

No. 12677

Supreme Court of Illinois

Town of Ottawa

vs.

Foster

1775
Journal of

Timothy

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1767

1858

LaSalle County Court September Term 1857
State of Illinois
LaSalle County
Pleas Proceedings and Judgments
held and taken in and before the LaSalle -
County Court in the State of Illinois at the Court
House in Ottawa in the County of LaSalle of
September Term thereof to wit, of the Seventh
day of September A.D. 1857 and of the Independence
of the United States of America the Eighty Second
Present Hon. ^{John B. Champlin} Henry G. Cotton Judge

Be it remembered that heretofore to wit on the
29th day of July 1857 a precept was filed in and
a summons issued out of the clerk's office of the
LaSalle County Court, Illinois in the following
words and figures to wit -

The People of the State of Illinois.
To our Sheriff of our County of LaSalle Greeting. We,
command You that you Summon The Town
of South Ottawa if it shall be found in your
County personally to be and appear in our LaSalle
County Court before our Judge thereof on the first
day of the next Term of said Court to be held
at the Court House in Ottawa on the first Monday
in September next at Ten o'clock in the forenoon
then and there to answer unto Amasa Foster for
use of George Whipple in a plea of case to his

(2)

damage of Three Hundred dollars, And have
you then there this writ and the manner in which
you shall have executed the same

In witness whereof we have caused the seal
of our said Court to be hereunto affixed and attes-
tified by Samuel W. Raymond our
Clerk thereof at Ottawa 29th day of July
1857.

Samuel W. Raymond clerk
E. L. Herrick Deputy

Which summons was returned and filed in
said clerk's office Aug 31, 1857, with the following
endorsement thereon:-

Served by reading the within summons to Arthur Lowman
Supervisor of the Town of South Ottawa and deliv-
ering to him a copy thereof this 25th day of August 1857,
Fees \$5 & R. \$11 - 3 miles "15 - 1 copy "57 - \$ 120

And afterwards to wit on the 18th day of August
A.D. 1857, a declaration was filed in the office of
the clerk of said Court in the following words and
figures to wit:

State of Illinois }
LaSalle County } ^{and} 20th County Court in & for said
County to September Term A.D. 1857.

Amasa Foster plaintiff in this suit for the use

of George N. Whipple assigned by Glover & Cook his
attorneys complain of the Town of South Ottawa
defendant summoned &c of a plea of trespass on the
case for that whereas heretofore to wit on the 21st
day of December A.D. 1856 and for a long space of
time before that time there was in the said Town
of South Ottawa a certain common and public
Highway which was during all the time aforesaid
a common and public Highway in said Town
for all citizens of said Town and others to pass
and repass with wagons carriages and other
vehicles at their free will and pleasure to wit=
at the County aforesaid which said common and
public Highway it was the duty of the said
Town of South Ottawa during all the time
aforesaid to keep in good repair so that the
same might be safely used by the citizens of
said Town and others in passing and repassing
over and along the same with horses wagons
carriages and other vehicles at their free will
and pleasure. Plaintiff avers that on the day & year
aforesaid and at the County aforesaid upon the said
common and public Highway in said Town of South
Ottawa there was a certain bridge which said
bridge was constructed across a certain stream called
Coville Creek at a point on said common & pub-
lic highway nearly on the west line of Section No.
Thirty five in Township Thirty Three Range No Three

East of the 3^d principal meridian in said LaSalle County, which said bridge was a high bridge the same being raised so that the waters of said Stream might freely pass in time of highwater and that there were on each side of said Bridge high embankments of earth for the purpose of enabling persons traveling said common and public Highway with their teams wagons and carriages and other vehicles to pass and repass upon said bridge and the plaintiff avers that it was then and then the duty of the said Town of South Ottawa to keep said embankment in good repair so that the same might be safely used by the citizens aforesaid with their teams wagons carriages and other vehicles in passing and repassing over and along the same that it was then and then the duty of the said Town of South Ottawa to have said embankments so constructed that the same might be safely and by the citizens aforesaid in the manner aforesaid, And the plaintiff avers that the said Town of South Ottawa at the time and place aforesaid neglected to keep said common & public highway in good repair so that the same might be used by the citizens aforesaid in the manner aforesaid that the said Town of South Ottawa then and then carelessly & negligently suffered the same to be out of repair in this to wit=

