No. 14817

Supreme Court of Illinois

C. & A. R. R. Co.

vs.

Hogarth

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 125 117

J. W. Middleton & Co., Stationers, 100 Lake St.

14817

Chicago & Alton R.R. Co.
vs
Hagarth
365

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1865.

CHICAGO & ALTON R. R. CO.,
Appellant,
vs.
THOMAS HOGARTH,
Appellee.

This was an action to recover for an injury to plaintiff's horses and wagon, which, while stalled upon defendant's railroad track, on one of the street or alley crossings, in the city of Chicago, were struck by a train of cars belonging to appellant.

The evidence, which is given very fully in the printed abstract, shows that the train was approaching the city from the west, and that the point of collision was just 584 feet, by actual measurement, to the eastward of a slight curve in defendant's track—the curve bending to the south. The accident occurred on

the 16th of March, 1864. The wagon had been loaded with about fifteen tierces of bacon, at a packing house near by, and in endeavoring to cross the said road track, through an alley-way leading into the "Archer road," became stalled on the track, the near forward wheel having passed over both rails, the near hind wheel over one, and the two off wheels over neither. The wagon was thus standing on a diagonal line over the track as the train approached.

The testimony of the witnesses, Timothy Enright, the driver of the plaintiff's team, and of James Hogarth, shows that it was necessary to move on this diagonal line to cross the railroad track with the loaded wagon, and that its becoming stalled there was purely accidental. At the time this occurred the three forward teams—only one of which belonged to plaintiff—had passed out into the "Archer road" about one block distant to the southward of the railroad. Enright—when he saw that he could not draw the wagon over—went immediately to the forward teams for assistance. James Hogarth, the driver of the other of the plaintiff's teams, had discovered the difficulty, and at once unhitched his horses and drove them back to the front of Enright's team, while Enright went for the whiffletrees, and was unhitching them, as he saw the approaching train. It was then passing over the bridge beyond the curve, (see record, page 28). O'Mara, the driver of one of Walsh's teams, and the hindermost team of the three, was the first to go to the assistance of Enright, and Enright left him in charge of his own team as he went for the whiffletrees.

James Hogarth, Enright, and another of Walsh's teamsters, was at the wagon as the train appeared in sight, (record, page 38). Hogarth heard hallooing from Enright, and, upon looking up, saw the smoke of the engine, and O'Mara immediately ran up the track, making signals to the engineer.

Up to this point it does not appear that the plaintiff's teamster was guilty of any negligence whatever. He had taken the proper steps to get his wagon out of the difficulty, and says (see page 28 of record,) that he was active all the while; and even those who volunteered their assistance (even if the plaintiff was responsible for their acts or omissions, which will not be pretended,) seem to have done all they could do to avoid the accident. No efforts on their part could possibly have extricated the wagon before the col-

lision. As plaintiff's teamster did not know, and was not bound to know, at what time defendant's train passed this point, he could not, of course, tell in which direction to look for danger; and it would simply be an impossibility for him to run in both directions from his wagon to signal an approaching train. On the contrary, his plain duty was to get his wagon away as soon as possible; this he swears to have attempted, and to have employed the most sensible means for its accomplishment.

Enright swears (page 27, record,) that "when I first saw the train three "or four men ran up the track to make motions to the engineer."

James Hogarth (page 39, record,) says, "seeing the cars coming, O'Mara "ran up the track, and also another man ran up the track, nearer the train, "making signals to the engineer." At page 36 he says: "O'Mara and sev- "eral others went up the track making signals; a man, about half-way to "the intersection of the Archer road,"—which was several hundred feet beyond the curve—"was making signals; I saw the train coming around the coal office,"—which was a little beyond the curve;—"there were two or "three others making signals, one with two pails of water being the further- "most one."

John Hurd (page 39,) says he saw "three or four men run up the track "making signals to the engineer."

Patrick O'Mara (page 42,) says, "I saw the train coming around the "curve; then I ran up the road making motions; there were two or three "others; I couldn't say how many; I took off my hat and made motions "with it; it was a clear morning, and there were no obstructions in the "way."

Walden Schiller, formerly a brakeman, (page 45,) says he had been helping to load the teams; "I saw the cars coming before the team came; by "the time the team came to the wagon, the cars were coming round the "curve on the corner of Archer road; I thought I would give a swing to "signal engineer to stop; I saw the engineer looking out of the window; I "ran about forty or fifty feet to give the signal; train was four or five hund- "red feet off when I first saw it; I hallooed and kept swinging all the time; "the engineer gave no attention; I did not hear the whistle sounded till he "was near the wagon; the train *did not slack till the whistle sounded;* the

"whistle was to slack up the brakes; when I first gave the signal the *train* "*was four or five hundred feet away.*"

The above evidence shows that every thing was done that could have been done by the plaintiff's agent, and those about him, from the time the approaching train was first discovered, to stop it.

Were the servants of the railroad guilty of any negligence?

The engineer of the train could plainly see the wagon from the curve, a distance of 584 feet.

Schiller, a disinterested witness, says, page 45, "The track was clear so that "the engineer could see the wagon." Patrick O'Mara, page 42, says, "I "ran up the track about one hundred feet or more. I took off my hat and "made motions with it. It was a clear morning and there were no obstruc- "tions in the way."

George Deacon, defendant's engineer, says, at page 47, and 14 of abstract, "*I first saw the wagon as I was coming round the curve.* I was not three "hundred feet from the wagon when I first saw it. I could not see it sooner "because of the curve and steam from my engine." The witness was mistaken about the distance for it was 584 feet by actual measurement. Hogarth's testimony, page 37 of record.

The engineer, Deacon, did not, according to his own testimony, check the train until he was within from 50 to 100 feet of the wagon. (See his testimony, pages 14 and 15 of abstract.) He says that train might have been stopped in going 260 feet. "As soon as I saw the wagon I sounded "the whistle twice—during this time I ran about fifty feet—and then I saw "a man leave the wagon, making signals by waving his hands.. I whistled "down the breaks; this was the third time *I whistled. I then reversed my* "*engine.* I whistled twice as soon as I saw it" (the wagon). On his cross-examination, at page 15 of abstract, he says, "As soon as I got the signal "I reversed my engine. I whistled twice as soon as I saw the wagon." John C. Ragland, defendant's witness and brakesman on the train, on his cross-examination at page 18, printed abstract, says, he is sure the whistle sounded three times before the engine was reversed. Deacon says, page 15 and 16 of abstract, the third or fourth car was abreast of the wagon when he came to a stop; cars 35 feet long each, and engine and tender 50 feet

long. So if he stopped the train in running 260 feet, he reversed the engine when only 88 feet from the wagon.

Dorrington, at page 3 of abstract, says, the train was within 15 or 20 feet of the wagon when the whistle sounded.

Timothy Enright, at pages 5 and 6 of abstract, says, the whistle did not sound until the train was within 10 or 15 feet of the wagon, and did not slacken its speed until the whistle sounded. Hogarth, at page 9 of abstract, says, the whistle sounded when the train was about 20 feet from the wagon, and train did not slacken its speed until then; and at page 10, that the train went about half its length past the wagon before it stopped; and O'Mara, at page 12, says, the whistle did not sound until the train was within 50 feet of the wagon at most.

The evidence establishes the fact beyond controversy that the engineer did not attempt to stop the train until he was within from 20 to 50 feet of the wagon. He says himself that the reason why he did not attempt to stop the train before was, that supposed the wagon would get out of the way; that it was not until he saw that it would not get out of the way that he whistled down the brakes and reversed his engine; and at page 15 of abstract, he says, "If I had known, when I first saw the wagon, that it could "not get out of the way, I might have stopped the train before reaching the "wagon." According to his own testimony he could have stopped his train twice in going from the curve to the wagon.

It would be gross carelessness for any one voluntarily to leave a loaded wagon standing on a railroad track, where trains were constantly passing; and the engineer should have supposed the moment he saw the wagon in that position that it was there by an overruling necessity. Under such circumstances it was gross negligence in him to wait for a signal before attempting to stop his train. A glance at the objects about the wagon—an additional team approaching it to draw it out—the men about the wagon—would show him at once that the wagon was stalled there, and he should have stopped his train.

Even if the engineer was justified in waiting for a signal before attemping to stop his train, which will not be contended for, the evidence in this case clearly shows, that if he had been at all attentive to his duty he would have

observed a signal in time to have stopped his train. He swears to have noticed but one, while there were several making signals and running towards the train endeavoring to stop it. Not only were the jury justified in finding that the engineer was guilty of negligence, but the evidence establishes that fact beyond controversy.

II.

1. The question of negligence was properly left to the jury under the plaintiff's three instructions to which no exception was taken.

2. The third given for plaintiff in regard to concurring negligence is in strict accordance with the rule as laid down in this State.

Galena and Chicago Union Railroad Co. vs. Jacobs, 20 Ill., 478.
Chicago and Rock Island Railroad Co. vs. Still, 19 Ill., 499.
Galena and Chicago Union Railroad Co. vs. Dill, 22 Ill. 264—271.

3. The first instruction asked for by the defendant was properly refused. The second branch of the instruction is not only not the law in this State but is not now the law anywhere.

Supposing the driver of this team had by his own negligence allowed the wagon to become stalled on the railroad track.

This is such negligence as in any view of the case would have contributed to the injury, and without which it would not have happened; and yet suppose the engineer must have seen and did see the wagon in time to have stopped the train before reaching it, and yet recklessly or heedlessly continued on. The defendant in such a case would be clearly held liable for the consequences by any Court. According to this instruction, however, he would not be.

Says Judge Redfield, Am. L. Reg., vol. 2, No. 2, N. Series, page 91: The greatest advance towards a sound and sensible rule upon this perplexing subject which we have yet seen, will be found in Scott vs. Dublin & Wicklow Railway Co., 11 Ir. Com. Law Rep. 377, where it is held, "In case he (plff.) "recover, notwithstanding there is negligence on the part of the defendant, "if he has so far contributed to the accident by the want of ordinary care "that but for that the accident would not have happened; but though a "plaintiff has so contributed to the accident he is not disentitled to recover

"if the defendant might by ordinary care have avoided the consequences of "the plaintiff's negligence."

3. For the reasons above given, the defendant's 2d and 5th were properly modified by the Court.

This modification presented the rule of concurring negligence precisely as stated in plaintiff's 3d instruction, and to which no exception was taken, as established by the decisions of our own Court, in the cases above cited.

4. For the same reason, the defendant's 3d, 6th, 7th and 8th instructions were properly refused by the Court. They ignored the defendant's negligence altogether, and would disentitle the plaintiff to recover, although the defendant, by the exercise of ordinary care, might have avoided the collision; and even though the collision was the result of utter recklessness on the part of its servants.

These instructions were rightly refused for another reason.

The question of plaintiff's negligence was the main fact to be ascertained by the jury, and was a conclusion to be arrived at by them from all the facts in the case.

The facts to which the attention of the jury was called by these instructions, were merely evidential facts, tending to prove the main fact. The The Court could not, therefore, without invading the province of the jury, have determined what was or what was not proved by these evidential facts. It is the exclusive province of the jury, first, to determine whether the evidential facts are sufficiently proved, and, if they are, seriously to weigh them, and determine whether they establish the main fact. It is well enough for the Court to call the attention of the jury to these evidential facts, but it is for the jury to say what weight shall be given to them as evidence.

And, certainly, the Court should not select one or two of these evidential facts, and say that they alone, without reference to the other evidence in the case, to prove or disprove the main fact. Each party has a right to have all the facts considered and weighed together.

Beers vs. Housatonic R. R. Co., 19 Conn., 569–570.
Galena & Ch. U. R. R. Co. vs. Dill, 22 Ill., 271.

5. For the reason above stated, the Court properly refused the plaintiff's 4th instruction.

That instruction, moreover, as asked, entirely ignored the question as to whether defendant's engineer was not guilty of negligence, in not slackening the speed of his train *until he became aware* that the wagon could not get out of his way.

In other words, it excuses all negligence on his part, *until he actually saw* that the wagon was stalled, and could not be removed.

6. The damages found by the jury were fully warranted by the evidence under the 9th instruction given as asked by defendant.

This instruction which, undoubtedly, lays down the rule correctly, prescribes the following measures of damages in this case:

1. The cost of repairing the wagon.
2. The use of the wagon until it was again fit to be used.
3. The difference between the value of the horses before and at the time when they were again fit to be used.
4. The cost of caring for and keeping the horses, and the hire of other horses in their stead, until they were fit to work.

The evidence shows that the cost of repairing wagon, (see page 4, of abstract,) was	$104 00
Cost of repairing harness,	7 00
Horses, before injury, worth $450 to $475, after injury—one worth $30 the other worth $50, (see page 5, of abstract,) according to Hogarth's testimony, (see page 9,)—they were worth $475 before injury, and after injury $140, making the difference	335 00
Use of wagon, two weeks, during repair, $2 per day,	24 00
One horse, upon which new hoof grew, was unsound in barn six months, the other horse could not work for a little more two months, making the average of the time for which they were unfit for work, four months. It would have cost to hire other horses in their stead, according to the testimony of Brown, (see page 8, of abstract,) $10 per day; according to the testi-	

mony of Enright's (cross examination, page 7, of abstract,) from $10 to $12 per day. Considering the use of the wagon worth $2, as testified to by witness Enright, page 5, would leave the cost of hiring horses only at $8 per day, this for four months would amount to 832 00

Making the whole amount which they could properly find under this instruction $1,302 00

And this without allowing anything for the cost of care and treatment of the horses, which, according to the evidence, would have very much increased this amount. So the jury, in rendering their verdict for $1,000, found $302 less than they should have found under this instruction.

Even considering the horses unfit for work for only two months, the plaintiff would then have been entitled to recover on the basis of the value of the horses before and after the injury, as stated by Enright, page 5, $834, and this without allowing anything for care and treatment, and this is $34 more than the sum for which judgment was entered.

Under the evidence, and the instruction given as asked by the defendant, we do not see how the jury could have rendered a verdict for less than $1,000.

MILLER & LEWIS,

Attorneys for Appellee.

Supreme Court of Illinois

Chicago & Alton R.R.
Co
appellants
vs
Hermon Dopkins
appellee

Brief for appellee

Filed Apl 25. 1865
G. Lemon Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

April Term, A. D., 1865.

The Chicago and Alton Rail Road Company, *Appellant*, *vs.* Thomas Hogarth, *Appellee.*	Appeal from Cook Circuit Court.

APPELLANT'S POINTS AND AUTHORITIES.

I.

The first instruction asked by the defendant and refused by the Court, contains a sound legal proposition, and should have been given to the jury as requested.

The instruction is as follows:

The plaintiff's right to recover in this case depends upon two concurring facts:

1. The defendant must be chargeable with some degree of negligence.

2. The plaintiff must have been entirely free from any negligence which contributed to the injury, that is, of any negligence without which the injury would not have happened.

The Courts in many of the States of the Union adopted at an early day the stringent rule laid down by the English Courts, with regard to concurrent negligence. It was for a long time uni-

formly held that in all cases where a plaintiff, by his own negligence, contributed to the production of the injury complained of, he could not recover, and this, too, notwithstanding there might have been negligence on the part of the defendant.

In the State of New York, such was and is now the rule, the Courts of that State discarding all degrees of negligence, and even going so far as to hold that a Court might order a non-suit where it appeared from the evidence that the plaintiff was not absolutely free from all negligence which contributed to the accident complained of.

Johnson vs. Hudson River R. R. Co., 20 N. Y. 65.
Wilds vs. Hudson River R. R. Co., 24 N. Y. 430.

The same rule was adopted in Massachusetts.

Gahagan vs. Boston & Lowell R. R. Co., 1, Allen 65.

And in Connecticut.

Neal vs. Gillett, 23 Conn. 443.
29 Conn. 208.

In our own State, from the decision of the case of The Aurora Branch R. R. Co. vs. Grimes, in 1852, reported in 13 Ill., p. 585, this Court seemed inclined to adopt the same rule, holding, uniformly, that a party seeking to recover damages for a loss occasioned by negligence or misconduct, must show that his own negligence or misconduct had not concurred in producing the injury, and until 1858 this continued to be the rule in such cases.

In 1858, however, the stringency of the rule seems to have been somewhat relaxed by our Supreme Court, and in the case of The Chicago & Rock Island R. R. Co. vs. Still, it is intimated that although a plaintiff might be guilty of some negligence, he might still recover if he could show that the defendant was guilty of still greater negligence.

