrument.

Paley on Agcy 378 — In such a case the Agent is individually bound — + in order to bind the Principal the terms of the instrument should at least show that the Principal is intended to be bound thereby and that the agent acts as his agent in Executing it

Vide Story Agency Sec 147 — + note 4 Id.

(over)

[8709-24]

Vide also Bodkin vs Bostwick 16 Pick 350.

11 Mass. 27
16 Pk. 350

Stockpole vs Arnold 11 Mass 27-29 Where it is said that whatever authority an agent may have to lend another if he does not sign as agent he binds himself & none other — And it is expressly decided in this case that the rule is applicable to written simple contracts.

In 9th N H Reps 268.9. the same rule is to be found laid down that the contract must not be the contract of the principal to show even that the principal had authorized it — there should be something on the face of the contract itself to make it the contract of the principal even where he has delegated authority Vide - 7th Cowen 454. Stone vs Wood

5th Gill 516

8.	Id.	33-80	Mills vs Bannister.
9	Johns R	334	— Tofts vs Brewster,
3rd	Pend.	98.	Borden vs Mech Ins Co.
7th	Ibid	69	Minard vs Mead
10	"	88	Spencer vs Field
10	"	271-7.	Penly vs Stanton
20	"	433-4	Mills vs Hunt —
23	Pick.	126 -	Semmes vs Hartford. —

& the authorities cited in support of these decisions

In Delahay vs Clement 2nd Scam 575 — the note was signed "Mark W Delahay per RB Hughes agent" In Gray et al vs Gilliland et al 15th Ills 434 Was on a written warranty of a machine sold by Gray & Son to Gilliland - Signed Horace Milan agent - and this case was reversed for not showing that the

Horace Wilder who Signd as agent for a named principal had authority

It will be seen by a close Examination of the foregoing authorities that before an agents Contract is binding on the principal it is not enough that he have authority to make such a contract as he has made, but that authority must be exercised in such a manner as to Evidence the intention to bind the principal - the principals name must appear to it, or it in such a manner as to show the Contract to be the Contract of some other person than the one who is engaged in Selling its Terms - This cannot be made appear by parol testimony - for if it did not appear in the instrument to be the Contract of some other person than the agent one who Settled its Terms & Signd it - then it would appear to be his own Contract - (Such is the legal intendment) & if it appeared to be his own Contract, parol Evidence to make it appear or to prove it to be some other persons Contract would be to allow a Written instrument to be Contradicted or Varied by parol proof - This cannot be done

If it appears in the instrument that there was an unnamed principal in whose behalf the Contract was made & who was to be bound parol proof to show that a certain person was the principal (& was bound) would not be Confined Reading the instrument

(8709-25)

But when the puffs below Seek to introduce proof to make the instrument show a fact not before appearing to wit that the instrument was executed by Whittle as an agent - and then insists to fasten liability upon the principal thus discovered for the first time outside of the writing - I insist it is carrying the principal further than any authority of respectability has ever carried it with respect to written instruments either sealed or unsealed

It will be seen that the foregoing cases cited from American Authorities amply sustained by English authorities of the first character & respectability -

Ville Maque vs Atkinson 3rd M & W. 440

" Higgins vs Senior 8" Mes & Welby 843 -

and authorities refused to these -

This last case was determined after a curia Adv. vult - & fully sustains the foregoing principal assumed by me to be the law. Such then was the decided law of England as late as 1841 -

9 Allen 334 -
3 Mead 98.
18th Mead 90
33 Pick 126

The words "Pro Engineer on Ohio Rail Road" are clearly descriptive persona, he does not contract as Engineer for as Engineer it does not appear he had any power to Contract. The term does not import a power to make

a Contract neither is that its Meaning in any Sense it Can be used — but if it Were it Could not help this Case for if the term Engineer imported or Meant a person with Power to Contract That Power must be Exercised (not Merely by a "Resident Engineer on the Railroad") but as Resident Engineer for the O & M R R Co

As to what is Disceptis penans vide

What Proof testimony to Shew that the Ohio & Mississippi Rail road Company are the Contracting Parties. Will Counsel the Written instrument We have only Look to the instrument & See —

If Whittle is the Contracting party of the second part (as the instrument Says he is — then Proof to Show that the Ohio & M R R Co is the Contracting party of the Second part — As proves the Written Statement

If Whittle being the party of the Second part, agreed to pay Mudeton & Morgan + not Whittle then proof that the O & M R R Co agreed to pay would Contradict the Written Statement —

If the Ohio & M R R Co were parties of the Second part then the pumps named in Contract was to be furnished at his discretion. What a Medley of terms — to assert that the words his discretion are to be construed to mean the Companies discretion

[8709-26]

If the term his Execution Wales & Whittle then proof proof to show that the Party of the Second part means the Company is ~~signing~~ acting the Contract making it to be the Companies Execution & not Whittles

If the Place of digging the Well was to be done as by the party of the Second part or his assistant - it could mean none other than Whittle for he only had an assistant -

But the Signature fixes the Contract as Whittles as none Else - and this is sustained by the authorities cited even if "B B Thomas" name did not appear on the paper

Page 27 of Record Nethup was allowed to state what he had done for Whittle, at his request - with money - given Nethup by Whittle - this is Res inter alios acta

But on Page 28. the Nethup Thomas Expressly states that he Signed the instrument for Whittle, as he Directed - by his authority - that O'Neil & Co never authorized him to do so - Never paid money for the Company but for Whittle. Who gave it to him - and all the testimony by which Plffs Counsel seek to charge the Company is the suspicion or belief of Thomas that the Contract was for the Company or the Work or Mill Coy for them

To get clear of Paper indefinite and

inconclusive inspection — Where a Witness
Concerns to be upon his memory after a long
Lapse of time from the original transaction is
one of the strong reasons for rejecting parol
testimony when in Conflict with Written testimony
The Written testimony is the best & therefore
the only testimony

But in Conclusion upon this point Let
me ask Why if Whittle or Thomas did
intend to charge the Company as principal
did they not say so — The Contract was not
Written by Thomas (but must have been by Whittle)
"Except the last clause" Why did they not
say they meant differently if they did mean
differently — The reason is they meant just
what they have said & no more — And
this is the Only Legal inference from
Every Written Contract, unless there be
an ambiguity or uncertainty apparent
on the face of the instrument — I take it
therefore to be Whittles Contract

On Page 29 of Record the testimony of Thomas Collier
cut by Pltff is all res inter alios acta —
for want of any proof of authority from
Agts below Given to Whittle authorizing him
to Authorize or ins Mot Thomas to draw
up a Contract to bind Agts below —
Moreover the Witness Gives his Opinion that the Con

[8709-27]

that this Contract was the Contract of Defts below. He Witness should not have been allowed to State his Opinion, the question as to whether the Contract was the Contract of the Company or of Whittle was not for him to Settle & his Opinion was not a fact or basis upon which anything could be infered — this was Error to allow it to go to the Jury

Pag 31 of Record the testimony of Black was improperly admitted, Because it is not shown that Defts below had anything to do in authorizing him to put in the pump — he done it in the absence of the Company or their agent — without their authority — The pump was not to be used in digging a Well or raising the water from the Well about which Defts below had nothing to do — Moreover the Pltffs below ordered the pump — made the Contract with Black for it — now Seeks to charge Defts below with it. Certainly the pltffs own words & Contracts are not testimony for him to charge Defts below upon —