that the embankment aforesaid on the South
end of said bridge on the said common &
public highway was elevated above the land
adjoining it to a great height to wit of the
height of Twenty feet and there was not along
the sides of said embankment any railing guard
or other protection to prevent teams wagons carriages
and other vehicles from going over the sides of
said embankment, the wagon track along
said embankment being on a narrow track to
wit of the width of Twelve feet & the sides of said
Embankment being then and there nearly
perpendicular. And the plaintiff avers that
by reason of the negligence of the said Town of
South Attenu in not keeping the said common
and public highway in good repair at the point
aforesaid and by reason of the same being out
of repair in the manner aforesaid on the day
& year aforesaid & at the county aforesaid a
pair of horses belonging to the said plaintiff
of great value to wit of the value of Two
hundred & Fifty Dollars and attached to a
wagon belonging to the said plaintiff of
great value to wit of the value of Eighty dollars
which were then & there being driven along
and upon said embankment on said common
& public highway were thrown and precipitated
together with said wagon off from said embankment

ment upon the ground upon the west side of
 said embankment by means whereof one of said
 horses was then & there thereby killed and the
 other of said horses was then & there thereby rendered
 wholly valueless and useless and the said wagon
 & harness of said plaintiff then & there thereby greatly
 & materially injured & damaged all to the damage
 of the said plaintiff in the sum of Three Hundred
 dollars. And for that whereas on the 24th day
 of December A.D. 1856 and for a long time previous
 to said time there was a certain common & public
 Highway in the Town of South Ottawa leading from
 Ottawa to Bloomington & known as the Bloomington
 road which during all the time aforesaid was
 and still is a common & public highway for all
 persons to come go pass & repass with horses teams
 wagons & carriages. And it was then and there
 the duty of the said Town of South Ottawa
 to keep said highway in good repair and
 condition for the use of the persons aforesaid
 in the manner aforesaid And the plaintiff avers
 that heretofore to wit on the 24th day of December
 A.D. 1856, to wit at the county aforesaid there was
 upon said common & public highway in said
 Town of South Ottawa a bridge across a certain
 stream called Devil Creek at a point on
 said common & public high way nearly on
 the west line of Section Thirty five Town thirty

three Range three East of the 3^d principal meridian
in said County of LaSalle which said bridge
was a high bridge being raised so that the
water of said stream might freely pass under
the same in times of high water. And for
the purpose of passing on to & off from said
bridge there was at each end of the same an
embankment of earth which was then and there
raised above the surface of the adjoining land
to a great height to wit the height of Twenty feet,
being there and there a narrow embankment
said embankment, to wit of the width of Twelve feet
and the sides of the same being then & there nearly
perpendicular, and it then and there became & was
the duty of the said Town of South Ottawa, to cause
to be erected and maintained along the sides of said
embankment a railing a wall or some other
guard or protection to prevent teams wagons &
carriages & other vehicles from being precipitated
down the sides of said embankment.

Yet the said Town of South Ottawa carelessly &
negligently failed to perform its duty in that behalf,
and did not cause any wall or railing or other
guard or protection to be erected or maintained
along the sides of said embankment. And the
plaintiff avers that heretofore to wit on the 20th day
of December A.D. 1856 at the County aforesaid
two horses of great value to wit of the value of two
Hundred & Fifty dollars of the said plaintiff.

attached to a wagon of the said plaintiff of great value to wit of the value of Eighty dollars now being driven along said common & public highway and then & there by the said neglect of the said Town of South Ottawa of its duty in failing to cause to be erected along the sides of said embankment some wall railing or other guard or protection the said horses of the said plaintiff together with the said wagon of the plaintiff were then and there precipitated down the west side of the said embankment, on the ground and one of the said horses was then & there thereby instantly killed and the other of said horses was then & there thereby rendered wholly worthless & valueless and its said wagon & a harness of great value to wit of the value of forty dollars then & there on said horses & belonging to the said plaintiff were then & there thereby greatly damaged.

Whereby the plaintiff has sustained damage in the sum of Three Hundred Dollars & therefore he brings his suit

Glover & Cook

Pliffs Attys

And afterwards to wit on the 7th day of September A.D. 1857, a demurrer was filed in the office of the clerk of said court in the following words to wit:

LaSalle County & County Court thereof, September

Term 1857.

