No. 12514

Supreme Court of Illinois

Galena & Chicago Union R. R. Co

vs.

Jacobs.

The Galena & Chicago Union Rail Road
Company appellant
vs
Frederick Jacobs who sues by his next
friend George Scoville appellee

The said appellant says there is manifest
error in the record and proceedings in this
cause in the Circuit Court, and assigns
the following

The Court below permitted improper evidence
to go to the jury on the part of the plaintiff
in the trial of the cause.

The Court below gave improper instructions
to the jury on the part of the plaintiff.

The Court improperly qualified the fourth,
ninth and thirteenth instructions as
asked for by the defendant in the Court below.

The Circuit Court erred in refusing the
eighth instruction ~~xx~~ asked for on the
part of the defendant below.

The Circuit Court erred in overruling the
motion for a new trial.

The Circuit Court erred in rendering
judgment on the verdict, which was
contrary to law and evidence.

Peck
for appellt

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And the appellee says there is no error

Goodrich & Trowbridge

for Appellee

Be it remembered that on the third day of February in the year of our Lord One thousand eight hundred and fifty seven Frederick Jacobs who sues &c. by Goodrich Farwell & Scoville his attorneys filed in the office of the Clerk of the Circuit Court in and for the County of Cook in the State aforesaid his certain Precipe which is in the words and figures following, to wit,

Circuit Court of Cook County

March Term A. D. 1857

Frederick Jacobs by his next friend George Scoville
vs.
The Galena and Chicago Union Rail Road Company

Please issue summons to Shff. of Cook County in action of trespass on the case. Pffs damages $15,000

Goodrich Farwell & Scoville
Pffs. Attys.

And afterwards, to wit, on the day and year last aforesaid there was issued out of the office of the Clerk of the Court aforesaid, and under the seal of said Court, the Peoples' writ of summons directed to the Sheriff of said County to execute and which is in the words and figures following to wit,

State of Illinois } ss
County of Cook }

The people of the State of Illinois to the Sheriff of said County — Greeting:

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We command you that you summon the Galena & Chicago Union Rail Road Company if it shall be found in your County personally to be & appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said County on the first Monday of March next, to answer unto Fredwick Jacobs by his next friend Geo. Seville in a plea of trespass on the case to the damage of the said Plaintiff as is said, in the sum of Fifteen Thousand Dollars

And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same

Witness, William L. Church, Clerk of our said Court, and the seal thereof at Chicago aforesaid this third day of February A. D. 1857

Seal

Wm L. Church Clerk

And afterwards, to wit, on the seventeenth day of February in the year last aforesaid the said writ was returned into said Court by the Sheriff aforesaid with his endorsement thereon in the words & figures following to wit, Served by reading to John B. Turner, President of the Galena & Chicago Union Rail Road Company the 17th day of February 1857. Fees, 1 Service 50, 2 miles 10, 1 Return 10 $. Jo^c John L Wilson Sheriff By John J. Holt Deputy.

And afterwards, to wit, on the 16th day of March in the year last aforesaid the said plaintiff by his said attorneys filed in the Court aforesaid his certain declaration in this cause which is in the words and figures following to wit,

In the Circuit Court of Cook County
March Special Term A.D. 1857

State of Illinois }
County of Cook } ss

Frederick Jacobs a minor who sues by George Scoville his next friend, plaintiff in this suit by Goodrich, Farwell & Scoville his attorneys, complains of the Galena & Chicago Union Rail Road Company defendants herein summoned &c. of a plea of trespass on the case —

For that, whereas, the said plaintiff, heretofore, to wit, on the second day of May, A.D. 1856. to wit, at Junction in Du Page County, State of Illinois, that is to say, at the County of Cook aforesaid, then & there being in and passing along a certain public & common highway, and the said defendant being then & there possessed of a certain rail-road track laid across & upon the said highway, & of a certain locomotive engine & tender used & running upon the said rail-road track, known as the Wabash, under the care, government and direction of a certain servant of the said defendant who was then & there driving and running the same along & upon the said rail road track, across & over the said highway

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to wit, at &c. aforesaid — And the said defendant then & there by its said servant so carelessly and improperly drove, governed and directed the said locomotive engine & tender, that by & through the carelessness, negligence & improper conduct of the said defendant by its said servant in that behalf, the said engine & tender of the said defendant then & there ran upon & over the said plaintiff with great force & violence and thereby then & there the said plaintiff was cast and thrown with great force & violence to & upon the ground there, and by means of the said several premises the said plaintiff was then & there greatly bruised, hurt, maimed & wounded and became & was sick, sore, lame & disordered and so remained & continued for a long space of time, to wit, hitherto to wit, at &c. aforesaid.

2. And whereas also the said plaintiff heretofore, to wit, on the second day of May A. D. 1856, to wit, at Junction, in Du Page County, State of Illinois, to wit, at the said County of Cook, was then & there upon a certain rail-road track of the said defendant, and the said defendant being then & there possessed of a certain other locomotive engine named Wabashaw which was then & there being run and driven upon & along the said last mentioned rail-road track, under the guidance & direction of a certain other thereservant of the said defendant, to wit, at &c. aforesaid — Nevertheless the said defendant then

& there by its said servant, so rapidly, carelessly & improperly guided, governed and directed the said last mentioned locomotive engine upon & along the said last mentioned rail road track, and without ringing the bell or blowing the whistle of said last mentioned engine, that by & through the carelessness, negligence and improper conduct of the said defendant by its said servant in that behalf the said last mentioned locomotive engine of the said defendant then & there ran over & upon the said plaintiff and with great force & violence knocked down upon the ground & bruised, maimed & wounded the said plaintiff, and by means of the several premises aforesaid the said plaintiff was then & there greatly bruised hurt, wounded & maimed and became & was sick, sore, lame, & disordered and lost his arm and so remained & continued for a long space of time, to wit, hitherto, to wit, at &c. aforesaid —

3 And also, for that, whereas, heretofore, to wit, on the day & year aforesaid, to wit, at the place aforesaid the said plaintiff was then & there passing along & upon a certain other rail road track of the said defendant and the said defendant being then & there possessed of a certain other locomotive engine, used and employed in running upon & along the said last mentioned rail road track in the business & employment of the said defendant, as a rail road company so carelessly, negligently & improperly run, drove & propelled the said last mentioned locomotive engine upon & along said last mentioned rail

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road back, that by & through the carelessness, negligence & improper conduct of the said defendant in that behalf the said last mentioned locomotive engine was run upon & over the said plaintiff, and said plaintiff was thereby greatly bruised, wounded & hurt & became & was sick, sore, lame & disordered & maimed, & so still continues, to wit, at &c. aforesaid

4 And also for that whereas, heretofore to wit, on the day & year last aforesaid, to wit, at the place aforesaid the said plaintiff was standing upon a certain rail road of the said defendant near to & by a certain public road or street where the said public road or street was crossed by the said rail road on the same level. And the said defendant was then & there a rail-road company & corporation created by the laws of the State of Illinois, and said defendant as such rail-road company & corporation & through & by its own carelessness & negligence had not caused any board to be placed, supported by posts or otherwise, nor was any such board then or there maintained by said defendant, across said public road or street, where the same was crossed by said rail road as aforesaid, with the words thereon painted in capital letters, or otherwise, Rail road crossing, look out for the cars while the bell rings, or the whistle sounds - "according to the Statute in such case made & provided, though the said rail road then & there crossed said public road or street, on the same level. And

the said defendant then & there was running, driving & directing & carelessly & negligently did run, drive, & direct a certain engine of the said defendant upon & along the said rail road, for a great distance to wit, forty rods on each side of the place where said rail road crossed said public road or street as aforesaid, & across said public road or street, yet the said defendant did not cause any bell of said engine to be rung, or whistle thereof to be whistled, at the distance of eighty rods, or any other distance from the place where said rail road crossed said public road or street, as aforesaid or at the said crossing, according to the Statute in such case made & provided.

