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No. _____

Supreme Court of Illinois

Loomis

vs.

Peoria Bridge Ass'N.

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LYMAN J. LOOMIS, } IN THE SUPREME COURT
vs. } OF THE
 THE PEORIA BRIDGE } STATE OF ILLINOIS,
 ASSOCIATION. } APRIL TERM, A. D. 1858.

APPEAL FROM MARSHALL COUNTY.

This is an action of Trespass on the case, commenced in Tazewell and by change of venue sent to Marshall County, where it was tried at January term, 1858.

The declaration contains two counts, which are as follows :

DECLARATION.

LYMAN J. LOOMIS, } CIRCUIT COURT,
vs. } IN AND FOR THE COUNTY OF TAZE-
 THE PEORIA BRIDGE ASSOCIATION, } WELL,
 A CORPORATION, &c. } APRIL TERM THEREOF, A. D. 1857.

STATE OF ILLINOIS, }
 COUNTY OF TAZEWELL, } ss.

Lyman J. Loomis, the plaintiff in this suit, complains of the Peoria Bridge Association, a corporation created by and under the laws of the State of Illinois, passed on and since the 26th day of January, A. D. 1847, entitled "An Act to authorize the construction of a bridge across the Illinois River," and also an Act amendatory thereto, entitled "An Act in addition to an Act entitled an Act to authorize the construction of a bridge across the Illinois River approved January 26th, 1847," defendants in this suit, of a plea of trespass on the case; for that whereas before and at the time of the committing of the grievances hereinafter next mentioned the said defendants were the owners and possessors of a certain bridge across the Illinois River, extending from the city and county of Peoria across the Illinois River, in the county of Tazewell and State aforesaid, and were also the owners and possessors of certain lands adjacent thereto, and lying and adjoining their (the defendants') said bridge, and whereas all and every person was entitled, and of right, to cross and pass over, along and upon said bridge of said defendants aforesaid, on paying tolls therefor to said defendants; and said defendants were bound by law to keep their said bridge in good repair, so as to furnish a safe and convenient passage to all and every person and persons, and their teams, horses, wagons and property, on payment of the tolls aforesaid to said defendants; and said defendants were also bound by law, and of right should and ought to have kept their said lands and premises adjacent to and adjoining said bridge free and clear of and from any and all cars, locomotives, railroad tracks, fixtures, steam engines, and free and clear of and from the running, noise, confusion, whistling and alarm, on, over and upon their said lands and premises so adjoining, adjacent and next contiguous to their said bridge, whereby the horses, teams and property of any and all persons crossing over, along and upon said bridge of said defendants could become frightened and alarmed, and run or back off, through or over said bridge. Yet the said defendants, not regarding their duty in this behalf, willfully, negligently and carelessly suffered and permitted divers persons, corporations and railroad companies to lay down their certain railroad track on the land and premises of and belonging to

said defendants, adjacent to, next adjoining and contiguous to their said bridge aforesaid; and said defendants also authorized, contracted, and agreed to and with, and knowingly suffered said divers persons, corporations and railroad companies to lay down their said road track as aforesaid, and build and construct their fixtures thereon, and run their cars, to-wit: one hundred cars and engines, to-wit: ten engines and locomotives, to-wit: ten locomotives, over and upon said railroad track so laid down and constructed on and over the said premises of defendants as aforesaid, and which said cars, engines, machinery and locomotives were moved, driven and propelled by steam power, with great force, noise, confusion and whistling, to the great fright, consternation, alarm, dread, hazard and danger of all and every person and persons, their horses, teams and property passing and crossing over, upon and along said bridge of said defendants as aforesaid; to-wit: on the 15th day of December, A. D. 1856, at the county of Tazewell aforesaid, and by reason whereof, and by reason of the running, driving, and propelling of said cars, engines, locomotives and machinery of said divers persons, corporations and railroad companies over and upon the said land and premises of said defendants as aforesaid, with great force, noise, confusion, disturbance and whistling of said locomotives and engines, the team and horses of said plaintiff, so crossing along, upon and over said bridge as aforesaid, as he lawfully might do, and of right was entitled to, took fright, became greatly alarmed, and run and pushed over and through said bridge, and fell, and was precipitated and hurled with great violence to the ground, a great distance, to-wit: the distance of fifteen feet, together with the plaintiff, his wagon, team and property, where-with he the said plaintiff was then and there passing over, upon and along said bridge of said defendants aforesaid; and whereby and by reason of said fall off, through and over said bridge of said defendants aforesaid, the said plaintiff was bruised, injured, wounded and maimed for life, and his bones broken; and whereby, also, his said horses and team were bruised, damaged, injured, wounded and rendered entirely valueless to said plaintiff; and his said wagon and property which said plaintiff was crossing over, along and upon said defendants' bridge, as aforesaid, became broken, injured and worthless, and entirely useless and valueless to said plaintiff, to-wit: at the county aforesaid; and the said plaintiff in consequence of such falling and being hurled and precipitated to the ground, together with his said horses, team, wagon and property as aforesaid, and in consequence of such bruises, maims, wounds, injuries and broken bones to himself and horses as aforesaid, and the damage and breaking of his wagon, team and property so crossing along, over and upon said bridge of said defendants as aforesaid, and in and about the curing, healing, care, skill and attention of and to himself and horses, and the repairing of his wagon, team and property, was forced and obliged to pay, lay out and expend divers large sums of money, amounting in all to a great sum of money, to-wit: the sum of one thousand dollars, to-wit: at the county of Tazewell aforesaid.

And also for that whereas before and at the time of committing of the grievances by said defendants as hereinafter next mentioned, the said defendants were the owners and possessors of a certain other bridge, extending from the city and county of Peoria across the Illinois River into the county of Tazewell and State of Illinois, and over, across and along which said bridge any and all persons were entitled to cross, pass, and of right might cross, pass and travel, and use for the purpose of crossing the said Illinois River, together with their and each of their horses, wagons, teams and property, on payment of tolls to said defendants, and said defendants being so possessed of and the owners of said other bridge as aforesaid, and entitled to have, demand and receive tolls from any and all persons so crossing and pass-