Amasa Foster for the use
of George Whipple
vs
The Town of South Attama

Case

and the said defendant
by Bushnell Gray & Wallace their attorneys says
that the said declaration and the matters and
things therein contained as the same are
therein stated and set forth are not suff-
icient in law and that the said defendant is
not bound by law to answer the same wherefor
said defendants prays judgment &c

Bushnell Gray & Wallace
atty for deft

Afterwards to wit at the September Term 1857 of said
court on the 7th day of September 1857 the following
proceedings were had and entered of Record to wit
Amasa Foster for use
of George Whipple

vs
The Town of South Attama

Case

This day comes the defend-
ants by Wallace Bushnell & Gray their attorneys and on
their motion it is ordered that the plaintiff file
security for the costs herein by Thursday morning.

And afterwards to wit - on the 10th day of September
A.D. 1857, a Bond for costs was filed which is in the
words and figures following to wit =

Annasa Pastor for use
of George Whipple

vs

In LaSalle County Court
The Town of South Ottawa } Trespas on the land

I hereby enter myself security
for costs in this cause and acknowledge myself
bound to pay or cause to be paid all costs which
may accrue in this action either to the opposite
party or to any of the officers of this court in pursu-
-ance of the laws of this State

Dated September 10th 1857

Geo. Whipple

assignee of A. Pastor

Afterwards to wit - at the September Term 1857 of
said Court this 10th day of September 1857 the
following proceedings were had and entered into
of Record to wit =

Annasa Pastor for use
of George Whipple

vs

In LaSalle County Court
The Town of South Ottawa } This day comes the defend-
-ant by Wallace Bushnell &
Gray their attorneys and file a demurrer to the
declaration of plaintiff filed herein, which

~~demourner~~ after hearing the arguments of counsel
is overruled by the court - to which ruling of the
court the defendant then and there excepted and
says they will abide by their ~~demourner~~ and to
the decision of the court in overruling said ~~demo-~~
~~urser~~

And afterwards to wit - at the September term 1857. of said
court this 13th day of September 1857. the following proceedings
were had and entered of Record

Amelia Foster for use of

George Whipple

vs

Case

The Town of South Attama

This day came the
plaintiff by Homer Cook
his attorney and the defendant by Wallace Bush-
nell & Co. its attorney. Whereupon came the following
jurors of a jury to wit - John R. Cooper Thomas A. Wade
A. D. Pennell C. S. Beardsley C. H. Raymond G. C. Smith
J. H. Aldrich Joseph Avery Platt Thorne George B.
Macy Henry Barker and Addison D. Lyon who
were duly sworn to assess the damages herein according
to the evidence and after hearing the evidence the
jury retire to consider of their verdict with leave
to seal the same and come into court to morrow
morning

(12)

1857 of the said Court this 15th day of September 1857
The following proceedings were had and entered of
Record to wit:-

Annasa Foster for the use of

George Whipple

vs

Cuse

The Town of South Ottawa

This day again came
the parties herein by their
said Attorneys together with the jury sworn herein
who return into Court the following verdict to wit:- "We the
jury assess the plaintiffs damages at the sum of Two
hundred and thirty dollars."

Whereupon the defendant by its attorneys enters its
motion to set aside the inquest herein - which
motion after hearing the arguments of counsel is
overruled by the Court - to which ruling of the Court
the defendant by its attorneys then and there excepted

It is therefore considered by the Court that
said plaintiff have and recover of said defendant
the said sum of Two Hundred and Thirty dollars
for his damages and also his costs and charges by
him herein expended and that he have execution
therefor

and afterwards to wit - on said 16th day of September
A.D. 1857, a bill of exceptions was filed with the clerk
of said Court in the words and figures following
to wit -

State of Illinois In the County Court thereof
La Salle County ss September Term 1857.

Armasa Carter for me of
George Whipple his assignee

vs

Cade

The Town of South Ottawa

Be it remembered that on the
trial of this cause before the ingrust for the assessment
of Damages the plaintiff introduced C. M. Rodgers as a
witness who testified as follows I was a turnster
for plaintiff and was hauling coal to Ottawa for
him near the 20th of December last I drove a gray
team of horses and wagon- The wagon was nearly
new and was loaded with coal Carter put the
team in my possession as turnster on the evening
of that day we came to the top of Coal Creek hill
It was between day-light and dark and I did not
know how bad the hill was Belgard who is Carter
brother-in-law was with me - He locked the off hind
wheel with a chain at the top of the hill we
started down the hill I heard something clink.
The off horse fell down some how I dont know
how nor the reason of his falling. The horses wagon
and myself went over the bank - one horse was killed
and the other so nearly dead, that Belgard knocked
it in the head one hind wheel was broken and
the wagon otherwise injured. The damage to the

wagon was from Twelve to Sixteen dollars. I found on examination afterwards that the point of the Hook of the chain had broken off. I had no whip with me. I do not know the time that the accident happened nor had no watch with us and if we had had one, it was so dark that we could not have seen the time.

