Matthews, Lawrence vs. Foster, Eli 1852 St. Louis 319/10

McO'Blenis, Robert

S63/20

recover damages $1000.00
carriage business
Scott
affirmed
oral contract

The State of Missouri }.

The State of Missouri

To the Honorable the Court of Common Pleas in and for the County of Saint Louis in said State Greeting:

Whereas, it has been represented to our Honorable, the Supreme Court, of the State of Missouri, that in the transcript of the record and proceedings filed in said Supreme Court in a certain cause lately pending in your Honorable Court, sitting in and for the County of Saint Louis in said State, wherein Eli Foster was plaintiff and Robert Mc O'Blenis and Lawrence Matthews were defendants, in a Civil Action, commenced on the Twenty third day of July in the year Eighteen hundred and fifty one, and which said cause has been by the said Robert Mc O'Blenis and Lawrence Matthews brought into our said Supreme Court by appeal from your Honorable Court, a change has been made since the said transcript in said cause was filed in this our said Supreme Court, and without the leave of our said Court, and whereas our said Supreme Court is fully satisfied that a change has been made by the Clerk of your Honorable Court in the transcript in said cause, as above represented, since the same was filed in our said Supreme Court, and without the leave of this Court, our said Supreme Court do order and award this writ herein, requiring a full and perfect transcript of the record and proceedings in said cause to be sent up from your Honorable Court to our said Supreme Court.

These are therefore to command you that you send up to our Honorable the Supreme Court, certified under your Seal, a full, true and perfect transcript

of the record and proceedings of your Honorable Court in the said cause, on or before the first day of the next Term of our said Supreme Court, to be begun and held at the Court House in the city of Saint Louis, on the third Monday of March next, to wit, in the year of our Lord One Thousand eight hundred and fifty three, to the end that our said Supreme Court may proceed to administer speedy justice in the premises, as the law directs, and have you then there this writ.

Witness my hand and the Seal of said Court, at Office in Saint Louis this Ninth day of February Anno Eighteen hundred and fifty three.

Wm. S. Glanville,
Clerk

State of Missouri
County of St Louis } I Charles W Hicks Clerk of the St Louis Court of Common Pleas in and for said County certify and herewith transmit a full and perfect transcript of the record and proceedings in the case of Eli Foster against Robert Mc O'Blenis and Lawrence Matthews as the same remain in my office

In Testimony whereof I hereto set my hand and affix the Seal of said Court at office in Saint Louis this 24th day of March A.D. 1853

C. W. Hicks. Clerk

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State of Missouri
County of St. Louis ss Be it remembered that heretofore to wit: on the 23d day of July 1851. there was filed in the office of the clerk of the St. Louis Court of Common Pleas within and for said County a Petition. in the words and figures following viz:

Petition

Eli Foster Plaintiff		In St. Louis
vs		Court of Common
Lawrence Matthews		Pleas September
Robert Mc Allenis Defts		Term 1851

St. Louis County ss. The plaintiff states that heretofore on or about the 25th day of October in the year eighteen hundred & forty nine. at the County of St. Louis aforesaid. he was engaged in running a line of Omnibus Carriages for the transportation of persons & property for hire on a public thoroughfare or street called Morgan Street in the City of St. Louis & County aforesaid. which said line of omnibuses the plaintiff was engaged in running on said street from Broadway in said City westwardly to the western limits of said City & thence to the House or Tavern on the St. Charles Road. called the Prairie House. The plaintiff further states that while he was so engaged in running his said line of Omnibuses as aforesaid upon the street & road & in the direction aforesaid the defendants proposed & offered. that if he. the plaintiff would consent & agree to withdraw his said line of Omnibuses from & off the said Morgan Street & not run his said Omnibuses on said street. they the defendants would

pay the plaintiff the sum of $200. & they the defendants would not run their omnibuses or any of them on the St. Charles Road westwardly from the House or Tavern called the "Rising Sun" - which said proposition so made by the defendants to the plaintiff was accepted by him & a bargain was made between the plaintiff & the defendants to the effect viz: that if the plaintiff would not run or employ his said line of omnibuses on Morgan Street from Broadway westwardly to the city limits for the transportation of persons & property. they the defendants would pay the plaintiff two hundred dollars & agreed that they would not run their omnibuses or any of them for the transportation of persons on the St. Charles Road from the house or Tavern called the "Rising Sun" westwardly to the said Prairie House. The plaintiff further states that relying on the said contract & upon the good faith of the defendants in its observance he did, according to the terms & provisions of said contract discontinue running his said line of omnibuses on the said Morgan Street & withdrew the same therefrom & thenceforth did not & has not run his said omnibus line on said street for the purpose of transporting persons or property thereon. but the plaintiff says that in violation of the said agreement the said defendants since the making thereof on divers days & times before the filing of this petition have run several omnibuses for the purpose of transporting persons & property

on the St. Charles Road. westwardly from the House or Tavern called the "Rising Sun" & that for such transportation the defendants have realized large sums of money & made & realized large profits therefrom to the plaintiffs damage of one thousand dollars & for which he asks judgment. Todd & Krum attys for Plff

Eli Foster plaintiff being duly sworn says that the foregoing Petition & the matters therein as stated he believes to be true.

Sworn to & subscribed Eli Foster

before me July 24th 1851. P Tippett clk

Upon the foregoing Petition the following Summons issued to wit: "The State of

Summons Missouri. To the Sheriff of St. Louis County. Greeting. We command you to summon Robert McOBlenis and Lawrence Mathews to appear before the Judge of our St. Louis Court of Common Pleas on the first day of the next term thereof, to be held at the City of St. Louis within and for the County of St. Louis. on the third monday of September next. then and there to answer the complaint of Eli Foster as set forth in the annexed Petition. and have you then there this writ.

Witness. Philip Tippett Clerk of our said Court. with the seal thereof hereto affixed at office in the City of St. Louis this 24th day of July in the year of our Lord one thousand eight hundred and fifty one. P. Tippett Clerk

Sheriffs Return

upon the foregoing Summons the Sheriff made the following return viz: executed this writ in the County of Saint Louis this 2d day of August 1851 by delivering to Robert McOBlenis a true copy thereof and of the petition and further executed the same by delivering to Lawrence Matthews a true copy thereof and of the petition this 20th day of August 1851 Henry B Belt Shff

4 Service $2.00 By Peoblm Peyinghans Dpty

And afterwards viz: on the 20th September 1851. the following demurrer was filed viz:

Demurrer Eli Foster vs Laurence Matthews & Robert McOBlenis. In St. Louis Court of Common Pleas Septr. Tr 1851. and now the defendants by Leslie and Barretts come and say that the Plff ought not to have or maintain his aforesaid action thereof against them because they say that the matters and things in the said Plaintiffs Petition contained in manner & form as therein set forth are not sufficient in law. and for special reasons or causes of demurrer the said defendants set down the following viz: the said Petition does not contain any allegation or statement amounting to a legal or equitable consideration for the supposed contract said Petition in no form or manner alleges that the said Plft had any right or property to sell bargain or contract to Defts or any one else in the matter of running Omnibuses on Morgan Street in the City of St. Louis. or any exclusive right to do the same or any right which by the law of the land could be the subject matter of sale. and these Defts further demurring say that so far as the petition states that part of the consideration of the contract sued upon was that these defendants should not run their Omnibuses on the St. Charles road from the Rising Sun house (mentioned in in said Petition) westwardly to the Prairie House the same is of no effect in law. and

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The Defts for further cause of demurrer state that the Petition does not allege any time when their right to run omnibuses on said St. Charles road should cease, or how long the disability by said contract should continue or whether the same should be perpetual, and therefore the allegation that Defts on divers days and times before the filing of this petition did run omnibuses on St. Charles road shows no cause of action against defendants and the Defts say that whether they have earned money and made profits by the said running of omnibuses is not business of Plft and he has no legal right to complain. Wherefore for want of a sufficient Petition Defts pray Judgment &c Leslie & Barrett

Demurrer overruled

And afterwards to wit: on Wednesday 26th November 1857 the following proceedings were had in said cause Eli Foster vs Robert McOBlenis &c. The defendants demurrer to the plaintiffs petition herein being heard and the Court being fully advised of and concerning the premises it is considered that said demurrer be overruled.

Answer

And afterwards to wit: on the 6th December 1857 the following answer was filed in said cause to wit: Eli Foster Plaff vs Lawrence Matthews & Robt McOBlenis Defts. In the St Louis Court of Com. Pleas Sept. Term 1857. Robert McOBlenis & Lawrence Mathews defendants. answering say they believe that plff did run a line of something in the shape of carriages on Morgan Street, once. But it is not true that these defendants proposed

& offered. that if the plaintiff would consent & agree to withdraw his said line of Omnibusses from & off the said Morgan Street & not run his omnibusses on same they the defendants would pay the plaintiff the sum of $200. & they the defendants would not run their omnibusses or any of them on the St. Charles Road westwardly from the house or Tavern called the Rising Sun. These defendants never made such a proposition. nor was such a proposition ever accepted by plaintiff nor was any bargain made between the plaintiff & these defendants. these defendants never agreed that if the plff. would not run or employ his said line of Omnibusses on Morgan Street from Broadway westwardly to the City limits. for the transportation of persons & property. they the defendants would pay plff. 200 Dollars. nor did defendants ever agree that they would not run their omnibusses or any of them for the transportation of persons on the St. Charles Road from Rising Sun Tavern & house westwardly to the Prairie House. Defendants further say that Plaintiff did not discontinue altogether running his omnibusses on said Morgan Street. as stated. these Defts deny ever having damaged the plff at all. & do not owe him a cent on any acct. Leslie & Barretts

State of Missouri } Attys for Defts
County of St. Louis } ss Robert McOBlenis & Lawrence Matthews defendants make oath & say they believe the above answer & the matters therein as stated are true. R. McOBlenis

Sworn to & subscribed before me } L Mathews

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Dec. 5th 1851. P. Tippett clk

and afterwards to wit: on Wednesday the 14th
april 1852 the following further proceedings were
had in said cause viz: Eli Foster vs Robert McC
Blenis & Laurence Matthews. Petition. now at
this day come the parties by their attorneys. and
Jury — thereupon come also a jury to wit. J. Barron. John
Vaughn. George Bowman. J. H. Shands. William
N. Hazel. Benjamin Gooslin. John D Hauser. Wil-
liam Fine. Henry Gailor. William Cruss. John
Buchanan and Joseph Herkles twelve good and
lawful men who being duly elected tried and
sworn well and truly to try the issue joined between
the parties aforesaid the trial progressed and not
being finished is laid over until to-morrow.
and afterwards to wit: on Thursday the 15th
april 1852. the following further proceed-
ings were had in said cause viz:
Eli Foster vs Robert McC Blenis & Laurence
Matthews. Petition. now at this day come
again the parties by their attorneys and the
Trial — jury empannelled and sworn herein also come
and the trial of this cause progressed. but not
being finished is laid over until to-morrow.
and afterwards to wit: on Friday the 16th
april 1852 the following further proceedings
were had in said cause viz:
Eli Foster vs Robert McC Blenis & Laurence
Matthews. Petition. now at this day come
Judgment — again the parties by their attorneys and the
jury empannelled and sworn herein also come
and the trial of this cause progressed and being

finished. The jurors aforesaid upon their oaths aforesaid find the issue herein joined in favor of said plaintiff and assess his damages sustained by reason of the premises in his petition at the sum of One Hundred dollars. It is therefore considered by the court that said Plaintiff recover of said defendants the damages aforesaid in form aforesaid assessed and also his costs and charges herein expended and that execution issue therefor.

And afterwards to wit: On Friday May 7th 1852 the following further proceedings were had in said cause viz:

Motion for new trial overruled

Eli Foster vs Robert McCblenis &c. The defendants motion for a new trial herein being heard and the court being fully advised of and concerning the premises it is ordered that said motion be overruled.

