

14502

No. _____

Supreme Court of Illinois

Galena & Chicago Union
R.R. Co.

vs.

Griffin

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 146.

Ex. & P.

R. P. D.

75

W. P.

1863

16/507

W. P.

United States of America }
 State of Illinois }
 Whiteside County }

Whiteside Circuit Court Record May Term 1862

At a regular term of the Circuit Court in and for the County of Whiteside and State of Illinois begun and holden at the Court House in the Town of Morrison in said County and State on the third Monday of May in the year of our Lord one thousand eight hundred and Sixty two it being the Nineteenth day of said month

Present Hon W W Heaton Judge of the twenty second Judicial Circuit in the State of Illinois

Present Addison Farrington Clerk of the Circuit Court in and for the County of Whiteside in the State of Illinois

Present Robert G Glendon Sheriff of the County of Whiteside in the State of Illinois

Present David M Hartney States Attorney for the twenty second Judicial Circuit in the State of Illinois

Be it Remembered that heretofore to wit on the Twenty first (21st) day of February A.D. 1862 there was filed in the Office of the Clerk of the Circuit Court of Whiteside County State of Illinois an Appeal Bond, Transcript and other papers in a cause wherein Thomas Guffin was Plaintiff and The Galena and Chicago Union Rail Road Company, Defendant. from Joseph M Gilman Esq one of the Justices of the Peace in said

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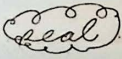
County and State among which said papers appears
the Peoples writ of Summons - in the following words and
figures, to wit

State of Illinois }
Whiteside County }^{ss}

The People of the State of Illinois, to any
Constable of said County - Greeting

You are hereby commanded to Summon the Galena + Chicago
Union Rail Road Company to appear before me at my Office in
Morrison on the 29 day of January A.D. 1862 at 1 o'clock P.M.
to answer the complaint of Thomas Guffin for a failure to
pay him a certain sum not exceeding one hundred dollars,
and hereof make due return as the law directs,

Given under my hand and seal, this 24 day of January
A.D. 1862

Joseph M. Gilman, 
Justice of the Peace

(On the Back of said Summons the following Endorsement appears)
to wit

Served by reading the within to James C Overhiser Station Agent at
Morrison and Leaving a true copy within to said Agent of
within Summons this 25 day of January 1862

Servic 25 copy 25 mileage 1 ml 5 .55

B. L. Bailey
Constable

The following is a copy of the Transcript in said cause
filed on the said 21st day of February A.D. 1862

State of Illinois }
Whiteside County }

In Justice Court Before
Joseph M Gilman Justice

Thomas Guffin
vs

The Galena + Chicago Union
Rail Road Co

Plaintiffs Demand \$100.00

Justice fees 80
one sub 25
continuance 15
one sub 25
continuance 15
swearing witness 30
on trial 2.00
\$3.90
constable fees
B. C. Bailey
per sum 55

January 24 A.D. 1862 Summons issued returnable the 29 day of January 1862 at 1 o'clock P.M. and delivered to constable B. C. Bailey to serve

January 28 A.D. 1862 Summons returned by constable B. C. Bailey served by reading to James C. Overhiser Station Agent and leaving a copy with said Agent of the same. this 25 day of January 1862

const fees 50 cts
January 29 A.D. 1862 1. o'clock P.M. cause continued until the 4 day of February A.D. 1862 at 10. o'clock A.M. by the request of both parties

February 4 A.D. 1862 10. o'clock A.M. Court being called the parties appear and ask for the cause to be continued until 1. o'clock P.M. Cause continued until 1. o'clock P.M. same day

February 4 A.D. 1862 1. o'clock, P. M. Parties reappear the Plaintiff claims of the said Defendants the sum of One Hundred Dollars as Damages for killing a Colt and loaded upon Charles Johnson + William Spears + William Trauger + John Corkron + Thomas Guffin + B. C. Bailey who was sworn and testified on the part of the Plaintiff. the Defendant make no Defense. after hearing the evidence adduced in the cause it is considered by the Court that the said Plaintiff have and recover of the said Defendants

Witness fees
William Trauger 50
B. C. Bailey 50
C. Johnson 50
\$1.50
Costs of Plaintiff
paid by the
Defendants

4
the sum of Fifty dollars for his demand against the said
Defendants and costs of suit herein taxed at Seven dollars
and thirty five cts

Joseph M Gilman J. P.

State of Illinois }
Whiteside County }¹⁴

I Joseph M Gilman a Justice of the
Peace in and for said County do
hereby certify that the foregoing Transcript and the papers
herewith being six in number and being numbered from one
to six containing a full and perfect statement of all the
proceedings before me in said cause

In witness whereof I have hereunto set my hand this 21 day
of February 1862

Joseph M Gilman J. P.

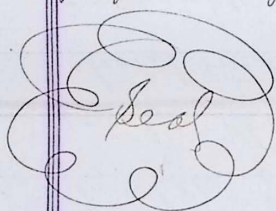
And afterwards to wit on the same day and year last
aforesaid to wit the Twenty first (21st) day of February A.D. 1862
there was issued out of the Office of the Clerk of said
Circuit Court and under the Seal thereof the Peoples writ
of Summons directed to the Sheriff of Whiteside County
to Execute clothed in the words and figures following
to wit

State of Illinois }
Whiteside County }⁵⁵

The People of the State of Illinois. To
the Sheriff of said County. Greeting:

Whereas in a certain cause lately pending before Joseph
M Gilman Esquire, one of the Justices of the Peace, within
and for said County, wherein Thomas Griffin was

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Plaintiff, and The Galena & Chicago Union Rail
Road Company defendant. Judgement was rendered
by said Justice against the said Galena and Chicago
Union Rail Road Company from which judgement
the said Galena and Chicago Union Rail Road Company
has appealed to the Circuit Court of said County.
We Therefore command You, that you summon the said
Thomas Guffin to be and appear before said Circuit
Court, on the first day of the next term thereof, to be held at
the Court House in Morrison on the third Monday in
May next at ten o'clock in the forenoon, and abide by and
perform the judgement of said Court in the premises.