on the cross examination of this witness a question being asked tending to effect the credibility of the witness as well as to defeat the plaintiffs cause of action the court gave of its own motion the following instruction -

Instruction given by the Court

The Jury are instructed that they cannot consider the evidence now offered as tending to defeat the Plaintiffs right of action but they are at liberty to consider it in any point of view in which they may think it tends to induce them to place more or less reliance upon the witnesses credibility - The defendant objected. The court overruled the objection read the instruction to the jury and the defendant then moved there excepted, on the cross examination by defendant the witness stated as follows.

The accident happened on the Saturday before Christmas. It was a cold blustering day I only had been on, had been engaged in teaming then some six weeks but I had drove teams before - I am twenty three years old I have been had about

a year and have been engaged most of the time in shoveling a jick plane. when I went up the hill in the day time I did not notice how bad the hill was as there was a wagon before me and I did not look. I do not know of any change in the weather that day and the weather had been cold for a number of years before we remained there two hours. I could see the hill there was a creek near the top I have no recollection that the hill was covered with ice, or that it was all a glass of ice. There was ice on the hill and considerable of it the bank where we went over was on the off side.

The defendant then asked the witness the following questions

State to the jury whether or not when the off horse fell down you did not give the right horse a jerk to the left - and in that way draw the wagon, so that it went over the bank. The plaintiff by his counsel objected to the question. The court sustained the objection and would not allow the question to be put and to the overruling of the question by the court, the defendant then and there excepted.

The plaintiff then called Horace N. Hopkins as a witness who testified as follows

I saw Foster have a grey team last fall, &

Knew them when Jas. B. Lighthall had them. The team was worth between three and four hundred dollars. It was a very good team of heavy large whitish grey horses, good business horses. I don't know how old they were. They looked speckled like old horses of that color become. I never examined the team closely.

Thomas Hickey was sworn by the plaintiff and testified as follows:

Paster bot the harness spoken of from me last fall it was after the accident bot back to my shop some cut and some broke. The damage to the harness was five or six dollars and in the sale of it, it was damaged from ten to twelve dollars.

Mr. Cummings was sworn on the part of the plaintiff and testified as follows. The wagon spoken of was bot of me by Paster and when the wagon was bot back after the accident it cost for repairs fifteen dollars and twenty five cents. The wagon was injured so far as the sale of it was concerned some ten or twelve dollars. The plaintiff here rested his case.

The defendant in his part called Francis Gibby as a witness who was sworn and testified as follows:

I know the team of horses spoken of as the Lightball team that Foster had. It was a pretty old team I worked that team seven or eight years ago in threshing & saw the team run away fourteen years ago. It was a working team then. The team of horses is from fifteen to twenty years old on cross examination by plaintiff witnesses stated that if the team was fourteen ^{years} old upon the hypothesis put by the plaintiffs they would now be worth twenty five dollars apiece. I may have told and think I did that such a team was worth two hundred and fifty dollars. I did not think of their age at that time. I worked three horses considerably. It was called the Lightball team I do not know of Lightball having any other team of that kind.

The defendant then called Richard Harding as a witness, who was sworn and testified as follows, "I live near the hill about 100 rods beyond it where the accident occurred. I saw the witness Rodgers at the hill & went down between 8 and 9 o'clock at night. My Brother Samuel Harding came up to get a lantern - he told me that a team had gone over the Bank. I had been up and down the hill that day. The hill was very icy all day. There was a crack in the road near the ^{top} of the hill and a little bend in the road when the wagon

went off. The defendant then asked the witness the following question?

State whether or not in your opinion it was prudent for any person at that time after dark to go down that hill with a loaded wagon without having both hind wheels locked? The plaintiff objected to the question the court sustained the objection, and would not permit the question to be answered and to the decision of the court in that behalf, the defendant then and there excepted.

