

No. 13255

Supreme Court of Illinois

crawford

vs.

Galena & Chicago Union

R. R Co.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 199.

Cranford
vs
Greene & Co
R/R Co

Proffered

Printed by BEACH & BARNARD, 14 S. Clark St.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }

APRIL TERM, A. D. 1861. }

THE GALENA AND CHICAGO
UNION RAILROAD CO. }

Appellant, }

VS. }

CHARLES CRAWFORD, }

Appellee. }

APPEAL FROM

WINNEBAGO CIRCUIT COURT.

ABSTRACT OF RECORD.

STATEMENT OF CASE.

This was an action on the case, brought by the appellee against the appellant, under the act of 1855, entitled "An act to regulate the duties and liabilities of Railroad Companies," for killing a mare, which the appellee claims got upon the railroad track over an insufficient cattle guard.

The mare was depastured on the public highway by Crawford, and, as is claimed by him, it strayed from the public highway on to the railroad track, over an insufficient cattle guard.

The suit was commenced at the February Term, A. D. 1861, and was tried at the same term, and resulted in a verdict for Crawford of one hun-

dred and sixty-seven dollars and fifty cents. The plaintiff, upon the motion for a new trial, remitted a portion of the judgment, and a judgment was finally entered for one hundred and fifty dollars.

Pages 3, 4, 5, 6, 7, 8, 9 — **Plaintiff's Narr.**

It consists of Two Counts.

The first count alleges that the defendant, on the 14th day of June, 1856, was and still is, a Railroad Corporation, and was running cars from Chicago to Freeport; and that, according to an act entitled "An act to regulate the duties and liabilities of Railroad Companies, approved Feb. 14th, 1855," the defendant ought to have built and made, within six months from and after the opening of said railroad for use, and maintained, at all road crossings, existing or established, cattle guards, suitable and sufficient, &c. It then avers neglect of the Company to erect, build and maintain cattle guards at a Railroad crossing established and existing across the railroad in Winnebago, in the county of Winnebago; then alleges that "*a certain mare, of which the said plaintiff was then and there on the said 14th day of June, 1856, lawfully possessed in his own right, of great value, to wit: of the value of three hundred dollars, was then and there lawfully feeding and depasturing in the public highway or road in the said town of Winnebago aforesaid, and then and there went from out of the said highway or road on to and upon the said railroad of the said defendant, at and from the said public highway or road crossing, across, on or upon a cattle guard not suitable or sufficient to protect said railroad from cattle, horses, sheep or hogs; and that the said animal of the said plaintiff, so being upon the said railroad of the said defendant, on the 14th day of June aforesaid, was then and there run over and killed, &c.* The count then concludes as follows: —

6 "And the said plaintiff further avers that the said mare did not *get on, to, or upon the said railroad* of the said defendant five miles from a settlement, nor was said animal killed, run against, over and upon, at any public highway or road crossing, nor within the limits of any town, city or village, nor did said animal *get on* to said railroad within the limits of any town, city or village, and that it was necessary such cattle guard should have been made and maintained to prevent cattle, horses, sheep and hogs from getting upon the track of said railroad, to the damage of said plaintiff of three hundred dollars.

9 **The second count** is substantially like the first, and concludes as follows : — “And the said plaintiff further avers that the plaintiff’s “said animal did not *get on, to, or upon the said defendant’s said “railroad* five miles from a settlement, nor was said animal killed, run “against, over and upon as aforesaid at any public highway or road “crossing, nor within the limits of any town, city or village, nor did the “said animal *get on, to, or upon* said railroad within the limits of any “town, city or village, and it was necessary that such cattle guard should “have been made to prevent cattle, horses, sheep and hogs from getting “upon the said railroad and the track of the same, to the said plaintiff’s “damage of three hundred dollars; and therefore he brings suit.”

19

PLAINTIFF’S EVIDENCE.

John Elliott was introduced and sworn as a witness on behalf of plaintiff, and testified as follows : —

Resides in the town of Winnebago, in Winnebago Co.; resided there in A. D. 1856; lives sixty-five rods from the Galena & Chicago Union Railroad; don’t know when Railroad was built; think it was built in A. D. 1853; the cars commenced running to Freeport in A. D. 1854: the Railroad has been in use since 1854; was completed to Freeport in 1854.

20

Sometime in June, four years ago last Summer, I saw the mare; it was about one o’clock when I first saw her; I went away, and it was about half past four when I returned; the mare was well when I went away; she was not there when I came back; I saw the colt and followed it to the mare; I saw the mare—she had three broken legs; the colt got over the cattle guard, some way; I don’t know how; the colt was sucking; I saw the mare in a ditch down the embankment; the legs were broken—not off; but were hanging by flesh; I don’t know how colt got on the track. Two trains passed that day; one freight train east, one passenger train west; the freight train struck the mare; I judged the freight train struck the mare, from the way she laid.

I examined cattle guard; saw foot marks on the slats, which were made of pine; the mare had walked over the cattle guard very near the public crossing; the cattle guard was at a county road, in the town of Winne-

bago, in this county; the cattle guard is in the country, and not in a town, city, or village. There was not over two inches space between slats; the horses' feet could not slip through; there was not a place to let a horses' leg through between the rails; the width of the cattle guard is four feet; I did not measure it; I guess it was four feet. I could see tracks of shoes on the slats; I examined the cattle guard that evening when the mare lay there; she was not far from cattle guard when struck; the mare was well at half past one p. m.; I saw her at six p. m., lying injured; the mare was a decent mare; horses were high; don't know her exact value; I am a farmer; use horses myself; the mare was worth, at that time, from \$140 to \$145; she was shot Sunday forenoon; this happened Saturday; she was not of any value after the injury; I saw she was well at one o'clock.

Cross Examined by defendant :

21

The mare was at Riley Hall's land when I saw her at one o'clock; she was on the north side of railroad — on commons; she was eighty rods from the railroad; the railroad was fenced on only one side; there was not a fence between her and railroad; she had to go to highway to get on railroad. *I found her fifteen yards from cattle guard; I cannot tell when she was struck; she was standing on track when struck; she was standing on centre of track when struck; I could see gravel thrown up and blood on the rails. I do not know but that the cars brought her from Winnebago, but think not. She was fifteen yards from crossing. There were foot marks of horses all the way from cattle guard to where she was struck; there were marks on the guard made by horse shoes. The slats were diamond shaped, with edge up; the guard was made of three inch square timber. Saw tracks on edge of two slats; saw but one track.*

22

The mare had not been on run; the tracks were of an animal walking; don't think she ran at all; *I had never seen the mare until that afternoon; I was ten yards from her when I saw her at one o'clock; I had never seen her before. Crawford (the plaintiff) lives on the state road one mile from the railroad. It was further, one mile and a half, where mare was killed. The road that intersects runs south to Bryan's. It is one mile and a quarter from the place where the Bryan road intersects*

state road to the railroad. I can't tell how far plaintiff lives from the railroad. Part of his land is south of the railroad; his house is north of the railroad. *There is improved land, but not quite up to where state road intersects. Between plaintiff's house and improved land, Charles Morgan lives. The railroad was all fenced at the time accident occurred. The cattle guard was at highway crossing. The mare got on the railroad out of the highway.*

I meant the cattle guard was very short; the slats were only about four feet long; the pit was about one foot deep. *I did not measure cattle guard or depth; grass and rubbish grew right through guard; I did not examine guard to see whether it was right; saw the guard every day; was crossing it daily, almost; I lived on south side of railroad; I lived sixty-five rods from cattle guard. The plaintiff lived west, on state road, one mile and a quarter.*

Direct Examination resumed :

I don't know just where mare was struck; I think fifteen yards from cattle guard; the railroad is straight there; from the west an object could be seen one hundred rods; cannot see far from the other way. There were other cattle guards that were insufficient; they have been removed because they were found to be insufficient.