And the said defendant otherwise so carelessly & improperly drove, run, governed & directed the said engine that by & through the carelessness, negligence & improper conduct of the said defendant, the said engine was run upon & over the said plaintiff, & he was then & there cast and thrown down upon the ground there and by means of the said several premises aforesaid, the said plaintiff was then & there greatly bruised, hurt, wounded & maimed & became & was sick, sore, lame & disordered & so remained & continued for a long space of time, to wit, hitherto, to wit, at &c. aforesaid, To the damage of the said plaintiff of Fifteen thousand dollars & therefore he brings his suit &c.

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Goodrich Farwell & Scoville
Plffs. Attys.

And afterwards, to wit, on the 25th day of May
Novem-
ber in the year last aforesaid the said defendant by
its attorney filed in the Court aforesaid its certain
Plea which are in the words & figures following
to wit,

State of Illinois } ss
Cook County }

In the Circuit Court

The Galena and Chicago Union
Rail Road Company

ads

Frederick Jacobs by George Scoville
his next friend

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

Wherefore &c.

E. Peck
(Atty. for Defl.)

And the said plaintiff
doth the like &c.

Goodrich Farwell & Scoville
(Plffs. Atty.)

And the said defendant by E. Peck its Attorney comes and defends the wrong and injury when &c. and says actio non, because the said defendant says, that just before and at the time when &c. in the said several counts of the said declaration mentioned, the said defendant was causing the said locomotive tender &c. in the said several counts mentioned to be run along and upon its rail road track at the time and place mentioned in the pursuit of the business of the said defendant as the said defendant had a right and lawfully might do, and the said plaintiff negligently carelessly and improperly remained in and continued upon the said rail road track without any consent or default on the part of the said defendant or without being seen or perceived by the said defendant or any of its servants, and the said locomotive and tender &c. was thereby then and there without any default on the part of the said defendant, driven against the said plaintiff and so the said defendant in fact saith that if any hurt or damage happened to the said plaintiff, it was caused by the said negligent, careless and improper conduct of the said plaintiff in so remaining in and upon the said rail road track as aforesaid and not by the default of the said defendants which are the said supposed trespasses in the said declaration mentioned and whereof the said plaintiff hath thereof

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10 complained against the said defendant, and this the said defendant is ready to verify.

Wherefore &c,

E. Peck
(Atty. for Defts.)

3 And for a further plea in this behalf the said defendant says that the said plaintiff ought not to have or maintain his said action because it says that before and at the said time when &c, in the several counts mentioned, the said defendant was causing its said locomotive and tender &c. in the transaction and for the use of its business to be driven along its said rail road track, the said plaintiff also at the said time and place being in and upon and within the said rail road track of the said defendant and the said defendant in fact saith that the said plaintiff so carelessly, negligently and improperly remained and continued in and upon and within the said rail road track, that by reason thereof the said locomotive with tender &c. by accident and without any default on the part of the said defendant but by and through the want of due care on the part of the said plaintiff was driven upon and over the said plaintiff and thereby the said plaintiff sustained the injury in the said several counts of the said declaration mentioned and so the said defendant in fact saith if any hurt, injury or damage happened to the said plaintiff it was caused by such accident

and by such carelessness of said plaintiff and not by the default of said defendant which are the said supposed trespassers in the said declaration mentioned and this the said defendant is ready to verify.

Wherefore &c.

E. Peck
Atty. for Defft.

And for a further plea in this behalf the said defendant says actio non because it says that before and at the time when &c. in the said several counts mentioned, the said defendant was causing its said locomotive and tender &c. in the transaction and for the use of its business to be driven along its said rail road track, the said plaintiff also at the said time and place was in, upon and within the said rail road track of the said defendant, and the said defendant in fact saith that the said plaintiff being so in and upon the said rail road track as aforesaid at the time aforesaid carelessly, negligently and improperly remained and continued in and upon and within the said rail road track and that by reason thereof the plaintiff sustained the injury in the said several counts of the said declaration mentioned, and so the said defendant in fact saith that if any hurt, injury or damage happened to the said plaintiff it was in part caused by and resulted from the said carelessness and fault of

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the said plaintiff and not by the sole default and negligence of the said defendant, which are the said supposed trespasses in the said declaration mentioned, and this the said defendants are ready to verify. Wherefore &c.

E. Peck

Atty. for Defts.

And afterwards, to wit, on the 5th day of December in the year last aforesaid the said Plaintiff filed in the Court aforesaid his certain Replication which is in the words and figures following to wit,

Circuit Court of Cook County

Frederick Jacobs by
Geo. Scoville his next friend
vs.
Galena & Chicago Union
Rail Road Company

For replication to the said plea of the said defendant secondly above pleaded the said plaintiff saith precludi non &c. because he says that the said locomotive & tender &c. was not, as is in said plea alleged, without any default on the part of the said defendant, driven against the said plaintiff; and that the said hurt and damage to the said plaintiff was not caused by the negligent, careless or improper conduct of the said plaintiff in so remaining in and upon the said rail road track as in said plea alleged, but by the default of the said defendant, and of this

the said plaintiff puts himself upon the Country &c.

Goodrich Farwell & Scoville

Pltffs. Attys.

For replication to the said plea of the said defendant thirdly above pleaded the said plaintiff saith precludi non &c. because he says that the said Locomotive with tender &c. was not by accident & without any default on the part of the said defendant & by & through the want of due care on the part of the said plaintiff, driven upon & over the said plaintiff as in said plea alleged, & that the said hurt, injury & damage to the said plaintiff was not caused by such accident, or by such carelessness of said plaintiff but by the default of said defendant & this the said plaintiff prays may be enquired of by the Country &c.

Goodrich Farwell & Scoville

Pltffs Attys.

And for replication to the said plea of said defendant fourthly above pleaded the said plaintiff saith precludi non &c. because he says that the said hurt, injury & damage to the said plaintiff was not in part caused by, nor did it result from the said supposed carelessness or fault of the said plaintiff but by the sole default & negligence of the said defendant & this the plaintiff prays may be enquired of by

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The County &c,

Goodrich Farwell & Scoville
(Pltfs Attys.)

And afterwards, to wit, at the November Term of said Court for the year last aforesaid, to wit, January 4th A.D. 1858 the following proceedings among others in said Court were had and entered of record therein,

Frederick Jacobs by his next friend George Scoville
vs.
Galena & Chicago Union Rail Road Company
} Case

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This day come the said parties by their Attorneys, and issue being joined herein it is ordered that a Jury come. Whereupon come the Jurors of a Jury of good and lawful men to wit, L. P. Higgins J. A. Ballard, H. W. Harris, C. M. Eldridge, A. S. Hayward, H. B. Townsend, John Moore, William Timmons J. D. Morris, B. Chase, H. Hough, & H. Danks who being duly elected, tried and sworn well & truly to try the issue joined aforesaid; after hearing the evidence addduced arguments of Counsel and instructions of the Court retire to consider of their verdict and afterwards come into Court and say - We the Jury find for the Plaintiff and assess his damages herein to the sum of Two Thousand dollars.

Therefore the said defendant moved the Court for a new trial of this cause.

And afterwards to wit on seventh day of January in the year last aforesaid the said defendants filed in said Court his motion for a new trial which is in the words & figures following to wit.

State of Illinois } ss.
Cook County }

In the Circuit Court

F. Jacobs by his next friend George Scoville Plff.

vs

The Galena & Chicago Union Rail Road Company Defft.

} Motion

The defendant moves the Court for a new trial of this cause for the following among other reasons—

Because the Court admitted improper evidence to go to the Jury.

Because the Court refused to give proper instructions to the Jury

Because the Court gave improper instructions to the Jury on the part of the plaintiff.

Because the verdict of the Jury was against law.

Because the verdict of the Jury was against evidence.

Because the verdict of the Jury is against law and evidence

Because the damages awarded are excessive

E. Peck
for Defft.

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And afterwards, to wit, at the March Term of said Court for the year last aforesaid, to wit, on the 9th. day of March in said year the following proceedings among others were had and entered of record in said Court, to wit,

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Frederick Jacobs by his next friend George Scoville
vs
Galena & Chicago Union Rail Road Company
} Case

This day comes as well the said Plaintiff by Goodrich Farwell & Scoville his attorneys, as the said Defendant by E. Peck its Attorney and Counsel being heard upon the said Defendants' motion made at the last term of this Court for a new trial of this cause, and the Court having carefully considered the motion and being well advised of the premises doth order that the same be and it hereby is overruled, to which ruling of the Court the said defendant by its counsel now here excepts.

