

No. **12169**

Supreme Court of Illinois

Chicago & Rock Island
R.R.Co.

vs.

Ward

71641  7

81
Chicago R. I. R. Co.

vs
Daniel Ward

Pl
Affirmed
S. E. Miner
each judge

12169

Held over for
opinion of
other judges

1855

1 LaSalle County Court June Term A.D. 1854

State of Illinois }
LaSalle County } p

Pleas proceedings and
judgments to held and taken in and before
the LaSalle County Court in the State of
Illinois at the Court House in Ottawa in the
County of LaSalle of June Term, to wit, on the
fifth day of June in the year of our Lord one
thousand eight hundred and fifty four - and
of the Independence of the United States of
America the seventy eighth -

Present, Henry S. Cotton Judge
Samuel W. Raymond Clerk
Richard Stone Sheriff

Be it remembered that on the 4th day of May
1854 a precipe was filed in the office of the Clerk
of the Said County Court - which precipe is in
the words and figures following, to wit,

State of Illinois } the County Court thereof
LaSalle County ss. } To June Term A.D. 1854

Daniel Ward } Action of Covenant
vs } Damages \$150.00
Chicago and Rock Island }
Rail Road Company } Issue Summons in
} Covenant as above,

against above named defendants, returnable
to June Term Anno Domini 1854

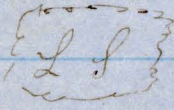
To, —

SW Raymond Esqr.
Clerk County Court
May 4th 1854,

Bushnell & Gray
Atty for Plff

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On the said fourth day of May A.D. 1854
a summons was issued, which is in the
words and figures following to wit;

The People of the State of Illinois, Your Sheriff
of our County of LaSalle Greeting
 We Command you that you summon
The Chicago and Rock Island
Rail Company,

if they shall be found in your County personally
to be and appear in our LaSalle County ~~Circuit~~
Court, before our Judge thereof, on the first day
of the next term thereof of said Court, to
be held at the Court House in Ottawa, on
the first Monday in June next, at ten
O'clock in the forenoon, there and then to
answer unto Daniel Ward in a plea of
breach of lease want to the damage of the
said Daniel Ward of one hundred & fifty
dollars - And have you then there this writ
and the manner in which you shall have
executed the same,

In witness whereof, we have caused the Seal
of our said Court to be hereto affixed and attested
by Samuel W. Raymond, our clerk thereof at
Ottawa fourth day of May 1854

S. W. Raymond clerk

Enclosed " Executed this writ by sending the
same to & by leaving a copy with Thos. D.
Brewster as agent of C & R. I. R. Co,

May 5th 1854.

R. Thorne Sheriff

Law + Ret. .60
16 Mils .80
copy 75⁰⁰
\$1.90

Filed May 6th 1854

S. W. Raymond CLK "

Be it also remembered that on the 22^d day of May A.D. 1855, a Declaration was filed in the office of the Clerk of the County Court of said County in the words and figures following, to wit;

State of Illinois } In County Court thereof
 LaSalle County } to June term A.D. 1854
 Declaration in Covenant

Daniel Ward

vs

Chicago & Rock Island
 Rail Road Company

The Chicago and Rock
 Island Rail Road
 Company, defendant
 was summoned to answer

unto Daniel Ward plaintiff in a plea of breach of Covenant, and thereupon the said Daniel Ward plaintiff by Bushnell & Gray his attorneys complains of said Chicago and Rock Island Rail Road Company, defendant, for that whereas the said defendant heretofore, to wit, on the Sixth day of December in the year of our Lord, one thousand eight hundred and fifty one, before the Honorable Theophilus L. Dickes Judge of the Circuit Court in and for LaSalle County aforesaid, filed at his Chambers at Ottawa in said County, filed in said Court against the plaintiff his certain petition praying for the condemnation and appropriation of a strip of land of the plaintiff herein after described, for the use of the rail-road of defendant, and praying also for the appointment of three disinterested freeholders residents of said County, as appraisers

to assess the damages, which the plaintiff would sustain by reason of the condemnation and appropriation by said defendant, in pursuance of the act of incorporation of defendant, and for the use of the rail-road of defendant, of a strip of land of the plaintiff, fifty feet wide on each side of the center line of the tract of the rail-road of defendant, commencing at a point four chains and eighty seven links north of the south west quarter corner of the south east quarter of section eighteen, township thirty three, north of range five east of the third principal meridian, and running thence south seventy three degrees east eight hundred and sixty nine and four tenths feet containing one and ninety nine hundredths acres, extending through the lands of plaintiff, and situate in LaSalle County aforesaid,