ing over said other bridge, either with or without their and each of their horses, wagons, teams and property as aforesaid, and by reason whereof the said defendants ought of right, and were bound by law to repair said bridge and keep the same in good repair, so as to admit of convenient and safe passage for all persons and their property, teams, wagons and horses, on payment of the tolls to said defendant. Yet the said defendants, not regarding their duty in this behalf, willfully, negligently and carelessly, and by and through their negligence, carelessness and default, and for want of due care and attention in this behalf, suffered and permitted their said other bridge aforesaid to be, remain and continue out of repair, unsafe and in a rotten, dangerous and hazardous condition, insomuch that the said other bridge did not admit of convenient and safe passage to any and all persons and their property, on payment of the tolls to said defendants as aforesaid, to-wit: at the county aforesaid, and by reason whereof, and by reason of the said other bridge of said defendants being, remaining and continuing out of repair, and in a dangerous, hazardous and unsafe condition as aforesaid, to-wit: on the day and year aforesaid, at the county aforesaid, the plaintiff, together with his horses, team, wagon and property wherewith said plaintiff was crossing, passing over and along said other bridge, with due care and skill, as he lawfully might do, were violently hurled, thrown and precipitated down, through and over said bridge to the earth, a great distance, to-wit: the distance of fifteen feet, whereby said plaintiff was then and there cut, bruised, maimed for and during his whole life, injured, crushed and wounded, and his bones broken and remained so for a great length of time, and was thereby hindered and prevented from attending to his necessary and lawful affairs and business during all that time, and is forever maimed and deprived of ability to attend to business, to-wit hitherto; and the said horses, team, wagon and property which he the plaintiff was then and there crossing along, over and across said bridge as aforesaid also fell and was hurled, thrown and precipitated through, off of and over said bridge a great distance, to-wit: the distance of fifteen feet to the ground beneath said bridge, and whereby the said horses were and became bruised, injured, wounded and maimed, and entirely worthless and valueless to said plaintiff; and whereby said wagon, team and property were broken, damaged, injured and destroyed, to-wit: on the day and year aforesaid, at the county of Tazewell aforesaid; and the said plaintiff, in consequence of such falling, bruises, wounds, maims, injuries and broken bones to himself and horses, and the damage and breaking of his said wagon, team and property so crossing along and over said bridge, and in and about the healing and curing of himself and horses, and repairing of his said wagon, team and property, was forced and obliged to pay, lay out and expend, and actually did lay out and expend divers large sums of money, amounting in all to a great sum of money, to-wit: the sum of one thousand dollars, to-wit: at the county of Tazewell aforesaid. To the damage of the plaintiff ten thousand dollars, and therefore he brings suit, &c.

By WEAD & WILLIAMSON, Attorneys for Plaintiff.

The defendants demurred to the first count, and pleaded the general issue to the second count of said plaintiff's declaration. The Court overruled the demur to the first count, and the defendants filed pleas to the same, as follows:

1st. And the said defendants for plea to the first count of said plaintiff's declaration, say that they are not guilty in manner and form as stated in said count of said declaration, and of this they put themselves upon the country, &c.

PURPLE for Defendants.

2d. And for further plea the said defendants say as to the first count of said declaration *actio non*, because they say that on the 12th day of February, A. D. 1849, the General Assembly of the State of Illinois passed an Act entitled "An Act to incorporate the Peoria and Oquawka Railroad Company;" and on the 10th day of February, 1851, the said General Assembly passed "An Act to amend an Act entitled 'An Act to incorporate the Peoria and Oquawka Railroad Company, approved February 12, 1849;'" and that on the 22d day of June, A. D. 1852, the said General Assembly passed an Act entitled "An Act to amend an Act entitled 'An Act to amend an Act entitled 'An Act to incorporate the Peoria and Oquawka Railroad Company, approved February 10th, 1851,'" which said several Acts are as follows, to-wit:

(*See Bill of Exceptions.*)

And the said defendants aver that the said several Acts, since their passage as aforesaid, have been and still are in full force and unrepealed; and the said defendants further aver that after the passage of the said several Acts, and long before the committing of the several supposed grievances in the said first count of the said plaintiff's declaration mentioned, to-wit: on the first day of January, A. D. 1852, at the county of Peoria, to-wit: at the county of Marshall aforesaid, the said Peoria & Oquawka Railroad Co. had been, was and still is duly organized according to law, and ever since their said organization under the laws aforesaid have existed as a corporation, under the name and style of the "Peoria and Oquawka Railroad Company;" and that as such company they had full power and lawful authority to locate and construct a Railroad from Peoria, in the county of Peoria, Illinois, eastward on the most eligible route to the State line of the State of Indiana. And the said defendants aver that in the making and location of their said Railroad, the said Peoria and Oquawka Railroad Company had full power and lawful authority to locate and construct the same over the land and near to and adjoining the bridge of the said defendants; and that before the committing of the said several grievances or supposed grievances in the first count of the plaintiff's declaration mentioned, to-wit: on the first day of January, A. D. 1852, at the county aforesaid, the said Peoria and Oquawka Railroad Company had made, located and constructed their said Railroad upon, over and across the land of the said defendants, near to and adjoining the bridge of said defendants in said first count of said plaintiff's declaration mentioned; and at the place where, in the said count in said plaintiff's declaration mentioned, it is alleged and charged the said several grievances in said count mentioned were committed by the said defendants, as the said Peoria and Oquawka Railroad Co. might lawfully do; and the said defendants further aver that the said "Peoria and Oquawka Railroad Co." had then and there full power and lawful authority to run their said cars, engines and locomotives over and upon their said railroad, so by them located and constructed as aforesaid, either with or without the consent of the said defendants, and to propel the same by steam power, and to whistle and to make all the noise necessary for the transaction of the business of said Company and said Railroad; and that the noise, whistling and confusion in said count in said declaration mentioned, by which the team and horses of the said plaintiff became frightened and alarmed, as in said declaration mentioned, was made and done in the usual and ordinary course of the business of said company, in the management and operation of their said Railroad, and without the consent, knowledge or approbation of the said defendants, and without any power on their part to prevent, control, prohibit or restrain the same; and the said defendants aver that these are the same grievances complained of in the said first count of the said

plaintiff's declaration, and not other or different; and this the said defendants are ready to verify, wherefore they pray judgment, &c.

PURPLE for Defendants.

To this plea the plaintiff demurred. The Court sustained the demurrer; the defendants abided by the demurrer.

The defendants then filed the following additional plea to the first count of the plaintiff's declaration:

And for further plea in this behalf to the first count of the plaintiff's declaration the said defendants say that they did not suffer or permit the said companies, corporations or individuals, in said first count of said declaration mentioned, to erect or construct their said road at the time and place where, &c., in said declaration mentioned, as stated in said declaration, and of this they put themselves upon the country, &c.

PURPLE for Defendants.

Issue to the country.

BILL OF EXCEPTIONS.

Be it remembered, that upon the trial of this cause, the plaintiff, to maintain the issues on his part, called as a witness DAVID SLOANE, who testified as follows: I know the bridge across the Illinois River at Peoria. I was along at the time his (plaintiff's) horses backed off the bridge and injured them and himself. It was in November, 1856. The bridge (I think) was built in 1847. The horses took fright at a locomotive which was on the railroad track of the Peoria and Oquawka Railroad, which was located along the side and near to the bridge, and backed up against the railing, which was thereby broken down, and the horses and wagon of the plaintiff were precipitated to the ground, together with the plaintiff himself, some fifteen feet in distance, by means of which one of the plaintiff's horses was rendered nearly or quite useless, the other one stiffened and lamed, and the plaintiff seriously and dangerously wounded. There was a railing on the bridge at the place, constructed of posts about five inches square, which were attached to the sleepers of the bridge, about one half of the lower end of the posts being cut away and then nailed to the sleepers with large nails or spikes; these posts were nine feet apart, and every other one was braced on the outside by a brace from the top of the post extending to a cross timber of the bridge which extended beyond the railing and planks of the bridge. There was a string piece in the centre of the posts, running from one post to another, two inches by six in size, and another on the top of the posts about three inches by five, both nailed on. I do not know whether the nails of the posts were pulled out or the posts broken off. I cannot tell how close the horses were to the locomotive; they backed off very quick. The rails on the top were spliced between the posts by being nailed together, and were not strong. Only one of the posts broke when the wagon went over, and one part of the railing eighteen feet long went over with the post; the end posts did not give way. I did not see Loomis except at a distance the day of the accident; he was then walking with the assistance of a man on each side; his head was bloody. I did not see him again for two or three weeks. I do not think he has got over the injuries yet; he sometimes spits corrupted matter. The accident occurred four or five rods from the depot house toward Peoria. My horses were frightened at the same time. I knew the locomotive was there when I first came on the bridge—it was in plain sight. I could see it for a quarter of a mile before I came on to the bridge, but the locomotive was

standing still. We waited to see it move, but it did not move; we went on. The bridge was safe to pass over if horses were not frightened or scared. Loomis whipped his horses several times after they were scared and before they went over the bridge. They were ordinarily gentle horses. The locomotive was about forty feet from plaintiff's horses' heads when they backed off. The horses would not have backed off if the railing had been strong enough to have prevented them. I did not consider the bridge safe, principally on account of the weakness of the railing. I did not see Loomis jerk his horses; I did see him strike them. I was paying particular attention to my own horses, which were also frightened, and was not paying particular attention to the plaintiff. I had long considered the bridge unsafe. There are holes in it, the railing was insufficient, and many of the posts which held it were loose and rotten. If the railing had been sufficient the accident would not have happened. Defendants have since built a new bridge and put on strong railing. The railing that was then on was not as good as ordinary railing on bridges.