Therefore it is ordered and considered by the Court that the said plaintiff do have and recover of the said defendant his damages of two thousand dollars in form by the Jury aforesaid assessed together with his proper costs and charges by him in that behalf expended and that he have execution therefor.

Whereupon the said defendant by its Counsel prays an appeal to the Supreme Court of the State of Illinois which is granted yet upon condition that the said defendant within ten days execute

and file a bond in the penal sum of Four thousand Dollars with John B. Turner as surety, conditioned as the law directs. And it is further ordered that the said Defendant have ten days to file a bill of exceptions.

And afterwards to wit, on the 17th day of March in the year last aforesaid the said defendant filed in said Court a certain stipulation which is in the words and figures following to wit,

State of Illinois } ss In the Circuit Court
Cook County }

Frederick Jacobs by his next friend Geo. Scoville
vs.
The Galena & Chicago Union Rail Road Company

We do hereby consent that either William H. Brown, Walter L. Newberry, P. A. Hall may be substituted for that of John B. Turner in the appeal bond to be given in this case

Chicago 9th March 1858

Goodrich Farwell & Scoville
Attys for Plff

And afterwards to wit, on the day and year last aforesaid the said defendant filed in said Court its certain appeal bond which is in the words and figures following to wit,

1235 14 no 7

Know all men by these Presents, That we the Galena & Chicago Union Rail Road Company and Phillips A. Hall of the County of Cook and State of Illinois, are held and firmly bound unto Frederick Jacobs who sues by his next friend G. D. Scoville also of the same County and State, in the penal sum of four Thousand Dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Witness the seal of the said Galena Company and the signature of the President thereof

The condition of the above obligation is such, That whereas, the said Frederick Jacobs who sues by his next friend George D. Scoville did on the day of March A. D. 1858 in the Circuit Court, in and for the County and State aforesaid, and of the Term thereof, A. D. 185 recover a judgment against the above bounden Galena & Chicago Union Rail Road Company for the sum of Two Thousand Dollars besides costs of suit; from which said judgment of the said Circuit Court, the said Galena & Chicago Union Rail Road Company has prayed for and obtained an appeal to the Supreme Court of said State.

Now therefore if the said Galena & Chicago Union Rail Road Company shall duly prosecute its said appeal with effect and moreover

pay the amount of the judgment, costs, interest and damages rendered, and to be rendered, against it in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

Taken and entered into before me, at my office in Chicago this day of A. D. 185

Clerk

W. H. Brown Vice Pres. (seal)
Philip A. Hall (seal)

Seal

Attest
W. M. Larrabee
Secretary

And afterwards, to wit, on the 19th day of March in the year last aforesaid the said Defendant filed in said Court its certain Bill of Exceptions which is in the words and figures following to wit,

Frederick Jacobs by his next friend George Scoville
vs
The Galena & Chicago Union Rail Road Company

Be it remembered that on the trial of this cause on the fourth day of January A. D. 1858 the same being one of the days of the said

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term of said Court, before the said Court & a jury the Plaintiff introduced as a witness H. M. Hall who testified as follows —

I am a physician, live at the Junction in Du Page County — the place is sometimes called the Junction and sometimes Turner. I have been a physician for not quite two years. I have lived 15 months at the Junction. I have seen the Plaintiff occasionally, know of his being hurt May 2d 1856. About 10. A. M. on that day I was informed by one of the railroad employes that two children had been run over. I saw the Plaintiff in less than fifteen minutes after the accident. Cant say that I saw the engine before the accident.

Here the plaintiffs counsel, by permission withdrew this witness and called James Scoville who had just now come into Court who testified as follows.

I live in Chicago. Am in no particular business am stopping in Mr. Scoville's office — I am out of business and stopping there studying law a little I went out to the Junction and made a plat at the request of Mr. Scoville on the 10th of Dec. last. I went out there alone. I have been out there since on Dec. 24th with Mr. Farwell. I went to take the measurements of the premises about the rail road grounds and made a map of them. This is it. Witness here introduced the map which is as follows —

Mrs. Festers house is 64 feet from the rail-road

the railroad fence is made of six inch boards. The ground represented by the map is level or nearly so. The fence at the cattle guard has three boards above and one below the level of the track. The nature of the ground is generally level, the opening between the fences at the cattle guard is twelve feet wide. The track is five feet wide. The walls for the cattle guard are built up six feet apart and the scantlings are laid four or five inches apart, the flat sides up. Such guards are usually made with the corners or edges of the scantlings up. The boards on the fence do not project beyond the fence posts into the cattle guard space excepting the upper one which projects five or six inches. There is a rail fence in front of Jacob's house. Jacob's house is about on a level with the track. The track near the cattle guard is raised some as if by embankment - it looks as if the railroad had been filled up there. There is no difficulty whatever in crossing the track. It looks as if there was nothing to prevent driving over. There are five houses in the enclosure inside of the rail road fence. The fourth from the cattle guard is Pat Dempsy's This is 13 rods from the guard & 24 feet from the track. The nearest shanty is about six rods from the guard. I observed that the entire track could be seen from the water house to the cattle guard I got on an engine and could see to the cattle guard, but not through it distinctly by reason of the distance. The fence does not in any degree

obstruct the view from the water house. I have had four or five years experience as an engineer on the public works in the State of New York. Dont think one could see what was going on at the water house from Jacobs' house on account of some buildings. I had the plaintiff stand on the track inside of the cattle guard and seven rods from it, and when he was on the South rail I could see him from a point on the track twenty five rods East of the cattle guard. If he had been in the middle between the tracks I could have seen him further. The fence on the South of the guard would first interupt my view. The switch is thirty seven and a half rods East from the cattle guard. At the crossing of the highway I could see any distance West through the cattle guard. I could see the plaintiff on the track West of the cattle guard from the water house by looking along and over the track. While I was there I saw people go backwards and forwards over the track from the houses inside of the railroad fence. Think those houses were all occupied. The track spoken of is the Dixon air line of the Galena & Chicago Union Rail Road.

Cross ex. ✳

I went out to the Junction for the first time on Dec. 10th last. I dont know how the cattle guard was two years ago. I dont know how Jacobs' house stood two years ago nor any thing about those houses inside of the railroad fence there.

(Here the witness was shown a map of the

premises by the (Defts' counsel)

Think this map is essentially correct - I am not certain about the situation of the trees on it. Think Jacobs' house is correctly located on this map. I could stand on the North rail of the track East of the cattle guard and see a child on the track West of the guard. Standing at the switch I could see a child on the track two rods West of the cattle guard; an engineer on an engine could see him further. Jacobs' house is fifty eight feet back from the fence. The highway is 108 feet from the cattle guard, the children would have to go that distance to get on the track and would have to go through the first fence. I am Mr. Scoville's cousin - he is not related to Jacobs. There is no ditch along the rail road East of the cattle guard - but there is West of the guard. West of the cattle guard the road appears to have been made both by ditching and embankment. The abutments for the cattle guard are North and South and the scantlings are laid East and West. The fence each side comes to the centre between the abutments. I think that the ditch comes up to the fence. I dont know how deep the ditch is just West of the cattle guard, but think about two or three feet. The track is also raised there about two feet. I should suppose that the plaintiff is about three feet high. If the plaintiff had been in the ditch I could not have seen him, but this would depend somewhat on his position.

Σ 12514-13

The plaintiff then introduced as a witness Mrs. Highland, who testified as follows.

I am acquainted with the plaintiff, have known him ever since his father has lived at the Junction. At the time of the accident May 2d 1876 I lived about one mile West of the Junction. I was at Mr. Jacobs' house on the morning of the accident. The elder boy the plaintiff asked his mother to go out of doors for a necessary purpose and she told him he might go and to go out behind the house and come right back: in two or three minutes after his younger brother asked to go out and she told him the same. When the children went out Mrs Jacobs was getting ready to make some bread. She had got some flour ready and just then Mrs Fesler came in and told her that the children were run over. The children had been out about five or ten minutes.