19 Illinois 499.

In the case of The Peoria Bridge Association vs. Loomis, 20, Ill's 251, the same doctrine was dimly foreshadowed by the Court, who say that "the plaintiff, if not wholly free from fault, must "be, as compared to the negligence of the defendant, so much "less culpable as to incline the balance in his favor, both being in "some fault."

In another case reported in the same volume of our reports, this Court, after reviewing its former decisions, relaxes somewhat of the strictness of the established rule, and decide that a plaintiff shall not be deprived of his action an account of slight negligence, where the conduct of the defendant has been grossly negligent.

The Galena & Chicago Union R. R. Co. vs. Jacobs, 20, Ill. 478.

The same doctrine is maintained by the Court in

The Galena & Chicago Union R. R. Co. vs. Dill, 22, Ill. 264.

And it seems now to be the settled law of this State, that mere negligence on the part of the plaintiff will not of itself necessarially defeat an action brought by him for damage done him through the negligence of another.

While, however, the later decisions seem to establish the rule that even negligence on his part will not defeat his action, this Court has never gone so far as to say, that when the plaintiff has been guilty of negligence, without which the accident would not have occurred, he may still recover of the defendant. On the contrary, it has been uniformly held, that it is the duty of each party to use all the means in his power to prevent accident; and that where by the plaintiff's neglect in that respect, he has directly contributed to the production of the injury complained of, he must show gross or willful negligence on the part of the defendant before he can be entitled to a recovery.

It is said by the Court, that while railroad companies are bound to use all means in their power to foresee and prevent accident to others, "on the other hand, persons using the highway must be held "to the use of all reasonable efforts on their part, in like manner to "foresee and avoid danger. The highway traveler should use the "proper precautions to avoid danger, and failing to do so, negli- "gence on the part of the Company more gross, only will render "them liable for injuries received."

Galena & Chicago Union R. R. Co. vs. Dill, 22 Ill. 264.

"Each party, say the Court, in another case, while pursuing "their legal rights, is bound to exercise a due regard for the "rights of others, and when each party is equally in fault, and

"both parties negligent, the injured party has no right to recover "for an injury he has thus contributed to produce. Each party "must employ all reasonable means to foresee and prevent injury "When the party has acted with even a slight degree of negli- "gence, contributing to produce the injury, to recover he must "show that the other party has been guilty of gross negligence."

The Chicago, Burlington & Quincy R. R. Co. vs. Dewey, 26 Ill. 258.

Again, "If the plaintiff was guilty of negligence or want of "ordinary care, he could not recover, though the servants of the "defendant may have been guilty of some negligence."

The Chicago, Burlington& Quincy R. R. Co. vs. Caufman, 28 Ill. 513.

In another case the plaintiff was deprived of his remedy because he was guilty of negligence, in allowing his stock to run upon a place where the railroad company was not bound to fence, although the servants of the Company were proven to have been guilty of negligence.

Illinois Central R. R. Co. vs. Phelps, 29 Ill. 448.

In another case the Court say, "Negligence of the plaintiff "being so apparent, the defendent could be responsible only for "gross negligence, which implies a wilful injury."

Illinois Central R. R. Co. vs. Goodwin, 30 Ill. 117.

And the same rule obtained in

Gt. Western R. R. Co. vs. Worthland, 30 Ill. 458.

A review of these later decisions of our courts, seems to establish the rule, that while some degree of negligence on the part of the plaintiff may not prevent a right of recovery when the defendant has been guilty of a greater degree of negligence, yet if his negligence contribute directly to the production of the injury, nothing but gross negligence, amounting to wilful injury on the part of the defendant will entitle him to damages.

It has never been doubted, we believe, that when a party has been guilty of negligence, without which the accident would not have occurred, he is not entitled to damages for an injury. The injury done him in such case, is one of his own creation. His own neglect is the proximate cause of the accident to himself;

and it would not have occurred but for his failure to fulfill the duty which the law imposes on every one—to use all possible means to avoid accident to himself. The law does not protect those who are culpably negligent of their own safety, but leaves them to bear the consequences as of their own folly or imprudence.

When therefore, the defendant asked the Court below to charge the jury that the plaintiff could not recover unless he were free from any negligence, without which the accident would not have happened, he asked nothing but an undoubted rule of law—one which has never been denied by this or any other court, and the refusal to give this instruction was a grave and serious error, which should entitle the appellant to a new trial of the case.

II.

If we are right in our first point, then the 7th instruction asked by the defendant was improperly refused by the Court. The Court was asked to charge the jury, that if they believed from the evidence that the plaintiff had so overloaded his wagon as to render it impossible for his horses to draw it across the railroad track, and that but for this the accident would not have occurred, then this is negligence on his part which will prevent a recovery for the damage done by the collision.

III.

The 8th instruction refused by the Court seems to be eminently proper under the circumstances of the case: "If the failure of "the plaintiff to use his utmost efforts to extricate his wagon, and "his omission to notify the approaching train of his unfortunate "predicament occasioned the accident, then he was guilty of neg- "ligence without which the accident would not have occurred, and "is not entitled to recover."

IV.

The modification by the Court of the 4th instruction asked by the defendant, was clearly erroneous. The jury were told in effect by the insertion in the charge of the words "without any "fault on the part of the defendant," that the defendant must be

absolutely free of all negligence or the plaintiff might recover. Such is not the law even under the rule contended for by the plaintiff's counsel. The defendant might have been guilty of some fault and still the plaintiff would not be entitled to a recovery; for if the balance of negligence was on the part of the plaintiff he would not be entitled to recover, even though the defendant might have been guilty of some negligence.

V.

The refusal of the 3d instruction asked by the defendant was error in the Court. It was the duty of the plaintiff, knowing that his wagon was fast upon the defendant's track, and that the train of the latter was approaching, to take measures to notify the train men of his condition, and his failure to do this was such negligence on his part as ought to have prevented a recovery.

VI.

The modification of the 2d and 5th instructions asked by the defendant was clearly improper. There was not the slightest evidence upon the trial, nor was it contended by the counsel for the plaintiff, that the defendant's servants had been guilty of "gross negligence," and the modification of the defendant's instructions, although they may be correct in law, not being founded upon the facts in testimony before them, was calculated to mislead the jury and to lead them to infer that in the opinion of the Court there might be some proof of gross negligence on the part of the defendant.

A judge should confine himself in his remarks to the evidence in the case. So far from his being under obligation to call the attention of the jury to a conjectural state of facts, it would be highly improper for him to do so. In Bathune vs. McCrary, 8 Geo. Rep. 114, it was correctly held that when the Court instructs the jury as to the law, upon facts which are purely hypothetical, and about which there is no evidence, as this is calculated to mislead the jury to an issue not made, a new trial will be granted.

3 Graham & Waterman on New Trials, 824.

Upon a jury trial at the Circuit, the plaintiffs proved the execution of the promissory notes upon which the suits were brought. The defense of usury was set up, but no evidence was given in support of it. The judge's charge contained a simple and correct exposition of the law of usury as applicable to the case under consideration; but he then proceeded further and told the jury "it was for them to determine from the evidence whether such unlawful interest was contracted for, and if they found that it was, their verdict should be for the defendant—if not, for the plaintiff. Held that the judge erred because his language implied that there was some evidence from which the jury might legally infer that the usurious agreement was established, when from the testimony given on the trial the jury should have been told that there was no evidence to sustain the defense of usury, and that the plaintiffs were entitled to a verdict."

Fay vs. Grinstead, 10 Barber's Rep. 321.

The Supreme Court of Illinois has repeatedly affirmed the same doctrine.

Humphreys vs. Collier, 1 Scammon 53.

"The remainder of the instructions we consider as entirely irrel-
"evant and inapplicable to the case on trial, and, consequently,
"ought not to have been given, as they were calculated to mislead
"the jury."

White et. al. vs. Martin, 2 Scammon 69.

"In giving or refusing instructions in matters of law, it is the
"duty of the Court to look at the whole record and evidence in
"the cause, and, if upon such examination, they are found to be
"appropriate and pertinent, they should be given. In short, the
"Court should give a legal instruction when asked, if applicable
"to the case under consideration, and refuse the same, though it
"may be strictly a legal proposition, and founded upon the hy-
"pothesis that the jury believe certain facts which may be mate-
"rial to the issue, provided no evidence has been offered in sup-
"part of the supposed state of facts."

Hill vs. Ward, 2d Gilman 293.

"Such instructions only should be given as are based upon legit-
"imate evidence in the case; and if an irrelevant instruction be

"given, although it be unobjectionable as an abstract proposition "of law, which is calculated to mislead the jury and affect their "conclusion upon the issue submitted to them, it will be error."

Coughlin vs. People, 18 Ill. 268.

So in Chicago, Burlington & Quincy R. R. Co. vs. George, 19 Ill. 518.

Ewing vs. Runkle, 20 Ill. 463.

VII.

The verdict of the jury is contrary to evidence.

Let us examine the conduct of each of the parties as proved by the testimony on the trial, and, First, As to the negligence of defendants.

The defendant's train was running within the limits prescribed by law.

See Dorrington's testimony, p. 22,
Deacon's " . p. 48,
McMullin's " p. 51,
Van Allen's " p. 53,
Ragland's " p. 54.

Hogarth, p. 37, thinks it was running faster than he could walk—p. 37.

O'Mara, that it was running eight to ten miles an hour; but he swears that the train was five minutes in going 584 feet, which is simply impossible—p. 43. Schiller, on direct examination—p. 45—swears that the train was going eight to ten miles an hour, but on cross-examination, that he was not a good judge of the speed of a railroad train, and that this train was going five miles an hour.

The bell of the engine was ringing—all the witnesses concur in this.

The engineer was on the lookout.

Deacon's testimony, p. 47; O'Mara's, p. 42; Schiller's, p. 45.

The train had good brakes and the usual number of brakemen. Deacon's testimony, p. 50.

The brakes were set and the engine reversed as soon as the wagon was discovered to be fast on the track. Deacon's testimony, p. 50; Van Allen's, p. 52–53; Ragland's, p. 54.

The train was actually stopped about seven hundred feet from the curve—from which the wagon could be first seen. Deacon's testimony, p. 50; McMullin's do., p. 52; Dorrington's do., p. 24; Hogarth's do., p. 37; Schiller's do., p. 46.

There was, then, no violation of the statute. The train was in the charge of competent servants; was running at a low rate of speed; the bell was ringing; the engineer on the lookout; the brakes were good, and set as soon as danger was discovered; and the train was actually stopped within a very short period of time.

The only attempt to convict the defendant of negligence consists in the effort to prove that the whistle was not sounded until the train was quite close to the wagon. The plaintiff's witnesses differ about this.

Dorrington was in centre of packing-house, and did not hear the whistle till he came to the door; the train was then twenty feet from wagon—p. 22.

Enright says the whistle sounded first ten or fifteen feet from wagon—p. 27. So says Hogarth—p. 36–37. Hurd says that the engine was from one hundred to one hundred and fifty feet from wagon when whistle sounded—p. 39; he *knows* it was one hundred feet—p. 39. O'Mara puts it at fifty feet—p. 42.

Deacon swears he sounded the whistle as soon as he saw the wagon—very soon (about fifty feet) after coming round the curve—p. 46–47; and his testimony is confirmed by Ragland—p. 54. The whistle was sounded and brakes set as soon as the engineer received a signal to stop. Deacon's testimony, p. 47.

It is not proved that the blowing of the whistle would have prevented the accident, and without this the omission is not sufficient to render the defendant liable.

Ill. Central R. R. Co. vs. Phelps, 29 Ill. 448.

But the engineer testifies that he did not know the wagon was stalled when he first saw it—that he had no reason to suppose that such was the case; that he could not have seen the wagon sooner on account of the steam flying towards him, and the curve in the road—p. 47. He states that he used all the means in his power to stop when he saw the wagon could not get out of the way—

that if he had received a signal in time, the accident might have been avoided, and that he could not possibly have stopped the train in time to avoid the accident, after receiving the signal and before reaching the wagon, there being a heavy down-grade at that point—p. 48.

Let the Court consider how short a period of time the engineer had in which to avoid the accident. The train was running within the speed fixed by law—not more than six miles an hour. The engineer *could* not have seen the wagon until he was within five hundred and eighty-four feet of it. At six miles an hour the train would pass over five hundred and twenty-eight feet in one minute of time. The engineer had, therefore, but little more than one minute in which to stop his train; within that time he brought his train to a stop, shortly after reaching the wagon, and had the latter been movable it might easily have escaped unharmed.

The testimony not only discloses an entire want of negligence on the part of the defendant's servants, but, on the contrary, the evidence shows that all reasonable precautions were taken by them in order to avoid injury to the plaintiff.

What was the conduct of the plaintiff's servants?

The wagon was stalled on the crossing, which was as good as such crossings usually are.

Brown's Evidence, p. 33; O'Mara's, p. 34.

No witnesses could testify why the team was stalled. Other teams had crossed that morning without difficulty. This one was fast upon the track. In the absence of any explanation the inference is that the team was either overladen or had been carelessly driven. The wagon was driven diagonally across the track, and its wheels cramped on the rails. Had it been skillfully managed there is no reason why Enright, the driver of this team might not have crossed with the same facility as the other's did. This fact alone shows some negligence on the part of the driver, and, however slight this negligence, it must prevent a recovery unless greater negligence has been proven against the defendant.

We desire the Court to consider the length of time which the plaintiff's servants had in which to avoid the collision as com-

pared with what we have already shown the servants of the Company must have had. Enright, the teamster, testifies that from the time he was stalled the wagon remained on the track about not quite fifteen minutes before being struck (p. 29). He swears, too, that he knew that trains were passing continually over the track —that they passed there every hour in the day, (p. 30). Still, those in charge of the wagon, knowing their danger, allowed this time to elapse without taking the reasonable and prudent precaution of sending a signal to notify approaching trains of their situation. It was not until the train appeared at the curve, 584 feet from the wagon, and within *one minute's* time of reaching it, that a signal was given to the engineer. What would a reasonable and ordinarily prudent man have done under such circumstances? A signal man sent round the curve would have prevented the accident. There is no pretence that there was want of time to do this. No attempt is made to explain why it was not done. Men were at hand who would doubtless have gone had they been requested to do so by those in charge of the wagon, and both Deacon and McMullin swear that the accident would have been avoided had this been done. Neither of Hogarth's teamsters gave any signal to the engineer. Their danger seems to have deprived them of their ordinary senses, and, although fifteen minutes elapsed and the wagon still remained fast, no signal was given by any one until, as Deacon, the engineer, testifies it was too late to avoid the accident.

Surely this evidence does not disclose on the part of the plaintiff that ordinary and reasonable care to prevent accident which this Court has so often decided must be shown in order to entitle him to a recovery. On the contrary, the facts that the wagon was stalled at a good crossing, no reason given for its being so stalled, that it remained so stalled for a quarter of an hour, those in charge expecting a train every moment, and taking no means to notify it of their condition, although they must have known that the train men could not see the wagon until they were close upon it, by reason of the curve—all show a want of ordinary care to prevent accident, and a negligence amounting almost to grossness.

Taking all the circumstances of the case together, and making

a comparison of the diligence used by each party to avoid this accident, the preponderance is vastly in favor of the defendant, who was entitled to a verdict from the jury upon the testimony alone.

VIII.

But the damages awarded by the jury are exorbitant and excessive.

The verdict gives the plaintiff the full amount of the damages claimed in his declaration. We submit to the Court that there is no evidence to warrant the jury in this case in giving exemplary damages. There is not the slightest evidence showing that the plaintiff's servants were guilty of gross or willful negligence, and upon no other hypothesis can the amount of damages awarded be sustained.

No witness fixes the value of the horses at the time of the accident, at more than five hundred dollars. The wagon was made as good as new for one hundred and four dollars, and the repairs to the harness cost some six or seven dollars.

The entire value of the property in question was but six or seven hundred dollars. Had the property been entirely destroyed, —the horses killed and the wagon broken to pieces, so that it could not be mended—that amount must have been the limit of the verdict. Yet the horses were not killed, they were worth after the accident, at least one hundred and forty dollars, and the wagon was as good as new. How then is it possible to say that the plaintiff has suffered damage to the extent of one thousand dollars as found by the jury.

Such an award must have been made under the influence of other considerations than those produced by the evidence on the trial.

The Court below must have been of the opinion that the evidence did not warrant it. Else why compel the plaintiff, under pain of having a new trial granted, to remit two hundred dollars of the verdict?

A careful consideration of the evidence in this case, and the fact that under that evidence a jury awarded the extreme limit

of the damages claimed by the plaintiff, must lead irresistibly to the conclusion that some bias, which influenced their decision, rested upon the minds of those who tried the case. Had this case been tried between man and man, can any one doubt what would have been the result?

