

12521

No. _____

Supreme Court of Illinois

Chicago, St. Paul & Fund Du
Lac R. R.

vs.

McCarty.

71641  7

United States of America
State of Illinois
McHenry County

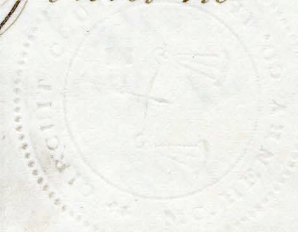
Pleas Before the Hon Isaac
G. Wilson Judge of the thirteenth Judicial Circuit
of the State of Illinois and Presiding Judge of the
McHenry County Circuit Court: at a Circuit Court
begun and held at Phoenix Hall in Woodstock, the
Court House in said County being unfit for that
purpose and the Board of Supervisors of said County
having provided said hall for that purpose on Monday
the sixteenth day of March in the year of Our
Lord One thousand Eight Hundred and Fifty Seven
and of the Independence of the said United
States the Eighty Second

Present the Hon
Isaac G. Wilson Judge
attest Geo. T. Kasson John Eddy Sheriff
Clerk

State of Illinois
McHenry County

I, Geo. T. Kasson
Clerk of the Circuit Court
in and for said County ^{in the State aforesaid}, do hereby certify that
the summons heretofore issued and returned
in the above entitled Cause is lost, and
by the most diligent search can not be
found in my office.

In Witness whereof I have
hereunto set my hand & affixed
the seal of said Court at Woodstock
this 30th day of April A.D. 1858
Geo. T. Kasson



And therefor At a term of the Circuit Court begun and held at the Court House in Woodstock McHenry County on the 18th day of November A.D. 1856 on the 25th day of November being one of the days of said Term the following among other proceedings were had

Owen McBarty

Chicago St Paul and
Fond du Lac Rail Road Co

vs
Respond Case

And now Come

the Plaintiff By Willard

And it appearing to the Court that no declaration has been filed herein it is therefore Ordered that this Cause be continued and that the Defendants have and recover of the plaintiff their costs and charges about this term Expended and that they have Execution therefor

And thereafter to wit on the 6 day of March A.D. 1857
The said plaintiff By his attorney filed in the Office of the Clerk of this Court his narration in the words and figures following to wit:

McHenry County Circuit Court
March Term A.D. 1857

State of Illinois

McHenry County

Owen McBarty Plaintiff in this suit
By Church and Willard his Attorney
Complains of the Chicago St Paul and Fond du Lac
Rail Road Company an incorporated Company
incorporated under and by virtue of the Laws of the
State of Illinois in a plea of Case

For that whereas the said Defendants on the first day of August A.D. 1856 under and by virtue of their act of incorporation claimed to have the right to Enter upon the Close and farm of said Plaintiff situate in the town of Warton in the County of McHenry aforesaid and Construct and Build their Rail Road track over and across the said Close and farm of the said Plaintiff as aforesaid. And the Plaintiff avers that the said Defendants on the day and year last aforesaid at the County aforesaid did Enter upon the Close and farm of him the said Plaintiff and Commenced the Construction of their said Rail Road track over and across the same and Continued so to Construct the same, from the day last aforesaid until the day of the Commencement of this suit. And the Plaintiff avers that it was the duty of the said Defendants and by law the said Defendants during all the time they were so Constructing the said Rail Road track over and across the Close and land of the said Plaintiff to keep up the fences, and to put up the fences taken down by them while so Engaged in the Construction of said track And to put in and maintain Cattle guards and use and take all necessary trouble and precaution to prevent Cattle Horses and other Animals from Escaping upon and Entering upon said Closes and Lands of the said Plaintiff. Nevertheless the said Plaintiff avers that the said Defendants not Regarding their duty and obligations in this behalf did not keep up the fences, and put the fences by them taken down during the Construction of their said track as aforesaid, nor did they put in and maintain Cattle guards and

use and take all necessary trouble and precautions
to prevent Cattle, horses and other animals from Escaping
upland Entering upon the Close and lands as aforesaid
of the said Plaintiff. And the Plaintiff further in
fact saith that the Said Defendants during
all the time they were so Constructing the said
Rail Road track as aforesaid took down and
removed the fences belonging to said Close and
land of the Plaintiff and negligently suffered
the same to remain down, by reason of which
premises and the negligence of the said Defendants
in this behalf the Cattle horses and other animals
Running at large on the highways and Common
lands of said town of Hartland were allowed to and
did Escape therefrom into ^{and} upon the Close and
lands of the said Plaintiff Situate in the said
town of Hartland in the County of McHenry
aforesaid and there and there destroyed, Eat
up, trampled upon & trampled the grass, grain
Corn Wheat and Chubage then & there growing
and standing upon said ~~Closes~~ and land
of the said Plaintiff to wit, at the County
of McHenry aforesaid, whereby and by reason of
the said several premises the said Plaintiff saith
he has been sustained damages to the sum of
Fifteen hundred dollars and therefore he brings suit &c

Church & Willard

(Endorsed) Filed Mar 6, 1857

Atty's for Plff

U.S. Kason Clk.

And thereafter to wit at the term of the Circuit Court
began and held at said Court Room in Woodstock
in said County of McHenry on the 16 day of March
to wit on the 27 day of March being one of the days of

the said March Term A.D. 1854 the following among other proceedings were had.

Owen McCarty }
vs } Case
Ch. St. P. & F. Ind. R.R. Co. } And now comes the Plaintiff
by Willard his Attorney and
the Defendant by his Attorney Joslyn and thereupon
it is ordered that a jury be called and there came
a jury of twelve good and lawful men to wit
Dan Buff Harmon Cole, David Pease, J. M. Underwood
A. Chamberlain C. Pease Pasco Austin M. H. McLaughlin
Jno. Sashbrook Geo. Pullen J. W. Mudgett Henry Probridge
who being duly sworn and sworn to well and truly
try the issue joined after having heard the evidence
and arguments of Counsel and received the instructions
of the Court retired to consider upon their
verdict. And thereafter returned and bring into Court
for their verdict that they find the issue for the
Plaintiff and assess his damages at three hundred
and sixty five Dollars - Whereupon the Defendant
by Joslyn his Attorney moves the Court for a new
trial and in arrest of Judgment.

