No. 12850

Supreme Court of Illinois

Moss, et al.

---

vs.

Johnson.

116

William S. Moss &c

vs

John M. Johnson

116

1285

1859

Be it remembered that on the 8th day of August A.D. 1857, a Transcript of a certain case therein named from the Circuit Court of Peoria County Illinois and accompanying papers, to wit; Precipe Declarations, Summons, Affidavits, Precipe for Subpoenas for Witnesses, were filed in the Office of the Clerk of the Circuit Court of Tazewell County Illinois, in the words and figures following to wit;

Transcript Proceedings at a term of the Circuit Court began and held at the Court house in the City of Peoria, in and for the County of Peoria in the State of Illinois on the third Monday of November in the year of our Lord, one thousand, eight hundred and fifty seven, it being the seventeenth day of said month, Present the Honorable Elihu N. Powell, judge of the Sixteenth Judicial Circuit in the State of Illinois - David D. Irons, Sheriff; and Enoch P. Sloan, Clerk - to wit;

Wednesday
November 26th A.D. 1857

John M Johnson
vs Trespass on the case
William Sellers et al

By agreement of Parties this cause is continued to next term of Court.

Proceedings in the Circuit Court at a term thereof began and held at the Court house in the City of Peoria, in and for the County of Peoria, and State of Illinois on the second Monday of May in the year of our

[12850-1]

Lord, one thousand eight hundred and fifty seven, it being the Eleventh day of said Month, Present- the Honorable Elisha A Powell, judge of the Sixteenth Judicial Circuit in said State; Francis M Smith, Sheriff, and Enoch R Sloan, Clerk to wit;

Monday May 25th AD 1857.

John M Johnson
vs Trespass on case
William S Moss & al.

This day came the Plaintiff by Read and Williamson his attorneys, and the defendants by Pirtle & Pratt their attorneys and it is ordered that a Jury be empannelled to try the issues in this cause, whereupon came a Jury of twelve good and lawful men to wit; Stewart Neil, S M Dunn, Jacob H. Wells, A O Garrett, Mathew Taggart, Samuel B King, John Batten, Thomas Cutter, John Earnest, S D W Brown, W A Herron, George Gimerlee, who being duly chosen, tried and sworn to well and truly try the issues joined in this cause, and a true verdict give according to the evidence. The evidence having been heard the case was submitted to the jury aforesaid who retired to consider of their verdict,

Wednesday May 27th AD 1857.

John M Johnson
vs Trespass on case
William S Moss & al.

3

This day came the Jury empannelled a Monday last to try the issues in this cause and a true verdict give according to the evidence. And also came the parties by their respective attorneys, and the jury aforesaid through their foreman having stated to the Court that they are unable to agree upon a verdict, it is ordered by the Court that said Jury be discharged from further consideration of this cause. Whereupon the plaintiff by his attorney entered a motion for a change of venue

John M Johnson
vs Trespass on Case
William Sellers et al

This day this cause again came on to be heard upon the motion of the defendant for a change of venue - affidavits having been filed herein alledging the prejudice of the Court as the reason for the change - It is ordered by the Court, that the venue be changed to the County of Tazewell in this State, and that the Clerk certify the same to the Clerk of the Circuit court in and for said County of Tazewell and that the clerk of this Court transmit the papers, and a transcript of the record of the proceedings herein, to the said Clerk of said Tazewell County.

State of Illinois } ss.
Peoria County }

I Enoch D Sloan, Clerk

4

of the Circuit Court in and for said County and State, do certify that the foregoing is a correct copy of the records in the case wherein John M Johnson is Plaintiff and William Mapp. et al, are defendants, as the same appears of Record in my office.

In witness whereof I hereunto set my hand and affix the Seal of said Court at Peoria, this 18th day of June AD 1887

Enoch P Sloan, Clerk

I do further certify that the papers herewith transmitted, and marked, 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. are all the papers filed in the above mentioned cause

Enoch P Sloan Clerk

Costs in Peoria Circuit Court.

Plaintiffs costs

Clerks fees			7.85	
Jno. Sheriff		$2.85		
Smith "		8.15	11.00	
Witness	Francis B Fowler 13 days		13.00	$31.85

Defendants costs

Clerks fees		$1.35	
Sheriffs fees		.45	$1.80

5

Precipe John M Johnson
vs
William J. Moss
William Kellogg
Charles J. Clark
Harvey Lightner &
Richard Gregg

In the Peoria Circuit
Cont. November Term
A.D. 1866

Trespass on the case.

Damages $5.000

The Clerk of the Circuit Court will please issue a summons returnable as above

H. M. Mead
Attorney for Pltff

Declaration John M Johnson
vs
William J. Moss
William Kellogg
Charles J. Clark
Harvey Lightner &
Richard Gregg

In the Peoria Cir. Ct.
November T. A.D. 1866.

Declaration

John M Johnson Plaintiff complains of William J. Moss, William Kellogg Charles J. Clark, Harvey Lightner & Richard Gregg defendants who were summoned &c in a plea of Trespass on the case,

For that whereas the said defendants before & at the time of committing the grievances hereinafter mentioned were & yet are proprietors of a certain Railroad & certain Ca

used thereon for carrying passengers (commonly called the Peoria & Oquawka Rail Road) from the City of Peoria in the County of Peoria in the State of Illinois to Edwards Station in the same County, for hire & reward, to wit; at & within the County aforesaid, and the said defendants being such lessee & proprietor of the said Railroad & Cars as aforesaid thereupon heretofore to wit on the 19th day of November A.D. 1856, at & within said County, the said Plaintiff at the special instance & request of the said defendants, became & was a passenger in said Cars to be safely & securely carried & conveyed thereby on a certain journey, to wit from said City of Peoria to said Edwards Station for a certain fare and reward to the said defendants in that behalf, and the said defendants then & there received the plaintiff as such passenger. And thereupon it became & was the duty of the defendants to use due & proper care that the said Plaintiff should be securely & safely carried & conveyed by & in the said Cars so used on said Rail Road as aforesaid on the said journey from said City of Peoria to said Edwards Station as aforesaid, Yet the said defendants not regarding their duty in that behalf did not use due & proper care that said plaintiff should be safely & securely carried & conveyed by & in said Cars on said journey, but wholly neglected so to do and & by reason thereof, afterward & while said Cars were proceeding along said Railroad with the Plaintiff as a passenger & before the arrival thereof at said Edwards Station afterwards to wit at & in the County aforesaid,

7

on the day and year aforesaid said Cars run off the track of said Railroad by means whereof one of the legs of the plaintiff became & was fractured & broken and his shoulder became & was bruised and injured & the said plaintiff was then & there otherwise greatly bruised wounded & injured, and also by means of the premises the plaintiff became & was sick sore lame & disordered and so remained for a long space of time to wit, hitherto during all which time Plaintiff suffered great pain & was hindered & prevented from transacting his necessary lawful business. during all that time last & was deprived of all the gains profits & advantages which he might & otherwise would have acquired from the same. And thereby injured & deprived of the use of his limbs during his life and thereby also was forced & obliged to & did pay layout & expend divers other large sums of money amounting in the whole to five Hundred dollars in & about endeavoring to be cured of said bruises fractures & injuries so received as aforesaid and also thereby the said plaintiff was hindered & prevented from continuing said journey.