And afterwards to wit: On the 12th day of June 1852. The following ~~Bill of Exceptions was filed~~ in said cause viz:

Bill of Exceptions

Eli Foster vs Robert McCblenis & Lawrence Mathews. In St. Louis court of Common Pleas Feby Term 1852. Be it remembered that on the trial of this case the Plaintiff to maintain the issue and his part. read to the Jury the deposition of Isaac Foster, which is as follows viz: Isaac J Foster being

Deposition of Isaac Foster

produced sworn and examined on behalf of plaintiff deposes & says. Question. Do you know the parties to this suit. Answer. I do. Question. State what business plain-

Tiff followed in 1848. 1849 & 1850, Answer
Part of '48. in all of '49 & part of '50 he was run-
ning omnibuses. Question. State where, between
what points he was then engaged in running
omnibuses. Answer. In part of '48 & till some
time in Nov. '49 he ran a line of omnibuses
from Broadway out Morgan Street I think,
to the Prairie House. Since that time, as to
what I know of his running, he ran a line of
omnibuses from the Grave yard to the Prairie
House & is still running a line there. Question
Do you know anything of a contract made be-
tween Plaintiff & defendants in respect to the
running of omnibuses from Broadway out
Morgan Street & thence to the Prairie House. If
so, state when such contract was made &
what were its terms, to the best of your knowl-
edge & recollection. Answer. Sometime in the
last of October or first of November 1849, I spoke
to Mr. O'Blenis about purchasing my brothers
line of omnibuses from Broadway through to
the Prairie House. He told me he would like to
purchase it as far as the Grave yard. I wanted to
sell the whole line & was authorized by my brother
to do so. I asked him $400. for the whole line i.e.
from Broadway to the Prairie House. He told
me he didn't wish the line any further than
the Grave yard & that he would give my brother
$200. if he would draw off his stock whenever
he O'Blenis, was ready to take it & not run any
more on that end of the line, i.e. between Broad-
way & the Grave yard. I then consulted with

my Brother. a day or two after that. I saw Mr. O'Blenis again & agreed with him for my brother, this end of the line for the $200. O'Blenis not to run any further than the Grave yard, so as not to interfere with my brother & he my brother wasnt to run on Morgan Strut between Broadway & the Grave yard so as to interfere with O'Blenis. my brother was then running on Morgan Strut out to the Prairie House & the $200. was to be paid to my brother for withdrawing his stock from Morgan Strut and not running on that strut from Broadway to the Grave yard & O'Blenis was not to run from the Grave yard to the Prairie House. Question. State if you know whether Mr. O'Blenis at any time, notified plaintiff to withdraw his stock from the omnibus route out Morgan Strut, from Broadway, to the Grave yard, in pursuance of the contract of which you have spoken, state, also whether the defendants put their stock & omnibuses on the route on Morgan Strut, from Broadway out to the Grave yard & if so, when or at about what time. (Question objected to by defts as leading & improper) Question withdrawn by pltff. Question state what you know in regard to the plaintiffs withdrawing his stock & omnibuses from the line from Broadway out Morgan Strut to the Grave yard in accordance with the agreement of which you have spoken & if he did so, state when & about what time? (Question objected to by defts) answer. I know that my brother ceased to run on that line & took his stock off, either in the fall of '49 or forepart '50. I know that Mr. O'Blenis

run his omnibuses out on that line from Broadway out Morgan to the Grave yard. immediately after my brother ceased running there. Question. about what month or months did the defendants first run their omnibuses from Broadway out Morgan to the Grave yard. Answer. I couldn't recollect the exact dates. I know they were running in February. Question state whether or not. to your knowledge the plaintiff run any omnibuses out Morgan from Broadway to the Grave yard after defendants commenced running their omnibuses on that route. (Question objected to by defts counsel) Answer I ~~have~~ never knew of his running any there. Question. What business were defts engaged in 1848. 49. 50? Answer In '49 they were engaged in running omnibuses likewise in 1850.- Question after this agreement was made between plaintiff & the defendants & after the plaintiff withdrew his stock from the route from Broadway. out Morgan to the Grave yard. did the plaintiff continue to run omnibuses anywhere & if so between what points.- (objected to by defts counsel) answer. so far as my knowledge has extended he has been running omnibuses ever since that time. between the Grave yard & the Prairie House & is running them at this time Question. Do you know anything of the defendants running any omnibuses between the Grave yard & the Prairie House. out the St. Charles Road since the plaintiff withdrew his stock & omnibuses from the route from Broadway. out Morgan to the Grave yard. if so state it.- (objected to by defts

counsel) answer. I have seen this omnibus running out there. between the two places. within the last month. Question state whether you have a Knowledge of the business & profits of running a line omnibus on the St. Charles road from the Grave yard to the Prairie House & back, answer I have none personally. Question. If you have had any opportunity of learning the business & the profits of it. on that ente will you state it,- Question Do you Know of any other matter or thing material to the issue in this case. answer. I dont know that I do. Question. Do you expect to leave this city or remain here. Answer. I expect to leave & to move my family to Wisconsin. to-morrow. Cross examined by Mr. Leslie Esq. for defts. Question. Did you give Testimony in this same matter in the case of plaintiff vs O'Blenis. answer. My deposition was taken in a suit of my brother vs O'Blenis for $200. for withdrawing his stock from between Broadway & the Grave yard. out Morgan St. Question Did your brother withdraw his stock & if so. at what time. answer. He ceasd to run upon Morgan Street either in the last part of 1849 or in the fore part of 1850. He didnt run there after the middle part of 1850. To my Knowledge. Question. was the bargain between your brother & O'Blenis & Mathews a verbal or written one. Answer It was a verbal bargain. I made it myself. for my brother. my brother was not present. I couldnt say that O'Blenis said that he wanted to see Mr. Mathews before he closed the bargain. I had nothing to do particularly with Mr. Mathews in making

the bargain. as to whether I saw him or not before the bargain was closed I cant say. Question. Did you wait at Mr. O'Blenis's stable to see Mr. Mathews. in order to complete the trade. answer. I dont know that I did in order to complete the trade I waited once or twice to get the money. I know, after the trade was made. Question. Did you see Mr. Mathews. upon the subject of the bargain before it was completed. answer I recollect after the bargain was made Mr. O'Blenis saying something about having Mr. Mathews draw up some paper I saw Mr. Mathews and had some talk about it. at this time. I think. I never know of any writings being drawn up. after the bargain was made I had some conversation with both O'Blenis & Mathews about the money. Mr. Matthews thought I believe that what O'Blenis had agreed to give was too much. I do not know whether any one else than my brother was then. running a line out morgan from Broadway to the Grave yard & the Prairie House. there had been a line. but whether there was one then is. at the time of the contract or not. I dont know. there was one at that time running on Franklin avenue to the Grave yard. I think the line of Franklin avenue has been running there ever since. I never received the $200. for my brother for his withdrawing from the morgan street line I know that my brother ran. after the day of the contract until Mr. O'Blenis got ready to put his line on. on morgan street. after Mr. O'Blenis started. my brother never to my knowledge

ran his omnibuses from the Grave yard to any part of this city. I dont know whether my brother ever offered to sell out the same line he sold to O'Blen's to any person named McDowall. Question Do you know if your brother ever offered to anybody to sell out for $50. the same property contracted by O'Blen's answer. No. I had no written power of attorney from my brother. Question. Did Mr O'Blen's speak of any one else being engaged with him in the contract at that time. Answer. Yes. he said that Mr Mathews was his partner

Isaac. J. Foster

Evidence of F. Wannis

Frederick Wannis a witness on the part of the Plaintiff deposed and said that defendants did run omnibuses to Prairie House during race week and west of Rising Sun in 1849 or 1850. believes both fall and spring thinks defendant run at the time of the chicken fight dont know whether defendants run more than one omnibus or not the Plft run on that route two or three little boxes of some sort and his fare was fifteen cents on the occasion of public days the Plft could not carry all. but on ordinary occasions could carry all who wanted to go. as I believe Plft run three or four omnibuses on the public occasions on were full. Plfts was running at same time. do not know whether defts omnibuses were chartered or not. and do not know if defendants run on any other days than these public occasion before mentioned –

Evidence of S. Simons

Sila Simons on the part of the Plft. defts run omnibuses in 1850 out on St. Charles road west

of Grave yard & early in 1857. have ridden in them beyond Grave yard but not early in 1857. was in 1856 but last fall rode out several times rode out I think in 1857. have talked with Mathews within a few days he admitted that he had run omnibuses there & that he bot Foster out and paid him for it. and had a right to run there, and did run when he could make by it. The Plfs has been running west 4 years and three or 4 omnibuses I paid in defendants omnibus fifteen cents from city out -

Evidence of Mr Losin

Mr Losin on part of Plfs. testified that he lived on Franklin Avenue on 27th Street in 1856 & 1857 lived at Grave yard. The Plfs run omnibuses west from Grave yard sometimes. dont know how many. he ran one. two or three often on Sundays and on race days and 4th July 1857. a great many persons were going over the route I rode several times in plaintiffs omnibuses and also in defendants out west from Grave yard on St Charles Road. Defts ran omnibuses on public days west of Grave yard. do not know what effect Defts omnibuses had on plaintiffs business cannot estimate or form any idea of the amount of receipts or profits. sometimes on public days plaintiff could carry all and sometimes not. I know nothing about the firm except from rumor. I know Capt Case he is present in the room -

Evidence of Nicholas ——

Nicholas —— lettered at Grave yard two years saw defts omnibuses going out some times. Plfs run omnibuses and not always full

Evidence of Kepp

Martin Kepp. in Spring & Summer of 1850. I drove for Defts. Mathews gave me directions. I quit last Summer sometimes I went beyond Grave yard west when any body waiting there did not go regularly nor every day I went west from Grave yard once or twice a week. never went unless passengers there and always stopped. If passengers wanted me to take them out I did so & if passengers did not want me to take them out to Prairie House I never came so and Deft told me (or Mathews one of the defendants) that if Plff was not there to go on and if Plff was there not to go on. and never to go unless I had four or five passengers. The most I ever received before I drove for Mathews was twelve dollars a day. I drove out west beyond the Rising Sun on Sundays and Pubblic Days and when passengers were waiting and sometimes passengers would not get out to go in Plaintiffs omnibusses and in such instances I went on with them Defts had no one at the stopping places to look after the omnibuses. never stopped at Prairie House longer than five or ~~then~~ ten minutes. and never saw more than one of Defts omnibuses at Prairie House at same time met them during Race Week. on the route west of the Rising Sun with passengers in them Plaintiff could not carry all the passengers at such times I carried all I could. Plaintiff would sometimes bring back those I carried out. I know pltff. could not carry all because sometimes saw fifteen or twenty waiting. It was not often that more were waiting than pltffs

omnibuses could carry. sometimes passengers who could not get a seat in Pfeffs omnibus would walk on. these I sometimes picked up. some time in 1850. Pfeffs son driving left the Rising Sun. at the same time with myself. He had a full load of passengers & brought them all the way into town. about half way he turned off into Morgan Street.

Evidence of Mr Kennedy

Mr. Kennedy. I was foreman of Pfeff. quit him in 1849. was not his foreman in 1850 & 51. Pfeff was running omnibusses in 1850 & 51. I never saw them running on the St. Charles Road. When I was foreman Pfeff was running omnibuses from the Market. through Morgan Street to the Prairie House. I never calculated the income on the whole route. one Race week I drove myself and on the whole line made from thirty to forty dollars. Passage was fifteen cents for the whole way & ten cents from the grave yard. Pfeff was running four or five omnibuses. they made five or six trips clear through per day. dont know how many beyond. the Grave Yard is nearly half way. there was at this time a line of four or five omnibuses. running on Franklin Avenue east of the Grave Yard. on ordinary occasions three or four omnibuses running through made from ten to twelve dollars each per day. In 1850 & 1851 an omnibus would make six or seven trips from Grave yard to Prairie House since first part of 1849 I dont know about Pfeffs running. I dont know how may omnibusses

plff has run. I saw some on the other side of the Rising Sun. I have seen none on this side they would carry from six to eight passengers inside. In some eight could ride comfortably at that time plff. hired a large omnibus which carried 15 or 20 passengers. There were five or six omnibusses including the big one. On one many rode outside & I have seen from ten to fifteen inside. Except one of his own and the one hired none were fixed for carrying outside. These could carry 3 or 4 outside. He hired that omnibus in 1847. Vogle was then running on Franklin avenue. persons sometimes sat on top. all this was before Oct. 1849.

Evidence of C Vogle

C. Vogle: I moved to the Rising Sun July 14th 1850 I saw defts omnibusses. go to Prairie House. in 1850. on every day when there was any thing to do on the track. They went out to the Prairie House. whenever they had passengers enough to make it worth while. during that year two horses generally carried 4 to 5 passengers Plff. had two or three omnibusses. They ran from the Rising Sun to the Prairie House. He put more omnibusses on the line on good days, such as Sundays and Race days. sometimes plaintiff himself drove & sometimes his two sons drove. from July 1850 to Winter Plaintiff suffered damage to the amount of Seventy five dollars by reason of defendants running their omnibuses west of Grave yard. when Defts omnibusses went through they would get more passengers than plaintiffs. I have seen passengers waiting

at Rising Sun. for Defts omnibuses which had gone to the Prairie House to take them in. have seen six or eight waiting at a time. I mean from July 14th 1850 to the end of the year. Defts omnibuses did not run every day & I cant say positively if once in every week. I have seen defts omnibus go with passengers. I dont know what directions were given to drivers but they went when they had passengers enough. Plffs omnibuses could carry 10 have seen 12 in them I saw plff omnibuses in 1851 on two occasions run down the avenue to catch the avenue omnibuses to give them the passengers cant say how many times Defts ran out. on public days. Plaintiffs would have had omnibuses enough if the passengers had been divided among them. I suppose plaintiff could have carried them all had defts given them to plff. It frequently occurred that passengers had to wait sometimes an hour more or less. for the omnibuses to return from the Prairie House. Plff averaged six trips per day a trip would take from fifteen to twenty minutes each way.

Evidence of Mr Patterson

Mr Patterson. In Summer of 1850 I worked at Mr Goods saw defts omnibuses running to Prairie House. I rode in them as often as twice a week sometimes they had 4 or 5 passengers sometimes as many as ten. I often saw Defts go out loaded & plffs nearly empty. The omnibuses had on them "Case & Co".

