

No. 14604

Supreme Court of Illinois

Chicago & Rock Island
R.R. Co.

vs.

Hutchins

STATE OF ILLINOIS

SUPREME COURT,

THIRD GRAND DIVISION.

No. 170-182

J. W. Middleton & Co., Stationers, 190 Lake St.

Chas. D. ...
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Fitch

1864

170 182

Supreme Court of Illinois:

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

THE CHICAGO & ROCK ISLAND
RAIL-ROAD CO, APPELLANT,
vs.
JOHN S. HUTCHINS, APPELLEE. } APPEAL FROM HENRY.

This was an action on the case for damages for the killing of a mare and colt, brought by Appellee vs. Appellant.

3 To the first count of the Declaration, a demurrer was sus-
7 tained.

4 The second count is as follows:

And whereas, also, heretofore, to-wit: on the thirtieth day of July, A. D., 1862, the said defendant was and still is a rail road corporation within the State of Illinois, and was on said day and for more than six months prior thereto, had been and ever since hath been using and running cars on the rail road of the said defendant, through and in the town of Geneseo, in the County of Henry and State of Illinois; and that said rail road of the defendant had been open and for use from and ever since the 14th
5 day of February, 1855, in said town, County and State, whereby the defendant, six months thereafter, became liable for injuries to stock, in case the defendant failed to erect and thereafter maintain fences on the sides of their road, or the part thereof so open for use, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on to such rail road, except at the crossing of public roads and highways and within the limits

Filed May 11, 1864.
J. L. Howard MR

of towns, cities and villages. And the plaintiff avers that the said defendant well-knowing the same, neglected and refused to erect and maintain such fences, whereby one certain other mare and one certain other colt, the property of the plaintiff, of the value of two hundred dollars, lawfully feeding and depasturing in a certain pasture field, in said town of Geneseo, on the line of and adjoining to said rail road, then and there, to-wit: on the said thirtieth day of July, A. D. 1862, went from said adjoining pasture-field, unto and upon said rail road at a point where the owners of the land had not fenced the same, and had not agreed to fence the same, and where it became necessary for the said defendant to fence the same, it being not five miles from a settlement and without the limits of a town, city or village, and where there was no crossing of a public road or highway; and thereby then and there, to-wit: on the said thirtieth day of July, A. D. 1862, and at the town of Geneseo, in the County of Henry and State of Illinois aforesaid, through the carelessness and gross negligence of the defendant, said last mentioned mare and colt were then and there, by a locomotive and cars then and there being run by the servants and agents of the defendant on said rail road of the defendant, run over and upon and against; and the said colt was killed; and the said mare then and there had her leg broken and was so injured that she became then and there worthless and of no value, and had by the plaintiff to be killed; whereby,

6 and by means of the premises, the plaintiff hath sustained great loss and damage, to-wit: on the said thirtieth day of July, A. D. 1862, to-wit: at the town of Geneseo, at the County of Henry, and State of Illinois, aforesaid. Wherefore, the plaintiff saith he is injured and hath sustained damage to the amount of two hundred dollars; and therefore he brings suit, &c.

J. B. CARPENTER, Plaintiff's Attorney.

7 Demurrer to the count overruled.

The record shows that no plea was ever filed to the count, and no default was ever entered for want of plea, and no judgment was ever entered upon the count.

8 'Leave given by court to file additional counts ten days before the next term, and cause continued.

The first additional count alleges that the defendant was, on the 30th day of July, 1862, and still is, the proprietor of a rail road running from Chicago to Rock Island, which had been open for use more than six months prior to said date, &c., and for
 9 more than six months had been running their cars thereupon through the town of Geneseo, in said County of Henry; that by an "act to regulate the duties and liabilities of rail road companies," approved Feb. 14th, 1855, defendant was bound, within six months after the passage of said act, and prior to said 30th day of July, to have erected and maintained, and keep and have in repair, fences, &c., to prevent cattle, horses, sheep and hogs, from getting on to said road, except, &c., and to construct and maintain at all road crossings, cattle guards, &c.; and where such fences and cattle guards were not erected and maintained or not kept in good repair, defendant thereby became liable for
 10 all damages done by the agents or engines of said defendant to any cattle, horses, sheep or hogs thereon or in said rail road corporation. Said defendant not being required by the act aforesaid to fence the sides of its road except, &c. And the plaintiff avers that said defendant, in non-compliance with the conditions of said law, neglected and failed to erect, maintain and keep in repair, a suitable and sufficient fence on the sides of its said rail road, in the County of Henry aforesaid, so open for use, suitable and sufficient to prevent cattle, &c., and neglected and failed to construct at all rail road crossings, cattle guards, suitable, &c., and failed and neglected to keep the said fences and cattle guards in good repair. And the plaintiff avers that a
 11 certain mare and colt, the property of the plaintiff, of the value of \$200, was, on said day, lawfully feeding in certain pasture in said county, adjoining said rail road, and then and there went out and from said pasture field, unto and upon said rail road of said defendant, at a point where the said defendant necessarily should have, by the laws and act aforesaid was bound to have, erected, maintained and kept in repair a suitable and

sufficient fence, and where said defendant had neglected so to do as aforesaid. And the said mare and colt of the said plaintiff, so being upon the rail road of the said defendant at the time and place last aforesaid, were then and there, in consequence of the negligence of the said defendant, and of the neglect of said defendant to erect, maintain and keep in repair said fences, by the engine and cars of said defendant, being then and there upon said

12 rail road, by said defendant, run over and upon and against the said mare and said colt; whereby, and by reason of the negligence and neglect of said defendant as aforesaid, the leg of said mare was broken, and said mare was otherwise greatly injured and rendered entirely unfit for use, and worthless to said plaintiff; and said colt was also thereby, in consequence of said negligence and neglect aforesaid, by said engine and cars of said defendant, being then and there run upon said rail road by said defendant, was then and there instantly killed. And the said plaintiff avers that the fence where said mare and colt were depasturing as aforesaid, and where they were run upon and against by said defendant, by their engine and cars aforesaid, and where said mare and colt got on to the rail road of said defendant aforesaid, did not lie within the limits of any town, city or village, nor at a greater distance than five miles from any settlement, nor where the proprietors of said land adjoining said rail road had already erected fences or agreed so to do; and said plaintiff says that said proprietor of said land where said mare and colt got on said rail road, never have erected fences along the line of said road or on said land adjoining said road, nor where they have ever agreed with said defendant so to do; and the said plaintiff says that in consequence of said negligence of said defendant, and in consequence of said defendant's neglect and failure to erect, maintain and keep in repair said fences on said land and adjoining said rail road, at the place aforesaid, where, by the law, they were required to erect, maintain and keep in repair such fences, said mare and colt wandered upon said track and, in consequence of said neglect and negligence of said defendant aforesaid, were greatly injured and rendered worthless, and said colt killed; and the said plaintiff thereby hath been greatly injured and sus-

13 tained great damages, to-wit: at the County of Henry and State of Illinois, to-wit: to the amount of two hundred dollars.

The second additional count alleges that defendant was a rail road company, organized under the laws of Illinois prior to February 14th, 1855, and was, on the 30th of July, 1862, using and operating its road throughout its entire length from Chicago to Rock Island, and also through the said County of Henry; that on said day in said County of Henry, a certain mare and colt, the property of plaintiff, were depasturing on land adjoining said rail road, and passing along the line of said rail road near where the same crossed a road and street; that on said day and in said place, the defendant, while running its engine and cars over its road, neglected to ring or whistle at a distance of at least eighty rods from said crossing, and neglected to keep ringing or whistling until said engine had crossed said street, although said mare and colt were then between said engine and crossing, and within eighty rods of the same; and said defendant did otherwise with great carelessness and negligence, run and operate said engine and cars, and by reason thereof did run against, over and upon said mare and colt, so that the same were rendered worthless

14 —to the plaintiff's damage two hundred dollars.

Plea of General Issue by defendant, to the last two counts, and joinder by plaintiff.

15 The jury rendered the following verdict: "We, the jury, find for the plaintiff, and assess.

16 Motion by defendant in arrest of judgment, and for a new trial, overruled by the court, and judgment rendered for the amount of verdict and costs.

17 Bill of exceptions.

ADAM LIEBERKNECHT, being sworn, testified as follows:

I reside just east of the corporation of the village of Geneseo; the rail road is about four rods north of my house, and there was

a pasture field just east of my house, in which Hutchins had several horses; Hutchins had a bay mare and colt. My lot is 26 rods deep from the highway to the pasture. The rail road has been there for 5 years, and they were running cars there last summer.

18 I examined the fence of the rail road company, July 29th, 1862, and it was down between the rail road and this pasture. The horses got on to the rail road the day before the accident happened, through the fence near the N. W. corner of pasture. They also got out a week or so before at the same place. The fence was of posts and boards; four boards and some of the posts were rotted off at the ground. One post was out at the place the horses got out, and the fence had been taken down several times there by a Swede, and some of the boards were split.

The place was one length of boards east of my lot.

I notified McGuire, one of the employees of defendant, that the fence was not sufficient to keep out the stock.

The defendant at the time objected to all of the above testimony relating to the condition of the fences and the escaping of stock through it prior to the accident in question. The court overruled the objection, and defendant excepted.

The day before the accident happened, McGuire put up the fence. They were at work at it but did not drive any nails.—Can't tell exactly how they fixed it. This was about five o'clock in the evening; and at five or six o'clock the next morning there was a passenger train went west; and at about seven o'clock the next morning McGuire came to my house and I went out and found the mare; she had her hind leg broken, and was in the highway north of the rail road. The colt was lying on the west side of the street, torn in two. I saw hair and blood on the east cattle guard and on the highway. I heard, about 9 o'clock the night before, some horses inside of the rail road opposite my house, cropping grass; and saw them there. I can't describe
19 them, it was too dark.

The section Boss, McGuire, buried the colt. I was called upon to appraise the colt, and valued him at \$25; didn't appraise

the mare. Dye and others were with McGuire; they then went and nailed up the fence at the same point they had fixed it the night before; this was July 30th, 1862.

The highway runs north and south across the railroad. The pasture was fenced on all sides.

There were some 14 or 15 horses in the pasture at times. The mare was worth \$100.

The passenger train went west at 5:50 that morning. I was standing in my door and saw it. They did not ring or whistle. I saw them for half a mile before they reached the crossing.

To all of said evidence with reference to the whistle and bell being sounded, deft then and there objected; overruled by court, and exception.

The freight train came in about four (4) o'clock the same morning. I was awake in bed, and did not hear any whistle or bell.

The ground at my house is about four (4) or five (5) feet above the rail road track, until it gets to the crossing.

If the mare had been at the crossing I could have seen her; if east of it I could not.

The centre of the highway at the crossing is the east line of the corporation of the town of Geneseo, which is an incorporated village. East of the village it is settled.

Cross-Examined. I stood at the east door of my house; this door is 8 to 9 feet south of the N. E. corner of house. The house is 8 or 9 rods from the track, and east of the crossing.

21 The track is in a cut about five feet deep, past my house.

I was waked in the morning by the freight train passing.—The colt was lying on the south side of the track, cut in two; one half was between the rails.

I can't tell whether the bell was rung or whistle blown on the morning of the 29th of July. Six or seven trains pass during every 24 hours. I don't know whether Hutchins knew the condition of the fence; he was frequently down to the pasture. The Swede who knocked the fence down went through to cultivate ground on the other side of the rail road, opposite the pasture.—

He came into the pasture at the south end through the gate. He wanted to go through my lot but I wouldn't let him. If the horses had got out of the pasture on the south side of it, there would be nothing to prevent them going along the highway to the crossing. I did not go to the fence on the evening of the 29th to see how 'twas put up after the horses were driven by McGuire into the pasture; neither did I go there on the morning of the 30th. On the morning of the 30th I saw a horse's track east of the cattle guard.

23 DEPOSITION OF O. J. STOUGH.—I owned the pasture in question at the time of the accident, and had since 1856. The rail road fence of pasture was built, I think, and kept in repair by defendant; don't know whether twas in good order. I never agreed with the defendant to build or repair the fence, and never did build or repair it. During the summer of 1862, I rented the pasture to Frank Gerard, and he pastured horses and colts there. The rail road is the north boundary of the pasture. Lieberknight's lot is on the west. I think the railroad fence was built when I bought the land, and I built the fence on the other sides after I bought.

24 *Cross-Examined.* The west fence was poor in 1862, and was down during the season, and if stock got through there was nothing to prevent their going along the highway to the crossing.

JOHN S. HANNA. The rail road was built in 1853 or 1854, and the cars have been running upon it ever since. I know the pasture spoken of, and have seen men putting up the fences along the line of rail road and repairing them.

25 I know the mare and think she was worth \$100.

OSCAR FISK. On the morning of the accident I was going to reaping oats between 4 and 5 o'clock in the morning, and I saw the freight train going west. I was 40 to 60 rods from it, and could only see the tops of the cars. They did not whistle or ring the bell. I saw the mare about 8 o'clock the same morning; she had then been shot.

I went to examine for blood and hair on the rail road and found some on the east cattle guard. I couldn't see anything I called horse tracks there.

26 THOMAS BURLINGAME. I keep a stable at Geneseo, and doctor horses. Knew the mare and colt; they were worth \$100. I saw the mare about 30 rods north of the rail road; she had a leg broken and was worthless. I made an examination on the track, and found blood and hair on the east cattle guard.

Cross-Examined. If a hand car going east had run over the colt on the track, I think it might have carried the blood and hair to the cattle guard where I saw it, and I think it would.

FRANCIS GERARD. I had the use of the pasture spoken of during the summer of 1862, and pastured horses and colts there.

72 I pastured plaintiff's mare and colt there. Think they were worth \$120. I had not been out to the pasture for ten days prior to the accident; was sick. The fence in the pasture next the rail road is rather poor. I fixed it up several times during the summer. Some of the posts were rotted so as not to hold a nail good.

Cross-Examined.—I don't think the horses ever got out on to the rail road until the Swede took the fence down, and they never got out at any other place. There was some poor fence on the west line, and early in the spring the horses were crowded together against it and broke it down in one place, and they got out on the west side of pasture. Don't know as they did while I was sick.

JOHN BRACKEN. I knew the mare and colt. They were worth \$125.

28 HIRAM BARTLETT. I knew the mare and colt. Think they were worth \$130.

Here plaintiff rested his case.

EPHRAIM McGUIRE, called by defendant. I am the section Boss spoken of by plaintiff's witnesses. I saw the fence between the rail road and pasture on the evening before the accident, and thought it sufficient to turn ordinary stock. I saw it again early the next morning, and it was in the same condition that I left it the evening before.

I was on the hand car with Mr. Dye and the men I had charge of on the morning of the accident, and left Geneseo going east at 6½ o'clock. We got within about 6 feet of the colt before I saw it, and were running very fast and couldn't stop the car, and it run over the colt and on over the east cattle-guard before we could stop it. We then ran back on to the east cattle-guard
29 and left it standing there while we buried the colt. There was blood and hair on the car for a week afterwards. These guards are one-half on each side of the fence, and are 10½ feet long.

I have been engaged on rail roads for 15 years, and don't think the locomotive could have carried her over the cattle-guard into the highway.

There was no gap in the pasture fence on the morning of the accident.