ERI GRAY being sworn stated: I live in Tazewell county. Know and have often crossed the bridge. I was there on the bridge at the time the accident occurred. Loomis' team passed Sloane's at or near the depot; that there was a pile of lumber lying on the right hand side of the bridge, and a team of horses unhitched from the wagon. The lumber, team and wagon occupied about one-half the space of the bridge. The engine was about to start as Loomis passed the lumber. His horses' heads were turned towards the engine. They took fright at the engine and backed off the bridge. They had to back not more than eight or ten feet. There was a railing on the bridge constructed of posts cut into the string pieces 5 inches square with a cross piece 2 by six inches in the centre, and three by five inches at the top, with a brace at each bent, but none at the centre posts; cross pieces and braces were all nailed with nails from 10's to 20's. I don't know whether the posts broke off or the nails pulled out. The posts were nailed, some with three nails and some with one or two. It is my impression that the nails of the post that gave way were drawn out. The last I saw of Loomis he was standing up in the fore part of his wagon, and he struck his horses once. One horse was badly injured and has a running sore now. The other horse was not much injured. Loomis was taken up to Mr. Parker's injured and in great distress. He has not got over it yet. The horses went off the bridge 6 or 8 rods from the depot towards Peoria. Loomis's team was about sixty feet from the locomotive track. The track runs near the bridge, 40 to 45 feet off. There is no screen between the two—the railroad and the bridge. There was a timber string-piece on the side of the bridge on the top of the plank where the horses backed off the bridge, extending along the edge of the bridge, 10 or 12 inches square, and the plaintiff's wagon backed over the said timber string-piece. It was not over three or four seconds from the time the horses were frightened till they went off the bridge. I think said Loomis was so wrapped up in buffalo skins that he could not have got out of his wagon. The accident was occasioned by the steam of the engine frightening the horses. If the post which held the railing had been sufficient it would have stopped the horses from going over the bridge. I was close by the plaintiff at the time of the accident. I saw him standing up whipping his horses, but can't say whether it was with a stick, a whip, or the lines.

JOSEPH C. FRYE being sworn testified as follows: I am a physician and surgeon, and reside at Peoria, Illinois. In November, 1856, I was called on to visit the plaintiff. I found him at Joseph Parker's, in Peoria. He was cold, had great difficulty in breathing, and but little pulse. He had received a severe shock, was very much bruised about the face. His

upper jaw was broken on the right side, and he was badly bruised on the hip, breast, forehead and head, and had a severe contusion on the top of his head. His difficulty of breathing and want of pulse continued about 48 hours. He was in great pain, and I thought he would die. I consulted with other physicians and they thought so too. I attended him twenty days, during which time he was unable to go home. He paid me \$30 for my fees, &c. His jaw is not yet sound; he discharges corrupted matter from it. I do not think he is either mentally or physically the same he was before he received the injury. His jaw I think will not get well unless a surgical operation is performed on the same.

WASHINGTON COCKLE, also called by plaintiff, testified: I am Secretary of the Peoria Bridge Association. The said Association owned the bridge at the time the Peoria and Oquawka Railroad was built, and it is a toll bridge, and at the time of the accident to the plaintiff in November, 1856, [and at the time the Railroad was built said Association claimed about one hundred acres of land, which extended above the bridge and covered that portion of the road opposite to which the plaintiff's accident occurred on the bridge, and which land extended to low water mark on the east side of the Illinois river, including the bridge also;] (this evidence the defendants objected to and excepted to the opinion of the Court in admitting the same.) The witness then at request of the plaintiff's counsel produced the minute book of the Peoria Bridge Association, and plaintiff offered to read from the same an order under date of October 8, 1853, which is as follows: "On motion of Mr. Curtenius, Ordered that the President and Secretary execute a release of the right of way over the lands of this Association in Tazewell county to the Peoria and Oquawka Railroad Company for the purpose of the road of said Company, reserving for the use of this Association the timber upon said land." To this evidence the defendants objected as irrelevant and incompetent. The Court admitted the evidence and the defendants then and there excepted to the opinion of the Court. Witness further stated that the Peoria and Oquawka Railroad was located before the passage of said resolution at the place where it is now built and where the plaintiff's horses took fright, before the above recited order was made, and the Peoria Bridge Association were not consulted at all in relation to this location; they never received any compensation for the right of way, and made no objection to the railroad being located where it is; they claimed the land and had their bridge on it when the railroad was located.

The plaintiff then offered in evidence an Act of the General Assembly of the State of Illinois, entitled

Approved January 16, 1847.

And also an Act of the said General Assembly entitled

Approved June 19, 1852.

Which said Acts are as follows, to-wit:

An Act to authorize the construction of a bridge across the Illinois River.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that William L. May and his associates, and his and their heirs and assigns, be and they are hereby authorized to build a toll bridge across the Illinois river at the outlet of Lake Peoria, at the place where said May now keeps his ferry, and to have, keep, maintain and enjoy the same.

SEC. 2. Said May and his associates, and his or their heirs and assigns, are hereby authorized to erect as many piers of stone or other material in the bed of said river as may be necessary for the support and construction of said bridge, *Provided* a span of at least seventy-five feet wide from pier to pier, and embracing the principal channel of the river, be left and always kept open for the passage of all craft navigating said river.

SEC. 3. The rates of toll for crossing said bridge shall be the same as the said May is authorized to receive at his ferry.

SEC. 4. The proprietors of said bridge shall always keep the same in good repair, so as to admit of convenient and safe passage for all persons and their property on payment of the tolls.

SEC. 5. In case the said bridge shall be destroyed by freshets or other accidents, and the same shall not be rebuilt or repaired in reasonable time, the charter hereby granted shall cease and be at an end.

SEC. 6. If said May and his associates, their heirs or assigns, shall fail to commence said bridge within three years, or shall fail to finish the same within five years from the passage of this Act, then the privilege hereby granted shall cease and be at an end.

SEC. 7. Any person passing over said bridge with a horse or carriage or other vehicle in a faster gait than a walk shall be subject for each and every such offence to a fine of five dollars, to be recovered before any justice of the peace in either of the counties of Tazewell or Peoria, in an action of debt for the use of the proprietors, *Provided*, that a copy of this section shall be kept fixed up in large letters in a conspicuous place at each end of said bridge.