The Testimony of James Huggins — Pleasant — Mediton & Nelson Colleried on Pag 32 - 33 - & 34 of Record is all Res inter alios acta —

Because 1st They are Conversations with persons who it is pretended are agents without proof —

that they were authorized to do any thing in regard to the subject matter of the conversation or had authority to make the offer or declaration — or that they were doing any act in or about the sale when the conversations — or either of them occured

3rdly — the conversations were had and statements made by persons who are competent to prove the facts they state — & should be produced —

3rd — the defts below had the right to require their production in order to have their statements given on oath — subject to cross examination, and since these objections are true — their testimony is mere hear say — Vs entire absence of Starkie Evidence 36-7-8-42 & note (b) P. 38

An admission, to bind the principal, must be made (as a necessity in reply to a question which one person has a right to ask —) by a person upon whom he has the right to have about the thing or matter enquired about — Or it must be made during the performance of an act within the scope of the agents authority. and it must concern the act performed

If said about a subject matter whilst performing an act about the same the words then become Evidence become part of the Res Gesta — If they do not constitute part of the Res gesta then express authority or a necessity & right to say what has been said by agent must be shown Else the Principal is not bound

Stay of proceedings see 68-69 135-136.
3 Esp 72-74-135-
2nd Camp 536
Paley Agc 256
10 Vrs 125-
7 East 367
4 Mod 394
7 Mod 446
8 Watts 392
10 Johns 227 278
3 S Carw
2 Starkie 60
[2709-28]

there is no proof that Nymon (P. 32) was asked about the Mill or had any authority to say anything or do anything about it — The Witness does not know any thing about the acceptance of the Mill — The Boys Settle for it & have it measured — the Witness does not say allusion to the Mill — but if it did It is a promise on Nymons part without authority from defendant — And even if he so promised he was not, nor would be liable on it unless it be shown that Middleton done as Nymons Agent to decide — I regard it as a mere voluntary Agent of Nymons. & no authority shown to make it —

Pltf's Middleton testimony (besides being mere Conversations not shown to be by authority or res gestæ) is further objectionable — because it amounts to a mere offer, & if Jennings had been shown to possess authority to make the offer of 20 ℔ to Settle it — Still if not accepted by Middleton it is no testimony to charge the Company —

Merrills testimony has all the mark of hear Say & res inter alios — Short & unpublished — a mere conversation — with another person about a matter not then transacting but past — or at all events not then being done

3rd Error — is disposed of by the first —

Page 34-35 of Record

The 1st instruction for plff is error — Suit being upon a Special Contract — the Signature & the Manner of Signing — "Wm P Whittle by B B Thomas" Cannot charge the defts below on the Contract — It remains Still in Every way the promise of the party Signing, & Even if the defts below promise to pay for work done under Sd Contract — it is a promise to answer the debt of another person — & does not & Cannot make Whittles Contract the Companies Contract

The 2nd instruction Should have been refused because there is no Evidence to Show that the Contract Was made on behalf of any one by Whittle & no Evidence of authority to Whittle to make it at all for any one — This instruction thirdly would Mislead

The 3rd instruction is Wrong — because that would charge the defendants upon a Contract made between Whittle & Plffs below — for if the defts below had procured & Contracted with Whittle to Buy the Mill and Whittle does it by his own agent — Still it is done by procurement of defts below & at their instance, but Not by Contract between the Builders of the Mill & the Company — So that Even if done in the manner agreed on between Whittle & Plffs below — and accepted by defts below — the plffs below Cannot recover from defts below unless they Can be made to pay Whittles debts

(809-29)

The 4th instruction not applicable to the case

The 5th instruction is wrong for the acceptance of the Mill (if the work was done by Pltffs below) must have been "as the work of Pltffs" and yet the Company might have accepted it from Whittle (or Wakettle from Pltffs below) the Company may would surely not be bound unless they accepted the work from Pltffs below under a contract with them — by the Company But this instruction is clearly wrong in another particular — for it would admit as "Evidence the "Circumstances and declarations" of an agent without regard to the time when — the place where — the manner in which — or matter with reference to which — or necessity for or Authority by which they have made this rule admits all declarations of agents to bind their principal (too Broad a rule)

The 6th instruction is not supported by any Contract or part of Defts below to furnish instructions &c

The 7th instruction is all wrong. The right of Pltffs recovery being based wholly upon

1st The belief of the Jury that it was the duty of Defts to decide how and the Mill should go &c & their failure &c

2nd That the Pltffs did as long as they could Conveniently do so — and left, suspected with the utmost Conviction that there was water Enough &c

the framing of these facts alone according to this instruction would justify a verdict for plffs — without any Contract with defts below however unreasonable the lowest Conviction of plffs below might be with reference to the quantity of water or the sufficiency of the depth of mill —

4th Error.

The allegation of 4th instruction See P. 37 mend was improper the words in Parenthesis & underscored which were inserted by the Court would make the defendants below Liable upon any Contract of Whittles Merely because he was Engineer; if the defts Sanctioned and ratified it — to Sanction Signifies to approve of — & this may be of an act not at all bearing nor capable of being bearing on defts below — To Ratify Signifies more — An act to be capable of being ratified must be done apparently for Another or in Anothers name without authority at the time — If it be done by authority it is the principals act "Qui facit per alium facit per se" — a ratification of an act without authority in the name of the person ratifying adopts the act done & makes it his own — Now let us apply this Meaning to the case — A makes a written Contract to pay B 100$ at Kenyon for his horse — If I ratify and Sanction the act of A — ~~Sanction~~ I am liable to pay B 100$ Especially if A happens to be my hostler — So says the addition of the Court to my instruction

[8109-30]

In the first place the act of A is not capable of being sanctioned and ratified, he did not buy the horse as my agent or in my name I might approve of, but could not adopt or ratify this act, If I had expressly agreed to pay the 100 $ to B, he could not compel me Because no consideration passes for my promise - and it is to pay another debt - The statute of frauds is in ~~my~~ his way — And surely if any contract of this kind is capable of being ratified an express undertaking would be a ratification I use this illustration to show that the term ratify cannot be applied so as to charge one man upon a contract made between others in others names — And it is upon an effort of this kind that this whole cause originated — Now by 4th instruction for this case — the Company could not ratify a contract made on their Status. and therefore the addition by the proper was Error

The 5th instruction P 38-39. was allowed by an erasure and addition both improperly - it should have been given as asked - and in support of its original correctness — I refer to my remarks relative to the above last instruction (no 4) — also authorities cited under first assignment of Error

5th Error,

A new trial should have been granted for reasons I have shown — admission of improper testimony — giving improper & refusing proper instructions — & for the further reason that if all the Evidence & instructions were competent & proper, the verdict is contrary to both.