Cross-Examined.—Twas my particular business to look after the rail road track and fences, and I examined the pasture fence the evening prior to the accident, and found that the two upper boards were down. One was clear down and one on top of the boards below. This was at the spot where the fence had been taken down by the Swede.

I drove the horses out and put up the fence. I put the boards up in their place and got a couple more boards which were longer than those on the fence, and twisted them in around the posts to hold the other up. They were so long as to stick past the posts some.

The next morning the fence was up just as I had fixed it the evening before.

I went east along the track to a little bridge to get the boards
30 to fix fence, and walked the whole length of the pasture, and

know the fence was not down in any other place, and that there were no boards off at any other place.

I know that there was no post out where I fixed the fence up. The next morning I went and nailed the boards fast where I had put them the evening before.

I saw blood and hair on the flange of the hand car wheel and at the crossing. I should think from the looks of the colt that the engine had struck it and knocked it down and then run over it.

31 *Direct Resumed.* The machinery beneath the hand car may also have struck the colt, and if so would probably have dripped blood on to the centre of east cattle-guard.

GEO. W. DYE. Have been a rail road man about 12 years. The plating on the lower side of the pilot of an engine is about 6 inches wide, and in striking an animal generally makes a larger wound than itself.

Question: "As a rail road man, judging from your own experience, and from what you saw in this case the next morning, the width and condition of the cattle-guard, condition of the mare, &c., give your opinion, whether she could have been struck by the engine east of the cattle-guard and carried over the cattle-guard into the highway and left in the condition she was found that morning."

Objection by plaintiff. Sustained by Court, and exception by defendant.

I examined the mare, and looked for a place on the ground beside the track where she had been thrown, but could not find anything. I saw some hair off the mare's leg inside the gambrel joint. I saw no blood and hair on the rail or track, but saw some on the south stringer of the east cattle-guard. If the mare had been struck on the north side of the track, blood could not have been thrown on to the south side, on account of the machinery under the engine. I saw the colt after we passed

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over it. The head and shoulders were on the south side of south rail, and the rest on the other side. Machinery of hand car runs within 6 or 7 inches of the ground, and car weighs 600 or 700 pounds.

It is not possible to stop a freight train in less than 500 feet.

33 *Cross-Examination.*—If the mare had been struck east of the cattle-guards, and train was going west, I think 'twould leave blood on the guards. I have never known a case of an animal being struck by the pilot of an engine so as to throw it down and only get a leg broken.

34 CHARLES ROBINSON. In the month of July, 1862, I had charge of and was running an engine as engineer on the rail road of defendant. I remember the morning of the thirtieth of July, 1862. I was running the engine of the freight train that went west that morning. It was the engine that was running that morning that killed the colt. I did not see the mare at the time when I first saw the colt. It was about five feet ahead of the engine upon the crossing in the public highway, on the south side of the track, and apparently in the act of turning around to go off the track on the south side when the engine struck it. I think it was about five feet east of the west cattle-guard. We were running at the usual speed. It was just about day light. The head-light on the engine was burning. I could not have seen the colt without the aid of the head-light.

Defendant's counsel here asked witness the following

Question: "State whether the bell on the engine was or not rung that morning at the crossing."

In reply to question by deff't's attorney, witness testified as follows:

I was an engineer in the employ of the defendants upon their rail road at the time of the injury to the mare and colt, and had charge of the engine that came in contact with them. It was
35 my duty to take charge of and manage the engine. There is a bell upon and attached to the engine. I don't know that

anything was said in my contract with defendants about ringing the bell. The regulations of the Company require the bell to be rung on the approach and crossing of high ways. There are printed directions by the defendant posted upon the pilot-house on the engine in respect to the ringing the bell, and I think the engineer is required to do it. It may be, and I think it probable, that the fireman is also required to ring it. I believe it is the duty of both the fireman and engineer to ring the bell. I know that it is rung sometimes by me, and sometimes by the other of them, as may at the time be most convenient. I have charge of the engine as engineer, and I suppose that when the fireman rings it is by my direction or permission. Do not think he would have any right to do it without direction or permission from me. I never supposed when I rung the bell, that I acted by direction or permission of the fireman.

Mr. Dye was here recalled by defendant, and asked by defendant's counsel the question: "Whose duty is it to ring the bell of an engine on approaching and crossing highways?" To which the witness answered: "I always supposed it was the duty of both the engineer and fireman upon the engine. I suppose it is more particularly the duty of the fireman, as the bell-rope runs into the pilot-house upon the side where he stands. The look-out is in front of the engineer. When one of the n is engaged at the time the other usually rings the bell."

On cross-examination by plaintiff's counsel, this witness further testified:

That from the position of the engineer upon the engine, he
 36 could discover obstructions upon the track better than the fireman. The engineer is superior in authority to the fireman. Is his subordinate, and acts under his direction.

The defendant then renewed his said question to the witness Charles Robinson, to-wit:

"State whether the bell on the engine was rung or not that morning at the crossing?" Which question was objected to by

plaintiff's counsel, and the objection was sustained by the Court, and to which ruling and decision of the Court the defendant, by its counsel, then and there excepted.

The defendant's counsel, Joseph O. Glover, Esq., then offered to execute to the witness his said counsel, bound with surety to be approved by the Court, in an amount sufficient to indemnify the witness against any suit that might be brought against him for any neglect of duty in ringing the bell, deposit with the Court an amount of money larger than was claimed in plaintiff's declaration, for the purpose of such indemnity, and which the Court refused to allow, the Court remarking, that from the evidence of the witness and of Mr. Dye, he regarded the witness (Robinson) as having such an interest as to prevent him from testifying as a witness upon the subject of ringing the bell: and that unless the witness were released in such a manner as to discharge him from that interest, he could not testify. To all of which ruling of the Court, the defendant then and there excepted.

The defendant then asked the witness, as follows :

Question by deft: Have you made any contract with defendant which makes it your duty to ring the bell at crossings ?

Objection by plff sustained, and exception by defts.

37 Question by deft: State whether the bell was or was not rung at the time the mare and colt were killed ?

Objection by plff sustained by Court, and exception by deft.

R. L. SHEPARD. I examined the crossing where the mare and colt were injured, and examined the mare. I did not see any dirt on her indicating that she had been thrown down. Did not see any marks upon the ground indicating that any animal had been thrown down. I saw some blood on the east cattle-guards.

Question: State from the examination you made of the cross-

ing and the mare, whether she could have been carried by the engine over the crossing without making other marks upon her than those she had?

Objection by plff sustained by Court, and exception.

I have been past the pasture lot, north and south, during the season of 1862. The fence on the west was rather poor. I think the gate to pasture was in the S. W. corner. It was a large frame gate. I knew the mare and colt and the value of 38 horses. I appraised the mare and colt at \$100.

RICHARD McEVoy. I was at the north fence of pasture the night before the accident. It was all up except where McGuire was fixing it, and I saw him fixing it up there. I left him at it.

39 MR. CATON. I was on the hand-car with McGuire and Dye the morning of the accident. Saw blood and hair upon the car when I helped bury the colt. The fence on the north of pasture was all up that morning when we went up there, just as McGuire left it.

Defendants closed here.

Plaintiff called C. W. PIPER. I reside in Geneseo, and have lived about 15 rods from the railroad for 2 years.

Question: State whether you have observed cases of accident on the rail road of the engine or cars striking horses and cattle, and if so, what the effect was in cases you have witnessed.

Objection by deft, overruled by Court, and exception by deff.

Answer: I have seen two cases. One was where the engine struck a yearling and knocked it about 2 rods off against a bank. It fell down, then got up and ran off. The other time it struck a cow, and carried her over the cattle-guard into the track, and broke one leg and one horn off.

40 *Cross-Examined.*—I was on the opposite side of the track where the yearling was thrown. Can't say that I know the engine struck her at all; but I saw her going off, and I know she

fell for I afterwards saw the spot where she struck the ground.

I saw the cow struck. I was on the opposite side of the track from where she fell. It made a good mark on the ground where she struck.

JAMES BARNARD. I saw the engine strike a wagon with team attached. It struck just before the hind wheels, and threw it over a woad pile, with a man in it.

This was all of the evidence.

The following instructions were then given to the jury by the Court, on the part of the plaintiff.

1. If the jury believe from the evidence in this case, that in July, 1862, the mare and colt of the plaintiff were being kept and depastured in a pasture lot in the town of Geneseo, in 41 Henry county, and that the defendant had, prior to February 14, 1855, constructed and opened for use a rail road along the north line of said pasture lot, and within said township, and that the mare and colt of the plaintiff entered from said pasture lot upon the rail road of deft without any neglect on the part of the plff, at a point in the line between the said pasture lot and the deft's rail road track outside of the limits of any incorporated town, city or village, within five miles of a settlement, and not upon the crossing of a public road or highway, and where the proprietors of the adjoining land had not erected or maintained a fence, or agreed so to do, and where it was necessary there should be a fence to prevent horses, cattle, sheep or hogs from getting on the track of said rail road, and that at such point where the plff's mare and colt entered upon deft's rail road the fence was out of repair by neglect of the defendants, and that by reason of such neglect the plff's mare and colt were killed or injured by the rail road train or engine of the deft, the jury will find a verdict for the plff for such amount of damages as the plff has proved to have sustained thereby. [Given.]

2. The statute of March 5, 1849, requires that a bell of at least

fifty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, and subjecting the corporation owning the rail road to a liability for all damages which shall be sustained by any person by reason of neglect
41 to comply with said requirements.

3. If the jury believe from the evidence that the mare and colt of the plff was depasturing in a pasture lot in the township of Geneseo, Henry county, Illinois, south of and adjoining the rail road of the deft and that it was the defendant's duty to keep in repair the fence along the line between the said pasture lot and their said rail road, and that if neglected so to do and that by reason of this negligence of the defendant to keep the said fence in repair, the said mare and colt, without neglect of the plff, entered upon the deft's rail road from said pasture lot, and on the line thereof, and were killed or injured by the engine or car of defendant, the jury will find for the defendant, without proof of negligence on the part of deft on any other point than that of the failure to keep the fence in repair.

4. If the jury believe from the evidence that the mare and colt of the plaintiff entered upon the rail road track of the defendant, in the township of Geneseo and county of Henry, without any knowledge or neglect of the plff, at a place where said rail road crosses a public highway, and that the defendant run its engine and train of cars upon its said rail road and across said highway, without causing the bell of said engine to be rung or its whistle sounded in approaching and crossing said highway, and in consequence of such neglect the said mare and colt were injured, the jury will find a verdict for the plaintiff. And the jury are instructed that the running of a locomotive, engine and cars by the defendant to and across such highway, without ringing a bell or sounding a whistle, constitutes a *prima facie* case of negligence on the part of defendant. [Given.]

44 The defendant then and there objected to the giving of each and every one of the instructions offered on the part of the plaintiff, which objection was overruled by the Court, and the instructions given. To the giving of said instructions and each of them the defendant then and there excepted.

The deft then asked the Court to instruct the jury as follows :

1. In this case, before the plaintiff is entitled to recover against the defendant, for damages done in consequence of the fences along the line of the rail road of the deft not being kept in repair, he must prove to the jury that the proprietors or owners of the land through which the road passed and where the fence is alleged not to have been kept in repair, had not erected or agreed with deft to erect said fence at the time the railroad was built. [Given.]

2. It makes no difference in this case how much negligence the deft may have been guilty of not keeping up its fences or in not ringing its engine bells, or otherwise the plaintiff cannot recover in this case, unless he prove affirmatively to the satisfaction of the jury that the injury complained of was occasioned by such negligence of the defendant. [Refused as asked, and another, No. (2), substituted by the Court.

3. It makes no difference in this case whether the fence along the north line of the pasture where the animals of plaintiff were pasturing and adjoining the rail road of deft was kept in repair or not, or even whether there was any fence there at all, unless the jury believe from the evidence that the said animals escaped from said pasture and got upon said road at that point. [Refused as asked, and another, No. (3), substituted by the Court.]

4. The deft is not liable for the acts of persons not in its employ, and in this case if the jury believe from the evidence that

a Swede had impaired or knocked down the fence of the deft, the deft is not liable for any damage done in consequence thereof, if [deft, by its agents or employees, afterwards used ordinary diligence to repair said breach so made by said Swede. [Refused as asked, and another (No. 4,) substituted by the Court.]

5. If in this case the fact is established by proof that the fence was up the night before the accident, at the point where the animals of plff actually got in to the rail road, that would be a sufficient compliance with the duty imposed by the law upon the defendant to keep and maintain a good and sufficient fence. [Refused.]

6. If the jury believe from the evidence that the agent or employee of defendant, on the evening prior to the killing complained of, repaired the fence through which the animals injured are alleged to have escaped and got upon the rail road, in such a manner as to make it sufficient to turn ordinary stock, and that the same remained in such repair until after the doing of the injury to the animals, then the presumption is that the animals did not get upon through said fence, and the plaintiff cannot recover on the ground of neglect to keep said fence in repair. [Given.]

7. If any person or persons knocks or takes down the fence along the line of the railroad and leaves it down, without the knowledge or consent of defendant, express or implied, and stock should escape there and get upon the road and get injured, the defendant is not liable for said injury, unless other negligence is shown on the part of the defendant, aside from the fence being down. [Refused.]

47 8. The defendant in this case is only required to exercise ordinary care and diligence in erecting and maintaining fences along the line of its road. and if the jury believes from the evidence that the defendant did, at and before the time of the injury complained of, exercise such ordinary care and diligence, and that the fence, if down at all so that the animals escaped

through it upon the road, was so down without the knowledge or reasonable opportunity for knowledge on the part of defendant's agents or employees, and after and while it had so used ordinary care and diligence in repairing said fence and keeping the same in good repair, then the plff cannot recover in this cause for damages received by his stock in consequence of the fence being out of repair. [Given.]

9. Although the jury should believe in this case that the animals escaped from the field through the fence of defendant and got upon the rail road, as charged in the plaintiff's declaration, and there received the injury as complained of, yet the plaintiff cannot recover in this case unless he prove to the jury affirmatively that their getting upon the track or getting injured was the result of negligence upon the part of the defendant [Given.]

10. If the jury believe from the evidence that the animals of plff got upon the road of the deft by reason of the fence along the line of the said road, and adjoining the pasture lot where plff was pasturing his said animals being down or out of repair, and that the plaintiff knew or had equal opportunity with deft to know that said fence was so down, then the plaintiff is guilty of negli-
48 gence in the matter, and cannot recover in this case on the ground that said fence was not kept in proper repair. [Refused as asked, and another substituted, (No. 10.)]

11. The plaintiff, in this case, has the affirmative of the issue, and it is incumbent upon him to establish his right to recover in this case by a clear preponderance of evidence, and unless he does so establish his right the jury will find for the defendant. [Given.]

12. If it is shown in this case that cattle-guards were erected and maintained at the crossing where the injury was done, it is presumed by the law that those guards were good and sufficient, unless it is shown to the jury by proof that they were not good and sufficient. [Given.]

13 If the jury believe from the evidence in this cause, that

the horses in question were on the public highway, within the limits of the village of Geneseo, and upon the track of the defendant's rail road, at the time when they were struck and injured, the plaintiff cannot recover in this action.

14. If the jury believe from the evidence in this cause, that the horses in question escaped from the field in plaintiff's declaration mentioned, that the fence along the line of defendant's road opposite the same was sufficient to turn ordinary stock of the country, the plaintiff cannot recover, unless the evidence shows the defendants guilty of some neglect other than erecting and maintaining fences. [Given.]