And whereas such proceedings were had in the premises, that afterwards, to wit, at the February term of said Circuit Court, in and for the County aforesaid in the year of our lord one thousand eight hundred and fifty two, held at the City of Ottawa, in said County, before the Honorable Theophilus L. Dickey, then Judge of said Circuit Court, the said Court made an order in the premises, and now to the Court here shown, as follows, to wit;

And thereupon the said Giles W. Jackson, David C. Underhill, Abiel Stebbins, Michael Stillman, Wm H. W. Cushman and Daniel Ward, by Hollister, Hoos and Champin their attorneys, each come and resisted said motion and moved the Court to modify the same, upon hearing the proofs and allegations of the parties, it is ordered, by the Court upon the motion of said Company

that the assessments of damages in each of said
 cases be confirmed and approved, but upon
 the following basis, viz; that, said rail-road com-
 pany shall erect and perpetually maintain on
 each side of said rail-road, across each of said
 tracts of land, a good and substantial fence,
 and suffer the owner of each of said tracts of land,
 his heirs and assigns, to join the said fence without
 charge, that said company shall construct and
 maintain perpetually across the said road
 on the land of the said Giles W. Jackson two
 secure and convenient crossings for cattle and
 carriages with such embankments or excavations
 on each side of the road, as may be necessary to
 make the crossings convenient for cattle and
 carriages, that, said company shall construct
 and maintain across the said road similar
 crossings as follows, two upon the land of
 said David C. Underhill, one upon the land
 of said Abel H. Stebbins, two upon the land
 of said Michael Killela, three upon the land
 of said William H. W. Cushman, one upon the
 land of said Daniel Ward, and one upon the
 land of said Hiram Higby, and that the
 same shall be perpetually kept and main-
 tained free and open for the use of said per-
 sons, their heirs or assigns, as appurtenances to
 the said lands, and to the lands adjoining
 the same now owned by said persons respec-
 tively; that said rail-road company shall
 not (until they have constructed a fence on each
 side of said rail-road as above provided) so
 lay open or remove any fence upon any of
 the land mentioned in said report as to

expose any field enclosed thereby, to the incursion of cattle from without, or so as to permit the escape of cattle from within the same: that said Rail Road Company shall by deed duly executed and delivered to each of said parties, or filed in the office of the Clerk of this Court, accept the terms and conditions imposed by this order, as the basis of the assessment of Damages and bind itself to the performance of the same, It is further ordered that this order to accept and confirm said report and assessment of damages shall confer no right upon the Company aforesaid in any case until the damages in such case be paid and such deed executed provided that the acceptance of the money assessed as damages shall in each case be a waiver of all exceptions to the form or substance of said deed or obligation in such case, It is further ordered, that this order confirming said report shall stand for naught in each case, unless the amount of damages in such case be paid, and the said deed be executed by said Company on or before the first day of January next - It is further ordered, that said Rail Road Company pay the costs and charges of this proceeding to be taxed -

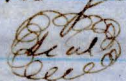
And whereas afterwards, to wit, on the twenty second day of September in the year of our Lord one thousand eight hundred and fifty two, the said defendant filed in the office of the Clerk of the Circuit Court in and for said LaSalle County, his certain indenture sealed with his corporate seal, and now to the Court here shown as follows, to wit;