A corporation has no protection against unfounded bias or prejudice in the minds of those appointed by law to decide upon the facts of the case in which it is interested, save an appeal to the even handed justice of our highest tribunal, which has never been slow to interpose its authority to correct and control any improper and unwarrantable distinction between the rights of corporations and those of individuals.

A. W. CHURCH,
Attorney for the Appellant.

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In the Supreme Court
Third Grand Division
April Term A.D. 1865
No. 125

The Chicago and Alton
Rail Road Company
appellant
Thomas Hogarth
appellee

Points and Authorities
of the appellant

Filed April 10. 1865
L Leland Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

April Term, A. D., 1865.

The Chicago and Alton Rail Road Company, *Appellant*, *vs.* Thomas Hogarth, *Appellee.*	Appeal from Cook County.

BRIEF STATEMENT OF CASE.

The appellee brought an action of trespass on the case in Cook Circuit Court to recover damages for an injury done to his wagon and horses by a collision with an engine of appellant. The team which was injured had become stalled on the railroad track in Grove Street, in the City of Chicago, and while in this situation the wagon was struck and broken and the horses injured. Issue having been joined on a plea of not guilty the case was tried at the December Term, 1864, of Cook Circuit Court, and a verdict obtained by the appellee for the sum of One Thousand Dollars, the full amount of the damages laid in his declaration. A motion for a new trial having been overruled by the Court below, on condition that the appellee remit Two Hundred Dollars of the verdict, this appeal was taken.

RECORD.

ABSTRACT OF RECORD.

pp. 1—2. Summons and return of Sheriff.

pp. 3—12. Plaintiff's declaration in three counts; alleging in the usual form that by the negligence of the defendant on the 22d March, A. D. 1864, at a crossing in Grove street, in the city of Chicago, the plaintiff's wagon was struck and broken and his horses injured, to his damage one thousand dollars.

p. 13. Defendant's plea not guilty, and similiter by plaintiff.

p. 14. Empanneling of jury.

p. 15. Consent that jury may seal verdict.

p. 16. Verdict of jury, defendant guilty; damages assessed at one thousand dollars. Defendant moves a new trial.

pp. 63–64. Reasons for new trial:

1st. Because the Court refused to give the first instruction asked by the defendant.

2d. Because the Court refused the third instruction asked by the defendant.

3d. Because the Court fused the sixth instruction asked by the defendant.

4th. Because the Court refused the seventh instruction asked by the defendant.

5th. Because the Court refused the eighth instruction asked by the defendant.

6th. Because the Court erred in modifying the fifth instruction asked by defendant.

7th. Because the Court erred in modifying the second instruction asked by defendant.

8th. Because the Court erred in modifying the fourth instruction asked by the defendant.

9th. Because the verdict of the jury is contrary to law.

10th. Because the verdict of the jury is contrary to evidence.

11th. Because the damages awarded by the jury are exorbitant and excessive.

p. 17. Order of Circuit Court, upon plaintiff's remitting two hundred dollars of verdict, overruling motion for new trial, and exception of defendant. Twelve days allowed it to prepare and file bill of exceptions.

p. 17. Judgment of Court, that plaintiff recover of defendant his damages of one thousand dollars assessed by the jury, less said sum of two hundred dollars remitted as aforesaid.

p. 17. Defendant excepts; prays an appeal, which is allowed upon filing bond (security being waived by plaintiff) in the sum of twelve hundred dollars within twelve days from date of judgment.

pp. 18–19. Appeal bond filed March 10th, 1865.

pp. 21–65. Bill of exceptions containing all the testimony and the rulings of the Court.

PLAINTIFF'S TESTIMONY.

p. 22. *Testimony of George E. Dorrington.*—Is second foreman in McCabe & Hughes' packing house near intersection of Archer road and Grove street; knows that Hogarth's team was hauling from Harris & Duffield's packing house in March last; was standing in centre of packing house at the time of accident; heard hallooing on railroad track and ran to the door; saw wagon on the track and saw train strike wagon; when I got to the door I heard the whistle; I had not heard it before; the bell was ringing all the time; the whistle is generally the signal for clearing the track; when I first saw the train it was distant about one
p. 23. hundred and fifty feet from the wagon; I took no special notice of the speed of the train, but think it was running about five or six miles per hour; about ten men were around the wagon; team was on the track opposite an alley which leads to the packing house; some cars were standing on the side track which might prevent me from seeing the signals made; I saw none made; there was no way of crossing the railroad track from the packing house except by coming through the alley; I heard more hallooing, and then saw one man turn the team round so that the cars would only strike the wagon; I saw wagon after the accident; it was turned in the gutter along side the railroad; the train was about one hundred and fifty feet from the wagon when I first saw it; I heard no whistle blow until I came to the door of the packing house, and none till the train was within fifteen or twenty feet of the wagon; I think I should have heard a whistle had one been sounded.

p. 23. *On Cross-Examination:* There is one main track and one side
p. 24. track in the street where the accident occurred; there were two or three cars which stood on switch track and obstructed my view; the nearest of these cars were distant about twenty feet from the place of accident; packing house where I was standing is north of the place where the accident occurred; about one-third of the distance between the curve and the place of accident was obscured by the cars on the side track; the distance of the curve from the place of accident is some five hundred and eighty feet; I could not see some one hundred to one hundred and fifty feet of the track; I was in the centre of the packing house when I first heard the hallooing, and I stood at the door about half a minute before the whistle was sounded; I do not swear that the whistle was not blown before; the [illegible] in charge of the wagon might have seen the train before it came round the curve; they were trying to get the wagon off the track; were trying to lead the horses off when I came to the door; I think there were some ten men near the wagon at the time; one of them had hold of the horses; I think the train passed the wagon one half its length before it stopped; the train ran round the curve at the usual rate, about
p. 25. five or six miles an hour; the distance from the wagon to the place where the engineer could first see it coming round the curve is about five hundred and eighty feet; I don't know how many cars were on the train.

p. 25. *Testimony of Robert A. Williams*—In March last was in employ of A. E. Bishop, wagon maker, saw the wagon injured by the collision after it was brought to shop for repair, knows that the repairs cost one hundred and four dollars, ($104) and that it was worth fully as much after repair, as before the injury—it was as good as new.

p. 26. *Testimony of Rudolph Bonn*—Was collector for A. E. Bishop and knows that Hogarth, the plaintiff paid the bill of repairs to the wagon mentioned by the last witness.

p. 26. *Testimony of Timothy Euright*—Am a teamster, and drove plaintiff's team in March last, Hogarth's business was teaming; remember the accident; was driving the team when it occurred;

team was composed of two horses and wagon loaded with hams. After I started from Duffield's packing house, I passed through the alley to the railroad track; the wagon was stuck on the
p. 27. track: I left them (*the horses*) standing on the track, and went to get another team to pull me over; I left them in charge of a man named O'Mara, when I got stuck, the near hind wheel had passed the near track, the near front wheel had passed over both tracks, neither of the two wheels were over the track; I went diagonally across the track; not being able to turn the wagon in the alley, I could not go straight over; after I reached the wagon where I went to obtain help, I commenced unhitching the whiffle-trees, when I saw the train coming; three or four men ran up the track to make motions to the engineer; O'Mara turned the horses off the track or they would have been cut in pieces; I made no motion to the engineer; the engine struck the wheel and turned the wagon over; the whistle was sounded ten or fifteen feet from the wagon; the engine struck the forward off wheel, the horses were thrown upon the wagon and struck by the train, one of them was idle two or three months and is still lame; the other was not injured that I could see, except a slight cut on his back. He became lame and lost his hoof about a week after the accident. The boss sold him for thirty-five or forty dollars. I believe I had driven the horses three or four months; they were sound, and were worth from four hundred and fifty to four hundred and
p. 28. seventy-five dollars. The one that was sold wasn't worth more than thirty dollars when sold; the other was not worth more than fifty dollars; he is working now, but could not work for three or four months after the accident. I don't know how long the wagon was being repaired, I think about two weeks or more; I think the hire of the wagon was worth two dollars per day. I suppose that the keeping of the horses was worth five dollars per week. The team I went after was about a block distant across lots; there was no way of crossing the railroad other than the way I did; I have crossed it often; I was taking the whiffletrees off the wagon when I saw the train on the bridge; I was active all the while. I did not know the time the train was due; there were five teamsters and a lot of men at the wagon; I saw the train first at the bridge across the Chicago river, above the curve; some men ran up the track to stop the train; I saw one man,

Walden Schiller, pretty near the curve; he was waiving his hat and making signals as best he could to the Engineer. The team I got to assist me was at the wagon when it was struck; I had on the wagon forty-five to fifty hundred weight; the load was not so
p. 29. heavy as usual. The team was a good strong one. I did not notice any slacking of the speed of the cars before the whistle blew; I dont know how many cars were on the train when it came to a full stop; all the cars had passed the wagon but three.

On Cross-Examination: The crossing where I got stuck was not a good crossing; I would not have got stalled if it had been a good crossing; other teams had crossed there the same day without difficulty, except one which got stuck and we pried it out. Three had crossed, just before me, hauling hams, two belonged to Walsh and two to Hogarth. I had fifteen tierces of hams on the wagons, weighing each about three hundred pounds, or a little more. I was about five minutes going and coming to and from the place where I went to get the whiffletrees. I was stuck on the railroad track about, not quite fifteen minutes; I was taking the whiffletrees from the wagon when I first saw the train coming; I got back to the wagon before it was struck by the engine; I was at the wagon one minute and a half before it was struck; it took me about two and a half minutes to run back to the wagon;
p. 30. I made no signal to the Engineer to stop; O'Mara had hold of the horses when I went away; he made signals to the Engineer; I was about seventy-five feet from the wagon when I saw O'Mara make the signals. When I first saw the train it was about two blocks from the wagon. I said nothing to the Engineer after the wagon was struck; I never saw him before or since. I knew that trains were continually passing over the road during the day; that is what the track is there for; I suppose that trains pass there every hour in the day. I sent no one up or down the track to notify trains that I was stalled on the track. O'Mara was driving for Walsh that day; his team was out on the Archer Road, near the place where I went for the whiffletrees; he came from it to help me out; two other men came to help me; they had driven out on the Archer Road and came back to help me. I did not hear the whistle until the train was within ten or fifteen feet of the wagon. I had crossed at the same place many times

before, and never got stalled. The accident happened between 9 and 10 o'clock A. M.; hadn't crossed there for three or four days previously. I paid no attention to the bell, but I think it was ringing. The train stopped after the wagon was struck; all but three cars had passed before the train stopped; wagon was
p. 31. knocked off the track and broke all to pieces; the near forward wheel crossed both tracks; the near hind wheel had crossed one track; the off front wheel had crossed one track; the off hind wheel had not crossed any track; train was coming into the city; think the engine struck wagon in forward part, it broke front and hind wheel; horses were thrown against side of cars; engine did not strike the horses but they were thrown off their feet; they walked home after the accident. I consider myself a judge of value of horses; never bought or sold; have seen them sold; think the horses were worth four hundred and fifty to four hundred and seventy-five dollars; such a pair could be hired for ten to twelve dollars per day; have a team myself and hire at that; team was worth as much at the time of the accident. I got stalled by accident; don't think I was careless; one team got stuck there before; I have crossed without difficulty many times; can't say how I got stalled; had I attempted to go straight over the railroad I would have got in the ditch; I couldn't cross square over; the alley was in bad condition; other teams crossed the
p. 32. same way I did. The alley runs right opposite to Duffield's packing house. There was a team in the alley which was going to pull me out. Usually carry four or five tons on my wagon, sometimes less; depends on road; can get 20 tierces on wagon; not more, without standing them atop of each other.

Direct Examination resumed.—Three teams had crossed railroad ahead of mine; one was in alley detached from wagon to help me, two were on Archer road; the wagon from which I took the whiffletrees was on the Archer road; I went to and from it as fast as I could; I noticed no difference in the speed of the train until I heard the whistle sounded.

p. 32. *Testimony of Edmund B. Brown.*—Was book-keeper in March last for Duffield & Co.; their establishment was fifty or sixty feet from the track; track is south of packing house, and the packing house north-east of place of collision; the alley leads across the

railroad and is a passage between the packing houses for teams; I have seen the team in question frequently; it was a heavy truck
p. 33. team and was worth $400 or $500; was not an eye-witness of the collision; I heard some one hallooing and on going out, the train had passed; the wagon left the packing house a short time before the collision, I think not more than ten minutes; saw the wagon after the collision; teams like the one injured are worth now about ten dollars per day; they are worth seven or eight dollars per day for a long job, more for a short one; I can't say how much the keeping of the horses was worth; teams usually hauled fifteen to eighteen tierces of hams; tierces average three hundred pounds each.

On Cross-Examination: Width of alley between platforms about ten feet; it is planked and in good condition; there was no more difficulty in making the crossing that day than usual.

p. 33. *Testimony of James Hogarth.*—Examined on *voir dire.* Is
p. 34. brother of plaintiff, but has no interest direct or indirect in the event of this suit.

p. 34. *Direct Examination:* Remembers collision in March last; does not remember exact day; it was in the latter part of the month; I had crossed the railroad with load of hams and had got out on Archer road, being either first or second wagon to cross the railroad track; after got to Archer road heard some one hallooing that the other team was stalled; O'Mara drove on behind me and told me to hurry up and unhitch my horses and go back; unhitched my team and was driving it back when I met Enright coming for the whiffletrees; he hallooed from the Archer road that the train was coming, and upon looking I saw the smoke of the engine; could not see the cars. I then drove my team in front of the wagon. Seeing cars coming, O'Mara ran up the track, and also another man ran up the track nearer the train, making signals to the engineer. Fearing that my horses might be hurt I drew them back from the track; cannot swear to the exact position of wheels upon the track; the wheels were cramped upon it; front wheels were clear; O'Mara ran back to wagon and drew
p. 35. team attached to it off track; front wheels being clear wagon slewed round; engine struck wagon near forward truck; horses

were thrown atop the wagon; engine altered the position of front of wagon about twenty feet, and of the hind part of it three or four feet; wagon badly broken; two wheels broken entirely up; hub knocked out; tire merely holding felloes; when teamster left wagon he tied the reins to one of the stakes as was customary; when wagon moved, it pulled horses up by the bits and threw them right up on their hind feet with their fore feet on boiler of engine; had they not been fastened by lines they would have fallen under cars; one horse was cut on pastern joint; that was all the injury I could see to him, unless he became lame from it; other horse was skinned a little on the back; he worked next day; I had known the horses some time before the accident; they worked first rate; since that time the horse whose leg was cut didn't work for a little over two months; after a hard day's work
p. 36. he is lame now; if he ever slips, has to stop before he can go on again; other horse worked next day and for several days and then went lame; in a few days after he went lame I took him to a blacksmith who shod him anew; smith said he was all right and put on a round shoe; he got no better and I took him again to the smith who cut into the hoof and found matter in it; in a short time hoof came off; another has since grown; this horse was unsound in barn six months, and is not sound now; he was worth before the injury three hundred dollars; not worth now more than one hundred dollars; other horse was worth about one hundred and seventy-five dollars; my brother sold him for forty; I think the keep of the horses was worth one dollar per day; some of the harness had to be cut; repairs cost six or seven dollars and brother paid it. O'Mara and several others went up the track making signals; a man about half way to the intersection of the Archer road was making signals; I saw the train coming round the coal office; there were two or three others making signals, one with two pails of water, beyond the farthest one; am not sure as to others; I did all I could to save the horses; I noticed the
p. 37. whistle; it was about twenty feet from the wagon when it sounded; I did not observe any whistle before; I noticed no slackening of speed until then; I think the train was running faster than six miles an hour; it was going faster than I could walk; I am now but was not then lame.