While the children were out I was setting by the window holding Mrs. Jacobs' baby. I did not hear any bell or whistle from the cars while I was sitting there. I saw the children after the engineer and fireman had brought them home. The plaintiff was all bloody, his arm was off, his face was badly cut and the top of his head was hurt. I dont know who lives inside of the railroad enclosure. I believe that people lived there then but I did not know them.

(The plaintiff's counsel here asked the question "After the plaintiff was brought in did he make any statement as to the cause of his injuries?

which was objected to by the Defts' counsel and the objection sustained by the Court)

I now live on the Illinois Central railroad about 85 miles from here.

Cross exc. ✕

I had been in Jacobs' house not fifteen minutes when the children were brought in. I was there about fifteen minutes altogether. Did not stay long as my husband was sick & I went for the Doctor — I heard no bell or whistle — I was not paying attention. Dont know whether I would have heard them or not, if they had sounded. I was holding the baby. Mrs. Jacobs went into a little room to get the flour. Mr. Jacobs was not at home; he came home before I left. Mr. Jacobs was almost crazy. He was angry; he told his wife to take the other little child and go off out of the house. I suppose he said this for the reason that he was so mad because she had let the children go out and get run over. He said "Why did not you tie them up?" He did not think then that the two children who were hurt would live, and told her that she might go away with the other one. He told her to take the little one and go off. He thought if he lost those two children he did not want his wife any more. I told him that she was not at all to blame and that quieted him some.

The plaintiff then introduced as a witness Mrs. Kell who testified as follows—

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I know the plaintiff, at the time of the accident in May 1886 I was living on the Geneva road inside of the railroad fence. There were five shanties there. I lived in the fifth one, that is the one furthest West. I lived with my husband he was at work at the depot for the railroad Company. Irish families lived in the other shanties. Dempsy lived in the second house towards the cattle guard. The other men living in those shanties worked for the Company. Those families had children then. At the time of the accident I was acquainted with Mr. Jacob's family. I had been at their house two days before the accident. I had taken the little boys to my house twice before the accident once two days before, and once about a week before. They were the same children who were run over. Their names were Frederick & William. I dont remember their ages, nor which is the oldest, nor which is the largest. I showed the children, at my house, something to make music, an instrument for children to play on.

The counsel for the plaintiff here put the question "How did people living inside of the railroad enclosure get backwards and forwards?" To which the defendants counsel then and there objected, but the Court overruled the objection and admitted the evidence —

Ans. — Along the track. It was rather difficult walking there. They walked on the timber when they crossed the cattle guard. I now live at the junction on the hill.

Cross exc — These children never went on the

back there alone. They had been to my house twice. I went with them. Mr. and Mrs. Jacobs both knew that the children went to my house. I have two children the oldest about twelve and the other about eight. I dont allow them to go on the railroad track. I keep watch of them to see that they do not go on the track. I dont think it safe to allow them to go on the track. Mr. Jacobs did not object to my taking his children to my house. He insisted upon my coming back with them. I did come back with them. I was not at Jacobs' house when the accident occurred, was not there until two days after the accident. I first heard of it the same day but did not go to the house for two days afterwards. After the accident I did not hear Mr. Jacobs say anything about it. There is only one fence between my house and Jacobs', there is one fence around Mr. Jacobs' house and one about the rail road. The children to get to my house had to get through or over these fences. Cant say whether or not it was difficult for the children to go through the cattle guard. I did not go through the cattle guard but went along the railroad track. I went straight to the highway and crossed the road there. I never took the children through the cattle guard.

(Here an attempt was made to explain to the witness what was meant by a cattle guard)

People living in the enclosure do not go through the cattle guard, they go right down the railroad. I never went through the guard myself. Dont know what

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the cattle guard is.

(Direct examination resumed)

At the time of the accident I had three children, the youngest not quite seven. I always kept them away from the railroad track. One of them is dead. The express train cut off its feet after the accident to Jacobs' children. When the people went from those shanties to the Junction they always went along the railroad When I first went for the children I did not climb over the railroad fence but went along the track – when I took the children home I went along the track – I never took the children over the fence.

Cross ex. resumed

I took the children along the railroad. I did not take them through the guard. I do not go over any fence. I went to the nearest point on the railroad and then went along it, part of the time on the track and part of the time at the side of it. The tallest boy walked over the cattle guard and I carried the smallest one all of the way.

The Plaintiff then introduced as a witness Mrs. Cunningham, who testified as follows —

I live at Oak Ridge. At the time of the accident I was living at St. Charles but I was visiting at Dempsey's house which is at the Junction inside of the railroad fence on the North side of the track. There were three or four shanties there then. There was no shanty very near the cattle guard. I had been there for some time, there were two children

with me. I saw the two little boys coming along the track inside of the fence. I looked out and saw them coming along the track, and looking out again I saw the engine coming along and it ran over the children. When I saw the engine coming I threw up my arms and the engine stopped; it ran past our house first. I saw the children after they were run over the youngest one was in the middle of the track between the rails; the other was nearer the rail, his hand was off and lay on the South side of the track, his body was between the rails – Dempsey was working at the water house. There were other children living in the houses inside of the railroad fence.

Cross examination

I cant say how far Dempsey's house was from the cattle guard; it was more than twice the length of this room. I am sure that the children were West of the cattle guard when the engine struck them.

Direct examination resumed –

I was looking at the children when they were struck. Those people who lived inside of the railroad enclosure in the shanties usually went through the cattle guard. There was no gate for them to go through that I heard of.

The plaintiff then introduced as a witness Mrs. Fisler who testified as follows –

In May 1876 I lived at the Junction. I live there now. I know the plaintiff. I saw him the morning of the accident. I saw his little brother with him.

I was at home in the kitchen washing. I looked out of the window and saw the two boys on the track. They were outside of the cattle guard on the track. I dont know where they were going. They were walking towards the shanties. It was in the forenoon after nine O'clock I heard a locomotive coming along the track and looked out and saw it. Then the children were outside of the guard on the track. I did not hear any bell or whistle. I did not see the engine run over the children. When I saw the engine I could not see the children, but I saw them before - I went out of doors at once and saw a man carrying the plaintiff. I then went to Mr. Jacobs' house. I noticed the engine when it went by because I thought it was the express train and that it must be dinner time. Mr. Jacobs has a grocery Folks call him a baker, he now lives at the Junction.

Cross examination

The children were outside of the cattle guard I mean by that West of the cattle guard when I first saw them.

Here the counsel for the plaintiff called as a witness Mr. Jacobs the father of the plaintiff. The Depots counsel objected to his examination and the

The Defendant here admitted that the plaintiff was four and a half years of age when the accident happened.

The plaintiff now introduced again as a witness Dr. H. M. Heall who had been partially examined in the commencement of the trial and who now testified as follows —

One of the railroad employees came and informed me of the accident. I went down to the Geneva road and thence to Jacob's house. I saw an engine about that time but dont know whether or not it was the same one that had run over the children. I found the plaintiff lying on the lounge. He was not insensible, he was lying nearly on his back, his arm was off and his head cut; nothing but his arm was seriously injured. I think he was lying on his face when run over, judge so from the wound of the arm. I had to take some stitches in the cut in his head. I said that I must have some assistance to operate on his arm and told the people there that they had better go ask some of the railroad people to send an engine to St. Charles for another Doctor, and I found that they had already done so.

(Here the plaintiffs' shoulder where the arm had been cut off was shown to the Jury and the witness described the operation of the amputation) (The Defdts. counsel admitted that the plaintiff had been seriously hurt and had lost his arm in consequence of the accident)

The arm[illegible] seemed to have been run over in two places as if it had been bent at the time. In addition to removing the mangled stump remaining

I had to take out a piece of the bone from the shoulder I considered this necessary to ensure the healing of the wound. I continued to visit him until June 21st. The plaintiff recovered very rapidly, he was out of the house in two weeks after the accident. The situation of the premises where the accident occurred is the same now as then so far as I know.