Evidence of H. Foster

H. Foster. I am the son of plff & drove for him Witness said he & his brother drove his Fathers omnibuses during 1849 & 1850 on route west of Grave yard except a week or so when he was sick

sometimes Pfeff ran one sometimes more omnibuses Defts ran an omnibus 25 or 30 times if not more they took passengers from us & delayed us I saw defts omnibus 20 times come to the Rising sun & wait until the next omnibus came & if it could get passengers enough would go on to the Prairie House otherwise not go. the average receipts were Ten dollars per day. when defendants ran they would carry more than three fourths of the passengers. When business was small we got all of it. if it increased defts would run & take most of the passengers. up to October 25th 1850 Pfeff was damaged fully three hundred dollars by reason of Defts running omnibuses west of Rising Sun to Prairie House. Mathews asked why we did not run up the line. I told him we ran them up as well as we could. O'Blenis came in 1849 to buy out the Morgan Street line Father was sick told him to go to Isaac Foster that any bargain they would make should be binding. Pfeff drew off his omnibuses from the Morgan Street route or line in November 1849 & on same day Defts came on that route I have talked lately with Pfeff about this suit but not about profits. I looked at some memoranda sometime ago as I thought I might have to testify. on the 4th of July we made forty dollars. we began with two omnibuses & at twelve o'clock we put on three at 4 o'clock we put on 4 omnibuses. we made forty dollars with the four. we never ran one into town we would sometimes make regular trips

when there were no passengers & never refused to take passengers who would pay. sometimes defts drivers would not let passengers get out of Defts omnibuses to go with us. Plff did not withdraw his line for any time nor did I say so to Mr Mathews. my Brothers were sick one two days the other a week during which time only one omnibus ran. plffs made from six to eight trips a day. I know of no occasion when plffs could not carry all the passengers.

Defendants to maintain the issue on their part introduced evidence as follows.

Evidence of Mr Todd

William Todd. being introduced defendants asked the following question – Do you know of plaintiffs running omnibuses into this city? Plaintiffs objected to witness stating what occurred after the 25th of October 1850. The objection was sustained by the court. Witness then stated as follows. "In the fall of 1850 but witness was not certain as to the year. I rode in plffs omnibus to seventeenth street. dont remember the day but early in the Fall. Plaintiff himself drove. a Mr Williams & others were with me. I paid fifteen cents passage. I have been frequently at the Rising Sun & did not see any omnibuses there. Plffs omnibuses were small & uncomfortable. Mr Billings saw an omnibus there in 1850. it was a small omnibus of plff in which I rode at the time of the second race between June Bug & Jackson. Plff said at the Prairie House that he should go into

Tum if he could get a load. Pltff did not stop at the Grave yard but went right on. I have remained at the Grave yard in 1850. without seeing any omnibus. Pltffs omnibuses were running on the line. on the same day that I rode in pltffs omb. those of Defts ran to the Prairie House. all the omnibuses were full.

Evidence of Mr. McDowell

Mr. M Dowell. I Know pltff. Question by deft What passed between you & Isaac Foster with regard to this line? (Pltffs object to the Question) The Court directed the witness to state only what occurred after 24th Oct. 1849. (Answer) I cant say what time I talked with him think it was in 1849 in the month of January, February or March. at that time plaintiff was running the line. Isaac said so.

Evidence of F. Baumgartner

Francis Baumgartner. I do not recollect that pltffs ran their omnibuses on this side of the Grave yard from Oct 1849 to Oct 1850. on special occasions pltff. could not carry all the passengers. Pltff provided well enough for ordinary travel when all his omnibuses were running. In 1850 I have seen persons frequently stop & wait a half or three quarters of an hour. for an omnibus & then go on because no omnibus came. In 1850 pltffs ordinarily ran two omnibuses & occasionally four during this time defts ran one omnibus on St. Charles Road west of Grave yard to Prairie House a few days & drew it off not more than three days.

Evidence of Capt. Case

Capt. Case. Pltff called on me in 1850 &

Sol. Ler. Mass.

said he had been trying to do something with defendants about a contract. but that Mathews would not agree. That O'Blenis had come to him when sick & offered $200- which he declined to take. That plffs brother afterwards agreed to take it & O'Blenis said he would see Mathews Plff proposed to take $125. Then $100. in order to get the matter settled and defts refused to give it. Case & Co ran the Omnibusses. all the plaintiffs Omnibusses were insufficient to carry all the passengers. Plffs Omnibusses ran on Morgan Street regularly until Jan 20th 1850. since then not regularly but frequently with persons in them but whether they paid anything or not did not know. Plff said O'Blenis had made him a proposition in Oct. that he plff then declined but was afterwards willing to accept. I received four or five letters from plff on the subject This is one (letter shown) This conversation with plff was as late as March or May 1850. Plff said that O'Blenis was willing to close the agreement but Mathews was not. Defendants put their line on about the 20th January 1850. and plff withdrew his mostly about that time. The firm of Case & Co is composed of Self. O'Blenis. Mathews & Wells. I understood from plff that defts would not enter into the arrangement. He said his brother came to see him in relation to the offer of O'Blenis that he plff consented to it. & came in with

his brother to see about it & Mathews refused to have anything to do with it. When this conversation occurred Pltff was running occasionally only. I saw his omnibuses at the corner of Broadway. Pltffs omnibuses would hold 8 or ten persons. After this conversation I saw Pltffs omnibuses come in with passengers on Franklin Avenue & Morgan Street with men in them but dont know whether or not they paid. When Pltff complained of our running out, I told him to run in. I did not suppose any contract existed. Pltff only complained of our omnibuses running at race times. I have frequently chartered our omnibuses to take out parties. I supposed we had a right to run. The effect of our running on Pltff would depend on whether or not he could carry all the passengers. The principal thing he wanted me to see Defts about was to compromise.

Evidence of Jas Lynch

James Lynch. Pltff & defendants both ran omnibuses from Broadway out. I saw Pltffs omnibuses come in with passengers & collected on Franklin Avenue. During that year Pltffs omnibuses came in on Morgan Street. This was in years 1851-2. At the time of the foot race in 1850 Pltffs son drove down Morgan Street once. At Spring or Fall Races I started from Prairie House with a load. The omnibus had been chartered to go out and back, at 15 cents for each passenger. Pltffs son followed & caught up with me & went from the avenue up eighteenth street to Morgan Street

before dark. I saw him land at the corner of Fourth & Franklin avenue. I saw him two squares down Morgan as I came down the avenue. This was in 1857. He did not stop at the Rising Sun & I followed him. I received instructions from Mathews not to go out if pltffs omnibuses were there. There were complaints made by passengers on account of our telling them omnibuses would be at the Rising Sun as there were none. Here defendants rested & pltffs by way of rebuttal introduced Eli Foster Jr who testified as follows "In 1850 we i.e. the Pltff never ran omnibuses on Morgan Street. We ran from the Grave yard to the Prairie House. Whenever there was any business or we expected any we quit running on Morgan in January 1850. Father had sold to Defts & we quit between the 18th & 20th Jan 1850. On that day Mathews put horses to omnibuses there & Blevins told pltff to see Mathews who was at the Grave yard & settle with him. We never had in 1850 a driver named Thomas. I went down the avenue once in 1857. Lynch has been driving there about two years. When I drove down the avenue I paid Lynch at the Grave yard. He paid me two or three times going out that day but would not give me passengers so I paid him off. I did not go down Morgan Street in 1850 after we took off our stock on 18 or 20 Jany 1850. I was absent a month in 1850 in the summer. I did not drive the rest of the

Evidence of Eli Foster

time but staid at home. at the Prairie House now cannot see all the way into town.

Evidence of H. Foster

Homer Foster. The race between Jackson & June Bug was in November 1850. My Brother & I drove Pfeffs omnibuses up to October 1850. In 1850 I did not drive on Morgan Street after our line had been withdrawn. Pfeff was engaged in farming in Ills & carried men from the Prairie House to the farm to work for him in a sort of open Hack with four seats. They paced back & forth more than four times that season. Pfeff did not drive omnibuses in 1850 William Todd rode with me at the June Bug race. I have conversed with Pfeff about this matter. he did not tell me what witnesses swore but I was asked if I knew. That year I did not bring passengers into town nor do I know that Pfeffs omnibuses did. I talked with Jemmy yesterday. not Lynch. he commenced talking about this case & I answered him when I say Pfeff did not drive omnibuses in 1850 I mean he did not drive on any line.

Evidence of Jno Shannon

John Shannon. There was very little travel except on Sundays & public days. on the former. two omnibuses could do the work. on the latter they could not. Dillon ran an omnibus then. That year Defts ran on public days only. I have no personal knowledge of persons being unable to get omnibuses coming out. but do know of persons being unable to get them to go in but dont recollect any particular omnibus persons would frequently

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have to remain. it was after night. Plffs generally ran until about dark. I dont remember if it was that year. July fourth the travel would have required ten omnibusses. On public days I have chartered Omnibusses from Defts for balls at Prairie House at night once or twice. They went round and called for persons.

Evidence of Mr. Dougherty

Mr. Dougherty called by Dft. I am Book Keeper for Case & Co. The firm of Case & Co is composed of Case. O'Blenis. Mathews & Wells. It began early in 1850. There was a firm of O'Blenis & Mathews once dont know that O'Blenis & Mathews ran Omnibusses there before the partnership of Case & Co was formed Saw plaintiffs omnibusses in the stand at Broadway three times in 1850 but I do not know whether or it they carried passengers O'Blenis & Mathews formed their partnership in 1848. and went into the partnership of Case & Co Defts omnibusses are marked most of them O'Blenis & Mathews others are marked Case & Co Saw Defts run to Prairie House frequently in 1850 — This was all the testimony in the case for Plft or Deft. and the Plft asked the following instructions to wit:

1. Plaintiffs Instructions Given by Court

If the jury believe from the Evidence that there was an agreement made between the Plaintiff & the Defendants as stated in the Plaintiffs Petition. that the Plaintiff in conformity with the terms of said agreement withdrew his stock & omnibusses from

Given

Morgan Street & ceased carrying passengers on said Street for hire & that the defendants before this suit was instituted. run one or more of their omnibusses & carried passengers on the St. Charles Road westwardly from the Rising Sun Tavern to the Prairie House. then the Defendants are liable in this action & the jury should find for the plaintiff. 2. If the jury find for the Plaintiff they will assess such damages against the Defendants as the Jury shall believe from all the facts & circumstances proven in the case the Plaintiff has sustained by reason of the violation on the part of the Defendants of their said agreement. not however to exceed the amount of damage sued for.

2, Given

3 3. If the jury believe from the evidence that the Plaintiff after the alledged agreement was entered into with the defendants. continued to run his omnibuses & carry passengers on Morgan Street until some time in January 1850. the fact that the Plaintiff did so run his omnibuses does not defeat his right to recover in this action provided the jury believe from the evidence that it was the understanding between the Plaintiff & the Defendants or either of them. that the Plaintiff should continue to run his omnibuses on said street until the defendants were ready to put their omnibuses on said Morgan Street or that the running of the Plaintiffs omnibuses on Morgan Street after the making of the alledged agreement was with the consent of the defendants or either of them.

Given

4. 4. The Defendants do not by their answer deny

29

Given

that they run omnibuses & carried passengers on the St. Charles Road westwardly from the Rising Sun Tavern to the Prairie House as alledged in petition. the averment in the plaintiffs petition as to such running is to be considered by the jury as admitted.

Given

5. The fact that the plaintiff may not have been able to carry all the passengers on public occasions. only goes to the quantum of the plaintiffs damages & not to his right of action. if the jury shall believe from the evidence that the Defendants have violated their agreement.

Instructions asked by Pltff & refused to be given by Court

If the jury believe from the evidence that the Defendants violated their said agreement by running omnibuses & carrying passengers on the St. Charles Road westwardly from the Rising Sun Tavern to the Prairie House before this suit was instituted & that they continued afterwards to run their omnibuses & carry passengers on said road. the jury may take into consideration in assessing the plaintiffs damages the injury they may believe from the evidence the Plaintiff sustained by reason of the running of omnibuses & carrying passengers as aforesaid by the Defendants. down to the time of trial.

Refused

If after making of said alledged agreement the Plaintiff run one or more omnibuses & carried passengers on any other Street or avenue in the City of St. Louis than Morgan Street that fact will not prevent the plaintiff from recovering in this action. if the jury believe from the evidence that there was such an agreement made between

Refused

30

the parties & that the Defendants have not kept & performed it on their part. and although the jury may believe from the testimony that after the making of said alleged agreement & after the Defendants had put their omnibuses on the Morgan Street line & the Plaintiff had withdrawn his omnibuses & stock therefrom the latter (the Plaintiff) did run one or more omnibuses on said Morgan Street on different occasions but not generally. such running of one or more omnibuses by the Plaintiff on said Street will not defeat or prevent the plaintiff from recovering in this action. unless the jury at the same time shall be satisfied from the testimony that the Plaintiff carried passengers on said Street. so as to interfere with the running of omnibuses & the business of the Defendants —

Refused

The Defendants asked the Court to give to the Jury the following instructions —

Instructions asked by Deft and given by Court

9 If the jury find from the evidence that the firm of Case and Company composed of Calvin Case Erastus Wells. Robert McOblenis & L Mathews run their omnibuses on Morgan Street West at the request of Eli Foster the Plff. between October 1849 & Oct 1850. and at the same time the said Plff run his on the same route & also at any time or times during the months aforesaid run his omnibuses from Prairie House to St. Louis over the route mentioned in Plffs Petition they will find for Deft. this instruction is subject to the qualifications contained in Instructions 8 and 11 —

Given

Springfield Sol. Lib. Mass.

§ 1

10 — 10 If the Jury find from the evidence that the Plft violated his part of the contract by running his omnibuses from Rising Sun Tavern to the City during the time that Case and company were running from the City west to the Rising Sun and between Oct 25th 1849 and Oct 25. 1850. they will find for Defts —

Given

1. Instructions asked by Deft and refused to be given by Court

1. The Court is requested to instruct the Jury that unless they find from the evidence that the contract set out in plaintiff's petition was to be performed within one year from the making of the same. or unless they find that the alleged agreement. or some memorandum or note thereof is in writing signed by the parties sought to be charged. or by some other person by them thereto lawfully authorized. the alleged contract is void and the jury ought to find for the defendants.