15. Unless the jury is satisfied from the evidence that the injury complained of was in some way occasioned by neglect to ring the bell or sound the whistle on the engine, at the proper time, the plaintiff cannot recover in this case on account of that neglect, and it is incumbent upon the plaintiff to show by affirmative proof that the killing or injury of the animals was in some way occasioned by such neglect. [Refused as asked, and one substituted, as No. 15.]

The Court refused to give defendant's instructions, numbered respectfully 2, 3, 4, 5, 7, 10, 13 and 15, without qualifying the same. To which refusal of the Court to give said instructions, and to which qualification, and each of them, the defendant then an there excepted.

Thereupon the Court instructed the jury as follows:

2. Although the jury should believe from the evidence that the deft was required to erect and maintain in good and sufficient repair the fence along the north line of the pasture where plaintiff's animals were pasturing, and adjoining the rail road of deft, and that the defendant failed and neglected to keep the fence in repair; yet, unless the jury further believe from the evidence, that the plff's mare and colt entered upon the defendant's rail road track at a point on said line, and that at such point the fence was defective and out of repair, the jury are not authorized to

find a verdict against the deff for neglect in maintaining the fence in good repair. [Given,]

4. If the jury believe from the evidence that a Swede man, not in the employ of the defendant, knocked down or impaired the fence of defendant on the line of their rail road and on the pasture lot where plff's mare and colt were depasturing, yet
50 if the jury further believe that the deff, by its agents or employees, used ordinary diligence and in reasonable time to repair said breach, the defendant cannot be made liable for negligence on account of such breach in the fence. [Given.]

10. Although the jury should believe from the evidence that the plff's mare and colt entered upon the rail road of deff by reason of the fence being down or out of repair on the line of said road and of the pasture lot where they were depasturing, yet if the plff knew or had the means of knowing that said fence was out of repair, and afterwards kept and continued his mare and colt in said lot, he also is chargable with negligence, and cannot recover for any negligence of deff in failing to keep the fence in good repair, unless such negligence of deff was to a greater degree than the plff was himself chargable with. [Given.]

15. Although the jury should believe from the evidence that the defendant omitted to ring the bell or sound the whistle attached to its engine as its said engine and cars approached or crossed the highway at or near which the injury complained of is alleged to have occurred, yet unless from all the facts and circumstances of this case as proved, the jury believe that such neglect occasioned or contributed to the commission of the injury to the mare and colt complained of, the plff is not entitled to recover damages for such omission to ring the bell or sound the whistle. [Given.]

The jury found for the plaintiff for \$126.

The defendant then and there entered a motion for a new trial,

which was overruled by the Court, and the defendant then and there excepted.

51 The defendant then entered its motion in said cause in arrest of judgment, which motion was overruled by the Court, and to said ruling said defendant then and there excepted.

ERRORS ASSIGNED.

1. The Court erred in admitting improper evidence on the part of said plaintiff.
2. The Court erred in refusing to admit proper evidence on the part of said defendant.
3. The Court erred in refusing to allow said witness, Charles Robinson, to testify in regard to whether the bell was rung or whistle sounded upon the engine, which caused the alledged injury.
4. The Court erred in giving the said instructions, and each of them, given on the part of said plaintiff.
5. The Court erred in refusing to give the said 2d, 3d, 4th, 5th, 7th and 10th instructions, asked by said defendants, and each of them, and in qualifying the same, and each of them, and giving the same as so qualified.
6. The Court erred in overruling said defendant's motion for a new trial
7. The Court erred in overruling said defendant's motion in arrest of judgment.
8. The Court erred in rendering the judgment aforesaid, in manner and form aforesaid.

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Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

THE CHICAGO & ROCK
ISLAND R. R. CO.

^{vs.}
JOHN S. HUTCHINS.

APPEAL FROM HENRY.

POINTS FOR APPELLANT.

I.

The Record in this case shows that there was a declaration filed in the case containing two counts to which demurrer was filed and sustained as to 1st count only. Pltff then took leave to, and did file two additional counts upon which issues were made by pleas, &c., but no pleadings whatever were ever filed to 1st count, and no default was ever had for want of a plea, and no verdict thereon, so that all the counts were not disposed of; and as each count is a separate cause of action there is no bar in this judgment to a future action upon the causes set out in first count, and the general rule is well settled that all the issues must be disposed of.

Russell v. Hamilton, 2 Scam. 57.

Merrewether v. Gregory, 2 Scam. 51.

Bradshaw v. Hoblett, 4 Scam. 53.

II.

There was improper evidence admitted on the part of pltff below.

The action was for a mare and colt killed by train of defendant. The evidence shows that the accident happened on the

Filed May 27, 1864
Leland M

morning of July 30th, by collision with the freight train going west between 4 and 5 o'clock A. M.

See evidence of Fisk, Abstract page 8, and Robinson, page 12.

Pltff's witness, Lieberknecht, was allowed to testify that the passenger train of deft going west an hour or more after the accident, passed the crossing without the whistle being sounded or the bell rung. See Abstract page 7.

This had no bearing whatever upon the issue and could only tend to prejudice the minds of the jury.

The same witness was permitted to testify that a week before the accident, some horses escaped from a pasture adjoining the railroad through the fence built by the company and got on to the track. See Abstract page 6.

This evidence did not in any way tend to prove that the stock killed escaped from the same pasture through railroad fence and on to the track on the morning in question, and was calculated to inflame and prejudice the minds of the jury.

The whole proof shows that this pasture was owned by one Stough, that the railroad was built and kept in repair by deft.

Testimony of Stough, Abstract page 8, that a Swede had come in at the south gate of pasture and knocked down a panel of the railroad fence and went across the track to cultivate another field.

See Abstract, bottom of page 7

Also " page 7.

And that the rest of the fence was good, and the horses never got out of the pasture through the railroad fence until after the Swede took down the panel, nor at any other place. Abstract page 9 and page 10. Also that this panel of fence was fixed up by McGuire, the section Boss, the night before the accident, and was in the same condition in the morning as he had left it the night before.

McGuire, Abstract page 10 and 11.

Caton, " " 15.

McEvoy, " " 15.

Also that the west fence of pasture was ruinous and down in the season of 1862, and if the horses got out there they could go

right along the highway to the crossing where they were killed.

Stough, Abstract page 28.

Gerard, " " 9.

Now, in the face of these facts, it was highly improper to allow the testimony as to what had happened a week before to go to the jury.

III.

Proper and competent evidence offered by deft below was excluded.

The defts called as a witness Charles Robinson, who testified that he was in charge of the engine which struck the horses, and was asked the following question:

State whether the bell on the engine was or not rung that morning at the crossing?

And the court refused to allow said witness to answer the question, on the ground that it was his duty to see that the bell was rung, and he would be liable to deft for his neglect.

We say the evidence was improperly excluded because the engineer was a competent witness. His interest, if any, was only a contingent one, and the court could not assume that he was chargeable with negligence, and without such assumption his

gence. Satisfaction recovered from his principal exonerates him from this certain liability, and leaves his responsibility over still only contingent. But it is said the judgment against the principal is admissable in an action which he may bring against the agent. Why it should be it is hard to see. The agent is not a party to it nor a privy, he had no right to conduct the defence, to call witnesses or to interfere in any manner between his principal and the party injured.

"Why then should he be affected by a record that is wholly *res inter alios* ?

"Yet such a judgment is undoubtedly held to be evidence against him *not to establish his liability* but admissable to show the *quantum* of damages. His liability must be shown by other proof.

"The questions whether he was negligent and whether the injury for which satisfaction was recovered from the principal was a consequence of his negligence remain open and are not solved in any degree by the record.

"Notwithstanding then a recovery against the principal, it may be that the agent is not responsible over to him, and at most it would seem *his testimony for the principal should be rejected only when offered to reduce the estimate of damages.*

Sawyer v. City of Alton, 3 Sam. 128.

Baxter v. People, 3 Gilm. 380.

Gregory v. Dodge, 12 Wend. 593.

Lake v. Auburn, 17 Wend. 18.

Curtenius v. Wheeler, 5 Gilm. 469.

But it is suggested that this question has been decided by this court in the case of *The Galena & Chicago Union R. R. Co. v. Welch*, 24 Ill 33, in opposition to the position taken by us; and I desire briefly to call attention to that case.

The opinion is delivered by Caton J., and the final conclusion is that the record in the case would only be evidence against the proposed witness *on the quantum of damages*, that his negligence and that such negligence was the occasion of the damage would have to be proven *alimudo* the record.

"But the simple fact that this judgment might be used in an action against the witness, upon the question of damages, would make it for his interest to defeat the present action."

Now I admit this doctrine fully. The doctrine has exactly the interest stated in the opinion which would make it for his interest to swear strongly for the defendant, and if that was *all* the interest he had I would willingly admit that he was incompetent.

But I insist that he has another direct and certain liability that would more than balance the interest above mentioned.

The law is well settled that if a damage is occasioned by the negligent act of a servant then both servant and employer are joint *tori feorsors*, and may be jointly or severally sued. They are both primarily liable to the party damaged; and the fact that he has seen fit to bring his action against the employer does not release the employee from liability.

Johnson v. Barber, 5 Gilm. 430.

But where judgment is rendered against the employer for the full damage and is satisfied, that does not release the employer, and the record would be evidence on his behalf if an action should be brought against him.

Is not the employee then directly interested to have a verdict and judgment against his employer, so that he will thereby be released from this primary, direct and certain liability to the injured person?

It seems to me that he is, and that this interest will induce him to swear fully as strong if not stronger against his employer as the remote, uncertain and contingent liability to his employer would induce him to swear for him. So that his interest is fully balanced, or if not balanced is strongest against the party calling him.

If plaintiff succeeds upon witnesses negligence then defendant, after paying the judgment against him, has an action over against witness.

If defendant succeeds, plaintiff has still an action against witness for the damages, and is not estopped by the failure to recover against the employer.

Between these two influences will he not stand upright, or if he leans at all will it not be against his employer who calls him.

And second, if he was not competent the offer of indemnity made by counsel in the court below was sufficient to overbalance any interest witness might otherwise have in the result of the suit and enable to become a general witness in the case.

Courts do not lean toward the exclusion of witnesses as the authorities above cited sufficiently show, and it is only where the interest of a witness is direct, certain and established that he will be excluded; and the rule is founded upon the reason that a person ought not to be allowed to testify in a case where his own testimony will tend to relieve himself from any direct and positive liability, where a judgment in favor of or against the party calling him will work the witness harm or bring him profit, and so witnesses who are by reason of interest as competent are allowed to be released, so as to become competent.

Stockholders in companies are allowed to sell their stock and then testify.

Sureties upon bonds may have other persons substituted in their place by order of court, and in short every device may be resorted to that will place them in a position where they will be devoid of pecuniary interest.

Would not the witness in this case have been protected by the deposit of the money or the proposed bond? He certainly would have been put in a position that if any judgment were ever ren-

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dered against him he had only to put his hand in into the pocket of a third person and find wherewith to satisfy the judgment.

He stood in the position of one whose interests were equally balanced. He could recover upon the bond any damage he might be compelled to pay.

IV.

The court gave improper instructions on the part of plttf below.

The 2d instruction is too broad. The law as decided by this court in several cases is, that although a railroad company may be guilty of negligence in not ringing the bell or sounding the whistle, yet if plttf was also guilty of negligence in allowing his animal to be upon the track at a crossing where the railroad company are not required to fence, he cannot recover unless for *gross neglect or wanton injury*.

Ill. Cen. R. R. v. Phelps, 29 Ill. 448.

C. & M. R. R. v. Patchen, 16 Ill. 198.

The 4th instruction is not the law and should not have been given. The neglect to ring the bell or sound the whistle at a crossing does not constitute a *prima facie* case of the negligence that caused the injury.

Ill. Cent. v. Phelps, 29 Ill. 449.

V.

The court refused to give proper instructions on the part of the deft below.

The 3d, 5th and 7th instructions asked, Abstract page 18 and 19, were certainly the law and should have been given.

Ill. Cent. R. R. v. Dickinson, 27 Ill. 55.

The testimony in the case showed conclusively that the fence on the north side of the pasture (the railroad fence) was a good

fence except at the point where the Swede had knocked the boards off, and that no stock had ever escaped through it before that.

The testimony further tended to show that the servants of the railroad company had used reasonable diligence in repairing.

And under this the instructions seem to us to have declared the law.

It certainly was not the intent of the statute that the railroad company should become the insurers of their fence in all cases, especially in a case where the owner or occupant of the adjoining premises permits a third person to pass through them and break down the fence which the defendant had constructed and maintained under the statute, and again repaired upon knowledge of the breach caused by consent of the owner.

Ga. C. U. R. R. v. Crawford, 25 Ill. 535.

Again, where a railroad company is bound to and does build and maintain a fence under the statute and the owner of the premises breaks it down or permits it to be done, is the line of such fence one which the company is bound to fence? Is it not the duty of the owner to fence it?

The company may by agreement shift the burden of building and maintaining from himself to the land owner, and why may it not as well be shifted by operation of law in a case like the one above stated.

It seems to us that public policy requires it should be done. Suppose that upon the breaking down of the fence in question by the Swede, who must be presumed to have done so with the consent of owner, that the horses in the field had rushed upon the track in front of a passenger train of defts and thrown it from the track, and caused the killing and wounding of passengers and the destruction of the train. What kind of figure would he cut if he should then come into court and sue the company for the stock killed by the collision? Would he not himself be liable for all damage?

2 Purple Stat. 1078, sec. 3.

And if the stock of his field belonged to third persons, and was under his care, would he not be directly liable for their loss? Would it be within the spirit of the statute that a company should be liable to such third person and then have to proceed against the owner of the land for indemnity?

We think the spirit and intent of the statute is that a railroad company shall build the fences on their line and maintain them against all wear and tear, and destruction by elements, with reasonable diligence, but not that they must repair the breaches made by the owner, or by third persons with his knowledge and consent.

See the Statute, especially sec. 3.

2 Purple 1078.

VI.

The verdict was against the weight of the evidence, and the motion for a new trial should have been allowed.

The first count in the declaration alleges that defendant was bound to fence its road, and that plaintiff's horse escaped on to the railroad at a point where the fence was insufficient.

The 2d count avers nothing in relation to fences, but alleges that the horses were killed by the mere carelessness of defendants.

The proof in relation to the fence is about as follows: There was a place on the line of the railroad near the northwest corner of the pasture where the fence was defective, and the horses had previously escaped from the pasture at that point. (Testimony of Leiberknight, Abstract p. 5.) McGuire, the section boss, put up the fence at that point the night before the horses were killed, and while they were in the pasture, McGuire, Abstract p. 10, testified that the night before the horses were killed he put up the fence at the point spoken of, *and the next morning the fence was up just as he fixed it the morning before.*

Caton testifies, Abstract p. 15, that McGuire fixed the fence

the evening before the horses were killed, and the next morning it was all up just as McGuire left it.

McEvoy testifies that the fence on that line was all up except where McGuire was fixing it the evening before. McGuire testifies to same thing. Abstract p. p. 1084.

The proof also shows that the west fence of the pasture, which was not on the line of the railroad, was poor and out of repair, and if horses got out along that line of fence they got into the highway, and there was nothing to prevent their going along the highway to the railroad.