Cross examination

An agent of the Company went to St. Charles for another Doctor. When Mr. Jacobs came home he seemed to be angry and blaming his wife. All the conversation was in German I did not then understand any German.

Question by Defdts counsel "From your remembrance of what occurred then, do you now think that he was blaming his wife for allowing the children to go out and get on the track?" Objected to by plaintiffs' counsel, but admitted by the Court

Ans— I think he was very angry and finding fault with his wife. The plaintiff was not actually confined two weeks. About eight trains a day pass the place where the accident occurred. The railroad Company are in the habit of running single engines up and down this place Sometimes the bell is rung at the crossing and sometimes it is not. There are about from thirty two to thirty six trains arrive and depart from the Junction daily and sometimes as many as fifty.

Direct examination resumed

Dont mean there were 30 trains on the Dixon road but on all the roads. There are no other roads come in near where the accident occurred. Mr. Jacobs' sells liquors, I dont know whether he has a trade or not. He owns two houses and two acres of land — The plaintiff has no property that I know of. Mr. Jacobs' property is worth I should think about $1800.

The defendant introduced as a witness Thomas Rackaw who testified as follows —

At the time of the accident I was running the engine Wabashaw. I had her out for the purpose of taking the mail train West which was behind time. I started from the Aurora water house with the engine and tender running West to pump up. The bell was rung from the time the engine started until it reached the switch, which is twenty two rods East of the highway crossing. Then I could see across the crossing and up to the cattle guards and every thing was clear. I then turned around and put on the pump on the left hand side which would take me about three seconds from my position by that time the engine was on the crossing — immediately after I saw a woman run out from one of the shanties and put up her hands which I took to be a signal

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of alarm. I reversed the engine and stopped as soon as possible. Before the engine was fairly stopped I looked back and saw two children lying between the rails and I said to the fireman "O God! I have killed two children" When the engine stopped I jumped off - it stopped some eight or ten rods from where the children lay. The fireman and another man who was on the engine got off and picked up the children. I sat down on the grass by the side of the road. I suppose the children were carried to their fathers' house. At the time I saw this woman I was running about seven miles an hour. I did not see the children at all until after I had run over them. I did not know the plaintiff and had no design of injuring him.

(Here the plaintiff's counsel admitted that there was no pretence that the injury complained of was intentional or wilful.)

The children were lying about four or five rods West of the cattle guard. If they had been on the East side of the cattle guard I could have seen them before I got to them; but if they had been just West of the guard I could not. I ran the engine down there because the water was low. It had been standing there at the water house waiting for the train to come up and the engine got hot and the water very low in it. The water was as low as it was safe to allow it to get. There was a curve in the road between me and the children. There were

weeds grown up along side of the road also. I am certain that if the Children had been on the track East of the cattle guard I would have seen them The shanty which the woman came out from was about three rods from the track. The children must have been on the West side of the guard. I was just East of the guard when I saw the woman put up her hands.

Cross examination

I was just East of the cattle guard when I saw the woman put up her hands. I could not see the track for about four rods ahead of the engine. I could see the track on my side two or three rods ahead. I started to reverse the engine just East of the cattle guard when I saw the woman put up her hands but I could not reverse until after I had passed the cattle guard. Stopped just West of the further shanty. There were no brakes on the engine. It is usual to have brakes in summer on engines. I recollect that I looked ahead on the track, there were weeds grown up along side of the track. They were weeds of that year's growth. They did not grow on the track did not grow beyond the ends of the fence. The children were lying about four rods West of the cattle guard after I run over them. If I had been off at the right window & the fireman at the left window & both on the watch we must have seen the boys if they had been there. Engine

& tender going 7 miles an hour may run 8 or 10 rods after the engine is reversed.

The Defendant then introduced as a witness John Parker who testified as follows —

I was the fireman on the engine Wabashaw on May 2d 1856 We were on the Dixon air line track. The train coming up that we were to take on was behind time and while waiting for it our water got low in the boiler. The engineer said we would fill up with water. The engine started from the water house West and I rang the bell. The engineer told me to put wood in the furnace and then I let go the bell and went back to the tender to put in the wood. A young man who was on the engine passed the wood to me and I threw it into the furnace. I stopped ringing the bell about ten rods from the water house. I could then look down the road a little ways but could not see the cattle guard, there was a curve in the road and a switch post in the way. I saw the children after they were hurt. When we ran over them we were going six or seven miles an hour. If the train had been running twenty five miles an hour the children would have been killed. From eight to twelve trains passed that place daily. They usually go about twenty four miles an hour. The children were 3 or 4 rods on the inside of the cattle guard when I saw them. Think they must have been on the

West side when hurt.

Cross examination.

I stopped looking out from the window when I was about ten rods from the water house. It is our usual custom to give notice by a bell or whistle when before a crossing — They usually ring the bell.

The Defendant then introduced as a witness Mr Chat Watson who testified as follows —

I live at the Junction — At the time of the accident to the plaintiff Mr. Jacobs lived in my house. I am well acquainted with the premises. The Galena & Chicago Union Rail road Company own the land inside of the railroad fence and also that outside up to the highway which is open. I own the land next North of this open place. That is my barn North from the cattle guard. The people who live inside of the railroad fence used to annoy me by pulling down my fence and coming through there with teams to get to their shanties and I opened a place at the corner next to the railroad fence for them to pass through. The cattle guard is not the same now as it was then, then they were laid with the corners or edges up the joists up — some of the people nailed slats across the guard to walk over on. People usually passed that way. The cattle guard was made with 2 X 4 joists or scantlings laid cornerwise that is with the edges up. At the time the accident happened that way around was open. I had opened that space for the people living in the shanties to use with teams. It was the only way for them to go with teams. There

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were eight or ten trains a day passed that place – There were about thirty five or forty arrived and departed from the Junction daily. I have children. I never allow them to go on the railroad track. At the time this accident happened Mr. Jacobs lived in the same house with me. I did not then allow my children to run on the railroad track

Cross examination

Those people living in the shanties inside of the railroad fence, when on foot, went through the cattle guard It was the usual way for them to go.

Here the plaintiff introduced as a witness George Colby who testified as follows——

I have been an engineer on the Galena road for six months. I commenced some time last February and ran until November 16th. I ran the locomotive J. B. Turner I ran twice a day, in the day time alway, it was over the Dixon air line road from the Junction West. I went over the road yesterday on the locomotive Blackhawk. I know the locomotive Wabashaw. I can't tell anything about the relative convenience of seeing from it and the Blackhawk. Standing in the engineers' position on an engine I can see pretty close ahead In passing near where this accident occurred and sitting on engineer's side, looking out of the window I could see from the water house to within eight or ten rods of the cattle-guard, the curve in the road prevented me from seeing further, also the smoke stack interfered some. On the left hand side of the engine I could have seen to the cattle guard

Standing on the right hand side I could see the guard when eight or ten rods from the water house. After passing the cattle guard the track is straight. When half way from the water house to the cattle guard on the right side of the engine I could see through the cattle guard for a quarter of a mile. If two boys were inside of the guard five or ten rods I could have seen them when I was half way from the water house, if I was looking out for them. I saw no switch post which prevented me from seeing the track. I dont know whether there is a switch post near the cattle guard or not. The switch posts are usually placed eight or ten feet from the track. A switch post is from two to three feet high and a foot and a half wide. I never knew a switch-post to be so placed as to hide the view of the road. I have rode on the engine Wabashaw, her construction does not prevent the engineer seeing — On consideration think I could not see so far from the Wabashaw as from some other engine perhaps I could not see the track for eight or ten feet ahead but am not certain. There are windows on the sides of the engine. We look from them when there is a curve, or step over to the fireman's side. The Wabashaw in pumping might be run at almost any speed. It depends upon the engineer he may run fast or slow as he pleases — it would depend upon the hurry he is in. There is no rule about it. It is the revolutions of the wheel that work the pump — so that an engine with a small

driving wheel pumps the fastest at the same speed.
In approaching a highway crossing it is customary to ring the bell. It is the rule of the road to do so. It is customary when approaching children or other people on the road to give alarm. I have seen people at this place where the accident happened on the track. I always rang the bell before I came to this crossing going either way. It was necessary to take more care here than at other places on the road. People coming out from the enclosure crossed the track there at the guard.
Cross examination