SEC. 8. If any person shall willfully or negligently do or cause to be done any injury to said bridge, the person or persons so offending shall forfeit and pay to the proprietor or proprietors of the same three times the amount of said injury, to be recovered by action of debt or action on the case before any justice of the peace or other court having jurisdiction of the same.

SEC. 9. The said bridge shall be deemed a public highway, within the meaning of the laws providing for the punishment of persons injuring or obstructing or destroying public highways or bridges in any manner or by any means whatever.

SEC. 10. The proprietors of said bridge are hereby authorized to erect gates as well as a house or houses at either end of said bridge for the collection of tolls.

SEC. 11. This Act to be in force from and after its passage.

Approved January 26th, 1847.

An Act in addition to an Act entitled "An Act to authorize the construction of a bridge across the Illinois River," approved January 26th, 1847.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That said corporation shall be known by the name and style of the Peoria Bridge Association, and by that name and style shall be capable of suing and being sued, pleading and being impleaded, answering and being answered unto in all courts and places whatsoever.

SEC. 2. The mode of serving process in any suit or proceeding against said corporation shall be by delivering a copy of the writ or process to the Secretary of said corporation at least ten days before the time of sitting of the court to which the same shall be made returnable.

SEC. 3. The said corporation shall have the right to extend said bridge on the present road as laid out for a distance of one mile from where the said bridge now terminates, either by trestle work or by throwing up the earth and planking the same; *Provided* that said corporation shall not demand or receive any more tolls than is now allowed by the charter to which this is an amendment.

SEC. 4. This Act to take effect from and after its passage.

Approved June 19th, 1852.

The bridge was built under the authority of the said Acts, by the Defendants.

The Plaintiff next called JOSEPH PARKER, who stated,—I live in Peoria, Loomis came to my house, in November 1856, badly hurt and wounded. He remained about three weeks. He paid me \$20 00, for taking care of him. I saw the bridge on Monday after the accident, the railing had been broken; there was a board nailed over the railing where it had been broken. I saw the Plaintiff's horses and wagon. One of the horses was badly wounded in the shoulder, and is not well yet. The wagon, except the wheels, was pretty much broken up; harness also. The other horse appeared to be lame and stiff. I examined the railing and posts of the bridge; about one third of them were loose at the bottom; some were rotten, and some I could push off with my hands. I did not consider the bridge safe. The team of the Plaintiff was a gentle, ordinarily quiet team, and the Plaintiff was a prudent and careful driver, so far as I know. I think the timber on the side of the bridge, on the top of the plank, was about 6 inches thick and 10 inches wide, and was lying on the flat side.

HENRY PRICE, called by the Plaintiff, stated,—I am a veterinary surgeon. I doctored Loomis' horses in November 1856; one was badly cut in the shoulder, the other lame in the back; one never got well, he was worth \$100 00 before he was injured. Loomis paid me forty dollars for doctering his horses, it was worth that sum. I did not consider the bridge safe; there were holes in it sometimes where a horse might get his foot through.

Plaintiff next called NATHANIEL BROWN, who stated,—I live in Tazewell County, three fourths of a mile from Loomis'. Loomis drives horses as well as common men. He is a careful and prudent driver, and his horses were as gentle as horses ordinarily are. Since his accident, he is not able to perform near as much labor as he could before.

Plaintiff then called IRA PRATT, who stated,—I live in Tazewell County, three-fourths of a mile from Plaintiff. I knew his horses, they went well enough,—were gentle. I saw his son ride and drive; and his daughters, from 11 to 15 years of age, were accustomed to ride one of them. I mended Loomis' wagon after the accident occurred, for which he paid me \$20 00.

Here the Plaintiff rested.

The Defendant then called O. CHAUNTE, who testified,—I live in Peoria, and am a civil

engineer, by occupation. The Rail Road, as appears by the books and records of the Peoria and Oquawka Rail Road Company, was located in 1851 and 1852. In July 1854, when I came to Peoria, the tressel work of the road where Plaintiff's accident happened, was up. The location of the road at that place is an eligible one, and there is no other proper or eligible location than the one then and now occupied by said road. In order to raise the bluff and get on to the highlands East, it was necessary for the railroad to keep up Farm Creek; and the road could not cross the river at Peoria at any other place, without great additional expense, and considerable more distance. There was a necessity of crossing the bridge at some place, and the line where the said road is located, crosses at a point where it is less likely to interfere with the travel over it, than at any other place. I was present at the time of the Plaintiff's accident, about 500 feet off. My attention was first attracted by the noise of the horses' feet upon the bridge. Same time I saw the engine moving slowly, it moved about 4 feet; steam was escaping from the cylinder. The horses of Plaintiff jumped, and backed some. Loomis, the Plaintiff, stood up in his wagon and whipped his horses once or twice, then sawed their heads with the lines. They then cramped the wagon round, and backed against the railing of the bridge. The railing snapped, and the hind wheels of the wagon went over, the reach hung poising upon the edge of the bridge about 5 seconds; the seat slipped back; Plaintiff fell down first, then the wagon, then one horse, and then the other. There was time for the Plaintiff, (if he had presence of mind) after the hind wheels were over the bridge, to have got out of the wagon upon the bridge. It was about a minute and a half after the horses took fright, that they went off the bridge. The team being frightened by the locomotive was the cause of the accident. The team was about seventy feet from the engine when the accident occurred. It was fifty-five feet from the outside of the bridge to the railroad track. The posts of the railing of the bridge which I saw, were halved into the sleepers with a dovetail, and the top pieces and the top railing were mortised on; and the bridge was safe and strong for all ordinary use. The railing was made of upright posts, 5 inches square, attached to the sleepers, braced on the outside at every other post, with a railing 2 by 6 inches in the centre, and 3 by 5 inches at the top, and 3½ feet high. I think Loomis, the Plaintiff, managed his horses with all the judgment and prudence that a man in his situation would be likely to do. But he sawed their heads while they were backing, and while the wagon was poised upon the bridge, after the hind wheels had gone over. The top railing at this place was not sound; it was dozy; but outwardly it being weather beaten, there was nothing to indicate unsoundness. After it was broken, it showed that it was partially decayed. But one of the posts were broken off at the time of the accident. There was no brace to this post; but there were braces to the two on each side, nine feet distant from this one: neither of which were broken or thrown off. The braces were at each bent, when the timbers projected beyond the planks of the bridge. The string piece or timber on the edge of the plank where the horses backed the wagon off, was twelve inches square, and the wagon was backed over the timber.

GEORGE RODGERS, called by Defendant, and testified,—I am a carpenter and bridge-builder, and have been so for more than seven years. I saw the Plaintiff's wagon going over the bridge at the time of the accident. I was about 20 feet from the bridge, on the lower side. The wagon, team and Plaintiff came off that side. I considered the bridge a safe bridge for the passage of teams. The railing is as good as is generally put on bridges. I have been at work about and near the bridge, about a year, for Cruger, Secor & Co. When I first saw the wagon of Plaintiff's, it was nearly against the railing. Plaintiff was stand-

ing up. From the time I first saw it in this position, five or six seconds of time elapsed before it went off the bridge. Plaintiff was pulling on the lines. The wagon was poised on the bridge, after the hind wheels were over, 4 or 5 seconds. I think the Plaintiff might have jumped out on the bridge. I think he was pulling the horses; do n't remember of his striking them. None of the posts were broken. The railing appeared sound on the outside, but upon examination, on the inside it had commenced decaying. I built two bridges within the past year, about 200 feet long, each; and put upon them the same kind of railing as was on this bridge.