And thereafter on the 1 day of April being one of the
days of said March Term the following among other
proceedings were had.

Owen McCarty }
vs } Case
Chic. St. P. & Ind. R.R. Co. } And the Court having
heard the Parties upon the
Motion for a new trial and
in arrest of Judgment, Overrules the same -

To the Opinion of the Court overruling said Motion the Defendant by its Counsel Excepts

It is therefore Ordered and Considered that the Plaintiff have and recover of the Defendant the sum of three hundred and sixty five dollars his damages so assessed as also his costs and Charges herein Expended and that he have Execution therefor. Whereupon the Defendants pray an appeal herein to the Supreme Court which is granted upon Condition that they enter into Bonds Conditioned according to Law in the sum of Seven hundred dollars within forty days from this date before the Clerk of the Circuit Court with Neil Donnelly, Joel H. Johnson or A. M. Fuller or Henry Smith of Chicago as Surety.

And thereafter was filed in this suit a Bill of Exceptions in the words and figures following to wit:

McHenry County Circuit Court

The Chicago St Paul & Fond du Lac
Rail Road Company

vs

Owen McCarty

Case

Be it Remembered

that on the trial of
the above entitled

Cause witnesses were called ⁱⁿ ~~on~~ ^{the} ~~part~~ ^{of} the Plaintiff
by whom it was proved that the Contractors engaged
in the construction of Defendants Rail Road, ^{entered} upon the
enclosed parts of Plaintiffs farm where the line of
said Road was located, for the purpose of construc-
ting said Road during the month of August 1856
that they took the fences down at the points where said
line entered said enclosure and left them down

during most of the time they were doing said work or if they put them up it was done in a ^{very} negligent and careless manner. That the fences around said enclosure were also thrown and taken down at other points by men engaged in said work, and that in consequence of the said taking down of said fences the crops growing within said enclosure were damaged by cattle entering said enclosure from the highways and common lands adjoining Plaintiffs farm. The value of the crops thus injured was variously estimated by Plaintiffs witnesses at from three to four hundred dollars. It was also proved on the part of Aff that during the latter part of the time the Company was running a construction train over its Road and that hogs went into the field over the cattle guards.

On the part of the defendant it was proven that the work of constructing the entire length of said Road from Chicago to Janesville was let to Page & Co Contractors and that said damage was occasioned by the carelessness and negligence of the men in the employ of Page & Co who were so engaged in constructing the Road for the Company.

It was also proven on the part of Aff that no cattle guards were constructed at the points where said line entered said enclosure, and that said cattle ^{also} entered ~~also~~ for want of said cattle guards. This being all the evidence in the case.

The Court at the request of the Plaintiff instructed the jury as follows.

1st If the jury believe from the evidence that during the time alleged in the Plaintiffs declaration

the defendants were engaged in constructing the Chicago St Paul and Fond du Lac Rail Road over and across the farm and close of the Plaintiff and that during that time they took down and left down the fences around said close and farm and negligently and carelessly suffered them to remain down and that through their negligence and carelessness in so doing they suffered hogs cattle and other animals to escape from the common lands and highways into and upon the lands and close mentioned in Plaintiffs declaration, and destroy the crops, to wit corn, wheat, oats and potatoes then growing, belonging to the Plaintiff, then the law is for the Plaintiff, and he is entitled to recover whatever damages he has proved he sustained in consequence of such acts of the defendant not exceeding the amount claimed.

Do That if the Jury believe from the Evidence that during the time alleged in the Plaintiffs declaration the Defendants ^{were} ~~the~~ constructing and running their Road over and across the lands of the Plaintiff mentioned in the declaration, and that during this time they negligently and carelessly omitted to put in sufficient necessary cattle guards whereby cattle and hogs were suffered to escape over and through such cattle guards into and upon the close and lands of Plaintiff and destroy the crops then growing then the law is for the Plaintiff and he is entitled to recover ^(whatever) the Jury believes the damages is proved to be in consequence of such negligence of the defendants not Exceeding the amount claimed

On the part of the defendant the court was requested to give the following instruction

"If the jury believe that Page & Others were Contractors for the construction of the Rail Road on the lands of the Plaintiff and that the damage complained of in this case resulted from the negligence of said Page & Co. and that the Rail Road had no knowledge of such acts of negligence then the law is for the defendant"

Which instruction was refused by the court to the giving of which said instruction asked by the Plaintiff, and to the refusal of the court to give the said instruction asked by the Defendant said Defendant Excepted, and prayed the court to sign and seal this Bill of Exceptions which is done.

Isaac J. Wilson *Seal*
Judge &c.

The above is correct according to the best of our recollection

Rodgett for Deft
Church & Willard for the Plff

(Endorsed) Filed Apr 1. 1857
G. T. Kasson clk

State of Illinois }
McHenry County } G. George T.
Kasson Clerk of the
Circuit Court in and for said County in the
State aforesaid do hereby certify that the
above & foregoing is a true and complete

copy of the Record of this Court in the
above Intitled Cause as appears to us,
by due examination. That

In Witness whereof I have
hereunto set my hand and
the Seal of said Court at
Woodstock this 20th day
of April A.D. 1858
Geo. S. Haffon Clerk

Cowan McCarty
vs
The Chicago & North
Western Ry Co

Sup Court
Error to M. Henry

And the said defend-
ant by S. S. Church his attorney
cons in and says that in the
said record and proceedings
there is no such error as is in
and by the said judgment
of errors of the said plaintiff
above thing supposed and
that he is ready to defend
S. S. Church

att for def in error

In Supreme Court of the State of Illinois Third Grand Division
The Chicago St Paul & Fond du Lac
Rail Road Company
Plff. in error

Error to Mr Henry

Owen Mc Carthy
Dist. in error

Now Comes said Plaintiff in error
by Blodgett its Attorney and says that in the Record
and proceedings in the above entitled Cause there is
manifest error as follows—

1st Said Circuit Court erred in giving the instructions to the
Jury asked by Dist in error on the trial of said Cause.

2^d Said Court erred in refusing to give the Jury the
instructions asked by Plff. in error.

3^d Said Court erred in overruling ~~and~~ the motion of
Plff. in error for a new trial.