On Cross-Examination: I was at the wagon close along side my horses when I first saw train coming; it was then coming round Meeker's coal office; I saw the distance measured yesterday; it is five hundred and eighty-four feet from the curve to where the wagon was struck; the curve is a little this side the coal office; was standing on sidewalk when train struck wagon, holding my team; train ran by wagon about half its length before it came to full stop; think it might have run about three hundred feet before the engine stopped; train came nearly to full stop about three car lengths from the place of collision; it slacked speed but did not stop; it then went on slowly again till it came to full stop. Am brother of plaintiff; am not interested in teaming business. I had just reached the wagon with my team; I
p. 38. made no signals to train; I hallooed; Enright made no signals but he hallooed; no one was at wagon but O'Mara, myself and another teamster of Walsh; don't know whether latter made signals; can't account for wagon being stuck on track; it was an accident; wheels were wedged on track; Enright had crossed them often without difficulty; wagon might have been stalled without carelessness; best teamster might cross twenty times and then get stuck; I presume Enright used all precautions; he had been driving three or four months; after crossing the track here I had to go on south side of track, cross the main track and then cross back again to get to the Archer road; I crossed railroad track that morning three times without difficulty; I cannot swear that the injury to horse's hoof was occasioned by this accident; his hoof came off; I think that it was not more than six or seven days after the accident that I took the horse to the shop; the smith's name is P. Carlin; his shop is between Lake and Washington streets, on Franklin.

p. 39. *Testimony of John Hurd.*—Am book-keeper for McCabe & Hughes; remember the accident; was going to packing house that morning; when about twenty feet from the alley saw train coming round the curve; then I turned and saw a man turn horses off the track, and saw three or four men run up the track, making signals to the engineer; heard the whistle sounded; the train was at that time about one hundred to one hundred and fifty feet from the wagon; the train was not running as fast when it struck the

wagon as it had been before when I first saw it; I think it run past the wagon fifty or sixty feet before it partially stopped; it did not come to full stop; I have not measured the distances.

On Cross-Examination: I think the wagon was at least one hundred feet from the engine when the whistle sounded; I know that when the engine struck the wagon it was running slower than when I first saw it; two or three cars passed the wagon after the collision; I think that the men who were making signals were
p. 40. about one hundred feet from the wagon; one man said that he ran up the road intending to turn the cars on the switch track; I heard the bell ringing; I am sure of this; The train was running faster than trains do when they go out of the city; I doubt whether the engineer was looking out; I thought if he had been the accident might have been avoided.

Testimony of Philip Carlin.—Is a horse shoer; shod Hogarth's horse last spring; examined horse's foot; thought it had been bruised internally, and put on bar shoe; foot had been jammed from outside and had hurt inside; an injury of this sort would not show itself for some time; think this horse was hurt in that way.

On Cross-Examination: I saw no other symptoms than those occasioned by a bruise; I examined horse nine or ten months ago; it was earlier than May last; this hurt would not probably show itself in three or four days. His hurt must have originated from a blow on bottom of hoof; strain of pastern would not affect it this way; a blow producing this effect must have come on bottom of hoof; horse may have hurt himself this way on a stone; horse was, in other respects, sound; I noticed no bruises elsewhere; considered the foot badly jammed; the blow must have been very severe under the hoof; have known several cases where horses pulled their hoofs off from being caught in railroad track.

Testimony of Patrick O'Mara.—Was teaming last March for Charlie Walsh; remember injury to Hogarth's team; saw the accident to plaintiff's wagon; I was hauling hams that morning
p. 42. with one of Walsh's teams; four teams were hauling that day—two of Walsh's and two of Hogarth's; both of Walsh's teams

had crossed the railroad track; one of Hogarth's teams got stuck on the track; my team was on the Archer road at the time; I went back to help Hogarth's team; we were unable to move it; I said we had better get another team to help us; the driver of Hogarth's other team was bringing his horses to help us, and Enright—Hogarth's teamster that was stuck—had gone to get the whiffletrees off the other wagon; I said we were in a bad fix, and had better get off quick; I saw the train coming around the curve, then I ran up the road making motions; there were two or three others, I couldn't say how many; I hallooed to somebody to stop the train, and, running back to the wagon, took hold of the horses that were stalled and swung them off the track; I run up the track about one hundred feet, or more; I took off my hat and made motions with it; it was a clear morning and there were no obstructions in the way; I paid particular attention; the engineer was looking out; the bell was ringing; the whistle was not sounded until he was within fifty feet of the wagon at most; the
p 43. train was almost striking the horses when the whistle sounded; it did not sound before; the train did not slacken its speed after it left the curve until it struck the horses; I ran up and back as rapidly as possible; can't swear how fast the train was running; think it was running some eight or ten miles an hour; I saw the horses were in a bad fix, and that the train would kill them unless I did something, and then I swung them round; he would have struck the horses before he touched the wagon, if I had not swung them off the track.

On Cross-Examination: I motioned all the way from time I left the horses: think the train was all of four hundred or five hundred feet off when I made first motion; when it first came in view it must have been all of four hundred feet away; after I first saw the train, and before it struck the wagon, it was a considerable while; couldn't tell exactly how long it was; I think it was more than five minutes; I think the train was running eight or ten miles an hour, and that it was all of five minutes running from the curve to the wagon; I do not know whether my statements
p. 44. agree, but I swear they are true to the best of my knowledge: the engineer made no effort to stop that I could see; I should think the wagon was distant five hundred and eighty feet from the

curve; the crossing was neither bad nor good; it was not as bad as half of them are; I got my own team over without difficulty that morning; all the wheels of the wagon were free of the track except the hind wheels; the bell of the engine was ringing.

Testimony of Walden Schiller.—I have lived in Chicago in winter time seven or eight years; I was at one time a brakeman for Pittsburgh & Fort Wayne R. R. Co.; I worked as brakeman about one month; I was never brakeman anywhere else; have been in employ of Chicago, Burlington & Quincy R. R. Co.; remember the accident; had been helping the boys to load their teams; the wagons started from packing house; one of them got stuck on track; I then went in a house and came out again; one man went for another team; I saw the cars coming before the team came; by the time the team came to the wagon the cars
p. 45. were coming round the curve on the corner of Archer road; I thought I would give a swing to signal engineer to stop; I saw the engineer looking out of the window; I ran about forty or fifty feet to give the signal; train was four hundred or five hundred feet off when I first saw it; I hallooed and kept swinging all the time; the engineer gave no attention; I did not hear the whistle sounded till he was near the wagon; the train did not slack till the whistle sounded; the whistle was to slack up breaks; the train was running at first twelve miles an hour, then it ran from nine to ten miles an hour; the men did every thing they could to get the wagon off the track; the track was clear so that engineer could see the wagon; I could see clear up to the cars.

On Cross-Examination: When I first gave the signal, the train was four hundred or five hundred feet away; train was just coming round the curve; when I first saw it it was six hundred feet away; I was standing on sidewalk; I saw other boys hallooing: when I first saw train from time of giving swing, was about five minutes; train was running about five miles an hour; I am not
p. 46. a very good judge of the speed of a railway train; the bell was ringing; after the accident I was standing by the wagon; the train ran nearly past the wagon before it stopped; after it struck the wagon the train ran slower, and partly stopped after from four to six cars passed the wagon; I saw the wagon smashed all to pieces.

DEFENDANT'S TESTIMONY.

It was admitted by the plaintiff that defendant had a right to use the street and track upon which its train was moving, and that it was using said street and track at the time of the accident.

George Deacon's testimony.—I reside in Chicago; have lived here eleven years; am an engineer by profession, and was in charge of defendant's train at the time of the collision. The accident occurred a few minutes before nine o'clock, about the 15th or 16th of March last. I was coming into the city in charge of a freight train; it was a very heavy train, composed of twenty-four cars; I got over the Archer road bridge and round the curve when I saw a wagon across the track; half the wagon was across
p. 47. the railroad, the other half had got over; the hind wheel was on the track; the front wheels were over and free of the track; as soon as I saw the wagon I sounded the whistle twice; during this time I ran about fifty feet, and then I saw a man leave the wagon and run towards me making signals by waving his hands; I whistled down brakes; this was the third time I whistled; I whistled down brakes as soon as I saw the wagon did not move; I then reversed my engine; very soon after this I struck the wagon, turned it on its broad side, and shoved it off the track; I stopped my train after some three cars had passed the wagon; the third or fourth car from the front of the train was abreast the wagon when I stopped; when I first saw the wagon I had no reason to suppose it was stuck; I saw no person near it at the time; I first saw the wagon as I was coming round the curve; I was not three hundred feet from the wagon when I first saw it; I could not see it sooner because of the curve and the steam from my engine; the steam was flying towards me; I did not know the wagon was stalled. When I saw the wagon was not going to get out of the way I used all the means in my power to stop. No signal man was more than ten feet from the wagon on the track; I whistled twice as soon as I saw it; I must have run some fifty
p. 48. feet when I saw a man come away from the wagon and make motions to me with his arm; no person made any signals to me before I got to the curve; there was no one sent above the curve to signal me that the wagon was stuck; if I had got a signal in time I

could have stopped the train before the collision; I was running about 5 miles an hour, not so fast as six; the bell was ringing; I could not possibly have stopped the train after receiving the signal and before reaching the wagon. There is a very heavy down grade at the place where the accident occurred; I ran over the Archer road bridge that morning at a rate, I think, not greater than four miles an hour; there is a very heavy grade on each side the bridge. As soon as I received the signal I whistled down brakes and reversed my engine, and set my engine brakes as soon as I had reversed the engine.

On Cross-Examination: As soon as I got the signal I reversed my engine; I whistled twice as soon as I saw the wagon; there might be seven or eight seconds between the whistles—that is, the two first whistles were not a second apart; I whistled for the
p. 49. wagon to get out of the way; I ran about fifty feet after seeing the wagon before I whistled for brakes and reversed my engine. There were twenty-four cars on the train, each about forty feet in length. I did not see the wagon as soon as I would have done but for the curve in the road and the steam from the engine; then when I got out of the curve I saw the wagon. From the curve to the Archer street bridge is from two hundred and sixty to two hundred and seventy feet; there is a down grade from the bridge on both sides; the track naturally raises itself for some distance on each side the bridge in order to approach it. If signal is given, the brakes on and the engine reversed at five miles an hour, I might have stopped the train in going two hundred and fifty feet; that train might have been stopped in two hundred and sixty feet; if I had known, when I first saw the wagon, that it could not get out of the way, I might have stopped the train before reaching the wagon. I saw the man who gave me the signal when I reversed my engine; he was close to the crossing, perhaps not more than fifteen feet from it; I was over two hundred feet from the man when I first saw him; I was about two hundred and seventy feet from the wagon when I first saw it; I have run over the track so often that I know the distances pretty well; was about
p. 50. two hundred feet from man when I saw him give signal; he was about fifteen feet from the wagon; I was about two hundred and fifteen feet from the wagon; when I came to a stop the third or

fourth car was abreast the wagon; the cars are, say, thirty-five feet long; the engine and tender fifty feet long. There was nothing on the track to obstruct my view; the curve bends to the south coming off the bridge; when on the other side of the curve there was nothing between the wagon and me but the curve; I couldn't see before leaving the curve for the buildings; there were buildings on the other side of the curve which obstructed my view; I had not run over this end of the road before that morning for three years. I had two brakemen; I usually have two; I had a fireman on the engine; he put on the engine break, and rang the bell; I told him to do so; I know the engine break was set; I didn't see him do it; when the train stopped I got off the train and found the cylinder cocks knocked off; I had good brakes on the engine; they were not steam brakes; steam brakes are used only on passenger trains; they cannot be used on freight trains; I think they are not used on freight trains on any road in Chicago; they may be used on the Burlington & Quincy Road, but I am not certain about it; I believe they tried them, but found
p. 51. that they would not work; I never used them on the Chicago & Alton Railroad.

Testimony of J. C. McMullin.—Am local freight agent of the Chicago and Alton Railroad Company; was on the train at time of accident, in caboose car at end of train; didn't see the engine strike the wagon; saw it after accident. Have had experience in railroading for eight years and consider myself competent to give an opinion of the speed of a railroad train. From my experience I judge that this train was running between four and five miles an hour; the brakes in use on this train were the same that are in use in this State on freight trains; I never heard of patent brakes being used on freight trains; they cannot be used on ordinary freight trains; the slack of the chain is too great; it would be impossible to use them on a train as long as the one in question. Conductor Van Allen was in the caboose car with me; I
p 52. got out at the place of the accident; the train came to a stop; I then got out and the train went slowly on again and stopped. If the person in charge of the wagon had sent a signal-man on the track each way, to notify approaching trains of the situation of the wagon, I think the accident might have been avoided.

On Cross-Examination: At that time the number of freight trains coming daily into the city averaged three or four in twenty-four hours, and passenger trains on the Chicago and Alton Railroad; the same number of trains went out on this road.

Testimony of Charles Van Allen.—I am conductor of freight train on the Chicago and Alton Railroad; was running the train at the time this accident occurred; was in caboose car at rear end
p. 53. of the train; have been a conductor two years and in employ of the Company ten years; consider myself good judge of speed of railroad trains. This train, at the time of accident, was running not exceeding five miles an hour; first I knew of matter I felt the reverse of the engine; was sitting on seat, and it nearly threw me over; I jumped up at once and caught hold of brake and set it; the brake is inside the caboose car.

On Cross-Examination: The first intimation I had of danger was the reverse of the engine; I heard no whistle at the reverse; I tightened the brakes.

Direct resumed: There were twenty-four cars on the train, averaging twenty-six feet to the car from bumper to bumper; I think the whistle might have been blown and I not hear it.

Cross-Examination resumed: A sharp whistle might have gone the whole length of the train; I was talking with McMullin; the whistle for brakes is peculiar, and I should most likely have heard it.

Testimony of John C. Ragland.—I am a brakeman on freight
p. 54. trains of defendant's road. In March last I was firing Engine No. 1, and was on the train when the accident occurred; as we came round the curve I saw by the guage that we had hardly steam enough on, and I stooped down to put coal on the engine; just as I shut the door of the fire-box Mr. Deacon reversed the engine; soon after we struck the wagon, run by it about four car lengths, and came to a full stop; I set the brakes on the engine myself; did not see the wagon until we were fifty or sixty feet from it; I heard the whistle sound three or four times; the train was running some five miles an hour.

p. 55. *On Cross-Examination:* My attention was first attracted by the whistle; the whistle sounded three or four times before the engine was reversed; am sure it sounded twice before the engine was reversed; it might have been half dozen times; I'll risk saying three times; it might have been half dozen times; I'll swear it was three times.

PLAINTIFF'S INSTRUCTIONS.

I.

p, 55. The question of negligence is one of fact for the jury to determine; and in this case the jury must determine from the situation of the parties and all the surrounding circumstances, whether those having charge of defendant's train were guilty of negligence in not stopping the train, so as to have avoided the accident.

It will be presumed, that the servants of a railway company are cognizant of the various road crossings on the line of their road, and that persons are liable at all times to be in the act of passing the point of intersection, and they should be on the look out, so as to avoid injury to others who may be passing the road, so far as may be done by the use of all reasonable efforts; and when danger is seen, or might be seen, by the exercise of ordinary prudence by those having charge of railroad trains, they should be held to all reasonable efforts to avoid it.

II.

p 55. If the jury shall believe, from the evidence of this case, that the engineer on the defendant's train might, by the exercise of reasonable care and diligence, have discovered the plaintiff's wagon on the railroad track, and that it was loaded and standing there under such circumstances as to lead a reasonable mind to the conclusion that it was stalled there, and could not be removed; and could have stopped the train before it reached the wagon, and failed so to do: these are facts which the jury should consider in determining whether or not the defendant is guilty of negligence.

III.

p. 56. It is the duty of those having the charge of railroad trains approaching the city of Chicago, to keep a constant lookout for objects in the way of their trains, and to use all reasonable exertions to prevent a collision with such objects; and if the jury shall believe, from the evidence in this case, that the injury complained of could have been avoided by the exercise of reasonable care on the part of those having charge of the defendant's train, and the plaintiff was not guilty of negligence, or if he was guilty of negligence, not amounting to gross negligence, and the defendant was guilty of gross negligence, then the jury should find for the plaintiff; and in passing upon the question of such reasonable care on defendant's part, the jury should consider, among other things, whether or not the engineer in charge of defendant's train ought to have judged, from all the circumstances in the case, and in the exercise of proper care and attention, that the plaintiff's wagon was stalled upon the railroad and could not be at once removed.

DEFENDANT'S INSTRUCTIONS.

I.

p. 57. The plaintiff's right to recover in this case depends upon two concurring facts:

1st. The defendant must be chargeable with some degree of negligence.

2d. The plaintiff must have been entirely free from any degree of negligence which contributed to the injury, that is, of any negligence without which the injury would not have happened.

Refused by the Court.

II.

p. 57. If in the enjoyment of their lawful rights by two persons at the same time and place, reasonable care is exercised by both, and an injury occurs to one of them, it must be borne by him as a Providential visitation. If such care is exercised by neither, and one is injured, he must bear it, for he was himself in fault, and in no case is the plaintiff entitled to recover where his own want of care contributed to the injury.

Refused by the Court, but given modified as follows:

If in the enjoyment of their lawful rights by two persons at the same time and place, reasonable care is exercised by both, and an injury occurs to one of them, it must be borne by him as a Providential visitation. If such care is exercised by neither, and one is injured, he must bear it, for he himself was in fault, unless the party committing the injury was guilty of gross negligence, in which case the injured party might recover if he had been guilty of some negligence, not amounting, however, on his part, to gross negligence.