Defendants then called HENRY MAXWELL, who testified,—I saw the the accident. I was standing at the engine. The hind wheels of the wagon, when I first noticed it, were against the railing of the bridge, and Loomis, the Plaintiff, was pulling back on the lines, and when the hind wheels hit the railing, it snapped, and over they went. The wagon, after the hind wheels were over, stopped five or six seconds on the bridge, before it finally went over. I was about two hundred feet off at the time. I was baggage master on the railroad. The engine was hauling up iron and tin. The Plaintiff's horses took fright at the engine. There were timbers lying along on the top of the bridge, on the planks, on both sides. The bridge was safe for all ordinary travel. Large loads and teams were daily in the habit of crossing it.

HIRAM BUNN, called by Defendant, testified,—I was standing on the bridge, thirty or forty feet from the Plaintiff's team, at the time the accident occurred. The team was frightened at the engine, and backed off the bridge. Plaintiff was jerking his horses, and slapping them with the lines. It was a minute or over, after the horses were frightened, before they backed off. The bridge was safe if teams were not frightened. Other teams passed over safely. Loomis had time to get out of his wagon, after the horses were frightened, before the wagon was backed off the bridge. I have often seen men with teams, when an engine was passing, get out and hold their horses by the heads; I have seen a great many do so. I think Loomis had time to jump from his wagon, on to the bridge, after the hind wheels were over the edge of the bridge: I said at the time, he was foolish for not doing so. I saw him pulling on the lines before the wagon struck the railing. I am a bridge builder and carpenter by occupation.

The Defendant then read in evidence an Act of the General Assembly, entitled "An Act to incorporate the Peoria & Oquawka Rail Road Company," approved February 12, 1849; and also an Act entitled, "An Act to amend an Act entitled an Act to incorporate the Peoria & Oquawka Rail Road Company, approved February 12, 1849," approved February 10, 1851. And also an Act entitled, "An Act to amend an Act entitled an Act to amend an Act entitled an Act to incorporate the Peoria & Oquawka Rail Road Company, approved February 10, 1851," Approved June 22, 1852. Which said several Acts are as follows, to wit:

Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly; that all such persons as shall become Stockholders, agreeably to the provisions of this Act, in the corporation hereby enacted, shall be, and are hereby constituted and declared a body corporate and politic, by the name of the "Peoria and Oquawka Rail Road Company;" and by that name shall have succession for the term of fifty years from and after the passage of this Act, and may by said name sue and be sued, complain and defend in any court of law or equity; may have and use a common seal; and alter or renew the same at pleasure; may make by-laws, rules and regulations for the management of its

property, the regulation of its affairs and for the transfer of its stock, not inconsistent with the laws and constitution of this State, or of the United States; and may moreover appoint such subordinates, agents, officers and servants, as the business of said corporation may require, and allow them a suitable compensation, prescribe their duties, and require bond for the faithful performance thereof, in such penal sums, and with securities as they may choose, who shall hold their office during the pleasure of a majority of the Directors of the said corporation.

Sec. 2. The said corporation shall have the right to survey, locate and construct, and during its continuance to maintain and continue a Railroad, with single or double track, and with such appendages as may be deemed necessary for the convenient use of the same, from the town of Peoria, on the Illinois river, in the county of Peoria, to the town of Oquawka, on the Mississippi river, in the county of Henderson, and to locate and construct the same on such line, course or way, as may be designated and selected by the Directors of said corporation, whereon to construct and make the same; and may also prescribe the manner in which said railroad may be used; by what force the carriages to be used thereon may be propelled; to regulate the time and manner in which goods, effects and passengers may be transported and carried on the same, and the rates of toll on the transportation of persons or property thereon. And it shall also be lawful for the said corporation to unite with any other Railroad Company already incorporated, or which may be incorporated, upon such terms and at such points and parts of the said Rail Roads, as may be agreed upon by the Directors of said companies: And also to construct such other and lateral routes as may be necessary to connect them with any other route or routes which may be deemed expedient, under the same privileges and restrictions as are herein contained.

Sec. 3. The capital stock of said corporation shall be Five Hundred Thousand Dollars, which shall be deemed personal property, and shall be divided into shares of one hundred dollars each. The said Capital Stock may at any time hereafter be increased to a sum not exceeding One Million Dollars, if the same shall be judged necessary, to be subscribed for and taken under the direction of the Directors of said corporation, whenever they shall cause one or more books to be opened for the purpose, and in such manner as may be prescribed by the by-laws of the said corporation.

Sec. 4. The following named persons, to wit: Alex. Turnbull, James W. Davidson, and Wyatt B. Stapp, of Warren County; Preston Martin, John McKinney, and Robert M. Patterson, of Henderson County; Samuel B. Anderson, James Knox, and David Meek, of Knox County; and William S. Moss, Alfred G. Curtenius, and Isaac Underhill, of Peoria County, shall be deemed Commissioners for receiving subscriptions to the Capital Stock of said Corporation; who shall within twelve months after the passage of this Act, cause books to be opened at such places as they may deem proper, for receiving subscriptions to the said Capital Stock. Notice of the times and places when and where the said books will be opened, to be given by publication, (for at least thirty days previous to opening the same,) in some public newspaper, printed and published in each of such places. On opening said books, the Commissioners shall attend, by themselves or agents, and continue to receive subscriptions to the Capital Stock of said Corporation, from all persons who will subscribe thereto, until the whole amount thereof shall have been subscribed, when the said books shall be closed. Each subscriber shall at the time of subscribing, pay to the Commissioners, the sum of Five Dollars on each share of the stock subscribed for by him. And the said Commissioners shall, as soon as the Directors of said Corporation are elected, deliver to them the

whole amount so received, and also all subscription books and papers belonging to said Company. A majority of the Commissioners above named may fill any vacancies that may occur in their number by death, resignation or otherwise.

Sec. 5. The affairs of said Corporation shall be managed by a Board of nine Directors, to be chosen annually by the stockholders, from among themselves. The first election for Directors shall be holden as soon as may be after the Stock has been subscribed. The Commissioners shall give notice of the time and place at which a meeting of the Stockholders will be held for the choice of Directors, and at the time and place appointed for that purpose, the Commissioners, or a majority of them shall attend and act as inspectors of said election. The Stockholders who shall be present either in person or by proxy, shall proceed by ballot, to elect their Directors; and the Commissioners present, shall certify the result of said election under their hands; which certificate shall be recorded in the books of the Corporation, and shall be sufficient evidence of the election of the Directors therein named. All future elections shall be held at the time and in the manner prescribed by the by-laws and regulations of said corporation. Each stockholder shall be entitled to vote in person, or by proxy duly authorized, one vote for every share he may own at the commencement of each election, and a plurality of votes shall determine the choice. But no stockholder shall be allowed to vote at any election after the first, for any stock which shall have been assigned to him within thirty days previous to the day of holding such election.

Sec. 6. It shall be lawful for the Directors to require payment to the subscriptions to the Capital Stock, at such times, and in such proportions, and on such conditions as they shall deem proper, under the penalty of the forfeiture of the stock, and all previous payments thereon; and they shall give notice of the payments thus required, and of the place where, and of the time when the same are required to be paid, at least thirty days previous to the time of requiring said payments, by publication in at least three public newspapers, printed in the State.