4th Said Court erred in overruling the motion of Plff.
in error for an arrest of Judgment.

5th Said Court erred in rendering Judgment in said Cause

N. W. Blodgett

Atty. for Plff. in error

Filed 2-5-80

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Error to Mr Henry

The Chicago St Paul & Fond du Lac
Rail Road Company
Plff. in error

vs.

Owen Mc Carthy

N. W. Blodgett
Atty. for Plff. in error

L. J. Schuch
for Dist. in error

Supreme Court of the State of Illinois. Third Grand Division
The Chicago, St Paul and
Fond du Lac Rail Road Company } Error from McHenry County
Plaintiff in Error }
vs } Bond
Owen McCarty, Deft. in Error }

Know all men by these
Presents that We, the Chicago, St Paul and Fond
du Lac Rail Road Company, and Henry Smith
of Chicago, County of Cook, in said State, are held
and firmly bound unto Owen McCarty, Defendant
in error in the above intitled cause, in the sum of
Seven Hundred Dollars, to be paid to the said Owen
McCarty, his executors administrators or assigns, for which
payment well and truly to be made, we bind ourselves,
our heirs, Executors, administrators, and Successors, jointly
and severally, firmly by these presents.

In witness whereof the Chicago, St. Paul and Fond du Lac
Rail Road Co. have caused these presents to be subscribed
by their Assistant Treasurer, and their Corporate Seal to be
hereto affixed, and the said Henry Smith has hereto set
his hand and Seal, the 9th day of July A.D. 1857.

Whereas the said Chicago, St Paul and Fond du Lac Rail
Road Company, has sued out a Writ of Error from this
Court, for the reversal of a judgment obtained against
said Company, in favor of Owen McCarty, Deft. in Error,
in the Circuit Court of McHenry County, on the 10th day
of June A.D. 1857, for three hundred and Sixty five

Dollars, Damages, & costs, Now therefore the Condition
of this obligation is such, that if the said Plaintiff
in Error shall diligently prosecute said Appeal,
and shall pay the said judgment, and all costs,
interest and Damages in case the said judgment shall
be affirmed, then this obligation shall be void, other-
wise to remain in full force and effect.



The Chicago St. P. & N. W. R.R. Company
By H. B. Reafelder. Attest
Henry Smith Seal

Chicago St. Paul &
Fond du Lac R.R. Co.
Plff in Error

vs
Carr & McCarty agt in Error
Bond

Filed July 9. 1854.
L. L. Leonard
Clerk

In Supreme Court,
THIRD GRAND DIVISION,
APRIL TERM, 1858.

CHICAGO, ST. PAUL & FOND DU LAC RAIL ROAD COMPANY, <small>PLAINTIFF IN ERROR.</small> VS. OWEN McCARTY, <small>DEFENDANT IN ERROR.</small>	}	ERROR TO McHENRY.
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ABSTRACT OF RECORD

This was an action of case commenced by defendant in error against
2 plaintiff in error in McHenry Circuit Court. The summons was issued in
October, 1856, and returnable at November term of said year. The cause
was continued at the November term for want of Declaration.

On the 6th day of March, 1857, the following declaration was filed:

STATE OF ILLINOIS }
McHENRY COUNTY, } ss.

Owen McCarty, plaintiff in this suit by Church and Willard, his attor-
neys, complains of the Chicago, St. Paul & Fond du Lac Rail Road Com-
3 pany, an incorporated company in and by virtue of the law of the State of
Illinois in a plea of case.

For that, whereas, the said defendants on the first day of August,
1856, under and by virtue of their act of incorporation, claimed to have
the right to enter upon the close and farm of said plaintiff situate in the
town of Hartland, in the County of McHenry, aforesaid, and construct and
build their rail road track over and across the said close and farm of the said

*If the record
in this case
does not show
that an issue
was joined
between the
parties in the
Court below*

Such omission

*was through the default of the Plaintiff
in Error who cannot be obliged to his*

own defendant. If he has had the full benefit of a trial in the Court below when the plaintiff in the Court below was entitled to a judgment by default for want of a plea objection now comes with a bad grace from the party who has had such gratuitous benefits

- 2 The Declaration does not concede that the defendant below had any ~~claim~~ or possessed the right to enter the plaintiff's land and construct the Rail Road thereon. The rail Road Company had not acquired the title to the land nor the right of way across it. and although they might lawfully exercise the right conferred on them by their franchise, yet they were obliged to so exercise their prerogatives as not to infringe upon the

Rights of others to them damage

2

It not appearing
from the evidence
or pleadings in
the Court below
that the Plaintiff
in Error had ac-
quired any
right to the
land of the
Defendants
in Error ~~or~~ or
any right to
use it as against
him for the
purpose of build-
ing their R.R.
They were liable
for all damage

plaintiff as aforesaid; and the plaintiff avers that the said defendant on the day and year last aforesaid, at the county aforesaid, did enter upon the close and farm of him the said plaintiff and commence the construction of their said rail road track, over and across the same, and continued so to construct the same from the day last aforesaid until the day of the commencement of this suit; and the plaintiff avers that it was the duty of the said defend-
4 dants, and by law the said defendants during all the time they were so constructing the said rail road track over and across the close and land of the said plaintiff to keep up the fences, and to put up the fences taken down by them while so engaged in the construction of said track, and to put in and maintain cattle guards, and use and take all necessary trouble and precaution to prevent cattle, horses and other animals from escaping upon, and entering upon said close and lands of said plaintiff; nevertheless the said plaintiff avers that the said defendants not regarding their duty and obligations in this behalf, did not keep up the fences and put up the fences by them taken down, during the construction of their said track, as aforesaid, nor did they put in and maintain cattle guards, and use and take all necessary trouble and precaution to prevent cattle, horses and other animals from escaping upon, and entering upon the close and lands as aforesaid of said plaintiff; and the plaintiff further in fact saith, that the said defendants during all the time they were so constructing their said rail road track, as aforesaid, took down and removed the fences belonging to said close and lands of the plaintiff, and negligently suffered the same to remain down, by reason of which premises and the negligence of the said defendant in this behalf, the cattle, horses and other animals running at large in the highway and common lands of said town of Hartland were allowed to, and did escape there-
5 from into and upon the close and lands of the said plaintiff, situate in the said town of Hartland, in the County of McHenry, and then and there destroy, eat up, trampled upon and subverted the grass, grain, corn, wheat and herbage then and their growing and standing upon said close and land of said plaintiff, to wit at the County of McHenry, aforesaid, whereby said plaintiff saith he has sustained damage to the amount of fifteen hundred dollars, and therefore he brings suit, &c.