And whereas also the said defendants before the committing of the grievances herein after mentioned were the proprietors of certain other Rail Road Cars used & running thereon for the transportation and conveyance of passengers (commonly called the Peoria & Oquawka Rail Road,) and used & employed by them for that purpose for hire & reward which Rail Road

[128 50-4]

is situated in the County of Peoria in the State of Illinois runs from the City of Peoria in said County to Edwards Station in said County & the said defendants being such proprietors of said Railroad & said Cars, the Plaintiff heretofore to wit on the 19th day of November AD 1856. at & in said County at the special instance & request of the defendants became & was a passenger by & on said Rail Road & said Cars to be safely & securely conveyed & carried on a certain journey from said City of Peoria to said Edwards Station

and although said plaintiff was then & there received by defendants as such passenger by said Cars & Rail Road as aforesaid to be conveyed as aforesaid, yet the defendants not their regarding their duty in that behalf so carelessly negligently unskilfully and improperly managed & conducted said Cars, that afterwards whilst said Cars were proceeding on said Rail Road the said plaintiff as a passenger as aforesaid on said journey, to wit on the 19th day of November aforesaid at & in the County aforesaid, the said Cars by & through the carelessness negligence and improper conduct of the said defendants & their servants, ran off the track of said last mentioned Rail Road by means whereof one of the legs of the said plaintiff became & was fractured bruised & broken & said Plaintiff was otherwise greatly injured bruised wounded & cut insomuch that the said plaintiff then & there became & was sick sore lame & disordered for a long Space of time to wit from thence hitherto & was prevented from attending to his

lawful business & pursuing his trade of a carpenter & joiner, & thereby lost & was deprived of all the gains & advantages, which had been accustomed to arise therefrom & was forced to lay out & expend, & did then & there lay out & expend divers large sums of money to wit the sum of $ 500 in & about the curing and endeavoring to cure the said last mentioned fractures bruises cuts & wounds to wit at & within the County aforesaid

To the damage of the said Plaintiff Five Thousand dollars wherefore he brings suit By A. McLean his attorney.

Summons The People of the State of Illinois.
To the Sheriff of Peoria County,
Greeting; We command you to summon William Sellers, William Kellogg, Charles Clark, Henry Lightner & Richard Gregg if they may be found in your county, to appear before our Circuit Court on the first day of the Term thereof, to be held at Peoria, within and for the said County of Peoria, on the 3rd Monday of November next then and there, in our said Court, to answer unto John M Johnson of a plea of Trespass on the case, to his damage five thousand dollars as he says. and make return of this writ with an endorsement of the time and manner of serving the same on or before

(Issued 5)

10

the first day of the term of the said Court to be held as aforesaid

Witness, James L Buckmaster, Clerk of our said Court, and the seal thereof, at Peoria, this Seventh day of July in the year of our Lord One thousand eight hundred and fifty six

James L Buckmaster Clerk

Precipe for Witness

John M Johnson
vs
Kellogg Moss & Co

In the Peoria C.C. Feby Special T. A.D. 1857.

The Clerk will please issue subpoenas for John Arnold, D.L. Dickinson, James Burr, Franklin Fowler, Elias Pratt, Thomas Fogwell, & William Wilcox as witnesses for Plaintiff in above cause

Mead for Plff

Precipe for Witness

John M Johnson
vs
Kellogg Moss & Co

In the Tazewell C.C. April T. 1858

Witnesses for Plaintiff

Edmund Dickinson
James L Burr
D A Wheeler
Robert P Carter
Francis Fowler

} Subpoenas to Sheriff of Peoria County

11

Richardson } Shriff Knox Co

Please leave blanks to insert other names & send us the subpoenas by return mail.

Weed & Williamson
Attys for Pltfs

Affidavit John M Johnson
vs
William Lellops et al } In the Peoria Cir Ct
May term 1857

To the Hon Elbt Powell Judge of the 16th Judicial Circuit in and for the State of Illinois. Your petitioner Jno M Johnson Pltf asks for a change of venue in this cause according to the statute in such case made & provided.

John M Johnson

State of Illinois }
Peoria County } John M Johnson Pltf in above entitled cause being duly sworn deposes & says that he fears he cannot have a fair and impartial trial in the Court in which said cause is pending on account of the prejudice of the Judge of said Court and that the knowledge of this fact was first had during the trial of this cause at the present term of this Court.

John M Johnson

Sworn to before me
this 29th day of May 1857.

Enoch P Sloan Clk

512850-67

Illas to a term of the Circuit Court begun and held at the Court house in the City of Pekin within and for the County & State of Illinois on the First Monday of the Month of April in the year of our Lord One Thousand Eight hundred and fifty Eight. Before the Honorable James Harriott Judge of the 21st Judicial Circuit of the State of Illinois composed of the Counties of Woodford Tazewell &c.

Be it remembered that on the 7th day April AD 1858. A Notice was filed in said cause in words and figures as follows to wit.

Notice to H M Wead

John M Johnson
vs
William S Moss
Williams Kellogg
Charles S Clark
Henry Lightner
Richard Gueyn

In this case the Defendants will apply for a change of Venue upon the ground that the inhabitants of this County are prejudiced against the Defendants.

Apl 7. 1858.

N. H. Purple
Defts Atty

Demurrer & John M Johnson
Plea
1 B vs
Kellogg Mfg. & Co

And the said Plff as to the plea of Defts by them secondly above pleaded & says precludi non because he says that the said plea & the matters therein contained is not sufficient in law to bar the Plffs action & that he is not bound by the law to answer the same and this he is ready to verify wherefore for want of sufficient plea herein the Plff prays judgement &c

And for Special cause of demurrer the Plff according to the form of the Statute in such case made & provided shows to the Court

1st That said plea amounts to the general issue

2d That it is double and attempts to join several defences in the same plea.

3d Dfts neither confesses & avoids the cause of action set forth, nor denies it.

4th It is also bad for duplicity.

By Davies & Head
his attys.

[illegible]

Plea

John M Johnson
vs
William S Moses
William Kellogg
Charles S Clark
Harvey Lightner
Richard B Gregg

In the Circuit Court of Tazewell County.

No 2

And for further plea in this behalf the said Defendants say actio non because they say that the said several causes of action in the first and second counts of the said Plaintiffs declaration are for one and the same cause of action, and not other or different; And the said defendants say that at the time when &c in said Declaration mentioned he the said Plaintiff was one of the Servants and employees of the said Defendants, engaged as a Carpenter and bridge builder for the defendants in aiding in the construction of the Peoria and Oquawka Rail Road. And that at the time when &c. said Plaintiff without the request or invitation of the Defendants, and without paying or assuming to pay any fare or passage money, had got upon the freight and construction train of the said Defendants voluntarily and of his own free will and accord to ride from Peoria to the place on

the said road where he the said Plaintiff was engaged in work for the said Defendants, and that while he was so proceeding along upon said train, and without any gross fault or negligence on the part of the said Defendants or their servants or agents, the said Plaintiff received and sustained the said several injuries and wrongdoings in said Plaintiffs declaration mentioned, and this the said Defendants are ready to verify, wherefore they pray judgment &c.

N. M. Purple
Defts Atty.

Notice for Change of Venue,

John M Johnson
vs
William S Mapes
William Kellogg
Charles S Clark
Henry Lightner
Richard Gregg

In this case the defendants for a change of venue upon the ground that the inhabitants of this County are prejudiced against the Defendants.

April 7. 1858.