Witness A Farrington Clerk of said Court, and
the seal thereof, at Morrison in said County
this 21st day of February A D 1882
A. Farrington Clerk

And afterwards to wit on the Twenty first day of March
A D 1882 said writ of Summons was returned into ^{the} Court
by said Sheriff Endorsed as follows to wit

State of Illinois *ss*
White County *D* I have duly served this writ, by reading
the same to in the presence and hearing of the within named
Thomas Guffin this 21st day of March, A D 1882
R. E. Glendenien Sheriff

Rec. service, 50. mileage & return 10 - 65 cts By R. E. Logan *clerk*

And afterwards to wit on Friday May 30th A D 1882

the same being one of the regular days of said May term of said Court the following among other proceedings were had and Entered of Record to wit

Thomas Guffin

vs

Appeal

Galena + Chicago Union

Rail Road Company

This day came the said Plaintiff by Teller + Woodneff his attorneys and the said defendants by Henry Price + Sackett their attorneys and issue being joined it is ordered by the Court that a jury come to try this cause, Whereupon came Allen Graves, Ezra Finch, Jos Williams, Wm Morton, A M Glenn, J K Robertson, Edgar Simpson, John S Thompson, Cornelius Springer, Wb Richardson, Geo Martin, Linas Williams and after being duly elected tried and sworn and hearing the evidence and argument of counsel retire to consider of their verdict with leave to read the same

And afterwards to wit on Saturday May 31st 1862 the same being one of the regular days of said May term of said Court the following among other proceedings were had and Entered of Record to wit

Thomas Guffin

vs

Appeal

Galena and Chicago Union

Rail Road Company

This day came the said Plaintiff by

Teller and Woodruff his Attorneys and the said defendants by Henry Price & Sackett their Attorneys. and the Jury Empaneled and sworn herein on a former day of this term of this Court this day return into Court and say "We the Jury find the Defendant Guilty and assess the damages at fifty dollars. And the said Defendants enter their motion herein for a new trial in this cause which said motion is overruled by the Court. It is therefore ordered by the Court that the said Plaintiff have and recover of the said Defendants the sum of Fifty dollars for his damages herein being the amount assessed as aforesaid together with all the costs and charges in and about this suit Expended and that he have Execution therefor. So all of which Rulings the said Defendants by their Counsel Excepts. And on motion the said Defendants are allowed thirty days from this date to file their Bill of Exceptions herein. And the said Defendants pray an appeal in this case to the Supreme Court of this State which said Appeal is allowed on the said Defendants filing their Bond herein in the penal sum of two hundred dollars with Miles & Henry as security within thirty days from this date.

And afterwards to wit on the 30th day of June 1862 there was filed in the Office of the Clerk of said Circuit Court a certain Bill of Exceptions which are in the words and figures following to wit

State of Illinois } 54
Whiteside County }

May Term of the Whiteside County
Circuit Court A D 1862

7
Thomas Guffin

vs

The Galena & Chicago Union
Rail Road Company

Appeal from Justice of the
Peace

Now on this thirtieth day of
May A D 1882 This cause came on for trial before the Hon-
orable William W Leaton Judge of the 22nd Judicial Circuit
Court of the State of Illinois and a Jury being called, came
likewise, and after being elected tried and sworn to try the
issues joined herein. The following testimony was introduced
on the part of the Plaintiff Thomas Guffin being
first sworn (testified) as follows I know the Plaintiff he is
my Father Saw the colt dead by the side of the Rail
Road. The colt belonged to the Plaintiff in this suit.
This was about Eleven months ago It was lying on the
South side of the Rail Road track I saw it five min-
utes after the cars passed Don't know what it was worth
Charles J Johnson being sworn testified I know the
Plaintiff - I know a colt was killed - don't know it
was Plaintiffs I was sitting right here in the Court House
on witness stand - Saw the train as it came past the cor-
ncrib: colt started from behind the crib: and went to cross
the track: it was about half way across, when cars struck
it and pushed it off - No bell was ringing when I saw
them - The Train was behind time. They were going fast:
I think from 15 to 20 miles an hour - according to my
best judgement - and run past the usual stopping
place I am not acquainted with Rail Roads rate of

8 Speed, Think they were not running quite so fast as when running between Stations - It was the regular Mail Train going East. This is one of its Stations - The track crosses two Streets. The bolt was struck about 60 feet East of the first crossing and 150 feet or more West of the 2nd crossing - The colt when I saw it was running from behind a corn crib, and running diagonally across the track. I saw no other colts with it.