It was the rule of the road to ring the bell before crossings. The instructions to all the engineers are alike. I always rang the bell before railroad crossings I did not consider it my duty to stop or slow a train when I had passed a highway and was coming on the Company's ground. I always rang the bell to warn people on the highway. It was the rule to ring the bell until we had passed the highway. On all engines the smoke pipe obstructs the view. I have often stepped on to the opposite side of the engine to look around a curve. I have done it at that place often but not always. I cannot say certainly that the bell on my engine was always rung. I cant remember for a week whether it was certainly rung or not. If the engine at the time of the accident had been running fast it would have been more likely to have killed the children. There is a switch-post just East of the cattle guard. I should not say it would

obstruct the view of the back of the engineer or fireman I should say that it was not four feet from the back. I could see from the switch through the guard for half a mile. An engine like the Wabash can properly ought to be stopped going seven miles an hour in five or six rods — If reversed and everything done, going fifteen miles an hour she ought to be stopped in ten or fifteen rods. If I had been in this engineer's position I would not be likely to remember whether I had rung the bell or not — think I would remember if I had not done so. If I run over two children I should remember whether I rung the bell or not.

Here the plaintiff introduced as a witness James Scoville who had been previously examined and who testified as follows —

From the water house to the cattle guard it is sixty four rods. From the water house to the switch it is twenty seven rods. From the switch to the cattle guard it is thirty seven rods. The fence posts each side of the cattle guard are ten feet eight inches apart. I saw no other switch post excepting one just East of the cattle guard. It was so far out of the way that I did not put it down on my plat. The fence which comes up each side of the cattle guard is the ordinary railroad fence made with four boards six inches wide with about eight inch spaces between them. None of these boards project beyond the posts excepting the upper one which projects about six inches. I was never on the locomotive Wabash.

This was all the evidence offered on the trial of this case For the admission of all which evidence on the part of the plaintiff, the defendant by its counsel then and there excepted

Geo. M

The Plaintiff by his attorney requested the Court to instruct the Jury as follows —

"The Plaintiff was not a trespasser if he was on the land of the defendant by the permission of the defendant either express or implied."

Which instructions the Court refused to give as asked, but added to it and gave the instruction as follows —

"The plaintiff was not a trespasser if he was on the land of the defendant by the permission of the defendant either express or implied — and it is for the Jury to determine from the evidence whether such permission was expressly given or can be implied from the circumstances and facts in proof."

The Plaintiff the, by his attorney asked the Court to instruct the Jury as follows — Which instructions were given by the Court as asked for —

"If the Jury shall find from the evidence that at the time of the accident, by the permission of the defendants, persons were living within the enclosure of the track near where the accident occurred and were permitted by the defendants to come and go over the same: and that at the time of the accident the Plaintiff was by the express or implied permission

of the defendants at the place where the injury occurred then it was the duty of the defendants to use due care and diligence in running their trains over the place in question -

3rd Instruction — If the Jury shall find from the evidence that the plaintiff was lawfully in the place where the injury occurred, either by the express or implied permission of the defendants, and that the injury was solely the result of the negligence of the defendants, without any negligence on the part of the plaintiff or his parents, then the plaintiff is entitled to a verdict.

The Defendant by its attorney requested the Court to instruct the Jury as follows —

1st Ins — A party seeking to recover damages for a loss which he alleges has been caused by the negligence or misconduct of another, must show to the Jury that his own negligence or misconduct has not in any way contributed in producing the injury complained of.

2nd Ins — The burthen of proof is on the plaintiff to show not only that the defendant was guilty of negligence but that the plaintiff exercised proper care and circumspection in his own conduct, and if he was of insufficient age to exercise care and circumspection then he must show that those who were bound to take care of him, did not by their negligence suffer the plaintiff to expose himself to the injury -

3rd Ins — If the Jury shall believe from the evidence

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that the plaintiff was of such tender years as would be likely to make him inconsiderate or imprudent and that he therefore required the control and oversight of his parents; then they should find that his parents were exercising such care and prudence over the plaintiff as judicious and careful parents ought to have done, at the time the injury was received; or the law is with the defendant and the plaintiff cannot recover."

All of which instructions were given by the Court as asked for by the defendant. The fourth instruction asked for by the defendant was as follows —

4½ Ins — "If the Jury believe from the evidence that the plaintiff or his parents knew that there was a railroad at the place where the injury occurred, upon which locomotives and cars were frequently running, and that if plaintiff wandered thereon that he would be exposed to injury and danger, then Plaintiff was on the railroad of the defendant at his own peril and the plaintiff and his parents were guilty of such negligence as should prevent a recovery in this case."

Which fourth instruction the Court refused to give as asked for by the but gave it altered and modified as follows —

"If the Jury believe from the evidence that the plaintiff or his parents knew that there was a railroad at the place where the injury occurred upon which locomotives and cars were frequently running, and that if plaintiff wandered thereon that he would be exposed to injury and danger and that

notwithstanding the plaintiff was permitted negligently to wander thereon, then plaintiff was on the railroad of the defendant at his own peril, and the plaintiff and his parents were guilty of such neglect as should prevent a recovery in this case."

To which refusal of the Court to give said fourth instruction as asked for, and to which alterations and qualifications of said fourth instruction the defendant by his attorney at the time excepted.

5th Ins— The Defendant by its attorney then asked the Court to instruct the Jury as follows—

"Under the issue raised by the pleadings in this case if the Jury believe from the evidence that the plaintiff was guilty of any negligence on his part by going upon and remaining upon the railroad track of the defendant, at the time when the accident complained of happened, then the law is with the defendant and the plaintiff cannot recover—"

6½ Ins— "If the Jury believe from the evidence that both plaintiff and defendant were in fault then the defendant cannot recover."

7th Ins— "The Plaintiff must show that he was without fault by going and being upon the railroad track at the time of the injury happened or he cannot recover; although it may appear that the defendant was also guilty of negligence."

Which instructions were given by the Court as asked for by the defendant. The defendant by his counsel then asked the Court to instruct the Jury

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as follows

8th Ins— "If the Jury believe from the evidence that the defendant has exercised ordinary care in fencing the railroad and in running trains thereon then the law is with the defendant and the plaintiff ought not to recover."

Which said instruction the Court refused to give to which refusal the defendant by its attorney at the time excepted—

The defendant by its counsel requested the Court to instruct the Jury as follows—

9th Ins— "If the Jury believe from the evidence that the land where the injury occurred was owned by the defendant and was in the use of the defendant, the plaintiff was a trespasser thereon and if he was on said grounds without permission of the defendant and not for any necessary purpose he was there in his own wrong and at his own risk and the law is for the defendant and the plaintiff cannot recover unless the Jury believe from the evidence that the defendant wilfully injured the plaintiff."

Which said ninth instruction the Court refused to give as asked for but having altered and qualified it gave it to the Jury as follows—

"If the Jury believe from the evidence that the land where the injury occurred was owned by the defendant and was in the use of the defendant the plaintiff was a trespasser thereon unless there by the express or implied permission of the

~~plaintiff~~ defendant and if he was on said ground without permission of defendant and not for any necessary purpose, he was there in his own wrong and at his own risk, and the law is for the defendant and the plaintiff cannot recover unless the Jury believe from the evidence that the defendant was guilty of gross negligence and wilfully injured the plaintiff."

To which refusal to give said ninth instruction as asked for and to which alterations and qualifications of said instruction the defendant by his attorney then at the time excepted. The defendant by its attorney then requested the Court to instruct the Jury as follows.

10th Ins— "That the defendant was not required by the Statutes of this State to ring a bell to warn persons against danger upon its own premises, that such warning is designed for persons upon and at road crossings and unless defendant was injured at a road crossing the omission to ring a bell unless it was a wilful omission does not in such case show that the defendant was negligent.