N. M. Purple
Defts Atty

Petition for Change of Venue.

John M Johnson vs
William S Mapes
William Kellogg
Charles S Clark
Henry Lightner
Richard Gregg

In the Circuit Court of Tazewell County April Term 1858

[12052-9]

The Petitions of the undersigned defendants in this suit respectfully represents, that the inhabitants of the County of Tazewell in which this suit is pending are prejudiced against the defendants so that they fear that they will not receive a fair trial in the Circuit Court of Tazewell County aforesaid in which said suit is pending for the reason aforesaid, and that the said Defendants did not ascertain the existence of such prejudice until within the last ten days, and that the cause and prejudice aforesaid did not come to the knowledge of Petitioners aforesaid until within the last ten days, Petitioners therefore pray for a change of venue in this cause pursuant to the Statute in such cases made and provided &c.

Wm J. Mofs. McKellogg
Charles L Clark Henry Leighton
Richard Gregg

State of Illinois }
Tazewell County } ss.

William Kellogg one of the defendants in the foregoing entitled cause being sworn says the foregoing petition subscribed by the said defendants is true in substance and

in fact, and that this application for a change of venue is made with the consent of all the Defendants and further saith not.

Wm Kellogg.

Sworn to before me
this 8th day of April
AD 1858
M Tackaberry

Bill of Exceptions

John M Johnson
vs
William S Mosp
William Kellogg
Charles S Clarke
Henry Lightner
Richard Gregg

In the Circuit Court
of Tazewell County
April Term AD 1858.

Be it remembered that on this day this cause came on to be heard upon the motion of the defendants for a change of venue, and it appearing to the Court that on this day previous to said application a notice of said intended application had been given to the attorney of the Plaintiff which said Notice is as follows:

Notice to H M Read

John M Johnson
vs
William S Mosp
William Kellogg

In this case the defendants will apply for a change of venue upon the

18

Charles S Clark
Harvey Lightner
Richard Gregg

ground that the inhabitants of this County are prejudiced against the Defendants,

April 7. 1858.

N. K Purple
Defts Atty

and it further appearing to the Court that said Petition is as follows;

John M Johnson
vs
William S Mosh
William Dellogg
Charles S Clark
Harvey Lightner
Richard Gregg

In the Circuit Court of Tazewell County, April Term 1858.

The Petition of the undersigned defendants in this suit respectfully represents, that the inhabitants of the County of Tazewell in which this suit is pending are prejudiced against the defendants so that they fear that they will not receive a fair trial in the Circuit Court of Tazewell County aforesaid in which said suit is pending for the reason aforesaid, and that the said defendants did not ascertain the existence of such prejudice until within the last ten days, and that the cause and prejudice aforesaid did not come to the knowledge of Petitioners aforesaid until within the last ten days. Petitioners therefore pray for a change

19

of venue in this cause pursuant to the statute in such cases made and provided

Wm. Mosp. Wm Kellogg
Charles Clark Henry Lightner,
Richard Gregg

State of Illinois }
Tazewell County } ss.

William Kellogg one of the defendants in the foregoing entitled cause being sworn says that the foregoing Petition subscribed by the said defendants is true in substance and in fact, and that this application for a change of venue is made with the consent of all the defendants and further saith not.

Wm Kellogg

Sworn to before me this 8th day of April AD 1858.

Mackaberry J.P.

It is ordered that the said application be and the same is hereby overruled and the motion for a change of venue is denied, to which order and decision the Defendants then and there excepted and requested the Court to seal this bill of exceptions which is done

James Marriott Seal

[illegible]

20

Instructions asked by Plff

John M Johnson
vs
Kellogg Mofat & Co

In the Tazewell
cc April T. 1858.

Instructions asked by plaintiff.

Given

1 If the jury believe from the evidence that the accident to the plaintiff was caused by the negligence and carelessness of the defendants in running their car the plaintiff is entitled to recover.

Given

2 If the jury believe from the evidence that the road was unsafe and that the accident happened in consequence of the road being unsafe, or in consequence of the cars being out of order the Plaintiff is entitled to recover,

Given

3 If the defendants undertook to carry the plaintiff on their car they were bound to use proper care and skill and prudence in conveying him, and if the accident happened in consequence of a want of such care skill and prudence then the plaintiff is entitled to recover.

4. That whether the plaintiff was or was not in the employment of the Company (unless he had some control over the train or road) they were bound if they undertook to transport him upon their cars. to have a safe road, well built, of sufficient materials, and to use ordinary care skill and diligence in transporting him, and if they have failed in either of these particulars, the plaintiff is entitled to recover

Given

5. The defendants were bound to know whether their Road & machinery were safe and in proper condition & if they were not safe and in proper condition and the accident was occasioned by reason of the road or machinery not being safe and in proper condition the plaintiff is entitled to recover.

Given

6. - It makes no difference whether the plaintiff paid any fare or not - if he was lawfully on the train it was the duty of the defendants to use all reasonable care & prudence to ensure his safety

Given

7 In assessing damages the jury can find such an amount as will fully compensate him for his suffering & the injuries he has sustained.

Given

12850-12

22

Mo for New trial

John M Johnson
vs
William J Mop & others

In the Circuit Court of Tazewell County.

The Defendants enter a motion for a new trial in this cause for the following reasons.

1 The verdict is against law & evidence.
2 The Court permitted improper evidence to be given to the Jury by the Plaintiff.
3 The Court misdirected the Jury in giving the instructions asked by the Plaintiff
4 The Court refused proper instructions asked by the Defendants.
5 The Court refused proper evidence offered to the Jury by the defendants.

S. H. Temple
Dfts Atty.

Appeal Bond

Know all men by these presents that we William J Mop. William Kellogg Harvey Lightner. Charles J Clarke & Richard Gregg. as principals and acceptable as security, are held and firmly bound unto John M Johnson in the penal sum of Ten thousand Dollars. lawful money of the United States to which payment well and truly to be made and done we do bind

22

Mo for New trial

John M Johnson
vs
William J Mop & others

In the Circuit Court of Tazewell County.

The Defendants enter a motion for a new trial in this cause for the following reasons.

1 The verdict is against law & evidence.
2 The Court permitted improper evidence to be given to the Jury by the Plaintiff.
3 The Court misdirected the Jury in giving the instructions asked by the Plaintiff
4 The Court refused proper instructions asked by the Defendants.
5 The Court refused proper evidence offered to the Jury by the defendants.

S. H. Temple
Dfts Atty.

Appeal Bond

Know all men by these presents that we William J Mop. William Kellogg Harvey Lightner. Charles J Clarke & Richard Gregg. as principals and acceptable as security, are held and firmly bound unto John M Johnson in the penal sum of Ten thousand Dollars. lawful money of the United States to which payment well and truly to be made and done we do bind

93

Ourselves our heirs executors and administrators jointly and severally. Witness our hands and seals this 13th day of April AD 1858.

The condition of this obligation is this, whereas on the Eleventh day of April AD 1858, in the Circuit Court of Sage=well County the above named John M Johnson recovered a Judgement against the said Mess. Kellogg. Lightner. Clark and Gregg for the sum of Four thousand dollars damages and costs of suits from which the said defendants have prayed an appeal to the Supreme Court which has been allowed, now if the said Mess Kellogg. Lightner Clark and Gregg shall duly prosecute their appeal in said Supreme Court and shall pay the said Judgement, costs, interests and damages in case said Judgment shall be affirmed in and by said Supreme Court then this bond shall be void, otherwise in force.