Cross Examined - I reside in Morrison. It is an incorporated town - and was at the time the bolt was killed. As the colt came out from the corn crib, it ran South across the track, and struck the track just as the car reached that point, bolt tried to jump the track ahead of the Locomotive, and in an instant more would have been across. The corn crib was on the Depot grounds and about 25 feet north of the main track - bolt came from the East End of the corn crib - he was running from the west and going East - bolt was killed on the depot grounds of the defendant and within the corporate limits of the town of Morrison. There were buildings and obstructions & the view of the colt, so as to prevent me seeing exactly where the colt was when it started - bolt was running when I saw it - Engineer on the train could not see the colt, till the train came through the cut at the west end of depot grounds - and about 300 feet from where the colt was struck - I could not see the car but an instant before the train struck the bolt because of obstructions - bolt was killed on the ground belonging to the Rail Road Company - devoted to Rail Road

uses

William Traeger was sworn + testified — That he knew the parties — Remembered the morning when the colt was killed — was on the wood pile at his home from 100 to 150 yards from the spot — The track runs through the end of the lot — The train came fast did not blow once — did not ring until near the depot — The train was 15 or 20 minutes late — behind time by my watch. Keep the Rail Road time very close, so as to keep posted as to the arrival of packages for Chicago — Train was going at the rate of 15 or 20 miles per hour — past the cattle Guard at the west end of the depot and about 100 paces west of the crossing — could not see the cars for my home — Speed was unusual more than twice as fast as usual — I live between 50 or 60 yards from the cattle Guard at the West End of the depot, and about 100 yards from the crossing —

Cross Examined

My home is on the North side of the Rail Road and west of the first cattle Guard — at the west end of the depot — There is a cut west of the crossing — Corn bins are on the depot grounds, between the main track and a side track — The cattle Guard is distant from the depot buildings about 100 yards — was chopping wood when the train came by — I saw the colt after it was hurt — both legs were cut off — Killed about one year ago in this State + County

James W Eves, was sworn + testified. Was in Mr Rudds Shop when colt was killed: saw train coming: was behind time a little: Running at the rate of about 20 miles

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an hour. I heard no bell or whistle until they approached
the crossing streets. I remarked that no bell at that
time had been rung - train was running twice as fast as
usual - Cross Examined - Know the parties
Colt was running at large upon the depot grounds of the
defendant - There were corn cribs between the main track
& a side track on the depot grounds - Never worked on a
Rail Road nor timed the Speed of cars
William Speers

Know the Plaintiff - Know of the colt being
killed - I thought the train came faster than usual.
I saw the colt when it started from the crib. but did
not see it when it was struck - I saw it just before it
was struck - it was on the North side of the main track &
South side of the corn crib - It started to run South west
in direction of the cars. and then turned towards the South
East. The colt could have got across if they had been
running at usual rate of Speed

Cross Examined I saw the colt near
- the corn crib - farthest east when I saw it - when
I saw it was running diagonally across the track towards
the locomotive. Colt was within 20 feet of track when
I saw it - Don't know whether there was corn in the
crib or not. Colt was running fast when I saw it -
I think they blew the whistle once for down brakes -
I know the cars were coming by the sound of the whistle
- One Blow means to break down to stop

Bela B Bailey being sworn Testified

I know the parties. have seen the colt, was running

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loose - in the Village - It was worth when killed
\$50 - There was corn in the crib the depot grounds

Elihu Redfield - was sworn on the part of the defendant & testified - That he was acting as Engineer for the defendant & recollects when the colt was killed. Was Engineer on the train & saw the colt when it was killed - Train was going East regular morning passenger train going East Was running about 15 miles an hour when I passed the first cattle guard - The colt could not be seen - The train struck the colt one or two rods from the west crossing - Colt could not be seen from the Engine at first - was behind a corn crib & came out & then was seen - The Bell was rung at least 80 rods West of the West crossing and until we reached the Station The whistle was a signal to break to stop the train & the breaks were put down to stop the train We were running no faster than usual - Train stopped at usual stopping place at the depot building - Train could not have stopped at the Station depot if it had been running at 20 miles an hour after it crossed the first crossing on the cattle guard - I saw the colt but a short time before we struck it - There was no possibility of stopping the train so as to save the colt from the time I first saw it It was attempting to cross the track ahead of the locomotive & running diagonally across the track
Crops Examined - If the train had been running

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20 miles per hour we could not have stopped at depot building - But 15 miles which is the common speed is about the Speed we were running - we were able to stop

James Moore Being sworn on the part of defendant Testified - Was Fireman on the Engine when the colt was killed - I rung the Bell 80 rods from the crossing and always do After we passed the switch I saw the colt come from behind the west end of the west corn crib on the depot grounds and was running South East towards the main track & diagonally across it and towards the locomotive I was ringing the Bell and kept ringing the Bell till we stopped at the Station. The colt attempted to jump across the track ahead of the locomotive. Train was running about 15 miles an hour. Speed was not unusual

Cross Examined by Counsel for Plaintiff

We are required by the Rules of the Rail Road Company to ring the Bell before we come to crossings We are liable to be discharged if we fail to ring the bell 80 rods from crossings & continue to ring it till we pass the crossings I run six days of the week at work. Three days I run East and Three days I run West

Charles Johnson was then recalled by Plaintiff and testified. That it was nine or ten rods east of the crossing when he first saw the colt.