III.

p. 58. If the Jury believe from the evidence that the plaintiff's wagon was fast upon the railroad track, so that his horses were unable to move it therefrom, and that he knowing this fact, and that the defendant's train was approaching, took no pains to notify defendant's servants that his wagon was fast until it was too late to avoid collision, then he was guilty of negligence which contributed to produce the injury and cannot recover therefor.

Refused by the Court.

IV.

p. 59. If the Jury believe from the evidence that the defendant's servants were running its train according to law, and that as soon as they became aware that the plaintiff was unable to remove his wagon from the track they took the proper precautions to prevent collision, and that notwithstanding this precaution the collision occurred which injured the plaintiff's wagon, then the defendants were guilty of no negligence which entitled the plaintiff to recover damages of the defendants.

Refused by the Court as asked, but given modified by inserting after the words "collision occurred" the words "without any fault on the part of the defendants."

V.

p. 60. The plaintiff and defendant were each lawfully and of right traveling the street where the accident occurred; each had the right at all times to exercise this privilege, but so as not to interfere with or deprive the other of its legal privileges. In the ex-

ercise of this right each was bound to use the same amount of care and prudence to avoid collision. The parties must be held on both sides to the use of every reasonable effort to avoid a collision, and in default of such efforts must be held responsible for the consequences of injuries inflicted upon others or received by themselves when they might have avoided them.

Refused as asked, but given modified by adding the words "but a party guilty of gross negligence would be responsible for damages by him committed, even if the other party were guilty of some negligence, not amounting, however, to gross negligence on his part."

VI.

p. 60. If the jury believe from the evidence that the defendant's servants, not knowing that plaintiff's team was unable to draw his wagon from the railroad track, supposed that the wagon would get off the track before the train reached it, and that as soon as said servants discovered the real state of the case they used the proper means to avoid collision, then the defendants were guilty of no negligence which render them liable in damages to the plaintiff.

Refused by the Court.

VII.

p. 61. If the jury believe from the evidence that the plaintiff had so overloaded his wagon as to render it impossible for his horses to draw it across the railroad track, and that but for this the accident would not have occurred, then this is such negligence on his part as will prevent a recovery for the damage done by the collision.

Refused by the Court.

VIII.

p. 61. If the jury believe from the evidence that the plaintiff failed to use his utmost efforts to extricate his wagon from its dangerous position upon defendant's railroad track, and that he gave no notice by signal or otherwise to those in charge of the approaching train of his inability to move his wagon until it was too late to

ercise of this right each was bound to use the same amount of care and prudence to avoid collision. The parties must be held on both sides to the use of every reasonable effort to avoid a collision, and in default of such efforts must be held responsible for the consequences of injuries inflicted upon others or received by themselves when they might have avoided them.

Refused as asked, but given modified by adding the words "but a party guilty of gross negligence would be responsible for damages by him committed, even if the other party were guilty of some negligence, not amounting, however, to gross negligence on his part."

VI.

p. 60. If the jury believe from the evidence that the defendant's servants, not knowing that plaintiff's team was unable to draw his wagon from the railroad track, supposed that the wagon would get off the track before the train reached it, and that as soon as said servants discovered the real state of the case they used the proper means to avoid collision, then the defendants were guilty of no negligence which render them liable in damages to the plaintiff.

Refused by the Court.

VII.

p. 61. If the jury believe from the evidence that the plaintiff had so overloaded his wagon as to render it impossible for his horses to draw it across the railroad track, and that but for this the accident would not have occurred, then this is such negligence on his part as will prevent a recovery for the damage done by the collision.

Refused by the Court.

VIII.

p. 61. If the jury believe from the evidence that the plaintiff failed to use his utmost efforts to extricate his wagon from its dangerous position upon defendant's railroad track, and that he gave no notice by signal or otherwise to those in charge of the approaching train of his inability to move his wagon until it was too late to

avoid collision, and that but for this failure to give notice to the defendant's servants the accident might have been avoided, then he was guilty of negligence which contributed directly to the production of the injury, and cannot recover damages.

Refused by the Court.

IX.

p. 62. The measure of damages in this case is the actual cost of repairing the wagon, provided it was as good after repair as it was before it was broken; the loss of the trip in which the plaintiff was engaged; the use of the wagon until by due diligence he might have had it repaired; and the actual difference in money value of his horses before they were injured, and at the time when they were again in a condition to be used; the cost of care and treatment of them, and the hire of other horses in their stead until they were fit for work. The plaintiff cannot recover for conjectural or possible profits which he might have received from the use of his horses but for the injury to them.

Which instruction was given by the Court as requested.

p. 63. Reasons for a new trial.

p. 64. Motion for new trial overruled upon the terms that the plaintiff remit two hundred dollars of the damages found by the jury.

p. 67. Certificate of Clerk.

ASSIGNMENT OF ERRORS.

The Court erred in refusing to give the jury the instructions asked by the defendant.

The Court erred in giving to the jury the instructions of the defendant as they were modified by the Court.

The Court erred in overruling the motion made by the defendant for a new trial.

The Court erred in rendering judgment against the defendant.

A. W. CHURCH,
Attorney for Appellant.

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The Chic. & Alton
RR Co
vs
Thos. Hogarth

Abstract

Filed April 4, 1865
L Leland Clk

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable Erastus S. Williams Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the third Monday, (being the twentieth day) of February in the year of our Lord One Thousand Eight Hundred and Sixty four and of the Independence of the said United States the Eighty ninth.

Present, Honorable Erastus S. Williams Judge of the 7th Judicial Circuit of the State of Illinois.

Charles H. Reed States Attorney.

John A. Nelson Sheriff of Cook County.

Attest, Wm L. Church Clerk.

Be it Remembered, that heretofore, to wit, on the twelfth day of May A.D. 1864. Thomas Hogarth by Messrs. Miller & Lewis, his attorneys, sued out of the office of the Clerk of said Court the People's certain writ of Summons directed to the Sheriff of said County to execute, and clothed in the words and figures following, to wit:

Summons.

State of Illinois, Cook County ss. The People of the State of Illinois, to the Sheriff of said County, Greeting:

We command you that you summon The Chicago and Alton Rail Road Company if it shall be found in your County personally

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to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said County of Cook, on the fourth Monday of May instant to answer unto Thomas Hogarth in a plea of trespass on the case to the damage of the said plaintiff as is said, in the sum of One Thousand Dollars; And have you there this writ, with and endorsement thereon, in what manner you shall have executed the same,

Seal Stamp

Witness, William L. Church, Clerk of our said Court, and the seal thereof, at Chicago aforesaid, this Twelfth day of May A.D. 1864., Wm L. Church Clerk

And afterwards, to wit; on the day and year last aforesaid, said writ was returned into the Court aforesaid by said Sheriff, endorsed as follows, to wit;

Sheriffs Return.

Served this writ on the within named "The Chicago and Alton Rail Road Company by reading and by delivering a true copy thereof to Timothy B. Blackstone, who is the President of the said Company, this 12th day of May A.D. 1864- David S. Hammond Sheriff- By E.M. Barnard Deputy.

Fees - Sivice No. 50. Copy .50 - Mile 10. Return 10=$1.20

And afterwards, to wit; on the 13th day of May in the year last aforesaid, said plaintiff, by his said attorneys filed in the Court aforesaid his certain declaration against the said defendant in said cause, in the words and figures following, viz;

Declaration.

Circuit Court of Cook County.

May Term A.D. 1864.

State of Illinois }
Cook County } ss.

Thomas Hogarth, plaintiff, by Miller & Lewis, his attorneys complains of The Chicago and Alton Rail Road Company, summoned &c, of a plea of trespass on the case; For that whereas the said plaintiff heretofore, to wit; on the 22nd day of March A.D. 1864 at the County of Cook aforesaid was lawfully possessed of a certain two horse wagon, of great value, to wit; of the value of five hundred dollars, and of divers, to wit; two horses then and there drawing the same, and in which said carriage the servant of the said plaintiff with all due care was then riding in and along Grove Street, a public Street in the City of

Chicago in said County aforesaid; and the said defendant being a body corporate under the name and style aforesaid, was also then and there the owner of a railway which it operated in and through Grove Street aforesaid and possessed of a certain locomotive engine and of a certain train of cars attached to and drawn by said engine and which said engine and cars were then and there under the care, government and management of certain then servants of the said defendant who were then and there directing and managing the same in and along the said public Street, to wit: at the County aforesaid. Nevertheless the said defendant then and there by his said servants so carelessly and improperly governed, directed and managed its said engine and train that by and through the carelessness negligence and improper conduct of the said defendant by its said servants in that behalf, the said engine and train of cars of the said defendant then and there ran and struck with great force and violence upon and against the said wagon of the said plaintiff and thereby then and there crushed broke to pieces, damaged and destroyed the same and the said wagon of the said plaintiff thereby then and there became

and was rendered of no use or value to the said plaintiff, and by means of the several premises aforesaid the said horses of the said plaintiff were then and there greatly bruised, hurt and wounded and became and were sick, lame and disordered, and so remained and continued for a long space of time, and thereby became and were rendered of no use or value to the said plaintiff, and also by means of the premises, divers, to wit: two harnesses by which said horses were attached to said wagon, and of which said plaintiff was possessed, were then and there cut, damaged and destroyed and thereby became and were rendered of no use or value to the said plaintiff, and also by means of the ~~said~~ premises said plaintiff during a long space of time, to wit: hitherto was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done and transacted with the said wagon and harnesses aforesaid, and also by means of the premises the said plaintiff was forced and obliged to pay lay out and expend and hath necessarily paid laid out and expended divers large sums of money in the whole amounting to a large sum of money, to wit: the sum

of five hundred dollars in and about the repairing of the said wagon so damaged as aforesaid, and also by means of the premises the said plaintiff hath paid laid out and expended divers large sums of money amounting in the whole to a large sum of money, to wit, the sum of five hundred dollars in and about the endeavoring to have said horses healed and cured of their said wounds hurt and bruises occasioned as aforesaid, and also by means of the premises the said plaintiff hath paid laid out and expended divers sums of money amounting in the whole to a large sum of money, to wit, the sum of fifty dollars in and about the repairing of the said harness so damaged as aforesaid, and also by means of the premises the said plaintiff was deprived of the use of his said carriage and horses for a long space of time, to wit: the space of three months, and was deprived of all the profits and advantages which during that time he might and also otherwise would have derived and acquired from the use of said wagon and horses and thereby lost a large sum, to wit: the sum of two hundred dollars, to wit: at the County of Cook aforesaid.

And whereas also the said plaintiff heretofore to wit: on the 22nd day of March A.D. 1864 at the County of Cook aforesaid was lawfully possessed

of a certain other ~~wagon~~ two horse wagon of great value, to wit: of the value of five hundred dollars and of divers others, to wit: two horses, then and there harnessed to the same and in which said wagon the servant of the said plaintiff with all due care was then riding in and along Grove Street, a public Street in the City of Chicago in said County aforesaid, and the said defendant, being a body corporate under the name and style aforesaid, was also then and there the owner of a certain other railway which it operated in and through Grove Street aforesaid and was possessed of a certain other locomotive engine and of a certain other train of cars attached to and drawn by said engine and which said last mentioned engine and cars the said defendant was then and there directing and managing in and along the said public street, to wit: at the County aforesaid, Nevertheless the said defendant then and there so carelessly and improperly governed, directed and managed its said engine and train of cars that by and through the carelessness, negligence and improper conduct of the said defendant the said engine of the said defendant then and there crushed, broke to pieces, damaged and destroyed the said wagon of the said plaintiff and the said wagon of the said plaintiff thereby then

and there became and was rendered of no use or value to the said plaintiff, and by means of the several premises aforesaid the said horses of the said plaintiff were then and there greatly bruised, hurt and wounded and became and were sick, lame and disordered and so remained and continued for a long space of time and thereby became and were rendered of no use or value to the said plaintiff, and also by means of the premises, divers others, to wit: two harnesses by which said horses were attached to said wagon and of which said plaintiff was possessed, were then and there cut, damaged and destroyed and thereby became and were rendered of no use or value to the said plaintiff; and also by means of the premises said plaintiff during a long space of time, to wit: hitherto, was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done and transacted with the said wagon and horses aforesaid; and also by means of the premises the said plaintiff was forced and obliged to pay, lay out and expend, and hath necessarily paid laid out and expended divers large sums of money amounting in the whole to a large sum of money, to wit: the sum of five hundred dollars in and about the repairing

of the said wagon so damaged as aforesaid; and also by means of the premises the said plaintiff hath paid, laid out and expended divers large sums of money amounting in the whole to a large sum of money, to wit; the sum of five hundred dollars in and about the endeavoring to have said horses healed and cured of their said wounds hurt and bruises occasioned as aforesaid; and also by means of the premises the said plaintiff was deprived of the use of his said wagon and horses for a long space of time, to wit, hitherto, and was deprived of all the profits and advantages which during that time he might and also otherwise would have derived and acquired from the use of said wagon and horses and thereby lost a large sum ~~of money~~ to wit; the sum of two hundred dollars; and also by means of the premises the said plaintiff hath paid laid out and expended divers sums of money amounting in the whole to a large sum of money, to wit; the sum of fifty dollars in and about the repairing of the said harness so damaged as aforesaid; to wit; at the County of York aforesaid.

And whereas also on the 22nd day of March A.D. 1864 the defendant being a body corporate under the name and style aforesaid, was the

owner of a railway which it operated in and through Grove Street, a public street in the City of Chicago in said County of Cook, And the plaintiff avers that on the day and year aforesaid, at the said County of Cook, he the said plaintiff was the owner of a certain other wagon and divers others, to wit: two horses then and there drawing the same and in which said wagon the servant of the said plaintiff was riding in and along said public street with all reasonable care and diligence when a certain other locomotive engine with a certain other train of cars attached, directed and managed by the servants of the defendant, moved in and along said public street without the knowledge of said plaintiff; and plaintiff avers that it was the duty of said defendant to ring a bell or blow a whistle attached to said locomotive engine while said engine and cars were moving in and along said public street, and that it was the duty of the defendant to slacken the speed of said engine and cars while moving in and along said public street and to proceed slowly and cautiously in and along said public street and at a rate of speed not greater than six miles per hour in accordance with the ordinance of the City of Chicago in such case made and provided; and plaintiff avers that the defendant so care-

lessly and improperly conducted the said engine and cars in and along said public street by proceeding at a greater rate of speed than that prescribed in the ordinances of the City of Chicago in such case made and provided and by not giving warning as aforesaid, nor otherwise of the approach of said engine and cars to the servant of said plaintiff while he was driving in and along said public street; that the plaintiff says that while passing along said public street as aforesaid, the wagon in which the servant of the said plaintiff was riding as aforesaid, was struck and destroyed by said engine and cars, and the said horses by which said wagon was drawn were then and there struck bursed and wounded by said engine and cars and divers others, to wit, harnesses by which said horses were attached to said wagon and of which said plaintiff was possessed were then and there cut broken and destroyed by said engine and cars, and by means of the premises plaintiff during a long space of time, to wit: the space of three months was prevented from transacting his lawful affairs and business by him during that time to be done and transacted with the said wagon and horses aforesaid, And plaintiff says that in consequence of such injuries &c he

has been forced to pay five hundred dollars in and about the repairing of the said carriage so damaged as aforesaid, and five hundred dollars in and about the endeavoring to cure and heal said horses of their said wounds and bruises occasioned as aforesaid, and fifty dollars in and about the repairing of the said harness so damaged as aforesaid; And plaintiff further avers that by reason of the several premises aforesaid he was deprived of the use of his said wagon and horses for a long space of time, to wit: the space of three months, and was deprived of all the profits and advantages which during that time he might and also otherwise would have derived and acquired from the use of said wagon and horses and thereby lost a large sum, to wit: the sum of two hundred dollars, to wit: at the County of Cook aforesaid.

To the damage of said plaintiff in the sum of one thousand dollars, and therefore he brings suit &c,

Miller & Lewis
Plaintiff's Attorneys

And afterwards, to wit: on the 21st day of June in the year last aforesaid, said defendant, by A.O. Church its attorney, filed in the Court aforesaid, its certain plea to said plaintiff said declaration, in said

cause in the words and figures following, Viz:

Defendants Plea.