CHURCH & WILLARD,

Attorneys for Plaintiff.

5 The cause was tried before the court and jury at the March term of said court, 1857.

which resulted
to the Defendants
in Error consequence of the careless and
negligent manner in which the corporate
powers were exercised

The Plaintiff in Error had become incorpo-
rated under the General Rail Road Law
but had acquired no rights or privilege from
the defendants with reference to the use

of his land. but by law the Rail Road Company by its agents servants or might by law enter the land for certain purposes being responsible for all damages

See General Rail Road Law Sec 21
see clause (Purples Stat 2. 1864

Rail Road companies should not be allowed to exercise their extraordinary privileges to the injury and ruin of the owners of land but should be held to reasonable care and regard for the rights of persons whose property they are temporarily using

They are liable for the tortious acts and negligence of their agents servants or and Contractors or servants within the above rule

See Langdon vs Foster 5 Bam & Cres 547
and cases there cited by Little and J

The question of the liability of an incorporated Company for the acts of contractors is stated by this court in

Hind v. al vs Mabush Jan Co

15 Ill Page 72

By the order noted in the bill of exceptions below
that the Rail Road Company and their
servants and contractors are guilty of the
most gross negligence in the prosecution
of their work through the land of McCarty
showing an utter

disregard of his
property and
subjecting him

to injury and
damage which
was wholly

unexcusable and
which might

have been wholly
avoided by a
reasonable

amount of care
on the part of

the persons acting
under the control
of the rail road company

The Bill of Exceptions is as follows:

McHENRY COUNTY CIRCUIT COURT.

THE CHICAGO, ST. PAUL & FOND
DU LAC RAIL ROAD COMPANY.

VS.

OWEN McCARTY.

CASE.

Be it remembered, that on the trial of the above entitled cause, witnesses
6 were called in behalf of the plaintiff, by whom it was proved that the con-
tractors engaged in the construction of defendants rail road, entered upon
the enclosed parts of Plaintiff's farm where the line of said road was located
for the purpose of constructing said road during the month of August, 1856.
That they took the fences down at the points where the line entered said
enclosure, and left them down during most of the time they were doing said
work, or if they put them up it was done in a very negligent and careless
manner. That the fences around said enclosure were also thrown and taken
down at other points by men engaged in said work, and that in consequence
of the said taking down of said fences the crops growing within said en-
closure were damaged by cattle entering said enclosure from the highways
and common lands adjoining plaintiff's farm.

The value of the crops thus injured was variously estimated by plaintiff's
witnesses, at from three to four hundred dollars. It was also proved on the
part of plaintiff that during the latter part of the time the company was
running a construction train over its road, and that hogs went into the field
over the cattle-guards.

On the part of the defendant it was proved that the work of constructing
the entire length of said road from Chicago to Janesville, was let to Page &
Co., contractors, and that said damage was occasioned by the carelessness
and negligence of the men in the employ of Page & Co., who were engaged
in constructing the road for the company.

It was also proved on the part of plaintiff that no cattle-guards were con-
structed at the points where said line entered said enclosure; and that said
6 cattle also entered for want of said cattle-guards.

This being all the evidence in the case. The court at request of plaintiff
instructed the jury as follows:

1st. If the Jury believe from the evidence that during the time alleged
in the plaintiff's declaration the defendants were engaged in constructing

Submitted

L S C. Smith

att. for Dep. in error

the Chicago, St. Paul & Fond du Lac Rail Road, over and across the close
 8 and farm of said plaintiff, and that during that time they took down and
 left down the fences around said close and farm, and negligently and care-
 lessly suffered them to remain down, and that through their negligence and
 carelessness in so doing, they suffered hogs, cattle and other animals to es-
 cape from the common lands and highways into and upon the lands and close
 mentioned in the plaintiff's declaration, and destroy the crops, to wit: corn,
 wheat, oats and potatoes, then growing, belonging to the plaintiff then the
 the law is for the plaintiff, and he is entitled to recover whatever damages
 he has proved he sustained in consequence of such acts of the defendants
 not exceeding the amount claimed.

2d. That if the jury believe from the evidence that during the time al-
 leged in the plaintiff's declaration, the defendants were constructing and run-
 ning their rail road over and across the lands of the plaintiff, mentioned in
 8 the declaration, and that during that time they negligently and carelessly
 omitted to put in and maintain sufficient and necessary cattle-guards, where-
 by cattle and hogs were suffered to escape over and through such cattle-
 guards, into and upon the close and lands of plaintiff and destroy the crops
 then growing, then the law is for the plaintiff, and he is entitled to recover
 whatever the jury believe the damage is proved to be in consequence of
 such negligence of the defendants, not exceeding the amount claimed.

On the part of the defendant the following instruction was asked, and re-
 fused by the court:

If the jury believe that Page and others were the contractors for the con-
 9 struction of the rail road over the lands of the plaintiff and that the dama-
 ges complained of in this case resulted from the negligence of said Page &
 Co., and that the Rail Road Company had no knowledge of such acts of
 negligence, then the law is for the defendant.

The defendant excepted to the giving of said instructions on the part of
 plaintiff, and to the refusal of the court to give the instruction asked by the
 defendant.

10 The jury found a verdict for plaintiff, and assessed his damages at \$365.

6 Defendant moved for a new trial and in arrest of judgement.

The said motions were over-ruled by the court, and judgement given for
 the plaintiff on the verdict. To which defendant excepted.

ASSIGNMENT OF ERRORS.

Defendant brings the cause to this court and assigns the following errors:

1st. The Circuit Court erred in trying the case when no issue was joined between the parties.

2d. The Court erred in giving the instructions asked by plaintiff.

2d. The Court erred in refusing the instruction asked by defendant.