23

Adams H. Davis was introduced, and sworn as a witness on the part of the plaintiff, and testified as follows :

I lived on the state road in June, 1856, in town of Winnebago, county of Winnebago, eighty rods from plaintiff. Have seen plaintiff drive the mare; I remember she was crushed with the cars in 1856; I saw her east of the crossing on the railroad track; *I saw her three or four rods east of crossing; saw her Monday morning; Ricker and plaintiff was present; three of her legs were broken, and her hind parts injured; it happened on the Galena Railroad; I saw where she was standing, and where she went down the bank; the cars must have been going east; an object could have been seen from a point one-half a mile or more. I did not see cattle guard; we measured the slats with a square; the average*

distance apart of the slats was one and one-half inches; some more and some a less distance apart; the cattle guard was not over five feet wide — length of slats. I saw horse tracks; there were two or three tracks on timbers; they were going east; I saw toe and heel corks. My opinion is that the tracks were made by the mare; we compared a shoe, which we took off the mare, with the tracks on the slats, and found they corresponded; the prints of nails were partially on two sticks; we took off only one shoe; I helped take it off.

24 **Cross Examined by defendant :**

I came in the Spring of 1856. I came to Rockford in the Fall of 1855. The railroad was in operation in the Winter of 1855. I have seen the mare, but could not say how old she was; she was not young. *The place where the mare was killed is three miles from plaintiff's*; she was thrown on the north side of railroad; I saw no tracks on highway before she came on railroad; I don't know what the weather was the day the mare was killed; I saw tracks after the mare crossed the guard, and before she got to the place where she was killed; the mare was not killed in any town, city, or village, or at any road crossing.

S. J. Ricker was introduced and sworn as a witness on the part of the plaintiff, and testified as follows :

I saw the mare on Monday morning; I don't remember seeing her previously; she was gray; I had seen plaintiff driving her; I suppose I saw her on Monday; Davis, plaintiff, and others were there; *she was three rods east of the cattle guard; I don't know where she was struck*; I saw two foot prints; saw horse shoe compared with those prints; they corresponded.

25 I measured between the slats; the slats were $1\frac{1}{2}$ inches; some exactly that — some over, some under; I cannot say how wide cattle guard was, but it was not, I think, over five feet; the pit was about length of square, two feet deep; there were one or two tracks near the north rail; the train going east must have struck mare; they commenced cutting slats

that (Monday) morning that we measured; they hewed the slats in the presence of me, Davis and others.

Cross Examined by defendant :

This was four or five years ago ; was a difference between fore and hind shoes ; I cannot tell difference ; *the shoe had five nails in it ; it had heel and toe corks ; any other medium sized shoe would have done to test the holes ; this was a medium shoe ; the plaintiff lived three miles from cattle guard ; plaintiff allowed the mare to run at large in the Summer time.*

Samuel Moat was introduced and sworn as a witness on part of plaintiff, and testified as follows :

23

Resided, in June, 1856, in town of Winnebago, in this county ; I live fifty rods from railroad ; I know the plaintiff — am some acquainted with him ; live three miles from plaintiff. I saw the mare about nine or ten o'clock that morning — the first time I ever saw her ; she was nine or ten rods from Mr. Hall's stone house ; she was grazing ; she was pretty much white ; I saw her next, half-past seven same day ; she was lying down embankment, in a gutter ; she had three broken legs, and was also jammed up somewhat in her hind parts ; there was no one present when I saw her ; my boys told me, and I went to see her, and found colt there. *I did not examine track.* I saw the mare next, on Sunday morning ; she was lying in gutter. *I could not tell what killed her.* It was fifteen or twenty yards from cattle guards ; the cars were going east ; she laid with her head north ; if cars were going other way, she would not have lain as she did ; saw track on south side of railroad ; saw where grass had been eaten on south side of railroad ; she was first struck fifteen or seventeen yards from crossing ; the crossing was at a public road ; I saw the mare about noon on Sunday ; plaintiff and Blackburn and others were there ; I examined cattle guard on Sunday ; the slats of the cattle guard were, as I put my hand down between them, the width of my hand apart ; I put my hand through, where steps of horses walked off ; the timber of the slats was pine ; *I saw marks of horses on slats ;* the marks were those of the shoes of horses ; saw marks of toe corks and heel corks ; they were more visible on south side than on north side ;

27

marks were on two slats ; saw tracks where she had walked on south side — fresh tracks ; I did not see shoes of mare taken off after she was dead ; I saw five of Stephenson's cattle walk over same cattle guard from the track ; the spaces had been widened between slats, when oxen jumped over ; the railroad men have made the spaces wider since ; I have seen sheep jump over the cattle guard ; a rope was put around the colt's neck, and it was pulled over ; the cattle guard was a little over four feet wide ; the road was used two years before mare was killed ; the road was fenced ; it had been fenced a year at that time ; I stood still and hopped over the cattle road several times.

Cross Examined by defendant :

28

I was coming to Rockford the morning I saw the mare ; I live one mile and a half south of the state road ; I knew then where plaintiff lived ; could not tell how long plaintiff had lived there ; did not pass plaintiff's house in coming to Rockford. I live on road that crosses railroad fifty rods from crossing ; I saw the mare near the road that crosses state road ; she was on south side of railroad and seventy rods from it ; she was east of highway that crosses on Hall's land ; she was on vacant ground ; she was one and three-fourths of a mile from plaintiff's house ; she was a half mile south of where we turn to go to Rockford ; it is, I think, about one mile from State road to the railroad ; the mare was fifty rods from railroad ; she was north of railroad and east of cross road ; she was *one and a half miles from home* ; there was no fence between her and public road ; it was fifty rods from public and seventy rods from railroad ; did not know who she belonged to at that time ; I never saw her before ; never measured length of slats ; have seen sheep jump over ; saw two foot prints on slats — one was where she stepped with one right foot, and the other the left — could not tell whether the right or left ; it was fore foot ; the one on the south side was the plainest to be seen.

This was two and a half miles from Winnebago station. There were two public crossings between that and Winnebago station. The last cattle guards were different ; the slats were longer and wider ; there was not so much pit under it, nor was it so long ; the slats were taken out

and changed ; don't know when ; the slats were from four to four and a half feet long. Would not believe that they were eight feet long, if measured and sworn to as being of that length ; I can't say when new ones were put in ; cattle guards were changed same Summer (1856.) they are not over eight feet now ; don't know where plaintiff came from when he moved there.

29 **S. P. Crawford** was introduced and sworn as a witness on the part of the plaintiff and testified as follows :

Am a son of plaintiff ; saw plaintiff's mare the morning after ; I know the crossing. The railroad went to Freeport in the Winter of '53-'4 ; I examined cattle guards ; the width between slats one and a half inches ; saw prints of shoes ; length of slats, four to four and a half feet ; mare was worth \$150.

Cross Examined by defendant :

I knew the mare over a year ; she did not run loose while here in Rockford ; never knew her to try cattle guards before ; she worked on Loomis' farm near Rockford ; her age was ten years ; plaintiff bought her of Wilder ; she was more valuable after plaintiff bought her of Wilder.

— ... —

DEFENDANT'S EVIDENCE.

Robert Crisp was then introduced and sworn as a witness on the part of the defendant and testified as follows :

Am in the employ of Railroad Company ; my business is to look after track between Cherry Valley and Winnebago ; have been seven years employed here ; am acquainted with cattle guards ; know track stringers ; they are eight feet, between Rockford and Winnebago ; both rested on same bed-timbers ; the distance might have been seven feet ;

might have been eight feet; have known none less than eight feet, except there will be one occasionally two inches shorter; know the mare; did not see her after she was killed; don't know whether she was breachy or not; she was killed on Saturday; examined cattle guard to see if tracks were upon it.

36 **Cross Examined by plaintiff:**

Don't know the exact length of slats; think guard was seven feet wide.