Thos. Hogarth
vs
The Chicago & Alton Rail Road Co

In the Circuit Court Cook County – June term 1864

And now comes the said defendant by A.W. Church its attorney and defends the wrong and injury when &c. and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof in manner and form as the said plaintiff hath above thereof complained against it. And of this it the said defendant puts itself upon the country &c

A.W. Church
Defts. Attyp.

And the said Plaintiff doth the like
Miller & Lewis.
Pltffs. Attys

And thereupon afterwards, to wit, at the November term of said Court, to wit: December 21st 1864 the following proceedings among others in said Court, were had and entered of record therein in said cause, viz:

23494 Thomas Hogarth
578. vs
The Chicago and Alton
Rail Road Company } Case

This day comes the said plaintiff by Miller & Lewis his attorneys, and the said defendant by A.W. Church its attorney also comes, and issue being joined herein it is ordered that a jury come: Whereupon come the jurors of a jury of good and lawful men, to wit: Jacob Dick, Herman Spanier, Carl Burgh, Martin N. Kimball, L. Burley, Alexander Reed, Otis H. Kenny, O.C. Adams, Luther Cleavland, William Ely, and O.W. Curran, who being duly elected tried and sworn well and truly to try the issues joined aforesaid, and a true verdict render according to law and the evidence, and after hearing a part of the evidence, the hour of adjournment having arrived, by consent of said parties, said jury is allowed to separate to meet the Court at ten oclock to morrow morning, to which time the further hearing of said cause is now adjourned.

And afterwards, to wit: at the same term of said Court last aforesaid, to wit: on the 22nd day of the month and year last aforesaid, the following proceedings

among others in said Court, were had and entered of record therein, in said cause, to wit;

23.494 Thomas Hogarth 578 vs The Chicago and Alton Rail Road Company } Case

This day again come the said parties by their attorneys, and the Jurors of the Jury aforesaid also come, and having heard all the evidence and arguments of counsel, and instructions from the Court, retire to consider of their verdict with the further instruction given by consent of said parties to sign and seal up their verdict, when they shall have agreed upon the same, and return it into Court at ten o'clock to morrow morning.

And afterwards, to wit; at the same term of said Court last aforesaid, to wit; on the 23d day of the month and year last aforesaid the following further proceedings, among others in said Court, were had and entered of record in said cause, to wit;

23.4994 Thomas Hogarth
578 vs
The Chicago & Alton
Rail Road Company
} Case

This day again come the said parties by their attorneys, and the jury aforesaid having agreed upon and sealed their verdict return into Court and say, we the jury find the said defendant guilty in manner and form as charged in the plaintiffs declaration, and assess the plaintiffs damages by reason of the premises to the sum of One thousand dollars: Whereupon the defendant, by its Counsel, moves the Court for a new trial of said cause,

And afterwards, to wit: at the February term of said Court, to wit: on the 4th day of March A.D. 1865, the following further proceedings, among others in said Court, were had and entered of record in said cause, to wit:

23.4994 Thomas Hogarth
578 vs
The Chicago & Alton
Rail Road Company
} Case

This day again come

the said parties by their attorneys, and argu-
ments of Counsel having been heard as well
in support of the motion of the defendant
heretofore entered for a new trial of said Cause
as in opposition thereto, said plaintiff now
here in open Court fully remits to the said
defendant the sum of two hundred dollars
parcel of the verdict of the jury aforesaid;
whereupon the Court orders that said motion
for a new trial be, and the same hereby is
overruled. To which ruling of the Court in
overruling said motion for a new trial the
defendant, by its Counsel, now here excepts,
and on its motion, twelve days are allowed
the defendant in which to prepare and file
its bill of exceptions in said cause.

Therefore it is considered by the Court that
said ~~defendant~~ plaintiff do have and recover
of the said defendant his damages of one
thousand dollars in form aforesaid by the
Jury aforesaid assessed, less the said sum of two
hundred dollars so as aforesaid remitted by the
plaintiff to the defendant, together with his costs
and charges by him about his suit in this
behalf expended, and have execution therefor.

Whereupon the defendant, by its Counsel excepts
to the rulings and judgment of this Court in
said cause and prays an appeal therefrom to

the Supreme Court of the State of Illinois, which is granted by the Court upon condition that the said defendant shall within twelve days from this date execute and file with the Clerk of this Court its appeal bond herein in the penal sum of twelve hundred dollars conditioned according to law, surety to said bond being hereby expressly waived by said plaintiffs.

And afterwards, to wit, on the 10th day of March in the year last aforesaid, said defendant, by its said attorneys, filed in the Court aforesaid, its certain appeal bond in said case in the words and figures following, to wit;

Appeal Bond.

Know all men by these presents, that the Chicago and Alton Rail Road Company is held and firmly bound unto Thomas Hogarth in the penal sum of one thousand two hundred dollars for the payment of which well and truly to be made, The Chicago and Alton Rail Road Company binds itself, its successors and assigns firmly by these presents, Sealed with its corporate seal and dated at Chicago this Eighth day of March Anno

Domini one thousand Eight Hundred and Sixty Five.

The condition of the above obligation is such that, whereas the above bounden named Thomas Hogarth on the third day of March one thousand eight hundred and sixty five at a term of the Circuit Court holden within and for the County of Cook and State of Illinois obtained a judgment against the above bounden The Chicago and Alton Rail Road Company for the sum of Eight Hundred Dollars and costs of suit, from which said judgment the said The Chicago and Alton Rail Road Company has prayed for and obtained an appeal to the Supreme Court of said State,

Now therefore if the said The Chicago and Alton Rail Road Company shall duly prosecute said appeal and shall moreover pay the amount of the judgment costs and interest and damages rendered and to be rendered against it the said The Chicago and Alton Rail Road Company in case the said judgment shall be affirmed in the said Supreme Court then the above obligation to be null and void otherwise to remain in full force and virtue.

Seal

The Chicago & Alton Rail Road Company
By C. B. Blackstone President,

attest
W. M. Lawbee Secretary

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And afterwards, to wit, on the 14th day of March, in the year last aforesaid, said defendant by its said attorney filed in the Court aforesaid its certain bill of exceptions in said cause in the words and figures following, to wit;

Bill of Exceptions.

In the Circuit Court
Cook County,

The Chicago and Alton
Rail Road Company
ads.
Thomas Hogarth.

And afterwards, to wit, at a term of the Circuit Court of Cook County, held at the Court House in the City of Chicago, in and for said County of Cook, on the twenty-second day of December in the year one thousand eight hundred and sixty four, before the Honorable Easties S Williams the Circuit Judge in and for the Seventh Judicial District, appointed to hold said Court according to the form of the statute in such case made and provided, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of the County of Cook aforesaid for that purpose duly empanelled, good and lawful men of said County. At which day came then as well the said plaintiff as the said defendant by their respective Attornies, to wit: for the plaintiff Miller and Lewis, and for the defendant A. W. Church; and the jurors of the jury aforesaid empanelled to try the said issues being called, also came, and were then and there

in due manner chosen, and sworn to try the same issue.

And upon the trial of that issue the counsel for the said plaintiff to maintain and prove the said issue on his part, called George E. Donnington, who being examined, testified as follows;

I reside in Chicago, and am second foreman in the packing house of Mc.Cabe and Hughes, which is situated near the intersection of the Archer road and Grove Street. I have only known Hogarth the plaintiff since the accident happened to his team. I remember that Hogarth's team was hauling from Hanis and Duffield's packing house last March. At the time of the accident I was standing in the centre of the packing house. I heard hallooing on the railroad track and ran to the door. I saw a wagon on the track and saw the train strike the wagon. When I got to the door I heard the whistle, I had not heard it before, the bell was ringing all the time. The signal whistle is generally the signal for clearing the track. When I first saw the train it was distant about one hundred and fifty feet from the wagon. I took no special notice of the speed of the train, but think that it was running about five or six

miles per hour. About ten men were around the wagon. The team was on the track opposite an alley which leads to the Packing House. Some cars were standing on the side track which might prevent me from seeing signals made. I saw none made. There was no way of crossing the rail road track from the packing house except by coming through the alley. I heard more hallooing and then saw one man turn the team round so that the cars would only strike the wagon the wagon I noticed after the accident it was turned over in the gutter along side the rail road. The train was about one hundred and fifty feet from the wagon when I first saw it. I heard no whistle blown until I came to the door of the packing house, and none until the train was within fifteen or twenty feet of the wagon. I think that I should have heard a whistle had one been sounded.

The Counsel for the said defendant to maintain and prove the said issue on its part then cross examined the said witness, and on such cross examination he testified as follows.

There is one main track and one switch track in the street where the accident

occurred. The cars which obstructed my view were two or three in number and stood on the switch track. The nearest of these cars was distant about twenty feet from the place of the accident. The packing house where I was standing is north of the place where the accident occurred. About one third of the distance between the curve and the place of the accident was obscured by the cars on the side track. The distance of the curve from the place of the accident is some 580 feet. I could not see some 100 to 150 feet of the track. I was in the centre of the packing house when I first heard the hallooing, and I stood at the door about half a minute before the whistle was sounded. I do not swear that the whistle was not blown before, but I did not hear it. Those in charge of the wagon might have seen the train before it came round the curve. They were trying to get the wagon off the track; some trying to lead the horses off when I came to the door. I think there were some ten men near the wagon at the time. One of them had hold of the horses. I think that the train passed the wagon about one half its length before it stopped. The train ran around the curve at the usual rate about five or six miles an hour.

The distance from the wagon to the place where the engineer could first see it coming round the curve is about five hundred and eighty feet. I don't know how many cars were on the train.

The Counsel for the said plaintiff further to maintain and prove the said issue on his part then called

Robert A. Williams.

who being examined, testified as follows.

In the month of March last, I was in the employ of A. E. Bishop, wagon maker. I saw the wagon which was injured by the collision, after it was brought to the shop for repairs. The wagon was nearly new. The bill of particulars shown me is Bishop's bill for repairs done the wagon. The amount of the bill is one hundred and four dollars. The wagon was badly broken. I know the value of wagons, and I think that this wagon was worth fully as much after its repair, as it was before the accident. It was as good as new.

The Counsel for the defendant to maintain said issue on its part then cross examined said witness, and upon such cross examination, the witness testified as follows.

I know that all the repairs to the wagon were rendered necessary by the collision. From

the appearance of the wagon I should think the engine struck the hind wheels first. Two wheels were broken, one fore wheel and one hind wheel.

The Counsel for the said plaintiff further to maintain and prove the said issue on his part, then called

Rudolph Bonn.

Who being examined, testified as follows;

I was Collector for A.E. Bishop at the time the bill for the repairs of the wagon was paid, and I know that the plaintiff paid Bishop the amount of the bill.

The Counsel for the said plaintiff further to maintain and prove the said issue on his part, then called

Timothy Enright.

Who being examined, testified as follows;

I am a teamster and I drove Hogarth's team in March last. Hogarth's business was that of teaming. I remember the accident. I was driving the team when the accident occurred. The team was composed of two horses and the wagon was loaded with hams. After I started from Duffield's packing house I passed through the alley to the railroad track. The wagon was stuck on the track. I left them standing on the track, and went to

get another teame to pull me over. I left them in charge of a man nameed O'Meara. When I got stuck the near hind wheel had passed the near track; the near front wheel had passed over both tracks. Neither of the other two wheels were over the track. I went diagonally across the track, I couldn't go straight over the track, not being able to turn the wagon in the alley. After I reached the wagon where I went to obtain help I commenced unhitching the whiffletrees. When I saw the train coming three or four men ran up the track to make motions to the engineer. O'Meara turned the horses off the track or they would have been cut in pieces. I myself made no motion to the engineer. The engine struck the wheel and turned the wagon over. The whistle was sounded ten or fifteen feet from the wagon. The engine struck the forward off wheel. The horses were thrown upon the wagon and struck by the train. They are injured. One of them was idle two or three months and is still lame. The other was not injured that I could see except a slight cut on his back. He became lame and lost his hoof about a week after the accident. The Boss sold him for 35 or 40 dollars I believe. I had driven the horses three or four months. They were sound and were worth from 450 to 475

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dollars. The one that was sold wasn't worth over thirty dollars when sold. The other was not worth more than fifty dollars. He is working now but could not work for three or four months after the accident. I don't know how long the wagon was being repaired. I think about two weeks or more. I think the hire of the wagon was worth two dollars per day. I suppose that the keeping of the horses was worth five dollars per week. The block team I went after was about a block distant across lots. There was no way of crossing the rail road other than the way I did. I have crossed it often. I was taking the whiffletrees off the wagon when I saw the train on the bridge. I was active all the while. I didn't know the time the train was due. There were four teamsters and a lot of men at the wagon. I saw the train first at the bridge across the Chicago river above the curve, about two blocks beyond the curve. Some men ran up the track to stop the train. I saw one man, Walden Schuller pretty near the curve, he was waving his hat and making motions as best he could to the engineer. The team which I got to assist me was at the wagon when the wagon was struck. I had on the wagon 45 to 50 hundred weight; the load was not as heavy as usual. The team was a good strong

one. I did not notice any slacking of the speed of the cars before the whistle blew. I don't know how many cars were on the train; when it came to a full stop all the cars but three had passed the wagon.

The Counsel for the defendant to maintain said issue upon its part then cross examined said witness, who thereupon testified as follows,

The crossing where I got stuck was not a good one. I would not have got stalled if it had been a good ~~one~~ crossing. Other teams had crossed there the same day without difficulty, except one, which got stuck, and we pried it out. Three had crossed just before me, hauling hams. Two ~~had~~ belonged to Walsh and two to Hogarth. I had fifteen tierces of hams on the wagon weighing each 300 pounds or a little more. I was about five minutes going and coming to and from the place where I went to get the whiffle trees. I was stuck on the railroad track about, ~~and~~ quite fifteen minutes. I was taking the whiffletrees from the wagon when I first saw the train coming. I got back to the wagon before it was struck by the engines. I was at the wagon about one minute and a half before it was struck. It took me about two and a half minutes to run back to the wagon. I made no signal to the engineer to stop. O'Meara had

hold of the horses when I went away; he made signals to the engineer. I was about 75 feet from the wagon when I saw O'Meara make the signals. When I first saw the train it was about two blocks from the wagon. I said nothing to the engineer after the wagon was struck; never saw him before or since. I knew that trains were continually passing over the road during the day; that is what the track is there for. I suppose that trains pass there every hour in the day. I sent no one up or down the track to notify trains that I was stalled on the track. O'Meara was driving for Walsh that day. His team was out on the Archer road near the place where I went for the whiffle trees. He came from it to help me out. Two other men came to help me. They had driven out on the Archer road and came back to help me. I did not hear the whistle until the train was within 10 or 15 feet of the wagon. I had crossed at the same place many times before and never got stalled there before. The accident happened between nine and ten o'clock in the morning. I had not crossed there for three or four days previously. I paid no attention to the bell but I think it was ringing. The train stopped after the wagon was struck. All but three cars had passed before the train stopped.

The wagon was knocked off the track, and broke all to pieces. The near forward wheel had crossed both tracks, the near hind wheel had crossed one track. The off front wheel had crossed one track. The off hind wheel had not crossed any track. The train was coming into the city. I think the engine struck the wagon in the forward part. It broke the front and hind wheel. The horses were thrown against the side of the cars. The engine did not strike the horses but they were thrown off their feet. They walked home after the accident. I consider myself a judge of the value of horses. I never sold or bought horses, but I have seen them sold. I think the horses were worth 450 to 475 dollars. Such a pair could be hired for ten to twelve dollars per day. I have a team myself and hire at that. The team was worth as much at the time of the accident. I got stalled by accident. I don't think that I was careless. One team got stuck there before. I have crossed without difficulty many times. I cant say how I got stalled. If I had attempted to cross straight over the rail road I would have got in the ditch. I couldn't cross square over. I couldn't cross straight over into the Archer road, the road is not good enough. The alley was in bad condition. Other teams crossed the same way I did. The alley runs right

opposite to Duffield's packing house. There was a team in the alley which was going to pull me out. I usually carry four or five tons on my wagon, sometimes less. It depends on the road. I can get on 20 times. Not more without standing them atop of each other.

The plaintiff's counsel to maintain the issue on his part here resumed the direct examination of the witness, when he testified as follows.

Three teams had crossed the rail road ahead of mine. One was in the alley detached from the wagon to help me. There were two on the Archer road. The wagon from which I took the whiffle-trees was on the Archer road. I went to and from it as fast as I could. I noticed no difference in the speed of the train until I heard the whistle sounded.