11th Ins— If the Jury believe from the evidence that the plaintiff was injured on the premises of the defendant and not at a road crossing, then the omission to ring a bell or blow a whistle is not prima facie evidence of negligence on the part of the defendant.

12th Ins— If the Jury believe from the evidence that the plaintiff had not sufficient discretion

or knowledge to have the care of himself, and was suffered to wander on the premises of the defendant, by the negligence or want of care of his parents, he was there in his own wrong and at his own risk and the law is for the defendant, unless the Jury believe that the defendant wilfully caused the injury complained of—

Which said tenth, eleventh & twelfth instructions were given as asked for—

13th Ins— If the evidence in this case shows that the injury complained of happened on the ground or right of way used and occupied by the defendant, and that the plaintiff had no right to be where he was, then the defendant was not answerable for the injury unless it was done done wilfully, because the defendant in the use of the road is not bound to keep a look out on its own ground as against those having no lawful right on the road but may use the same for its own purposes in its own way, and any person going upon the track without permission (express or implied) at such place is there at his own peril and in his own wrong and therefore if he is injured he cannot recover because his own neglect or carelessness has contributed thereto—

Which said thirteenth instruction the Court refused to give as asked for but altered and qualified it by inserting the words express or implied between the words permission and at in the

concluding sentence — To which refusal to give said 13th instruction as asked for, and to which alteration and qualification of said 13th instruction the defendant by its attorney at the time excepted —

The defendant by its attorney then requested the Court to instruct the Jury as follows —

14th Ins — "Persons not in privity with a railroad Company wishing to cross its track are bound to cross at a public crossing or take the consequences of any accident which may happen in consequence of any collision with the cars not occasioned by the wilful and reckless act of the servants of the defendant"

Which said fourteenth instruction was given as asked for. The case was then submitted to the Jury who returned the following verdict —

"We the Jury find for the plaintiff and assess the damage at two thousand dollars"

The defendant by its attorney then moved the Court for a new trial for the following reasons —

Because the Court permitted improper evidence to go to the Jury.

Because the Court refused to give proper instructions to the Jury.

Because the Court gave improper instructions to the Jury on the part of the plaintiff —

Because the verdict of the Jury was against law.

Because the verdict of the Jury was against evidence.

Because the verdict of the Jury was against

law and evidence.

Because the damages awarded were excessive.

Which motion for a new trial was overruled by the Court. To the overruling of which motion for a new trial the defendant then and there excepted — and the Court proceeded to enter judgment against the defendant — Whereupon the defendant prayed an appeal which was allowed.

And the defendant prays that this his bill of exceptions may be signed, sealed and made a part of the record.

George Manierre (Seal)
Judge of 7th Judicial
Circuit, Ills.

We believe the above bill of exceptions to be correct —
Goodrich Farwell & Scoville
Attys. for Plff

It is hereby agreed that the foregoing bill of exceptions contains a true statement of all the facts and proceedings in the said cause, to be made a part of the record for argument and decision in the Supreme Court

E. Peck
Atty. for Defd.

State of Illinois,
COUNTY OF COOK. } s. s.

I, **WILLIAM L. CHURCH,** Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of all the papers filed & proceedings had & entered of record in a certain cause lately pending in said Court on the Law side thereof, wherein Frederick Jacobs by his next friend Geo Scoville was Plaintiff and Galena & Chicago Union Rail Road Co defendent

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this thirtieth day of March A. D. 1858

Fees for Record $12.85

Wm L Church
Clerk.

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2559

Frederick Jacobs by
Geo. Scovill his next friend

vs

Galena & Chicago U. R. R. Co.

Record

Filed April 22, 1858
Leland
Clk

412 to [12314-28]

SUPREME COURT.

APRIL TERM, 1858.

Frederick Jacobs,
who sues, &c.,
Appellee.
ads.
The Galena and Chicago
Union Railroad,
Apellant.

Brief of Counsel for Appellee.

I. The evidence shows that the injury to the Plaintiff was caused by the negligence of the servants of the defendant.

The engine was at the Aurora water-house, waiting for the eastern train. The water getting low, the engineer started out to run west with the engine and tender, for the purpose of pumping up. The first sixty-four rods of this part of the road runs through a village and crosses a public highway; it then enters upon the enclosure of the Company; but within such enclosure, and near the track, were four or five shanties, which were occupied by persons in the employ of the Company and by their families, composed in part of children; persons passing to and from the shanties on foot were accustomed to walk along the railroad track, and boards or slats had been nailed upon the timbers of the cattle guard to enable them to walk over without inconvenience; an ordinary regard for the safety of the public, and for the safety of persons who might reasonably be expected to be passing on the track and within the enclosure, required that the engine should be run at a moderate speed, that a careful look-out should be kept, that the usual signals should be given, and that on discovering that human life was in danger, every effort should be made to save it. In this instance more than ordinary care was required, since the engine had no brakes to aid in checking its speed, which it is usual for engines to have; and since in addition to the engineer and fireman there was an extra hand on the engine, who appears to have acted as an assistant on this occasion, and who could have aided in keeping a look-out, if any was needed. This is what *should have been* done.

What *was* done? The engineer says the bell was rung until they arrived at the switch, 27 rods from the water-house; but the fireman who rung the bell says it was rung but 10 rods.

No look-out was kept from the time they left the switch until the boys were run over, or at least until the engine was so near them that it hid them from the view of the engineer.

If a look-out had been kept the children would have been seen. Mrs. Fesler, who was between the highway and the switch, and Mrs. Cunningham, who was in the farther shanty, both of them saw the children running on the track towards the shanties. It is idle to pretend that a

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switch post, or grass, or any other object obstructed the view. The testimony of Scoville, Colby, Mrs. Fesler, and, indeed, of the engineer and fireman, put to flight any such pretence.

If this is running an engine with *proper care*, it is difficult to imagine what would constitute *negligence*, short of a wilful and premeditated injury.

But the defendant answers, that, although there may have been negligence on the part of its servants, yet that the plaintiff cannot recover, because he was a trespasser, and because he was himself guilty of negligence. To this we reply:

II. The plaintiff was not a trespasser, for he was on the land of the defendant by the permission of the defendant.

The evidence does not show by whom the shanties were built, but the presumption is that they were built by and belonged to the company. At any rate, we have the right to conclude that they were occupied by the permission of the company, and that it was with the knowledge and permission of the company that persons were accustomed to use the track in going to and from the shanties.

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It is useless to assert that this was without the knowledge or consent of the company, for we find the shanties still standing and occupied, and the track still used as before up to the time of the trial, a year and a half after the accident.

It appears that Mrs. Kell, who occupied the further shanty, was on terms of neighborly intimacy with the family of Jacobs, the father of the plaintiff, and that she had at two different times, a few days before the accident, taken the children to her house. The children and their parents had a right to suppose that they would be welcome visitors at her house whenever they should go there. The Company, in permitting Mrs. Kell to reside there, is presumed to have consented that she might go back and forth, and might visit her neighbors and be visited by them. Cowen's Treatise, 3d ed., vol. 1., p. 404—4th ed., sec. 506. The circumstance that her house was a poor one, and she a person in humble life, can make no difference. The rights of the parties would be the same if she had resided there in a fine mansion instead of in a poor shanty, and had been the wife of the president of the company instead of a day laborer in its employ.

III. There is no evidence of negligence on the part of either the parents or the children.

The parents had never permitted the children to wander on the road, or to go there unattended. The mother had no reason to suppose they would go there at the time in question. In permitting them to go out of the house into their enclosed yard, unattended, she was not guilty of a want of ordinary care. She granted a reasonable request, but accompanied her consent with such directions as a careful mother would na-

turally give. The children were absent but from five to ten minutes; not longer than might be necessary for the purpose for which they went out. No bell or whistle or sound of cars was heard, to notify her that danger was near, so that she might look out and be sure that her children had not strayed away. She had a right to suppose that other persons would use ordinary care, and she was not guilty of negligence because she acted on that supposition.