XII

Refused

2. 2. If the jury find from the evidence that Mathews and O'Blenis never did run omnibuses on the St. Charles Road beyond the Rising Sun Tavern west to the Prairie House except as members of a firm in which others were also members formed after the contract alleged in the Petition they will find for Defendants.

Refused

4 — 4 If the Jury find from the evidence that Foster the Plft from and after the alleged contract did not accomodate the travelling community. and did not have carriages of capacity and numbers to do so. the fact of Defts running over their route upon public days. is no violation of the said contract and they will find for defendants

Refused

5 — If the jury believe from the evidence. that after the alleged contract. between plaintiff & defendants Foster the plaintiff. did not furnish or keep upon

the road in question. carriages of sufficient capacity and a sufficient number of carriages to accomodate the persons and the public desiring to ride upon said road in public conveyances, and that the defendants only run their carriages upon said road on such occasions. and at such times. as those when the plff failed to furnish conveyances sufficient for the accomodation of such persons. so travelling as aforesaid. Then the jury will find for the Defendants.

Refused

2½ If the jury find from the evidence that the Plaintiff Eli Foster within the time named in his petition run omnibuses one or more from the Rising Sun Tavern to the City of St. Louis contrary to the contract as alleged in said petition they will find for the Defendants.

Refused

3. If the Jury find from the evidence that the defendants only run omnibuses on particular occasions after the alleged contract and for the accomodation of the public. it is no violation of the contract set forth in Plfts Petition and they will find for the Defendants.

Refused

The Court gave instructions at its own option as follows.

Instructions given by Court at its own option

~~The Jury in this case after being out for some time sent to the Court for the deposition of Isaac I Foster thereupon the Court sent them said deposition with this instruction. The jury are instructed that so much of the deposition of said Isaac I Foster as is marked "ruled out" and which was excluded from the jury is no evidence for any purpose whatever in this case the parts excluded being those on 5th and 6th pages of said deposition which are marked~~

(X) 5/2 The Jury in this case after being out for some time sent to the Court for the deposition of Isaac. I. Foster. Thereupon the Court sent them said deposition with this instruction:

"The Jury are instructed that so much of the deposition of said Isaac. I. Foster as is marked "ruled out" and which was excluded from the Jury is no evidence for any purpose whatever in this case. the parts excluded being those on 5th and 6th pages of said deposition which are marked in the margin "ruled out" and which are also crossed"

Given by the Court

Oct 25. 1850. then the Plaintiff will be entitled to recover. if the jury further find the contract alleged, to have been made. If the jury find the understanding stated in Instruction No 5 to exist then the time to which reference is to be had as to the obligation of Plaintiff to cease running east of the Rising Sun. is as stated in that instruction. and not Oct 25th 1849 — (X)

The Jury returned a verdict for Plaintiffs and the defendants moved for a new trial for the reasons accompanying the said motion. which is as follows viz: Eli Foster vs Wm O Blenis & L Mathews. In the St Louis Court of Common Pleas March Tr. 1850. And now the Defts by Leslie W Barnetts their attys come and moved the Court for a new trial. Because the verdict of the jury is against evidence. and against law. and against law & evidence. Because the Court gave erroneous instructions for the Plft and refused instructions ask for by Defts. Leslie W Barnetts The Court overruled the motion for a new trial to which the defendants then and there instantly excepted. and did at the time of every decision of the Court against the propositions of the Defts from the commencement of the trial to the end of the same instantly except. now because the above and foregoing matters do not appear of record the Defendants write this their Bill of exceptions and pray that the same may be allowed and signed and made part of the record which is accordingly done. Samuel Treat Circuit Judge

motion for new trial

And afterwards Court: on July the 10th 1850 the

~~in the margin "rule 2 out" and which are also~~
~~confused~~ 6th If the jury find from the evidence that the Plaintiff. Eli Foster. ran Omnibuses from the Rising Sun Tavern into the City of St. Louis after the time agreed upon for him to cease running on that part of the line and before Oct 25. 1850 they will find for the Defendant 7th If the Omnibuses of the Defendants were chartered or hired occasionally by private individuals. to take private parties to the Prairie House and back. then such letting of their Omnibuses for hire was not a violation of the alleged agreement 8th If the jury find from the evidence that the contract alleged was made between the parties to this suit. and that the defendants violated the same, the measure of damages is the actual damages the Plaintiff sustained. and the Plaintiff cannot recover for any damages sustained in consequence of the running by Defendants of their Omnibuses after the twenty fifth day of October 1850. 11th The admission of the Defendants that they did run Omnibuses (referred to in the Instruction No 4) is an admission merely that they did run Omnibuses on divers days and times after October 25th 1849 and prior to July 24th 1850 If the jury do not find that there was such an understanding as in Instruction No 3. then any running by Plff of his Omnibuses East of the Rising Sun into the City after the 25th of October 1849 and prior to Oct 25. 1850 will defeat his right to recover. If he did not so run his Omnibuses and the defendants ran theirs West of the Rising Sun on the St. Charles Road between Oct 25th 1849 and

Given by the Court 11. Given by the Court 8. Given by the Court 7. Given by the Court 6.

following application for an appeal was filed Viz:

Application for Appeal

Eli Foster Plaintiff against Robt. McBlenis & Lorny Mathews Deftes. In the Court of Common Pleas for St. Louis County. To Philip Tippett Clerk of the court of Common Pleas for St. Louis County State of Mifsouri. Defendants by their attorneys Leslie & Barretts ask an appeal in the above entitled cause to the Supreme Court of said State of Mifsouri. Leslie & Barretts. attorneys for Defendants. An appeal is granted in the above case and said defendants required to file a bond with good and sufficient security in the sum of Four hundred dollars. which said bond is filed & approved. Attest P. Tippett clk

The above mentioned Bond is in the words and figures following Viz:

Appeal Bond

Know all men by these Presents. that we Lawrence Matthews as principal and Erastus Wells as surety are held and firmly bound unto Eli Foster in the sum of Four hundred dollars for the payment of which. well and truly to be made. we bind ourselves our heirs executors and administrators. jointly and severally. firmly by these presents. sealed with our seals. and dated at St. Louis this 10th day of July A.D. 1855. The condition of the above obligation is such. that whereas Robert Mc Blenis & Lawrence Matthews has appealed from the judgment rendered against them and in favor of said Eli Foster in the St. Louis Court of Common Pleas for the sum of one hundred dollars and cents together with costs. now if the said appellants will paiy all costs and damages that may be awarded against them accasioned by such appeal. and shall prosecute their appeal and shall perform such judgment as shall be given

by the Supreme Court and such as the Supreme Court may direct the St. Louis Court of Common Pleas to give. and if the judgment or any part thereof be affirmed. that they will comply with and perform the same so far as it may be affirmed and will pay all costs and damages which may be awarded against them by the Supreme Court then this obligation to be void. otherwise to remain in full force and effect.

Approved } L. Mathews (Seal)
P. Tippett clk } Erastus Wells (Seal)
(Seal)
(Seal)

State of Missouri
County of St. Louis } I Philip Tippett clerk of the St. Louis Court of Common Pleas within and for said County do certify that the foregoing is a full and complete transcript of the Record and Proceedings in the case of Eli Foster against R. McBlenis & L. Mathews

In testimony whereof I hereto set my hand and affix the seal of said Court at office in St. Louis this 24th day of September 1850

Philip Tippett clerk

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(20) 26 ~~100~~

March. T. 1853

Eli Foster
vs } Transcript of Record
R. McOBlenis
& L. Mathews

Filed 8th October 1852
Wm. L. Planville
Clerk.

$12.50 Fee paid by deft

Sain

Eli Foster
vs
Mathews Fell & Oblins

In the Supreme Court At St Louis Oct Tm 1852.

And now the Defts by Leslie & Barrett their attorneys come and allege that there is manifest Error in the record and proceeds of the Court below in this to wit the Judgt was for the Pfft when by the law of the land it should have been for the Defts.

1 And for special Errors the said Defts say that the court Erred in ~~in~~ giving the instructions asked for by ~~Defts~~ Plaintiff -

2 The Court Erred in giving the instruction for Pfft - on its own motion

3d The Court Erred in refusing the instruction asked for by Defts and also on its own motion qualifying the Defts instructions

4. The Court Erred in overruling the Defts Demurrer to Pfts petition

5 the Court Erred in refusing to sustain the Defts motion for a new trial

6 The Court Erred in sending the Deposition of Foster to the jury with an instruction Morrow, Leslie & Barrett -

Eli Foster
v
Mathews & Oblenis

Assignment of
Errors —

Leslie & Burnett
and
Joinder
Todd & Krum

Filed 16th November 1852
Wm. S. Glanvil, Clerk.

Here is no Error
Todd & Krum
for pltf

Eli Foster
vs
Mathews & Oblenis

In the supreme Court March Term 1853 –

Statement of the case for Defendants appellants –

This was an action of assumpsit brought by Eli Foster plantiff, and in declaration or petition he states in substance, that on or about the 25th day of October 1849, he was engaged in running a line of Omnibus carriages for the transportation of persons and property for hire on a public thoughfare, or street called Morgan street in the City & County of St Louis from Broadway in said City westwardly to the western limits of said City & further to the house or tavern (on the St Charles road) called the prairie house And the plff while engaged in said business as aforesaid, the defendant proposed & offered that if he the plff would consent and agree to withdraw his said line of Omnibuses from said Morgan street and not run the same on said street, they the defendants would pay plff $200,00 and that the defendants would run no Omnibuses, on the St Charles road westwardly from the rising Sun Tavern which proposition so made as aforesaid was accepted by the plantiff for which as alleged in plffs petition the defendants would pay plff $200,00 – The petition alleges that plff complied with the contract on his part, and that the defndts violated the contract in every essential particular on their part for which the plff claimed damages of one thousand Dollars To which petition the Defts demurred and set down for special causes of demurr. the matters as preserved on the 4th page of the transcript –

This demurrer was overruled by the Court; and the defendants filed the following answer to wit, -
"Robert McOblenis & Lawrence Mathews defendants, answering "say, that they believe the plantiff did run a line of something in the shape of carriages on Morgan Street once But it is not true that these defendants proposed & offered that if the plantiff would consent & agree to withdraw said line of omnibusses from and off the said Morgan Street & not run his omnibusses on same they the defendants would pay the plaintiff the sum of $ 200 and they the defendants would not run their omnibusses or any of them on the St Charles Road westwardly from the house or Tavern called the Rising sun. These defendants never made such a proposition nor was such a proposition ever accepted by plaintiff nor was any bargain made between the plaintiff & these defendants. these defendants never agreed that if the plff. would not run or employ his said line of omnibuses on Morgan Street from Broadway westwardly to the City limits for the transportation of persons and property they the defendants would pay plff 200 Dollars nor did defendants ever agree that they would not run their omnibuses or any of them for the transportation of persons on the St Charles Road from Rising Sun Tavern & house westwardly to the Prairie house Defendants further say that plaintiff did not discontinue altogether running his omnibusses on said Morgan Street as stated. These Defts deny ever having damaged the plaintiff at all and do not owe him a cent on any account. Upon this issue a Jury were impannelled who found a Verdict for the Plft. On the trial of said cause the Plft to support his side of the case gave the following evidence - 1st the deposition of Eli Foster. to wit - witness deposes & says -
" Question. do you know the parties to this suit answer; I do Question state what business plaintiff followed in 1848. 1849 and 1850 answer part of 48 in all of 49 and part of 50 he was running omnibusses. Question. state where between what points

he was then engaged in running omnibusfes. Answer In Part of 48 and till some time in November 49 he ran a line of omnibusfes from Broadway out Morgan Street I think to the Prairie house since that time. as to what I know of his running he ran a line of omnibuses from the Grave yard to the Prairie house and is still running a line there. Question Do you Know anything of a contract made between plaintiff and defendants in respect to the running of omnibuses from Broadway out Morgan Street and thence to the Prairie house. If so state when such contract was made and what were its terms to the best of your knowledge and recollection. Answer. Some time in the last of October or first of November 1849 I spoke to Mr O'Blenis about purchasing my brothers line of omnibuses from Broadway through to the Prairie house. He told me he would like to puchase it as far as the Grave yard. I wanted to sell the whole line & was authorized by my brother to do so. I asked him $400 for the whole line i.e. from Broadway to the Prairie house. He told me he didnt wish the line any further than the Grave yard and that he would give my brother $200 if he would draw off his stock whenever he O'Blenis was ready to take it and not run any more on that end of the line i.e. between Broadway and the Grave yard. I then consulted with my Brother a day or two after that. I saw Mr O'Blenis again and agreed with him for my brother this end of the line for $200 O'Blenis not to run any further than the Grave yard so as not to interfere with my brother he my brother was ont to run on Morgan Street between Broadway and the Grave yard so as to interfere with O'Blenis. my brother was then running on Morgan Street out to the Prairie house and the $200 was to be paid my brother for withdrawing his stock from Morgan Street and not running, ~~on~~ that street from Broadway to the Grave Yard and O'Blenis was not to run from the Grave Yard to the Prairie house — Question state if you know whether Mr O'Blenis at any time notified plaintiff to withdraw his stock from the Omnibus route out Morgan Street from