Whereupon the evidence was closed & was all the evidence introduced upon the trial of said cause

By agreement of parties it was admitted on the part of the

13 Defendant - That the defendant before and at the time of the accident and of the commencement of the suit, was and still is a corporation under the name and style of the Galena & Chicago Union Rail Road Company - and was at the times aforesaid & still is running & operating a Rail Road from Chicago to Fulton City passing through the town of Morrison & County of Whiteside in the State of Illinois

And it was admitted on the part of the Plaintiff that the town of Morrison aforesaid was at the time of the killing of said colt an incorporated town and that the Depot Grounds of said defendant upon which said colt was killed was within limits of the corporation of said Town of Morrison Whereupon after the arguments of Counsel for said parties respectively The Court instructed the Jury in the words and figures following to wit (on the part of the defendant)

No 1st That the mere proof of the killing of the said colt by the servants or Employees of the rail road is not alone sufficient to entitle the Plaintiff to recover in this action. but to entitle him to recover he must prove that such killing was by the negligent or wilful act of the servants or the Employees of the said defendant: and that such killing did not happen from the negligence of the Plaintiff

No 2nd If the Jury believe from the evidence that the negligence of the Plaintiff contributed in any material degree to the loss of the colt, the Plaintiff can not recover for such loss

No 3rd If the Jury believe from the evidence that the Plaintiff permitted the colt to run at large within the limits

Given

Given

of the village of Morrison + that whilst so running at large it strayed upon the rail road track of the defendant, + on the depot grounds of the defendant, within the limits of said village. and was then injured, so permitting said colt to run at large is evidence of such a degree of negligence on the part of the Plaintiff as to prevent his recovering in this suit: unless the evidence shows that the injury to the colt was occasioned by the wilful or grossly negligent acts on the part of the Employees of the defendant

No 4 That by the laws of the State of Illinois the defendant is not bound to fence its track within the limits of the village of Morrison

No 5 If the Jury believe from the evidence that the Plaintiff allowed his colt to run at large within the limits of the village of Morrison - where the colt was liable to get upon the Rail Road track of the defendant. and that while so running at large. the colt did so stray upon said Rail Road track of defendant on the depot grounds, and was then injured or Killed: The Plaintiff was guilty of such negligence as will prevent his recovery in this action unless the colt was Killed by the wilful or grossly negligent act of the defendant

No 6 If the Jury believe from the evidence that the colt was upon the the depot grounds of the defendant and strayed from there upon the track and was there injured, the defendant is not liable for such injury unless the Plaintiff has shown by the evidence that the colt was killed through the wilful or grossly

negligent act of the servants or Employees of the defendant

The defendant was not bound to run his train at such a rate of Speed as to prevent injury to the colt, but had the right to run the trains on their road at such speed, and at such times as may best suit their convenience consistent with the safety of passengers and freight

Given
No 7 Positive evidence that the bell was rung, or whistle was sounded, is entitled to more weight than negative evidence in relation to such facts

Given
No 8 If the Jury believe from the evidence that the colt when injured was straying upon the depot grounds and tracks of the defendants, it is not material at what rate of Speed the cars were running, within reasonable limits. The defendants were not bound to run their cars with reference to the safety of Stock straying upon the track, The defendants had a right to run at any rate of Speed consistent with the safety of persons and property rightfully thereon

And the following instructions were given by the court on the part of the Plaintiff

1st That gross negligence is a relative term, and whether an act be one of gross negligence or not, depends upon all the circumstances, that surround the act in respect to the time, place & the customary and usual way in which such act

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Given

is performed, together with the probabilities that injury may result from it, and not whether it be an act of gross negligence or otherwise is a question for the Jury in view of all the evidence in this cause

Given

No 2 If the Jury believe from the evidence that the defendants at the time of the killing of the colt if such killing is proved were guilty of gross negligence & that such negligence was the proximate cause of the killing the Plaintiff will be entitled to recover even if he has been guilty of slight negligence

When the Jury retired to consider of their verdict, and afterwards to wit on the 31st day of May came into Court and returned a verdict in favor of the Plaintiff & assessed his damages at the sum of fifty dollars

Whereupon the defendant by his counsel did then & there and at the time thereof move the Court for a new trial in said cause - for the reason that the verdict of the Jury aforesaid was against the law and the evidence, and against the instructions of the Court.

And afterwards to wit on the fourth day of June at the term aforesaid the said motion having been called on for hearing before the Court, when the said motion of the said defendant was overruled by the Court, and the verdict of the Jury sustained and a new trial refused - So the overruling of

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which said motion & the refusing to grant a new trial as aforesaid by the court. The defendant by his counsel did then & there and at the time thereof except and prayed an appeal

W W Heaton
Judge

Be it remembered that heretofore to wit on the Twenty first (21st) day of June A D 1862 there was filed in the office of the clerk of the Circuit Court in and for said County and State a certain Appeal Bond in the words and figures following to wit

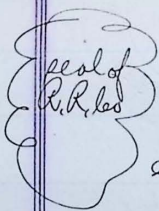
Know all men by these presents that the Galena and Chicago Union Rail Road Company as Principal and Miles S Henry as security are held and firmly bound unto Thomas Guffin in the penal sum of two hundred dollars good and lawful money of the United States, for the payment of which, well and truly to be made. The said Galena and Chicago Union Rail Road Company binds itself and its successors and the said Miles S Henry binds himself his heirs Executors and administrators jointly, severally and firmly by these presents. Witness the seal of the said Galena & Chicago Union Rail Road Company and the seal of the said Miles S Henry this 21st day of June A D 1862. The consideration of the above obligation is such that whereas the above named Thomas Guffin did at the May Term of the Whiteside Circuit Court held in and for the County of Whiteside in the State of Illinois A D 1862