This was all the evidence in the case.

— ... —

PLAINTIFF'S INSTRUCTIONS.

30 At the request of plaintiff's counsel,

The Court instructed the jury as follows :

If the jury believe, from the evidence, that the plaintiff's mare was killed upon the defendant's railroad track, and not upon the crossing of a public highway, nor within the limits of a town, city, or village, and within five miles of a settlement, and that the said railroad had been open for use for six months previous to the time of said injury of said animal; and that the said mare was injured, and rendered of no value, by the engines and servants of the defendants, as charged in the said plaintiff's declaration, and that the said mare got unto and upon the said defendant's said railroad track through the insufficiency of the defendant's said cattle guard, without any neglect on the part of the plaintiff, then the jury will find for the plaintiff such amount of damage as was proved to have been done to said animal.

To the giving of which instruction, the defendant, by its counsel, objected, which objection was overruled by the Court, and the defendant then and there excepted.

DEFENDANT'S INSTRUCTIONS.

31 The defendant's counsel asked the Court to give the following instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9.

1. The jury are instructed, that if they believe from the evidence, that the negligence of the plaintiff contributed to the loss of the mare in question, the plaintiff cannot recover.

2. That the killing of the mare, mentioned in plaintiff's declaration, is not of itself proof of gross negligence or malice; and that if the plaintiff charges, and claims to recover, for the negligence on the part of the servants of the defendant, that he must prove such negligence as charged in the declaration, or he cannot recover in this action.

3. That while, by the laws of this State, cattle have the right to run at large on uninclosed lands, and the owners of such cattle are not liable in trespass for their so running at large; yet if cattle, when so allowed to run at large by their owners, are killed or injured, by getting upon a railroad, the Railroad Company is not liable without proof that the death, or injury, was occasioned by the negligence of the Company, or its servants, or that it was wilfully done.

32 4. That a case of negligence on the part of a Railroad Company is not made out by showing simply the killing of live stock, but it must also be clearly shown that the death was occasioned by the negligence of the Company, which negligence consists in doing some act careless or negligent on its part, or failing to do some act required by law, or the omission of which implies carelessness on the part of the Company.

[Refused.]

5. That it is, in contemplation of law, negligence on the part of the plaintiff to allow his mare to run at large where it was liable to get upon defendant's railroad, and if the jury believe, from the evidence, that the plaintiff was guilty of such negligence at the time the mare was killed, the jury should find for the defendant.

[Refused.]

33

6. That a party cannot recover for an injury brought about by his own carelessness and negligence ; therefore if the jury in this case believe that the plaintiff was the owner of a mare, as alleged in this declaration, and that he turned said mare out in the highway, and that he there kept and depastured her, and that said mare went from said highway, over the cattle guards of the defendant, at a road crossing, unto the railroad track of the defendant, and that said defendant was bound to erect and maintain good and sufficient cattle guards to prevent cattle, horses, &c., from going over the railroad, and that said cattle guards were insufficient, and that in consequence of said cattle guards being insufficient said mare got on said railroad track and was run over by the cars of said defendant, who was exercising ordinary care and was guilty of no negligence, then in that case the plaintiff cannot recover; the law being that, although the law imposes upon a Railroad Company the absolute duty of erecting and maintaining good and sufficient fences and cattle guards, to keep horses and cattle off from a railroad track, yet there is a duty also upon the proprietors along the road ; and they have no right to fold their arms and voluntarily permit their cattle to stray upon the railroad track, even though the cattle guards and fences which the Company are bound to maintain be insufficient.

[Refused.]

34

7. That Railroad Companies, in this State, are not liable for injuries to cattle which have strayed upon the highway, or which have been voluntarily turned into the highway by the owner, and which came upon the track through the want of the fence, or cattle guard, which the Company is bound by law to maintain. Public highways cannot be regarded as commons, and no man has a right to depasture his cattle upon the public highway ; therefore cattle are unlawfully upon the highway unless they are being driven along, or, while being driven along, they escape from the person having them in charge who makes fresh pursuit ; and if the jury in this case believe that the plaintiff voluntarily turned the mare in question into the public highway to be depastured, and that the mare strayed on the railroad track and was killed, without any fault on the part of the defendant or its servants, then the jury must find for the defendant.

[Refused.]

8. That if the jury believe, from the evidence, that the cattle guard in question was insufficient, and they also believe, from such evidence, that the plaintiff was advised of such fact, it was negligence on his part to allow the mare to depasture on the highway; and if the jury find that the plaintiff allowed the mare in question so to depasture in the highway, and also believe that she came upon the railroad from the highway, and not from the plaintiffs' close adjoining the defendant's road, on account of the insufficiency of the defendant's fence, then the jury shall find the defendant not guilty.

[Refused.]

9. That the presumptions of law are in favor of defendants; and that the plaintiff cannot recover in this suit unless upon proof of gross negligence of the servants of the defendants.

Those instructions numbered 1, 2, 3, 4, the Court gave, and refused to give those numbered 5, 6, 7, 8, 9, to which decision and ruling

The defendant then and there excepted.

The Jury found a verdict for the plaintiff for one hundred and sixty-seven dollars and fifty cents.

ASSIGNMENT OF ERRORS.

SUPREME COURT OF ILLINOIS,
THIRD GRAND DIVISION. }

GALENA AND CHICAGO UNION RAILROAD COMPANY

Appellant,

vs.

CHARLES CRAWFORD, *Appellee.*

} APRIL TERM, 1861.

And now comes the said appellant, the Galena & Chicago Union Rail-

road Company, by Elliott Anthony, its attorney, and says: that in the records and proceedings aforesaid, and also in the rendition of this judgment aforesaid, there is manifest error in this, to-wit:

1. The declaration aforesaid, and the matters therein contained, are not sufficient in law, for the said Charles Crawford to have or maintain the aforesaid action thereof against the said appellant.

2. The judgment was given for the appellee, Charles Crawford; whereas, by law, it should have been given for the said Galena & Chicago Union Railroad Company.

3. The Court erred in overruling the motion for new trial in this case.

4. The Court erred in giving the instructions for the plaintiff.

5. The Court erred in refusing to give the fifth, sixth, seventh, eighth and ninth instructions asked for on the part of the said Galena & Chicago Union Railroad Company.

6. The Court erred in overruling the motion for arrest of judgment. And the said Galena & Chicago Union Railroad Company prays that the judgment aforesaid, for the errors aforesaid, and for other errors apparent in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing; and that the said appellant may be restored to all things which it has lost by occasion of the said judgment.

ELLIOTT ANTHONY,

Attorney for Appellant.

199-67

Galena & Chicago

Ammon B.B. Co

vs

Rechar Crawford

Abstract

Filed Apr 16. 1866

A. Deland

Clark

United States of America
State of Illinois Winnebago County for

Hear before the Hon Benj R Sheldon
Judge of the Fourteenth Judicial Circuit of the State
of Illinois began and held at the Court House in the
City of Rockford on the 11th day of February 1861.

Present Hon Benj R Sheldon Judge
Smith D. Atkins State Attorney
Mr J. Wright Sheriff

Attest

At Penneyer Clerk.

Pracipe

Winnebago Circuit Court
February Term A. D. 1861

Charles Crawford

v.

The Galena and Chicago Action. Case
Union Rail Road Company Damages \$300.00

The Clerk of said Court will release
from all writ of summons in the above entitled suit
to defendant thereof returnable to the first day of said
term. Action and damages as above.

Andon S. Miller

Dec 3rd 1860.