See testimony of A. J. Stough, Abstract p. 8. See also cross-examination of Francis Gerard, Ab. p. 9. See also testimony of R. L. Shepherd, Ab. p. 15.

It was also proven that at the point where the fence on the line of the railroad was poor the boards had been knocked off by a Swede. See Leiberknight's testimony Ab. p. 6; testimony of Francis Gerard, Ab. p. 9, cross-examination.

See also cross-examination of McGuire, Ab. p. 10.

From the testimony in this case it seems clear that the fence on the line of the railroad was a good fence except at one point where some boards had been knocked off by a Swede, at least there is no proof that the fence was not a good one at that point, and at that point the fence was fixed up the evening before the mare and colt were killed, they being then in the pasture, and that the next morning after the mare and colt were killed, the fence was up at that point, and was in the precise condition in which McGuire left it the night before after fixing it; and it is manifest that the mare and colt did not leave the pasture at that point. It is also proven that the other line of fence to that pasture was poor and out of repair, and that horses escaping from the pasture on that line could go on to the railroad.

But it is probable from an inspection of the evidence that the jury could only have found for plaintiff upon the second count.

There was proof tending to show that the bell was not rung or the whistle sounded at the crossing. The court instructed the jury that this constituted a *prima facie* case of negligence on the

part of defendant. Instruction No. 4; Ab. p. 17. If the court will compare this instruction with with instruction No. 15, asked by defendant and refused as asked, and the instruction No. 15 given as qualified, it will be seen that the court did instruct the jury that the neglect to ring a bell or sound a whistle was *prima facie* evidence of negligence for which plaintiff might recover. Now we hold the law to be that the plaintiff must show affirmatively that the neglect to ring the bell was the cause of the accident, before he can recover.

It is not the law, that if the plaintiff's horses escaped from his pasture at a point where the railroad company was not bound to fence, but for want of a sufficient fence at a place where *plaintiff* ought to fence that he can recover for their loss simply because defendants servants did not ring a bell at a crossing. If plttf allowed his horses to run on defts railroad he did it at his own risk.

It was wrong to instruct the jury that the omission to ring a bell or sound a whistle was *prima facie* evidence of negligence.

In the case of *G. & C. U. R. R. v. Dill*, 22 Ill. 271, this court say, "The question of negligence is one of fact which must be left to the determination of the jury. It depends to so great an extent upon the circumstances of each case that unless it is gross no rule can be adopted. Whether the failure to ring a bell or sound a whistle is negligence is a question of fact for the jury, and could not be so regarded unless its omission occasioned the collision producing the injury."

We think that the evidence fairly shows that the mare and colt did not escape from the pasture on the line of the railroad where the company were bound to fence. It is sufficient for our purpose that the proof fails to show that they did come on to the road at a point where the company were bound to fence. We think, however, that the court cannot fail to come to the conclusion that they escaped from the west side of the pasture, and came down to the crossing where they were killed.

If this be so, and the mare and colt came on to the track by reason of the poor fence of the owner, then if the plaintiff can recover, it is because he has shown that the injury to the horses

resulted from the negligent or willful act of the servants or agents of the company.

G. & C. U. R. R. Crawford, 25 Ill. 535.

Hence it follows that the plaintiff must show not only the omission to ring the bell, but that such omission caused the accident. Instead of this the court charged that the omission to ring the bell was *prima facie* evidence of negligence.

There not the slightest proof that the ringing of a bell would have prevented the accident or tended to have prevented it. The ringing of the bell might have warned an intelligent being who heard it, but it would make no greater noise to scare an animal than a freight train would make.

The court has carefully laid down the law on this subject in the case of *Ill. Cent. R. R. v. Phelps*, 29 Ill. 448, which is a parallel case to the one at bar.

See also cases above cited and *G. & C. U. R. R. v. Crawford*, 25 Ill. 533.

Again, the plaintiff below was guilty of negligence or want of ordinary care in allowing his stock to run in the road near the crossing, and could not recover, although the servants of the defendant may have been guilty of negligence, for putting them in a pasture enclosed by only a ruinous fence upon a side which the railroad company was not bound to fence, and through which they could easily escape into the highway near the crossin, is equivalent in law to putting them at large upon the highway in the vicinity of the crossing, which this court in the case of *C. B. & Q. R. R. v. Cauffman*, 28 Ill. 517, hold to be negligence on the part of the owner. Also *Ill. Cen. R. R. v. Phelps*, 29 Ill. 448.

GLOVER, COOK & CAMPBELL,

For Appellant.

State of Illinois } Henry County Circuit Court
Henry County } October Term AD 1862

Pleas before the Honorable Ira O. Wilkinson
Sole Judge of the Sixth Judicial Circuit in the State of
Illinois At a regular term of the circuit court of Henry
County and State of Illinois begun and holden at the Court
House in Cambridge in said county of Henry and State
aforesaid on Monday the thirteenth day of October in the
year of our Lord one thousand eight hundred and sixty two, it
being the second Monday of said month

Present Honorable Ira O. Wilkinson Judge
Adam H. Keeney Sheriff
Amos Gould Clerk

Be it Remembered that on the 27th day of September AD 1862
a summons issued out of said court in the words
and figures following to wit

State of Illinois } The People of the State of Illinois to the
Henry County } Sheriff of Henry County Greeting
You are hereby commanded to summon the Chicago
& Rock Island Rail Road Company to appear before
the circuit court of Henry County on the first day of the
next term thereof to be holden at Cambridge on the second
Monday of October next to answer the complaint of
John S. Hutchins in a plea of trespass on the case
Damages claimed \$200, and have you there and there
this writ, Witness Amos Gould clerk of our said circuit
court and the seal thereof at Cambridge this 27th day of
September in the year of our Lord one thousand eight hun
dred and sixty two

Sealed
and
delivered

Amos Gould clerk
By Wm. Cairnupple depy

2
Upon which Summons appears the following endorsement by the Sheriff, to wit

I have served the within summons by reading the same to & by delivering a true copy of the within Summons to L C Campbell here this 30th day of September AD 1862 the said L C Campbell being the agent of the Chicago & Rock Island Rail Road Company within named defendant & within the county of Henry & State of Illinois The President of said Chicago & Rock Island Rail Road Company was at the commencement of this suit & now is a non resident of said county & said President not being found by me in any said county he being absent from my said county.

Sept 30th AD 1862

Adam K Kennedy
Sheriff of Henry Co

And afterwards to wit on the day and year aforesaid the said plaintiff by his atty filed in said cause his declaration in the words and figures following to wit:

State of Illinois }
County of Henry }

Circuit Court of said County
Of the October Term AD 1862

John S Houlstun Plaintiff in this suit by J B Carpenter his attorney complains of "The Chicago and Rock Island Rail Road Company" defendant of a plea of trespass on the case for that whereas the said Defendant on the thirtieth day of July AD 1862 was and still is a rail road, incorporated within the State of Illinois and was & now is the proprietor of a rail road running from the city of Chicago in the county of Cook to the city of Rock Island in the county of Rock Island in said State and on the day & year aforesaid to wit the thirtieth day of July AD 1862 the defendant was and for more than six months prior thereto & ever since hath been using said rail road and running cars thereupon and that said road

passes & runs through the town of Geneseo in the county of
Henry and State of Illinois aforesaid, And the Plaintiff
averts that according to an act entitled "An act to
regulate the duties and liabilities of rail road companies"
approved February 14th 1855 the defendant ought & should
within within six months after the passage of said act have
erected and maintained fences on the sides of its said
rail road or the part thereof so open for use suitable & suf-
ficient to prevent cattle horses sheep & hogs from getting
on to such rail road except at the crossing of public
roads and highways and within the limits of towns cities
and villages And the plaintiff avers that the defendant
in non compliance with the conditions of the statute knowingly
neglected and failed to erect maintain and keep in re-
pair a suitable and sufficient fence on the side of its said
rail road to prevent cattle horses sheep & hogs from getting
on to such road in Geneseo in the county of Henry & State
of Illinois where of necessity such fence should have been so
erected maintained & kept in repair And the plaintiff avers
and alleges that a certain mare and colt of which the plaintiff
was then and there lawfully possessed in his own right on said
thirtieth day of July A.D. 1862 being of great value to wit of
the value of two hundred dollars was then and there law-
fully feeding and depasturing in a certain enclosed pasture
field in said town of Geneseo on the line of said rail road
& adjoining to said rail road & then & there went out & from
said pasture field on to & upon said rail road of the defendant
at a point where the defendant necessarily should have erected
& maintained a suitable & sufficient fence according to the
aforesaid statute and where the defendant had neglected &
failed to do as aforesaid And the said mare and colt

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of the said Plaintiff so being upon the said rail road of the said defendant on the said thirtieth day of July AD 1862 at the town of Geneseo in the county of Henry & state aforesaid were then & there (by the cars of the defendant being there & there run upon said rail road by the defendant) run over & upon & against and the said mare then & there had her leg broken and was otherwise greatly injured and rendered entirely unfit for use & entirely worthless to the plaintiff & it became necessary for the plaintiff thereafter then & there to kill said mare and the said colt was then & there instantly killed whereby the said mare and colt have become and are of no value or use to the said plaintiff & the said plaintiff hath been & is by means of the premises greatly injured & hath sustained great loss to wit at the county of Henry & state of Illinois aforesaid

And the said plaintiff further avers that the said mare & colt did not get on to or upon the said rail road of the said defendant five miles from a settlement nor within the limits of any town city or village nor were said mare & colt killed run against over & upon at any public highway or road crossing said rail road at any place where said mare & colt got on to & upon said rail road that such fence be erected & maintained in a suitable & sufficient manner to prevent cattle horses sheep & hogs from getting upon the track of said rail road

2 And whereas also heretofore to wit on the thirtieth day of July AD 1862 the said Defendant was and still is a rail road corporation within the state of Illinois & was on said day and for more than six months prior thereto had been & ever since hath been using & running cars on the rail road of the said defendant through & in the town of Geneseo in the county of Henry & state of Illinois and that said rail road of the defendant has been open & for use from & ever since the 14th day of February

AD 1855 in said town county & State whereby the defendant six months thereafter became liable for injuries to stock in case the defendant failed to erect & thereafter maintain fences on the sides of their said road or the part thereof so open for use suitable and sufficient to prevent cattle horses sheep & hogs from getting on to such rail road except at the crossing of public roads and highways and within the limits of towns cities & villages And the Plaintiff avers that the said defendant well knowing the same neglected and refused to erect & maintain such fences whereby one certain other mare and one certain other colt the property of the plaintiff of the value of two hundred dollars lawfully feeding & depasturing in a certain pasture field in said town of Geneseo on the line of and adjoining to said rail road then & there to wit on the said thirtieth day of July AD 1862 went from said adjoining pasture field onto & upon said rail road at a point where the owners of the land had not fenced the same & had not agreed to fence the same and where it became necessary for the said defendant to fence the same it being not five miles from a settlement and without the limits of a town city or village and where there was no crossing of a public road or highway and thereby then & there to wit on the 8th thirtieth day of July AD 1862 & at the town of Geneseo in the county of Henry & State of Illinois aforesaid through the carelessness & gross negligence of the defendant said last mentioned mare & colt were then & there by a locomotive & cars then then being run by the servants & agents of the defendant on said rail road of the defendant run over & upon & against and the said colt was killed & the said mare then & there had her leg broken & was so injured that she became then & there worthless & of no value & had by the plaintiff to be killed whereby & by means of the premises the plaintiff hath sustained

AD 1835 in said town county & State whereby the defendant six months thereafter became liable for injuries to stock in case the defendant failed to erect & thereafter maintain fences on the sides of their said road or the part thereof so open for use suitable and sufficient to prevent cattle horses sheep & hogs from getting on to such rail road except at the crossing of public roads and highways and within the limits of towns cities & villages And the Plaintiff avers that the said defendant well knowing the same neglected and refused to erect & maintain such fences whereby one certain other mare and one certain other colt the property of the plaintiff of the value of two hundred dollars lawfully feeding & depasturing in a certain pasture field in said town of Geneseo on the line of and adjoining to said rail road then & there to wit on the said thirtieth day of July AD 1862 went from said adjoining pasture field onto & upon said rail road at a point where the owners of the land had not fenced the same & had not agreed to fence the same and where it became necessary for the said defendant to fence the same it being not five miles from a settlement and without the limits of a town city or village and where there was no crossing of a public road or highway and thereby then & there to wit on the 30th thirtieth day of July AD 1862 & at the town of Geneseo in the county of Henry & State of Illinois aforesaid through the carelessness & gross negligence of the defendant said last mentioned mare & colt were then & there by a locomotive & cars then then being run by the servants & agents of the defendant on said rail road of the defendant run over & upon & against and the said colt was killed & the said mare then & there had her leg broken & was so injured that she became then & there worthless & of no value & had by the plaintiff to be killed whereby & by means of the premises the plaintiff hath sustained

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great loss & damage to wit on the said thirteenth day
of July AD 1862 to wit at the town of Geneva at the county
of Henry & state of Illinois aforesaid Wherefor the Plaintiff
sath he is required & hath sustained damage to the
amount of Two hundred dollars & therefore he brings suit
Dc

J B Carpenter
Plaintiffs Attorney
C H C

And afterwards to wit at the term of the court aforesaid
and on the second day thereof the following proceedings
were had in said cause to wit

John S Hutchins

Insepass

The Chicago & Rock Island
Railroad Company

} At this day came the said
Plff by Carpenter his atty and the said defendant by
Shaw & Glover their attorney and this cause being called
for the hearing of motions &c, Motion is made by deft to
quash thereffs return on summons, Cross motion by Plff
for leave to Sheriff to amend his return, upon consideration
thereof by the court, It is ordered that the plffs cross
motion be sustained and leave given to Sheriff to amend
his return on summons, Motion to quash thereby overruled

And afterwards to wit and on the 15th day of October
aforesaid the said defendant by their atty files their
demurrer to the said plaintiffs declaration in words
and figures following

The Chicago & Rock Island RR Company

ads

John S Hutchins

Demurrer

And the said defendant as to

the first count of the Plaintiff's declaration and the matters & things therein contained says that the same are not sufficient in law to enable the plaintiff to support his action because he says that it is nowhere alleged in the said count that at the point where the said mare & colt are alleged to have entered upon the grounds of the said defendant the owner of the close wherein the said mare & colt were depasturing had not previously to the enactment of the law recited in said count fenced and enclosed or agreed to fence & enclose the said close wherefore he prays judgment &c

And as to the second count of Plaintiff's declaration the said defendant says that the matters & things therein contained are not sufficient in the law to enable said plaintiff to support the action because he says that it appears from the said count that the point where the said mare & colt of the said plaintiff entered upon the lands of the said defendant is in the town of Geneva and not a point where the said defendant is bound by law to erect & maintain any fence wherefore the said def^t prays judgment &c

Geo W Shaw

att of Def

And afterwards to wit at the term aforesaid and on the 18th day thereof the following proceedings were had in said cause to wit

John S Hutchins

The Chicago & Rock Island

Rail Road Company

Trespass

At this day the cause being again called, comes the parties herein by their attys as aforesaid And the demurrer filed herein by the defendant to plaintiff's declaration is by the court sustained as a 1st count

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And Pltff abides by said count, And demurrer overruled
as to the 2^d count