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recover a Judgement against the above bounden Galena
and Chicago Union Rail Road Company for the sum of
Fifty dollars and costs, to reverse which said Judgement
the said Galena and Chicago Union Rail Road Company
has taken an appeal to the Supreme Court within and
for the Third Grand Division of said State

Now if the said Galena and Chicago Union Rail Road
Company shall duly prosecute its said appeal and
pay or cause to be paid, the amount of said Judgement,
and all Judgements, costs, interest and Damages, which
the said Supreme Court shall adjudge against said
Galena and Chicago Union Rail Road Company and
abide the order and Judgement of said Supreme Court, in
this behalf, then this obligation to be void, otherwise to
remain in full force and effect

W. H. Brown Presd

M. S. Henry Secy



Attest

W. M. Larrabee,
Secretary

State of Illinois }
Whiteside County }

I Addison Farrington Clerk of the Circuit Court within and for said County and State do hereby certify the above and foregoing to be a true, full and complete copy of all the Original Papers and Proceedings Entered of Record (Except the Instructions Given to the Jury in said cause which are incorporated in the Bill of Exceptions) in a certain cause lately pending in said Court wherein Thomas Griffin was Plaintiff and the Galena and Chicago Union Rail Road Company Defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at Monism in said County this Third day of January A.D. 1863

A. Farrington Clerk
for J. Blendenin Deputy Clerk

Galena & Chicago Union
Rail Road Company
Appellant

Thomas Griffin
Appellee

Supreme Court
Third Grand
Division.

And now comes the Appellant herein by its attorney Elliott Anthony and says that in the record and

proceedings in this case manifest
error both intervenor and
said Appellant. therefore assigns
as special causes of error.

1st The verdict of the jury is
contrary to the law and
the evidence in this case

2^d The court erred in overruling
the motion for a new trial
in this case.

3 The grounds of the jury was
contrary to the instructions
of the court.

4th The judgment of the court
should have been in favor
of the Appellants for these
errors and others appearing in
said record & proceedings herein
the said Appellant prop. that
said judgment be reversed
set aside & held for nought

E. Anthony
Atty for Appellant

Transcript 146

146

Thomas Guffin

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Galena + Chicago Union
Rail Road Company

Filed April 9. 1863.
L. Veland
Clk.

Per 105.00

State of Illinois. Appeal to the
White Pine County - } Supreme Court 3d
Galena & Chicago } Second Division from
Union Rail Road } White Pine County
Company, Appellant } April Term A.D. 1863
as
Thomas Buffin
Appellee

And the said
Thomas Buffin now comes by Teller
& Woodruff his attorneys say that
there is no error either in the
second proceedings aforesaid or
in giving the judgment aforesaid
therefore he prays that the said
judgment be affirmed & that his
costs may be adjudged to him.

Teller & Woodruff
Attys for Appellee

146
Galena Chicago
Union RR Co
Appellants

vs
Thomas Suffern
Appellee

founder in error

April 21st 1883
L. Leland
Clerk

STATE OF ILLINOIS, WHITESIDE COUNTY.

Error to the Supreme Court, 3d Division, from Whiteside County.
April Term, A. D. 1863.

Appellee
THOMAS GUFFIN, ~~DEFENDANT IN ERROR~~, —VS.—GALENA & CHICAGO
UNION R. R. Co., ~~PLAINTIFFS IN ERROR~~ *Appellant*

Appellee
This action was brought by ~~defendant in error~~ to recover of the Company the value of a colt killed, as was alleged by the gross negligence of the Company's servants in running a train on said Company's road. The evidence shows the colt to have been killed in May, 1861, within the limits of the town of Morrison, between two streets of said town, upon the depot grounds of the Company and but a few rods west of the depot. It also shows that the train was going east, was behind time, was running about twice as fast as usual, and that no bell was rung or whistle sounded until within a few feet of the first street, and from 30 to 60 feet from the place where the colt was struck, and that the rate of speed was such that the train could not, or at least did not, stop at the usual place of stopping, but run past. On this evidence all the instruction asked by the Company's counsel being given by the Court, the jury returned a verdict in favor of defendant, for \$50, and the Company bring the case to this Court by writ of error.

Now as there was no exception taken to the admission of any of the testimony, and all the instructions asked by the Company's counsel were given and but two given for ~~defendant in error~~ *Appellee* which are unobjectionable, the only question which arises is, is the verdict of the jury in this case so manifestly unsupported by the evidence and contrary to law, as to call for or warrant a reversal of the judgment by this court?

That this judgment ought not to be reversed on the ground that the verdict was contrary to evidence needs no argument, for it is only where the verdict of the jury strikes the *mind at first blush as palpably and manifestly contrary to the evidence* that the court will reverse it. Dawson vs. Robbins, (5 Gil. 72;) Johnson vs. Moulton, 1 Seam. 532. "When there is a contrariety of evidence on both sides and the facts and circumstances, by a fair and reasonable intendment will warrant the inference of the jury, the court will reluctantly, if ever, disturb their verdict," &c. Lowry vs. Orr, (1 Gil. 84.) In this case there can be no doubt that the preponderance of evidence is in favor of the verdict, and it ought not to be disturbed upon this point.