Whereas the Hon^{ble} Theophilus L. Dickey did at the February Term of the LaSalle Circuit Court for the County of LaSalle, and State of Illinois, in the year of our Lord one thousand eight hundred and fifty two, in a certain proceeding wherein the Chicago and Rock Island Rail Road Company were plaintiffs and Giles W. Jackson, David C. Underhill, Abel W. Stebbins, Michael Stillala, Mrs A. W. Cushman, Daniel Ward and Hiram Higley were defendants, and in a certain other proceeding ^{wherein} at the same Term, the said Chicago and Rock Island Rail Road Company were plaintiffs and James Alexander, Samuel Millikin, George Walbridge, William Parr, John Burton, Lyman D. Canary, the heirs of Christopher Long, deceased, and the heirs of Levi Giliff deceased, and Cyrus Shaver, were defendants, did in said several proceedings command, that said Chicago and Rock Island Rail Road Company in order to avail itself of the benefits of an order of said Court, confirming the appraisal of damages for right of way through the lands of said parties, - should execute and deliver to each of said parties, or file in the office of the Clerk of said Court, a deed accepting of the terms of said order, as the basis of approving said assessments of damages in said cause, and also bind itself to comply with the terms of and conditions of said order, Now therefore be it known that said Chicago and Rock Island Rail Road Company does obligate and bind itself to and with each of said parties to accept, and does accept, the terms of said order, and does bind itself to comply with and perform the conditions of said several orders of said ^{Court} Court

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Court of said LaSalle County in the premises,

In testimony whereof the said Chicago and Rock Island Rail-Road Company has caused their corporate seal to be here to affixed, and this deed to be signed by their President and Secretary, the fifteenth day of September in the year aforesaid,



N. D. Edwood

Sec. C. & R. I. R. R. Co.

James Grant,

Acting President

And the plaintiff says that ~~the~~ said defendant did, in and by ^{this} said indenture, sealed with his corporate seal as aforesaid, accept all the terms and conditions of the order aforesaid of said Circuit Court, and bind himself to the full performance of the same, and did in and by his said indenture covenant promise and agree to and with the plaintiff, to erect at his own cost and charge, a good and substantial fence on each side of the track of the rail-road of said defendant, and within fifty feet of the center line of said track, across the strip of land aforesaid, so condemned and appropriated to the use of the defendant as aforesaid, and the said defendant did, in and by his said indenture, further covenant promise and agree to and with the plaintiff, to erect at his own cost and charge, a good and substantial fence on each side of said rail-road, across the land of plaintiff, and to suffer the plaintiff to join the said fence, so to be erected by the defendant as aforesaid without cost or charge to the plaintiff, and the said defendant did, in and by his said indenture, further covenant, promise and agree to and with the plaintiff, to construct and

erect. at his own Cost and Charge, upon the land of the plaintiff, across which the track of the said rail-road of defendant is laid, one secure and convenient crossing for cattle and carriage, with such embankments or excavations on each side of said road, as might be necessary to make the said crossing secure and convenient as aforesaid, and to keep the same free and open for the use of the plaintiff, his heirs and assigns, as appurtenants to said land of plaintiff adjoining the aforesaid strip of land, so condemned and appropriated to the use of the said rail-road of defendant as aforesaid; and the said defendant did, in and by his said indenture, further covenant, promise and agree to and with the plaintiff, to construct and erect, at his own cost and charge, upon the land of plaintiff, across which the track of the said rail-road of defendant is laid one secure and convenient cattle-guard for cattle on each side of said road, with such embankments or excavations on each side of said road, as should be necessary to make the said crossing secure and convenient as aforesaid, and to keep and maintain the same free and open for the use of the plaintiff, his heirs and assigns, as appurtenants to said land of plaintiff, adjoining the aforesaid strip of land, so condemned and appropriated to the use of the said rail-road of defendant as aforesaid, and the said plaintiff did, in and by his said indenture, further covenant promise and agree to and with the said plaintiff, that the defendant would not so lay open or remove any fence upon the land of the plaintiff across which the track of the said rail-road of defendant was to be laid.

as aforesaid, so as to expose any field enclosed thereby and the plaintiff avers that his said lands and fields were enclosed by a fence, to the incursion of Cattle from without or so as to permit the escape of Cattle from within, the same until the defendant had constructed a fence upon each side of said rail-road of defendant, as aforesaid, to wit, at LaSalle County aforesaid, And the plaintiff avers that the Cattle guards aforesaid were in fact necessary to make said crossing secure and convenient for cattle as aforesaid, And the plaintiff further avers, that he accepted of and from the said defendant, the sum of eighty five dollars, the sum assessed to him by the appraisers appointed as prayed for in the petition of defendant as aforesaid, as the damages sustained by the plaintiff by reason of the condemnation and appropriation of the aforedescribed strip of land, to the use of the rail-road of defendant as aforesaid, and the plaintiff avers that he has thence hitherto suffered the defendant to use the same, without hindrance, let or molestation, and has in all other respects conformed to and complied with the order aforesaid of the Circuit Court aforesaid, and has on his part, from the time of the making of the order of said Circuit Court, and from ~~then~~ ^{the} time of making of the indenture aforesaid of defendant, and thence hitherto, well and truly performed, fulfilled and kept all things therein contained, on the part of the plaintiff to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, to wit at LaSalle County aforesaid, Yet protesting that said defendant has not performed, fulfilled or kept any thing in his said indenture