Wm Kellogg
Wm J Mess
R Gregg
C L Clarke
H Lightner
A C Harding Clerk

$12000-18

24

Bill of Exceptions

John M Johnson
vs
William Sillops.
William Kellogg
Henry Lightner
Charles S. Clark &
Richard Gregg.

In the Circuit Court of Tazewell County April Term 1858.

Be it remembered that on this day this cause came on to be tried and the Plaintiff, to prove the issue on his part called James D. Burt, who stated my occupation is that of a carpenter — In November, 1855, foreman of the Carpenters employed on the Peoria & Oquawka Rail Road, The Plaintiff was also at the same time employed as a carpenter on said Road, and was working under me and had been so working for the Company for a month or two; At the time he received his injury, he was going out on the freight and construction train to his work on a water tank being a hand employed on said Road as a carpenter. I have no recollection that I directed or requested Plaintiff to go out on the cars that morning, I and several hands who were going out to work on the Road; it was usual for them to ride out on the train — There was a box car attached to the train which

24

Bill of Exceptions

John M Johnson
vs
William Sillops.
William Kellogg
Henry Lightner
Charles S. Clark &
Richard Gregg.

In the Circuit Court of Tazewell County April Term 1858.

Be it remembered that on this day this cause came on to be tried and the Plaintiff, to prove the issue on his part called James D. Burt, who stated my occupation is that of a carpenter — In November, 1855, foreman of the Carpenters employed on the Peoria & Oquawka Rail Road, The Plaintiff was also at the same time employed as a carpenter on said Road, and was working under me and had been so working for the Company for a month or two; At the time he received his injury, he was going out on the freight and construction train to his work on a water tank being a hand employed on said Road as a carpenter. I have no recollection that I directed or requested Plaintiff to go out on the cars that morning, I and several hands who were going out to work on the Road; it was usual for them to ride out on the train — There was a box car attached to the train which

had been fitted up with seats, to convey the hands and passengers who wished to travel on the Route of the Road, in which the Plaintiff was riding at the time of the accident; This box car was placed in front of three other Cars and behind the Engine and next to the Tender, two of the other Cars immediately in rear of the box car were loaded with Iron for the Road and the other still behind them with Ties. This was not the usual manner of making up a train and in my judgment was improper; The Box or Passenger Car ought to have been placed behind the others,

There were 40 or 50 persons in this box Car, principally hands of the defendants going to their work, E D Palmer was Engineer and Smith Frye Conductor on the train; there were two or three passengers who paid fare in this box or Passenger Car,

The accident happened about five miles from Penn at a curve in the Road, it was a slight curve

The Car ran off the track about 100 feet before we reached the Trestle work and as soon as that was reached it was broken down, and the Car in which the plaintiff and other hands and passengers were was overturned and fell down off the Trestle work some 15 or 20 feet. The

Plaintiffs leg was broken and his shoulder dislocated,
Several other persons were injured one a brakeman was killed, Johnson was taken into a car and taken back to Peru. The Engine did not run off the track, some of the wheels of the tender did, We were running 8 or 10 Miles an hour, Plaintiff had nothing to do with the running of the cars.
On the embankment before reaching the Russell work, there were no chairs to hold the rails, They were only secured by spikes,
At the speed we were running I think the spikes were sufficient, some roads use larger ones, the spikes had been put in at very place where they ought to have been,
The Plaintiff was a hand employed in the construction of the Road, he was not requested by defendants or any other person to ride out on the cars, the Road was unfinished and in process of construction, the Plaintiff had been over this section of the Road before, The cars had been running over the Road for more than a year previous to the accident, and none had previously occured, The Plaintiff might, if he had chosen have got on the hind car instead of into the hot or passenger car;

D.7

I think he was not as good a judge as myself as to the manner in which a train ought to be made up.

There was in my judgement no carelessness or negligence in the conducting or running the train, and this portion of the Road where the accident occurred had been constructed by the Pennsylvania Oquakanon Rail Road Company before the defendants came into the possession of the Road,

The defendants had been operating and constructing the Road since April previous to the accident,

The Witness further stated that in his opinion the accident occurred by reason of a defect in the friction plate of the car, that it was too tight to allow the Car to turn easily,

The Defendants objected to all evidence given or offered by this and all other witnesses in relation to the manner of the making up of the train and the condition or imperfect construction of the Road at the place where the accident occurred, as not being proper evidence under the declaration and excepted at the time to all evidence given in relation to such matters,

[illegible]

E. D. Richardson, called by the Plaintiff Testified, that a passenger in the car at the time when the accident happened, The Box car in which I rode was next to the tender and and the cars loaded with Iron next to it in the rear. This is not the usual way of making up a train, The Passenger car was thrown from the track, the Locomotive did not run off—(one man was killed and Mr & Mrs Lowe were injured—) Johnson the Plaintiff was also injured, I was not—I went back to see how the accident occurred and think I know. There were no chairs where the accident happened There is a slight curve in the track, It had the appearance that the flange of the wheel had struck the square end of one of the Rail, which had got out of place not coming square together at the ends. Thus throwing the Car off the track, and running the same against the Passel track knocking the same down and throwing the cars off the track— The track had been in that way for several days The man that was killed had thrown off a stick of wood at the place a day or two before to show the Superintendent that the road was

29

out of order there — The man who was killed was named Murphy he was a Brakeman, and I think the cause of the accident was the misjoinder of the Rails.

There was no mismanagement in the running or conducting of the train; it was not running on that day as fast as usual — at the time the accident occured 3 or 4 of the Iron Rails on the car behind the box car ran through and into said box car,

The Defendants objected to all evidence offered in relation to injuries to other persons than the Plaintiff; and to all evidence in relation to the manner of making up the train, and to all evidence in relation to the condition or manner of construction of the Road, at the time the same was offered and excepted to the admission of said evidence at the time the same was offered and given

W. G. Wheaton, called by the Plaintiff Testified. That he is an Engineer by occupation, has been so for nine or ten years. The proper manner

of making up a freight and passenger train, is to put the passenger cars behind, in order to ensure safety, I should not think it was proper to put passenger Cars before heavily loaded freight trains or cars,
I never considered a road finished without Chairs but with proper attention they might be safe, they would be less safe on a curve and less safe with a half inch spike; this road was in process of construction at the time of the accident, but I do not know the condition of the Road at this particular place — All the roads with which I am acquainted except this use a larger spike that is a 7/8 spike which makes the Road safer,

The Plaintiff then gave in evidence the statement of of Edward Dickinson M.D. which was admitted by agreement of counsel and was as follows;

Johnson
vs
Thos. Kellogg & Co

Statement of Edward Dickinson
Physician & Surgeon I know the
Plaintiff in this suit was called upon
to attend him at his house in Peoria
Peoria County on the 19th day of Nov. 1855 in consequence
of injuries said to have been received on the Peoria
& Oquawka Rail Road. I went to his House immediately
after soon after arrived. was brought in a waggon on
a Bed. Dr Arnold came with him and assisted
me in Dressing his injuries. The Shoulder was
dislocated. The most serious injury was to the
right Leg which proved to be a compound and
Communited Fracture near the ancle and extending
into the Joint. The large bone was broken into
several and driven through the skin
fragments, some of which eventually were
discharged. The injury was of a nature so serious
as to render it doubtfull for 2 or 3 weeks whether
the limb could be saved. After 3 weeks inflamation
ensued & extensive suppuration. I attended him about
3 months charged him $70.00 which the defendants
paid me. There were other expenses of a considerable
amount. At one time his life was thought to be in
danger. He is still lame and will never fully
recover. Can walk with a Cane. is much incommoded
in working at his trade that of a Carpenter
I judge from his appearance in walking that he has im-
proved in the last six months. His sufferings were

necessarily severe and acute

Edward Dickinson

John M Johnson
vs.
Kellogg Mapp Hco

In the Tazewell Circuit Court April T 1858

It is agreed in this cause that the foregoing statement of Dr Edmond Dickinson shall be read as evidence on the next trial of this cause in said Court if tried at the present term

H M Reed
Atty for Plff

W C Pugh
Defts Atty

[12850-13]

John M Johnson

vs

Kellogg Mayhew

Dr Dickinsons

Statement

This was all the Plaintiffs Evidence.