And afterwards to wit and at the term aforesaid and the 24th
day of October 1862 at being the 11th day of said term of said
court the following proceedings were had in said cause to wit
John S. Hutchins

The Chicago & Rock Island } Express
Rail Road Company }
again collect comes the justices herein by their attys as aforesaid
And motion is made by plaintiff for a continuance, which
motion is confessed by the defendant, whereupon it is ordered
by the court that this cause be continued at the cost of the Pltff
It is therefore considered and adjudged by the court that the
defendant have and recover of the plaintiff their costs in
this behalf at this term expended and that they have execu-
tion therefor against the said plaintiff, On pltffs motion
leave is given by the court to file additional counts to declaration
ten days before next term of this court

And afterwards to wit and on the 9th day of February AD
1863 the said plaintiff by his atty filed in said cause ad-
ditional counts to his said declaration in the words and figures
following to wit

And for that whereas heretofore to wit. The said defendant the
Chicago and Rock Island Rail Road Company a Railroad
corporation before then duly organized under & by virtue
of the laws of the state of Illinois was on the thirtieth day of
July AD 1862 & still is the Proprietor of a Rail Road run-
ning from the city of Chicago in the county of Cook to the

City of Rock Island in the state of Illinois which Rail
road of said defendant had then been open for use for more than
six months and for several years prior to the date last aforesaid
& also at & prior to the 14th of Feb 1855 & ever since and on said
thirteenth day of July A.D. 1862 the said defendant was & for more
than six months prior thereto & ever since hath been using said
Rail road & running their cars thereupon and in & through the
town of Geneseo in the county of Henry in said state through
which said Rail road is located and said Plaintiff avers that
by the laws of the state of Illinois & by provision of an act of the
Legislature of said state entitled "An act to regulate the duties
& liabilities of Railroad companies" approved February 14th 1855
the said defendant ought & should and was legally bound
within six months after the passage of said act & at & prior
to the 30th day of July A.D. 1862 to have erected and maintained
& then to keep & have in repair erect & maintain fences on
the sides of its said Road so open for use suitable & sufficient
to prevent cattle horses sheep & Hogs from getting on to said
Railroad except at the crossing of Public roads & Highways
and within the limits of towns & Villages with openings or
gates or bars at the farm crossings of said Railroad for
the use of the Proprietors of the lands adjoining said Rail
road & to keep such fences in good repair and over also
at the time aforesaid legally bound to construct where the
same had not already been done & to maintain at all
road crossings cattle guards suitable & sufficient to pre
vent cattle horses sheep & hogs from getting to such Rail
road & to keep & maintain such fences & cattle guards
in good repair & when such fences & cattle guards were not
erected & maintained or after being erected were not kept
in good repair said defendant became thereby liable for
all damages done by the agents or engines of such

City of Rock Island on the state of Illinois which Rail
road of said defendant had then been open for use for more than
six months and for several years prior to the date last aforesaid
& also at & prior to the 14 of Feb 1835 & ever since and on said
thirtieth day of July A.D. 1862 the said defendant was & for more
than six months prior thereto & ever since hath been using said
Rail road & running their cars thereupon and in & through the
town of Geneseo in the county of Henry in said state through
which said Rail road is located and said Plaintiff avers that
by the laws of the state of Illinois & by provision of an act of the
Legislature of said state entitled "An act to regulate the duties
& liabilities of Railroad companies" approved February 14th 1835
the said defendant ought & should and was legally bound
within six months after the passage of said act & at & prior
to the 30th day of July A.D. 1862 to have erected and maintained
& then to keep & have in repair erect & maintain fences on
the sides of its said Road so open for use suitable & sufficient
to prevent cattle horses sheep & Hogs from getting on to said
Railroad except at the crossing of Public roads & Highways
and within the limits of towns & Villages with openings or
gates or bars at the farm crossings of said Railroad for
the use of the Proprietors of the lands adjoining said Rail
road & to keep such fences in good repair and also
at the time aforesaid legally bound to construct where the
same had not already been done & to maintain at all
road crossings cattle guards suitable & sufficient to pre
vent cattle horses sheep & hogs from getting to such Rail
road & to keep & maintain such fences & cattle guards
in good repair & when such fences & cattle guards were not
erected & maintained or after being erected were not kept
in good repair said defendant became thereby liable for
all damages done by the agents or engines of such

corporation to any cattle horses sheep or hogs thereon or in
said Railroad ~~said~~ Corporation said defendant however
not being required by the law & act aforesaid to fence the
sides of its road except when such fence is or might be
required necessary to prevent horses cattle sheep & hogs from
getting on to the track of the said Railroad from the lands
adjoining the same nor required to construct such fences
on the sides of their Railroad where the same runs through
unenclosed lands lying at a greater distance than five
miles from any settlement nor to erect or maintain said
fences through lands where the proprietors of said lands have
already erected fences or agreed with said corporation said
defendant so to do And the said plaintiff avers that the said
defendant in con compliance with the conditions of said
law neglected & failed to erect maintain & keep in repair
a suitable & sufficient fence on the sides of its said Railroad
to wit in the so of the county aforesaid so open for use suitable
& sufficient to prevent cattle horses sheep & hogs from getting
on to said Railroad (except at the crossing of public high-
ways within the limits of towns & villages) with openings or
gates or bars at the farm crossings of such Railroad for the
use of the proprietors of the lands adjoining said Railroad
& neglected & failed to construct where the same had not
already been done & to maintain at all Railroad cross-
ings cattle guards suitable & sufficient to prevent cat-
tle horses sheep & hogs from getting upon said Railroad
& failed & neglected to keep the said fences & cattle guards
in good repair said fences so neglected by said corporation
to be erected maintained & kept in repair being actually
necessary to be erected maintained & kept in repair to
prevent horses cattle sheep & hogs from getting on to the
track of said Railroad from the lands adjoining the same

& said Railroad where said fences were so neglected to be erected maintained & kept in repair aforesaid not there running through unenclosed lands lying a greater distance than five miles from any settlement nor had the proprietors of said lands through which Railroad Corporation failed & said defendant failed neglected to erect & maintain said fences already erected fences or agreed with said defendant so to do to wit at Quince in said county of Henry & State of Illinois & where by the provision of the law aforesaid said defendant were bound to erect maintain & keep in repair such fences but which they have wholly failed to do & the said plaintiff avers that a certain mare & colt the property of the said plaintiff & of which he was then & there lawfully possessed as of his own right on said 30th day of July A.D. 1862 being of great value to wit of the value of two hundred dollars was then & there lawfully feeding & depasturing in a certain pasture field in said county of Henry on the line of said Railroad & adjoining thereto then & there went out & from said pasture field into & upon said Railroad of said defendant at a point where the said defendant necessarily should have & by the laws & act aforesaid was bound to have erected maintained & kept in repair a suitable & sufficient fence & where said defendant had neglected so to do as aforesaid and the said mare & colt of the said plaintiff so being upon the Railroad of the said defendant at the time & place last aforesaid were then & there in consequence of the negligence of the said defendant & of the neglect of said defendant to erect maintain & keep in repair said fences by the engine & cars of said defendant being then & there run over & upon said defendant Railroad by said defendant run over & upon & against the

said mare & said colt whereby & by reason of the negligence
 & neglect of said defendant as aforesaid the leg of said
 mare was broken & said mare was otherwise greatly in-
 jured & rendered entirely unfit for use & worthless to
 said Plff & said colt was also thereby in consequence of
 said negligence & neglect aforesaid by said Engine & cars
 of said defendant being then & there run upon said Railroad
 by said defendant was then & there instantly killed) &
 the said Plff avers that the fence where said mare & colt were
 depasturing as aforesaid & where they were run upon & against
 by said defendant by their Engine & cars aforesaid &
 where said mare & colt got onto the Railroad of said deft
 aforesaid does not lie within the limits of any town city or village
 nor at a greater distance than five miles from any settlement
 nor where the proprietors of said land adjoining said Railroad
 had already erected fences or agreed so to do & said Plff
 says that said Proprietors of said land where said mare &
 colt were depasturing adjoining said R R & where said
 mare & colt got on said R R never have erected fences
 along the line of said road or on said land adjoining said
 road nor were they have ever agreed with said defendant
 so to do & the said Plff says that in consequence of said
 negligence of said defendant & in consequence of said
 deft neglect & failure to erect maintain & keep in re-
 pair said fences on said land & adjoining said Railroad
 at the place aforesaid where by law they were required to
 erect maintain & keep in repair such fences said mare
 & colt wandered upon said track & in consequence of said
 neglect & negligence of said defendant aforesaid were
 greatly injured & rendered worthless & said colt killed
 & the said Plff hath thereby been greatly injured & sus-

caused great damages to wit at the county of Henry &
 state of Illinois to wit of the amount of two hundred dollars)
 And for that whereas heretofore to wit said defendant the Chicago
 & Rock Island Rail Road occupying a corporation organized
 under and by virtue of the laws of the state of Illinois prior
 to the 14th of February AD 1855 was on the 30th day of July
 AD 1862 using and operating its Road through its entire
 length from the city of Chicago in the county of Cook to the
 city of Rock Island in the county of Rock Island in the state
 of Illinois And also through the county of Henry in said
 state that at the date last aforesaid to wit at Geneseo in the
 county of Henry a certain other man & c^t the property of
 said plaintiff of which he was then & there lawfully possessed of
 his own right was then lawfully depasturing in land
 adjoining said Railroad & passing along the line of said
 road near where said Rail road crossed another road & street
 that on said day & on said place last aforesaid while running
 its locomotive engine & cars over said road said defendant
 failed and neglected to ring or whistle at the distance of
 at least 80 rods from the place where the said Rail road crossed
 the other road and street aforesaid and wholly failed and
 neglected to keep ringing or whistling until said engine had
 crossed said road & street aforesaid although said man and
 c^t were then between said engine & said crossing and
 within 80 rods of said crossing and said defendant did
 otherwise with great carelessness & negligence in & operate
 its said engine & cars aforesaid with improper speed &
 negligent conduct of said cars did then & there by reason
 hereof and of the several acts of negligence aforesaid & by
 the negligent & improper management of its engine
 & cars aforesaid did run against over & upon said man
 & c^t of said plaintiff so that the same were greatly

injured and rendered entirely useless to said Plaintiff whereby he sustained great damage to the amount of two hundred dollars wherefore he brings suit

J B Carpenter

Plffs atty

And afterwards to wit and at the March Term AD 1863 of the said Circuit Court aforesaid and before the judge aforesaid the following proceedings were had in said cause to wit

And on the 14th day of April 1863 the said defendant by its attys file their plea to the additional counts in plaintiffs declaration in words following

The Chicago & Rock Island Rail Road company
ads

John S Neulchins

And the said defendant as to the said additional counts filed to the said plaintiffs declaration says that he is not guilty of the premises above laid to his charge in manner & form as the plaintiff hath above complained of him & of this he puts himself upon the country

Beckles & deasy attys
for deft

And the Plaintiff doth the like

most Carpenter & Denham

attys for Plff

And afterwards to wit and at the term of said court last aforesaid and on the 22^d day of April AD 1863 the following proceedings were had in said cause

John S Neulchins

as

The Chicago & Rock Island Railroad Company

} trespass

At this day came the said plaintiff by Carpenter

& Durham and Pleasants and Frost. his attorneys and the
defendant by Glover and Buckles & Leach their attys and
this cause now coming on to be heard and issue being now
joined by the parties it is ordered by the court that a jury
be called. And thereupon came the jurors of a jury of good
and lawful men to wit Joshua Bushnell M^r Mc Barker Jacob
Ott Thomas Bolee Jas M^r Barnett Lawrence Offerly Nathan
Nye & Gilbert Thomas Showers J^r P Payne J^r A Bishop &
E^c Winchester who were duly selected chosen and sworn to well
and truly try this cause and a true verdict render according
to the evidence, and the trial progressed but not concluded
and court adjourned until half past 8 o'clock to Morrow
morning.

And afterwards to wit at the term last aforesaid and on
the 28th day of April 1863 the following proceedings were had
in said cause

John S. Hutchins	}	Trespass
vs		
The Chicago & Rock Island Rail Road Company	}	At this day this cause being again called came the parties herein by their attys as aforesaid and the trial thereof concluded and the jury having heard the evidence to be adduced herein and the arguments of the counsel and the instructions of the court, retire under charge of a sworn officer of this court to consider of their verdict, And now to wit on the day and year aforesaid comes the said jury and return into court their verdict in the words and figures following to wit "We the jury in this case find for the plaintiff and assess his damages at one hundred and twenty six dollars" which is received by the court and ordered to be filed and entered upon the record of this case, And now upon the rendering of said verdict

comes the said defendant and enter their motion in arrest of judgment and for a new trial

And afterwards to wit at the term of said court last aforesaid and on the 24th day of April 1863 the following proceedings were had in said cause to wit

John S. Kenton

The Chicago & Rock Island
Railroad Company

Trespass

At this day this cause being again called comes the said parties herein by their attorneys as aforesaid, and the motion by defendant in arrest of judgment and for a new trial as by the court overruled. It is therefore ordered by the court that the said plaintiff have judgment against the said defendant on the verdict of the jury where upon it is considered and adjudged by the court that the said plaintiff have and recover of the defendant the sum of One hundred and twenty six dollars judgment as aforesaid together with his costs in this behalf by him expended and that he have execution therefor against the said defendant. And now on the rendering of said judgment comes the said defendant by their attys and pray an appeal from the judgment of this court to the Supreme court of the state of Illinois Appeal allowed on defendants executing appeal bond in the sum of three hundred dollars with security to be approved by the clerk of this court, and defendant allowed sixty days to prepare and file bill of exceptions

And afterwards to wit and on the 19th day of May AD
1863 the said defendant filed in said court in said cause
the following Bill of exceptions to wit

State of Illinois } Circuit Court of said County
Henry County } p March Term 1863

John S. Ventchins }
vs } Inexpers on the case
Ch & R. J. R. R. Co }

Be it remembered that this cause came into
be heard at the above named Term of court the Plaintiff
to sustain the issues on his part called the following witnesses
who testified as follows,

Evidence of Adam Leberkuecht first witness
Sworn on the part of plaintiff

I am acquainted with the plaintiff in this suit I reside on
South West quarter of the North West quarter of Section twenty two
in Township Seventeen Three east of the 4th P.M. immediately
East of the Corporation of Geneva The Railroad of the defendant
is about 4 rods from my house on the North side, Plat presented
to the witness & he explains the situation, I built my
house about 5 years ago, there was in a pasture lot east
of my house some horses belonging to Mr Ventchins and
others, Mr Ventchins had a bay mare with a colt, my
lot is 26 rods deep to the pasture my house is 4 or 5
rods east of the public highway The Railroad has been
there ever since I have been there They were running cars
there last summer, my house is about 4 or 5 rods from
the rail road fence & is on the East side of the highway & South
of the Rail road, Plaintiff then proposed to prove by
said witness the condition of the fence on North end of

pasture lot and between the pasture lot and the Railroad at and before the time of trespass, to the introduction of which proof the defendant objected which objection was overruled by the court and the defendant then & there excepted.