contained, on his part and behalf as aforesaid to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, the ^{said} plaintiff in fact says, that the said defendant did not nor would, from the date of the making of the said order of said Circuit Court, or the making of his said indenture, to this date, although the said defendant was possessed of, and has used the said strip of land aforesaid, prior thereto, and hence hitherto, erect at his own cost and charge, a good and substantial fence on each side or either side of the tract aforesaid, and within fifty feet of the centre line of the tract of ^{the} said rail-road of defendant, across the land of said plaintiff aforesaid, so condemned and appropriated to the use of the said defendant as aforesaid; but the same to do has hitherto wholly neglected and refused, contrary to the form and effect, of the said indenture, and of the covenant, so made by the said defendant as aforesaid, to wit; at LaSalle County aforesaid,

And the said plaintiff in fact further says, that the said defendant did not nor would, from the date of the making of said order of said Circuit Court, or the making of his said indenture, to this date, at his own cost and charge, erect a good and substantial fence, on each side of said rail-road, across the lands of the plaintiff aforesaid, nor suffer the plaintiff to join the said fence so to be erected by the defendant as aforesaid, without cost or charge to the plaintiff, but the same to do the said defendant has hitherto wholly neglected and refused, contrary to the form and effect of his said indenture, and of the covenant so made by the defendant

as aforesaid, to wit, at Laclede County aforesaid,
 And the said plaintiff in fact further says,
 that the said defendant did not nor would,
 from the date of the making of said order of said
 Circuit Court, or the making of the said indenture
 of said defendant, to this date, erect upon the land
 of plaintiff, across which the track of said rail-
 road ~~company~~ of defendant is laid, the said
 secure and convenient crossing for cattle and
 carriages, with such embankments or excavations
 on each side of said road as should be necessary
 to make the said crossing secure and convenient
 as aforesaid, nor ~~kept~~ keep and maintain the
 same free and open for the use of the plaintiff,
 his heirs and assigns, as appurtenants to said
 lands of plaintiff adjoining the aforesaid strip
 of land, so condemned and appropriated to the
 use of the rail-road of defendant, but the
 same to do, the said defendant has hitherto
 wholly neglected and refused, contrary to the
 form of and effect of the said indenture,
 and of the covenant so made by the defen-
 dant as aforesaid, to wit, at Laclede County
 aforesaid,

And the said plaintiff in fact further says,
 that the said defendant did not nor would,
 from the date of the making of said order
 of said Circuit Court, or the making of the
 said indenture of said defendant to this
 date, construct and erect upon the said
 land of plaintiff across which the track of
 said rail-road of said defendant is laid,
 a secure and convenient cattle-guard for
 cattle, on each side of said road, which the

plaintiff avers was necessary to make said crossing secure and convenient for cattle as aforesaid, nor keep and maintain the same free and open for the use of the plaintiff, his heirs and assigns, as appurtenances to said lands of plaintiff adjoining the aforesaid strip of land, so condemned and appropriated to the use of the railroad of defendant as aforesaid, but this same to do, the said defendant has hitherto wholly neglected and refused, contrary to the form and effect of the said indenture, and of the covenant so made by said defendant as aforesaid, to wit, at the County of Loshalle aforesaid -

And the ^{said} plaintiff in fact further says, that said defendant did lay open and remove fences of plaintiff enclosing said lands, and fields of the plaintiff, across which the track of the said railroad of defendant was to be laid as aforesaid, and is laid, and did thereby expose said lands and fields so enclosed by said fences, to the incursion of both cattle from without, and did thereby permit and allow cattle of the plaintiff to escape from within, the same, contrary to the form and effect of the said indenture, and of the covenant - so made by said defendant as aforesaid, to wit, at Loshalle County aforesaid,