Broadway out to the Grave yard and if so when or at about what time. (Question objected to by defts as leading & improper) Question with drawn by pltff. Question state what you know in regard to the plaintiffs withdrawing his stock and omnibuses from the line from Broadway out Morgan Street to the Grave yard in accordance with the agreement of which you have spoken and if he did so. state when and about what time. Question objected to by defts.) Answer. I know that my brother ceased to run on that line & took his stock off. either in the fall of '49 or for part '50 I know that Mr O'Blenis run his omnibuses out on that line from Broadway out Morgan Street to the Grave yard immediatly after my brother ceased running there. Question about what month or months did the defendants first run their Omnibuses from Broadway out Morgan Street to the Grave yard Answer I could not recollect the exact dates. I know they were running in February. Question State whether or not to your knowledge the plaintiff run any omnibuses out Morgan from Broadway to the Grave yard after defendants commenced running their omnibuses on that route (Question objected to by defts counsel) Answer I never know of his running any there. Question what business were defts engaged in 1848. 49. 50? Answer In 1849 they were engaged in running Omnibuses likwise in 1850. Question after this agreement was made between plaintiff and the defendants and after the plaintiff withdraw his stock from the route from Broadway out Morgan Street to the Grave Yard did the plaintiff continue to run omnibuses any where and if so between what points. (objected to by defts counsel) Answer so far as my knowledge has extended he has been running omnibuses ever since that time, between the Grave yard and the Prairie house and is running thence at this time. Question Do you know anything of the defendants running any omnibuses between the Grave yard and the Prairie house, out the St Charles Road and since the Pltff withdraw his stock and omnibuses from the route from Broadway out Morgan to the

Grave yard. if so state it - (objected to by defts. counsel) Answer I have seen their omnibuses running out there between the two places with in the last month - Question state whether you have a knowledge of the business and profits of running a line omnibuses on the St Charles road from the Grave yard to the Prairie house a back. Answer I have none personally. Question. If you have had any opportunity of learning the business & the profits of it on that route will you state it. - Question Do you know of any other matter or thing material to the issue in this case. Answer I dont know that I do - Question Do you expect to leave this City or remain here. Answer I expect to leave & to ~~morrow~~ move my family to Wisconsin to morrow - Cross examined by M. Leslie. Esq for defts. Did you give testimony in this same matter in the case of plaintiff vs. O'Blenis. - Answer my deposition was taken in a suit of my brothers vs. O'Blenis for $200 for withdrawing his stock from between Broadway and the Grave yard out Morgan Street Question. Did your brother withdraw his stock his stock and if so at what time. Answer He ceased to run upon Morgan Street either in the last part of 1849 or in the fore part of 1850. He didnt run there after the middle part of 1850 to my knowledge Question was the bargain between your brother and O'Blenis & Mathews a verbal or written one. Answer I was a verbal bargain. I made it myself for my brother my brother was not present I couldnt say that O'Blenis said that he wanted to see Mr Mathews befor he closed the bargain I had nothing to do particularly with Mr Mathews in making the bargain. as to whether I saw him or not before the bargain was closed I cant say, (Question) Did you wait at Mr O'Blenis's stable to see Mr Mathews in order to complete the trade. Answer. I dont no that I did in order to complete the trade. I waited once or twice to get the money I know after the trade was made Question. Did you see Mr Mathews upon the subject of the bargain before it was completed. Answer I recollect after the

bargain was made Mr O'Blenis saying something about having Mr Mathews draw up some paper I saw Mr Mathews and had some talks about it, at this time I think - I never know of any writings beeng drawn up. After the bargain was made I had some conversation with both O'Blenis & Mathews about the money. Mr Mathews thought I believe that what O'Blenis had agreed to give was to much. I do not know whether any one else than my brother was there running a line out Morgan from Broadway to the Grave yard & the Prairie house. There had been a line but whether there was on them i.e. at the time of the contract or not. I dont know. there was one at that time running on Franklin Avenue to the Grave yard. I think the line of Franklin Avenue has been running there ever since. I never received the $200 for my brother for his withdrawing from the Morgan Street line. I know that my brother ran after the day of the contract until Mr O'Blenis got ready to put his line on. on Morgan Street. after Mr O'Blenis started my brother never to my knowledge ran his omnibuses from the Grave yard to any part of this City. I dont know whether my brother ever offered to sell out the same line he sold to O'Blenis to any person named Mc Dowall. Question Do you know if your brother ever offeared to any body to sell out for $50. the same property contractedly by O'Blenis. answer. No. I had no written power of Attorney from my brother Question Did Mr O'Blenis speak of any one else beeng engaged ~~in~~ with him in the contract at that time answer Yes he said that Mr Mathews was his partner.

Evidence of F. Wannis

Frederick Wannis a Witness on the part of the Pltff. deposed and said that defendants did run omnibuses to Prairie house during race week and west of Rising sun in 1849 or 1850 belives both fall and spring thinks defendant run at the time of the Chicken fight dont know whether defendant run more than one omnibus or not the Pltff run at that

route two or three little boxes of some sort and his fare was fifteen cents on the occasion of public days the Pltff could not carry all. but on ordinary occasions could carry all who wanted to go: as I believe Pltff run three or four omnibuses on the public occasion as were full. Pltffs was running at same time. do not know wether defts. omnibuses where chartered or not. and do not know if defendants run any other days than these public occasion before mentioned. —

Evidence of S. Simons

Sila Simons on the part of the Pltff. defts run omnibusses in 1850 out on St Charles road west of Grave Yard & early in 1851. have rided in them beyond Grave yard but not early in 1851 nor in 1850 but last fall rode out several times rode out I think in 1851. have talked with Mathews with in a few days he admitted that he had run Omnibuses there & that he let Foster out and paid him for it. and had a right to run there. and did run when he could make by it the Pltff. has been running West 4 Years and three or 4 omnibuses I paid in defendants omnibus fifteen Cents from City out. —

Evidence of Mr Lozier

Mr Lozier on part of Pltff. testified that he lived on Franklin Avenue on 27th Street in 1850 & 1851. lived on Grave Yard the Pltff run omnibuses west from Grave yard some time, dont know how many he run one two or three often on Saundays and on race days and on 4 the July 1851. a great many persons were going over the route. I rode several times in Pltff omnibuses and also in Defts out west from Grave Yard on St Charles Road. Defts run omnibuses on public days west of Grave Yard do not what effect Defts omnibusses had on plaintiffs business cannot estimate or form any idea of the amount of receipt or profits some times on public days plaintiff could carry all and some times not. I know nothing about the firm except by rumor. I know Capt. Case he is present in the room.

Evidence of Nicholas —

Nicholas — lettered at Grave yard two years saw defts omnibuses going out some times Pltff. run omnibuses and not always full —

Evidence of M. Repp.

Martin Repp in Spring & Summer of 1850 I drove for Defts Mathews gave me directions. I quit last summer some times I went beyond the Grave yard west when any body there did not go regularly nor every day I went west from Grave Yard once or twice a week never went unless passengers there and always eloped. If passengers wanted me to take them out I did ~~not~~ so & if passengers did not wanted me to take them out to Prairie house I never done so and Defts told me (or Mathews one of the Defendant's) that if Plfs. was not there to go on, and if Plfs was there not to go on, and never to go unless I had four or five passengers. the most I ever received before I drove for Mathews was twelve Dollars a day. I drove out West beyond the Rising sun on Sundays and Public days and when passengers were waiting and some times passengers would not get out to go in Plaintiffs omnibusses and in such instances I went on with them Defts had no one at the eloping places to look after the omnibusses never eloped at Prairie house longer than five or ten minutes and never saw more than one of Defts omnibuses at Prairie at same time met them during race week on the route west of the Rising sun with passengers in them Plaintiff could not carry all the passengers at such times I carried all I could. Plaintiff would sometimes beeny back thouse I carried out. I Know Plff could not carry all because I saw some times fifteen or twenty waiting It was not often that more were waiting than Plff omnibuses could carry. some times passengers who could not git a seat in plffs. omnibus would walk on. these I some times picked. some time in 1850 plffs son driving left the Rising Sun at the same time with myself He had a full load of passengers & brought them all the way into town about half way he returned off into Morgan Street.

Evidence of Mr Kennedy

Mr Kennedy I was foreman of plff quit him in 1849 was not his foreman in 1850 & 51 Plff was running omnibuses in 1850 & 1851. ~~Plff~~ I never saw them running on the St Charles Road. When I was

foreman pfff was running omnibusses from the Market through Morgan Street to the Prairie house. I never calculated the income on the whole route. one Race week I drove myself and on the hole line made from thirty to forty Dollars Passage was fifteen cents for the hole way and ten cents from the grave yard Pfff was running four or five omnibusses. They made five or six tripes clear through per day dont know how many beyond the Grave Yard is nearly half way. There was at this time a line of four or five omnibusses running on Franklin Avenue East of the Grave Yard. on ordinary occasion three or four omnibusses running through made from ten to twelve Dollars each per day. In 1850 & 1851 on omnibus would make six or seven tripes from Grave yard to Prairie house since fore part of 1849 I dont know about pfffs running ~~about~~ I dont know how may omnibuses pfff has run. I saw some on the other side of the Rising sun non on this side. They would carry from six to Eight passengers inside. In some Eight could ride comfortably at that time pfff hired a large omnibus which carried 15 or 20 passengers. There were fiy or six omnibusses including the big one. on one many rode outside & I have seen from ten to fifteen inside. Except one of his own and the one hired none ever fixed for carrying out side these could carry 3 or 4 outside. He hired that omnibus in 1847. Vogle was then running on Franklin Avenue persons sometimes sat on top. all this was before Octobr. 1849.

Evidence of C. Vogle

C. Vogle I moved to the Rising sun July 14 the 1850. I saw deffs omnibusses go to Prairie house in 1850 on every day when there was anything to do on the track they went out to the Prairie house whenever they had passengers enough to make it worth while, during that year two horses generally carried 4 to 5 pasfengers Pfff. had two or three omnibusses they run from the Rising sun to the Prairie house, he put more omnibusfes on the line on good days

such as sundays and Race days sometimes pltff himself drove & sometimes his two sons drove from July 1850 to winter Pltff suffered damage to the amount of seventy five Dollars by reason of defendants running their omnibusses West of Grave Yard when Defts omnibusses went trough they would get more passengers than plaintiffs. I have seen passengers waiting at Rising sun for Defts omnibusses which had gone to the Prairie house to take them in. have seen six or Eight waiting at a time. I mean from July 14 the 1850 to the end of the year. Defts omnibusses did not run every day & I cant say positively if once in every week I have seen Defts omnibusses go with passengers. I dont no what directions were given to drivers but they went when they had passengers enough. Pltffs omnibusses could carry 10 have seen 12 in them I saw pltff omnibusses 1851 on two occasions run down ~~to~~ the Avenue to catch the avenue passengers to give them the passengers cant say how many times Defts ran out. on public days Plaintiffs would have had omnibusses enough if the passengers had been divided among them. I suppose plaintiff could have carried them all had defts given them to pltff. It frequently occured that passengers had to wait sometimes one hour more or less for the omnibusses to return from the Prairie house Pltff averaged six trips per day a trip would take from fifteen to twenty minutes each way.

Evidence of Mr Patterson

Mr Patterson. In summer of 1850 I worked at Mr Goodes saw Defts omnibusses running to Prairie house. I rode in them as often as twice a week sometimes the had 4 or 5 passengers some times as many as ten. I often saw Defts go out loaded and pltffs nearly empty. The omnibusses had on them "Case & Co°."

Evidence of H Foster.

H. Foster I am the son of Pltff & drove for him Witness said he & his brothers drove his Fathers omnibusses during 1849 &

1850 on route west of Grave yard except a week or so when he was sick sometimes pfff ran one sometimes more omnibusses Defts ran an omnibus 25 or 30 times if not more they took passengers from us & delayed us I saw Defts omnibusses 20 times come to the Rising sun & wait until the next omnibus came & if the could get passengers enough would go on to the Prairie house otherwise not go — the average receipt were Ten Dollars per day when defendants ran they would carry more than three fourths of the passengers when business was small we got all of it if it increased defts would run & take most of the passengers. up to October 25 the 1850 pfff was damaged fully three hundred Dollars by reason of Defts running omnibusses west of Rising sun to Prairie house. Mathews asked why we did not run up the line. I told him we ran them up as well as we could O'Blenis came in 1849 to buy out the Morgan Street line Father was sick told him to go to Isaac Foster that any bargain they would make should be binding. Pfff drew off his omnibusses from the Morgan Street route or line in November 1849 and on some day Defts came on that route I talked lately with pfff about this suit but not about profits. I looked at some memoranda sometime ago as I thought I might have to testify on the 4 the of July we made forty Dollars we began with two omnibusses and at twelve o'clock we put on three at 4 o'clock we put on 4 omnibusses we made forty Dollars with the four we never run one into town we would sometimes make regular trips when there where no passengers and never refused to take passengers who would pay, sometimes Defts drivers would not let passengers get out of Defts omnibusses to go with us. Pfff did not with draw his line for any time nor did ~~I~~ I say so to Mr Mathews my Brothers were sick one two days the other a week during which time only one omnibus ran pfffs

made from six to Eight trips a day. I know of no occasion when pltffs could not carry all the passengers. Defendants to maintain the issue on their part introduced evidence as follows:

Evidence of Wm Todd.