I commenced the fence of the Railroad Co on July 29th 1862 & it was down between the Railroad & the pasture. The horses got on to the Railroad the day before the accident happened & got through the fence from the pasture near the North West corner of the pasture they got out a week or so before I think in the same place the fence was made of posts & four boards some of the posts were rotten off at the top of the ground one post at the place where the horses got out was out. The fence at this place had been taken down several times by a Swede and the boards were some split. The horses got through one length of boards east of East side of my lot. I notified McGuire^{an} of the employees of defendant that the fence was not sufficient to keep out the stock. The day before the accident happened he McGuire drove the horses from the Railroad & put up the fence they were at work there at the fence but did not drive any nails. I could not tell exactly how they fixed it up. The evening before the accident happened about six o'clock the horses were driven into the pasture off the Railroad by McGuire at 5 or 6 in the morning there was a passenger train went west at about 7 o'clock McGuire came to my house & I went & found the mare had her hind leg broke she was in the highway North of the railroad. The colt was lying on the West side of the street torn in two. I saw hair & blood on East cattle guards on highway. I heard about 9 o'clock the night before some horses inside the Railroad opposite my house cropping grass & saw

them here I cannot describe the horses it was too dark
The horses were turned into the pasture off the Railroad
about 6 in the evening and about 9 I heard them on
the Railroad. When I saw the mare next morning
she stood on 3 legs the other was broke & hung loose, the
section boss McGuire took the colt & buried it. There
was with the section boss one man named Dye & several
others I did not know. I was called upon by the section
boss to appraise the colt. I estimated it at 25 & the
mare was not appraised at that time. The section boss &
Dye were present when I appraised the colt. They asked
me for my opinion as to the value of the colt & I gave
it. The same morning of the accident the section boss went
up & nailed the boards at the same point where the horses
were driven into the pasture the evening before. It was
on the morning of July 30th 1862. The highway runs north
& south across the street Railroad. The pasture is fenced
on all sides. The fence on 3 sides of the pasture was made
of 4 boards & was 4 feet high. There were some 14 or 15
horses in the pasture at times. The mare was worth at
least one hundred dollars. I saw the mare on the evening
& she was lying at the same spot where she stood in the
morning she had been shot. The passenger train went
West at 5.50 in the morning I saw it I was standing
in my door when the train went along. They did not
whistle or ring the bell. I saw them half a mile before
they got to my house & until they got to the crossing & in
all that time they did not whistle or ~~any~~ ring the bell.
To all of the evidence of said witnesses in reference to said
passenger train & the whistling and ringing of the bell
thereof Deft objected, the court overruled the objection.

& defendant then & there excepted. The freight train came in about four O'clock the same morning. I was in bed at my house and did not hear any whistle or bell. I was awake & think I would have heard it if they had whistled or rung. My house is so near the Railroad that the freight trains always shake it. The ground is about 5 or 6 feet above the track until it gets to the crossing. If the mare had been at the crossing I could not have seen her if she had been East of the crossing I could have seen her from my house. The center of the highway at the crossing is the line of the corporation of the town of Genesee. The town is an incorporated village. East of the village it is settled.

Cross examined by Deft

My house has 3 outside doors. There is no door on the north side. The door on the East end is 8 or 9 feet South of N.E. corner. I stood in the East door when passenger train passed, the R R track is 8 or 9 rods from my house which stands east & West. The Railroad runs North of West. I never dealt in horses. I don't know how old the mare was. I don't know whether or not she was sound. I don't profess to know how much she was worth but in my judgment she was worth \$100. I was in good health at the time I told them that morning that I did not know whose colt it was which was true. The mare was a dark bay some would call it a kind of roan. I knew there were two trains would pass that night. The reason I did not go down to drive out the horses that night when I heard them there was that they had been drove out before & the Railroad men had been told often enough before and they did not fix the fence. I knew when I went to bed that night that there would be men on the trains that would

pass in the night but I thought the Railroad men had as much interest in keeping the stock off the track as I had it was their business I had told them often enough and the time comes when patience ceases to be a virtue I went to bed & slept soundly until the freight train waked me in the morning I felt uncomfortable toward the R R co. because they did not fix the fence next to my lot I heard horses inside the R R eating grass on the night of the 29th of July I don't know how many there were but I know there were two full grown horses I did not see any colt with them I could swear they were horses for I could see their shape on the 29th of July I worked in the printing office went home about six O'clock & saw the fence down & the horses on the track The West fence of pasture was in good condition. Where they got onto R R was on South side of R R I did not see the horses go on to the track but they were on the Railroad grounds beside the track I said first the horses had been on the road twice The track is in a cut about 5 feet deep at my house The Rail Road men wanted to see where the colt was first struck & I wanted same The colt was lying on South side of track cut in two one part lying on South side of South rail & the other on the track between the rails I keep a clock in my house 6 or 7 trains pass my house in course of 24 hours I can't tell whether they ring the bell or not on the 29th of July in the morning. On the morning of the 30th July I was standing in my East door when the passenger train passed and the happening of the accident that morning is the reason I recollect the bell was not rung about $\frac{1}{2}$ of the time they ring & half they don't since the accident happened I sometimes set it down

when they don't ring, I am not intimate with Mr Kentchins. He did not agree to pay me for taking notice when the bell was not ringing. I don't know whether Mr Kentchins knew the condition of the fence next the Rail road or not. he was frequently down to the pasture. The Swede that knocked the fence down went through to cultivate the ground on South side of the track. The plowing was on same side of track as my house but not opposite my lot. it was opposite the the pasture. The Swede came onto the pasture at the South end through a gate. He wanted to go through my lot & I would not let him. If the horses had got out of the pasture on the South or west there was nothing to prevent them from going along the highway & on to the rail road at the crossing. I did not go to the fence on the evening of the 29th July to see how McQuire fixed it after he drove the horses into the pasture. And I did not go to it to see it on the 30th July either.

On the morning of the 30th I saw a horses tracks on the east side of the east cattle guard. The highway is four rods wide.

Re-examined by Plaintiff.

I was about 20 rods from where McQuire fixed the fence at the time he fixed it & know he did not nail it.

The Deposition of Of Stought was here read in evidence by the plaintiff."

State of Illinois } In the Circuit Court of said county
Henry County, } at the March Term AD 1863
John S. Kentchins }

The Chicago & Rock Island
Railroad Company

It is hereby agreed by and between the parties to said suit that the following testimony of

Of Slough shall be received and taken in evidence in the above suit on a trial thereof subject to all the exceptions in law as if said witness were personally present in court. Said witness having been first duly sworn by Wm Smith Esq a Justice of the peace in and for said county testifies as follows to wit

Carpenter & Dunham
attys for Pltff

Buckles & Mealey attys
for Defr

Answers to direct Questions

My name is Oliver J Slough age 35-resides in Genesee County Co Ill. I owned S W of NW 22 17-3 in said county of Genesee I owned the land from 1856 to 1862 in the fall the Railroad of the defendant runs through said land, Adam Leberknecht now resides on said land and said land is fenced on both sides said road the fences was constructed by said defendant I believe do not know whether said fences is good or not. I believe the fences on the sides of said Rail road were kept in repair by said defendant never agreed with the deft to keep said fences in repair or to build the same I never built or repaired said fences on the line of said Rail road on the south side of said Rail road and immediately east of said Leberknecht House is a pasture I rented said pasture the summer of 1862 to one Frank Gerard he pastures horses and colts there said summer the pasture is a part of the land above described and the Railroad is the boundary line on the north side of said pasture I think there was a fence between the Railroad of defendant and said pasture when I purchased

said land and I built the fence on the other side of said pasture after I purchased the same I bought the land of Homer Abbott

Answers to cross Questions

I believe the fence on the West side of said pasture during the summer of 1862 was rather a poor fence the fence on the west line of the above described forty acres and adjoining the public highway was down during the summer of 1862 so that if stock got through the fence on the west side of said pasture there was nothing to prevent them from going into the public highway which public highway crosses the Rail road of the defendant

Of Strength

The above answers were made by the aforesaid Witness Of Strength to interrogatories propounded to him by the aforesaid attorney in said suit he being first duly sworn by me for that purpose & the said Witness subscribing his said name to the same all being done on this 6th day of June A.D. 1863

Wm Smith J.P.

John S Keanna was next called & sworn by plaintiff & testified as follows,

I reside in Henry county have lived here since 1835 the Railroad was built in 1853 or 4 I don't know which there has been cars running on the said road ever since it was built I know where the pasture is which the last witness on the stand testified about I have seen men putting up the fences along the line of the road there & repairing them whom I took to Railroad men but don't know who they were nor who employed them to do it. I know the mare of the Plaintiff I should say she was worth

\$100. She was a bay mare or red mare. I live just north of where the Railroad crosses the public highway spoken of

Cross examined by Deft.

I would have given \$100 for the mare without the colt. I don't know her age but think she was three years old. As near as I know anything I know she was not spavined. I never examined to see whether she was spavined or not. I wanted to buy a mare that spring I did by two. I don't know who was in possession of the land where the pasture is at the time the Railroad was built.

Oscar Fisk was next called & sworn by the plaintiff & testified as follows.

I reside at Genesee. On the morning of the accident I was going to reaping oats. I saw the freight train going west. I was from 40 to 60 rods from it. It was between 4 or 5 o'clock in the morning. Mr. Keenias place is north of the Railroad. I could see the tops of the cars at the crossing & long before they got to it and they did not whistle or ring the bell. I saw the mare about 8 o'clock in the morning. She was shot when I saw her. I went to examine for blood. I was on the rail road & found some on the East cattle guard on the East side. I could not see anything. I called horse tracks east of the cattle guard. It was on the last day of July or first day of August. Mr. Burlingame, Mr. Hutchins & some others I was not acquainted with there.

Cross examined by Deft.

I noticed the train that morning. It was a clear morning & was early & no one was stirring. They ran across the public highway & toward the wood house before the

ring the Bell

Thomas Burlingame was next called by plaintiff & sworn & testified as follows

I keep a stable at Geneseo & doctor horses I knew the mare of the plaintiff I saw her the morning she was hurt in the highway 30 rods north of R R crossing she had one leg broken she was so injured that she was not worth anything Mr Shepard & Mr Dye were present Mr Dye called me to appraise the mare I estimated the value of the mare & colt at \$100. I had seen her once in a while before that morning I was well enough acquainted with her to know her value I made an examination on the track & found some blood & hair on the track & on the East cattle guard on south side of the track I could not say whether the hair was from the mare or colt but it was of the horse species The Blood had the appearance of being done that morning

Cross examined by Deft

The colt was turned on the West side of the Street If a hand car going East had run over the colt on the track I think it might have carried the blood & hair to the East cattle guard where I saw it

Re examined by Plff

I should think the hand car would carry some blood & hair over to the East cattle guard where I saw it

Francis Gerard was next called by the plaintiff & sworn & testified as follows

I have heard the testimony of the other witnesses in the case I had the use of the pasture spoken of during last summer I pastured horses & colts there The Railroad was on the north side of it The pasture

Should be fenced next to the Rail road to keep stock from the rail road. I pastured plaintiffs mare & colt in the pasture I should call the mare & colt worth \$120 I had not been out to the pasture for a week or ten days before the accident happened I was sick

East of the pasture the land is settled, up the fence in the pasture next the Rail. is rather poor I went & fixed it up several times during last summer some of the posts were rotted so they would not hold a nail good

Cross examined by Deft

I had six horses of my own in the pasture with a little colt & some of the time 8 of my own & 3 of other peoples I dont think the horses ever got out on to the rail road until the Swede took the fence down and think they never got out only at that place I live $\frac{3}{4}$ of a mile from the pasture There was some poor fence on west side of the pasture but I was more afraid of the Rail road fence I dont think they ever got out at any other place except where the Swede took the fence down but once early in the spring when they were crowded together against the fence on west side and broke it down at one place there they got on west side of pasture Dont know that they got out where I was sick

John Bracken next called testified as follows I knew the mare & colt The last time I saw them the colt was 3 or 4 weeks old I deal some in horses and have raised some I went to see the mare she was a red mare some would call her a straw berry mare I would have given \$125 for her & the colt

Cross examined by Deft

I had not taken pains to find out what such stock was worth in the market but I considered the mare & colt worth \$125

Hermin Bartlett next called & sworn & testified as follows. I buy horses some I knew the mare of the plaintiff I knew the market value of horses at the time I should call the mare & colt worth \$130

Cross examined by Deft

I had sold 4 or 5 horses that Spring and one was a brood mare I should think the colt was worth \$30 I keep a stud horse but this colt was not out of my horse

There the plaintiff rest his case

Witnesses sworn on part of defence

Ephraim McQuire called & sworn testified as follows

I am the person pointed out & spoken of by the first witness for the plaintiff as the section boss I saw the fence between the Rail road & the pasture the evening before the accident happened It was sufficient as I thought to turn ordinary stock I saw it again early next morning & it was all up & in the same condition as when I left it the evening before I was in the hand car with Mr Dye & the men I had charge of in the morning of the accident & left Genesee & going East at a 4, past six we got in about 5 feet of the colt before I saw it but we were running very fast & could not stop the car & it ran over the colt & run on over the East cattle guard before we could stop we then ran the car back

on to the East cattle guard & left it stand there while he
reared the colt. There was blood & hair on the hand car
for a week afterwards. The cattle guards are just
on the line half on each side of the fence & are less $8\frac{1}{2}$
feet long parallel with the track. I have been on a
locomotive & seen it strike stock. I have been on
Railroads for 15 years. From the appearance of the mare
I don't think the locomotive could have carried her over
the cattle guard into the highway. I have been on that
section of the road since July 15th 1862. There was no gap
in the fence between the Railroad & pasture on the morning
of the accident. Leiberknecht never notified me that
that the fence was bad between the pasture & the Railroad.

Cross examined by Pltff

It was my business to look after the property of the
Railroad co. My particular business was to look after
the track & the fence and do anything the Road Master
Mr Dye ordered me to do. I saw the fence from three
miles east of Genesee & went past the pasture fence
and examined that the evening before the accident.
There is a cut on North side of pasture from four to 6
feet deep. I went to the fence that evening as I was
going along home to supper at the place where I drove
the horses out & where the sweels had taken it down and
a couple of the left boards were down one was clear
down and the other was on the left of the boards below.
I put the boards up & got a couple more boards & thrust
them in around the posts to hold them up. They were
longer than the other boards & stuck past the posts some 2
next morning the fence was up just as I left it that evening.
I went East along the Railroad to a little bridge to get
the boards to fix the fence & went on the track the whole

length of the pasture & know the fence was not down in any other place and there was no boards off at any other place. Some of the posts along the pasture fence were rolled off at the top of the ground but the boards being nailed to them held them up. I don't think there was any post rolled off where I fixed the fence that evening. I worked around them and know there was not. If the fence had been down anywhere else along the pasture that evening I should have known it. I did not mend the fence anywhere else that evening along the pasture. The next morning I went and nailed the boards where I had put them up the evening before. If a person had tried to climb over the fence there he would have pushed the boards down, I came from the west when I first saw the colt. I don't now know how many men I had on the hand car. It was in the day time & I did not see the colt until I got within about 5 feet of it. It was cut in two except a little hide and the hand car run over it & went on some distance. I tried to find out where colt it was & could not & then I turned it, I saw the mare she was by Wards house north of the crossing. I saw her after she was shot she had one hind leg broken. After we passed over the colt we stopped & went back to see about it, I saw blood & hair on the flange of the hand car wheel & on the wheel I did not notice any blood or hair on the East cattle guard but I saw some on the crossing. I should think from the looks of the colt that the engine struck it & knocked it down & then run over it. When we pushed the hand car back & went to the colt we left the car standing on the east cattle guard.

