
Conner v. Gas Pipe Company.

same time, and that with the same prudence she might have been as well clothed to the present time. The case having been submitted on bill and answer, all the statements in the answer responsive to the bill must be taken to be true; and we cannot, therefore, find, contrary to the explicit statements in the answer, that the said Nancy has failed to furnish her daughter Sarah with suitable clothing, or materials or money for clothing, during the past five years; although the court cannot avoid entertaining some doubts upon the subject, in view of the claim in the answer that the said Nancy was bound to expend the income only of the property, and that she had not furnished much clothing, or money, or materials, from 1855, by reason of diminished income. Should the fact appear to be that suitable provision for the clothing had not been made, the want of sufficient income would furnish no legal excuse. But, as we must hold the answer to be conclusive against the plaintiffs, they are not entitled to a decree upon this ground; although, if desired, we should, upon terms, allow the plaintiffs to reply, and go to proofs.

Unless, then, this disposition is desired, the

Bill must be dismissed.

CONNER v. NEW-ENGLAND STEAM AND GAS PIPE COMPANY.

On trial before the jury, either party may introduce the report of an auditor, previously made in the same cause, as evidence of such fact or facts as he may desire to prove by it; but the party thus introducing it as evidence is not thereby estopped to deny its correctness in any other particular, or precluded from impeaching it.

Nor does the party thus introducing the report need any more evidence on his part to impeach it in any respect, than he would if it had been introduced by the other party.

Conner v. Gas Pipe Company.

ASSUMPSIT, to recover the amount of freights due the plaintiffs, for the transportation of coal, iron and sand, from Portsmouth to Exeter in their boat, from August 8, 1856, to October 22, of the same year, inclusive. The declaration contained the usual counts for transporting coal, &c., to the amount of \$250. The specification was for a balance of \$173.12. The action had been referred to an auditor, who reported in favor of the plaintiffs a balance of \$35.76. The defendants, by leave of court, paid this balance and the interest thereon into court under the common rule. The plaintiffs elected to go to the jury to recover the balance claimed as due. The plea was the general issue and set-off. Upon the trial of this issue the principal matter of controversy between the parties was whether the plaintiffs should be permitted, by virtue of their contract, to charge five shillings for each ton of coal at 2000 pounds, or, as the defendants claimed the contract to be, five shillings gross weight, at 2240 pounds per ton.

For the purpose of showing the actual number of tons transported, the plaintiffs offered the auditor's report as evidence on that point. The defendants here claimed that if the plaintiffs offered the auditor's report for any purpose, they were bound by the finding of the auditor, and precluded afterward to impeach it in any particular. The court overruled the defendants' exception, and permitted the plaintiffs to offer other testimony, tending to impeach the auditor's report, by showing that the contract price for the freight was five shillings the net instead of the gross ton. The jury returned their verdict for the plaintiffs for the amount claimed by them. Thereupon the defendants moved to set aside the verdict and for a new trial; and the case was transferred.

Bell, for the plaintiffs.

Hatch, for the defendants.

Conner v. Gas Pipe Company.

SARGENT, J. The Revised Statutes (ch. 189), provide for the appointment of one or more auditors in certain cases, and prescribe their duties. Section 5 also provides that "if either party is dissatisfied with the report, the case may be tried by jury, and such report shall be given in evidence to the jury, subject to be impeached by evidence offered by either party." The report being thus made evidence competent for the jury to consider, it would of course, if introduced in the absence of all other testimony, be sufficient to establish all the facts found in it. Now it not unfrequently happens, as in this case, that the auditor, in stating the account, finds some of the facts in favor of one, and other facts in favor of the other party. The report therefore would be in such cases evidence for one party upon some points, and for the other party upon others.

If it were to be held that the party who should introduce the report, as evidence of such facts as are there found in his favor, was to be estopped from impeaching the report in other respects, where the finding was against him, the result would inevitably be that neither party would in such a case introduce the report, and the parties would be compelled to have all their testimony at court to be used before the jury, in order to prove the facts which were found in their favor respectively in the report, and of which the report would be sufficient evidence, if introduced, and that, too, frequently in relation to facts in regard to which neither party would expect or desire to change the report.

We think the intention of the law was that the report should be submitted to the jury in all cases, so that, whatever was there found, that neither party objected to, need not be proved by any other evidence, and that neither party might need to be prepared with testimony upon any points except those upon which they desired to change the report. We conclude also that it makes no difference

Simpson v. White.

which side introduces the report; that either party may do so without being estopped to deny its correctness in any particular, or precluded from impeaching it; and that the party introducing the report needs no more evidence on his part to impeach it in any respect, than he would if it had been introduced by the other party; that either party may impeach the report in such particulars as they choose, without any regard to the fact as to which of them first introduced it as evidence before the jury; and that in all particulars, where not thus impeached, the report is to be confirmed. There must be

Judgment on the verdict.

SIMPSON v. WHITE.

By the Revised Statutes, protests of bills, notes and orders are made evidence in all cases, of the facts stated in such protests, whether those facts relate to the dishonor of the bill or note, or to the notice given to any of the parties thereto.

Where the notary certifies in his protest that he has notified the indorsers residing in the same town or city, such certificate is to be taken as *prima facie* evidence of personal notice to such indorsers, of the dishonor of the bill or note, and of all other facts necessary to charge the indorsers.

Where the notary certifies in such protest that he deposited in the post-office a notice directed to the indorser, if it shall appear that such notice was deposited at the proper time, and was properly directed, such certificate is to be received as *prima facie* evidence that such written notice contained a statement of all the facts necessary to charge the indorser.

Where the indorser of a bill or note resides in this State, and has no place of business elsewhere, though the original parties to the note or bill, and the indorsee and first indorser, reside in another State, in the absence of all proof as to where the indorsement was actually made, it will be presumed to have been made at the place of residence of the indorser.