The court at the request of Company's counsel, instructed the jury that if plaintiff's colt was running at large, &c. plaintiff could not recover unless he showed *gross* negligence on the part of the Company. It must then be taken as found by the jury that there was gross negligence on the part of the Company, and that such negligence was the cause of the injury complained of. This was a case for the jury to decide. Pierce on R. R. Law, page 282 and case cited, and the evidence is amply sufficient to warrant this finding. For, 1st, It was gross negligence to omit to ring the bell or blow the whistle as enjoined by statute. Upon this point there are four witnesses who swear positively that no bell was rung till after the colt was struck, and no whistle blown till near the first crossing and about from 30 to 60 feet from the place where the colt was struck, one of them (Trauger) lives 100 yards west of crossing and was at his house when the train passed, one (Johnson) saw the colt when struck and one (Eves) remarked it to others at the time that no bell was rung, and one (Spears) heard but one *toot* just at the crossing. To oppose this testimony there are but two witnesses, employees of the Company, and who admit that the regulations of the road are such that if it be shown they have omitted to ring or blow they will be discharged. As the jury were judges of the credibility of witnesses is it not apparent, that no exception ought to be taken to their finding and that no warning was given as required by statute? That such omission was gross negligence, is seen from the fact that the train was approaching a town where the road is crossed by at least two streets, and where for the convenience of the Company the usual precautions to keep the track clear, such as fences, cattle guards, &c., have been dispensed with; it was behind time and going at an unusual rate of speed. It was clearly the duty of those who had charge of the train to be the more cautious, as there was greater liability to accident. The question of negligence is a relative one depending upon circumstances. What would be but slight negligence or none at all in running a train on the prairie where the road is fenced, might be gross negligence in running through a town or city where no fence is kept, and where streets cross the road with but little distance between them. To run into a town this way without ringing or blowing is a clear case of gross negligence on the part of the Company. This is the more apparent from the fact that there was nothing to prevent cattle coming on the track at that place, and in view of that more care was required of the Company. In the case of Sullivan vs. Philadelphia & Reading R. R. Co., 30 Penn State 234, where the engine struck a cow that was on the track, &c., the Court say—"If cattle were in the habit of coming upon the road at that place, or if there was nothing to *prevent* them, it was a contingency that the Company were bound to anticipate and provide against."

True, this was a case where the safety of a passenger was con-

cerned, yet if the fact that there was nothing to prevent cattle coming on the track imposed new obligations in the one case it must in the other, for these obligations were imposed by reason of the increased liability to accident, requiring greater diligence, and making what would otherwise be slight, to become gross negligence. A failure to ring or blow makes a *prima facie* case of negligence in any case. 13th Ill., 549. As more than ordinary care was required of the Company in running into a town of this kind, it is clear that the failure to ring and blow in this instance was gross negligence on the part of the Company, and the jury were right in so finding, and such finding ought not to be disturbed.

2nd. There was gross negligence shown in the rate of speed at which this train was running. And here, too, the jury were instructed "that defendant was not bound to run its trains at such a rate of speed as to prevent injury to the colt, but had the right to run its trains at such a rate of speed and at such times as may best suit their convenience, consistent with the safety of passengers and freight," and as the jury found defendant guilty, they must be held to have found the rate of speed on that occasion inconsistent with such safety, and the Company guilty of gross negligence in that particular, and unless this finding is entirely unsupported it ought not to be disturbed. Here, again, there is a contrariety of evidence, four witnesses against two, the former swear that the train was going "15 or 20 miles an hour," "twice as fast as usual," "very fast," "and so fast that it could not be stopped at the usual stopping place," &c. Now when we consider, as the evidence shows, that this rate of speed was kept up through an incorporated town, over two street crossings, near to and on the depot grounds where the trains regularly stop, and where, as a matter of fact, it usually and necessarily runs at a much lower rate of speed, one can easily see that the finding of the jury was correct. The liability of meeting with obstructions is greatly increased by the absence of fences, cattle guards, &c., and the passers upon the two streets, hence the rate of speed should have been correspondingly lower, and a failure to adopt this course was a gross negligence on the part of the Company.

Again, it appears by witness Spears, that, had the train run at the usual rate of speed the colt could have escaped.

Now when a customary and usual rate of speed has been established any one has a right to act upon his knowledge of the fact, and negligence cannot be imputed to him if he acts upon such knowledge different from what he would under other circumstances. The defendant in error knows that a low rate of speed in running into the village is usual and necessary to the safety and convenience of the trains and persons crossing the road, while out of the village the road is fenced and no danger can be apprehended and no negligence can be imputed. But

double the rate of speed and it is another case. Who now is guilty of negligence, he who has acted upon the established rate of speed, or he who has without warning changed the whole aspect of the question?

3d. Again, all the care required of plaintiff in order that he may recover in a case like this, is "ordinary care" Chicago & Galena U. R. R. Co.—vs.—Jacobs, (20th Ill., 478) and we submit that the plaintiffs in this case did use ordinary care, and that nothing but the unusual and extraordinary rate of speed of the Company's train caused the accident.

Or suppose it be admitted that there was some negligence on the part of the defendant in error in allowing the colt to run at large, yet he is entitled to recover, for under the circumstances, his negligence is only slight, while that of the Company's is clearly gross, and in such a case plaintiff can recover. Chicago, Burlington & Quincy R. R. Co.—vs.—N. M. Dewy, (26 Ill. 255) and so too in G. & C. U. R. R. Co.—vs.—Jacobs, (20 Ill. 496-7) where it is said "whenever it appears that the plaintiff's negligence is slight as compared with defendants greater or gross negligence, he must not be deprived of his action."