The defendant then called Thomas M. Mason as a witness, who was sworn the defendant asked the witness this question.

State whether or not Foster admitted to you that the cause of the accident was the breaking of the lock chain? The plaintiff objected and the court overruled the question, and to the decision of the court in that behalf the defendant then and there excepted.

The defendant here closed his testimony.

The plaintiff then called Charles G. Miller as a witness who was sworn and testified as follows I have known these horses since or eight years ago Lighthall then owned them. The horses were somewhat advanced in years They were worth \$250. I should think the team was 14 or 15 years old if a team was a runaway team

that would depreciate its value very much in my estimation, a horse after it is fifteen years old sinks very fast."

The defendant then called Joseph Lighthall as a witness who testified as follows

I once owned the team of grey horses which Foster owned last fall. It was the same team I owned seven or eight years ago when Libby threshed for me I owned them 14 years & sold them two years ago last spring. They were said to be colts when I got them & sired of their running away once - one was two years old when I got them the other was 4 years old or more, when I bought them out of a drove. An. Cross examination by plaintiff witness stated that they were heavy horses, gentle and kind to work, good to work were of good constitution and had done a good deal of hard work."

It is now all the party in the case at the request of the plaintiff the court gave the following instructions.

Amasa Foster for use of
George Whipple

vs

Jour of South Atlantic

} Plaintiff's instructions

} Will the court instruct

} the jury that it is com-

ceded for the purposes of this proceeding now before them that the plaintiff is entitled to recover and the only question before them is how much damages the plaintiff has sustained by the injury to his team wagon & harness by reason of the same being precipitated down the hill & the true measure of damages is the actual amount the said team harness & wagon were reduced in value thereby not exceeding three hundred dollars.

To the giving of which the defendant at the time excepted.

The defendant asked the court to give the following instruction.

Position

as will the court instruct the
 South O'Brien Jury, that if they believe from
 the evidence that the negligence
 of the plaintiff or his servant contributed to
 the loss sustained then the jury should
 find only nominal damages for the
 plaintiff.

Refused

(Which the court refused to give and to the decision of the court in refusing to give said instruction the defendant then and there excepted.)

The ~~Jury~~ ~~finds~~ found a verdict for the plaintiff and assessed his damages at \$230.00

The defendant then moved the court to set aside the inquiry. The court overruled the motion and to the opinion of the court in so doing, the defendant then and there excepted, and prayed the court to sign and seal this the defendants Bill of exceptions which is accordingly done in open court

A. C. Champion Seal

State of Missouri ss
I, Philo Lissally Clerk
of the County Court in
and for the County and State aforesaid
do hereby certify that the above and
foregoing is a full true and complete
transcript of all the orders of Court &
of the pleadings in the foregoing
cause as the same appear of record
on file in my office

In Witness Whereof I have
hereunto set my hand &
the Seal of said Court at Marion
this 15th day of March A.D. 1858
Philo Lissally Clerk

confess 45 folios \$4.50

Ord Seal \$4.85

paid by A. Looman Sep 2

State of Illinois

Supreme Court - April Term 1856.

And now comes the said
town of South Ottawa by May
& Wallace her attorneys & shows to
the court that there is manifest error
in the record of the proceedings of the
cause aforesaid and shows and
assigns to the court the following
errors to wit -

- 1st The court erred in overruling the demurrer
to the declaration
- 2nd The court erred in excluding testimony
offered by defendant below -
- 3 The court erred in giving the instructions
which were given
- 4 The court erred in refusing to give
the instruction asked for by defendant below
- 5 The court erred in setting refusing to
set aside the request of damages -

Wherefore for these errors and others
apparent on the face of said record
plaintiff in error prays that said judgment
may be set aside reversed & wholly for nothing
estimated &c.

May & Wallace
counsel for plff in error.

And now comes the defendant in error
 & says that there is no error in the record
 & proceeds, & prays an affirmance of
 the judgment. Plaintiff looks
 for aught in error

76
 The Town of South
 Otterbein, Va.
 vs
 Emerson Foster
 for use of

Filed March 15, 1858
 J. L. Leland
 Clerk
 by order of the Court

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1858.

THE TOWN OF SOUTH OTTAWA *vs.* AMASA FOSTER, &C.

Error to La Salle County Court.

ABSTRACT OF THE RECORD.