Re examined by Dept

When I went after the boards to fix the fence that evening I went on the bank a little ways & then went in the

track & I could see the fence all the way along the pasture & know it was not down. The Machinery underneath the hand car might have struck the carcass of the colt but I don't know whether it did or not. If it did it would have been so as to have left blood on either of cattle guards if it had dropped from the car. I think the fence on the evening of the day before the accident was sufficient to turn ordinary stock of the country not breaking.

George W Dye, next called & sworn testified as follows

I have been acquainted with Railroading about 12 years. The platform on the lower bar of the pilot to an Engine is about 6 inches wide. In striking an animal it generally makes a larger wound than the part that strikes the animal.

The Deft's counsel then asked this witness the following question, "As a Rail road man judging from your own experience and from what you saw in this case the next morning the width & condition of the Cattle guards condition of the mare &c give your opinion whether she could have been struck by the engine East of the East cattle guard & carried over the cattle guard into the highway & left in the condition she was found that morning."

Which question was objected to by Plff's counsel & objection sustained by court and to which ruling by the court the defendant then and there excepted.

I examined the mare and looked for a place on the ground beside the track where she had been thrown but could find no signs of an animal having been thrown upon the ground. I saw some hair off mare

leg inside above gambrel joint, I think I was the first
 that saw the cot that morning & I ordered them to stop the
 hand car & I got off soon as I could & went back to cot
 A hand car will weigh I should think 6 or 700 pounds
 I saw no blood or hair on the rail ~~road~~ or track but saw
 some blood on south stringer of East cattle guard
 If the man had been struck on north side of track
 blood could not have been thrown on to south side on ac-
 count of machinery under Engine, I noticed the cot after
 we had passed over it part of it was on each side of the south
 rail The head & shoulders was on the south side & balance
 on the other, There is a shaft on the center underneath a
 hand car and on the shaft there is a cog wheel which carries
 the car and runs within about 6 or 7 inches of the ground
 I did not hear the conversation between McQuire & Leiberbueck
 I know the duties of the employees of the Railroad, It is
 one of their duties to bury animals killed on the track
 It is the duty of the section boss or Road master to cause
 all animals injured on the track to be appraised
 The speed of trains depends on the grade & condition of
 the track and the distance it would require to stop
 a train it would depend on same thing & whether the
 track was wet, Trains usually stop on from an $\frac{1}{8}$ to
 a $\frac{1}{4}$ of mile Freight trains usually run about 12 miles
 per hour It is not possible to stop a freight train in less
 than 500 feet

Cross Examined by Plaintiff

I have been engaged on Railroads 12 years and on various
 roads Most of the time have been connected with running
 trains Never was an Engineer Have run a construction
 train Construction trains run about as fast as freight

trains, I know of one cow in the last year that had her hind leg broken by being struck by the cars. It was not near a cattle guard. I think I have witnessed about 75 cases where stock have been struck by the cars I was on the train in every instance. For the last year I have rode most of the time on the engine & could see the condition of the road & the effect upon the stock when struck. I have seen as many as twelve instances of stock being struck by the cars in the last year. I could each time see how they were struck how far thrown & which way & how far they were carried by the engine but I did not go back to them to see them after they were struck only in one or two instances. I saw marks on the mare after she was shot. There was one place on her head about the size of $\frac{1}{4}$ dollar where the skin was off & one place on inside of leg above the gambrel joint where the hair was rubbed off. I did not see any marks on her belly. My attention was not called particularly to any marks on the mare & I was not present at any time when any other marks were spoken of. I would not swear there were no other marks on her. If the mare was struck East of the cattle guard and the train going West I think it would leave blood on the guards. The skin on the leg I think was some broken & I don't know whether there was any blood on the ground where she stood when I first saw her or not. I think the fracture was horizontal across the leg and about 6 or 7 inches wide.

Re-examination by Deft

I have never known of an animal being struck by the pilot on an engine so as to throw it down and only get a leg broke. (This answer of witness was to a question asked by Deft's counsel whether he (the witness) had frequently seen cases of accident

by the Engine or cars striking horses or cattle and whether he had ever known of such a case where by the striking of by the feet and ~~things~~ throwing the animal down it recd no other injury than a broken leg)

Charles Robinson being next called by the defendant as a witness was sworn & testified (subject to any exception that might appear on the ground of interest) "In the month of July 1862 I had charge of and was running an Engine as Engineer on the Rail Road of defendant I remember the morning of the ~~thirteenth~~ of July 1862, I was running the Engine of the freight train that went West that morning It was the Engine that I was running that morning that killed the colt I did not see the man at the time When I first saw the colt it was about five feet ahead of the engine upon the crossing in the public highway on the south side of the track and apparently in the act of turning around to go off the track on the south side When the Engine struck it I think it was about five feet east of the west end of the guard We were running at the usual speed It was just about day light The head light on the Engine was burning I could not have seen the colt without the aid of the head light Defendants counsel here asked the witness the following question "State whether the bell on the Engine was or not rung that morning at that crossing") Plaintiffs counsel here asked the privilege of examining said Witness touching his interest in respect to the matter involved in said question and objected to his answering said question, and said permission being given by the court said Witness was examined touching his interest and testified thereon as follows (I was an Engineer in the employ of defendant upon their said road at the time of the injury to the mare and colt and had charge of the engine that came in contact with them It was my

duty to take charge of and manage the engine. There is a bell upon and attached to the engine. I don't know that any thing was said in my contract with defendants about ringing the bell. The regulations of the company require the bell to be rung on the approach and crossing of highways. There are printed directions by the defendant posted up in the pilot house on the engine in respect of the ringing the bell and I think the engineer is required to do it. It may be and I think it is probable that the fireman is also required to ring it. I believe it is the duty of both the engineer and the fireman to ring the bell. I know that it is rung some times by one and sometimes by the other of them as may at the time be most convenient. I have charge of the engine as Engineer and I suppose that when the fireman rings it is by my direction or permission. Do not think he would have any right to do it without direction or permission from me. I never supposed when I rung it that I acted by the direction or permission of the fireman. Mr. Dye was here recalled by defendant and asked by defendants counsel the question "whose duty is it to ring the bell of an engine on approaching and crossing highways?" to which the witness answered "I always supposed it was the duty of both the engineer and fireman upon the engine. I suppose it is more particularly the duty of the fireman as the bell rope runs into the pilot house upon the side where he stands. The look out is in front of the Engineer. When one of them is engaged at the time the other usually rings the bell." On cross examination by Plffs counsel the witness further testified that from the position of the Engineer upon the engine he could discover obstructions upon the track in front better than

the fireman The engineer is Superior in authority to the fireman And the fireman is his subordinate and acts under his directions

The defendant then renewed his said question to the witness Charles Robinson to wit "State whether the bell on the Engine was rung or not that morning at that crossing," which question was objected to by plaintiffs counsel and the objection was sustained by the court and to which ruling and decision of the court the defendant by its counsel then and there excepted

The defendants counsel Joseph O Glover Esq then offered to execute to the witness his said counsels bond with surety to be approved by the court in an amount sufficient to indemnify the witness against any suit that might be brought against him for any neglect of duty in ringing the bell or deposit with the court an amount of money larger than was claimed in plaintiffs declaration for the purpose of such indemnity and which the court refused to allow. The court remarking that from the evidence of the witness and of Mr Dye he regarded the witness (Robinson) ^{as} having such an interest as to prevent him from testifying as a witness upon the subject of the ringing of the bell, and that unless the witness were released in such a manner as to discharge him from that interest he could not testify to all of which ruling of the court the defendant then and there excepted. The defts counsel then asked this witness as follows Have you made any contract with defendant which makes it your duty to ring the bell at the crossings. Objected to by pliffs counsel and overruled by the court on the ground among others that the question is to whether it was defts duty to ring the bell or not

had been fully inquired into by counsel on each side as far as they had asked before the question of the witnesses' interest was submitted to and decided by the court and that the court would not now reopen that question for further inquiry. After counsel then restated to this witness his final question as follows "State whether the bell was or was not rung at the time the mare and colt were killed" to which question Jeffs counsel objected and the objection was sustained by the court and to which ruling of the court the defendant by its counsel then and there excepted.)

R. L. Shepherd next called & sworn & testified as follows I examined the crossing where the mare & colt were said to have been struck I saw & examined the mare I did not see any dirt on her indicating that she had been thrown down, I did not see any marks on the ground indicating that any animal had been thrown down I saw some blood on the east cattle guard

Question.

State from the examination you made of the crossing and of the appearance of the mare whether in your opinion she could have been carried over the crossing by the engine without making other marks upon her than those she had, Objection to by Plff & objection sustained & Diff then & there excepted

I have been by the pasture North & South in the Summer of 1862 Fence on West side of pasture was rather poor I think the gate to the pasture was in the South West corner It was a large frame gate I never saw it open I do not know the Swede spoken of who took the fence down I had seen the mare & colt & was acquainted with the

the value of horses The plaintiff knew that I appraised the mare & colt & said he thought it very low but he supposed he would have to stand it I appraised the mare and colt at \$100 that morning

Cross examined by plaintiff

I did not hear the plaintiff object to me appraising the mare & colt & said he was satisfied that we acted upon our best judgment but said he could have done better The ground at the crossing on the highway is low the track is the highest and it slopes both ways from it The highway at the crossing is much travelled, the ground was hard & dry except one low spot I saw the hair was rubbed off on inside of one of the mares hind legs inside the stifle The skin was off above the left eye about the size of a penny The right leg was broken but I think the hair was off of the other I have not been very near the west fence of the pasture I am not in the employ of the Railroad Co in any way I board some of the employees of the Co I keep a hotel in Genesio, I was called upon by Mr Dye to appraise the mare & colt

Re-examination by Deft

The spot where the hair was rubbed off was inside the stifle & was no higher up than the fender on the locomotive & I think was just about as high as the fender would naturally come The skin on the head had the appearance of being knocked off that morning

Richard McOvery next called & sworn testified as follows

I heard the evidence except about the hand car I was at the fence on both side of the pasture the night before the accident happened and it was all up except where McOvery was firing at I did not fire the fence but

I saw McGuire firing at

Cross examined by Plaintiff

I don't know how he fired at nor how much I left him at at

Calton next called & sworn testified as follows

I was on the hand car with McGuire & Dye the morning of the accident I saw some blood & hair on the car when I helped bury the colt we buried it by the side of the track I did not see any blood on the beds The fence along the north side of the pasture was all up that morning when we went up there & buried the colt I noticed the fence where McGuire fired at the evening before & it was up as he left it as far as I noticed

Here Deft retracts the case

Plaintiff then called as rebutting the following witnesses
L. W. Piper

I reside in Geneseo I have lived in about 15 rods of the Railroad for 2 years

Question, State whether you have observed cases of accident on the Railroad of the engine or cars striking horses or cattle & if so what the effect was in cases you have witnessed,

Objection to by Deft objection overruled & Deft then & there accepted

Answer I have seen two cases one was where the Engine struck a yearling & knocked it about 2 rods off against the bank it fell down & then got up & ran off. The other time it struck a cow & carried her over the cattle guard onto the track & broke one leg & one horn off

Cross Examined by Deft

I saw the yearling when it was struck by the Pilot. I could see it when it was struck & it was thrown over on the opposite side from me. I was in the field a few rods East of the highway & a few rods South of the Railroad the train was going West & throwed the yearling on it side of Rail road, I cant say that I know it struck it at all but I saw it going off & I know it fell for I afterwards went & saw where it struck the ground. I saw the cow struck on the crossing. It was the second crossing east of Genesee the cars were going West & I was on the opposite side of the track from where she fell it made a good mark on the ground where she struck.

James Bernard next called & Sworn

I reside in Genesee $\frac{1}{2}$ mile or so from the Rail road. I have never seen any cattle or horses struck by the cars but I once saw the engine strike a wagon that had a pair of mules hitched to it it struck just forward of hind wheels & threw the hind part of the wagon & the box over a creek of wood by the side of the road with the man in the wagon box.

Here the evidence closed

The foregoing is all the evidence there was in this cause thereupon the plaintiff asked the court to give the following instructions to the Jury

- * The plff asked the court to instruct the jury
- 1 If the jury believe from the evidence in this case that in July 1862 the mare & colt of the plaintiff were being kept and depastured in a pasture lot in the town of Genesee in Henry county and that the defendant had prior to July 14

1855 constructed and opened for use a rail road along the north line of said pasture lot and within said Township and that the mare and colt of the plff entered from the said pasture lot upon the rail road of deft without any neglect on the part of the plff at a point on the line between the said pasture lot and the deft rail road track outside of the limits of any incorporated town city or village within five miles of a settlement and not upon the crossing of a public road or highway and where the proprietors of the adjoining land had not erected or maintained a fence or agreed so to do and where it was necessary that there should be a fence to prevent horses cattle sheep or hogs from getting on the track of said rail road and that at such point where the plffs mare or colt entered upon deft rail road the fence was out of repair by neglect of the defendants and that by reason of such neglect the plffs mare and colt were killed or injured by the rail road train or engine of the deft the jury will find a verdict for the plff for such amount of damages as the plff has proved to have sustained thereby

- 2 The Statute of March 5-1849 requires that "a bell of at least fifty pounds weight or a steam whistle shall be placed on each locomotive engine and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street and be kept ringing or whistling until it shall have crossed said road or street" and interpreting the corporation owning the rail road to a liability for all damage which shall be sustained by any person by reason of neglect to comply with said requirement

Lives

If the jury believe from the evidence that the mare and colt of the plaintiff was depasturing in a pasture lot in the township of Geneseo Henry county Illinois south of and adjoining the railroad of the defendant and that it was the defendant's duty to keep in repair the fence along the line between the said pasture lot and their said railroad and that it neglected so to do and that by reason of the negligence of the defendant to keep the said fence in repair the said mare & colt without neglect of the plaintiff entered upon the defendant's railroad from said pasture lot and on the line thereof and were killed or injured by the engine or car of defendant the jury will find for the plaintiff without proof of negligence on the part of defendant on any other point than that of the failure to keep the fence in repair.

4

Lives

If the jury believe from the evidence that the mare and colt of the plaintiff entered upon the railroad track of the defendant in the township of Geneseo & county of Henry without any knowledge or neglect of the plaintiff at a place where said railroad crosses a public highway and that the defendant ran its engine and train of cars upon the said road & across said highway without causing the bell of said engine to be rung or its whistle sounded in approaching and crossing said highway and in consequence of such neglect the said mare and colt were injured the jury will find a verdict for the plaintiff. And the jury are instructed that the running of a locomotive engine and cars by the defendant to and across such highway without ringing a bell or sounding a whistle constitutes a prima facie case of negligence on the part of defendant.