And so the said plaintiff in fact says, that the said defendant, although often requested so to do, has not kept the said covenants so made by him as aforesaid, nor any of them, but has broken the same and to keep the same with the plaintiff, has hitherto wholly neglected and refused, and still neglects and refuses, to the damage of the said plaintiff of one hundred

and fifty dollars, and therefore he brings
suit by

Bushnell & Gray
His Attorneys

May 20th 1854,

Endorsed "Filed May 22^d 1854,

J. M. Raymond clerk."

Be it also remembered that on the 6th day
of June A.D. 1854 the same being one of the
days of said term of said County Court
the following order was entered of record in
this cause to wit,

Daniel Ward

vs

Chicago & Rock Island
Rail Road Company

Covenant

This day comes the
plaintiff by Bushnell & Gray his attorneys, and
it appearing to the Court that declaration
has been duly filed - On motion of Plaintiff's
Attorneys. It is ordered that Defendant file
a plea herein by Thursday morning

And on the Eighth day of June 1854 the same
being one of the days of said Term of said
County Court the following order was
entered of record in this cause, to wit,

Daniel Ward

vs

Chicago & Rock Island
Rail Road Company

Covenant

This day again comes

the plaintiff by Bushnell & Gray, his attorneys - and on motion it is ordered that the rule to plead herein be extended to Monday next,

On the same day the following order was entered of record in this cause, to wit,

Daniel Ward

vs

Chicago and Rock Island
Rail Road Company

Covenant

This day the Plaintiff comes by Bushnell & Gray his attorneys and A. Hoar Esquire comes and enters the appearance of the defendants - And by agreement of parties. It is ordered that defendants be ruled to plead, and that the issues between the parties hereto shall be made on or before the 1st day of August next, and that orders for that purpose may be entered on or before said 1st day of August next as of the present term of this Court,

LaSalle County Court, September Term A.D. 1854

State of Illinois }
LaSalle County } p

Pleas, Proceedings and judgments
held and taken in and before the LaSalle County
Court, in the State of Illinois, at the Court House in Ottawa
in the County of LaSalle of September Term, to wit,
on the fourth day of September in the year of our
Lord one thousand eight hundred and fifty four,
and of the independence of the United States of Am-
erica the seventy ninth,

Present Henry G. Cotton Judge
Samuel W. Raymond clerk
Richard Thorne Sheriff.

Be it remembered that on the 5th day of September
A.D. 1854, the same being one of the days of said
Term of said County Court the following
order was entered of record in this cause, to wit;

Daniel Ward

vs

Chicago & Rock Island
Rail Road Company

Covenant

This day comes the plaintiff
by Bushnell and Gray his attorneys and the defend-
ants by A. Hoar his Attorney who moves the Court
for a further time to plead herein, which motion
is overruled by the Court. Thereupon on motion of the
plaintiffs attorneys, It is ordered by the Court
that Judgment be entered against the defend-
ants ^{by default} for want of a plea, Thereupon come the
following jurors of a jury to assess the damages

herin viz; William Simmons, John C. Waterman, Levi H. Road, Alfred Dean, Charles Mylie, Levi Green, J. W. Beresford, David Dana, Asael Dewey, Stephen Morey, J. D. Whitman, and Thomas M. Mason, who are duly elected tried and sworn to well and truly assess the damages herein according to the evidence and after hearing the testimony and arguments of counsel the Jury retire to consider of their verdict and after due deliberation thereon had return into Court the following verdict, to wit, We the jury find the damages sustained by the plaintiff to be the sum of One hundred and forty five dollars,

On the 6th day of September 1854 the same being one of the days of said term of said County Court the following order was entered of record in this cause, to wit,

Daniel Ward

vs

Chicago & Rock Island
Rail Road Company

} Government

} This day come the defendant by Glover Cook their attorneys and enter a motion to set aside the inquiry -

And on the 9th day of September A.D. 1854 the same being also one of the days of said term of said County Court the following orders were entered of record in this cause, to wit,