THIS was an action on the case, brought in the county court of La Salle county, by Foster, for the use of Whipple, against the town of South Ottawa, to recover damages for a team and wagon having fallen off of an embankment at the end of the Coval creek bridge, in said town. The declaration is in the usual form in an action on the case, alleging that it was the duty of the town to keep the embankment in repair, and that, by reason of a neglect of that duty, the team and wagon were precipitated down the embankment and injured, and \$300 damages were claimed. The declaration was filed to the September term of the court, 1857.

The town filed a demurrer to the declaration, which, after argument, was overruled by the court, and the town abided by the demurrer.

On the inquest of damages, the defendant (the town) offered proof tending to affect the credibility of a witness introduced by Foster, and also tending to defeat the plaintiff's cause of action, and in that connection, the court instructed the jury "that they could not consider the evidence thus offered as tending to defeat the plaintiff's cause of action, but that they might consider it in any point of view in which they might think it tended to induce the jury to place more or less reliance on the witness' credibility." The defendant (the town) objected to the giving of said instruction, and the court overruled the objection, and the defendant excepted.

The plaintiff offered evidence tending to prove that the plaintiff was the owner of a pair of horses and wagon, worth \$200 to \$300, which were being driven down the hill on to the bridge embankment, after dark, with a heavy load, the hill was icy, and one of the horses fell and thereupon the team and wagon were precipitated over the embankment and one horse killed and the other so badly injured that he was worthless, and the wagon and harness were also injured, and that the damage was from \$200 to \$300.

The defendant (the town) introduced a witness and asked him "whether or not in his opinion it was prudent for any person at that time after dark to go down that hill with a loaded wagon without having both hind wheels locked." The plaintiff objected to the question, the court sustained the objection and the defendant excepted.

The defendant then called another witness and asked him "whether or not Foster (the plaintiff) had stated to him (the witness) that the cause of the accident was the breaking of the lock chain?" The plaintiff objected, the court sustained the objection and the defendant excepted.

At the instance of the plaintiff, the court instructed the jury, that "It

Record p. 2. 3.
4. 5. 6. 7. 8

p. 9. 10. 11

p. 14

p. 18.

p. 18

p. 19. 20

p. 20

p. 12.

is conceded for the purposes of this case that the plaintiff is entitled to recover, and the only question before the jury is, how much damage the plaintiff has sustained by the injury to his team, wagon, and harness by reason of the same being precipitated down the hill, and the true measure of damages is the actual amount said team, wagon, and harness were reduced in value thereby, not exceeding \$300." Defendant excepted to the giving of this instruction.

Defendant asked the court to instruct the jury, "that if they believed from the evidence that the negligence of the plaintiff or his servant contributed to the loss sustained, then the jury should find only nominal damages for the plaintiff." The court refused so to instruct, and the defendant excepted.

The jury rendered a verdict for \$230. The defendant moved the court to set aside the inquest; the court overruled the motion, and defendant excepted.

Errors Assigned.

- 1st. The court erred in overruling defendant's demurrer to the declaration.
- 2d. The court erred in excluding proper testimony offered by defendant.
- 3d. The court erred in giving the instructions that were given.
- 4th. The court erred in refusing instructions asked by the defendant.
- 5th. The court erred in refusing to set aside the inquest of damages.

GRAY & WALLACE,
For plaintiff in Error.

No. 96.

Supreme Court

Term of Oct. 1858

vs.
Amara Foster & Co.

Abstract of Record &
Assignment of Errors.

Filed April 28 1858

L. Leland
clerk

May & Wallace
Judges in error.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1858.

TOWN OF SOUTH OTTAWA, }
vs. } Error to La Salle County Court.
AMASA FOSTER, &C. }

POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

The first error assigned is well taken, viz: That the Court erred in overruling the defendant's demurrer to the declaration.

I. There is no common law liability upon the town of South Ottawa for this injury, and there is no statute fixing the liability of the town. No action can be maintained against the town, and the demurrer should have been sustained.

The case of *Browning vs. The City of Springfield*, and cases there cited, in the opinion of the Court, fully sustain this position.

17 Ill. R. 143.

II. In order to bind the town, in any event, three things must concur, viz:—

1st. There must be a specific, full, and complete *duty* imposed by law upon the town, to keep the road in repair.

2d. The law must confer on the town powers adequate to discharge such duty.

3d. The law must provide, and, in some way, place under the control of the town, sufficient money or labor, or other means, to accomplish the duty and execute the power.