William Todd beeng introduced defendants asked the following question. Do you know of plaintiffs running omnibusses into this City? Plaintiffs objected to Witness stating what occured after the 25 the of October 1850. The objection was sustained by the Court Witness than stated as follows. — In the fall of 1850 but witness was not certain as to the year. I rode in Pltffs omnibus to seventeenth Street dont remember the day but early in the Fall. Pltff. him self drove a Mr Williams and others were with me. I paid fifteen cents passage. I have been frequently at the Rising sun and did not see any omnibusses there. Pltffs omnibusses where small and uncomfortable Mr Billings saw an omnibus there in 1850 it was a small omnibus of plaintiffs in which I rode at the time of the second race between June Bug & Jackson Pltff said at the Prairie house that he should go into Town if he could get a load. Pltff did not stop at the Grave yard but went right on. I have remained at the Grave yard in 1850 with out seeng any omnibus Pltffs omnibusses were running at the line. on the same day that I rode in Pltffs omnibus those of Defts ran to the Prairie house all the omnibusses were full

Evidence of Mr McIowell

Mr McIowell I Know Pltff Question by Deft what passed between you and Isaac Foster with regard to this line? (Pltffs object to the Question) The Court directed the Witness to state only what occured after 24 the October 1849 (answer) I cant see what time I talked with him think it was in 1849 in the month of January February or March at that time pltff. was running the line, Isaac said so.

Evidence of J. Baumgartner

Francis Baumgartner, I do not recollect that pltffs ran their omnibusses on this side of the Grave yard from October 1849 to October 1850 on special occasion pltff could not carry all

the passengers Pltff provided well enough for ordinary travel when all his omnibuses were running In 1850 I have seen persons frequently stop & wait half or three quarters of an hour for an omnibus & then go on because no omnibus came. In 1850 pltffs ordinarily ran two omnibuses and accassionally four during this time Defts ran one omnibus on St Charles Road west of Grave Yard to Prairie house a few days & drew it off not more than three days. —

Evidence of Capt Case

Capt. Case Pltff called on me in 1850 and said he had been trying to do something with defendants about a contract but that Mathews would not agree. That O'Blenis had come to him when sick & offered $200. which he declined to take. That pltffs brother afterwards agreed to take it & O'Blenis said he would see Mathews Pltff proposed to take $125. then $100. in order to get the matter settled and defts refused to give it. Case & Co ran the omnibusses, all the plaintiffs omnibusses were insufficient to carry all the passengers. Pltffs omnibusses ran on Morgan Street regularly until January 20 the 1850 since then not regularly but frequently with persons in them but whether they paid anything or not did not know. Pltff said O'Blenis had made him a proposition in October that he pltff then declined but was afterwards willing to accept. I received four or five letters from pltff on the subject this is one (letter shown) this conversation with pltff was as late as March or May 1850 Pltff said that O'Blenis was willing to close the agreement but Mathews was not. Defendants put their line on about 20 the January 1850 and Pltff withdraw his mostly about this time. The firm of Case & Co is composed of self. O'Blenis. Mathews & Wells. I understood from pltff that deft would not enter into the arrangement. He said his brother came to see him in relation to the offer of O'Blenis that he pltff consented to it & came in with his brother to see about it & Mathews refused to have anything to do

with it. When this conversation occured pltff was running occasionally only. I saw his omnibuses at the corner of Broadway Pltffs omnibuses would hold 8 or ten persons after this conversation I saw pltffs omnibuses come in with passengers on Franklin Avenue & Morgan Street with men in them but dont know whether or not they paid. When pltff complained of our running out. I told him to run in. I did not suppose any contract existed. Pltff only complained of our omnibusses running at race times I have frequently chartered our omnibusses to take out parties. I supposed we had a right to run. The effect of our running on pltff would depend on whether or not he could carry all the passengers. The principal thing he wanted ~~the passengers~~ me to see Defts about was to compromise —

Evidence of Jas Lynch

James Lynch. — Pltffs and Defendants both ran Omnibusses from Broadway out. I saw Pltffs omnibuses come in with passengers & collected on Franklin Avenue during that year pltffs omnibusses came in on Morgan Street this was in years 1851-2. at the time of the foot race in 1850 pltffs son drove down Morgan Street once at Spring or Fall Races I started from Prairie house with a load the omnibus had been chartered to go out and back at 15 cents for each passenger Pltffs son followed and caught up with me and went from the Avenue up Eighteenth street to Morgan Street before dark. I saw him land at the corner of Fourth and Franklin Avenue I saw him two squares down Morgan Street as I came down the Avenue. This was in 1851 He did not stop at the Rising sun & I followed him I received instructions from Mathews not to go out if plaintiffs omnibusses were there. There were complaints made by passengers on account of our telling them omnibuses would be at the Rising sun as there were non. Here defendants rested & pltffs by way of rebuttal introduced Eli Foster Jr. who testified as follows: —

Evidence of Eli Foster.

In 1850 we i.e. the Pliff never ran omnibuses on Morgan Street we ran from the Grave yard to the Prairie house whenever there was any business or we expected any we quit running on Morgan in January 1850 Father had sold to Jeffs & we quit between the 18 the & 22nd Jan: 1850 on that day Mathews put horses to omnibusses there & O'Blenis told pliff to see Mathews who was at the Grave Yard & settle with him. We never had in 1850 a driver named Thomas I went down the Avenue once in 1851 Lynch has beeng driving there about two years. When I drove down the Avenue I passed Lynch at the Grave yard he passed me two or three times going out that day but would not give me passengers so I paid him off. I did not go down Morgan Street in 1850 after we took off our stock on 18 or 20 th of January 1850 I was absent a month in 1850 in the summer I did not drive the rest of the time but staid at home at the Prairie house on cannot see all the way into town. —

Evidence of H Foster.

Homer Foster. The race between Jackson & June Bug was in November 1850 my brother and I drove pliffs omnibuses up to October 1850. In 1850 I did not drive on Morgan Street after our line has been withdrawn. Pliffs was engaged in farming in Ills. & carried men from the Prairie house to the farm to work for him in a sort of open Hack with four seats They passed back & forth more than four times that season Pliff did not drive omnibuses in 1850 William Todd rode with me at the June Bugg Race I have conversed with Pliff about this matter he did not tell me what Witnesses swore but I was asked if I know. That year I did not bring passengers into town nor do I know that Pliffs omnibuses did. I talked with Jemmey yesterday not Lynch he commenced talking about this case & I answered him when I say Pliff did not drive on any line

Evidence of John Shannon.

John Shannon. There was very little travel except on Sundays & public days on the former two omnibuses could do the work on the latter they could not. Dillon ran an omnibus there that year Defts ran on public days only. I have no personal knowledge of persons beeng unable to get omniboses coming out. but do know of persons beeng unable to get them to go in but dont recollect any particullar omnibus persons would frequently have to remain it was after night. Defts generally run until about dark I dont remember if it was that year July fourth the travel would have required ten omnibuses from Defts for balls at Prairie house at night once or twice. They event round and called for persons.

Evidence of Mr Dougherty

Mr Dougherty called by Deft Jane Book Keeper for Case & Co the firm of Case & Co is composed of Case O'Blenis Mathews & Wells It began early in 1850 there was a firm of O'Blenis & Mathews once dont know that O'Blenis & Mathews ran Omnibuses there before the partnership of Case & Co was formed saw plaintiffs omnibuses in the stand at Broadway three times in 1850 but I do not know wether on it they carried pasengers O'Blenis & Mathews formed their partnership in 1848 and went into the partnership of Case & Co Defts omnibuses are market Case & Co saw Defts run to Prairie house frequently in 1850. — this was all the testimony in the case for Pltff or Deft. and the Plf. asked the following instaxuction to wit. —

Plaintiffs instructions given by Court

If the Jury believe from the Evidence that there was an agreement made between the Plaintiff & the defendants as stated in the Pltffs petition that the plaintiff in conformity with the terms of said agreement withdraw his stock & omnibuses from Morgan Street & ceased carrying pasengers on said Street

Evidence of El: Foster.

In 1850 we i.e. the Pliff never ran omnibuses on Morgan Street we ran from the Grave yard to the Prairie house whenever there was any business or we expected any we quit running on Morgan in January 1850 Father had sold to Jeffs & we quit between the 18 the & 22nd Jan: 1850 on that day Mathews put horses to omnibuses there & O'Blenis told Pliff to see Mathews who was at the Grave Yard & settle with him. We never had in 1850 a driver named Thomas I went down the Avenue once in 1851 Lynch has beeng driving there about two years. When I drove down the Avenue I passed Lynch at the Grave yard he passed me two or three times going out that day but would not give me passengers so I paid him off. I did not go down Morgan Street in 1850 after we took off our stock on 18 or 20 th of January 1850 I was absent a month in 1850 in the summer I did not drive the rest of the time but staid at home at the Prairie house on cannot see all the way into town —

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for hire & that the defendants before this suit was instituted run one or more of their omnibusses & carried passengers on the St Charles Road Westwardly from the Rising sun Tavern to the Prairie house, then the defendants are liable in this action & the jury should find for the plaintiff

2, If the Jury find for the Pltff. they will assess such damages against the defendants as the Jury shall believe from all the facts & circumstances proven in the case the Plaintiff has sustained by reason of the violation on the part of the defendants of their said agreement. not however to exceed the amount of damages sued for. —

3. If the Jury believe from the Evidence that the plaintiff after the alledged agreement was entered into with the defendants. continued to run his omnibuses & carry passengers on Morgan Street until some time in January 1850 the fact that the plaintiff did so run his omnibusses does not defeat his right to recover in this action provided the Jury believe from the Evidence that is was the under standing between the Plaintiff & the Defendants or either of them, that the plaintiff should continue to run his omnibuses on said Street until the defendants were ready to put their omnibuses on said Morgan Street or that the running of the Plaintiffs omnibuses on Morgan Street after the making up the alledged agreement was with the consent of the defendants or either of them.

4. The Deft. do not by their answer deny that they run omnibuses & carried passengers on the St Charles Road westwardly from the Rising Sun Tavern to the Prairie house as alledged in petition the averment in the plaintiffs petition as to such running is to be considered by the jury as admitted. —

5. The fact that the plaintiff may not have been able to carry all the passengers on public occasion only goes

to the reduction of the plaintiffs damages and not to his right of action. if the Jury shall beleive from the evidence that the Defendants have violated their agreement.

If the Jury beleive from the Evidence that the Defendants violated their said agreement by running omnibusses & carrying passengers on the St Charles Road westwardly from the Rising Sun Tavern to the Prairie house before this suit was instituted & that they continued afterwards to run their omnibusses & carry passengers on said road the Jury may take into consideration in assessing the plaintiffs damages the injury they may believe from the Evidence the Pltff sustained by reason of the running of Omnibusses & carrying passengers as aforesaid by the Defendants down to the time of trial.

If after making of said alledged agreement the Pltff run one or more Omnibusses & carried passengers on any other Street or Avenue in the City of St Louis than Morgan Street that fact will not prevent the Pltff. from recovering in this action, if the jury believe from the Evidence that there was such an agreement made between the parties & that the Defendants have not kept & performed it on their part, and although the Jury may believe from the testimony that after the making of said alledged agreement & after the Defts had put their omnibusses on the Morgan Street line & the Pltff. has withdrawn his omnibusses & stock therefrom the latter (the Plaintiff) did run one or more omnibuses on said Morgan Street on different occasions but not generally such running of one or omnibusses by the Pltff on said Street will not defeat or prevent the plaintiff from the recovering in this action. unless the jury at the same time shall be satisfied from the testimony that the Pltff carried

passengers on said Street so as to intefere with the running of omnibuses and the business of the defendants

7. The Defendants asked the Court to give to the Jury the following instructions. —

9. If the Jury find from the Evidence that the firm of Case & Co composed of Calvin Case, Erastus Wells, Rober McOBlenis & L Mathews run their omnibusses on Morgan Street west at the request of Eli Foster the Pltff. between October 1849 & October 1850 and at the same time the said Pltff run his on the same route and also at any time or times during the months aforesaid run his Omnibusses from Prairie house to St Louis over the route mentioned in Pltffs petition they will find for Deft. This instruction is subject to the qualification contained in Instructions 3 and 11.

10-11. If the Jury find from the Evidence that the Pltff violated his part of the contract by running his omnibusses from Rising sun Tavern to the City during the time that Case & Company were running from the City west to the Rising sun and between October 25 the 1849 and October 25 the 1850 they will find for Defts. —

1.-1. The Court is requested to instruct the Jury that unless the find from the evidence that the contract set out in plaintiffs petition was to be performed with in one year from the making of the same or unless they find that the alledged agreement or some memorandum or note thereof is in writing signed by the parties sought to be charged, or by some other person by them thereto lawfully authorized the alledged contract is void and the Jury ought to find for the Defendants.

2. If the Jury find from the Evidence that Mathews and OBlenis never did run Omnibusses on the St Charles

Road beyond the Rising sun Tavern west to the Prairie house except as Members of a firm in which others were also members formed after the contract alledged in the Petition they will find for Defendants

4. If the Jury find from the Evidence that Foster the Pltff. from and after the alleged contract did not accomodate the travelling community and did not have carriages of capacity and numbers to do so. the fact of Defts running over their route upon public days is no violation of the said contract and they will find for defendants. —

5. If the Jury believe from the Evidence that after the alleged contract between plaintiff & defendants Foster the plaintiff did not furnish or keep upon the road in question carriages of sufficient capacity and a sufficient number of carriages to accomodate the persons and the public desiring to ride upon said road in public conveyances. and that the defendant only run their carriages upon said road on such occasions and at such times. as those when the pltff failed to furnish conveyances sufficient for the accomodation of such persons so travelling as aforesaid. then the Jury will find for the Defendants

2½. If the Jury find firm the Evidence that the Pltff Eli Foster with in the time named in his petition run Omnibusses one or more from the <u>Rising sun Tavern</u> to the City of St Louis. contrary to the contract as alledged in said petition they will find for the Defendants. —

3. If the Jury find from the Evidence that the defendants only run omnibusses on particular accasion after the alleged contract and for the accomodation of the

Public it is not violation of the contract set forth in Pltff Petition and they will find for the Defendants.