City of Chicago vs. Mayor, 18 Ill., p. 360.

If this mother was negligent, no families that are poor or in moderate circumstances, can reside any where in the neighborhood of a railroad, for each child would need an attendant. To charter a railroad would be in effect to depopulate the country though which it would pass. The whole route would have to be abandoned to the company and its agents.

But the counsel for the appellant insists that the passionate reproaches of the father prove that the mother was negligent.

It may be observed that no amount of talk, subsequent to the accident, could alter the facts of the case. But is it surprising that the father should have used such language? His two oldest boys lay before him, bloody and mangled, and he supposed them about to die. In his frenzy, and without any knowledge of the circumstances of the case, he blames his wife. Many a man has abused an unoffending woman for less cause than that. On being assured by Mrs. Highland that the mother "was not at all to blame," he ceased his reproaches. And upon such incoherent ravings of a distracted parent, does the defendant rely in this case.

But the counsel says the *children* were negligent. It may well be doubted whether or not, in a case like this, where the children are under the immediate care of their parents, and there is shown to have been no want of proper care on the part of the parents, negligence can be imputed to the children, owing to their tender years, whatever may have been their conduct.

IV. But the children were *not* negligent. They were going where they had been before, and where they supposed they would be welcome. They went by the usual route, and without loitering by the way. If they had been standing still they might possibly have heard the noise made by the running of the engine in time to have escaped; but since they were ahead, running in the same direction, they would not be likely to hear it in time. The engine was evidently running at high speed, for it run some 14 or 15 rods before the engineer could stop it. They were run down without warning and without excuse. A person of full age might have met with the same fate under like circumstances.

Such being the facts in the case, as appears from the evidence, the jury were warranted in finding a verdict for the plaintiff. It is difficult to see how they could have found otherwise, and have regarded their oaths. Yet, under these circumstances, the counsel complains that there is no evidence to warrant the finding of the jury!

V. Even if this Court should be of opinion that the jury ought to have found for the defendant, yet this is not one of those cases where a verdict will be set aside, or a judgment reversed for that reason.

The Judge before whom the case was tried, was satisfied with the result, and he, having seen and heard the witnesses on the stand, was better prepared to judge of the merits of the case than this court can be, upon written evidence.

This question of negligence is a question of fact for the jury, and not of law for the court.

Redfield on Railways, page 333.
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VI. There is no error in the instructions of the Judge.

If it was a proper case to be submitted to the jury—if there was any evidence to warrant a finding for the plaintiff—the instructions are correct. At least the *defendant* has no right to find fault with them. No leaning in our favor is shown, but we were held to the strictest rules of law on every point in the case.

The counsel would be satisfied with nothing short of an instruction which amounted to saying to the jury, that the plaintiff was not entitled to recover. Such an instruction he could not get, and we trust this court will not say he was entitled to it.

As regards the authorities cited* by the counsel for the appellant, we do not find that we are obliged to quarrel with any of them in order to support this verdict.

There seems to be some difference in the decisions of the courts, as to the negligence on the part of the plaintiff which shall prevent a recovery.

Without following the extreme cases on either side, the reasonable rule seems to be fairly stated in Parsons on Contracts, vol. 1, p. 702.

See, also, Angell on Carriers, sec. 561–562.

As respects the case of Hartfield vs. Roper, 21 Wend., 615, although it may not be necessary for the court to have any reference to that case in deciding this one, yet, since great prominence has been given to that decision, and to the opinion of the judge, by the counsel for the appellant, we feel free to say that we consider that decision and opinion neither good law nor good sense. It is generally regarded as an *extreme case*, in which the doctrine discussed was carried to an excess of refinement not warranted by former decisions, nor by the facts in that case, nor founded on any sound principle. The courts of other States hesitate to follow it; respectable writers speak of it with disapproval, and the strong and growing inclination is to disregard it.

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Defendants everywhere, in actions of this nature, are accustomed to quote that decision with the greatest confidence, no matter how aggravated a case of negligence may be shown against them. The courts profess to have a great regard for infants, but that decision treats them with the greatest severity. Human beings are not to be placed on the same level with sheep and cattle. Children are not to be run over with impunity, either on highways or on railroads. We trust this court will be slow to *indorse*, much less to *extend*, a doctrine which shocks the moral sense and does violence to the humane instincts of us all.

GOODRICH & FARWELL,

Counsel for Appellee.

[12514-33]

259 259-108

Supreme Court

Frederick Jacobs
who sues &c
appellee
ads
Galena & C. U. R. R. Co
appellant

Brief of Goodrich & Farwell
counsel for Appellee.

Filed May 17, 1858
S. Leland
Clk

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12514

SUPREME COURT.

APRIL TERM, 1858.

Frederick Jacobs,
who sues, &c.,
Appellee.
ads.
The Galena and Chicago
Union Railroad,
Apellant.

Brief of Counsel for Appellee.

I. The evidence shows that the injury to the Plaintiff was caused by the negligence of the servants of the defendant.

The engine was at the Aurora water-house, waiting for the eastern train. The water getting low, the engineer started out to run west with the engine and tender, for the purpose of pumping up. The first sixty-four rods of this part of the road runs through a village and crosses a public highway; it then enters upon the enclosure of the Company; but within such enclosure, and near the track, were four or five shanties, which were occupied by persons in the employ of the Company and by their families, composed in part of children; persons passing to and from the shanties on foot were accustomed to walk along the railroad track, and boards or slats had been nailed upon the timbers of the cattle guard to enable them to walk over without inconvenience; an ordinary regard for the safety of the public, and for the safety of persons who might reasonably be expected to be passing on the track and within the enclosure, required that the engine should be run at a moderate speed, that a careful look-out should be kept, that the usual signals should be given, and that on discovering that human life was in danger, every effort should be made to save it. In this instance more than ordinary care was required, since the engine had no brakes to aid in checking its speed, which it is usual for engines to have; and since in addition to the engineer and fireman there was an extra hand on the engine, who appears to have acted as an assistant on this occasion, and who could have aided in keeping a look-out, if any was needed. This is what *should have been* done.

What *was* done? The engineer says the bell was rung until they arrived at the switch, 27 rods from the water-house; but the fireman who rung the bell says it was rung but 10 rods.

No look-out was kept from the time they left the switch until the boys were run over, or at least until the engine was so near them that it hid them from the view of the engineer.

If a look-out had been kept the children would have been seen. Mrs. Fesler, who was between the highway and the switch, and Mrs. Cunningham, who was in the farther shanty, both of them saw the children running on the track towards the shanties. It is idle to pretend that a

switch post, or grass, or any other object obstructed the view. The testimony of Scoville, Colby, Mrs. Fesler, and, indeed, of the engineer and fireman, put to flight any such pretence.

If this is running an engine with *proper care*, it is difficult to imagine what would constitute *negligence*, short of a wilful and premeditated injury.

But the defendant answers, that, although there may have been negligence on the part of its servants, yet that the plaintiff cannot recover, because he was a trespasser, and because he was himself guilty of negligence. To this we reply:

II. The plaintiff was not a trespasser, for he was on the land of the defendant by the permission of the defendant.

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GOODRICH & FARWELL,

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257–108

Supreme Court

Frederick Jacobs
who sues &c
appellee
ads
Galena & C. U. R. R. Co.
Appellant

Brief of Goodrich & Farwell
counsel for Appellee.

Filed May 17. 1858
L. Leland
Clk

106

United States of America

STATE OF ILLINOIS, COUNTY OF COOK, S. S.

Pleas, *before the* **Honorable** George Manierre

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the First *Monday, (being the* First *day) of* March *in the year of our Lord one thousand eight hundred and* Sixty Eight *and of the Independence of the said United States the* Eighty Second

Present, Honorable George Manierre *Judge of the 7th Judicial Circuit of the State of Illinois.*

Carlos Haven *States Attorney.*

John L Wilson *Sheriff of Cook County.*

Attest; Wm L Church *Clerk.*

Galena & Chicago
U. R. R. Co
vs
Friedrich Jacobs

2J-9

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1858

Refused