3d. The Court erred in over-ruling defendants motion for a new trial.

4th. The Court erred in over-ruling defendants motion in arrest of judgment.

5th. The Record is in other respects informal and erroneous.

Super 74 A-V

George McCarty

Ats

The Chicago & North
Western Railroad
Company

Deft's Answer

Filed May 26, 1888
L. Leland
Clk

The Chicago St Paul & Fond du Lac
Rail Road Company } In Supreme Court of the State of
Plff. in Error } Illinois - Third Division

vs.
Owen McHenry } April Term 1858
Def't. in Error } Error to McHenry

This was an action on the case brought by Def't. in Error against the Plff. in Error in the McHenry County Circuit Court. The summons was made returnable at the October term 1856 and at that term the cause was continued for want of a declaration.

On the 6th March 1857 the Def't. in Error filed his declaration which set forth in substance - That therefore, to wit, on the first day of August 1856 said Plff. in Error under and by virtue of their act of incorporation claimed to have the right to enter upon the close and farm of said Def't. in Error situated in said County of McHenry and to construct and build their Rail Road track over and across the said close and farm of the said Def't. in Error as aforesaid; And that on the day and year last aforesaid said Plff. in Error did enter upon the close and farm of said Def't. in Error and commence the construction of their said Rail Road track over and across the same and continued to construct the same from the day last aforesaid until the day of the commencement of said suit; And the Def't. in Error avers that it was the duty of said Plff. in Error by law

During all the time they were so constructing the said Rail Road tracks over and across said farm & done to keep up the fences and to put up the fences taken down by them while so engaged in the construction of said track And to put in and maintain Cattle-guards And use and take all necessary trouble and precaution to prevent Cattle horses and other animals from escaping upon and entering said close - Nevertheless said ~~Plff.~~ in error did not put up the fences, taken down And did not put in & maintain Cattle-guards And use all necessary trouble and precaution to prevent Cattle horses and other animals from escaping upon and entering the lands of the ~~Def.~~ in error by reason of which negligence of ~~Plff.~~ in error Cattle, horses and other animals escaped from the highways and common lands adjoining said farm into and upon the lands of said ~~Def.~~ in error And then and there destroyed the grass grain corn ~~and~~ wheat & herbage then and then standing and growing upon the land and close of said ~~Plff.~~ ~~Def.~~ in error whereby said ~~Def.~~ in error has sustained damage &c. The plea of general issue was filed.

At the March term of said Court for 1857 said Cause was tried ^{before the Court and} by a jury And the evidence as embodied in the Bill of Exceptions in the case was ~~as follows~~

that the contractors engaged in the construction of defendants rail road, entered upon the enclosed parts of Plaintiff's farm where the line of said road was located for the purpose of constructing said road during the month of August, 1856. That they took the fences down at the points where the line entered said enclosure, and left them down during most of the time they were doing said work, or if they put them up it was done in a very negligent and careless manner. That the fences around said enclosure were also thrown and taken down at other points by men engaged in said work, and that in consequence of the said taking down of said fences the crops growing within said enclosure were damaged by cattle entering said enclosure from the highways and common lands adjoining plaintiff's farm.

The value of the crops thus injured was variously estimated by plaintiff's witnesses, at from three to four hundred dollars. It was also proved on the

part of plaintiff that during the latter part of the time the company was running a construction train over its road, and that hogs went into the field over the cattle-guards.

On the part of the defendant it was proved that the work of constructing the entire length of said road from Chicago to Janesville, was let to Page & Co., contractors, and that said damage was occasioned by the carelessness and negligence of the men in the employ of Page & Co., who were engaged in constructing the road for the company.

It was also proved on the part of plaintiff that no cattle-guards were constructed at the points where said line entered said enclosure; and that said 6 cattle also entered for want of said cattle-guards.

This being all the evidence in the case. The court at request of plaintiff instructed the jury as follows:

1st. If the Jury believe from the evidence that during the time alleged in the plaintiff's declaration the defendants were engaged in constructing

the Chicago, St. Paul & Fond du Lac Rail Road, over and across the close 8 and farm of said plaintiff, and that during that time they took down and left down the fences around said close and farm, and negligently and carelessly suffered them to remain down, and that through their negligence and carelessness in so doing, they suffered hogs, cattle and other animals to escape from the common lands and highways into and upon the lands and close mentioned in the plaintiff's declaration, and destroy the crops, to wit: corn, wheat, oats and potatoes, then growing, belonging to the plaintiff then the the law is for the plaintiff, and he is entitled to recover whatever damages he has proved he sustained in consequence of such acts of the defendants not exceeding the amount claimed.

2d. That if the jury believe from the evidence that during the time alleged in the plaintiff's declaration, the defendants were constructing and running their rail road over and across the lands of the plaintiff, mentioned in 8 the declaration, and that during that time they negligently and carelessly omitted to put in and maintain sufficient and necessary cattle-guards, whereby cattle and hogs were suffered to escape over and through such cattle-guards, into and upon the close and lands of plaintiff and destroy the crops then growing, then the law is for the plaintiff, and he is entitled to recover whatever the jury believe the damage is proved to be in consequence of such negligence of the defendants, not exceeding the amount claimed.

On the part of the defendant the following instruction was asked, and refused by the court:

If the jury believe that Page and others were the contractors for the construction of the rail road over the lands of the plaintiff and that the damages complained of in this case resulted from the negligence of said Page & Co., and that the Rail Road Company had no knowledge of such acts of negligence, then the law is for the defendant.

The defendant excepted to the giving of said instructions on the part of plaintiff, and to the refusal of the court to give the instruction asked by the defendant.

10 The jury found a verdict for plaintiff, and assessed his damages at \$365.

6 Defendant moved for a new trial and in arrest of judgement.

The said motions were over-ruled by the court, and judgement given for the plaintiff on the verdict. To which defendant excepted.

The errors assigned are
1st Giving the instructions asked by Deft. in error
2^d Refusing instruction asked by Plff. in error
3^d Overruling motion for new trial
4 Overruling motion in arrest of judgement

8th Rendering Judgment in the Case.