Daniel Ward

vs

Covenant

Chicago & Rock Island
Rail Road Company

This day again comes the plaintiff by Bushnell & Gray his attorneys, and the defendant by Glover & Cook their attorneys - After hearing the parties aforesaid on the motion of the defendant to set aside the inquiry aforesaid by their respective counsel the Court did decide that the said inquiry ought not to be set aside -

Thereupon the said defendant by their said counsel moved that judgment be arrested, and after hearing the parties by their counsel aforesaid and the premises being seen the said Court did decide that judgment ought not to be arrested,

Therefore it is considered by the Court that the said plaintiff recover against the said defendant his damages aforesaid by the said jury here in Court assessed in form aforesaid found amounting to the sum of One hundred and forty five dollars for his damages - and his costs and charges by him herein expended and that he have execution therefor -

Thereupon the defendant by their counsel prays an appeal which is allowed on his entering into a Bond in the penal sum of Two hundred and fifty dollars with Nelson D. Edwood and George H. Norris or George S. Fisher as security who are hereby approved by the Court, And by the agreement of the parties it is ordered that a bill of exceptions be made and

filed within thirty days - and that a bond be
filed within sixty days,

Be it also remembered that on the 9th day of
October A.D. 1854 a bill of exceptions was
filed in the office of the Clerk of said County
Court in the words and figures following,
to wit;

Daniel Ward	} LaSalle County Court
vs	
The Chicago & Rock Island	} September term 1854
Rail Road Company	

Be it remembered that
on the first day of the present term of this Court
the above named defendant by Hoos Atty. moved
the Court for leave to file pleas in said cause
and in support of said motion submitted &
read the following affidavit (affidavits of A.
Hoos Esqr not on file in my office) which motion
was resisted by the plaintiff who moved the
Court for Judgment by default against the
defendant and submitted & read to the Court the
following affidavits (affidavits of Bushnell &
Gray not on file in my office) The Court
overruled the motion of defendant for leave to
plead and rendered Judgment against the
defendant by default for want of a plea, To
which decisions of the Court the defendant
then & there excepted -

Be it also remembered that a jury was
called by order of the Court empanelled in
open Court to assess the plaintiff's damages in
this cause and thereupon the plaintiff introduced,

Joseph Mills as a witness who testified as follows, I have lived in Marsailles 4 Years, I am a Blacksmith and acquainted with Daniel Doctor Ward the plaintiff, the plaintiff had an enclosure crossed by Defendants Rail Road, about 6 acres were cut off on the South Side, of said Rail Road and something like twenty acres on the north side, The defendant commenced making a cattle crossing in that field but did not finish it, The embankment on each side of the rail road was cut down, the rail road makes a cut from 2 to 5 feet deep at the crossing about 3 feet, ~~there~~ no boards or timbers were put under the track, a person might cross with an empty waggon in that place, but not with a loaded Waggon, could not cross the iron rail with a load, there was no cattle guard made, it would take 3 persons to drive cattle across the rail road there, Cattle in that enclosure would have to go to Marsailles or to the Canal for water, The defendant has put in a kind of cattle guard on Doctor Wards land, The Co. entered that enclosure to commence their road in October 1852, I think they kept the fence put up for 3 or 4 weeks there after, I did not see what the damage was on the crop in fall of 1852. Hags, Cattle & Cattle got in the field, There was corn in the field, The R.R. Co fenced the North Side of their road in that field in May 1853. the South Side on 27th June 1853. There was corn planted on that land in 1853. The Hags eat it up entirely on the South Side before the fence was made, The crop on the North Side of the R.R. was a good crop

Q1 it was the same sort of land on each side of the road, The plaintiff here asked the witness What was it worth to attend to the corn on the 6 acres south side of the road from June 27th through the season of 1853, to which question the defendant by his counsel objected, The Court overruled the objection and the defendant then & there excepted to said decision - The witness answered the corn might have been tended for six dollars, The plaintiff then asked the witness what account of corn per acre was raised that year on the 20 acres north of the road, was then 10 bushels or more to the acre, to which question the defendant then & there objected the Court overruled the objection to which decision the defendant then & there excepted, The plaintiff then asked the witness when would that crop of corn have been merchantable & what would it then have been worth to which question the defendant ~~objected~~ objected & the Court overruled the objection to which decision of the Court the plaintiff ^{and} then & there excepted - answer The corn would have been merchantable in November last when ripe, & and would have been worth 40 cts a bushel,

Crop examined.