Atty

Endorsed

Filed Dec 3. 1860

Oliver A. Penoyer Clerk

Summons

State of Illinois

Winnebago County vs The People of the State of Illinois to the Sheriff of said County Greeting:

We Command you that you summon The Galena & Chicago Union Rail Road Company if they shall be found in your County, personally to be and appear before the Circuit Court of said Winnebago County, on the first day of the next term thereof, to be holden at the Court House in the City of Rockford in said Winnebago County, on the first Monday of February A.D. 1861 to answer unto Charles Crawford in an action: Case to the damage of the said plaintiff as he says in the sum of three hundred dollars: And have you there and there this writ with an endorsement thereon in what manner you shall have executed the same:

J. S.

Witness, Oliver A. Penoyer, Clerk of said Court, and the seal thereof, at his Office in the City of Rockford, in said Winnebago County, this 11th day of December A.D. 1860.

Oliver A. Penoyer Clerk

Endorsed

State of Illinois

Hennepago County ss I duly served the within upon the within named Galena & Chicago Union Rail Road Company by reading and delivering a Copy hereof to J. B. Mculliken an Agent of said Company in Rockford in said County the President of said Company not residing in my County and not being found therein as I am therein Commanded this 6 day of December 1860.
M. J. Waight Sheriff.

Narr.

State of Illinois Hennepago County Circuit Court
Hennepago County ss February Term A.D. 1861

Charles Crawford plaintiff by A. S. & C. F. Miller his Attornies Complain of the Galena & Chicago Union Rail Road Company defendant Having been duly summoned & of a plea of trespass on the Case For that heretofore to wit on the Fourteenth day of June in the year of our Lord one thousand eight hundred and fifty six in the said County of Hennepago the said defendant was and for a long time before and since said last named day had been and still is a Rail Road Corporation transacting business under the name and stylo of the Galena and Chicago Union Rail Road Company, and being such Company was the owner and manager of the Galena & Chicago Union Rail Road

at the time aforesaid, and was at said time running and managing driver cars, Locomotives, or Steam Engines from Chicago in the County of Cook, and State of Illinois through the said County of Hennepago, to the City of Freeport, in the County of Stephenson in said State on along and upon said Rail Road, and from thence to the time of the Commencement of this suit according to an Act entitled 'An Act to regulate the duties and liabilities of Rail Road Companies, Approved February fourteenth eighteen hundred and fifty five. The said defendant ought to have constructed and made within six months from and after the opening of said Rail Road for use as aforesaid and during all the time aforesaid to the Commencement of this suit at all Road Crossings existing or established across the said Rail Road Cattle guards suitable and sufficient, to prevent Cattle, Horses, Sheep, Hogs from getting on to or upon the said Rail Road of the said Defendant. And the said Plaintiff Avers that the said Rail Road had been open for use more than six months prior to the said fourteenth day of June A.D. 1856 and that the said Defendant on the said fourteenth day of June had neglected and does still neglect to erect build and maintain suitable & sufficient Cattle guards at a road Crossing there established and existing across the said Rail Road in the town of Hennepago, in the County of Hennepago, aforesaid, and between the said City of Chicago & the City of Freeport in said State of Illinois and that in consequence of such neglect to construct build

and maintain such suitable and sufficient Cattle guard at the Road Crossing aforesaid a certain mare of which the said plaintiff was then and there on the said fourteenth day of June A.D. 1836. lawfully possessed in his own right of great value to wit. of the value of three hundred dollars was then and there lawfully feeding and depasturing in the public highway or road in the said town of Minnetago in the County of Minnetago, aforesaid, and then and there went from out of the said highway, or road on to & upon the said Rail Road of the said defendant, at and from the said public highway or road Crossing across on or upon a Cattle guard not suitable or sufficient to protect said Rail Road from Cattle, Horses, Sheep or Hogs, and that the said Animal of the said plaintiff so being upon the said Rail Road of the said defendant to wit on the said fourteenth day of June aforesaid in the said town of Minnetago without negligence Carelessness, or improper Conduct of the said plaintiff, was then and there run against, over, and upon by the Locomotive, Engine & Cars of the said defendant, the said Locomotive, Engine and Cars, then and there were under the direction management & Control of certain servants of the said defendant who were then and there conducting engineering & managing the same, under the direction of for the said defendant on upon and along the said Rail Road, of the said Defendant, to wit in the town of Minnetago aforesaid. And the said mare of the said plaintiff so run against over & upon by the said

2

Locomotive Engine & Cars of the said Defendant was then & there wounded bruised and killed and in consequence of said injury of no value to the said plaintiff. and said plaintiff further declares that the said damage loss & injury was caused & in consequence of the said defendant neglecting to construct build and maintain suitable & sufficient cattle guards at the road crossing aforesaid & that said animal passed over onto and upon the said defendant said Rail Road as aforesaid in consequence of said defendant's said neglect at the said public high way or road crossing of the said defendant's said Rail Road in the town of Minnetago aforesaid. and the said running driving & directing the said Locomotive Engine & Cars then & there to wit in the said town of Minnetago over against & upon the said mare of the said plaintiff. and the said plaintiff further avers that the said Mare did not get onto or upon the said Rail Road of the said defendant's five miles from a settlement nor was said animal killed run against over & upon at any public highway or road crossing nor within the limits of any town City or village. nor did said animal get onto said Rail Road within the limits of any town City or village. and that it was necessary such cattle guards should have been made & maintained to prevent cattle horses sheep & hogs from getting upon the track of said Rail Road to the damage of said plaintiff of three hundred dollars:

For that heretofore to wit on the fourteenth

day of June in the year of our Lord one thousand eight
 hundred and fifty six the said defendant was for a long
 time before and since has been & now is a Rail Road
 Corporation, transacting business under the name & style
 of the Galena & Chicago Union Rail Road Company
 & owned possessed controlled & managed the Galena & Chi-
 cago Union Rail Road, a Rail Road extending from
 the City of Chicago in the County of Cook, through the
 said County of Hennepago to the City of Freeport in Ste-
 phenson County in said State, and at the time last a-
 foresaid said Company was running & directing drivers
 Locomotives or Steam Engines & Cars, on along and over
 said Rail Road from the said City of Chicago, through
 the town of Hennepago in said Hennepago County, to the
 said City of Freeport, under & by virtue of an act entit-
 led an act to regulate the duties liabilities of Rail
 Road Companies, Approved February fourteenth A.D.
 1855, by which said Act the said defendant was required
 & ought to have Constructed built & maintained within
 six months from & after the opening of said Rail Road
 for use and during all the time therefrom to the Com-
 mitting the grievance herein complained of all road
 Crossings existing or established across said Rail Road
 Cattle guards suitable & sufficient to prevent Cattle horses
 Sheep & hogs from getting on to or upon the said Rail
 Road of the said defendant, and the said plaintiff
 avers that the said Rail Road was open for use more
 than six months prior to the said fourteenth day of

June 1856. and that the said Defendant on the said
 fourteenth day of June last aforesaid and prior and sub-
 sequent thereto neglected and refused to erect build & main-
 tain suitable and sufficient Cattle guards at road crossings
 then established crossing across said Rail Road in the town
 of Hennepago in the County of Hennepago aforesaid: And that
 in consequence of such neglect to construct and maintain
 such suitable and sufficient Cattle guards at the road cross-
 ings aforesaid a certain other Mule the property of the said
 plaintiff of the value of three hundred dollars was then
 and there lawfully feeding & depasturing in the public
 highway or road in the said town of Hennepago in said
 Hennepago County. And the said Animal on the said four-
 teenth day of June A.D. 1856. then & there went from out-
 of the said highway or road over & upon a Cattle guard
 of said Rail Road not suitable & sufficient to prevent cat-
 tle Horses sheep & hogs from getting upon the said Rail
 Road: on to & upon the said defendants said Rail Road
 And that while the said Animal was then & there upon
 said Rail Road in the said town of Hennepago without
 negligence, carelessness or improper conduct of the said plain-
 tiff, the said Mule was then & there run against over and
 upon by the Locomotive or Steam Engine and Cars of
 the said Defendant: then & there wounded bruised & killed
 & become & was in consequence of said injury of no value to
 the said plaintiff: and that the said Locomotive or steam
 engine & Cars were then & there under the direction and

9

Control of certain Servants of the said defendant who were then there guiding & propelling the said Locomotive & Steam Engine & Cars upon, and along the said defendant's said Rail Road, in said town of Kennebago as Commanded by said defendant - and said plaintiff further avers that the plaintiff said Animal did not get onto or upon the said defendant's said Rail Road five miles from a settlement - nor was said Animal killed run against or upon as aforesaid at any public highway or road Crossing, nor within the limits of any Town City or Village, nor did the said Animal get onto or upon said Rail Road within the limits of any Town City or Village. And it was necessary that such Cattle guard should have been made to prevent Cattle Horses Sheep & Hogs from getting upon the said Rail Road & the tracks of the same, to the said plaintiff damage of three hundred dollars, therefore he brings suit &c

A. S. & C. F. Miller

Plff Attys.