The Plaintiff in Error now submits the following suggestions in support of the Error aforesaid —

First — The Circuit Court erred in overruling the motion in arrest of Judgment — The declaration in the case is radically defective — It charges that under its act of Incorporation Plff. in error claimed to have the right to enter the farm & close of Duff in error And that on the first day of August 1856 they did enter said close and commenced the construction of their Rail Road & continued said construction until the commencement of said suit And that by law it became the duty of Plff. in error to put up fences &c. Now this obligation is not created by Common Law nor by any Statute of this State — By the Act of 1855 — See Sess. Laws 1855 page 178) Rail Road Companies are required to ~~put~~ erect and maintain fences on the sides of their Road sufficient to prevent horses, cattle, sheep & hogs from getting on to such Rail Road within six months after the line of said Road is opened for use — But the entry in this case was not made until the first day of August 1856 and this suit was brought before the next October term of the Circuit Court — This statute too only creates an obligation as against the R.R. Company to erect and maintain fences to keep cattle, horses, sheep & hogs from getting on to the line of the Road, not to put

put up ~~a fence~~ of the fences & built up the fences
around any Enclosure which it may be necessary
to construct its Road across to prevent animals from going upon
the adjoining lands.

See Chicago & N.W. R.R. Co. v. Peckham 16 Ill. Great Western R.R. Co. v.
Thompson 17th Ill. 131. Centut Mil. East R.R. Co. v. Rockafellow
17 Ill. 541, Ill. Cent. R.R. Co. v. Rudy, ^{17 Ill.} 580. Williams v. Mich Cent. R.R. Co.
2nd Gibbs 209. Hurd v. Rutland & B.R. Co. 25th Ill. 116.

The duty to put up and maintain fences and cattle
guards during the time the Company is constructing its
Road then not being one created by law must have
arisen, if at all, by virtue of a Private Law, or a
Contract between the parties. In either event it was
necessary for the pleader to set out the Contract or
Private Law under which the duty arose.

It is necessary to set out in the Declaration all the facts
which it was incumbent on the Def. in Error to prove in order
to enable him to recover. If the Duty alleged arose
from a Contract then it was necessary for the party
relying upon it to show and prove ~~it~~ such Contract.

If from a private law then the origin of the duty should
be equally as specifically set out.

If this duty arose from a Contract, with whom was
the Contract made? Not from ought that appears in
the Declaration with the Def. in Error And 2 Certainly
he could not sue for a breach of that Contract ~~unless~~
unless it was made with him.

The Declaration must show that by express or implied

contrast the defendant in the particular character or situation stated in the declaration is bound to do or omit to do the act in reference to which he is charged

See - Elson v. Gatewood 5th Term Reports 145, Map v. Roberts 12 East 89, Ross v. Emmett 8th Barnard & Cusack 114, Edwards v. Bennett & Bingham²³⁵ Saunders Pleas & Evidence 730-31

In an action for breach of duty imposed by statute it is necessary to allege the facts upon which such duty arises and a general allegation that it was the defendant's duty to do certain acts is not sufficient without a statement of the facts out of which the duty results - Metcalf v. Breckinridge 32^d Law & Equity Reports 606. See also 3^d Alden Reports 493 - 25th Vermont 707 - Stephens v. Nisi 1022-23 3^d Wisconsin 160 -

Again this declaration is defective in not showing whose grasp, grain, corn, & stubble was injured & destroyed by the ingress of cattle & Hogs into said close for consequence of said neglect. The allegation is that it was the grasp & growing & standing in said close. But it does not follow that it was the property of Deft. in error.

2^d The Court erred in overruling the motion for a new trial. The Bill of Exceptions sets out all the testimony in the case. Yet no evidence was introduced showing that any obligation existed on the part of Plff. in error

to Construct said Cattle-guards and put up the fences
to be taken down while Constructing the Rail Road.
It was certainly necessary for the Hff. below to show
on trial some state of facts from which the duty
arose for a breach of which the action is brought.

3^d The Court erred in giving the instructions asked
by the Hff. below.

These instructions are based upon the same erroneous
view of the law which pervades the declaration viz
That the Rail Road Company were by law obliged or in duty
bound to put up the fences around the Close over which
they were Constructing their Road and to keep the same
up and also to put in Cattle-guards (whether at a
highway or not) Even though said Close had no
fences about it at the time the entry is made.

I contend that the Rail Road Company acquired no
right and could acquire no right to enter any more of
of said Close than was necessary for the purpose of
Constructing its Road. That such entry carried
with it no obligation to repair or build fences (except
the obligation created by the Statute of 1855, which does not
attach until six months after the Road is opened) but
the Company becomes seized of so much & such parts
of said Close, ^{as are necessary for its purposes} discharging the former owner of his title and
assuming pro duty as to the ~~fence~~ protection of said
Close from the encroachments of animals. Indeed from

ought that appears in the Case the whole Case was
taken & used for the purposes of Constructing and
Maintaining the Rail Road under the act of
Incorporation and the Crops then and then growing
became the property of the Company with the land.
At All Events there is no allegation either in pleadings
or proof that the Damages were sustained by ~~act~~
reason of the violation of any Contract or duty arising
between Plff. below and the Company. The allegation is that
the Company entered under its Charter for the purpose of Construction not
for the purpose of preliminary survey; and it could therefore only enter

44th ^{so much as was necessary for that purpose and the fair & indeed only inference is}
^{that the damages sustained by the party for such entry were first paid him.}
The Court erred in refusing the instruction
asked by the Defendant below.

The Evidence showed that the work of Constructing the
entire length of the Company's Road was let to Page & Co. as
Contractors and that the Damages complained of was
occasioned by the negligence of men in the employ of Page & Co.

These men were not the servants or employees of
the Rail Road Company and the Company is not liable
for their negligence. See Blake vs. Ferris 1 Selden 48
Jack vs. Mayor of New York 4th Selden 3rd Gray 849, 852,
Gondier vs. Cormack 2nd E.D. Smith's Reports 254. Knight
vs. Fox 2nd Eng. Law & Eq. R. 477, Brady vs. Randall 16th
Eng. Law & Eq. 442, Reed vs. London & N.W.R.R. Co. 4 Exch. 244
Robbitt vs. Sisson 254. The Case of Gondier vs. Nabash New. Co. 15 Ill. 72,
is in no degree in conflict with the above authorities.
It is therefore Overruled by the Plaintiff in Error

that the judgment rendered by the Circuit
Court should be ^{Reversed} ~~affirmed~~ and the cause remanded
with leave for Plff below to answer his declaration.