Edward Palmer called by the Defendants Testified, that he was engineer, and was running the engine in the train, at the time that the accident occurred, The train was running at the rate of 8 or 10 miles per hour, I had been employed on the Road

from two and a half to three years; I was employed first by the Peoria & Oquawka Rail Road Company — I think this portion of the Road was con=structed by the Peoria and Oquawka Rail Road Company before the defendants had charge of the road.

I had run over the road for a year or more previous to the accident to the Plaintiff. The speed of the Cars was checked at the place, I think — It was the usual practice to do so.

I know the Plaintiff — He was a hand employed on the Road. He was not a passenger on the day of the accident for fare — He got on the train to ride to the work with the rest of the hands — I think the train was carefully and prudently managed and conducted on that day.

This was all the evidence —

The Counsel for the Plaintiff requested the Court to instruct the Jury as follows;

John M. Johnson }
vs } In the Tazewell
Kellogg Moss & Co } C.C. April T. 1858

Instructions asked by Plaintiff

34

Grimm

1. If the Jury believe from the evidence that the accident to the Plaintiff was caused by the negligence and carelessness of the defendants in running their cars the plaintiff is entitled to recover.

Grimm

2. If the jury believe from the evidence that the road was unsafe and that the accident happened in consequence of the Road being unsafe, or in consequence of the cars being out of order the plaintiff is entitled to recover.

Grimm

3. If the Defendants undertook to carry the Plaintiff in their cars they were bound to use prudence and skill and prudence in conveying him, and if the accident happened in consequence of want of such care skill and prudence then the plaintiff is entitled to recover.

Grimm

4. That whether the plaintiff was or was not in the employment of the Company (under whose control over the train or road) they were bound if they undertook to transport him upon their cars, to have a safe road, well built of sufficient material, and to use ordinary care skill and diligence in transporting him.

and if they have failed in either of these particulars, the plaintiff is entitled to recover.

Given

5. The Defendants were bound to know whether their road & machinery were safe and in proper condition & if they were not safe and in proper condition and the accident was occasioned by reason of the Road or machinery not being safe and in proper condition. the plaintiff is entitled to recover.

Given

6 It makes no difference whether the plaintiff paid any fare or not — if he was lawfully on the train it was the duty of the Defendants to use all reasonable care and prudence to ensure his safety.

Given

7 In assessing damages the jury can find such an amount as will fully compensate him for his suffering & the injuries he has sustained.

& the giving of which instructions the defendants by their counsel, then and there excepted — The Defendants requested the Court to instruct the Jury as as follows —

36 John M Johnson
vs
Kellogg Master

Instructions asked by the Defendants.

Given

1 That a master who employs several servants who are engaged in the same business is not liable for the negligence or carelessness of one through which another sustains an injury.

Given

4 That if the Jury believe from the evidence that neither the defendants nor their servants were guilty of carelessness or negligence, the Plaintiff cannot recover.

Given

5 If one of the Proprietors or owners of a Rail Road acts as conductor upon a train of cars, He is the servant of the Proprietors or owners while acting in such capacity

Refused X

2 That a master who employs several servants who are engaged in different Branches of the same business is not liable for the negligence or carelessness of one through which another sustains an injury.

1845-21

37

3. If the Jury believe from the evidence that the plaintiff was a carpenter employed by the defendants in the construction of the ROAD that he had without any special request from the defendants been in the habit of riding into Town at night and back to his work in the morning free of charge or fare, and that if he had on the day of the alledged injury got voluntarily on to the construction train to go to his work, without the request of the defendants and without the payment of fare, the Defendants are not liable, although the injury may have occured through the carelessness of their Servants,

Refused

4. That if the Jury believe from the evidence, that the Plaintiff at the time the injury was received by him, was a hand employed by the defendants upon the Road as a Carpenter and was aiding in the construction of the Road, and that he got voluntarily upon the Cars without paying any fare or assuming to pay any; without any request from the defendants and that the accident occured without the gross fault or negligence of the defendants they will find for the Defendants,

Refused

38

No. 5 If the Jury believe from the evidence that the Plaintiffs injury was occasioned by reason of any defect in the construction of the Rail Road or any defect in the same they will find for the Defendants,

see Navv: Refused

Refused No. 6.

No 8. That unless the jury believe from the evidence that the Defendants were guilty of gross negligence in conducting and running the train of cars at the time this accident happened they will find for the defendants,

The Court gave the instructions numbered (1) one (4) four (5) five and Refused those numbered (2). (3). (6). (7). (8).

To the decision and ruling of the Court in refusing said last mentioned instructions the Defendants by their counsel then and there Excepted.

The Jury found a verdict for the Plaintiff for $ 4000.00.

The Defendants entered a motion for a new trial for the following reasons.

John M Johnson
vs
William Mays & others

In the Circuit Court of Tazewell County

SIA-B-50-22

89

The defendants enter a motion for a new trial in this cause for the following reasons,

1. The Verdict is against law & evidence
2. The Court permitted improper evidence to be given to the Jury by the Plaintiff -
3. The Court misdirected the Jury in giving the instructions asked by the Plaintiff.
4. The Court refused proper instructions asked by the Defendants,
5. The Court refused proper evidence offered to the Jury by the Defendants,

A H Purple
Defts atty.

The Court overruled said motion and entered Judgment upon the verdict and the defendants then & there again excepted to the decision and ruling of the Court in overruling said motion and entering Judgment upon the verdict, and requested the Court to sign and seal this Bill of exceptions which is done

James Hamilton Clerk

And now heretofore towit, At the a
terme of the Circuit Court begun and
held at the Court House in the City of Pekin
within and for the County of Tazewell and
State of Illinois on the first Monday
in the Month of ~~October~~ April in the year
of our Lord One Thousand eight Hundred
and fifty eight Present the Honorable James
Harriott ~~Bridges~~ Judge of the 2nd
Judicial Circuit of the State of Illinois
Hugh Fullerton Esqr. Prosecuting attorney
Chapman Williamson Sheriff and
Merille Young Clerk. the following
proceedings were had in said
cause towit:

Thursday* April 8th 1858.

John M Johnson
vs
William S. Wolf
Et als.

} Trespass.