Endorsed

Filed Jan'y 25. 1861

Of Penneyer Clerk

Pleash

Galena & Chicago Union
Rail Road Company
Attys
Charles Crawford

And the said defendant
by J. L. Loop its Attorney
Comes and defends &c and

says that it is not guilty of the said supposed grievances
laid to its Charge in manner of and as the said plaintiff
has Complained against it and of this the said defendant
puts itself upon the Country &c

J. L. Loop

Atty for Deft

And the said plaintiff does the like wherein the said
defendant puts himself upon the Country as above:

Cyrus S. Miller

Plff Atty

Endoned

"Filed Feb'y 11. 1861

O. Penney Clerk

And afterwards to wit on the 7th March 1861.
it being one of the days of the February Term of the
Kennebago County Circuit Court the following entry was made
as appears of Court record to wit:

Charles Crawford

vs. Case:
The Galena & Chicago
Union Rail Road
Company

And now comes the Plaintiff by
A. S. Miller his Attorney and the
Defendant by Loop their At-
torney also comes and after being joined: It is ordered
that a jury come, and thereupon come a jury of twelve

11

good and lawfull men who being duly empanelled
 tried and sworn well and truly to try the Cause in hear-
 ing according to the evidence, and having heard the evi-
 dence and arguement of Counsel, the jury retire to Consider
 of their verdict: And the hour of adjournment having ar-
 rived they are charged to meet the Court at the hour of
 nine O'Clock to morrow morning.

And afterwards to wit on the 8th day of
 March 1861: It being one of the days of the aforesaid
 February Term of Court the following entry was made
 as appears of Court record to wit:

Charles Crawford

v.

March 8. 1861

The Galena & Chicago

Union Rail Road

Company

} Case.

And now again Come the
 parties herein as also the jury
 empanelled in this Cause and having Considered of their
 verdict they render the following: ^{to} the jury find the
 Defendant guilty, and assess the Plaintiff damages in
 the sum of \$167.00: Whereupon the Defendant moves the
 Court for a new trial herein. The Plaintiff remits \$5.00
 from the verdict of the jury.

Motion for a new trial

In the Menetago County Circuit Court
February term 1861.

Charles Crawford

v.

G & C W R R Co

The defendant by its Attorneys
Comes and moves the Court for a new trial in this Cause
for the following Causes.

- 1st The verdict is Contrary to Law.
- 2nd It is Contrary to evidence.
- 3rd The instructions by the Court on the part of the Plaintiff was erroneous.
- 4th The Court wrongfully refused instructions offered on the part of the defendant.
- 5th The damages are excessive & not in any event justified by the evidence.
- 6th The verdict should have been for the defendant instead of the Plaintiff.

Anthony Scop

Atty for D. ft.

Endorsed

Filed Mar 8th 1861

At Penney's Clerk's

And afterwards to wit on the 9th day of March 1861. it being one of the days of the aforesaid February Term of Court the following entry was made as appears of Court record to wit:

Charles Crawford

^{vs}
The Galena & Chicago, Care
Union Rail Road

Company

And now again come the parties by their Attornies, and the Court having heard an argument of Counsel on the motion for a new trial therein overrules the same: The defendant excepts to the said decision of the Court. It is therefore considered and ordered by the Court that the Plaintiff have and recover of the defendant the sum of One Hundred and fifty dollars damages, as also his Costs & Charges herein expended & that he have execution therefor. Thereupon the Defendant pray an appeal to the Supreme Court which is allowed Conditioned that the said Defendant file their Appeal Bond with Hester S. Newbury as surety in the sum of three hundred dollars within 20 days with the Clerk of this Court.

Plaintiff Instructions

The Plaintiff asks the following instructions: If the jury believe from the evidence that the plaintiff mare was killed upon the defendants Rail Road track and not upon the crossing of a public highway nor within the limits of a town, city or village and within five miles of a settlement and that the said Rail Road had been open for use for six months previous to the time of said injury of said Animal and that the said Mare was injured and rendered of no value by the engines or servants of the defendants as charged in the said plaintiff declaration; and that the said Mare got onto and upon the said defendants said Rail Road track through the insufficiency of the ~~said~~ defendants said Cattle guard without any neglect on the part of the Plaintiff then the jury will find for the plaintiff such amount of damage as was proved to have been done to said Animal.

Given

Defendants Instructions:

The jury are instructed that if they believe from the evidence that the negligence of the plaintiff contributed to the loss of the mare in question the plaintiff cannot recover.

Given

That the killing of the mare mentioned in plaintiff's declaration, is not of itself proof of gross negligence or malice. And that if the plaintiff charges, and claims to recover for negligence on the part of the servants of the defendants, that he must prove such negligence as charged in the declaration, or he cannot recover in this Action.

That whilst by the law of this State Cattle have the right to run at large, on uninclosed lands, and the owner of such Cattle are not liable in trespass for their so running, yet if Cattle, when so allowed to run at large by their owner are killed or injured by getting upon a Rail Road, the Rail Road Company are not liable without proof that the death or injury was occasioned by the negligence of the Company, or its servants or that it was wilfully done.

That a case of negligence on the part of a Rail Road Company is not made out by simply showing simply the killing of live stock, but it must also be clearly shown that the death was occasioned by the negligence of the Company which negligence consists in doing some act careless or negligent on its part or failing to do some act required by law or the omission of which implies carelessness on the part of the Company.

Refused

That it is in Contemplation of law negligence on the part of the Plaintiff to allow his mare to run at large, when it was liable to get upon defendants Rail Road. And if the jury believe from the evidence that the Plaintiff was guilty of such negligence at the time the Mare was killed, the jury should find for the defendants.

Refused

The jury are instructed that a party cannot recover for an injury brought about by his own carelessness and negligence: therefore if the jury in this case believe that the plaintiff was the owner of a Mare, as alleged in his declaration, and that he turned said Mare out in the highway, and that he then kept and depastured her, and that said Mare went from said highway over the cattle guards of the defendants at a road crossing onto the Rail Road track of the Defendant and that said defendant was bound to erect and maintain good and sufficient Cattle guards to prevent Cattle horses &c from going over the Rail Road, and that said Cattle guards were insufficient, and that in consequence of said Cattle guards being insufficient said Mare got on said R Road track, and was run over by the Cars of the defendant, who was exercising ordinary Care and was guilty of no negligence, then in that case the Plaintiff cannot recover, the law being that although the law imposes upon a Rail Road Co the absolute duty of erecting and maintaining good and sufficient fences and Cattle guards to keep

Horses and Cattle off from a Rail Road track yet a duty also devolves upon the proprietors along the road and they have no right to fold their arms and voluntarily permit their Cattle to stray upon the R. Road track even though the Cattle guards and fences which the Company are bound to maintain be insufficient.