My estimate of p. b. does not include harvesting the corn, it includes ploughing 3 times it does include the preparation of the land & planting, the length of the road in plaintiff's ~~land~~ field is about 60 rods, I think it would cost \$25, a piece to make the cropings & cattle grounds -

Direct examination resumed

The plaintiff then asked the witness the following

question, what would it cost to harvest the corn on the south side acres & take it to market to which the defendant objected, The court overruled the objection & the defendant then & there expected, answer. They paid 3 cents for husking, it was as easy to haul to the ware house as to the barn, I think the corn is more valuable when ripe & ready to be taken from the field, The hogs got in a good deal on the north side, I think there was at least 50 bushels destroyed in the north field after it was ripe -

Crop examination resumed,

The plaintiff let it stand after the were running in it for a while until November, The plaintiff then called Robert Dow as a witness who testified as follows, I have lived in N. Orleans 44 years know plaintiffs land there, The R.R. Co. have fenced their road through his land, The ^{since} is not good. Some places the posts are set only 14 1/2 feet in the ground, in some places the boards are not close enough together to keep hogs & sheep out, There is no crossing on plaintiffs land it needs timber & planks & cattle guards to make the crossing, ^{at the place where to make a crossing} the Rail Road went in an excavation from two to four feet, no planks on the track there, on the South side of the R.R. the Company fenced in June or July 1853 on the north side before that time, In 1852 late in the fall the Rail Road entered the enclosure, A crop of corn that would yield from 45 to 60 bushels per acre was on the land, I did not notice particularly what damage was done to that crop, I have seen hogs ^{& hogs} & cattle in there that fall, I think from 50 to 100 bushels of

grain was destroyed In 1853 plaintiff lost all the crop south of the rail road. I do not know what damage was done to the crop on the north side in that year don't know of any cattle being in there saw hogs in there they got in through the R.R. fence, that corn would have matured in Nov, it would have been worth from \$20 to \$25 to have tressed the south six acres from June till it was in the crib. The plaintiff here rested, the defendant asked the witness the following question.

Is it not the usual custom in that town to fence only against cattle & not hogs & sheep which question the plaintiff objected, the court sustained the objection & refused to permit the witness to answer the same, to which decision the defendant then & there excepted -

This is substantially all the evidence -
At the request of the plaintiff the court instructed the jury as follows -

Upon default all the facts in the declaration are admitted to be true and the jury have only to assess the damages which the jury think from the evidence the plaintiff has sustained.

2^d The fact of the failure of the defendant to erect a good & substantial fence and to erect ^{convenient} secure and ~~substantial~~ crossings & cattle guards is admitted by the default and need not be proved by the plaintiff, At the request of the defendant the court qualified the foregoing instructions as follows, "Let that the plaintiff has sustained
" any damage by such failure is not admitted
" & plaintiff must prove that the failure to build

24 " Such fences and crossings on the particular
" tract mentioned in the declaration caused
" him damage or he is entitled to nominal
" damages only."

At the request of defendant the Court instructed the jury as follows,

1 The jury should allow no damages except such damages as the plaintiff has sustained by reason of the failure of the defendant to make good & substantial fences & crossings upon a strip of land fifty feet wide on each side of the centre line of the track of ~~said~~ the rail road of defendant commencing at a point four chains & eighty seven links north of the South West quarter corner of the South East quarter of Section 18 in Township No 33 North of Range five East of the third principal meridian and running thence South seventy three degrees east eight hundred sixty nine & four tenths feet,

2^d If there was a small deficiency in the fence erected by the defendant & plaintiff knew it at the time & neglected to repair said fence when he might have done it at a small cost & hogs ^{or} sheep got through said fence & destroyed the crops of the plaintiff after the plaintiff knew such deficiency then the rule of damages is what it would have cost to repair such fence with the pay for the necessary trouble,

The defendant asked the Court to instruct the jury as follows—

In estimating the damages done in destroying the crops on the 6.

acres, the jury should base their estimate upon what the corn was worth at the time it was destroyed in the condition it then was, the jury should not estimate the damages at the amount which might have been made by the plaintiff by raising a crop & selling the same,

Which instruction the Court refused to give to which decision of the Court in refusing to give said instruction the defendant then & there excepted -