Now come
the parties by their attorneys and the
Defendants motions for change of Venue
is overruled and leave is granted Defendants
to file new plea and the Plaintiff filed
and entered his Special Demurrer
to said plea and the Court having
heard argument of counsel thereon
took the same under advisement

* 1st Monday in Nov. the 3rd

Saturday April 10. 1858

" John M. Johnson
"
" vs } Trespass
"
" William J. McAfee Williams
" Kellogg Henry Eighmen
" Charles S. Clark
" Richard Gregg

" This day
" came again the parties by their attys
" and the Court having fully considered
" the Demurrer to the additional Plea
" is of opinion that the same be sustained.
" It is therefore considered by the Court that the
" Plaintiffs have judgment against said
" Defendants for the costs and charges by
" him about his demurrer expended.
" Thereupon came a Jury of twelve
" good and lawful men to wit: A.C. Flood
" Joseph Stewart A.M. Pollard James
" Harvey John Garrison Ellis Dillon
" Joseph Hicks Elmon Shumaker W.B. Silg
" Anthony Field Charles Dillon and J.A.
" Timmons. duly elected tried and sworn
" who having heard the allegations and proofs
" of the parties and arguments of Counsel thereon
" for Verdict say We the Jury find the issues
" for the Plaintiff and assess his damages
" to the Sum of Four Thousand dollars.
" It is therefore ordered and adjudged
" by the Court that the Plaintiff recover of
" said defendants the damages afore-
" said and likewise the costs and charges
" by him about his suit expended and

that Executions issue therefor.

42 " Thereupon the defendants
" prayed an appeal having entered a
" Motion for a new trial which the
" Court overruled. It is therefore ordered
" by the Court that defendants have leave
" to file appeal bond in sum of Four
" Thousand Dollars with A. C. Harding
" as security and file a Statement
" in thirty days. "

112 John M Johnson } Appellee } In Supreme Court
vs } } April Term 1859
William I Mapes } } 1859.
Defendant } Appellant }

Appeal from Jasper C

And now Comes the Defendant and say
that in the record and proceedings and
in the rendition of the Judgment aforesaid
there is manifest Error in this to wit

The Circuit Court Erred

1st. In admitting the Evidence offered by the
Plaintiff which was Objected to by Defendant

2. In giving Plaintiff's instructions

3. In refusing instructions asked by
the Defendants

4. In Overruling Defendants Motion for a new trial

5. In rendering Judgment for the Plaintiff upon
the Verdict

Wherefore they pray that the said Judg-
ment may be reversed set aside and
wholly for nothing esteemed

January 13. 1859. J. M. Temple
Atty for Appellants

6 The Court Erred in refusing to Change the
venue on application of Appellants

State of Illinois }
Tazewell County } ss.

I Merill C Young Clerk of the Circuit Court within and for said County, do hereby certify the foregoing thirty eight (38) pages hereto annexed, to be a faithful and correct copy of all the papers and record in the cause wherein John M Johnson is Plaintiff and Wm Gallop et al. are defendants, as fully as the same remain of record in my office.

Witness Merill C Young Clerk and the seal of said Circuit Court at Pekin, this 21st day September A.D. 1858.

Merill C Young Clerk

Recd eight dollars payment in full fees for copying

M C Young

S12650-207

Kelley, Maxfield & Co
vs
John M Johnson

} Supreme Court of Illinois
April T. 1859

And now comes the said defendant in Error by Weed his Atty & says that no such Errors have intervened as are complained of above & this he prays may be enquired of by the Court

By H. M. Weed
his Attorney

John M Johnson
vs
Wm S Moss et al
Trespass on the case
Tazewell Circuit Court
Certified Transcript

Filed February 17, 1859
L. Leland Clerk
by J. R. Rice Deputy

Fee $12.10

"John M. Johnson
(12½)
vs
"William J Moss
& others

Case
Circuit Court Peoria County
Nov Term / 56

" And now comes the defendants by Purple
" & Pratt, their Attorneys and for plea say
" that they are not guilty of the said supposed wrongs
" and injuries in the Plaintiffs declaration mentioned
" in manner and form as therein stated and of this
" the Deft puts himself upon the Country &c

"And plaintiff doth the like
"Bead & Williamson
for Pl'ff

Purple & Pratt
Defts Attys

"
State of Illinois
Tazewell County ss

I Minor C Young Clerk of the Circuit Court ~~in~~ and for said County, do hereby certify that foregoing to be a true, correct and exemplified transcript of a certain paper on file in my office; that the same is marked "12" in the papers on venue from the the Circuit Court of Peoria County, under the seal of the Clerk thereof, filed in my office on the 8th day of August AD 1857 and ~~being one of the aforesaid papers in a certain cause~~ that the said paper is a part of a certain cause lately appealed from our Circuit Court of said Tazewell County ~~wherein John M Johnson is~~ to the

[L2B500]

Supreme Court of the State of Illinois
in which said suit John M Johnson
is Plaintiff and William J Moss
and others Defendants, in a plea of
Trespass on the case.

As appears of Record

Witness Merrill C Young Clerk
and the seal of said Circuit Court
at Pekin this 18th day of January
AD 1859

Merrill C Young Clerk

In Supr Court Apl Tm
1857

William S Mossdal
appt
vs
John M Johnson Appe

Argument for appellee

The first point made by the appellants counsel is that the Court ought to have granted a change of venue — In the early time when the law was enacted allowing a change upon the ground of prejudice of the inhabitants either against the applicant or in favor of the opposite party the country being so sparsely settled there might have been & probably were cases in which twelve competent & unbiassed jurors could not be found in very extraordinary cases and such as even in those times would very seldom arise But now in our well populated counties a case can not be conceived in which any party may not have his case tried by twelve jurors standing entirely indifferent between the parties and the universal feeling of the bar and judiciary I believe

21850-32

now is, that this laws is used in civil cases only for purposes of oppressing a poor adversary or as a means of unjustly obtaining a continuance or escaping from just liability - In 1845 at the place refered to in appts brief a law was passed greatly restricting the then existing arbitrary power of procuring such change of venue by providing that notice of ten days shall be given of such proposed change in all cases unless the party shall swear that the knowledge of the cause for such change shall have come to his knowledge within less than ten days before the making of said application. The petition in this case does not show that the facts came to the knowledge of petitioners within less than ten days - But that such knowledge was acquired by him within ten days The Court will readily see the difference in the language used in the Statute & that used by the applicants - Motions like these in our times ought as far as possible to be discouraged by our Courts because of their baseless foundation and the perversion of the original intention of the law to the base purposes above indicated

[12850-12]

Again the Statute providing for ten days notice before the terms of the application to change the venue most obviously contemplates that ~~that~~ the notice shall be given as soon as the knowledge of the fact did come to him or at the farthest within a reasonable time thereafter which can not be judged by the Court without the applicant setting forth the time when he derived his knowledge — It is decided in the 1. Scam 164 that what is reasonable notice must be left to the discretion of the Court under the circumstances of each particular case. this case arose in 1834, 1 Scam and perhaps would not be authority in this case but if it would not it clearly indicates that ~~that~~ the Circuit Court has a discretion in the premises and that unless such discretion is clearly abused his decision cannot be successfully assigned for Error In this case clearly there is nothing showing any abuse of discretion but on the contrary a most wholesome & just administration of the laws — It will be perceived by an examination of the record that this case had been once tried before in Peoria upon the General issue And the pleadings were entirely made up And that it was not till the motion for a change of venue had been denied that leave was even asked to file an

12956-34

to file an additional plea for what reason it is alleged by the appts Counsel that the motion was made for a change of venue before the issue was made up I can not perceive but from the very awkward & bungling manner in which this record is made up perhaps he might reasonably infer that your honors would not be able to detect the error And I therefore call your attention particularly to page 400 of the record near the bottom where the thing is clearly shown — Having known the proceedings below it is apprehended by me that it was only interposed to provoce a demurrer In which it was eminently successful and he gained all he expected to gain by it two days additional time to prepare for trial —

The second point made is that the demurrer should have been overruled to the 2nd plea —

It seems to me that the demurrer was so well taken that neither argument nor authority can be necessary in this Court to sustain so plain a proposition as that the demurrer was correctly decided by the Court — But if it is not so no injury happened by the error to the appts. All the matters sought to be given in Evidence

under it for all evidence that could possibly have been given under the broadest construction of the plea was given under the general issue and without any objection. So that the only question of defence is as clearly & fully presented by the present record without as it could have been with the plea. An error of a court below which so manifestly has done no injury should not be allowed by this court as the ground of reversing a just judgment.