Refused

The jury are further instructed that R. R. Companies in this State are not liable for injuries to Cattle which have strayed upon the highway, or which have been voluntarily turned into the highway by the owner and which came upon the track through the want of the fence or Cattle guards which the Company is bound by law to maintain. Public highways can not be regarded as Commons and no man has a right to depasture his Cattle upon the public highway, therefore Cattle are unlawfully upon the highway unless they are being driven along, or while being driven a long escape from the person leaving them in charge who make fresh pursuits. And if the jury in this case believe that the plaintiff voluntarily turned the mare in question into the public highway to be depastured, and not the mare strayed on the Rail Road track and was killed without any fault on the part of the defendant or its servants, then the jury must find for the defendant.

Replied.

That if the jury believe from the evidence that the cattle guard in question was insufficient, and they also believe from such evidence that the Plaintiff was advised of such fact, it was negligence on his part to allow the mare to depasture in the highway, and if the jury find that the plaintiff allowed the mare ^{in question} to depasture in the highway, and also believe that she came upon the Rail Road from the highway and not from the Plaintiff's close adjoining the defendant's road, on account of the insufficiency of the defendant's fence, then the jury should find the defendant guilty.

Replied

That the presumptions of law are in favor of defendants: And that the Plaintiff cannot recover in this suit unless upon proof of gross negligence in the servants of the defendants.

Bill of Exceptions.

Charles Crawford

(v.)

Galena & Chicago Union
Rail Road Company

In the Menominee County
Circuit Court of the
February Term 1861

Be it remembered that on the 7th day of March A.D. 1861 it being one of the days of the February Term of this Court this Cause came on to be tried before Honorable Benjamin R. Sheldon Judge and a Jury.

That John Elliott was introduced and sworn as a witness on the part of the plaintiff and testified as follows.

Resides in Town of Mennebago, Mennebago County. Resided there in 1856. Lived sixty five rods from Galena Rail Road. Don't know when Rail Road was built - I think it was built in 1853 - The Cars commenced running in 1854 to Treepost. The Rail Road has been in use since 1854. The Rail Road was completed to Treepost in 1854.

Sometime in June, 4 years ago last summer I saw the mare - It was about One O'clock when I first saw her - I went away - It was half past 4 O'clock when I returned. The mare was well when I went away. She was not there when I came back. I saw the Colt and followed it to the Mare - I saw the Mare. she had three broken legs. - The Colt got over the Cattle guard some way. I don't know how. Colt was sucking - I found the Mare in a ditch down the embankment - The legs were broken - not off - they were hanging by flesh - I don't know how Colt got on the track - Two trains passed that day - One freight train east - One passenger train west - The freight train

struck the Mare- I judged that the freight train struck the Mare from the way she laid:

I examined Cattle guard- Saw foot marks on the slats which were made of pine: The mare had walked over- The Cattle guards were at the Public Crossing- The Cattle guard was at a County road in the town of Humboldt in this County- The Cattle guard is in the County and not in a Village Town or city- There was not over two inches space between slats- The horses feet could not slip through- There was not a place to let a horses leg through between the rails- The width of Cattle guard is four feet. I did not measure it- I guess it was 4 feet- I could see tracks of shoes on the slats. I examined the Cattle guard that evening when the Mare lay there- She was not far from Cattle guard when struck- The Mare was well at half past one P.M. I saw her at 6 P.M. lying injured- The Mare was a decent Mare- Horses were high- Dont know her exact value: Am a farmer- use Horses myself- The mare was worth at that time \$140. to \$145- She was a kind of Mare roan or gray or Pepper and salt Color- I found out the next day who she belonged to- Had not seen her before that afternoon- She was shot Sunday forenoon: This happened Saturday: She was not of any value after the injury. I saw she she was well at one -

21

Crop examined by defendant
 The man was at Riley Hall's land when I saw her
 at one, on the north side of Rail Road on com-
 mons - She was 80 rods from highway crossing -
 She was 80 rods from Rail Road - Road was not fenced
 on only one side: There was not a fence between her
 and Rail Road - She had to go to highway to get
 on Rail Road - I found her fifteen yards from
 cattle guard - I can not tell when she was struck
 She was standing on track when struck - She was
 standing on Centre of track when struck: I called
 could see gravel thrown up and blood on the rails -
 I don't know but that the Cars brought her from Menno
 bags but think not. She was 15 yards from Crossing
 when struck - There were foot marks of horses all the
 way from cattle guard to where she was struck -
 There were marks on the guard made by horse shoes -
 The slats were diamond shaped with edge up - The
 guard was made of three inch square timber - saw
 tracks on edge of two slats - saw but one track

The man had not been on run - The tracks
 were of an animal walking - I don't think she
 ran at all - I had never seen the man until
 that afternoon - I was ten yards from her when I
 saw her at One O'clock - I had never seen her
 before - Crawford (the Plaintiff) lives on the State
 road one mile from the Rail Road - It was

further $1\frac{1}{2}$ miles where man was killed - The road that intersects runs south to Byron - It is $1\frac{1}{4}$ miles from the place where the Byron Road intersects state road to the Rail Road. I can't tell how far Crawford lives from the Rail Road - Part of his land is south of the Rail Road, his house is north of the Rail Road. - There is improved land but not quite up to where state road intersects: Between Crawford house and improved land Charles Morgan lives - The Rail Road was also fenced at the time the accident occurred - The cattle guard was at high way crossing - The man got on the Rail Road out of the highway - I meant cattle guards were very short - The slats were only about 4 feet long The pit was about one foot deep. I did not measure cattle guard or depth of pit: - Grass and rubbish grew right through guard. - I did not examine guard to see whether it was right - saw guard every day was crossing it daily almost - I lived on south side of Rail Road - Lived 65 rods from cattle guard - Crawford (plaintiff) lived west on State road $1\frac{1}{4}$ miles

Direct examination resumed.

I don't know just where man was struck - I think 15 yards from cattle guard. - Rail Road is straight there - From the west an object could be seen 100 rods - Can not see far from the other way There was other cattle guards that were insufficient:

They have been removed because they were found to be insufficient:

Adams H. Davis was introduced and sworn as a witness on the part of the plaintiff and testified as follows—

I lived on the State road in June 1856, in Town of Hennepago, County of Hennepago 80 rods from Plaintiff. Have seen Crawford drive the mare— I remember that she was crushed with the Cars in 1856 I saw her east of the Crossing in the Rail Road track I saw her 3 or 4 rods east of Crossing— saw her Monday Morning— Riches & Crawford were present. Three of her legs were broken and her hind parts injured— It happened on the Galena Rail Road— I saw where she was standing and where she went down the bank:— The Cars must have been going east— An object could have been seen from a point one half a mile or more— I did see Cattle guard— We measured the slats with a square. The average distance apart of the slats was $1\frac{1}{2}$ inches some more and some a little distanced apart The Cattle guard was not over 5 feet wide length of slats. I saw horse tracks. — There were two or three tracks on timbers. They were going east. I saw too and heel marks— my opinion is that the tracks were made by the mare— We compared a shoe which we took off the mare with the tracks on the slats and found they

Corresponded - The prints of nails were ^{partially} on two sticks - He took off only one shoe - I helped take it off -

Crop examined by defendant.

I came in the Spring of 1856 - I came to Rockford in the fall of 1855. - The Rail Road was in operation winter of 1855. - Had seen the mare - I could not say how old she was - She was not young - The place where the Mare was killed is three miles from Crawford. She was thrown on north side - I saw no tracks on high way before she came on the Rail Road. I dont know what the weather was the day the Mare was killed - I saw tracks after the Mare crossed the guard and before she got to the place where she was killed. - The Mare was not killed in any Town Village or City, or at any road Crossing.