SEC. 7. The said corporation is hereby empowered to purchase, receive and hold such real estate as may be necessary and convenient in accomplishing the objects for which this incorporation is granted, and may by their agents, engineers and surveyors enter upon and take possession of and use all such lands and real estate as may be necessary and indispensable for the construction and maintenance of said railroad and the appendages and accommodations requisite and appertaining thereto; and may also receive, take and hold all such voluntary grants and donations of land and real estate as shall be made to the said corporation for the purposes aforesaid. But whenever any lands, real estate or materials shall be taken and appropriated by said corporation for the location or construction of said railroad or its appendages, or any work appertaining thereto, and the same shall not be given or granted to said corporation, or the proprietor or proprietors do not agree with said corporation as to the amount of damage or compensation which ought to be allowed and paid therefor, or shall not mutually agree on some person or persons to appraise the same, the damages shall be estimated in the manner following: The said corporation or the owner or owners of said lands may, on giving notice of their intended application and the time and place of making the same, apply by petition to the Judge of the Circuit Court of the county in which said lands may lie, or in the absence of the said Judge from the said county then to the senior County Commissioner of said county, or the County Judge of said county, particularly describing in said petition the lands to be appraised, and upon proof that reasonable notice has been

given as directed, the said Judge, or in case of his absence as aforesaid the said senior County Commissioner shall, on hearing the said petition, appoint three disinterested persons, freeholders and residents of the county in which said lands may be situate, as commissioners for the purpose of assessing such damages, and the order in which they are appointed shall specify the lands proposed to be appropriated and occupied by said corporation for the purposes aforesaid. The said appraisers, after being duly sworn before some officer legally authorized to administer oaths honestly and impartially to assess such damages, shall proceed by viewing said lands, and by such other evidence as the parties may produce before them, to ascertain and assess the damages which such owner will sustain by the appropriation of his land for the purposes aforesaid, over and above the benefit and advantage which said commissioners shall adjudge will accrue to such owner or owners by the construction of said railroad. The said appraisers shall make report in writing to the said Judge of the Circuit Court, reciting the order of their appointment and specifying the several parcels of land described therein; the names of the owner or owners of the respective parcels if known, stating that fact, and specifying also the damages which the owner of the respective parcels will sustain by reason of the appropriation of the same for the purposes aforesaid; which said report shall be filed in the office of the Clerk of the Circuit Court of the county in which said lands may lie. In case either of the parties is dissatisfied with said assessment, the said Judge may at the next term of the Circuit Court in said county, on hearing the parties in interest, or if both shall not appear on proof of notice being given to the opposite party, modify the said assessment as to him shall appear just. At the said term of the Circuit Court holden next after the filing of said report as aforesaid, a record shall be made of the said report, with the order of the Court thereon, accepting or modifying the same. On payment of the damages, if any, then assessed, and the expenses of the assessment, the said corporation shall immediately become seized and possessed of the said land and property, and entitled to the use of the same for the purposes aforesaid.

SEC. 8. When the lands or any other property or estate of any married woman, infant or person *non compos mentis* shall be necessary for the construction of the said railroad or its appendages, the husband of such married woman or the guardian of such infant or person *non compos mentis* may release all damages in relation to the land, property or estate to be taken and appropriated as aforesaid, as fully as they might do if the same were holden in their own right respectively, or the husband or guardian of any such person whose property shall be taken may appear and act for and in their behalf in obtaining an assessment of the damages to the same under this Act. And in case any such infant or person *non compos mentis* whose property may be taken as aforesaid shall be without guardian, the Judge of the Circuit Court or the Commissioners shall have the power to appoint a guardian *ad litem* to act in behalf of such person.

SEC. 9. Whenever it shall be necessary under this Act of Corporation for the construction of a single or double track railroad, as herein authorized, to intersect or cross any stream of water, or any public road or highway, it shall be lawful for the said corporation to construct across or upon the same; *Provided* the said corporation shall restore said stream or water course or public road or highway thus intersected to its former state, or in a sufficient manner not to materially impair its usefulness.

SEC. 10. If any person shall willfully or negligently do or cause to be done any act or acts whatever whereby the said road, or any building or construction or work of said corporation,

or any engine, machine or structure, or any matter or thing appertaining to the same shall be stopped, obstructed, weakened or impaired, injured or destroyed, the person or persons so offending shall forfeit and pay to said corporation treble the amount of damages sustained by reason of such offence, to be recovered with costs of suit in the name of said corporation, by action of debt, and such offender or offenders shall also be deemed guilty of misdemeanor, and be subject to indictment and punishment as in other cases.

SEC. 11. For the purposes of facility in the construction of the railroad authorized in this Act, the said corporation shall be permitted to negotiate a loan or loans of money to the amount of its capital stock, and pledge all of its rights, credits and franchises for the payment thereof.

SEC. 12. It shall be the duty of the corporation hereby created, when the railroad contemplated by this Act shall have been completed, to keep and maintain the same in good condition and repair, and whenever from any cause whatever the same shall become injured and out of repair the said corporation shall immediately proceed to repair the same, under a penalty of the forfeiture of the amount of all damages caused by such want of repair in said road.

SEC. 13. This Act shall be deemed and considered a public Act, and shall be favorably and justly construed for all purposes therein expressed and declared, in all courts and places whatever.

SEC. 14. The railroad contemplated herein to be completed within ten years from the passage of this Act.

Approved February 12th, 1849.

An Act to amend an Act entitled "An Act to incorporate the Peoria and Oquawka Railroad Company," approved February 12, 1847.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That the company incorporated under the said Act to which this is an amendment shall be required to construct said road through the towns of Farmington, Fulton county, Knoxville in Knox county, and Monmouth in Warren county, and that they shall establish depots in each of said towns and places; *Provided*, however, that nothing in this act shall be construed as to prevent said company from having stations at other points or places for the reception or discharge of goods, produce, stock or other commodities.

SEC. 2 Said company are hereby authorized to acquire and hold so much of the grade of the Peoria and Warsaw Railroad as they may deem necessary, and may employ and use the same in the construction of their said road, and if said grades and right of way should belong to the State of Illinois, the said company may purchase the same from the Governor of this State, upon such terms as they shall agree upon, and such contract if made shall be binding upon both parties.

SEC. 3. The said company is authorized to organize and proceed in the construction of said road under the restrictions, conditions and limitations contained in said Act to which this is an amendment, whenever the sum of one hundred thousand dollars is bona fide subscribed and five per cent. thereof actually paid in.

SEC. 4. The said company is hereby authorized to build a branch of said road in the same manner as the main track is to be erected hereby, to commence at or west of Monmouth, thence to the Mississippi River at or above Shokoken, in Henderson county.

SEC. 5. The commissioners named in the Act to which this is an amendment, together with Asa D. Reed, of Fulton county, Wm. J. Phelps, Rudolphus Rouse, Peter Sweat and Joshua P. Hotchkiss, of Peoria county, who are hereby made commissioners, shall exercise the same powers and duties under this Act as are enjoined upon them in said former Acts.

SEC. 6. The said road contemplated herein to be completed within ten years from the passage of this Act.

SEC. 7. This Act to take effect from and after its passage.

Approved February 10, 1851.

An Act to amend an Act entitled "An Act to amend an Act entitled 'An Act to incorporate the Peoria and Oquawka Railroad Company,'" approved February 10, 1851.