Because the jury have charged Defts below. When there is no Evidence any where either in the written contract or out of it — that Whittle ever had any Authority to bind them by a contract with Pltffs below. — therefore they have found

15 Ills. 454 wrong—

Again taking all the proof as competent Pltffs proved no acceptance of the work — or any ~~app~~ approbation by Defts. — nor have they shown any performance of the contract, for their own witness says there was not enough water in the mill — so that it was not deep enough — nor have they shown an Excuse for non performance — the contract specified how it was to be done & if an Engineer had come and directed him to do differently from what the contract specified — it would have been nugatory & idle — In the absence of any interference the mill should have been finished as per contract — Unless they show an interference — prevention — or impossibility by act of god they show no Excuse for nonperformance

[8709-31]

6th Error

The Judgment Should have been entered But a new trial Should have been granted for another reason — If there is an issue of fact upon the 2nd 3rd & 4th Pleas of defts then the verdict is Wrong because the Evidence proves Every fact averred in Each Plea fully clearly & unequivocally — But If there is no issue of fact on those Pleas then I insist that this assignment of Error Must be sustained Judgment Because the Judgment Should have been [redacted] for deft upon his Pleas not answered —

6th Error,

The 3 Special Pleas remain not replied to — they are neither Denied nor confessed & avoided & there is no issue upon them, The instant intended as a Replication is a nullity See Chit Pl 578 — as to Pleadings & Rep

The 5th Plea Contained a prima facie defence if true to Plffs action — If deft duly pleaded the Plff Should have demurred — if not he must Confess & avoid or traverse — he has done neither the Pleas are

Each Wholly unanswered & Judgment Should be Reversed for this Error.

3 Gill 326.

The filing of such a thing as the pltff's Bill is clearly declining the issue presented and is a Discontinuance 3 Gill & J 267

It is to objected that Each plea amounts to the General issue I answer first that such is not so — The Plea to 3rd Count sets up facts that do not appear in that Count, & which if true negates a recovery on it — Then if the pltffs below prove under a Common Count for Work & Labor — that they done the Work on defts Lands — under defts Notice, & the benefit thereof was Optional with defts they have a prima facie case but I reply that the Work & Was done under a Written Contract — not Whitlle by Pltff & not for defts — & Conclude with a Verification — Then I insist it is a good Special plea to that Count.

I answer Secondly

That if they do amount to the Genl issue the pltff Should have Answered Specially 4 Scam 412

1 Gill 338.

13 Md 133

There being one good Count the-
Motion in arrest of Judgment was properly
denied

But for the other Errors I
insist a new trial is clearly the
right of Pltff in Error

D. McIntyre
for Pltff in Error

Brief
&
Argument for Pltff

Chas & Miss R.R. Co Pltffs
in Error
vs
Wm E. Wilkerson et al
Defts in Error

Adam McIntyre
for Pltff in Error

The Statute in the case of Special Counts only intended to dispense with the proof of the Execution of the written instrument set forth in the Counts. any writing offered in testimony which is variant in its parts from the Description in the Count cannot be admitted & its Execution is not admitted 1st Scam 390.

18 Ills 188.

Now when this instrument is variant from the Special Counts then on these Counts the Court should have Excluded it below —

~~Still~~ Then if the instrument was improper under the Special Counts — the Same proof Devolved on Pltff below as did at Common law under the Common Counts, And in this case proof in full is required on Every part to Charge Deft — They then would have to prove the power of Whitten — his Exercise of it — in the way to Charge the Company — performance of Contract ~~in the~~ By Pltff below — ~~the~~ an acceptance by Defendt. This they have failed as I have Shown in my argument —

Higgins.

Brief & Argument

Ohio & Miss RR Co
vs
W E Middleton Exrl

Error to Marion

Haynie
for Pl'ff in er

SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.

NOVEMBER TERM A. D., 1857.

Record Page.

ABSTRACT.

The Ohio & Mississippi Railroad Company, Plaintiffs in Error.
vs.
Wm. E. Middleton, et. al., Defendants in Error.
} Error to Marion County.

This was an action of "trespass on the case or premises" by Defendants in Error against Plaintiffs in Error. Declaration contained three counts. Damages $500.

3 4 1st count, Is upon a *special contract*—charged and averred to have been made by plaintiffs by Wm. P. Whittle, their agent, who signed said contract by B. B. Thomas, his agent—in writing to the effect following: That the said plaintiffs below agreed to dig a well for the use of the Ohio & Mississippi Railroad Company, defendants below, at the side track to be laid out by defendants below, at Middleton Depot, in Marion county, Illinois. Well to be dug twelve feet in diameter, until rock of sufficient strength is reached to support a wall one foot thick—of height to reach surface—and was to be built as directed by the engineer in charge of the work at that point. Then the well was to be ten feet in diameter until water was reached of sufficient quantity for the purpose aforesaid—said well to be dug and walled as required by engineer of defts in charge of the construction of the work, for the following consideration, to-wit: $10 per foot for the first twenty feet dug and walled as required, &c.; $12 per foot for the second twenty feet; $15 per foot for the third twenty feet; and $3 per foot additional for each 20 feet thereafter. Defendants were to furnish a force pump and a chain pump if necessary, to keep water out of well while at work—furnishing pumps *discretionary* with defendants' engineer—plaintiffs not bound to dig more then one hundred feet, nor bound to finish well if life endangered by the *gas* or *damp*, this to be decided by defendants or their engineer. Averment that in consideration of plaintiffs' (below) promise to perform, &c., defendants undertook and promised to fulfill their part, &c. 5 6 Averment of performance by plaintiffs below, under inspection of engineer in charge, and approved by him; that it was dug deep enough to supply sufficient water, &c., and was so determined by said engineer, and all of said work was approved by said engineer, and received by him for said defendants below as completed. Averment that said contract was executed by Whittle by B. B. Thomas, on defendants behalf. No breach to first count, and no averment that it was delivered to plaintiffs.

7 2d count, For that, &c., defendants on the 16th of February, 1855, made, &c., and delivered to said plaintiffs their certain other contract, in writing, dated February 16th, 1855, which said contract, &c., the said plaintiffs aver, was executed on the part of said defendants, and at the special instance and request of said defendants, by the agent of said defendants, Wm. P. Whittle, signed and abreviated thus "WM. P. WHITTLE BY B. B. THOMAS," in consideration of the promises of defendants, and on behalf of defendants, and at special instance of defendants, &c., the plaintiffs agreed to dig a well for the use of defendants, at the side track to be laid out by said defendants by the said Wm. P. Whittle, or his assistant, at a place in Marion county called Middleton Depot; said well to be dug twelve feet in diameter till they struck rock, &c., sufficient to support wall one foot thick, 8 &c., to be built as directed by the engineer in charge, &c., then ten feet in diameter until water sufficient for the use of Ohio & Mississippi Railroad Company was found; said well to be dug and walled as required, &c., for the following consideration: $10 per foot for first twenty feet; $12 per foot for second; $15 per foot for third; and $3 additional for each twenty feet thereafter—that is to say, $3 additional to the last named sum of $15 per foot. And it was further agreed that if water sufficient to retard the digging of said well was found, and not sufficient for the purposes named, &c., then defendants were to furnish plaintiffs a chain pump free of charge, to be furnished, however, at defendants' 9 discretion, &c. Further that plaintiffs should not be bound to dig more than one hundred feet, &c., and were not bound to finish the same if gas or damp endangered life, to be decided by defendants. Plaintiffs aver that they, at special instance, &c., of defendants and upon the consideration, undertaking and agreement of said defendants in said contract, executed said contract. Plaintiffs aver that they dug well 54 feet, and were then notified 10 by defendants not to dig any deeper, because there was water sufficient, &c., and thereby completed, walled and finished said well, and *delivered possession* to defendants, and it was, on the 1st of November, 1855, *accepted* by defendants. Averment that defendants broke their agreement in this, to-wit: That plaintiffs found water sufficient to retard digging and not sufficient for the use aforesaid, and notified defendants thereof; that the 11 engineer in charge declared a pump necessary, and said defendants then &c. promised to furnish a chain pump, as bound, &c., by said contract. Averment that defendants failed to furnish a chain pump, &c., whereby an action accrued to plaintiffs, to demand, &c., $400.