6. If the Jury find from the Evidence that the Pltff Eli Foster ran omnibusses from the Rising sun Tavern into the City of St Louis after the time agreed upon for him to cease running on that part of the line and before October 25 1850. they will find for the Defendant.

7. If the omnibusses of the Defendants were chartered or hired occasionally by private individuals to take private parties to the Prairie house and back then such letting of their omnibusses for hire was not a violation of the alleged agreement.

8. If the Jury find from the Evidence that the contract alleged was made between the parties to this suit and that the defendants violated the same the measure of damages is the actual damages the Plaintiff sustained and the Pltff cannot recover for any damages sustained in consequence of the running by Defendants of their omnibusses after the twenty fifth day of October 1850.

11. The admission of the Defendants that they did run omnibusses (referred to in the Instruction No. 4.) is an admission merely that they did run omnibusses on divers days and times after October 25th 1849 and prior to July 24th 1850. If the Jury do not find that there was such an understanding as in Instruction No. 3. then any running by Pltff of his omnibusses East of the Rising sun into the City after the 25th of October 1849 and prior to October 25th 1850 will defeat his right to recover. If he did not so run his omnibusses and the Defendants run theirs west of the Rising sun on the St Charles Road between October 25th 1849 and October 25th 1850 then the Pltff will be entitled

to recover if the Jury further find the Contract alleged to have been made. If the Jury find the understanding stated in Instruction No 3 to exist them the time to which reference is to be had as to the obligation of Plaintiff to cease running East of the Rising sun is as stated in that instruction and not October 25 the 1849.

5th. The Jury in this case after beeng out for some time sens to the Court of the deposition of Isaac J. Foster Here upon the Court sent them said deposition with this instrument

The Jury are instructed that so much of the deposition of said Isaac J. Foster as in marked "ruled out" and which was excluded from the Jury in no evidence for any purpose whatever in this case. the parts excluded beeng those on 5the and 6the pages of said deposition which are marked in the margain "ruled out" and which are also crosed."

The Jury returned a verdict for Plaintiffs and the Defendants moved for a new trial for the reasons accompanying the said motion which is as follows. Viz Eli Foster vs. Mc OBlenis & L Mathews. In the St Louis Court of Common Pleas March Tr. 1852. And now the Defts by Leslie & Barrets their Attys come and moved the Court for a new trial. Because the verdict of the Jury is against law and evidence. Because the Court gave Erroneous instructions for the Plfft and refused instructions ask for by Defts. Leslie & Barrets

The Court overruled the motion for a new trial to which the defendants then and there instantly excepted and did ~~not~~ the time of every decision of the Court against the propositions of the Defts from the commencement of the trial to the end of the same instantly except now because the above and foregoing matters do not appear of record the Defendants ~~write~~ this their Bill

23.

of Exceptions and pray that the same may be allowed and signed and made part of there record which is accordingly done (signed) Samuel Treat (Seal) Judge

And afterwards towit on July the 10 the 1852 the following application for an appeal was filed Viz.-

~~Eli Foster Plaintiff against Robt McAllenis & Lowry Mathews Defts. In the Court of Common Pleas for St Louis County To Philipp Tippett Clerk of the Court of Common Pleas for St Louis County State of Missouri. Defendants by their Attorneys Leslie & Barret ask an appeal~~

Ele Foster
v
Mathews & O'Bliner

Statement of the
Case —
Leslie & Barrett

Filed 23d March 1853
Wm L Glanville
clk.

Eli Foster Respdt.
vs.
Robt. McOblenis & L. Matthews appellts.

Appeal from the St Louis Court of Common Pleas.

The first question we will consider in this cause is, whether the contract stated in the petition is within the statute of frauds and perjuries as it is not to be performed within a year, but may have an indefinite extension as to the period within which it may be completed. Whatever might be our opinion in relation to this question if it were now for the first time to be determined, we do not deem ourselves, warranted in departing from a course of decisions, which seems to have been uniform in interpreting this clause of the statute: the construction was early made and has been steadily adhered to, that the clause under consideration only applies to contracts, in which by the express appointment or understanding of the parties, the thing is not to be performed within a year; but as to those contracts, which may by possibility be performed within a year, they are beyond the control of the statute. O'Blenis & Matthews might have died within a year from the period of making the contract, and as it would then have been fully performed it is not therefore within the statute. The point involved in the present controversy was determined in the case of Lyon vs. Kling 11. Metcalfe 411 where it was held, that an oral agreement not thereafter to engage in the staging or livery business is not within the statute of frauds, which prohibits the bringing an action on any oral agreement, that is not to be performed within one year from the making thereof. Peters vs. Westborough 19. Pick. A promise to pay the plaintiff so much money "on the day of his marriage" or "on the arrival of a ship" or "to leave money by a will" need not be in writing. Peter vs Crompton. Skin. Fenton vs. Emblers 3. Bur. 1 Salk. 180.

It is next insisted, that the verdict should be set aside and a new trial granted, because the court permitted a deposition to be sent to the jury, which

had been read during the trial, parts of which had been ruled out. The deposition sent to the jury was accompanied by an instruction from the court, that the parts ~~and~~ marked ruled out is no evidence for any purpose whatever in this case". No exception was taken to this action of the court, nor does it appear what was the character of the part of the deposition ruled out. Hence we cannot see that it influenced the jury in finding their verdict. It is true the court had once refused to let it be read, but we are not to presume that the jury violated the direction of the court without any proof on the subject, and considered ~~read~~ that which was expressly excluded from them. Courts cannot be too vigilant in guarding all avenues to improper interference with jurors during their deliberations. Had the act complained of been done by either of the parties, the verdict would have been set aside, without any inquiry as to the nature of the evidence. The proper practice is, if, after a jury has retired, they wish any of the evidence explained or repeated, they should return into Court, and the explanation or repetition should take place in the presence of the parties or their counsel. As the matter complained of, was the act of the Court who stands indifferent between the parties, and as it does not appear that the evidence was of a character to abuse the minds of the jury even had they read it, which we are not to presume, we do not consider ourselves warranted in granting a new trial for this cause.

We see no error in the refusal of the instructions asked by the defendants if indeed they were refused which does not appear upon the record. The defendants certainly could not evade their contract with the plaintiff by associating themselves with others and running an omnibus line under the name of new firm. Nor would the fact, that the plaintiff did not furnish as many carriages on the route as the public convenience required authorize the interference of the defendants by supplying

the deficiency. The omission to furnish as many omnibuses as the public required was a circumstance to be weighed by the jury in determining the damages for a breach of the contract, but would be no justification to the defendants for running a line of stages in violation of their agreement. The defendants were under no obligation to furnish carriages for the public in the event of their not being supplied by the plaintiff, so as to warrant a violation of their contract. An occasional running of omnibuses on the line was as much a violation of the contract, as though it had been done without intermission. The difference only affects the damages. The instruction to the effect that if the plaintiff had violated his undertaking with the defendants which was part of the consideration of the defendants contract, he could not recover, though it was not given at the defendants instance as he alleges, yet was given by the Court. The defendants had the advantage of it, though it may be doubted whether it should have been given at all. We have said, this much in relation to the law of those instructions on the record which seem most opposed to the views of the defendants: It does not appear from the record which of the instructions were given or refused for the respective parties or which were excepted to; and it would be a useless task to prosecute this investigation farther as from the confusion in the record in relation to the instructions it would be impossible to come to a result, that would warrant a reversal of the judgment, should any error appear which we have not been enabled to descover.

The other judges concurring judgment affirmed

Wm Scott

26

Foster
vs
Ollennis & Matthews

Opinion

Filed 23 May 1853.
Wm. L. Glanville
Clerk.

Eli Foster
Respondent
vs
Robert McD. Blevis &
Lawrence Matthews
Appellants

Supreme Court
Oct. Term
1852

Statement made by Respondents

The Petition of Respondent was filed July 24. 1850 & states, that on 25. Oct. 1849 he was Engaged in running a line of Omnibus Carriages for the transportation of persons & property for hire on Morgan Street in the City of St. Louis - a public thoroughfare - & that he run his said Carriages on said Street, from Broadway Westwardly to the Western limits of said City & thence to the Tavern on the St. Charles Road Called Train House - that the Defendants agreed with him, if he would withdraw his Carriages & Stock from Morgan Street & not run them & carry passengers on said Street East of the Rising Sun Tavern they would pay him $200 - & they the defendants agreed with the plaintiff that they would not run Omnibus Carriages & carry passengers on the St. Charles Road Westwardly from the Rising Sun Tavern - that in pursuance of said agreement the plaintiff withdrew his Stock & Omnibuses from Morgan Street & ceased to run them for the purpose of carrying passengers & has not since run them on said Street - that the defendants in violation of said agreement on divers days & times since the making thereof, run Omnibuses & carried passengers on the St. Charles Road Westwardly from the Rising Sun Tavern & that for such carrying of passengers they have realized large sums of money & realized large profits to the Plff's damage of One thousand Dollars -

This is the substance of the Petition -

The Defendants in their answer admit that the plaintiff did run Omnibuses on Morgan Street before the alleged agreement, but deny that they ever made such agreement with the Plaintiff as he set up in his Petition - Defendants further state that the Plaintiff did not discontinue altogether running Omnibuses on Morgan Street as stated by him - Defendants deny that they have damaged the plaintiff

This is the substance of the answer -

The Case was tried by a jury -

The Plaintiff proved the making of the agreement substantially as stated in his petition & introduced witnesses, who proved that the Plaintiff withdrew his Stock & Omnibus Carriages off of Morgan Street about 18. or 22. of January 1850 & did not run there or carry passengers on said Street East of the Rising Sun Tavern after that time - that it was the understanding between the Plaintiff & Defendants, that the plaintiff should withdraw his Carriages & Stock from Morgan Street as soon as the Defendants were ready to put theirs on - that they wanted the line kept up - & as soon as they were ready & went on to said Street with their Omnibuses the Plaintiff withdrew his, which was between 18 & 22 January 1850 - ~~that~~ The Plaintiff proved also that he kept up & continued to run his Omnibus Carriages after that time, on the St. Charles Road from the Rising Sun Tavern & carried passengers for hire, westwardly to the Prairie Home up to the time of bringing this suit -

The Plaintiff also proved that after he withdrew his Stock & Carriages from Morgan Street & ceased to carry passengers on said Street as before stated, the Defendants during the year 1850 & early part of 1851 frequently, that is to say, sometimes several times a day - often as many times a week & on nearly all Sab

-lic occasions, such as the 4 of July & when there were horse or foot races or Cock fighting at the Prairie House, the defendants run their Omnibus Carriages on the St. Charles Road & called passengers for hire westwardly from the Rising Sun Tavern & back - & to run their Carriages & called passengers at the same time that the Plaintiff was running his Carriages for the same purpose on the same road -

The plaintiffs witnesses estimated his Damages by reason of the interference & running of defendants Omnibuses & calling passengers on the St. Charles Road from the Rising Sun Tavern Westwardly to the Prairie House, at sums varying from $500. to $800. -

The Plaintiff examined several witnesses whose testimony tended to prove all of the foregoing facts -

The defendants called witnesses whose testimony tended to prove that the Plaintiff had on several occasions run his Carriages & called passengers on Morgan Street East of the Rising Sun Tavern for hire, after the defendants had taken their Stock & Omnibuses on to Morgan Street -

The defendants also proved that the Stock & Omnibuses taken on to Morgan Street & run there in the early part of 1850 belonged to the firm of Case & Co. - which firm was composed of Calvin Case - Charles Wells & the Defendants - The defendants also offered testimony tending to show that the contract set up by Plff. in his Petition, though talked of between Plff. & O. Blanc, was never consummated - The defendants also offered testimony tending to show that at times & especially on public occasions, the

Plaintiff could not carry all the passengers going out & coming in between the Rising Sun Tavern & the Prairie House - that his Carriages were not sufficient for that purpose - & that many passengers were obliged to wait for that nearer - the Defendants also offered testimony tending to prove that Case & Co. of Tenthiers Chartered one or more of their Omnibuses to take private parties out, to the Prairie House

The testimony offered by Plaintiff & the Defendants, respectively in respect to ~~[illegible]~~ every material issue in the Case, was more or less conflicting & contradictory

The Court at the instance of the Plaintiff gave to the jury the following instructions -:

1. If the jury believe from the evidence that there was an agreement made between the Plaintiff & the Defendants as stated in the Plaintiffs Petition - that the Plaintiff in Conformity with the terms of said agreement withdrew his stock & Omnibuses from Morgan Street & Ceased Carrying passengers on said Street for hire & that the Defendants before this suit was instituted run one or more of their

Omnibuses & Carried passengers on the St. Charles Road Westwardly from the Rising Sun Tavern to the Prairie House, then the defendants are liable in this action & the jury should find for the Plaintiff -

2 If the jury find for the plaintiff they will assess such damages against the Defendants as the jury shall believe from all the facts & circumstances proven in the Case, the Plaintiff has sustained by reason of the violation on the part of the Defendants of their said agreement, not however to exceed the amount of damages sued for -

3. If the jury believe from the Evidence that the Plaintiff after the alleged agreement was entered into with the Defendants continued to run his Omnibuses & Carry passengers on Morgan Street until sometime in January 1850, the fact that the Plaintiff did so run his Omnibuses does not defeat his right to recover in this action, provided the jury believe from the Evidence that it was the understanding between the Plaintiff & the Defendants or either of them, that the Plaintiff should continue to run his Omnibuses on said Street until the Defendants were ready to put their Omnibuses on said Morgan Street or that the running of the Plaintiffs Omnibuses on Morgan Street after the making of the Alleged agreement, was with the Consent of the Defendants or Either of them -

4th - The Defendants do not by their answer deny that they run Omnibuses & Carried passengers on the St. Charles Road Westwardly from the Rising Sun Tavern to the Prairie House as alleged in the Petition - the averment in the Plaintiffs Petition as to such running is to be considered as admitted -

5th - The fact that the Plaintiff may not have been able to Carry all the passengers on public occasions, only goes to the reduction of the

Plaintiffs damages & not to his right of action, if the jury shall believe from the Evidence that the Defendants have violated their said agreement.