The third ground of error relied on is that the court erred in permitting evidence to be given of the manner of making up the train as not admissible under the allegation of carelessly & negligently running & conducting the train. Certainly the making up properly the train is properly conducting it & the conducting of a train in my judgment commences by seeing to it that in the first place suitable & proper cars & engine are provided to compose it secondly that they are attached in a skillful & judicious manner to the Engine & in their proper positions it seems to me that this is a self evident proposition. That these were not attached in such order clearly appears from the evidence in which there is no conflict. Indeed so obviously wrong was the train made up that running such a train in N York even without injury is made a high misdemeanor †

† So in this State (Sess Laws 1848 Ch. 37)

It is also objected that evidence was received as to the condition of the road Surely the Counsel can hardly be serious in this objection Surely it is great negligence in appls. to run a train at all on a road they are bound to maintain and keep in good running order when the same is manifestly unfinished & unsafe as this shows the distinction attempted to be drawn between running & conducting a train and negligently using on an improper or unsafe road can not be sustained where the defts are bound to furnish not only a proper & safe train but also a proper and safe road It can not be likened to the mail coach where the Company furnish only the horses driver & coach but have no control of the road which the public not they are bound to keep in repair, in that case all that could be required would be extraordinary care in driving the bad places ——

A rule as stringent as the appe. contends for is indispensible for the preservation of the lives and safety of the citizen and one more lax would probably be attended with the most disastrous consequences

As the Courts of England as well as this Country have uniformly held the master accountable for the injuries to third persons (with the occasional but not uniform exception of fellow servants)

Let us enquire in what respect it can be said that Johnson was a fellow servant with the persons running this train He was a carpenter employed to erect a water tank having no more to do with nor any more control over the running of this train than any Stranger How could he know or be expected to know whether the train or road either were in proper & safe condition The ground upon which the Exemption to liability is that the employee had skill in the employment he engaged in & would know whether or not the service was properly or improperly performed & took the risk not only of the employment but of the skill & faithfulness of his Co laborers and this undoubtedly upon the ground that he might in time by proper care be warned of danger and if he could not induce better and safer conduct that he might by ordinary diligence escape danger This is the only ground upon which such exception ever could rightly be made —

He has been employed to & from his work.

But does a carpenter or Attorney of a road have any such knowledge or skill or can they more than a stranger at all interfere with the running of the train? The answer is so obvious and the consequent liability so plain that the ablest opinions ever delivered upon the subject maintain & clearly inculcate the doctrine above contended for

12850-8

& commend them to the judgment of all right thinking men
This case was fairly tried in the Court upon
full preparation the facts were all plainly proved
the verdict of the jury was manifestly just &
not influenced by prejudice or passion and
in my judgment ought not to be disturbed
A L Davison for Appe

I know of no additional cases of importance
which I should desire to call the attention of
the Court to except those cited in the
printed argument of my colleague Mr Weads

116

Mof & Co.
vs
J. M. Johnson

Argument for
Appellee
by Davidson -

Filed April 28, 1859
L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

WILLIAM S. MOSS *et al.* vs. JOHN M. JOHNSON.

Appeal from Tazewell.

POINTS AND BRIEF.

1st. The Court ought to have awarded a change of venue in the cause. The application was in due form, and the notice was properly given.

The defendants did not know of the existence of the prejudice till within ten days of the time of the application.

Application made and notice given on the 7th April. The trial was on the 8th of April, 1858.

Reasonable notice is such as gives the parties time to examine the application. This notice was given before the issues had been made up.—See Statute, "Venue," p. 1179., 2 Vol. Purple's Stat.

2d. The demurrer to the second plea should have been overruled.

The plea presented a full defence to the action.

The authorities sustain the position. Plaintiff was an employee engaged in the construction of the road, &c..—See Plea, p. 14, 15, Record.

AUTHORITIES.

Degg vs. Midland R. W. Co., Law Reg. 500.
Tanout vs. Webb, " " 306.
Noyes vs. Smith & Lee, " " 617.
Wiggell vs. Fox, 11 Exchequer R. 832.
Seymour vs. Maddox, 5 Eng. L. & E. R. 265.
Coon vs. N. & I. R. R. Co., 6 Barbour 231.
Farewell vs Boston & Worcester R. R. Co., 4 Met. 49.
Horner vs. Ill. Central R. R. Co., 15 Ill. 550.

3d. The Court below erred in admitting evidence as to the manner of making up the train.

The declaration attributes the injury solely to the *carelessness* and *negligence* of the defendants below, in running and conducting the train; and not at all to any imperfect manner of its being made up.

The evidence was clearly inadmissible under the declaration.

The allegations and proof do not at all correspond.

The proof is clear, from all the witnesses, that there was no carelessness or mismanagement in the running or conducting the train. In the declaration this is the only thing complained of.

116 68

Proofs Oath vs Johnson

Pffs Points & Auth

by Purple Lee

Pffs.

Filed April 25. 1859

L Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

KELLOGG, MOSS & CO. *vs.* JOHN M. JOHNSON.

DEFENDANT'S ARGUMENT, BY H. M. WEAD.

I. As to the refusal to change the *venue*.

1. The *notice* of application was given on the 7th; the case was tried on the 8th April. The application for a change of venue was made on the 8th. The petition shows that a knowledge of the prejudice existing against the plaintiffs had come to their knowledge within the last ten days; i. e. they had known of the prejudice *nine* days, and yet neglected to give *notice* of the intended application until the case was in *fact ready for trial*. Then, when the case was called for trial, on the evening of the 7th, they gave the notice and got the case put over till morning, and then applied for a change of venue. The statute requires that proper notice of the intended application should be given, and fixes the time at 10 days, unless the facts have come to the knowledge of the party making the application since that time. In all cases, reasonable notice should be required. Here there was not reasonable notice. There is no pretence that they did not know the facts long before the notice was given. The plaintiff below had prepared for trial; he was a poor man, ruined and maimed for life by the accident; he had at great expense procured the attendance of his witnesses, and kept them in attendance for several days. All this time the defendants below, with a full knowledge of the facts, failed to give notice of their intended application until the case was called for trial. This was clearly wrong and ought not to be tolerated.