S. J. Picher was introduced and sworn as a witness on the part of the plaintiff and testified as follows:

I saw the Mare on Monday Morning - I dont remember seeing her previously - She was grey I had seen Crawford driving her I suppose - I saw her on Monday - Davis Crawford and others were there - She was 3 rods east of the cattle guard I dont know where she was struck - Saw two footprints

25

Saw horse shoes compared with horse prints. They corresponded - I measured between the slats they were $1\frac{1}{2}$ inches - same exactly that came over same under - I cannot say how wide cattle guard was, but not exceeding, I think, 3 feet - Pit was about length of square - 2 feet deep - There were one or two tracks near the north rail - The train going east must have struck mare - They commenced telling slats that (Monday) morning that we measured - They showed the slats in the presence of me - Davis and others -

Crop examined by Defendant

This was 4 or 5 years ago - There is a difference between fore and hind shoes - I can't tell difference - Shoe had five nails on it - It had heel and two corks - any other medium sized shoe would have done to test the holes - This was a medium shoe - Crawford lives three miles from cattle guard - He allowed the mare to run at large in the summer time -

Samuel Moat was introduced and sworn as a witness on the part of the Plaintiff - and testified as follows -

Resided in June 1886 in Town of Minnabago in this County. I live 50 rods from Rice Road - know the plaintiff - am some acquainted with him - not much - I live 3 miles from plaintiff - I saw the mare about nine o'clock that morning the first

time I ever saw her - She was 9 or 10 rods from Mr Walls stone house - She was grazing - She was pretty much white - I saw her next half past seven P.M. same day - She was laying down embankment in a gutter - She had 3 broken legs and was also jammed up somewhat in her hind parts - One side of her hip was injured - It was in month of June A.D. 1856 - no one present when I saw her - My boys told me - I went to see found Colt there - Did not examine track - Saw the mare next on Sunday morning - She was lying in gutter - Could not tell what killed her - It was 15 or 17 yards from Cattle guard - Cars were going east - She laid with her head north - If cars were going other way she would not have layed as she did - Saw track on south side of Rail Road - There were tracks on south side of Rail Road - saw where gap on south side had been eaten - She was first struck 15 to 17 yards from crossing - It was a public road where crossing was - Saw mare near noon on Sunday - Crawford was there & also William Blackburn - James Stephenson and others - I examined Cattle guards on Sunday - The slats of Cattle guard was as I put my hand down between them the width of my hand apart - I put my hand through where steps of horses walked off - The timber of the slats was pine - I saw marks of horses on slats - They were marks of the shoes of horses - Saw marks of the tusk too - Cuts and heel cuts - More visible on south chain on north side - Marks

27

were on two slats - Saw tracks where she had walked on south side - fresh tracks - I did not see shoes of Mare taken off after she was dead - I saw 5 of Stephensons Open walk over same Cattle guard from track - The spaces had been widened between slats when Open jumped over - The Rail Road men have made the spaces wider since - I have seen sheep jump over the Cattle guard - A rope was put around the colts neck and it was pulled over. It jumped or was pulled over - The Cattle guard was a little over four feet wide not over $4\frac{1}{2}$ feet - The road was used two years before Mare was killed - The road was fenced - The road had been fenced a year at that time - I stood still and looked over the Cattle guard several times -

Crop examined by defendant.

I was coming to Rockford the morning I saw the Mare - I live $1\frac{1}{2}$ miles south of State road - I knew then where Crawford lived - Could not tell how long Crawford had lived there - Did not pass Alf House in coming to Rockford - I live on road that crosses Rail Road 50 rods from Cropping - I saw the mare near the road ^{the crop place was} She was on south side of Rail Road and 70 rods from Rail Road - She was east of highway that crosses over Halls land. She was on vacant ground She was $1\frac{3}{4}$ miles from Crawford - She was one half mile south of where we turn to go to

Rockford - It is I think about one mile from state road to the Rail Road - The man was 50 rods from Rail Road - She was north of Rail Road and east of Crop road - She was $1\frac{1}{2}$ miles from home - There was no fence between her and public road - It was 50 rods from public road 70 rods from Rail Road - Did not know who she belonged to at that time - I never saw her before - I never measured length of slats - Have seen sheep jump over - Saw two foot prints on slats - One print was where she stepped with right foot and the other the left - Could not tell whether right or left - It was four foot - The one on the south side was the plainest to be seen - This was $2\frac{1}{2}$ miles from Minnabago station - There was two public crossings between that and Minnabago station - The last cattle guards were different - The slats were longer and wider - There was not as much pit under it nor was it so long - The slats were taken out and changed - Don't know when - The slats were from 4 to $4\frac{1}{2}$ feet long - Would not believe that they were 8 feet long if measured and sworn to as being of that length - Can't say when new ones were put in - Cattle guards were changed same summer (1856) They are not over eight feet now - Don't know where Plaintiff came from when he moved there -

J. P. Crawford was then introduced and sworn on behalf of Plaintiff and testified as follows - Am son of

29

Plaintiff - Saw father mow the morning after - know the Cropanz - The Rail Road went to Freeport winter of 53-4 - I examined Cattle guards - The width between slats $1\frac{1}{2}$ inches - Saw joints of shoes - length of slats 4 to $4\frac{1}{2}$ feet - Mow was worth \$150#

Crop examined by defendant.

I knew the Mow over a year - she did not run loose while here in Rockford - never knew her to try cattle guards before - She worked on Loomis farm near Rockford - Her age was 10 years - Father bought her of Helder - Saw her when Helder owned her - She became more valuable -

Robert Crisp was introduced and sworn as a Witness on the part of the Defendant - and testified as follows:

Am in employ of Rail Road Company - My business is to look after track between Cherry Valley and Minnebago - Been 7 years employed here - Am acquainted with Cattle guards - know track stringers - They are 8 feet between Rockford and Minnebago - Both rested on same bed timbers - The distance might have been 7 feet - Might have been 8 feet - Have known none less than 8 feet except there will be occasionally one 2 inches shorter - know the mow mow, did not see her after she was killed - Don't know whether she was brachy or not - She was killed on Saturday - examined

Cattle guard to see if tracks were upon it.

Crop examined by Plaintiff.

I don't know the length of Slats. Can't give the exact length - think guard was seven feet wide -

This was ^{all} the evidence in the Cause.

At the request of the Plaintiff's Counsel the Court instructed the jury as follows:

The Plaintiff asks the following instructions: If the jury believe from the evidence - that the Plaintiff's Mare was killed upon the defendant's Rail Road track - and not upon the Crossing of a public highway nor within the limits of a town, City or County village and within five miles of a settlement, and that the said Rail Road had been open for use for six months previous to the time of said injury of said Animal. And that the said Mare was injured and rendered of no value by the engines and servants of the defendant, as charged in the said Plaintiff's declaration. And that the said Mare got onto and upon the said defendant's said Rail Road track through the insufficiency of the defendant's said Cattle guard, without any neglect on the part of the Plaintiff then the jury will find for the Plaintiff such amount of damage as was proved to have been done to said Animal.

To the giving of which instruction the

31

defendant by its Counsel objected, which objections was overruled by the Court - And the Defendant then & there accepted

The defendants Counsel asked the Court to give the following instructions numbered, 1. 2. 3. 4. 5. 6. 7. 8. 9.

Number 1.

The jury are instructed that if they believe from the evidence that the negligence of the Plaintiff Contributed to the loss of the Mare in question, the Plaintiff cannot recover.

Number 2.

That the killing of the Mare mentioned in Plaintiff declaration is not of itself proof of gross negligence or malice, and that if the Plaintiff charges & Claims to recover for negligence on the part of the servants of the defendants, that he must prove such negligence as Charged in the declaration or he cannot recover in this action

Number 3.

That whilst by the laws of this State Cattle have the right to run at large, on uninclosed lands, and the owners of such Cattle are not liable in trespass for their so running at large, yet if Cattle when so allowed

to run at large by their owner are killed or injured by getting upon a Rail Road, the Rail Road Company are not liable without proof that the death or injury was occasioned by the negligence of the Company, or its servants, or that it was wilfully done.

Number 4.