The Jury assessed the plaintiffs damages at one hundred and forty five dollars, the defendant moved to set aside the assessment of damages as being wrong, excessive & unsupported by the evidence, the Court overruled said motion, and the defendant then & there excepted to the decision, the defendant then moved in arrest of judgment, which motion was overruled to which decision of the Court in overruling said motion in arrest of judgment the defendant then and there excepted and prays that this his bill of exceptions be signed sealed & made part of the record which is done

H. G. Cotton

Clk

State of Illinois
 LaSalle County } p

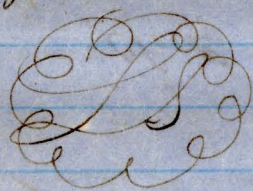
I, Samuel W. Raymond
 Clerk of the County Court in and for said
 County do hereby certify that the foregoing
 transcript is a true full and correct copy
 from the record of all the proceedings which
 have been had in said County Court in the
 aforesaid case of Daniel Ward vs. Chicago
 & Rock Island Rail Road Company.

In testimony whereof I have here-
 unto set my hand and affixed
 the Seal of said Court at my
 Office at Ottawa in said
 County this 30th day of May
 1855

S. W. Raymond Clerk

~~Clerk for the Record \$9.85~~

costs interest and damages rendered
 & to be rendered against them in case
 the said judgment shall be affirmed in
 the said Supreme Court then the above
 obligation to be void otherwise in full
 force

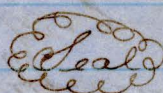


The Chicago & Rock Island Rail
 Road Company

By Henry Fairman Pres^t
 Chicago and Rock Island Railroad
 company

Attest

Geo McGinnis Jr. Asst-Secy. C. & R. I. R. R. Co.

Geo. S. Fisher 

And now comes the said appellants and
 says that in the record of proceedings aforesaid
 & in the rendition of the judgment aforesaid
 there is manifest error in this to wit

- 1st The court erred in admitting improper
 evidence & go to the jury upon the assess-
 ment of damages
- 2^d The court erred in giving each of the instructions
 asked for by the plaintiffs
- 3^d The court erred in refusing to set aside the verdict
 of damages
- 4th The court erred in refusing each of the instructions

On the 9th day of December A.D. 1854 a bond was filed in the office of the clerk of the County Court of said county which bond is in the words and figures following to wit -

I know all men by these presents that in the Chicago and Rock Island Rail Road Company as principal and George S. Fisher as surety are held and firmly bound unto Daniel Ward in the sum of Ten hundred and fifty dollars for the payment of which well and truly to be made we bind ourselves and the said George S. Fisher binds himself his heirs executors administrators jointly severally and firmly by these presents sealed with our seals and dated this 26th day of September A.D. 1854

The condition of this obligation is such that whereas the above named Daniel Ward did on the 9th day of September A.D. 1854 in the County Court in and for the county of LaSalle State of Illinois recover a judgment against the above bounden Chicago & Rock Island Rail Road Company for the sum of one hundred and forty five dollars together with the costs of suit from which said judgment of the said County Court the said Rail Road Company has appealed for and obtained an appeal to the Supreme Court of said State - Now if the said Rail Road Company shall prosecute their said appeal with effect and shall nevertheless pay the amount of the judgment,

29

clears ashen & defendant which well required

3^{line} The court shall in rendering its judgment
forrain in manner of our officers

Glover & Hook deposed.

London in Essex.

State of Illinois

Saline County

Bushnell & Gray.

per defect in error

§^d I. Samuel W. Raymond

Clk of the County Court in and for said
County do hereby Certify that the foregoing
transcript is a true full and correct ~~transcript~~ Copy
from the records of all the proceedings which
have been had in said County Court in the
aforesaid Case of Daniel Ward vs the Chicago
& Rock Island Rail Road Company.

In testimony whereof I have here-
unto set my hand and affixed
the Seal of said Court at my
Office at Ottawa in said County
this 30th day of May 1855

S. W. Raymond Clerk

Clerk's fees Record \$9.85

81
Chicago & R. I. R. R. Co.

us
Daniel Ward

Record

34
18
238
34
528.00
528
6.28

Filed June 13, 1885.

L. Leland & Co.