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That the capital stock of the Peoria and Oquawka Railroad Company is hereby increased to the sum of thirty-five hundred thousand dollars; and the stockholders of said company and their successors shall have perpetual succession by the name and style aforesaid, and shall have and enjoy all the rights and privileges heretofore or herein granted to said company by said General Assembly.

Sec. 2. The acts of the Commissioners for receiving subscriptions to the Capital Stock of said Company, and in the election of Directors, on the twentieth day of June, in the year of our Lord one thousand eight hundred and fifty-one, are hereby declared to be legal and valid in law; any omission or imperfection in rotation to said organization to the contrary notwithstanding.

Sec. 3. The Directors of said Company are hereby empowered and authorized to locate said railroad on the most direct, eligible and feasible route from Peoria to Knoxville, without reference to Farmington: Provided that said Company shall build a branch of said railroad to Farmington, and shall establish a depot there.

Sec. 4. The said Directors are also empowered and authorized to locate a branch of said railroad, provided for in the fourth section of the act to which this is an amendment, according to the survey already made thereof, and to fix the termination of said branch on the Mississippi river, at a point opposite to, or above or below the City of Burlington, in the State of Iowa; which termination shall be within two miles of said point, opposite said City of Burlington, Iowa.

Sec. 5. The said Company shall have the right of way upon, and may appropriate to its sole use and control, for the purposes and uses of said railroad Company, any land belonging to the State of Illinois, not exceeding two hundred feet in width, whenever any such land may be situated along said railroad, for its entire length, as well as along its branches; and may enter upon and take possession of, and use all and singular any land, streams and materials of any kind, belonging to said State, for the location of depots and stopping stages; for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil

banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road; and all such lands, waters, materials and privileges are hereby forever granted to said Company, for said purposes.

Sec. 6. Said Company are hereby authorized and empowered to make and establish a ferry across the Mississppi river, at the termination of the branch west of Monmouth, to such point on the Iowa shore of said river, as said Company may be authorized or required to land at. Said Company are also authorized and empowered to make and establish a ferry across the Illinois river, from any ground owned by them in the City of Peoria, to the opposite shore of said Illinois river, in Tazewell County. They are hereby authorized to make and use all necessary boats and apparatus of all and every description whatsoever, advantageous and necessary for said Company, at either or both of said ferries, and propel the same by horse, steam, or any other mode or power that to said Company may seem best: provided that said Company shall not use said ferries, or allow the same to be used for any other purpose than those connected with, or arising out of said railroad.

Sec. 7. Said Company shall have authority and power to improve all or either of their landings, at either or both of said ferries, by building a pier or piers, or making embankments into either or both of said rivers; provided that any such improvement does not interfere with the free navigation of either of said rivers.

Sec. 8. If any person shall wilfully or negligently do or cause to be done any injury to said ferries, or to any boat or appurtenance thereunto belonging, the person or persons so offending, shall forfeit and pay to said Company, three times the amount of such injury; to be recovered by action of debt, or action on the case before any Justice of the Peace, or any other Court having jurisdiction of the same. The said ferries shall be deemed public highways, within the meaning of the laws providing for the punishment of persons injuring, obstructing or destroying public highways or bridges, in any manner, or by any means whatever.

Sec. 9. The said Company are hereby authorized to continue said railroad from Peoria, on the most eligible route eastward, to a point on the Indiana state line, which shall not be more than twenty miles either north or south of a due east and west line, that would run through Lafayette, Indiana. And the same powers and privileges for construction, and maintaining this extension, and for connecting the same with other roads, as is contained in the original charter, is hereby conferred upon said Company in relation to this extension.

Sec. 10. That the Peoria and Oquawka Rail Road Company shall have power to borrow money on the credit of the Company, not exceeding its authorized Capital Stock, at a rate of interest not exceeding ten per cent. per annum, payable semi-annually, and may execute bonds therefor, with interest coupons thereto annexed, and secure the payment of the same by mortgage, or deed of trust, on the whole or any part of the road, property and income of the Company, then existing or thereafter to be acquired; and may annex to such mortgage bonds, the privilege of converting the same into the Capital Stock of the Company, at par, at the option of the holders, if such election be signified in writing to the Company, three years before the maturity of said bonds.

Sec. 11. That the Directors of said Company be, and are hereby authorized to negotiate

and sell the bonds of said Company, at such times and at such places, either within or without this State, and at such rates, and for such price as in their opinion will best advance the interests of the Company; and if such bonds are thus negotiated or sold at a discount, below their par value, such sale and disposition thereof shall be as valid and binding on the Company, in every respect, as if they were sold or disposed of at their par value.

Sec. 12. That the said Company, in securing the payment of said bonds by a mortgage or deed of trust, on the road, property and income of the Company, shall have power to execute a mortgage or deed of trust as aforesaid, to secure the payment of the full amount of bonds which the Company may at the time said deed of trust or mortgage bears date, or at any time thereafter, desire to sell and dispose of; and may execute, and sell from time to time, such amounts of said bonds, and of such dates, and payable to such person or persons as to the Directors of said Company may seem advisable, till the whole amount of bonds mentioned in such mortgage or deed of trust is executed and sold; and the said mortgage or deed of trust shall be as valid and effectual to secure the payment of the bonds so executed and sold, and of every part thereof, as if the same and every part thereof had been executed of even date with the said deed of trust or mortgage.

Sec. 13. This Act to be in force from and after its passage.

Approved June 22, 1852.

The plaintiff objected to the admission of this evidence, but the Court overruled the objection and admitted the same, and the plaintiff's counsel then and there excepted to the opinion of the Court admitting the same. This was all the evidence. The Court at the request of the plaintiff's counsel instructed the jury as follows:

INSTRUCTIONS FOR PLAINTIFF.

Given. The defendants were bound in law to keep their bridge in good repair, so as to admit of the *convenient* and *safe* passage of all persons with their property, and if the jury believe from the evidence that the bridge was not in such repair as to render the passage thereof *safe* at the time the injury happened to the plaintiff, the defendants are liable for such injury if it was occasioned by the bridge so being unsafe if the plaintiff used reasonable care.

Given. 2. The defendants were bound to keep their bridge in such repair as to render it reasonably safe from the consequence of *such accidents* as might be justly expected to occasionally occur thereon; and if the jury believe from the evidence that the want of such repair cooperated to produce the injury in this case, the defendants are liable, if plaintiff used reasonable care.

Given. 3. The defendants were bound to keep their bridge in such repair as to render it safe against such accidents as might reasonably be supposed to occur, and if the jury find in this case that the bridge was not safe so as to protect the plaintiff from such injury, the defendants are liable if plaintiff used reasonable care.

Given. 4. It is not sufficient that the bridge was safe for *gentle horses*; it must be so built and kept in repair as to reasonably protect persons from injury whose horses were not gentle and well trained, and so as to guard against such accidents as may be reasonably expected to occur.

Given. 5. If the jury believe from the evidence that the injury would not have happened if the bridge had been in suitable repair, and sufficiently strong to reasonably prevent the wagon from going over, then the defendants are liable if plaintiff used reasonable care.

Given. 6. The charter of the Peoria and Oquawka Railroad did not repeal that part of the bridge charter which requires them to keep their bridge in repair so as to render its passage safe; and they were bound in law to keep it in such condition as to admit of its *safe* passage at the time of the accident complained of in this cause.