The plaintiff's counsel to maintain the issue on his part then called

Edmund L. Brown.

who thereupon testified as follows;

In March last I was book-keeper for Duffield and Co.. Their establishment was fifty or sixty feet from the track. The track is south of the packing house of Duffield & Co., and the packing house is north east of the point of collision. The alley leads across the railroad, and is a passage between the packing houses for teams. I

have seen the team in question frequently. It was a heavy truck team, and was worth four or five hundred dollars. I was not an eye-witness of the collision. I heard some one hallooing, and upon going out the train had left. passed. The wagon left the packing house a short time before the collision. I think not more than ten minutes. I saw the wagon after the collision. Teams like the one injured are worth now about ten dollars per day. They are worth seven or eight dollars a day for a long job, and more for a short one. I could not say how much the keeping off the horses was worth. Teams hauled usually from 15 to 18 tierces of hams, and the tierces average 300 lbs. each.

The Counsel for the defendant to maintain and prove the said issue on its part then cross-examined said witness who thereupon testified as follows;

The width of the alley between the platforms is about ten feet. It is planked and in good condition. There was no more difficulty in making the crossing that day than usual.

The counsel for the plaintiff to maintain and prove the said issue on his part, then called

James Hogarth

Who being examined on his voir dire testified that he is the brother of the plaintiff, but that

he hath no interest direct or indirect in the event of this suit, and upon direct examination as follows;

I remember the collision in March last. I do not remember the exact day; it happened in March, in the latter part of the month. I had crossed the railroad with a load of hams, and had got out on the Archer road, having been either the first or second wagon to cross the railroad. After I got to the Archer road I heard some one hallooing that the other team was stalled. O'Meara drove in behind me, and told me to hurry up and unhitch my horses and go back. I unhitched my team and was driving it back, when I met Enright coming for the whiffletrees. He hallooed from the Archer road that the train was coming, and upon looking I saw the smoke of the engine. I could not see the cars. I then drove my team in front of the wagon. Seeing the cars coming O'Meara ran up the track, and also another man ran up the track nearer the train, making signals to the engineer. Fearing that my horses might be hurt, I drew them back from the track. I cannot swear to the exact position of the wheels of the wagon on the track. The wheels were cramped upon it. The front wheels were clear. O'Meara ran back to the wagon and

drew the horses which were attached to it off the track. The front wheels being clear the wagon slewed round. The engine struck the wagon near the forward truck, and hauled the wagon along side the track. The horses were thrown atop of the wagon. The engine altered the position of the front of the wagon about twenty feet, and the position of the hinder part of the wagon about three or four feet. The wagon was badly broken. Two wheels were broken entirely up, the hub knocked out, and the tire merely holding the fellows. When the teamster left the wagon he tied his reins to one of the stakes of the wagon as was customary. The wagon when it moved pulled the horses up by the bits, and threw them right up on their hind feet, with their fore feet on the boiler of the engine; then they tumbled down. Had they not been fastened by the lines they would have fallen under the cars. One horse was cut on the pastern joint. That was all the injury I could see to him unless he became lame from it. The other horse was skinned a little on the back. He worked the next day. I had known the horses some time before the accident. They worked first rate. Since that time the horse whose leg was cut didn't work for a little over two months. After a hard day's work he is lame now.

If he ever slips he has to stop before he can go on again. The other horse worked next day and for several days and then went lame. A few days after he went lame I took him to a blacksmith, who shod him anew. The smith said he was all right and put on a round shoe. He got no better and I took him again to the smith who cut into his hoof and found matter in it. In a short time the hoof came off. Another has since grown. This horse was unsound in the barn six months and is not sound now. He was worth before the accident three hundred dollars, and is not worth more than one hundred dollars now. The other horse was worth about $175. My brother sold him for forty dollars. I think the keeping of horses was worth one dollar per day. Some of the harness had to be cut. The repairs cost six or seven dollars and my brother paid it. O'Meara and several others went up the track making signals. A man about half way to the intersection of the Archer road was making signals. I saw the train coming round Meeker's coal office. There were two or three others making signals; one with two pails of water beyond the farthest one. I am not sure as to others. I did all I could to save the horses. I noticed the whistle. It was about twenty feet from the

wagon when it sounded. I did not observe any whistle before, I noticed no slacking of speed until then. I think decidedly that the train was running faster than six miles an hour. It was going faster than I could run; I am lame now but I was not then.

The counsel for the defendant to maintain and prove the said issue on its part, then cross examined said witness, who thereupon testified as follows.

I was at the wagon close along side my horses when I first saw the train coming. It was then coming round Meeker's Coal Office. I saw the distance to the curve measured yesterday; it is five hundred and eighty-four feet from the curve to where the wagon was struck. The curve is a little this side the coal office. I was standing on the side walk when the train struck the wagon, holding my team. The train ran by the wagon about half its length after it struck the wagon before coming to full stop. I think it might have ran about 300 feet before the engine stopped. The engine came nearly to a full stop about 3 car lengths from the place of collision. It slacked its speed but did not stop. It then started on slowly again until it came to a full stop. I am brother of the plaintiff, but am not interested in the teaming business. I had just reached the wagon with my team. I made

no signals to the train. I hallooed. Jno. Enright made no signals, but he hallooed There was no one at the wagon but O'Meara, myself, and another teamster of Walch's I don't know whether the latter made signals or not. I cannot account for the wagon's being stuck on the railroad track, it was an accident. The wheels were wedged on the track. Enright had crossed them often without difficulty. The wagon might have been stalled without carelessness. The best teamster might cross 20 times and then get stuck. I presume Enright used all precautions. He had been driving three or four months. After crossing the track here, I had to go on the south side of track, cross the main track, and then cross back again to get to the Arthur road. I crossed the rail road track that morning three times without difficulty. I cannot swear that the injury to the horse's hoof was occasioned by this accident. The hoof came off. I think that it was not more than six or seven days after the accident that I took the horse to the shop. The smith's name is P. Carlin. His shop is between Lake and Washington streets on Franklin Street.

The plaintiff's Counsel further to maintain and prove the said issue on his part then called

John Lord.

Who being examined, testified as follows.

I am book keeper for Mc. Cabe and Hughes. I remember the accident. I was going to the packing house on the morning of the accident, and when about 20 feet from the alley I saw the train coming round the curve. I then turned round, saw a man turn the horses off the track, and saw 3 or 4 men run up the track making signals to the engineer. I heard the whistle sounded. The train was at that time from one hundred to one hundred and fifty feet from the wagon. The train was not running as fast when it struck the wagon as it had been before when I first saw it. I think it ran past the wagon fifty or sixty feet before it partially stopped. It did not come to a full stop. I have not measured the distances.

The defendant's Counsel further to maintain and prove the said issue on its part, then cross examined said witness, who thereupon testified as follows.

I think the wagon was at least one hundred feet from the engine when the whistle sounded I know that when the engine struck the wagon it was running slower than when I first saw it. Two or three cars passed the wagon after the collision. I think that the men who were making the signals were about one hundred feet from the wagon. One man said he

ran up the road intending to turn the cars on the switch track. I heard the bell ringing; I am sure of this. The train was running faster than trains do when they go out of the city. I don't know whether the engineer was looking out. I thought if he had been, the accident would not have happened.

The counsel for the plaintiff further to maintain and prove the said issue on his part then called

Philip Carlin,

who being examined, testified as follows;

My business is horse shoeing. My shop is No. 67 Franklin Street. I have been in the business 28 years, and on my own account 18 years. I am familiar with the effect of bruises on horses' hoofs. I know Thomas Hogarth. I shod a horse for him last Spring, and saw the hoof examined. I thought the hoof of the horse had been bruised internally, and put on a bar shoe. The foot had been jammed from the outside, and had hurt the inside. An injury of this sort would not show itself for some time. I think this horse was hurt in that way.

The defendant's counsel further to maintain and prove the said issue on its part, then cross examined said witness, who thereupon testified as follows.

I saw no other symptoms than those occasioned by a bruise. I cut into the hoof. I can't tell exactly when Hogarth paid me, and I made no charge of it on my books. It was nine or ten months ago. I think it was earlier than May last. Bruise will produce festering in horses' hoofs. This hurt would not probably show itself in three or four days. This hurt must have originated from a blow on the bottom of the hoof. A strain of the pastern would not have affected it this way. A blow producing this effect must have come on the bottom of the hoof. The horse may have hurt himself this way on a stone. This horse was in other respects sound. I noticed no bruises elsewhere. I considered the foot badly jammed, and the blow must have been very severe under the hoof. I have known several cases where horses pulled their hoofs off from being caught in the railroad track.

The Counsel for the plaintiff further to maintain and prove the said issue on his part then called

Patrick O'Mara,

who thereupon testified as follows.

I live in Chicago, have lived here four years next June. Last March I was teaming for Charley Walsh. I remember the injury to Hogarth's team. I saw the accident to the plaintiff's

wagon. I was that morning hauling hams with one of Walsh's teams. There were four teams hauling that day. Two of Walsh's and two of Hogarth's Both of Walsh's teams had crossed the rail road track. One of Hogarth's teams got stuck on the track. My team was on the Archer road at the time. I went back to help Hogarth's team. We were unable to move it. I said that we had better get another team to help us. The driver of Hogarth's other team was bringing his horses to help us, and Enright Hogarth's team that was stuck, had gone to get the whiffletrees off the other wagon. I said we were in a bad fix and had better get off quick. I saw the train coming round the curve; then I ran up the road making motions. There were two or three others, I couldn't say how many. I hallooed to somebody to stop the train, and running back to the wagon took hold of the horses that were stalled and swung them round off the track. I ran up the track about one hundred feet or more. I took off my hat and made motions with it. It was a clear morning and there were no obstructions in the way. I paid particular attention. The engineer was looking out. The bell was ringing. The whistle was not sounded until he was within fifty feet of the wagon at most. The train was almost striking the horses when the whistle

sounded. It did not sound before. The train did not slacken its speed after it left the curve until it struck the horses. I ran up and back as rapidly as possible. I cant swear how fast the train was running. I think it was running some 8 or 10 miles an hour. I saw the horses were in a bad fix, and that the train would kill them unless I did something, and then I swung them round. He would have struck the horses before he touched the wagon if I had not swung them off the track.

The Counsel for the defendant further to maintain and prove said issue on its part, then cross-examined said witness, who thereupon testified as follows.

I motioned all the way from the time I left the horses. I think that the train was all of four or five hundred feet off when I made the first motion. When it first came in view it must have been all of 400 feet away. After I first saw the train and before it struck the wagon it was a considerable while. I couldn't tell exactly how long it was. I think it was more than five minutes. I think the train was running eight to ten miles an hour, and that it was all of five minutes running from the curve to the wagon. I do not know whether my statements agree, but I swear they are true to the best of my

knowledge. The engineer made no effort to stop that I could see. I should think the wagon was distant 580 feet from the curve. The crossing was neither bad nor good. It was not as bad as half of them are. I got my own team over without difficulty that morning. All the wheels of the wagon were free of the track except the hind wheel. The bell of the engine was running.

The Counsel for the plaintiff further to maintain and prove the said issue on his part, then called

Walden Schuller

who being examined, testified as follows.

I have lived in Chicago in the winter time for seven or eight years, in the summer time I lived in the country. I was at one time a brakesman for the Pittsburgh and Fort Wayne Rail Road Company. I worked as brakesman about one month. I was never brakesman any where else. I have been in the employ of the Chicago Burlington and Quincy Rail Road Company. I remember the accident to Hogarth's team. I had been helping the boys to load their teams. The wagons started from the packing house, one of them got stuck on the track. I then went in a house and came out again. One man went for another team. I saw the cars coming before the team came. By the time this team came to the wagon the cars were coming round the

curve on the corner of the Archer road. I thought I would give a swing to engineer signal to stop. I saw the engineer looking through the window. I ran about forty or fifty feet to give the signal. Train was about four or five hundred feet off when I first saw it. I hallooed and kept swinging all the time. The engineer gave no attention. I did not hear the whistle sounded till he was near the wagon. The train didn't slack till the whistle sounded; the whistle was to slack up brakes. The train was running at first twelve miles an hour, then it ran from nine to ten miles an hour. The men did everything they could to get the wagon off the track. The track was clear so the engineer could see the wagon. I could see clear up to the cars.

The counsel for the defendant to maintain and prove the issue on its part, then cross examined said witness, who thereupon testified as follows.

When I first gave the signal the train was 400 or 500 feet away. The train was just coming round the curve, when I first saw it, it was 600 feet away. I was standing on side walk. I saw other boys hallooing. When I first saw train from time of giving swing was about five minutes. Train was running about five miles an hour. I am not a very good judge of the speed of a railway

train. The bell was ringing. After the accident I was standing by the wagon. The train ran nearly past the wagon before it stopped. After it struck the train ran slower and partly stopped. After from four to six cars passed the wagon I saw the wagon smashed all to pieces.

The plaintiff having here closed the testimony on his behalf,

It was admitted by the plaintiff that the defendant had a right to use the street and track upon which its train was moving, and that it was using said street and track at the time of the accident.

The Counsel for the defendant to maintain and prove the issue on its part, then called

George Deacon.

who being examined, testified as follows.

I reside in Chicago, and have lived here eleven years. I am an engineer by profession, and was in charge of defendant's train at the time of the collision. The accident occurred a few minutes before nine O'clock, about the 15th or 16th of March last. I was coming into the city in charge of a freight train. It was a very heavy train composed of 24 cars. I got on the Archer road bridge and rounded the curve when I saw a wagon across the track. Half the wagon was across the rail road, the other half had got over.

The hind wheel was on the track, the front wheels were over and free of the track. As soon as I saw the wagon I sounded the whistle twice: During this time I ran about fifty feet, and then I saw a man leave the wagon and run towards me making signals by waving his hand. I whistled down brakes. This was the third time I whistled. I whistled down brakes so soon as I saw that the wagon did not move. I then reversed my engine, and soon after this I struck the wagon, turned it it on its broadside, and shoved it off the track. I stopped my train after some three cars had passed the wagon. The third or fourth car from the front of the train was abreast the wagon when I stopped. When I first saw the wagon I had no reason to suppose it was struck. I saw no person near it at the time I first saw the wagon as I was coming round the curve. I was not 300 feet from the wagon when I first saw it. I could not see it sooner because of the curve and the steam from my engine. The steam was flying towards me. I did not know the wagon was stalled. When I saw that the wagon was not going to get out of the way I used all the means in my power to stop. No signal man was more than ten feet from the wagon on the track. I whistled twice as soon as soon as I saw it. I must have run some fifty feet when a man

came away from the wagon and made motions to me with his arm. No person made any signal to me before I got to the curve. There was no one sent above the curve to signal me that the wagon was struck. If I had got a signal in time I could have stopped the train before the collision. I was running about five miles an hour, not so fast as six. The bell was ringing. I could not possibly have stopped the train after receiving the signal and before reaching the wagon. There is a very heavy down grade at the place where the accident occurred. I ran over the Archer Street bridge that morning at a rate I think not greater than four miles an hour. There is a very heavy grade on each side the bridge. As soon as I received the signal I whistled down brakes, and reversed my engine, and set my engine brakes as soon as I had reversed the engine.

The counsel for the plaintiff to maintain and prove the issue on his part, then cross examined said witness, who thereupon testified as follows.

As soon as I got the signal I reversed the engine. I whistled twice as soon as I saw the wagon. There might be seven or eight seconds between the whistles, that is, the two first whistles were not a second apart. I whistled

for the wagon to get out of the way. I ran about fifty feet after seeing the wagon before I whistled for brakes and reversed my engine. There were 24 cars on the train, each about 40 feet in length. I did not see the wagon as soon as I would have done but for the curve in the road and the steam from the engine. Then when I got out of the curve I saw the wagon. From the curve to the Archer road bridge is from 260 to 270 feet. There is a down grade from the bridge on both sides. The track naturally raises itself for some distance on each side the bridge in order to approach it. If signal is given, the brakes on and the engine reversed at five miles an hour, I might have stopped the train in going 250 feet. That train might have been stopped in 260 feet. If I had known when I first saw the wagon that it could not get out of the way, I might have stopped the train before reaching the wagon. I saw the man who gave me the signal when I reversed my engine. He was close to the crossing, perhaps not more than 15 feet from it. I was over 200 feet from the man when I first saw him. I was about 270 feet from the wagon when I first saw it. I have run over the track so often that I know the distances pretty well, was about 200 feet from man when I saw him

give signal. He was about 15 feet from the wagon. I was about 215 feet from the wagon. When I came to a stop the 3d or 4th car was abreast of the wagon. The cars are say 35 feet long. The engine and tender fifty feet long. There was nothing on the track to obstruct my view. The curve bends to the south coming off the bridge. When on the other side of the curve there was nothing between the wagon and me but the curve. I couldn't see before leaving the curve for the buildings. There were buildings on the other side of the curve which obstructed my view. I had not run over this end of the road before that morning for three years. I had two brakesmen, I usually have two. I had a fireman on the engine, he put on the engine brake and rang the bell. I told him to do so. I know the engine brake was set. I didn't see him do it. When the train stopped I got off the train and found the cylinder cocks knocked off. I had good brakes on the engine, they were not steam brakes. Steam brakes are used only on passenger trains. They cannot be used on freight trains. I think they are not used on freight trains on any road in Chicago. They may be used on the Burlington and Quincy road, but I am not certain about it. I believe they tried them but found that they

would not work. I never used them on the Chicago and Alton Rail Road.