12 3d Count—Indebitatus Assumpsit, on 1st April, 1856, for digging and walling well,

$500—common [illegible] $500—demur sustained at March term, '57, overruled at August term, 1857.

17 Defendant plead general issue, and joinder, and 3d special pleas as follows, to-wit:

18 Pleas.—2d Plea—1st special Plea, to 3d Count, to-wit:

That the work &c was done under a written contract between Wm. P. Whittle, and said Plaintiff dated 16th February, '55, and that other than under said contract they never dug any well at Middleton depot, or otherwhers for use of said road &c.—Hoc Paratus Est &c.

19 3d Plea—2d special Plea to 1st Count Acteo non, because the work therein (1st Count) mentioned if done at all was under a written contract with Wm. P. Whittle and not otherwise &c. Verification &c.

4th Plea—3d special Plea to 2d Count Actio non, because the chain pump was to be furnished under agreement between Whittle and Plaintiff, and was to be so furnished at Whittles descretion, and not by Defendant.

20 Replication as to 2d, 3d and 4th Pleas precludi non because they say "that by virtue of the said contracts in the said Plaintiff's declaration mentioned in manner and form as therein set forth, the said Defendants did undertake and promise as alledged therein in the said declaration &c. conclusion to the contrary, &c."

No issue joined on this thing by Defendants.

21 Jury and trial, verdict for Plaintiff for $635.

Motion for new trial and in arrest of Judgment.

Remettiher by Plaintiff for $332; motion for new trial and in arrest overruled, and bill of exceptions tendered; signed &c.

23 Plaintiff's Testimony.—B. B. Thomas testified, that in December and January, 1855, he was assistant Engineer under Wm. P. Whittle, on the O. & M. R. R.; that said Whittle authorized him to sign his (Whittles) name to an agreement with Plaintiff, to dig a well at Middleton station on the O. & M. R. R.—witness did not write the agreement, except the latter clause; witness had a minute in a memorandum book of what he wrote. Mr. Whittle did not give witness written authority.

Witness was then asked by Plaintiff "for whom he executed the contract sued on, whether for Whittle or the company." Defendants objected to the question, Court overruled objection; witness stated that he believed he executed or signed Whittles name for
24 the O. & M. R. R. company, as the well was for the use of the company. Defendant ex
ex cepted to decision of Court, or overruling his objection, and admitting said testimony at the time Plaintiff then offered the following instrument in evidence, being the instrument alluded to by witness Thomas, viz.

"State of Illinois, } An article of agreement made and entered into the fifth day of
"Clay County. } January, A. D. 1855, by and between W. E. Middleton, and L. L.
"Morgan, of the first part, and William P. Whittle (Res'd. Engineer, on O. & M. R. R.,
"of the second part, that party of the first part hereby covenant and agree to dig a well
"for the use of the O. & M. R. R. at the side tract to be laid by the said party of the
"second part or his assistant in Marion county, Illinois, known as the Middleton depot,
"said well to be dug as follows: twelve feet in diameter, until they strike rock of sufficient
"to strength support wall, one foot thick, rock of sufficient strength to support a wall one foot
25 "thick, and of sufficient height to rock surface of the ground (and to be built as directed
"by the Engineer in charge of the work,) then the party of the first part shall dig but
"ten feet in diameter, until water is found sufficient for the purpose named above, said
"well to be dug and walled as required by the Engineer in charge for the following con-
"sideration to-wit: The party of the second part, hereby covenants and agree to pay
"the said party of the first part ten dollars for each foot for the first twenty feet, dug and
"walled as required by the Engineer, and twelve dollars for the second twenty feet,
"fifteen dollars for the third twenty feet, and three dollars per foot additional for each
"twenty feet thereafter. And the party of the second part further agrees, that if the
"said party of the first part shall find water sufficient to retard the digging of said well,
"and not sufficient for the purpose named in this contract, then said party of the second
"part will furnish said first party with a chain pump free of charge, but it is the under-
"standing of the said parties, that it shall be left to the discretion of the second party,
"when said pump is necessary that *he* shall furnish it at *his* descretion, it being under-
26 "stood that the said party of the first part, shall not be bound to finish said well if the
"damp or gas shall arise sufficient to endanger the lives of persons employed to do such
"work, said party of the second part shall decide whether or not such is the case, or if it
"is or shall be dangerous for such hands.

"Witness the hands of said parties, at Xenia, this the sixteenth day of February, A.
"D. 1855.

"WM. E. MIDDLETON,
"L. L. MORGAN
"WM. P. WHITTLE,
"By B. B. THOMAS."

"Witness, C. D. BROWN,
"WM. ELSTON."

Defendant objected to the introduction of said instrument as evidence; the Court overruled the objection, allowed it to be read and Defendant at the time excepted, &c.

ex *B. B. Thomas*, continued, stated that he made two estimates of work done on O. & M.
R. R., and returned them to Whittle, and I suppose they should go to Walker, Engineer
27 in chief—believe work was done by Plaintiff on well, cannot say how deep well was sunk *

27 diameter at surface 12 fe[illegible]ourt say how far that diameter went down—suppose I estimated the work same as I did other work.—Question was then asked what was paid by Defendants, or offered to be paid by them on the contract; objected to—objection overruled testimony admitted. Defendant *excepted*, witness said he remembered no payment, but presume he made a payment, might have taken a receipt and it might have gone to Whittle, *I received the money from him* Weittle, was not properly the *person to pay money* for said company on said work. Witness had made payments several times for Whittle on contracts for O. & M. R. R. company and other payments, Mr. Whittle told me to do so—paid some on trestle work for the company, I believe of money received from Whittle—to all which testimony Defendant objected and moved Court to exclude it, but Court
28 overruled motion and Defendant excepted at the time.

CROSS EXAMINATION OF B. B. THOMAS.—I signed the instrument at the request of Wm. P. Whittle—I put his name there *at his request, he told me to sign it as it is signed*, and I did so. The Defendants never authorized me to sign their names to it. Engineers take contracts to do work sometimes and then *sub-let*—I did so. Whittle took a contract to get wood; when Engineers make contracts, they make and return estimates and *receive* the *money* themselves and *then pay it out to sub-contractors*—never received money from Defendants to pay Plaintiffs—if I paid money, *Whittle* gave it to me—knows nothing of receipts, when work is done for the Railroad company, receipts are made in the form of *vouchers*. Whittle was not the proper person to pay money on contracts with the company. It
29 is not often men pay outside of their employment.

RE-EXAMINED BY PLAINTIFF.—Plaintiff asked "what instructions did Whittle give you at the time telling you to make the contract." Defendant objected, but Court overruled objection—Defendant excepted. Witness said, "I have a memorandum of instructions given me as follows." Reads from a paper the following:

"Instructions given by Whittle to B. B. Thomas, to draw up contract.

"$10 per foot for first 20 feet,"
"$12 " " second 20 feet,"
"$15 " " third 20 feet,"
"$3 " " additional for every twenty feet, chain pump to be furnished

"by company at discretion of Engineer. It is my belief (witness said) that he told me to "sign his name on behalf of company."