H. W. Bloxton
for Plff. in error

April 7. 1858

C. St. P. & F. R. R. Co.

n.

McCarty

Points by Pff. in error

Filed May 26. 1858
L. DeLaud
Clk

3 mp 160

H. W. Prager
for Pff. in error

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

TO THE SHERIFF OF THE COUNTY OF

The People of the State of Illinois,

GREETING:

BECAUSE, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of *McHenry* county, before the Judge thereof, between *Owen McBarty* plaintiff and the *Chicago, St. Paul & Von Du Lac Rail Road Company*

defendant, it is said that manifest error hath intervened, to the injury of the said *Chicago, St. Paul & Von Du Lac Rail Road Company*

as we are informed by *the* ~~of said R.R. Company~~ complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; THEREFORE, WE COMMAND YOU, that by good and lawful men of your county, you give notice to the said *Owen McBarty*

that *he* be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the *first Monday after the* ~~third~~ Monday in *April* next, to hear the records and proceedings aforesaid, and the errors assigned, if *he* shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Owen McBarty* notice, together with this writ.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof at Ottawa, this *9th* day of *July* in the Year of Our Lord One Thousand Eight Hundred and Fifty- *Seven*.

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

Clerk of the Supreme Court.



Fifty-
Year of Our Lord One Thousand Eight Hundred and
Ottawa, this 7th day of Sept in the
Justice of our said Court, and the Seal thereof at
notices, The Hon. WALTER B. SCATES, Chief

notice, together with this writ.

shall give the said
shall order in this behalf; and have you then there the names of those by whom you
errors assigned, if
shall see fit; and further to do and receive what said Court
next to hear the records and proceedings aforesaid and the

Chicago, St. Paul and
For Du Lac N.R. Company

74
Owen McCarty
Scire facias

Served the within
by reading to the
within named Owen
McCarty this 10th
day of Sept AD 1857
John Eddy Sct
By C. D. Smith Dpty

Fee \$5-0
Mg 15-75
10
Pch 1-35

Filed September 12, 1857
L. Leland
Clerk

before the Judge thereof, between
ment of a plea which was in the Circuit Court of
county.

RECAUSE In the record and proceedings and also in the rendition of the judg-

TO THE SHERIFF OF THE COUNTY OF
SUPREME COURT,
STATE OF ILLINOIS, as. The People of the State of Illinois,
GREETING:

STATE OF ILLINOIS,
SUPREME COURT,

} ss. The People of the State of Illinois,
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF *McHenry* GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *McHenry* County, before the Judge thereof, between *Owen McCarty*

plaintiff, and *The Chicago, St. Paul and Fond Du Lac
Rail Road Company*

defendant it is said manifest error hath intervened, to the injury of the aforesaid *Chicago, St. Paul & Fond Du Lac Rail Road Company* as we are informed by *the* complaint, and we being willing that error should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the *first Tuesday of the third Monday in April* next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *9th* day of *July* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*Seven*

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

Clerk of the Supreme Court

of Our Lord One Thousand Eight Hundred and Fifty-
in the Year
Justice of our said Court, and the Seal thereof at Ot-
The Hon. WALTER B. SCATES, Chief
be done according to law.

spected, we may cause to be done therein, to correct the error, what of right ought to
next, that the record and proceedings, being in-
the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the
aforesaid, with all things touching the same, under your seal, so that we may have
sent to our Justices of the Supreme Court the record and proceedings of the plain-
mand you that if judgment thereof be given, you distinctly and openly, without delay,
be, in the form and manner, and that justice be done to the parties aforesaid, com-
by the complaint and we hereby willing that error, if detected, be corrected, and
defendant it is said manifest error, shall interfere to the prejudice of the plaintiff
plaintiff and
the Judge thereof, between
of a plea which was in the Circuit Court of
BECAUSE, In the record and proceedings, as also in the rendition of the judgment
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF
SUPREME COURT,
STATE OF ILLINOIS,
Chicago St. Paul & Nor-
Dodge R.R. Company
Owen Mc Carthy
Writ of Error
This writ of Error is
to operate as a sur-
pendens and as
such is to be obeyed
by all concerned.
L. Leland
Clerk
by J. B. Rice Deputy

Filed July 9. 1857

L. Leland
Clerk

County, before
GREETING:

to sit at the City of Illinois,
The People of the State of Illinois,
as.

In Supreme Court,
THIRD GRAND DIVISION,
APRIL TERM, 1858.

CHICAGO, ST. PAUL & FOND
DU LAC
RAIL ROAD COMPANY,
PLAINTIFF IN ERROR.
VS.
OWEN McCARTY,
DEFENDANT IN ERROR.

ERROR TO McHENRY.

ABSTRACT OF RECORD

This was an action of case commenced by defendant in error against plaintiff in error in McHenry Circuit Court. The summons was issued in October, 1856, and returnable at November term of said year. The cause was continued at the November term for want of Declaration.

On the 6th day of March, 1857, the following declaration was filed:

STATE OF ILLINOIS }
McHENRY COUNTY, } ss.

Owen McCarty, plaintiff in this suit by Church and Willard, his attorneys, complains of the Chicago, St. Paul & Fond du Lac Rail Road Company, an incorporated company in and by virtue of the law of the State of Illinois in a plea of case.

