Cases Omitted in the Reports.

UNION PACIFIC RAILROAD COMPANY *v.* CLOPPER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 139. October Term, 1880. — Decided January 17, 1881.

In an action to recover of the defendant the profits which the plaintiff would have gained in supplying articles to him under a contract, which articles the plaintiff was ready and willing to furnish and the defendant refused to receive, the burden of proof is on the plaintiff to show clearly that the articles refused came within the contract.

In the trial of such an action brought to recover profits on stone contracted to be supplied to a railroad company for the construction of a bridge and its approaches, and which the company refused to receive, the testimony of experts is admissible to show what constitutes the bridge and its approaches, and whether a dyke is a necessary part of them; and the jury should be told to consider what was the condition of things at the time the contract was made, and not the condition as developed subsequently by the operation of nature.

THE case is stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court.

The Union Pacific Railroad Company having undertaken to build a railroad bridge across the Missouri River at Omaha, entered into the following written contract, by its chief engineer and superintendent:

"OMAHA, *June 13th*, '71.

"We hereby propose to furnish at Missouri River bridge stone enough to complete said bridge and approaches, excepting the three thousand yards now under contract to W. B. Clark, ag't, at the following rates, viz.:

"Column stone, containing not less than three cubic feet each, and not less than six inches in thickness, at three dollars and fifty cents per cubic y'd.

"Riprap stone, containing not less than six cubic feet, each stone, at four dollars per cubic y'd.

"Dimension stone, containing not less than nine cubic feet each, and rectangular in shape, at four dollars and fifty cents per cubic y'd.

"All stone to be clear, sound and durable, and subject to inspection of the engineer of the bridge, and in quantities as may be required.

"It being understood that forty-four hundred and twenty pounds be a cubic yard. "CLOPPER AND GISE.
"CHAS. FLEURY.

"Approved.
"[STAMP.] "T. E. SICKLES,
"*Ch. Eng'r. and Sup't.*"

The defendants in error having furnished a large amount of stone for which they received payment under this contract, and being ready and willing to furnish other stone, which they allege was needed by the company to complete the bridge and its approaches, bring this suit to recover damages for the refusal of the company to receive it, alleging that it had bought the same from other persons.

The case was submitted to a jury, who found a verdict for the plaintiffs in the sum of $22,085.50, on which judgment was rendered; to reverse which this writ of error is brought.

The assignments of error necessary to be considered here arise in the refusal of the court to grant certain prayers for instruction by the defendant, and the exception to the charge which the court did give to the jury.

So far as these are material to be considered, they all relate to the mode of ascertaining what work, in which stone was used, was necessary to complete the bridge and its approaches, within the meaning of the contract.

It will be seen at once that the language of the contract on this point is very vague. There is no description of the bridge, no statement of its length, or the number of its piers, or their height; no indication of the length of the approaches to it, nor any estimate of quantity. Nor does the testimony reveal any statement of this kind referred to by either party at the time the contract was made, or during its negotiation, nor any estimate made by the company itself.

The principal object of this action being the recovery of profits for stone not actually delivered, but which the plaintiffs would have made if delivered and paid for according to the terms of the contract, it would seem eminently proper that plaintiffs should make out clearly that the stone which was bought by the company from others was within the terms of their contract, and used to complete the bridge or its approaches.

Cases Omitted in the Reports.

The main controversy before the jury had relation to what constituted the eastern approach to the bridge. To understand this it is essential to understand the topography of the land adjacent to the eastern end of the bridge. The ground there at the river bank is higher than it is for several thousand feet back toward the eastern bluffs. In fact, from the bank of the river a low bottom extends for about four miles to the city of Council Bluffs, which in many places is lower than the level of the immediate bank of the river. The current of the river, at the time the bridge was built and for many years before, ran close to this eastern bank, and in very high water the whole bottom was overflowed, and on occasions when it was not so high, a part of the water would break through the eastern bank at different points, and run in currents or channels through this wide bottom. The bottom of the bridge on which the rails were laid was considerably higher than the level of this bank, and of course the eastern approach to it had to be projected a corresponding distance on this bottom to obtain the grade necessary to enable the train to ascend to the level of the rails of the bridge.

After the bridge was completed, it was found necessary to protect this eastern approach against the overflow of the river by a riprap wall of stone. It also became expedient for the company to prolong or continue its track for more than a thousand feet, at a considerable elevation above the natural surface of the ground, as a means of checking the currents of these overflows, which would otherwise cut through their track and do it immense damage. This also aided in turning the current or channel to the western or Omaha side of the river. It does not seem to be yet decided how far eastwardly this elevation of the railroad may be profitably projected for these purposes, without reference to its use as an approach to the bridge; nor how much of it will require a riprap of stone for its protection; nor how much of this may be profitably done, though not absolutely necessary.

Under these circumstances, it was important that the principles which should guide the jury in deciding what part of this track was the approach to the bridge, within the meaning of the contract, and what was mere elevated track to get above high water, and dyke to repel the currents of the overflow, should be stated to them with as much precision as possible. We are of opinion that this was not done, but that prayers of the defendant were refused which conveyed the true rule on that subject, and others granted, at the request of the plaintiffs, which were erroneous.