THOMAS RE-CROSS-EXAMINED BY DEFENDANT.—"I only state the last from impression on my mind, I signed it as he instructed me, or tried."

To question by Plaintiff, he answered, "It was always my *opinion* that it was done for the company, for the well was on their road-way. To which Defendant objected at the time, but was overruled by Court, and excepted to the same.

30 D. J. MIDDLETON TESTIFIED.—In 1855, Plaintiff commenced work on well—diameter, 12 feet—struck rock at 10 feet deep, Well was 53 or 4 deep—water at 27 to 30 feet—water got stronger the deeper we went. We drew 13 tubs up day before we left it, in less than one hour and a quarter; we bailed with two buckets sufficient to keep water out.—Had hands employed to bail at night—failed to do so one Saturday, and we did it on Monday; I had been wet, but was dry then tolerably. A man came there, did not know him, can't say he was an Engineer—put his line in well, said it was 47 feet deep, my idea was, he was an Engineer. Measured well and left. Saw no otner person there—did not see B. B. Thomas
31 there; well was walled above the rock with sand and stone. Two men worked to keep water out at windlass.

GEORGE MIDDLETON, testified, that he worked at well, it was 54 feet deep at bottom part of work, we lifted six buckets of water to one of stone, well was walled with stone. A man came and measured well—did not know him. We quit digging because there was so much water; pump was furnished and then taken away and then returned.

W. H. BLACK testified, that Mr. Middleton ordered me to go and get a pump—did so—put it in. It is not paid for yet; Middleton said put it in. I made the contract with him, the price was $23 for pump. Defendant objected to said testimony, but the Court overruled the objection—allowed it to go to jury, and Defendant excepted.

B. B. THOMAS, re-called, testified; I heard witness state about the quantity of water. Can't say how much water would be sufficient—depend on number of trains running;
32 rather think there was not enough—don't know who authorized Middleton to get pump. I had a talk about pump. I received pay on road till June, '55, then quit. Gordon came on road then.

JAMES HUGGINS, testified, that one Wyman, the paymaster and agent of O. & M. R. R. company, told Middleton to come to Xenia, and he would send an Engineer—measure it, and settle for it. Defendant objected to said testimony—overruled by Court, and except-
ex ed to.

CHARLES HUGGENS testified, that he was at well. A man came on cars, left a force pump, went off on cars. He said it would be sufficient to take the water out. This was while they were at work, don't know who the man was.

33 PLEASANT MIDDLETON testified, I was in Salem in 1855; a man was there selling and giving notes for debts—dont know him, he proposed to give Medleton $200 and quit off now, he would not, do it—this man gave me a note and others. I heard the next day about the same. Don't know but they were looking over papers; he seemed to be acting as agent, seltting debts for company. Cant read, he said well was not measured, and $200 was all he would give; think this man's name was Winenger, he was not an Engineer.

CROSS EXAMINED.—Don't know that he (the man) had any accounts for Middleton; did not see his name on books; the man merely offered to give $200 and settle it; defend-

ant then moved to e[illegible]et ; Co[illegible]e above testimony as to an offer to pay—overruled and excepted to.

34 N. C. MERRELL TESTIFED :—I have seen well ; don't know how much water was in it ; met Mr. Trip, (a road master on road) he told me they were going to put up a station at Middleton station, clean out the well and put a tank there ; this was told me to induce me to put a store there ; I was agent of the owners of the town at Middleton station and talked of putting a store there ; said I would see my principal, this was the last of the matter ; nothing was done.

4 or 5 weeks ago, I saw Mr. Clements the superintendent of the road ; he said they ex were going to put up a tank there ; this is all I know. Defendant objected to all the testimony given by Merrell at the time, and moved the court to exclude from the jury the conversation of Merrett with Trip and Clements, objections overruled, motion dis allowed ; evidence went to jury, and defendant excepted. This was all the testimony.

THE COURT INSTRUCTED JURY FOR PLAINTIFFS.—1st, that however the signature may be made to the contract sued on in this case the jury may decide from all the evidence whether it is or is not the contract of the O. & M. R. R. Co.

35 2nd, that if the jury believe from the evidence that the contract sued on was made on behalf of the defendants by William P. Whittle with authority of defendants to make it, and the plaintifis have performe their contract on their part they must find for the plaintiffs, taking the contract price per foot as the measure of damages.

3d, that if the jury believe from the evidence that the work was done by the procurement and at the instance of defendants, and in the manner agreed upon, and that the work so done was accepted by defendants, they must find for the plaintiffs, being governed by contract price.

4th, that the defendants to be bound by an acceptance of the well were not bound to use the well but were at liberty to use or not use as they might choose.

5th, that if the jury believe from the evidence that the O. & M. R. R. Co., accepted the well in question as the work of the plaintiffs, then they should find for the plaintiffs under the third count of plaintiffs' declaration. And in arriving at the question of acceptance the jury are at liberty to consider the circumstances and declarations of the legally constituted agents of defendants.

35 6th, the Court is asked to instruct the jury on behalf of Plaintiff, that if they believe from
36 the evidence, that during the progress of the work, the Defendants were bound by contract to give instructions and directions as to the character and extent of the work, and that Defendant failed to do so ; and Plaintiffs conducted and completed the work under the contract as prudent men should have done ; that then the jury should find for the Plaintiffs, and fix their damages according to the stipulations in the contract.

7th that although the jury may believe from the evidence that the Plaintiffs did not dig the well to a sufficient depth to supply all the water for the purposes intended ; yet if they believe from the evidence, that it was the duty of Defendants to decide how deep the well should have been sunk to supply the quantity of water required, and Defendants failed or refused to give instructions as to the matter, and that the Plaintiffs did dig so long as they could conveniently do so, and were impressed with the honest conviction that the well was sunk deep enough to supply all the water required under the contract, then the jury should find for the Plaintiffs.

Defendants excepted to each and all of said instructions at the time.

DEFENDANTS INSTRUCTIONS.—4th, If the jury believe from the testimony, that the well
37 built at Midleton, was done under a written contract, and that said contract was sgned
38 by, and entered into by William P. Whittle, by his agent in his own name—then his being an Engineer of the road, would not make Defendants liable at all, and the verdict should be for defendants (*unless the act was sanctioned and ratified by Defendants, and this can be determined by the circumstances.*)

The Court refused to give said instructions as asked, but amended the same by adding the words in brackets or parentheses and *italicised*, and gave it as amended, to which refusal and amendment, and giving same as amended, Defendant excepted at the time.

5th.—The following instruction was then asked by Defendant, to-wit : The Court in-
38 structs the jury further, that if the said Wm. P. Whittle was the Engineer of the road,
39 and had authority from Defendants to sign and execute contracts in their name, he should execute them himself, and if any agent of his should ever at his request, attempt to execute a contract in writing, the Defendants would not be bound by it.

(*Because an agent cannot authorize another to execute delegated authority, and if Thomas signed Whittles name as Whittle's agent and not by authority from Defendants, then the Defendants are not bound by the contract.*)

Said instruction *as asked* refused by Court, and struck out all the part in parenthasis and *underscored* ; and added the following words as an amendment, to-wit : (after the words "by it") "unless afterwards sanctioned and ratified by the company, and this sanction and ratification can be judged of by circumstances."

To the refusal of said instructiou *as asked*, and to the striking out part of the same and adding other words in lieu thereof, Defendants at the time excepted.