The Counsel for the defendant further to maintain and prove the paid issue on its part, then called

J. C. Mc. Mullen.

who, being examined, testified as follows.

I reside in Chicago, and am the Local Freight Agent of the Chicago and Alton Rail Road Company. I was on the train at the time of the accident. I was in the caboose car at the end of the train. I did not see the engine strike the wagon. I saw it after the accident. I have had experience in railroading for eight years, and consider myself competent to give an opinion as to the speed of a railway train. From my experience I judge that this train was running between 4 and 5 miles per hour. I have heard of a great many brakes, but have had no experience in their use. The brakes in use on this train were the same that are in use in this state on freight trains. I never heard of patent brakes being used on freight trains. They cannot be used on ordinary freight trains. The slack of the chain is too great. It would be impossible to use them on a train as long as the one in question. Conductor Van Allen was in the caboose car with me. I got out at the place of the accident.

The train came to a stop. I then got out, and the train then went slowly on again and stopped. If the person in charge of the wagon had sent a signal man on the track each way to notify approaching trains of the situation of the wagon, I think the accident might have been avoided

The Counsel for the plaintiff to maintain and prove said issue on his part, then cross examined said ~~the~~ witness, who thereupon testified as follows.

At that time the number of freight trains coming daily into the city averaged 3 or 4 in 24 hours, and passenger trains on the Chicago and Alton Rail Road. The same number of trains went out on this road.

The Counsel for the defendant further to maintain the said issue on its part, then called

Charles Van Allen.

who being examined, testified as follows.

I live at Joliet; am conductor of freight train on the Chicago and Alton Rail Road. I was running the train at the time this accident occurred. I was in the caboose car at the rear end of the train. I have been a conductor two years in the Company's employ, and an employee of the Company the past ten years, and consider myself a good judge of the speed of

railway trains. This train at the time of the accident was running at a rate not exceeding five miles an hour. The first I knew of the matter I felt the reverse of the engine. I was sitting in the seat and it nearly threw me over. I jumped up at once, caught hold of the brake and set it. The brake is inside the caboose.

The plaintiff's Counsel to maintain said issue on its part, then cross examined said witness, who thereupon testified as follows.

The first intimation I had of the danger was the reverse of the engine. I heard no whistle at the reverse: I tightened the brakes.

The defendant's Counsel to maintain and prove said issue on its part, then resumed the direct examination of this witness, who thereupon testified as follows.

There were 24 cars on the train averaging 26 feet to the car from bumper to bumper. I think the whistle might have been blown and I not hear it.

The plaintiff's counsel to maintain and prove said issue on his part then resumed the cross examination of this witness, who thereupon testified as follows.

A sharp whistle might have gone the whole length of the train. I was talking with Mr. Mullin. The whistle for brakes is peculiar, and

I should most likely have heard it.

The defendant's Counsel to maintain and prove the issue on its part, then called

John C. Raylund

who being examined, testified as follows.

I live at Bloomington. Am a brakesman on the freight trains of the Chicago and Alton Rail Road Company. In March last I was firing engine number one, and was on the train when the accident occurred. As we came round the curve, I saw by the guage that we had hardly steam enough on, and I stooped down to put coal on the engine. Just as I shut the door of the fire box Mr. Deacon reversed the engine. Soon after we struck the wagon, ran by it about four car lengths, and came to a full stop. I set the brakes on the engine myself. I did not see the wagon until we went fifty or sixty feet from it. I heard the whistle sound three or four times. The train was running some five miles an hour.

The plaintiff's Counsel to maintain and prove said issue on his part, then cross examined said witness, who thereupon testified as follows.

My attention was first attracted by the whistle. The whistle sounded three or four times before the engine was reversed. I am sure it sounded twice before the engine

was reversed. It might have been half dozen times. I'll risk saying three times. It might have been half dozen, I'll swear it was three times.

And no further or other evidence being offered by either of the said parties, the said plaintiff moved the said Court upon the evidence aforesaid, to direct the jury as follows.

I The question of negligence is one of fact for the jury to determine, and in this case the jury must determine from the situation of the parties, and all the surrounding circumstances, whether those having charge of the defendant's train were guilty of negligence in not stopping the train as to as to have avoided the accident.

It will be presumed that the servants of a railway company are cognizant of the various road crossings on the line of their road, and that persons are liable at all times to be in the act of passing the point of intersection, and they should be on the look out so as to avoid injury to others who may be passing the road, so far as may be done by the use of all reasonable efforts. And when danger is seen or might be seen by the exercise of ordinary prudence by those having charge of rail road trains they should be held to all reasonable efforts to avoid it.

II If the jury shall believe from the evidence in this case that the engineer on the defendant's

trains might by the exercise of reasonable care and diligence have discerned the plaintiff's wagon on the rail road track, and that it was loaded, and standing there under such circumstances as to lead a reasonable mind to the conclusion that it was stalled there and could not be removed, and could have stopped the train before it reached the wagon, and failed so to do, these are facts which the jury should consider in determining whether or not the defendant is guilty of negligence.

III. It is the duty of those having the charge of rail road trains approaching the City of Chicago to keep a constant look out for objects in the way of their trains, and to use all reasonable exertions to prevent a collision with such objects, and if the jury shall believe from the evidence in this case that the injury complained of could have been avoided by the exercise of reasonable care on the part of those having charge of the defendant's train, and the plaintiff was not guilty of negligence, or if he was guilty of negligence not amounting to gross negligence, and the defendant was guilty of gross negligence, then the jury should find for the plaintiff, and in passing upon the question of such reasonable care on defendant's part, the jury should consider among other things whether or not

the engineer in charge of defendant's train ought to have judged from all the circumstances in the case, and in the exercise of proper care and attention that the plaintiff's wagon was stalled upon the rail road, and could not be at once removed.

All of which instructions were by the Court given to the jury as requested by the plaintiff's Counsel.

And thereupon the defendant's Counsel requested the Court upon the evidence to instruct the jury as follows.

I. The plaintiff's right to recover in this case depends upon two concurring facts;

1. The defendant must be chargeable with some degree of negligence.

2nd The plaintiff must have been entirely free from any degree of negligence which contributed to the injury; that is of any negligence without which the injury would not have happened.

Which instruction the Court refused, and thereupon the defendant's Counsel excepted on behalf of the defendant.

The defendant's Counsel then requested the Court to instruct the jury.

II. If in the enjoyment of their lawful rights by two persons at the same time and place, reasonable care is exercised by both, and an injury

accrues to one of them it must be borne by him as a providential visitation. If such care is exercised by neither and one is injured, he must bear it for he was himself in fault, and in no case is the plaintiff entitled to recover where his own want of care contributed to the injury.

which said instruction the Court refused as directed, but gave to the jury modified as follows.

If in the enjoyment of their lawful rights by two persons at the same time and place, reasonable care is exercised by both, and an injury accrues to one of them, it must be borne by him as a providential visitation. If such care is exercised by neither and one is injured, he must bear it for he himself was in fault; unless the party committing the injury was guilty of gross negligence; in which case the injured party might recover if he had been guilty of some negligence, not amounting however on his part to gross negligence.

To which refusal of the Court to give said instruction and modification of the same the defendant's Counsel on its behalf thereupon excepted

The defendant's Counsel requested the Court to instruct the jury

III "If the jury believe from the evidence that the plaintiff's wagon was fast upon the rail

road track so that his horses were unable to move it therefrom, and that he knowing this fact, and that the defendant's train was approaching, took no pains to notify defendant's servants that his wagon was fast, until it was too late to avoid collision, then he was guilty of negligence which contributed to produce the injury, and cannot recover therefor; which said injunction the Court refused to give to the jury, and thereupon the defendant's Counsel excepted.

The defendant's Counsel then requested the Court to instruct the jury

IV. If the jury belive from the evidence that the defendant's servants were running its train according to law, and that as soon as they became aware that the plaintiff was unable to remove his wagon from the track, they took the proper precautions to prevent collision, and that notwithstanding this precaution the collission occurred which injured the plaintiff's wagon, then the defendants were guilty of no negligence which entitled the plaintiff to recover damages of the defendant.

Which said instruction the Court refused to give as requested but modified the same by inserting after the words "collision occurred" the words "without any fault on the part of the defendant."

To which refusal to charge and modification

thereof defendant thereupon by its counsel excepted.

The defendant's Counsel then requested the Court to give the following instruction to the jury.

V. The plaintiff and defendant were each lawfully and of right travelling the street where the accident occurred. Each had the right at all times to exercise this privilege, but so as not to interfere with or deprive the other of its legal privileges. In the exercise of this right each was bound to use the same amount of care and prudence to avoid collision. The parties must be held on both sides to the use of every reasonable effort to to avoid a collision, and in default of such efforts must be held responsible for the consequences of injuries inflicted upon others or received by themselves when they might have avoided them.

Which said instruction the Court modified by adding the words "but a party guilty of gross "negligence would be responsible for damages by "him committed even if the other party were guilty "of some negligence not amounting however to "gross negligence on his part."

To which modification of said instruction defendant by its Counsel thereupon excepted.

The defendant's Counsel requested the Court to give the following instruction to the jury.

VI. If the jury believe from the evidence that the

defendant's servants not knowing that plaintiff's team was unable to draw his wagon from the rail road track, supposed that the wagon would get off the track befor the train reached it, and that as soon as said servants discovered the real state of the case they used the proper means to avoid collision, then defendants were guilty of no negligence which under them liable in damages to the plaintiff.

Which said instruction was refused by the Court, and defendant thereupon by its Counsel excepted.

The defendant's Counsel then requested the Court to give to the jury the following instruction.

VII If the jury believe from the evidence that the plaintiff had so overloaded his wagon as to render it impossible for his horses to draw it across the rail road track, and that but for this the accident would not have occurred, then this is such negligence on his part as will prevent a recovery for the damage done by the collision.

Which said instruction the Court refused and thereupon the defendant by its Counsel excepted.

The defendant's Counsel then requested the Court to give the jury the following instruction.

VIII If the jury believe from the evidence that the plaintiff failed to use his utmost effort

to extricate his wagon from its dangerous position upon defendant's rail road track, and that he gave no notice by signal or otherwise to those in charge of the approaching train of his inability to move his wagon until it was too late to avoid collision, and that but for this failure to give notice to the defendant's servants, the accident might have been avoided, then he was guilty of negligence which contributed directly to the production of the injury, and cannot recover.

Which said instruction the Court refused to give, and thereupon defendant by its Counsel excepted.

The defendant's Counsel requested the Court to give the following instruction, which was given as requested.

IX. The measure of damages in this case is the actual cost of repairing the wagon provided it was as good after repair as before it was broken; the loss of the trip in which the plaintiff was engaged; the use of the wagon until by due diligence he might have had it repaired; and the actual difference in money value of his horses before they were injured and at the time when they were again in a condition to be used; the cost of care and treatment of them; and the hire of other horses in their stead until they were fit for work. The plaintiff cannot recover

for conjectural or possible profits which he might have received from the use of his horses, but for the injury to them.

The said issue was thereupon by the Court submitted to the jury upon the evidence and under the instructions of the Court aforesaid, and thereupon the jury found the issue aforesaid for the plaintiff, and assessed his damages in the sum of one thousand dollars.

Whereupon the Counsel for the defendant moved said Court to set aside said verdict and for a new trial upon the issue aforesaid, and assigned the following reasons in support of said motion.

1st. Because the Court refused to give the first instruction asked by the defendant.

2nd. Because the Court refused the third instruction asked by the defendant.

3d. Because the Court refused the sixth instruction asked by the defendant.

4th. Because the Court refused the seventh instruction asked by the defendant.

5th. Because the Court refused the eighth instruction asked by the defendant.

6th. Because the Court erred in modifying the fifth instruction asked by defendant.

7th. Because the Court erred in modifying the second instruction asked by the defendant.

8th. Because the Court erred in modifying the fourth instruction asked by the defendant.
9th. Because the verdict of the jury is contrary to law.
10th. Because the verdict of the jury is contrary to evidence.
11th. Because the damages awarded by the jury are exorbitant and excessive.

And afterwards at the February Term of said Court held at the Court House in the city of Chicago, on the third day of March, 1865, the motion made by the defendant's Counsel for a new trial on the said issue came on to be heard, and the Court having heard the argument of the Counsel thereon, as well of the defendant as of the plaintiff, and being fully advised in relation thereto, overruled the said motion upon condition that the plaintiff remitted to the defendant two hundred dollars of the damages awarded by the jury; and the plaintiff thereupon remitting to the plaintiff said sum of two hundred dollars, the Court overruled the motion of the defendant for a new trial, and entered judgment upon the verdict of the jury against said defendant for the sum of eight hundred dollars and the costs of said suit.

To which ruling and opinion of the Court the defendant thereupon excepted, and prayed an appeal to the Supreme Court, which was allowed by the Court upon the defendant's filing

its own bond without security, (security being waived by the plaintiff) within twelve days from the third day of March, A. D. 1865, in the sum of twelve hundred dollars, and the defendant was allowed twelve days in which to tender his bill of exceptions, for signature by the Court. And inasmuch as the said several matters so produced and given in evidence, on the part of said defendant, and by its Counsel aforesaid, objected and insisted on in the trial of said Cause do not appear by the record of the verdict aforesaid, the said Counsel did then and there propose the aforesaid exceptions to the opinion of the said Court, and requested him to put his seal to this Bill of Exceptions, containing the whole of the evidence submitted upon the trial of said issue, according to the form of the statute in such case made and provided; and thereupon the said Circuit Judge at the request of the said Counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the statute aforesaid, in such case made and provided, on this 14th day of March, in the year of our Lord one thousand eight hundred and sixty-five.

Easties S. Williams (Seal)

Judge

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of Original writ and Officers Return thereon declaration, plea, order and judgment of record & appeal bond and bill of Exceptions in a certain cause lately pending in said Court, on the Common Law side thereof, wherein Thomas Hogarth is plaintiff and The Chicago and Alton Rail Road Company is Defendant



In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this twenty fourth day of March A. D. 1865.

Wm L. Church Clerk.

Fees- Fee record &c $19.70
Stamps $19.25

See assignment of Error
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The Chicago and Alton Rail Road Company appellant
vs
Thomas Hogarth the appellee } April Term 1865

And now at this term of this Court comes the appellant in said case the Chicago and Alton Rail Road Company by A. W Church its attorney and saith that in the records and proceedings aforesaid and also in giving the judgment aforesaid there is manifest Error in this viz.

1. That the Court Erred in refusing to give the first instruction asked by the Defendant.
2. That the Court Erred in refusing the third instruction asked by the Defendant.
3d That the Court Erred in refusing the sixth instruction asked by the Defendant
4th That the Court Erred in refusing the seventh instruction asked by the Defendant.
5th That the Court Erred in refusing the eighth instruction asked by the defendant.
6 That the Court Erred in giving the Defendants fifth instruction as the same was modified by the Court.
7 That the Court Erred in giving the second instruction of the Defendant as modified by the Court
8th That the Court Erred in giving the fourth instruction of the Defendant as modified by the Court.
9th That the Court Erred in overruling the motion of the Defendant for a new trial
10 That the Court Erred in rendering judgment for the plaintiff against the Defendant.

And the said Appellant prays that the judgment aforesaid, for the Errors aforesaid, and other Errors in the record and proceedings aforesaid may be reversed annulled and held for nothing and that this cause be remanded &c

A W Church Attorney for Appellant

The Chicago & Alton R.R Co Appellant vs Thomas Hogarth Appellee

And hereupon afterwards at this term of the Court the said Thomas Hogarth the appellee by his attorneys, Miller and Lewis comes into Court and says that there is no Error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and he prays the Court now here to proceed to examine as well the record and proceedings aforesaid, above assigned for Error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed &c

Miller & Lewis
attorneys for Appellee

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The Chicago & Alton
R. R. Co
v
Thomas Hogarth

Record Errors & Joinder

Filed April 3d 1865
L. Leland
Clerk