Union Pacific Railroad Co. *v.* Clopper.

The following instructions, each of which was specifically refused by the court, were, in our opinion, entirely correct and should have been applied by the jury to the ascertainment of what was the eastern approach to the bridge, intended by the use of that language in the contract:

7.

"In determining what was intended to be embraced in the contract the jury should consider what was the condition of things at the time it was made, and not the condition as developed by the operations of nature years afterwards, and which was not and could not have been in the minds of the parties at the time the contract was made.

"(Refused by the court.)

8.

"The contract must be construed and interpreted as it was made and understood at the time of entering into it, unless it has been satisfactorily shown that it was subsequently changed or modified.

"(Refused by the court.)

9.

"The testimony of experts who are shown to have had experience in the science of bridge-building and as civil engineers has been admitted, and is entitled to due weight as to whether or not the work spoken of as a dyke is a part of the bridge or approach.

"(Refused by the court.)"

That the opinion of a practical civil engineer of experience in bridge building is entitled to weight with the jury in deciding whether part of this track through the bottom, which had been protected by stone, was so constructed as a dyke against the current of water, or as the approach to the bridge, is, we think, too clear for argument. Such a witness would know what is usually meant by the term approach to a bridge, much better than the average juror, and would have, perhaps, little difficulty in forming a just opinion, when the ordinary juror would have been wholly at a loss. So, also, no reason can be seen for rejecting the seventh and eighth instructions, which were only intended to assert the ordinary rule, that a contract must be construed in the light of surrounding circumstances, as the parties understood it at the time it was made.

The reason for rejecting these prayers is found in the following instruction granted at the request of the plaintiffs:

"If the jury are satisfied from the evidence, that at the time the contract sued on was executed, no plan or specifications for the building of the bridge or its approaches existed, but that the building and completion of the bridge and its approaches were left entirely by the defendant to Mr. Sickles, the chief engineer, who had not, at the time of executing said contract, any definite or fixed plan as to construction and completion of piers or columns and approaches, other than to put in said piers or columns and approaches and riprap the same with stone to protect the same, as it might subsequently be ascertained to be necessary, and it was subsequently ascertained, while work under said contract was in progress, that it would be necessary for such protection to riprap any or all of said piers or approaches, by putting in stone about said piers or columns, or by extending the east approach by building a heavy wall, extending back in a northeast direction, as far as circumstances might develop a necessity for, then the plaintiffs would be entitled to recover such damage as the proof under instruction may show them entitled to, for all stone necessary to be used for such purposes; and this right of plaintiffs to so recover would exist and apply to stone yet undelivered, if necessary for such purposes, as well as to stone already delivered."

Under this last instruction the jury was left fairly to infer that if, after the bridge itself was completed and in use, the company should find it expedient, with a view to arrest the overflow of the river bottom, to extend its track across the entire four miles to Council Bluffs, and protect it by an exterior covering of stone, this dyke or wall might be the approach to the bridge within the meaning of the contract and the stone used in the dyke covered by its terms.

Taking the prayers refused and the instructions given, and we are satisfied that the jury were left with a very improper view of what was the approach to the bridge, and with unlimited discretion as to time of completion and extent of track that might be called an approach.

We cannot, of course, lay down any precise description of how much of this track was approach and how much was dyke and how much ordinary railroad track. We think the three prayers asked by defendant and refused by the court contain the true elements of the problem, and that much weight ought to be given to the views of scientific and practical engineers and builders of bridges.

The main charge delivered by the court is very full and apparently

very fair, but it nowhere removes or cures the errors we have pointed out, and for these the judgment of the court is

Reversed and the case remanded, with instructions to set aside the verdict and grant a new trial.

Mr. Samuel Shellabarger, *Mr. J. M. Wilson* and *Mr. A. J. Poppleton* for plaintiff in error. *Mr. J. L. Webster* and *Mr. W. J. Connell* for defendants in error.

WHITNEY *v.* COOK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 285. October Term, 1880. — Decided May 2, 1881.

Damages are awarded in a case where the appeal was taken for delay, and was frivolous.

The case is stated in the opinion.

Mr. Chief Justice Waite announced the judgment of the court.

There has been no appearance for the plaintiffs in error in this case. The writ of error has operated to delay proceedings on the judgment against Klein, the garnishee. There is nothing whatever in the record to justify him in staying execution. The security by Whitney, the judgment debtor, was for costs only. The cause has been permitted to remain on the docket for two years, notwithstanding what was said by us at the October Term, 1878, 99 U. S. 607, when we felt compelled to deny a motion to affirm because it could not be brought under the operation of rule 6, there being no color of right to a dismissal.

We, therefore, affirm the judgments, with interest and costs, and award two hundred and fifty dollars damages against Klein on account of the delay. *So ordered.*

Mr. P. Phillips and *Mr. G. Gordon Adam* for defendants in error.

FLETCHER *v.* BLAKE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 685. October Term, 1880. — Decided December 6, 1880.

The internal revenue stamps used by the defendant in error are no infringement of the letters patent issued to the plaintiff in error, June 8, 1869, for an improvement in stamps used for revenue and other purposes.