40 VERDICT, $635, motion for new trial and in arrest, remittibur of $332 by Plaintiffs motion for new trial, and in arrest overruled by the Court and judgment entered for Plantiffs for $303 to all which Defendant at the time excepted.

ERRORS ASSIGNED.—1st—The Court erred in admitting testimony below, objected to by Defendants below.

[illegible]

42

2d—The Court erred in refusing to sustain motion of Defendant below to exclude evidence.

3d—The Court gave improper instructions to Plaihtiff below over objection of defendant below.

4th—The Court refused proper instructions to Defendant below, made improer erasures, alterations and amendments to those asked, although objected to.

5th—The Court erred in refusing new trial.

6th—The Court erred in refusing to arrest judgment.

7th—The Court erred in entering judgment for Plaintiff below, against Defendant below.

8th—The Court erred in proceeding to trial without issues on Defendants special pleas. Wherefore, &c., Plaintiff in error prays that same be set aside, reversed, &c., and judgment arrested, &c.

HAYNIE, for Plaintiff in Error.

D & M R R Co
vs
Middleton
et al

8

Abstract

Filed Dec. 1. 1857.
N. Johnston Clk

See See 8. page 44 of the old charter & construe this section in connection with Law of March 1. 1854. found in Scates. Treat. Blackwell Stat. 202.

See New old charter page 11. Sec 27. also page 14. Sec 40. & subsequent sections

See also page 25 of new charter sections 85. 86. &c.

170
30
30
5

255

SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.

NOVEMBER TERM A. D., 1857.

Record Page.

ABSTRACT.

The Ohio & Mississippi Railroad Company, Plaintiffs in Error.
vs.
Wm. E. Middleton, et. al., Defendants in Error. } Error to Marion County.

This was an action of "trespass on the case or premises" by Defendants in Error against
3 Plaintiffs in Error. Declaration contained three counts. Damages $500.

4 1st count, Is upon a *special contract*—charged and averred to have been made by plaintiffs by Wm. P. Whittle, their agent, who signed said contract by B. B. Thomas, his agent—in writing to the effect following: That the said plaintiffs below agreed to dig a well for the use of the Ohio & Mississippi Railroad Company, defendants below, at the side track to be laid out by defendants below, at Middleton Depot, in Marion county, Illinois. Well to be dug twelve feet in diameter, until rock of sufficient strength is reached to support a wall one foot thick—of height to reach surface—and was to be built as directed by the engineer in charge of the work at that point. Then the well was to be ten feet in diameter until water was reached of sufficient quantity for the purpose aforesaid—said well to be dug and walled as required by engineer of defts in charge of the construction of the work,
5 for the following consideration, to-wit: $10 per foot for the first twenty feet dug and walled as required, &c.; $12 per foot for the second twenty feet; $15 per foot for the third twenty feet; and $3 per foot additional for each 20 feet thereafter. Defendants were to furnish a force pump and a chain pump if necessary, to keep water out of well while at work—furnishing pumps *discretionary* with defendants' engineer—plaintiffs not bound to dig more then one hundred feet, nor bound to finish well if life endangered by the *gas* or *damp*, this to be decided by defendants or their engineer. Averment that in consideration of plain-
6 tiffs' (below) promise to perform, &c., defendants undertook and promised to fulfill their part, &c. Averment of performance by plaintiffs below, under inspection of engineer in charge, and approved by him; that it was dug deep enough to supply sufficient water, &c., and was so determined by said engineer, and all of said work was approved by said engineer, and received by him for said defendants below as completed. Averment that said contract was executed by Whittle by B. B. Thomas, on defendants behalf. No breach to first count, and no averment that it was delivered to plaintiffs.

7 2d count, For that, &c., defendants on the 16th of February, 1855, made, &c., and delivered to said plaintiffs their certain other contract, in writing, dated February 16th, 1855, which said contract, &c., the said plaintiffs aver, was executed on the part of said defendants, and at the special instance and request of said defendants, by the agent of said defendants, Wm. P. Whittle, signed and abreviated thus "WM. P. WHITTLE BY B. B. THOMAS," in consideration of the promises of defendants, and on behalf of defendants, and and at special instance of defendants, &c., the plaintiffs agreed to dig a well for the use of defendants, at the side track to be laid out by said defendants by the said Wm. P. Whittle, or his assistant, at a place in Marion county called Middleton Depot; said well to be dug twelve feet in diameter till they struck rock, &c., sufficient to support wall one foot thick,
8 &c., to be built as directed by the engineer in charge, &c., then ten feet in diameter until water sufficient for the use of Ohio & Mississippi Railroad Company was found; said well to be dug and walled as required, &c., for the following consideration: $10 per foot for first twenty feet; $12 per foot for second; $15 per foot for third; and $3 additional for each twenty feet thereafter—that is to say, $3 additional to the last named sum of $15 per foot. And it was further agreed that if water sufficient to retard the digging of said well was found, and not sufficient for the purposes named, &c., then defendants were to furnish plaintiffs a chain pump free of charge, to be furnished, however, at defendants'
9 discretion, &c. Further that plaintiffs should not be bound to dig more than one hundred feet, &c., and were not bound to finish the same if gas or damp endangered life, to be decided by defendants. Plaintiffs aver that they, at special instance, &c., of defendants and upon the consideration, undertaking and agreement of said defendants in said contract,
10 executed said contract. Plaintiffs aver that they dug well 54 feet, and were then notified by defendants not to dig any deeper, bocause there was water sufficient, &c., and thereby completed, walled and finished said well, and *delivered possession* to defendants, and it was, on the 1st of November, 1855, *accepted* by defendants. Averment that defendants broke their agreement in this, to-wit: That plaintiffs found water sufficient to retard digging and not sufficient for the use aforesaid, and notified defendants thereof; that the
11 engineer in charge declared a pump necessary, and said defendants then &c. promised to furnish a chain pump, as bound, &c., by said contract. Averment that defendants failed to furnish a chain pump, &c., whereby an action accrued to plaintiffs, to demand, &c., $400.

12 3d Count—Indebitatus Assumpsit, on 1st April, 1856, for digging and walling well,

[8109-40]

$500—common conclusion, damages $500—demur sustained at March term, '57, overruled at August term, 1857.

17 Defendant plead general issue, and joinder, and 3d special pleas as follows, to-wit:

18 Pleas.—2d Plea—1st special Plea, to 3d Count, to-wit:

That the work &c was done under a written contract between Wm. P. Whittle, and said Plaintiff dated 16th February, '55, and that other than under said contract they never dug any well at Middleton depot, or otherwhers for use of said road &c.—Hoc Paratus Est &c.

19 3d Plea—2d special Plea to 1st Count Acteo non, because the work therein (1st Count) mentioned if done at all was under a written contract with Wm. P. Whittle and not otherwise &c. Verification &c.

4th Plea—3d special Plea to 2d Count Actio non, because the chain pump was to be furnished under agreement between Whittle and Plaintiff, and was to be so furnished at Whittles descretion, and not by Defendant.

20 Replication as to 2d, 3d and 4th Pleas precludi non because they say "that by virtue of the said contracts in the said Plaintiff's declaration mentioned in manner and form as therein set forth, the said Defendants did undertake and promise as alledged therein in the said declaration &c. conclusion to the contrary, &c."

No issue joined on this thing by Defendants.