For that, whereas, the said defendants on the first day of August, 1856, under and by virtue of their act of incorporation, claimed to have the right to enter upon the close and farm of said plaintiff situate in the town of Hartland, in the County of McHenry, aforesaid, and construct and build their rail road track over and across the said close and farm of the said

plaintiff as aforesaid; and the plaintiff avers that the said defendant on the day and year last aforesaid, at the county aforesaid, did enter upon the close and farm of him the said plaintiff and commence the construction of their said rail road track, over and across the same, and continued so to construct the same from the day last aforesaid until the day of the commencement of this suit; and the plaintiff avers that it was the duty of the said defendants, and by law the said defendants during all the time they were so constructing the said rail road track over and across the close and land of the said plaintiff to keep up the fences, and to put up the fences taken down by them while so engaged in the construction of said track, and to put in and maintain cattle guards, and use and take all necessary trouble and precaution to prevent cattle, horses and other animals from escaping upon, and entering upon said close and lands of said plaintiff; nevertheless the said plaintiff avers that the said defendants not regarding their duty and obligations in this behalf, did not keep up the fences and put up the fences by them taken down, during the construction of their said track, as aforesaid, nor did they put in and maintain cattle guards, and use and take all necessary trouble and precaution to prevent cattle, horses and other animals from escaping upon, and entering upon the close and lands as aforesaid of said plaintiff; and the plaintiff further in fact saith, that the said defendants during all the time they were so constructing their said rail road track, as aforesaid, took down and removed the fences belonging to said close and lands of the plaintiff, and negligently suffered the same to remain down, by reason of which premises and the negligence of the said defendant in this behalf, the cattle, horses and other animals running at large in the highway and common lands of said town of Hartland were allowed to, and did escape there-
 5 from into and upon the close and lands of the said plaintiff, situate in the said town of Hartland, in the County of McHenry, and then and there destroy, eat up, trampled upon and subverted the grass, grain, corn, wheat and herbage then and their growing and standing upon said close and land of said plaintiff, to wit at the County of McHenry, aforesaid, whereby said plaintiff saith he has sustained damage to the amount of fifteen hundred dollars, and therefore he brings suit, &c.

CHURCH & WILLARD,

Attorneys for Plaintiff.

5 The cause was tried before the court and jury at the March term of said court, 1857.

The Bill of Exceptions is as follows:

McHENRY COUNTY CIRCUIT COURT.

THE CHICAGO, ST. PAUL & FOND DU LAC RAIL ROAD COMPANY. <i>ATS.</i> OWEN McCARTY.	} CASE.
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Be it remembered, that on the trial of the above entitled cause, witnesses
6 were called in behalf of the plaintiff, by whom it was proved that the contractors engaged in the construction of defendants rail road, entered upon the enclosed parts of Plaintiff's farm where the line of said road was located for the purpose of constructing said road during the month of August, 1856. That they took the fences down at the points where the line entered said enclosure, and left them down during most of the time they were doing said work, or if they put them up it was done in a very negligent and careless manner. That the fences around said enclosure were also thrown and taken down at other points by men engaged in said work, and that in consequence of the said taking down of said fences the crops growing within said enclosure were damaged by cattle entering said enclosure from the highways and common lands adjoining plaintiff's farm.

The value of the crops thus injured was variously estimated by plaintiff's witnesses, at from three to four hundred dollars. It was also proved on the part of plaintiff that during the latter part of the time the company was running a construction train over its road, and that hogs went into the field over the cattle-guards.

On the part of the defendant it was proved that the work of constructing the entire length of said road from Chicago to Janesville, was let to Page & Co., contractors, and that said damage was occasioned by the carelessness and negligence of the men in the employ of Page & Co., who were engaged in constructing the road for the company.

It was also proved on the part of plaintiff that no cattle-guards were constructed at the points where said line entered said enclosure; and that said
6 cattle also entered for want of said cattle-guards.

This being all the evidence in the case. The court at request of plaintiff instructed the jury as follows:

1st. If the Jury believe from the evidence that during the time alleged in the plaintiff's declaration the defendants were engaged in constructing

the Chicago, St. Paul & Fond du Lac Rail Road, over and across the close
 8 and farm of said plaintiff, and that during that time they took down and
 left down the fences around said close and farm, and negligently and care-
 lessly suffered them to remain down, and that through their negligence and
 carelessness in so doing, they suffered hogs, cattle and other animals to es-
 cape from the common lands and highways into and upon the lands and close
 mentioned in the plaintiff's declaration, and destroy the crops, to wit: corn,
 wheat, oats and potatoes, then growing, belonging to the plaintiff then the
 the law is for the plaintiff, and he is entitled to recover whatever damages
 he has proved he sustained in consequence of such acts of the defendants
 not exceeding the amount claimed.

2d. That if the jury believe from the evidence that during the time al-
 leged in the plaintiff's declaration, the defendants were constructing and run-
 ning their rail road over and across the lands of the plaintiff, mentioned in
 8 the declaration, and that during that time they negligently and carelessly
 omitted to put in and maintain sufficient and necessary cattle-guards, where-
 by cattle and hogs were suffered to escape over and through such cattle-
 guards, into and upon the close and lands of plaintiff and destroy the crops
 then growing, then the law is for the plaintiff, and he is entitled to recover
 whatever the jury believe the damage is proved to be in consequence of
 such negligence of the defendants, not exceeding the amount claimed.

On the part of the defendant the following instruction was asked, and re-
 fused by the court:

If the jury believe that Page and others were the contractors for the con-
 9 struction of the rail road over the lands of the plaintiff and that the dama-
 ges complained of in this case resulted from the negligence of said Page &
 Co., and that the Rail Road Company had no knowledge of such acts of
 negligence, then the law is for the defendant.

The defendant excepted to the giving of said instructions on the part of
 plaintiff, and to the refusal of the court to give the instruction asked by the
 defendant.

- 10 The jury found a verdict for plaintiff, and assessed his damages at \$365.
- 6 Defendant moved for a new trial and in arrest of judgement.

The said motions were over-ruled by the court, and judgement given for
 the plaintiff on the verdict. To which defendant excepted.

ASSIGNMENT OF ERRORS.

Defendant brings the cause to this court and assigns the following errors :

1st. ~~The Circuit Court erred in trying the case when no issue was joined between the parties.~~

1 2d. The Court erred in giving the instructions asked by plaintiff.

2 2d. The Court erred in refusing the instruction asked by defendant.

3 3d. The Court erred in over-ruling defendants motion for a new trial.

4th. The Court erred in over-ruling defendants motion in arrest of judgment.

5th. The Record is in other respects informal and erroneous.

Owen Mc Carthy
Abstract

Filed May 18. 1858
L. Leland
Clerk

74-134
The Chicago, St. Paul
and Fond du Lac R.R. Co.,

vs
Queen Mc Carthy

74

12521

1858

~~Refused~~