Refused as asked and another
substituted by the court

1 If the jury believe from the evidence in this case that the plaintiffs mare & colt were killed & injured upon the rail road track of the defendant in the township of said rail road having been opened & used for six months prior to the time of the injury & killing of said animals & the said mare & colt getting upon said rail road track at a point where the proprietor of the adjoining land had not fenced the side of said rail road or agreed to fence the same & within five miles of a settlement & not upon the crossing of a public road or highway nor within the limits of a town city or village & where it was the duty of the defendant to erect & maintain a fence suitable & sufficient to prevent cattle horses sheep and hogs from getting on to such rail road & had failed & neglected so to do whereby said mare & colt went on to & upon said rail road track & without any neglect on the part of the plaintiffs then the jury will find a verdict for the plaintiff & for such amount of damage as was proved to have been done to the plaintiff by the killing & injury of said animals

Refused as asked
and another substituted
by the court

2 The statute of March 5th 1849 requires that "a bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine & shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street & be kept ringing or whistling until it shall have crossed said road or street. State & shall be liable for all damages which shall be sustained by any person by reason of such neglect"

Refused as asked and another
substituted by the court

- 1 If the jury believe from the evidence in this case that the plaintiffs mare & colt were killed & injured upon the rail road track of the defendant in the township of said rail road having been opened & used for six months prior to the time of the injury & killing of said animals & the said mare & colt getting upon said rail road track at a point where the proprietors of the adjoining land had not fenced the side of said rail road or agreed to fence the same & within five miles of a settlement & not upon the crossing of a public road or highway nor within the limits of a town city or village & where it was the duty of the defendant to erect & maintain a fence suitable & sufficient to prevent cattle horses sheep and hogs from getting on to such rail road & had failed & neglected so to do whereby said mare & colt went on to & upon said rail road track & without any neglect on the part of the plaintiffs then the jury will find a verdict for the plaintiff & for such amount of damage as was proved to have been done to the plaintiff by the killing & injury of said animals

Refused as asked
and another substituted
by the court

- 2 The statute of March 5th 1849 requires that "a bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine & shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street & be kept ringing or whistling until it shall have crossed said road or street. State & shall be liable for all damages which shall be sustained by any person by reason of such neglect"

Refused as asked &
whether substituted by
the court

3

If the jury believe from the evidence in this case that the defendant was within the provisions of the statute & bound to keep the fence along the track at the place of the accident in good repair & that the defendant failed to keep the same in repair as required by the statute & that on consequence thereof the plaintiffs mare & colt were killed & injured the defendant is liable without any other proof of negligence on the part of the defendant & the jury will find a verdict for the plaintiff.

4

If the jury believe from the evidence that the mare & colt of the plaintiffs in question were killed & injured by the locomotive & cars of the defendant while the said mare & colt were upon the rail road of the defendant at a place in this county where said rail road crosses a public highway and that the defendant omitted to ring a bell or sound a whistle or cause the same to be done in the manner required by the statute recited in the instruction secondly above given the jury is instructed that such omission constituted a prima facie case of negligence on the part of the defendant and if the jury further believe that on consequence of such negligence on the part of the defendant the said mare & colt were killed & injured then they will find a verdict for the plaintiff.

Refused as asked and
whether substituted by
the court

5

The jury is instructed that all the statements on the witness stand of the Engineer Robinson are excluded from this case and not to be considered by them.

Refused

7

The defendant then and there objected to the giving of each and every one of the instructions offered on

the part of the plaintiffs which objection was overruled by the court and the instructions given, To the giving of said instructions and each of them the defendant then & there excepted

1st

Given

The Deft then asked the court to instruct the jury as follows
In this case before the plaintiff is entitled to recover against the defendant for damage done in consequence of the fences along the line of the Railroad of the deft not being kept in repair he must prove to the satisfaction of the jury that the Proprietor or owner of the land through which the road passed & where the fence is alleged not to have been kept in repair had not erected or agreed with deft to erect said fence at the time the Rail road was built

2

Refused as asked
another (No 2) Substituted by the court

It makes no difference in this case how much negligence the deft may have been guilty of in keeping up its fences or in not ringing its engine bells or otherwise the plaintiff cannot recover in this case unless he prove affirmatively to the satisfaction of the jury that the injury complained of was occasioned by such negligence of the defendant

3

Refused as asked
and another (No 3) Substituted by the Court

It makes no difference in this case whether the fence along the north line of the pasture where the animals of plaintiff were pasturing & adjoining the Railroad of deft was kept in repair or not or even whether there was any fence there at all unless the jury believe from the evidence that the said animals escaped from said pasture & got upon said road at that point

4

45

The deft is not liable for the acts of persons not in its employ and in this case if the jury believe from the evidence

Refused as asked
and another
(No 4) substituted
by the court

46

that a Swede had impaired or knocked down the fence of the deft the deft is not liable for any damage done in consequence thereof if deft by its agent or employees afterwards used ordinary diligence to repair said breach so made by said Swede

Refused

5 If in this case the fact is established by proof that the fence was up the night before the accident at the point where the animals of plff actually got on to the Railroad that would be a sufficient compliance with the duty imposed by the law upon the defendant to keep and maintain a good and sufficient fence

Denied

6 If the jury believe from the evidence that the agent or employee of the defendant on the evening prior to the killing, saw the fence of repaired the fence through which the animals injured are alleged to have escaped & got upon the railroad in such a manner as to make it sufficient to turn ordinary stock and that the same remained in such repair until after the doing of the injury to the animals then the presumption is that the animals did not get upon the road through said fence & the plaintiff cannot recover on the ground of neglect to keep said fence in repair

Refused

7

If any person or persons knocks or takes down the fence along the line of the Railroad & leaves it down without the knowledge or consent of defendant express or implied & stock should escape there & get upon the road & get injured the defendant is not liable for said injury unless other negligence is shown on the part of the defendant aside from the fence being down

8 The defendant in this case is only required to exercise ordinary care & diligence in erecting and maintaining fences along the line of its road. And if the jury believe from the evidence that the defendant did at & before the time of the injury complained of exercise such ordinary care and diligence and that the fence if down at all so that the animals escaped through it upon the road was so down without the knowledge or reasonable opportunity for knowledge on the part of the defendants agents or employees and after & while it had so used ordinary care & diligence in repairing said fence & keeping the same in good repair then the plaintiff cannot recover in this case for damages received by his stock in consequence of ~~for~~ damages received by his stock in ~~the~~ the fence being out of repair

Given

9 Although the jury should believe in this case that the animals escaped from the field through the fence of defendant & got upon the Railroad as charged in the plaintiffs declaration & there received the injury as complained of Yet the plaintiff cannot recover in this case unless he prove to the jury affirmatively that their getting upon the track or getting injured was the result of negligence upon the part of the defendant

Given

10 If the jury believe from the evidence that the animals of plaintiff got upon the road of defendant by reason of the fence along the line of the said road and adjoining the pasture lot where plaintiff was pasturing his said animals being down or out of repair and that the plaintiff knew or had equal opportunity with defendant to know that said fence was so down then the plaintiff is guilty of negligence in

believed as asked
and another substituted
(No 10)

the matter and cannot recover in this case on the ground that said fence was not kept in proper repair

11th The plaintiff in this case has the affirmative of the issue & it is incumbent upon him to establish his right to recover in this case by a clear preponderance of evidence and unless he does so establish his right the jury will find for the defendant

12 If it is shown in this case that cattle guards were erected and maintained at the crossing where the injury was done it is presumed by the law that those guards were good and sufficient unless it is shown to the jury by proof that they were not good & sufficient

13 If the jury believe from the evidence in this cause that the horses in question were on the public highway within the limits of the village of Genesee and upon the track of the defendants Railroad at the time when they were struck and injured the plaintiff cannot recover in this action

14 If the jury believe from the evidence in this cause that the horses in question escaped from the field in Plaintiffs declaration mentioned that the fence along the line of defendants Road opposite the same was sufficient to hold ordinary stock of the country the plaintiff cannot recover unless the evidence shows the defendant guilty of some neglect other than erecting and maintaining fences

15th Unless the jury is satisfied from the evidence that the injury complained of was in some way occa-

Refused as asked
& been substituted
as of 15-

monies by the neglect to ring the bell or sound the whistle on the engine at the proper time the plaintiff cannot recover in this case on account of this neglect and it is incumbent upon the plaintiff to show by affirmative proof that the killing or injury of the animals was in some way occasioned by such neglect

The court refused to give defendants instructions numbered respectively 2, 3, 4, 5, 7, 10, 13, and 15 without qualifying the same. To which refusal of the court to give said instructions and to which qualification and each of them the defendant then and there excepted. Whereupon the court instructed the jury as follows

2

although the jury should believe from the evidence that the deft was required to erect and maintain in good and sufficient repair the fence along the north line of the pasture where plaintiffs animals were pasturing & adjoining the rail road of deft and that the defendant failed and neglected to keep the fence in repair yet unless the jury further believe from the evidence that the plffs mare and colt entered upon the defendants rail road track at a point on said line & that at such point the fence was defective & out of repair the jury are not authorized to find a verdict against the deft for neglect in maintaining the fence in good repair

4

If the jury believe from the evidence that a Swedish man not in the employ of the defendant knocked down or impaired the fence of defendant on the line of their rail road and in the pasture lot where plffs mare & colt were depasturing, yet if the jury further

believe that the deft by its agents or employees used ordinary diligence and in reasonable time to repair said breach the defendant cannot be made liable for negligence on account of such breach in the fence

10

Although the jury should believe from the evidence that the pliffs mare & colt entered upon the Railroad of deft by reason of the fence being down or out of repair on the line of said road and of the pasture lot where they were depas-
turing. Yet if the pliff knew or had the means of know-
ing that said fence was out of repair and afterwards kept and continued his mare & colt in said lot he also is chargeable with negligence and cannot re-
cover for any negligence of deft in failing to keep the fence in good repair unless such negligence of deft was to a greater degree than the pliff was himself chargeable with

15

Although the jury should believe from the evidence that the defendant omitted to ring the bell or sound the whistle attached to its engine as its said engine and cars approached or crossed the highway at or near which the injury complained of is alleged to have occurred yet unless from all the facts and circumstances of the case as proved the jury believe that such neglect occasioned or contributed to the commission of the injury to the mare & colt complained of the pliff is not entitled to recover damages for such omission to ring the bell or sound the whistle

X

The jury found a verdict in favor of the plaintiff for \$126. The defendant then & there moved the court for a new trial which motion was overruled by the

court to which ruling of the court the defendant then & there excepted, Defendant then & there moved the court in arrest of judgment which motion was overruled by the court to which defendant then & there excepted

On motion of defendant it was allowed sixty days to tender a bill of exceptions in this cause

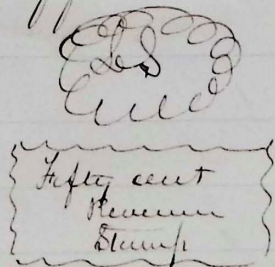
The court rendered judgment in favor of the plaintiff and against the defendant for the sum of \$126 and costs of suit, defendant prayed an appeal to the Supreme court which was allowed by defendant's entering into bond within sixty days from the rendition of said judgment in the penal sum of \$300 with Barton C Cook and Joseph A Glover as security, Defendant prayed the court that this his bill of exceptions be signed & sealed which is done and made a part of the records in this cause

J O Wilkinson Clerk
Judge &c

And afterwards to wit and on the 22^d day of May A.D. 1863 the said defendants file in said cause their appeal bond in the words following to wit

Know all men by these presents that The Chicago and Rock Island Railroad Company as principal and Joseph A Glover & Barton C Cook as security are held and firmly bound unto John S Hatchins in the penal sum of three hundred dollars good and lawful money of the United States for the payment of which well and truly to be made the said Chicago & Rock Island Railroad Company binds itself

itself and the said Joseph O Glover & Barton C Cook bind themselves their heirs executors and administrators jointly severally and firmly by these presents. Witness the said Rock Island Rail Road Company & the hand of the Superintendent of said Rail Road Company & the hands & seals of the said Joseph O Glover and Barton C Cook. The condition of the above obligation is such that whereas the above named John S Ventchins did on the twentyfourth day of April A.D. 1863 at the April Term of the Circuit Court held in and for the County of Henry in the State of Illinois A.D. 1863 recover a judgment against the above bounden The Chicago and Rock Island Rail Road Company for the sum of One hundred and twenty six dollars damages and costs of suit to reverse which said judgment the said Chicago and Rock Island Rail Road Company has prayed & obtained an appeal from said Circuit Court of Henry County to the Supreme Court within and for the Third Judicial Division of said State Now if the said Chicago and Rock Island Rail Road Company shall duly prosecute said appeal and pay or cause to be paid the amount of said judgment and all judgments costs interest and damages which the said Supreme Court shall adjudge against said Rail Road Company in case said judgment shall be affirmed and abide the order and judgment of said Supreme Court in this behalf then this obligation is to be void otherwise to remain in full force and effect



The Chicago & Rock Island R.R. Co
by John F. Tracy

B C Cook
J O Glover

State of Illinois) I Amos Gould Clerk of the Circuit
Hennepin County) Court in and for said county, in the
State aforesaid do hereby certify the foregoing to be a true
full and complete copy of the record and proceedings had
in the foregoing cause in this court as appears from the
Records in my office In testimony whereof I have
hereunto set my hand and affixed the seal of said
court at Cambridge this 12th day of March A.D. 1864



Amos Gould clerk
By S. M. Dalrymple Deputy

Henry County Ill

March Term AD 1863

John S Hutchins
vs
The Chicago & Rock Island
Rail Road Company

} Trespass

Clerks fees,
Defendants costs

For making Record in above entitled
cause for Supreme Court

\$20.25

State of Illinois
Henry County Ill I hereby certify that the above
amount of twenty & 25/100 dollars is the amount of the costs
for making record in above entitled cause on an
appeal of said cause to Supreme Court. Witness
my hand and seal of court at Cambridge this
12th day of March AD 1864



Amos Gould clerk
By W. L. Darymple Deputy

Now Comes the Saide Appellant by
Honor, Leode Chambliss its atty and says
that in the record proceedings afore
saide and in the rendering of judgement
aforeaid ^{in manner & form aforesaid} there is manifest error in
this to wit

1. The Court erred in admitting improper evidence on the part of said plaintiff.
2. The Court erred in refusing to admit proper evidence on the part of said defendant.
3. The Court erred in refusing to allow said witness, Charles Robinson, to testify in regard to whether the bell was rung or whistle sounded upon the engine, which caused the alledged injury.
4. The Court erred in giving the said instructions, and each of them, given on the part of said plaintiff.
5. The Court erred in refusing to give the said 2d, 3d, 4th, 5th, 7th and 10th instructions, asked by said defendants, and each of them, and in qualifying the same, and each of them, and giving the same as so qualified.
6. The Court erred in overruling said defendant's motion for a new trial
7. The Court erred in overruling said defendant's motion in arrest of judgment.
8. The Court erred in rendering the judgment aforesaid, in manner and form aforesaid.

Supreme Court of Illinois }
Third Grand Division }

April Term A.D. 1864

The Chicago & Rock Island
Rail Road Company
Appellant
vs.

John S. Hutchins
Appellee

} Appeal from Henry

And the said John S.
Hutchins Appellee as aforesaid now
comes & says that there is no error
in the records & proceedings aforesaid
or in giving judgment aforesaid in manner & form
as above ~~is~~ assigned & therefore
he prays the said judgment
may be affirmed & that his
costs may be adjudged to
him &c.

Carpenter & Dunham
Attorneys for Appellee



Glover Cook & Campbell

Ottawa Ills.

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John A. Kentabins

The Chicago & Rock Island
Rail Road Company

Appeal from Henry
Circuit Court

Transcript of Record

Filed Apl. 18. 1864.
L. Leland
Clerk.