21 Jury and trial, verdict for Plaintiff for $635.

Motion for new trial and in arrest of Judgment.

Remettiher by Plaintiff for $332; motion for new trial and in arrest overruled, and bill of exceptions tendered; signed &c.

23 Plaintiff's Testimony.—B. B. Thomas testified, that in December and January, 1855, he was assistant Engineer under Wm. P. Whittle, on the O. & M. R. R.; that said Whittle authorized him to sign his (Whittles) name to an agreement with Plaintiff, to dig a well at Middleton station on the O. & M. R. R.—witness did not write the agreement, except the latter clause; witness had a minute in a memorandum book of what he wrote. Mr. Whittle did not give witness written authority.

Witness was then asked by Plaintiff "for whom he executed the contract sued on, whether for Whittle or the company." Defendants objected to the question, Court over-
24 ruled objection; witness stated that he believed he executed or signed Whittles name for the O. & M. R. R. company, as the well was for the use of the company. Defendant ex-
ex cepted to decision of Court, on overruling his objection, and admitting said testimony at the time Plaintiff then offered the following instrument in evidence, being the instrument alluded to by witness Thomas, viz.

"State of Illinois, } An article of agreement made and entered into the fifth day of
"Clay County. } January, A. D. 1855, by and between W. E. Middleton, and L. L.
"Morgan, of the first part, and William P. Whittle (Res'd. Engineer, on O. & M. R. R.,
"of the second part, that party of the first part hereby covenant and agree to dig a well
"for the use of the O. & M. R. R. at the side tract to be laid by the said party of the
"second part or his assistant in Marion county, Illinois, known as the Middleton depot,
"said well to be dug as follows: twelve feet in diameter, until they strike rock of sufficient
"to strength support wall, one foot thick, rock of sufficient strength to support a wall one foot
25 "thick, and of sufficient height to rock surface of the ground (and to be built as directed
"by the Engineer in charge of the work,) then the party of the first part shall dig but
"ten feet in diameter, until water is found sufficient for the purpose named above, said
'well to be dug and walled as required by the Engineer in charge for the following con-
"sideration to-wit: The party of the second part, hereby covenants and agree to pay
"the said party of the first part ten dollars for each foot for the first twenty feet, dug and
"walled as required by the Engineer, and twelve dollars for the second twenty feet,
"fifteen dollars for the third twenty feet, and three dollars per foot additional for each
"twenty feet thereafter. And the party of the second part further agrees, that if the
"said party of the first part shall find water sufficient to retard the digging of said well,
"and not sufficient for the purpose named in this contract, then said party of the second
"part will furnish said first party with a chain pump free of charge, but it is the under-
"standing of the said parties, that it shall be left to the discretion of the second party,
"when said pump is necessary that *he* shall furnish it at *his* descretion, it being under-
26 "stood that the said party of the first part, shall not be bound to finish said well if the
"damp or gas shall arise sufficient to endanger the lives of persons employed to do such
"work, said party of the second part shall decide whether or not such is the case, or if it
"is or shall be dangerous for such hands.

"Witness the hands of said parties, at Xenia, this the sixteenth day of February, A.
"D. 1855.

"WM. E. MIDDLETON,
"L. L. MORGAN.
"WM. P. WHITTLE,
"By B. B. THOMAS."

"Witness, C. D. BROWN,
"WM. ELSTON."

Defendant objected to the introduction of said instrument as evidence; the Court overruled the objection, allowed it to be read and Defendant at the time excepted, &c.

ex *B. B. Thomas*, continued, stated that he made two estimates of work done on O. & M.
R. R., and returned them to Whittle, and I suppose they should go to Walker, Engineer
27 in chief—believe work was done by Plaintiff on well, cannot say how deep well was sunk

[9709-41]

27 diameter at surface 12 feet ; Court say how far that diameter went down—suppose I estimated the work same as I did other work.—Question was then asked what was paid by Defendants, or offered to be paid by them on the contract; objected to—objection overruled testimony admitted. Defendant *excepted*, witness said he remembered no payment, but presume he made a payment, might have taken a receipt and it might have gone to Whittle, *I received the money from him* Weittle, was not properly the *person to pay money* for said company on said work. Witness had made payments several times for Whittle on contracts for O. & M. R. R. company and other payments, Mr. Whittle told me to do so—paid some on trestle work for the company, I believe of money received from Whittle—to all which testimony Defendant objected and moved Court to exclude it, but Court
28 overruled motion and Defendant excepted at the time.

CROSS EXAMINATION OF B. B. THOMAS.—I signed the instrument at the request of Wm. P. Whittle—I put his name there *at his request, he told me to sign it as it is signed*, and I did so. The Defendants never authorized me to sign their names to it. Engineers take contracts to do work sometimes and then *sub-let*—I did so. Whittle took a contract to get wood ; when Engineers make contracts, they make and return estimates and *receive* the *money* themselves and *then pay it out to sub-contractors*—never received money from Defendants to pay Plaintiffs—if I paid money, *Whittle* gave it to me—knows nothing of receipts, when work is done for the Railroad company, receipts are made in the form of *vouchers*. Whittle was not the proper person to pay money on contracts with the company. It
29 is not often men pay outside of their employment.

RE-EXAMINED BY PLAINTIFF.—Plaintiff asked "what instructions did Whittle give you at the time telling you to make the contract." Defendant objected, but Court overruled objection.—Defendant excepted. Witness said, "I have a memorandum of instructions given me as follows." Reads from a paper the following:

"Instructions given by Whittle to B. B. Thomas, to draw up contract.

"$10 per foot for first 20 feet,"
"$12 " " second 20 feet,"
"$15 " " third 20 feet,"
"$3 " " additional for every twenty feet, chain pump to be furnished
"by company at discretion of Engineer. It is my belief (witness said) that he told me to
"sign his name on behalf of company."

THOMAS RE-CROSS-EXAMINED BY DEFENDANT.—"I only state the last from impression on my mind, I signed it as he instructed me, or tried."

To question by Plaintiff, he answered, "It was always my *opinion* that it was done for the company, for the well was on their road-way. To which Defendant objected at the time, but was overruled by Court, and excepted to the same.

30 D. J. MIDDLETON TESTIFIED.—In 1855, Plaintiff commenced work on well—diameter, 12 feet—struck rock at 10 feet deep, Well was 53 or 4 deep—water at 27 to 30 feet—water got stronger the deeper we went. We drew 13 tubs up day before we left it, in less than one hour and a quarter; we bailed with two buckets sufficient to keep water out.—Had hands employed to bail at night—failed to do so one Saturday, and we did it on Monday; I had been wet, but was dry then tolerably. A man came there, did not know him, can't say he was an Engineer—put his line in well, said it was 47 feet deep, my idea was, he was an Engineer. Measured well and left. Saw no other person there—did not see B. B. Thomas
31 there; well was walled above the rock with sand and stone. Two men worked to keep water out at windlass.

GEORGE MIDDLETON, testified, that he worked at well, it was 54 feet deep at bottom part of work, we lifted six buckets of water to one of stone, well was walled with stone. A man came and measured well—did not know him. We quit digging because there was so much water ; pump was furnished and then taken away and then returned.

W. H. BLACK testified, that Mr. Middleton ordered me to go and get a pump—did so—put it in. It is not paid for yet; Middleton said put it in. I made the contract with him, the price was $28 for pump. Defendant objected to said testimony, but the Court overruled the objection—allowed it to go to jury, and Defendant excepted.