That a case of negligence on the part of a Rail Road Company is not made out by showing simply the killing of live stock, but it must also be clearly shown that the death was occasioned by the negligence of the Company, which negligence consists in doing some act careless or negligent on its part, or failing to do some act required by law, or the omission of which implies carelessness on the part of the Company.

Number 5

That is in contemplation of law negligence on the part of the plaintiff to allow his mare to run at large, where it was liable to get upon defendant's Rail Road, and if the jury believe from the evidence that the plaintiff was guilty of such negligence at the time the mare was killed the jury should find for the defendant.

Number 6.

That a party Cannot recover for an injury brought about by his own Carelessness and negligence - then for if the jury in this case believe that the plaintiff was the owner of a mare, as alleged in his declaration, and that he turned said Mare out in the highway, and that he thus kept and depastured her, and that said Mare went from said highway, over the Cattle guards of the defendants, at a road crossing, onto the Rail Road track of the defendant, and that said defendant was bound to erect and maintain good and sufficient Cattle guards to prevent cattle, horses & from going over the Rail Road, and that said Cattle guards were insufficient, and that in consequence of said Cattle guards being insufficient, said mare got on said Rail Road track, and was run over by the Cars of the defendant, who was exercising ordinary care and was guilty of no negligence, then in that case the plaintiff Cannot recover, the law being that although the law imposes upon a Rail Road Co. the absolute duty of erecting and maintaining good and sufficient fences & Cattle guards to keep horses and Cattle off from a Rail Road track, yet a duty also devolves upon the proprietors along the road, and they have no right to place their arms and voluntarily permit their Cattle to stray upon the Rail Road track even though the Cattle guards and fences, which the Company are bound to maintain, be insufficient;

Number 7.

That Rail Road Companies in this State are not liable for injuries to Cattle which have strayed upon the highway or which have been voluntarily turned into the highway by the owner, and which came upon the track through the want of the fence or cattle guard which the Company is bound by law to maintain - Public highways cannot be regarded as Commons, and no man has a right to depasture his Cattle upon the public highway therefore Cattle are unlawfully upon the highway unless they are being driven along, or while being driven along escape from the person having them in charge who makes fresh pursuit: And if the jury in this Case believe that the Plaintiff voluntarily turned the mare in question into the public highway to be depastured, and not the mare strayed on the Rail Road track and was killed without any fault on the part of the defendant or its servants then the jury must find for the defendants.

Number 8.

That if the jury believe from the evidence that the Cattle guard in question was insufficient, and that they also believe from such evidence that the Plaintiff was advised of such fact, it was negligence on his part to allow the mare to depasture on the

highway and if the jury find that the Plaintiff allowed the mare in question so to departure in the highway - and also believe that she came upon the Race Road from the highway and not from the Plaintiff close adjoining the defendants road on account of the insufficiency of the defendants fence then the jury should find the defendant not guilty.

Number 9.

That the presumptions of law are in favor of defendants: and that the plaintiff cannot recover in this suit unless upon proof of gross negligence in the servants of the defendant:-

Those numbered 1. 2. 3. 4 the Court gave and refused to give those numbered 5. 6. 7. 8. 9 to which decision and ruling the defendant then & there accepted;

The jury found a verdict for the Plaintiff for one hundred and sixty seven dollars and fifty cents.

The defendant moved for a new trial and the plaintiff then by his Counsel remitted all of said judgment excepting one hundred and fifty dollars After argument the Court overruled said motion and rendered judgment for the said sum of one hundred and fifty dollars damages to which overruling of said motion

and entry of judgment the defendant by its Counsel then and then excepted and prayed that this its bill of exceptions be signed and sealed by the Judge, which is done accordingly:-

Agreed upon by Counsel

Benj A Sheldon

(Seal)

(Seal)

Endorsed

"Filed Mar 28. 1861.

Of Penngor Clerk"

Appeal Bond

Know all men by these presents- That the Galena and Chicago Union Rail Road Company as principal and Walter L. Strawberry as security are here and firmly bound unto Charles Crawford in the penal sum of Three hundred Dollars good and lawful money of the United States for the payment of which well & truly to be made the said Galena and Chicago Union Rail Road Company binds itself and its successors and the said Walter L. Strawberry binds his heirs, executors and administrators jointly severally and firmly by these presents:

Witness the Corporate seal of the said Galena and Chicago Union Rail Road Company and the seal of said Walter L. Strawberry this 12th day of

37

March A D 1861.

The Condition of the above obligation is such that whereas the above named Charles Crawford did at the February Term of the Hennepago Circuit Court held on for the County of Hennepago in the State of Illinois A D 1861. recover a judgment against the above named Galena and Chicago Union Rail Road Company for the sum of One Hundred and fifty dollars and Costs Costs of suit from which judgment the said Galena and Chicago Union Rail Road Company has prayed an appeal to the Supreme Court which has been allowed by the Court - Now if the said Galena & Chicago Union Rail Road Company shall duly and diligently prosecute its said appeal with effect and shall pay whatever judgment damages interest and Costs, which shall be given adjudged or awarded in case the said judgment is affirmed by the Supreme Court Then the above obligation to be void, otherwise to remain in full force and effect.

W. L. Hawbury Pres.

Attest

W. L. Hawbury (Seal)

W. M. Sarabee

Secretary

Enclosed

Filed Mar 14. 1861.

O. Reminger Clerk

Costs of Circuit Court

Plaintiff's Costs
 Defendant's Costs
 Transcript

\$ 88.85
 \$ 2.30
 \$ 11.00

State of Illinois

Menisbago County p. $\exists$ J. Oliver A. Penneyer Clerk
 of the Circuit Court in & for said County do hereby cer-
 tify that the foregoing is a full true & complete copy of
 the papers on file, & transcript of the records in foregoing
 Cause of Charles Crawford vs. The Galena & Chicago
 Union Rail Road Company, in my office. And
 that they are Copies of such files & records duly com-
 pared therewith by me.

Witness my hand and the seal of the Circuit
 Court in & for said County this 4th April
 1861.

Oliver A. Penneyer Clerk

State of Illinois
 Supreme Court

Supreme Court, Third
 Grand Division April
 Term A. D. 1861-

Galena & Chicago
Union Rail Road
Company
vs Appellant
Charles Crawford
Appellee

And now comes the said appellant the Galena & Chicago Union Rail Road Company, by Elliott Anthony its attorney and says that in the record and proceedings aforesaid and also in the rendition of the judgment aforesaid, there is manifest error in this to wit -

- 1 The declaration aforesaid and the matters therein contained are not sufficient in law for the said Charles Crawford to have or maintain his aforesaid action thereof against the said appellant -
- 2 The judgment was given for the appelle Charles Crawford whereas by law it should have been given for the said Galena & Chicago Union Rail Road Company.
- 3 The Court erred in overruling the motion for a new trial in this case -
- 4 The Court erred in giving the instructions

for the plaintiff-

5- The Court erred in refusing to give the 5. 6. 7. 8 instructions asked for on the part of the said Galena Chicago Union Rail Road Company.

6- The Court erred in overruling the motion for arrest of judgment-

And the said Galena Chicago Union Rail Road Company prays that the judgment aforesaid, for the errors aforesaid and for other errors apparent in the record of proceedings aforesaid, may be reversed, annulled and altogether held for nothing and that the said appellant may be restored to all things which it hath lost by occasion of the said judgment to

Elliott Anthony
Atty for Appellant

And now comes the said Appellee by Miller & Leland his attys & says that there is no such error in said record & proceedings as is above opined & prays an affirmance of the judgment,

April 18 1861

Leland & Leland
for Appellee

Filed Apr. 18. 1861
L. Leland
Clerk

179
Winnebago Co Cir Court.

Charles Crawford

vs.

The Galena & Chicago
Union Rail Road Co

Transcript.

Filed April 16. 1861
L. Leland
clerk