Given. 7. The defendants had no right to place any obstruction on or near their bridge which would render its passage perilous or unsafe; nor had they a right to authorize or permit any one else to do so; and if they have done so they are liable if such obstruction caused the injury complained of, if the plaintiff used reasonable care.

Given. 8. If the defendants authorized the Peoria and Oquawka Railroad Company to build their road and run their engines thereon contiguous to the defendants' bridge, and on the defendants' land, and the running of such engines frightened the horses of the plaintiff and caused the injury complained of the defendants are liable, if the plaintiff used reasonable care.

Given. 9. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowances for them and leaves the circumstances of their conduct to the jury.

Given. 10. The jury may give such damages in this case, if they find for the plaintiff, as will fully compensate him for all the injuries he may have sustained by reason of the accident, including any moneys expended by him in curing himself and horses and repairing his wagon, the diminished value of his horse, and the injury occasioned to his person and intellect, and for his sufferings, pain, danger to his life and loss of time in consequence thereof.

Given. 11. If the jury believe that the defendants were guilty of criminal and gross negligence in not keeping their bridge in repair, then the jury may give exemplary damages, if they find for the plaintiff.

To the giving of which said instructions the defendants by their counsel then and there objected, and excepted to the opinion of the Court in giving the same.

The counsel for the defendants then requested the Court to instruct the jury as follows:

Refused. 1st. That the law and the charter of the Peoria and Oquawka Railroad Company authorized said company to construct their railroad upon the most eligible route from Peoria to the Indiana State line, and that the question of eligibility in relation to the route was a question to be decided and determined alone by said company; and that if they had located and established their road at the place where the grievances complained of in the declaration occurred, as stated in the declaration, the plaintiff as against the defendants had no right to complain of said location.

Refused. 2. That as far as the plaintiff is concerned it is wholly immaterial whether the defendants donated the land to the Peoria and Oquawka Railroad Company, or whether they gave said company the right of way for an agreed price, or their damages were assessed as provided by law.

3. That if the Peoria and Oquawka Railroad Company had, pursuant to law, located and

Refused. constructed their road over the land of the defendants, at the place where the alleged grievances in the plaintiff's declaration are supposed to have occurred, prior to the time of the happening of the same, and the injury to the plaintiff was occasioned by his horses being frightened by the noise of the cars, or the noise or whistling of a locomotive upon said railroad, the defendants are not liable in this action.

Refused as to all but the two first propositions. 4. [That the owners of a toll bridge are not liable as common carriers; that they are not insurers of property passing over the same,] and are only bound to use reasonable care and diligence to keep their bridge in good repair so that ordinarily gentle teams may pass in safety over the same, and that they are not responsible for any injury arising from horses taking fright at a railroad, or engine running upon the same, when said road has been constructed under the authority of law, or under a charter from the General Assembly of this State.

Refused. 5. That the owners of a toll bridge are only bound to keep their bridge within its own limits in good repair, so as to afford a safe passage to ordinarily quiet teams, and to prudent and careful drivers; and that they are not responsible for any accident or injury which may occur by reason of any railroad, structure or other thing existing, set up or operated outside of the limits of such bridge, and which had been placed, or set up or operated there under the authority of any law of this State.

Refused. 6. If the jury believe that the plaintiff himself was grossly careless and negligent, and had sufficient opportunity to prevent the injury by leaving his wagon and holding his horses by the head while the engine was passing, and that he neglected to do so, and thereby the injury was occasioned, the plaintiff cannot recover.

Refused. 7. That the owners of a bridge are not bound in law to construct any railing along the sides of the said bridge, to prevent frightened horses from running or backing off the same.

Refused. 8. That if the jury believe from the evidence that the plaintiff knew or might have known that his horses were accustomed to become frightened at a locomotive, and if they further believe that the locomotive which frightened his horses was in plain sight for at least half a mile before he approached the same, and that as he approached he or any other person of ordinary understanding and prudence could plainly perceive that said locomotive had her steam up and ready to start, then the plaintiff would be guilty of gross carelessness and negligence if he drove his team up to within a few feet of said locomotive, and if they believe that the horses became frightened at such locomotive and the accident occurred in consequence thereof, under such circumstances the plaintiff cannot recover.

Given. 9. That if the jury shall believe from the evidence that the railing of the bridge was not sound and sufficient, still it would not excuse the plaintiff from using reasonable care and diligence to avoid the accident, and if the jury shall believe from the evidence that the plaintiff did not use such reasonable care and diligence, they will find a verdict of not guilty.

Given. 10. That if the jury believe from the evidence that the injury done to the plaintiff and his property was the result of the fault or negligence of the plaintiff, or the fault or negligence of both the plaintiff and defendant, without any intentional wrong on the part of the defendant, then the plaintiff cannot recover and the jury must find for the defendant.

11. That the burden of proof lies upon the plaintiff not only to prove that he himself

Given. used reasonable care to avoid the injury, but that the bridge was not sufficient to allow the plaintiff to pass over safely.

Given. 12. That notwithstanding the Jury may believe from the evidence that the defendant may have been in the wrong in giving the right of way to the Peoria and Oquawka Rail Road Company; still, if the Jury shall believe from the evidence that the Plaintiff might by using reasonable care and diligence, avoided the accident; he was bound to use reasonable care and diligence, and if the Jury believe from the evidence he did not do so, they will find a verdict for the Defendant.

Given. 13. That if the Jury believe from the evidence in this case that the Plaintiff is entitled to recover at all, he can only recover such damages as he has proved that he actually sustained; and that no vindictive or exemplary damages can be allowed, unless it is shown that the injury, (if any), to himself and property, was occasioned by some malicious act or acts of the Defendants.

The Court gave the instructions numbered 9, 10, 11, 12 and 13, and refused to give all the others numbered 1, 2, 3, 4, 5, 6, 7, and 8, except so much of number 4 which reads as follows: "*That the owners of a toll bridge are not liable as common carriers. That they are not insurers of property passing over the same.*"

To the decision of the Court in refusing to give all said instructions asked, the Defendants' counsel then and there excepted.

The Jury returned a verdict for the Plaintiff, for the sum of \$5,750 00.

The Defendants' counsel entered a motion for a new trial for the following reasons:

1. The verdict is against law and evidence.
2. The damages are excessive.
3. The Court gave improper instructions to the Jury at the request of the Plaintiff.
4. The Court refused proper instructions asked by the Defendants.
5. The Court admitted improper evidence offered by the Plaintiff.

PURPLE & POWELL,

For Defendant.

The Court overruled said motion, and the Defendants' counsel then and there excepted to the decision of the Court in overruling said motion, and requested the Court to sign and seal this bill of exceptions, which is done.

M. BALLOU, [SEAL.]

Judge of 23d Judicial Circuit, Ills.

The Errors assigned are,

1. Sustaining Plaintiff's demurrer to the Defendants' 2d Plea to 1st count of the Declaration.

2. Admitting improper evidence offered by Plaintiff, and rejecting proper evidence offered by Defendants.
3. Overruling Defendants' motion for a new trial.
4. Giving Plaintiff's and refusing Defendants' instructions.
5. Rendering Judgment in favor of the Plaintiff.

N. H. PURPLE,

Defendants' Attorney.

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Boornis

vs
Perria Bridge

Association

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Filed Apr 21, 1858

W. Keenan

Clerk

1858

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