17 Ill. 143.

But no duty is imposed by law; no power over the subject matter conferred; and no provision made by law for such means, so far as the town is concerned.

III. The action should have been brought against the Commissioners of Highways, who are a *quasi* corporation, and, by law, are charged with the duty, armed with the power, and control the means to keep roads in repair.

Perhaps an action would lie against the Overseer.

The Township Organization law, approved Feb. 27th, 1854, Art. 22, Sec. 1, Blackwell's Statutes, page 347, provides "that the Commissioners of Highways shall have the care and superintendence of highways and bridges in the towns." By reference to this section, it will be seen that the sole control of roads in every respect is embraced in the powers and duties therein enumerated. Art. 25, Sec. 16 of same law provides, "The commissioners of highways are hereby vested with full jurisdiction and control of the roads and bridges in their respective towns, &c."

IV. The Commissioners of Highways have also the sole control of means raised for the repair of roads.

They give all directions for the repair of roads to the Overseer of Highways.

Art. 22, Sec. 1.

Blackwell's Statutes, 364.

The Overseer makes all returns of his doings to the Commissioners.

Art. 23, Sec. 22.

The Commissioners of Highways are empowered to assess a road tax, not exceeding 20 cents on each \$100 of property in the town.

Art. 22, Sec. 1.

Blackwell's Statutes, 347.

The Town Collector is directed to pay over to the Commissioners of Highways the amount of taxes collected for the support of highways and bridges, and to the Supervisor all other moneys.

Art. 20, Sec. 6.

Blackwell's Statutes, 343.

The Overseer pays over to them all road money not expended under their direction.

Art. 23, Sec. 23.

If the Overseer fails to account or pay over as above, they prosecute.

Art. 23, Sec. 24.

The Commissioners of Highways appoint their own Treasurer. The Treasurer receives and has charge of all moneys raised in the town for the support of roads and bridges. The law provides that the Treasurer "shall hold such moneys at all times subject to the order of the Commissioners of Highways, and shall pay them over upon their order, or a majority of them, *and not otherwise.*"

Art. 25, Sec. 12.

Blackwell's Statutes, 363.

V. The 2d, 3d, and 4th errors are well assigned.

Upon the inquest of damages, the town of S. Ottawa had a right to contest the amount of damages to which the plaintiff below was entitled, and reduce the damages down to nominal damages; and for this purpose, the town had a right to introduce witnesses; and *for the purpose of reducing the damages to nominal*, could offer proof, which (had no default been taken) would have defeated the plaintiff's action entirely. Though such proof would not have been competent for the purpose of defeating the action entirely, (a default having been taken which admitted a cause of action,) yet proof, the effect of which would have defeated even the cause of action, was competent, after default even, for the purpose of reducing the plaintiff's claim to nominal damages.

Chicago & Rock Island R. R. Co. vs. Ward.

16 Ill. 532.

If evidence tends to prove two things, one of which is proper and the other improper, it should go to the jury with an explanation from the Court, in instructions of its legitimate bearing.

Webster vs. Enfield, 5 Gilman 298.

For the purpose above stated, it was competent for the town to show that Foster's negligence contributed to produce the injury, and the Court erred in not permitting the witness of the town to answer, "whether or not it was prudent for any person, at that time, after dark, to go down that hill with a loaded wagon without having both hind wheels locked?"

For the same reason, the Court erred in refusing to let the witness answer, "Whether or not Foster had stated to the witness that the cause of the accident was the breaking of the lock-chain?"

The Court erred in giving the instruction asked by Foster, (set out in the abstract,) because that instruction limited the inquiry of the jury to the value of the team, wagon, and harness, and the injury to them, and effectually barred the town from introducing, and the jury from considering, any proof which the town offered for the purpose of reducing the plaintiff's claim to nominal damages; and for the same reason, the Court erred in refusing to give the instruction asked by the town, (set forth in the abstract,) upon the same point, and in the same point of view.

For the above reasons, we think the 5th error assigned is properly taken.

We submit, therefore, that the judgment in this cause should be reversed.

GRAY & WALLACE,
For Plaintiff in Error.

No. 96.

Town of S. Olatia

vs.

Amasa Foster & C.

Argument. Points
& authorities for
plaintiff in error

Filed May 20, 1858
S. Deland
clerk

Gray & Wallace
for plaintiff in error