The defendants Counsel asked & the Court gave the following instructions:-

9. If the jury find from the Evidence that the firm of Case & Co. Composed of Calvin Case Erastus Wells Robt. McOBlenis & L. Matthews run their Omnibuses on Morgan Street West at the request of Eli Forter the Pltff. between Oct. 25. 1849 & Oct. 1850 & at the same time the said Plaintiff run his on the same route & also at any time or times during the Months aforesaid, run his Omnibuses from the Prairie House to St. Louis over the route mentioned in the Plaintiffs Petition, they will find for the Defendant - This instruction is subject to the qualification contained in Instructions 3 & 11. —

10. If the jury find from the Evidence that the Pltff violated his part of the Contract by running his Omnibuses from Rising Sun Tavern to the City during the times that Case & Co. were running from the City West to the Rising Sun & between Oct. 25. 1849 & Oct. 25. 1850, they will find for the Defendants -

The defendants also asked the following instructions, which the Court below refused to give:-

1. — The Court is requested to instruct the jury that unless they find from the Evidence that the Contract set out in Plaintiffs Petition was to be performed within one year from the making of the same - or unless they find that the alleged agreement or some memorandum or note thereof is in writing signed by the parties

sought to be charged or by some other person by them thereto lawfully authorized, the alleged Contract is void & the jury ought to find for the Defendants -

2 - If the jury find from the Evidence that Matthews & O. Pleiss never did run Omnibuses on the St. Charles Road beyond the Rising Sun Tavern West to the Prairie House except as Members of a firm in which others were also Members formed after the Contract alleged in the Petition, they will find for the Defendants -

~~3 - If the jury find from the Evidence that Matthews & O. Pleiss never did run Omnibuses on the St. Charles Road beyond the Rising Sun Tavern West to the Prairie House except as Members of a firm in which others were also Members formed after the Contract alleged in the Petition, they will find for Defendants~~ -

4. If the jury find from the Evidence that Foster the Plff from & after the alleged Contract did not accommodate the travelling Community & did not have Carriages of Capacity & Numbers to do so, the fact of Defendants running over their route upon public days, is no violation of said Contract & they will find for Defendants -

5 - If the jury believe from the Evidence that after the alleged Contract between Plaintiff & Defendants, Foster, the Plff, did not furnish or keep upon the road in question, Carriages of sufficient Capacity & a sufficient Number of Carriages to accommodate the persons & the public desiring to ride upon said road in public Conveyances & that the Defendants only run their Carriages upon said road on such occasions & at such times, as those when the Plaintiff failed to furnish Conveyances sufficient for the accommodation of such persons so travelling as aforesaid then the jury will find for the Defendants -

~~If the jury believe from the Evidence that after the Alledged Contract, between Plaintiff & Defendants, Forter the Pl'ff, did not furnish or keep upon the road in question, Carriages of sufficient Capacity & sufficient Number of Carriages to accommodate the persons ~~[illegible]~~ & the public desiring to ride upon said road in public Conveyances & that the Defendants only run their Carriages upon said road on such occasions & at such times as those when the Plaintiff failed to furnish Conveyances sufficient for the accommodation of such persons, so travelling as aforesaid, then the jury will find for the Defendants~~

2½ If the jury find from the Evidence that the Pl'ff, Eli Forter within the time named in his Petition run Omnibuses one or more from the Rising Sun Tavern to the City of St. Louis Contrary to the Contract as alledged in said Petition, they will find for defts.

Same as 6th of Court

3. If the jury find from the Evidence that the Defendants only run Omnibuses on particular occasions after the alleged Contract & for the accommodation of the public, it is no violation of the Contract set forth in Pl'ffs Petition & they will find for the Defendants —

Same as 7 given by Court

The Court on its own Motion instructed the jury in writing as follows:

~~The jury in this Case after being out for sometime, sent to the Court for the deposition of of Isaac I Forter, thereupon the Court sent them said deposition with this instruction —:~~

~~The jury are instructed that so much of the Deposition of Isaac F. Forter as is marked "ruled out" & which was excluded from the jury is no Evidence for any purpose whatever in this Case, the parts excluded being those on 5th & 6th pages~~

~~of said deposition which are marked in the margin "Held out" which are also crossed~~

6. — 6 - If the jury find from the evidence that the Plaintiff Eli Foster ran Omnibuses from the Rising Sun Tavern into the City of St. Louis after the time agreed upon for him to cease running on that part of the line & before Oct. 25th 1850 they will find for defendant -

Same as 2 1/2

7. 7th - If the omnibuses of the defendants were chartered or hired occasionally by private individuals to take private parties to the Prairie House & back, then such letting of their Omnibuses for hire was not a violation of the alledged agreement

Same as 3 .. asked by the Deft

8. 8th - If the jury find from the evidence that the contract alledged was made between the parties to this suit & that the defendants violated the same, the measure of damage is the actual damages the Plaintiff sustained & the Plaintiff cannot recover for any damages sustained in consequence of the running by defendants of their Omnibuses after the 25th October 1850

11. 11 - The admission of the defendants that they did run Omnibuses (referred to in the instruction No. 4) is an admission merely that they did run Omnibuses on divers days & times after Oct. 25th 1849 & prior to July 24. 1850 - If the jury do not find that there was such an understanding as in instruction No. 3. then any running by Plaintiff of his Omnibuses East of the Rising Sun Tavern into the City after Oct. 25th 1849 & prior to Oct. 25th 1850 will defeat

his right to recover - If he did not so run his Omnibuses, & the defendants ran theirs West of the Rising Sun on the St. Charles Road, between Oct. 25th 1849 & Oct. 25. 1850, then the Pl'ff. will be entitled to recover if the jury further find the Contract alledged to have been made - If the jury find the understanding stated in instruction No. 3 to exist, then the time to which reference is to be had as to the Obligation of Plaintiff to Cease running East of the Rising Sun, is as stated in that instruction & not Oct. 25th 1849 -

The jury in then retired to Consider their verdict -

The jury in this Case after being out for some time sent to the Court for the Deposition of Isaac I. Forter - Thereupon the Court sent them said deposition with this instruction -:

The jury are instructed that so much of the Deposition of said Isaac I. Forter as is marked "ruled out" which was Excluded from the jury is no Evidence for any purpose whatever in this Case - the parts Excluded, being those on 5th & 6th pages of said Deposition which are marked in the margin "ruled out" which are also crossed -

The Defts duly Excepted to the instructions given by the Court

& to the refusal of the Court to give instructions asked by Deft - the Jury returned a verdict for the Pl'ff -

Whereupon the Defendants moved for a new trial, for the reasons following!

— Because the verdict is against evidence and law & against law & evidence.

— Because the Court gave erroneous instructions for the Pl'ff. & refused instructions asked by Deft, -

Which motion the Court overruled & Deft excepted

The case comes into this Court by appeal —

Supreme Court

Eli Forter
Respondent
vs
Rob.t Mc O'Blenis &
Lawrence Matthews
Appellants

Statement made
by Respondent
Todd & Kinney
for Respondent

2 [illegible]

Filed 17th November 1853
Wm J Glanville
Clerk

Eli Foster
Respondent
vs
Robert McC. Blevins &
Lawrence Matthews
Appellants

Supreme Court
Oct. Term
1852

Brief of Respondent

1st The defendants having submitted to answer & no motion in arrest of judgement having been made, the Case will be considered in this Court upon the facts given in Evidence under the issues made by the pleadings & upon the law arising upon those facts & the ruling of the Court below -

2d. The instructions asked by the Pl'ff below & given by the Court enunciate correct rules of law arising upon the facts established by the testimony in the case —

3rd. The instruction No. 1. asked by defts & overruled by the Court below, (having reference to the time in which the agreement sued upon was to have been performed,) was properly overruled.

This instruction was founded on an erroneous interpretation of the 5th Sec. of the Statute to prevent frauds & perjuries.

It does not appear either from the Plaintiffs Petition or from the testimony in the Case, that the alleged agreement was not to be performed within one year.

The Statute only applies to agreements which are by express stipulation not to be performed within one year.

2 Kent 510.a

10. Ward. 426.

12. Gray. 455.

4th The instructions No. 4 & 5. asked by Defts. & overruled by the Court below, having reference to the Capacity of the Plffs. Omnibus Carriages to accommodate the travelling Public upon the St. Charles Road, were properly overruled -

The Plff. was under no obligation to carry all persons who might desire to ride in his Carriages & if he was under such an obligation it was no Concern of the Defts. whether the Plff. performed his duty to the public or not -

If the Plff. did not accommodate the public & the Defendants supplied the omission, such fact will not defeat the

Pltffs right to recover for a breach of the alleged agreement - At best it would only go in Mitigation of Pltffs damages & the Defendants had the benefit of an instruction on this point —

12. Mo. Rep. 85

5th The other instructions asked by Defts & overruled by the Court were given by the Court on its own Motion in a better form & more favorable to Defendants than those asked by the Defts themselves, on the same point –

Viz 2/2, is Embodied in instruction 6. given by the Court –

" – 3 – is Embodied in instruction 7. given by the Court. –

6th The Court below did not err in sending the deposition of J. J. Porter to the jury on their request, & accompanying it with an instruction, as to the parts Excluded from the jury –

this was wholly within the discretion of the Court below, & it exercised its discretion soundly -

7th All of the instructions given to the jury, Considered together, Enunciate Correct rules of law upon the facts Established by the testimony in the Case -

The instructions given, present the Case to the jury in the most favorable aspect for the defendants & so far as the instructions are Concerned there is no ground of Complaint -

Supreme Court
Eli Foster
Respondent

vs

O. Blenis & Matthews

Brief of Respondent

Todd & Krum
Attys for Respt

Deft says - Must show affirmatively that the Contract is to be performed in one year -

Suffering deposition to jury -

Eli Foster vs Mathews & Oblenes . . } In Supreme Court March Tr 1853 —

Points by Leslie & Barrets for Defendants, appellants —

We insist that by the terms and words of the 5th Section of the act of the 15th of March, 1845, the Contract between the plaintiffs in error and the defendant is absolutely void, Because the same was not to be performed within one year from the making thereof. Revised Code, p. 530. Section 5. To make a Contract good within the meaning of that section of the Statute it must be shown affirmatively that the Contract was to be performed within the year: and it is not left to the defendant below, in order to defeat a recovery to show that the Contract was not to performed within the year. The affirmative is upon the party who alleges the existence of the Contract, and the party who claims must show that the Contract under which he claims is valid.

We further contend, that the Judgement of the Court below ought to be reversed; because there is manifest Error in the instruction giving by the Court on its own motion su-record page — 21. and the instructions are in Defendants case stated Numbers 6-7-8 & 11 —

Again we say — that the Court done wrong in refusing the instruction asked for by Deft in the shape and words as contained, in said instruction, The same should have been given or refused. The qualification by the court is equivalent,

to a refusal to act; on the proposition ~~[illegible]~~ submitted by the instruction; he also argues that the instruction; as amended by the Court sends to the Jury no other law than that which is embraced in said amendment — which he contends is not law. and that the instruction stripped of the qualification added by the Court is ~~[illegible]~~ law.

The court below had no legal right to send to the Jury the evidence adduced on the trial, whether the same was in deposition or viva voce; on the stand; After their retirement; to consider of the verdict; all examination of the evidence by them is ex parte, dangerous to the rights of both parties to the suit; & unprecedented as ~~[illegible]~~ a rule of practice. There would be as much propriety in sending the witnesses who had been personally present on the trial before the Jury; after they had gone to make their verdict; as to send a deposition. It is evident that the Jury were not convinced ~~and [illegible]~~ of how they should find a verdict; and so they request the Court to permit them to try the case over again and the Court improvidently and illegally grants the request.

The fifth instruction given for the Pft. is directly in opposition to the instructions asked for by Defts. admitting a ~~certainly~~ a principle of law for the Plft and denying it for the Defts.

Instruction No 7. asked for by Defendants. was in effect neither given or refused giving the instruction pro-forma subject to the qualification, in instructions No 3 & 11 asked for by Plft. gave no light to the jury but on the contrary was calculated to plunge them in darkness & confusion — and deprived the Defts. of the benefit of a plain and important proposition pertinent to the issue: —

Again we say that the evidence is conclusive in favour of Defendants and the court below should have granted the Defendants motion for a new trial —

And in conclusion we say that in view of the whole case; the Court ought not to have given the instructions prayed for by Pft, and should have given the instructions asked for by Defendants —

Leslie & Barrels —

In answer to Plft. argument we say that there was nothing belonging to or under the controle of the Pft to sell to Defendants and so the contract was without consideration —

Ele Foster
y
Mathews & O'Blines

Paints by Leslie
& Barrels —

~~[illegible]~~
~~[illegible]~~
~~[illegible]~~