It was a common practice in some courts for attorneys to apply for a change of venue when the case is called for trial, in order to get a *continuance*. That was the sole object in this case. Up to the day the case was first called for trial, they were looking hourly for a witness, who did not come; then, in order to get a continuance of the case, the application for a change of venue was made. And this has become a common practice in some courts. The law authorizing a change of venue is very loose, and, in my judgment, no change should ever be granted unless the *causes inducing the conclusions* of the petitioner are set forth. The statute is a prolific source of perjury, and every court should require a complete and perfect fulfilment of its letter and spirit, before granting a change of venue. There clearly was no such compliance in this case, and the application was properly rejected.

Berry vs. *Wilkinson* et al., 1 Scammon, 164.

2. There had already been a change of venue, on application of the plaintiff, from Peoria county.

II. The real question in this case is as to the right of the plaintiff to recover, he being engaged in the service of defendants below.

He had no control over the engine or cars, and no authority on the train. The freight cars, being open box cars, were placed behind the passenger car. They were loaded, two of them with iron and two of them with ties. This was clearly wrong and unusual. The passenger car should have been placed behind the loaded cars, but Johnson could not direct as to this. He was in the defendant's employment, just as an attorney would have been. He was in their employment, just as a book keeper would have been. He was not employed to run the hazards incident to a negligent running of the cars. The case of

15th Illinois, does not apply to him.

The case of *Gillenwater* vs. *Railroad Co.*, 5 Indiana, 339, is directly in point and decisive of this case.

I desire also to call the attention of the Court to reasoning in that case, and also to the case of *Railroad Co.* vs. *Keary*, 3 Ohio State Rep., 201.

The following cases are decisive:

Gillenwater vs. *R. R. Co.*, 5 Indiana, 339.
R. R. Co. vs. *Keary*, 3 Ohio State Rep., 201.
R. R. Co. vs. *Stevens*, 20 Ohio Rep., 415.
Fitzpatrick vs. *R. R. Co.*, 7 Indiana, 436.
Railroad Co. vs. *Yandell*, 17 B. Munroe, 587.
Dixon vs. *Ranken*, 1 Am. Railway Cases, 569.

116

Kellogg Mostheo

vs 68

Lin Johnson

Defts. Brief by

Filed April 27th 1859

L. Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

WILLIAM S. MOSS *et al.* vs. JOHN M. JOHNSON.

Appeal from Tazewell.

POINTS AND BRIEF.

1st. The Court ought to have awarded a change of venue in the cause. The application was in due form, and the notice was properly given.

The defendants did not know of the existence of the prejudice till within ten days of the time of the application.

Application made and notice given on the 7th April. The trial was on the 8th of April, 1858.

Reasonable notice is such as gives the parties time to examine the application. This notice was given before the issues had been made up.—See Statute, "Venue," p. 1179., 2 Vol. Purple's Stat.

2d. The demurrer to the second plea should have been overruled.

The plea presented a full defence to the action.

The authorities sustain the position. Plaintiff was an employee engaged in the construction of the road, &c..—See Plea, p. 14, 15, Record.

AUTHORITIES.

Degg vs. Midland R. W. Co., Law Reg. 500.
Tanout vs. Webb, " " 306.
Noyes vs. Smith & Lee, " " 617.
Wiggell vs. Fox, 11 Exchequer R. 832.
Seymour vs. Maddox, 5 Eng. L. & E. R. 265.
Coon vs. N. & I. R. R. Co., 6 Barbour 231.
Farewell vs Boston & Worcester R. R. Co., 4 Met. 49.
Horner vs. Ill. Central R. R. Co., 15 Ill. 550.

3d. The Court below erred in admitting evidence as to the manner of making up the train.

The declaration attributes the injury solely to the *carelessness* and *negligence* of the defendants below, in running and conducting the train; and not at all to any imperfect manner of its being made up.

The evidence was clearly inadmissible under the declaration.

The allegations and proof do not at all correspond.

The proof is clear, from all the witnesses, that there was no carelessness or mismanagement in the running or conducting the train. In the declaration this is the only thing complained of.

116

Amos vs Johnson

Plff's Brief & Points

by Pruyn

for Plffs. in Error

Filed April 25. 1859

L. Lolland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

KELLOGG, MOSS & CO. *vs.* JOHN M. JOHNSON.

DEFENDANT'S ARGUMENT, BY H. M. WEAD.

I. As to the refusal to change the *venue*.

1. The *notice* of application was given on the 7th; the case was tried on the 8th April. The application for a change of venue was made on the 8th. The petition shows that a knowledge of the prejudice existing against the plaintiffs had come to their knowledge within the last ten days; i. e. they had known of the prejudice *nine* days, and yet neglected to give *notice* of the intended application until the case was in *fact ready for trial.* Then, when the case was called for trial, on the evening of the 7th, they gave the notice and got the case put over till morning, and then applied for a change of venue. The statute requires that proper notice of the intended application should be given, and fixes the time at 10 days, unless the facts have come to the knowledge of the party making the application since that time. In all cases, reasonable notice should be required. Here there was not reasonable notice. There is no pretence that they did not know the facts long before the notice was given. The plaintiff below had prepared for trial; he was a poor man, ruined and maimed for life by the accident; he had at great expense procured the attendance of his witnesses, and kept them in attendance for several days. All this time the defendants below, with a full knowledge of the facts, failed to give notice of their intended application until the case was called for trial. This was clearly wrong and ought not to be tolerated.

It was a common practice in some courts for attorneys to apply for a change of venue when the case is called for trial, in order to get a *continuance.* That was the sole object in this case. Up to the day the case was first called for trial, they were looking hourly for a witness, who did not come; then, in order to get a continuance of the case, the application for a change of venue was made. And this has become a common practice in some courts. The law authorizing a change of venue is very loose, and, in my judgment, no change should ever be granted unless the *causes inducing the conclusions* of the petitioner are set forth. The statute is a prolific source of perjury, and every court should require a complete and perfect fulfilment of its letter and spirit, before granting a change of venue. There clearly was no such compliance in this case, and the application was properly rejected.

Berry vs. *Wilkinson* et al., 1 Scammon, 164.

2. There had already been a change of venue, on application of the plaintiff, from Peoria county.

II. The real question in this case is as to the right of the plaintiff to recover, he being engaged in the service of defendants below.

He had no control over the engine or cars, and no authority on the train. The freight cars, being open box cars, were placed behind the passenger car. They were loaded, two of them with iron and two of them with ties. This was clearly wrong and unusual. The passenger car should have been placed behind the loaded cars, but Johnson could not direct as to this. He was in the defendant's employment, just as an attorney would have been. He was in their employment, just as a book keeper would have been. He was not employed to run the hazards incident to a negligent running of the cars. The case of

15th Illinois, does not apply to him.

The case of *Gillenwater* vs. *Railroad Co.*, 5 Indiana, 339, is directly in point and decisive of this case.

I desire also to call the attention of the Court to reasoning in that case, and also to the case of *Railroad Co.* vs. *Keary*, 3 Ohio State Rep., 201.

The following cases are decisive:

Gillenwater vs. *R. R. Co.*, 5 Indiana, 339.
R. R. Co. vs. *Keary*, 3 Ohio State Rep., 201.
R. R. Co. vs. *Stevens*, 20 Ohio Rep., 415.
Fitzpatrick vs. *R. R. Co.*, 7 Indiana, 436.
Railroad Co. vs. *Yandell*, 17 B. Munroe, 587.
Dixon vs. *Ranken*, 1 Am. Railway Cases, 569.

116

Kellogg Mosher & Co

vs

A M Johnson

Defts Brief by

Mr. Reed

Filed April 27. 1859

L Leland

Clerk