4th. If there is any negligence to be imputed to defendant in error, it was the remote and not the proximate cause of the injury complained of, and in such a case plaintiff may recover. Button,—vs.—Hudson River R. R. Co. (18 N. Y. Rep. 248-58) Kerwhacker,—vs.—Cleveland & Cincinnati R. R. Co., 3 Ohio, 172; Id.—vs.—Elliott, 4 Ohio, 464, and C. H. & D. R. R. Co.,—vs.—Waterson, 4 Ohio, 424; Cranstons,—vs.—C. H. & D. R. R. Co., 1 Handy, 193; Trow,—vs.—Vermont Central R. R. Co., Vermont 487-94. In the latter case, the Court say this seems now to be the settled rule in England and in this country, and in the same decision it defines the use of the words "proximate cause" to mean "negligence occurring at the time the injury happened," and says that "even had the plaintiff been guilty of positive wrong in placing his horse in the highway, yet the defendants were bound to exercise reasonable care and diligence in the use of their road, &c., and if for want of such care the injury arose, they are liable."

In Kerwhacker vs. C. C. & C. R. R. Co. (3 Ohio, 172,) the court says "the remote negligence of the plaintiff will not prevent his recovering for an injury to his property, immediately caused by the negligence of the defendant." The negligence of plaintiff that defeats a recovery must be the proximate cause of the injury. "Suffering domestic animals to run at large by means whereby they stray upon unclosed rail road tracks, &c., is not, in general, a proximate cause of the loss." If, then, any negligence can be imputed to defendant in error at all, it was only the remote cause of the injury, and he should be allowed to recover. The defendant in error was in the exercise of his rights in allowing his colt to run at large, and even were he a trespasser the Company were bound to use ordinary care to prevent injury to the colt. Lafayette & Ind. R. R. Co. vs. Shimer (6 Ind., 145). (24 Vermont, 488). (5 Denio, 255 and 256). Pierce on American R. R. Law, 323. This they have failed to do, and under any view that can be taken of this case the finding of the jury was correct, and the judgment should be affirmed.

JOHNSON & TELLER,
Counsel for Def't in Error.

And 298
And 295
And 271
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vs Appellants
Thomas Buffum
~~Defts in Error~~
~~Defts~~ Bond & Appell

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

THE GALENA & CHICAGO UNION RAILROAD COM-
PANY, *Appellant,*

VS.

THOMAS GRIFFIN, *Appellee.*

ABSTRACT OF RECORD.

This was an action commenced before Joseph M. Gilman, a justice of the peace, in the county of Whiteside, by the plaintiff against the defendant, to recover damages for the killing of a colt. The justice rendered a judgment against the defendant, for fifty dollars, and the defendant took an appeal to the Circuit Court of said county of Whiteside—which was there tried, and a verdict rendered against the Company.

PLAINTIFF'S EVIDENCE.

Rec. p. **Thomas H. Griffin** being first called at the trial, by the plaintiff,
7 in the Circuit Court, testified as follows :

(2)

I know the plaintiff. He is my father. Saw the colt dead by the south side of the railroad. The colt belonged to plaintiff; it was about 11 months old. I saw it five minutes after the cars passed. Don't know what it was worth.

Charles J. Johnson next testified as follows:

8 Know plaintiff. Know that a colt was killed—don't know that it was plaintiff's. Was sitting in court house—saw the train as it came past the corn crib—*colt started from behind the crib, and went to cross the track, and was about half way across when cars struck it and pushed it off.* No bell was ringing when I saw them. The train was behind time. They were going fast—think from 15 to 20 miles an hour—and run past the usual stopping place. *I am not acquainted with railroad rate of speed. Think they were not running quite so fast as when running between stations.* It was the regular mail train going east. This is one of its stations. The track crosses two streets. The colt was struck about 60 feet east of the first crossing, and 150 feet or more west of the second crossing. *The colt, when I saw it, was running from behind a corn crib, and running diagonally across the track.* I saw no other colts with it.

Cross Examined :

(4)

Cross Examined :

Defendant's Instructions.

1. That the mere proof of the killing of the said colt by the servants or employees of the railroad, is not alone sufficient to entitle the plaintiff to recover in this action; but to entitle him to recover, he must prove that such killing was by the negligent or wilful act of the servants or the employees of said defendant; and that such killing did not happen from the negligence of the plaintiff.

2. If the jury believe, from the evidence, that the negligence of the plaintiff contributed in any material degree to the loss of the colt, the plaintiff can not recover for such loss.

14

3. If the jury believe, from the evidence, that the plaintiff permitted the colt to run at large within the limits of the village of Morrison, and that whilst so running at large it strayed upon the railroad track of the defendant, and on the depot grounds of the defendant, within the limits of said village, and was there injured, so permitting said colt to run at large is evidence of such a degree of negligence on the part of the plaintiff, as to prevent his recovering in this suit, unless the evidence shows that the injury to the colt was occasioned by the willful or grossly negligent acts on the part of the employees of the defendant.

4. That by the laws of the State of Illinois, the defendant is not bound to fence its track within the limits of the village of Morrison.

5. If the jury believe, from the evidence, that the plaintiff allowed his colt to run at large within the limits of the village of Morrison, where the colt was liable to get upon the railroad track of the defendant, and that while so running at large, the colt did so stray upon said railroad track of defendant, on the depot grounds, and was there injured or killed, the plaintiff was guilty of such negligence as will prevent his recovery in this action, unless the colt was killed by the willful or grossly negligent act of the defendant.