B. B. THOMAS, re-called, testified ; I heard witness state about the quantity of water. Can't say how much water would be sufficient—depend on number of trains running ;
32 rather think there was not enough—don't know who authorized Middleton to get pump. I had a talk about pump. I received pay on road till June, '55, then quit. Gordon came on road then.

JAMES HUGGINS, testified, that one Wyman, the paymaster and agent of O. & M. R. R. company, told Middleton to come to Xenia, and he would send an Engineer—measure it, and settle for it. Defendant objected to said testimony—overruled by Court, and excepted to.

CHARLES HUGGENS testified, that he was at well. A man came on cars, left a force pump, went off on cars. He said it would be sufficient to take the water out. This was while they were at work, don't know who the man was.

PLEASANT MIDDLETON testified, I was in Salem in 1855 ; a man was there selling and
33 giving notes for debts—dont know him, he proposed to give Medleton $200 and quit off now, he would not, do it—this man gave me a note and others. I heard the next day about the same. Don't know but they were looking over papers ; he seemed to be acting as agent, seltting debts for company. Cant read, he said well was not measured, and $200 was all he would give ; think this man's name was Winenger, he was not an Engineer.

CROSS EXAMINED.—Don't know that he (the man) had any accounts for Middleton ; did not see his name on books ; the man merely offered to give $200 and settle it ; defend

ant then moved to exclude the above testimony as to the [illegible] cepted to.

34 N. C. Merrell Testifed :—I have seen well ; don't know how much water was in it ; met Mr. Trip, (a road master on road) he told me they were going to put up a station at Middleton station, clean out the well and put a tank there ; this was told me to induce me to put a store there ; I was agent of the owners of the town at Middleton station and talked of putting a store there ; said I would see my principal, this was the last of the matter ; nothing was done.

4 or 5 weeks ago, I saw Mr. Clements the superintendent of the road ; he said they ex were going to put up a tank there ; this is all I know. Defendant objected to all the testimony given by Merrell at the time, and moved the court to exclude from the jury the conversation of Merrett with Trip and Clements, objections overruled, motion dis allowed ; evidence went to jury, and defendant excepted. This was all the testimony.

The Court Instructed Jury for Plaintiffs.—1st, that however the signature may be made to the contract sued on in this case the jury may decide from all the evidence whether it is or is not the contract of the O. & M. R. R. Co.

35 2nd, that if the jury believe from the evidence that the contract sued on was made on behalf of the defendants by William P. Whittle with authority of defendants to make it, and the plaintifis have performe their contract on their part they must find for the plaintiffs, taking the contract price per foot as the measure of damages.

3d, that if the jury believe from the evidence that the work was done by the procurement and at the instance of defendants, and in the manner agreed upon, and that the work so done was accepted by defendants, they must find for the plaintiffs, being governed by contract price.

4th, that the defendants to be bound by an acceptance of the well were not bound to use the well but were at liberty to use or not use as they might choose.

5th, that if the jury believe from the evidence that the O. & M. R. R. Co., accepted the well in question as the work of the plaintiffs, then they should find for the plaintiffs under the third count of plaintiffs' declaration. And in arriving at the question of acceptance the jury are at liberty to consider the circumstances and declarations of the legally constituted agents of defendants.

35 6th, the Court is asked to instruct the jury on behalf of Plaintiff, that if they believe from
36 the evidence, that during the progress of the work, the Defendants were bound by contract to give instructions and directions as to the character and extent of the work, and that Defendant failed to do so ; and Plaintiffs conducted and completed the work under the contract as prudent men should have done ; that then the jury should find for the Plaintiffs, and fix their damages according to the stipulations in the contract.

7th that although the jury may believe from the evidence that the Plaintiffs did not dig the well to a sufficient depth to supply all the water for the purposes intended ; yet if they believe from the evidence, that it was the duty of Defendants to decide how deep the well should have been sunk to supply the quantity of water required, and Defendants failed or refused to give instructions as to the matter, and that the Plaintiffs did dig so long as they gouid conveniently do so, and were impressed with the honest conviction that the well was sunk deep enough to supply all the water required under the contract, then the jury should find for the Plaintiffs.

Defendants excepted to each and all of said instructions at the time.

Defendants Instructions.—4th, If the jury believe from the testimony, that the well
37 built at Midleton, was done under a written contract, and that said contract was sgned
38 by, and entered into by William P. Whittle, by his agent in his own name—then his being an Engineer of the road, would not make Defendants liable at all, and the verdict should be for defendants (*unless the act was sanctioned and ratified by Defendants, and this can be determined by the circumstances.*)

The Court refused to give said instructions as asked, but amended the same by adding the words in brackets or parentheses and *italicised*, and gave it as amended, to which refusal and amendment, and giving same as amended, Defendant excepted at the time.

5th.—The following instruction was then asked by Defendant, to-wit : The Court in-
38 structs the jury further, that if the said Wm. P. Whittle was the Engineer of the road,
39 and had authority from Defendants to sign and execute contracts in their name, he should execute them himself, and if any agent of his should ever at his request, attempt to execute a contract in writing, the Defendants would not be bound by it.

(*Because an agent cannot authorize another to execute delegated authority, and if Thomas signed Whittles name as Whittle's agent and not by authority from Defendants, then the Defendants are not bound by the contract.*)

Said instruction *as asked* refused by Court, and struck out all the part in parenthasis and *underscored* ; and added the following words as an amendment, to-wit : (after the words "by it") "unless afterwards sanctioned and ratified by the company, and this sanction and ratification can be judged of by circumstances."

To the refusal of said instructiou *as asked*, and to the striking out part of the same and adding other words in lieu thereof, Defendants at the time excepted.

40 Verdict, $635, motion for new trial and in arrest, remittibur of $332 by Plaintiffs motion for new trial, and in arrest overruled by the Court and judgment entered for Plantiffs for $303 to all which Defendant at the time excepted.

Errors Assigned.—1st—The Court erred in admitting testimony below, objected to by Defendants below.

[8709-43]

12

2d—The Court erred in refusing to sustain motion of Defendant below to exclude evidence.

3d—The Court gave improper instructions to Plaihtiff below over objection of defend, ant below.

4th—The Court refused proper instructions to Defendant below, made improer erasures, alterations and amendments to those asked, although objected to.

5th—The Court erred in refusing new trial.

6th—The Court erred in refusing to arrest judgment,

7th—The Court erred in entering judgment for Plaintiff below, against Defendant below.

8th—The Court erred in proceeding to trial without issues on Defendants special pleas. Wherefore, &c., Plaintiff in error prays that same be set aside, reversed, &c., and judgment arrested, &c.

HAYNIE, for Plaintiff in Error.

[8709-44]

O & M R R Co
vs
Middleton
et al

for Plff [illegible]
" Dfts [illegible]

Abstract

Filed Dec. 1. 1857.
A. Schuster Clk

9 N H R – 268
16 Pick 02 347
11 Mass – 27 —
8 Cow
453
10 [illegible] 88
10 " 241

23 Pick 126

15 " 454

Objects by plff.
contract not signed by nor on behalf of plff and no right to be read in evidence as no evidence of liability of Co.

16 Ills – 270
18 – " Hinds & withers &c

1858 — No 8 —

O & M Railroad

by

Middleton and Morgan

Error to
Marion

Affirmed

8709