6. If the jury believe, from the evidence, that the colt was upon the depot grounds of the defendant, and strayed from there upon the track, and was there injured, the defendant is not liable for such injury, unless the plaintiff has shown, by the evidence, that the colt was killed through

15 the willful or grossly negligent act of the servants or employees of the defendant. The defendant was not bound to run his train at such a rate of speed as to prevent injury to the colt, but had the right to run the trains on their road at such speed and at such times as may best suit their convenience, consistent with the safety of passengers and freight.

7. Positive evidence that the bell was rung, or whistle was sounded, is entitled to more weight than negative evidence in relation to such facts.

8. If the jury believe, from the evidence, that the colt, when injured, was straying upon the depot grounds and track of the defendants, it is not material at what rate of speed the cars were running, within reasonable limits. The defendants were not bound to run their cars with reference to the safety of stock straying upon the track. The defendants had a right to run at any rate of speed, consistent with the safety of persons and property rightfully thereon.

Plaintiff's Instructions.

16 1. That gross negligence is a relative term ; and whether an act be one of gross negligence or not, depends upon all the circumstances that surround the act in respect to the time, place and the customary and usual way in which such act is performed, together with the probabilities that injury may result from it, and not whether it be an act of gross negligence or otherwise, is a question for the jury, in view of all the evidence, in this cause.

2. If the jury believe, from the evidence, that the defendants, at the time of the killing of the colt, if such killing is proved, were guilty of gross negligence, and that such negligence was the proximate cause of the killing, the plaintiff will be entitled to recover, even if he has been guilty of slight negligence.

Verdict of Jury, for fifty dollars.

Motion for new trial overruled, and exceptions.

17 **Appeal** Bond.

ASSIGNMENT OF ERRORS.

1. The verdict of the jury is contrary to the law and evidence in the case.
2. The Court erred in overruling the motion for a new trial in this case.
3. The verdict of the jury and judgment of the Court should have been in favor of the appellant.

APPELLANT'S BRIEF AND POINTS.

All there is in this case, is this : Thomas Griffin, of the town of Morrison, Whiteside county, was the owner of a colt, "about eleven months old," which he permitted to run at large, in the streets of the town.

Sometime in the year 1861, as one of the regular passenger trains of the Galena and Chicago Union Railroad Company, on one of its regular trips from Fulton City to Chicago, was approaching the station, the colt, which was standing behind a large corn crib, became frightened by the noise, and sprang out, and ran *directly* in front of the locomotive and before the train *could be stopped or anything done*, was run over and killed.

The bell was ringing at the time ; the train running at its *usual* speed, and as soon as the colt came in front of the engine, the brakes were applied, and, so far as can be ascertained from the evidence, not the *slightest particle* of negligence or dereliction of duty can be discovered on the part of the Railroad Company or any of its agents, or employees, in any way, shape or manner.

Mr. Griffin filed a claim against the company, and on the company refusing to pay, an action was commenced before a justice of the peace—a trial had, and a judgment rendered against the company.

An appeal was taken to the Circuit Court, and a trial there took place before a jury of *twelve* men ; and they, *contrary to all of the evidence*

in the case, and contrary to the instructions of the Court, found a verdict against the company for fifty dollars.

A motion was made for a new trial, which motion was overruled, and an appeal taken to this Court.

The amount involved in this case is *small*, but we think it presents a case of *great* wrong and injustice. What more *could* have been done than *was* done, under the circumstances, we are at a loss to determine.

We respectfully submit to this Court, that the verdict in this case is directly contrary to *the evidence* and the instructions, and should be reversed. There have been so many of these cattle killing cases before the Court, and the law is now so well settled, that argument or citation of authorities cannot aid the Court in coming to a conclusion in this case.

The *facts* are precisely as above set forth, and if this verdict can be sustained, under the circumstances, then there is no case in which a railroad company would not be liable for killing animals, whether they came by accident upon the track, or whether they run recklessly against a passing locomotive.

We think that this case belongs to that category of cases, specified by the Court in the case of *Higgins vs. Lee*, 16 Ill., 500, in which the following rule is laid down, to-wit: "Where it is apparent, as it is here, that "the jury must have misunderstood or *disregarded* the *evidence* or *instructions* of the Court, or neglected properly to consider the facts, or overlooked prominent and essential points in them, and have failed to do "substantial justice, we are compelled to set the verdict aside and grant "a new trial."

A simple examination of the evidence in this case, and instructions given by the Court, will, we think, show that the Court below erred in not granting the appellant a new trial; and that the jury found their verdict against both the law and the evidence. It is for these reasons that we respectfully submit that the judgment in this case should be reversed.

ELLIOTT ANTHONY,

Attorney for Appellant.

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Galena & Chicago Union
Rail Road Company

vs

Thomas Griffin

Abstract of Record

Filed April 23-1863

L. Leland

Clerk

and had ~~been~~ for at least eighty
 rods. This was all that the agents
~~could do to~~ of the company ~~could~~
 do to prevent the accident. Instea
 of the evidence showing negligenc
 -ce, it seems to establish the high
 -est degree of care, that could have
 been exercised under the circum
 stances. We can perceive no om
 -ission of duty on this part.

The finding of the jury was, we
 think, manifestly against the
 evidence, and the court below
 should have granted a new trial.
 The judgment must be ~~reversed~~
 -ed and the cause remanded.

~~Judgment Reversed.~~

~~In this opinion the whole Court concurred~~

Judgment reversed.

The Galena & Chicago
R R Co

146 vs 33

Thomas Griffin

Opinion by
Walker.

Record Book 13
p 49.