No. 14789

Supreme Court of Illinois

Coursen E

vs.

Ely

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 161

J. W. Middleton & Co., Stationers, 196 Lake St.

161

Supreme Court of Illinois.

APRIL TERM, A. D. 1865, AT OTTAWA.

ABRAM G. COURSEN, Appellant.
vs.
EDWARD ELY, Appellee.

Appeal from Superior Court of Chicago.

POINTS AND AUTHORITIES FOR APPELLANT,

BY

GARRISON & BLANCHARD.

Filed April 12, 1865

L. Leland Clk

CHICAGO:
DEAN & OTTAWAY, LAW PRINTERS, 148 LAKE STREET.
1865.

Supreme Court of Illinois.

APRIL TERM, A. D. 1865, AT OTTAWA.

ABRAM G. COURSEN,
Appellant.

vs.

EDWARD ELY,
Appellee.

POINTS AND AUTHORITIES, FOR APPELLANT.

By GARRISON & BLANCHARD.

This was an action of trespass on the case for alleged injuries to Ely's horse and carriage, while controlled by his servant, and going along Clark street, Chicago, alleged to be done by Neil Stewart, driving a large double team, belonging to Coursen, while in his employ.

A trial by jury resulted in a verdict and judgment for plaintiff, for $132.25, from which the defendant appealed to this court.

I.

The plaintiff was allowed to prove by the witness Tilden, a livery stable clerk, (See page 06 of abstract,) the value of

the use per day, of able bodied livery horses; when the proof shows that plaintiff's was a family horse, only occasionally and little used, and not well at the time of the accident. Proof of the value of the use per day of a family horse, or a horse used as plaintiff's was, would have been the best evidence. No excuse was given why such evidence was not produced.

II.

The verdict of the jury was not warranted by the evidence, but should have been for the defendant, and consequently, the motion for a new trial should have been sustained.

There is no ground for discrediting Stewart's testimony. He saw what transpired. Williams did not. Williams is contradicted by Stewart and Sutten. Both drivers say Stewart was endeavoring to turn out. Stewart says Williams turned in front of him to prevent his passing. Williams confesses his "lines were lying loose on the dash." That he "heard a great noise behind him and paid no attention to it." He "did not look behind. Never looks behind, &c." He did not, therefore, use such care and caution as is required on such a thoroughfare as Clark street, Chicago. In any view, the jury was not warranted in coming to the conclusion that Stewart was any more careless than Williams. We insist that if the collision was the result of an accident, or could have been prevented by the exercise of ordinary care and caution on the part of the witness Williams, then the plaintiff cannot recover.

Aurora R. R. Co. *vs.* Grimes, 13 Ill. 587.
Lucy Lane *vs.* Cromby, 12 Pick. 177.

III.

1. As there was no attempt to impeach the witness Stewart, or pretence that he testified falsely in any particular, there was nothing on which to base the plaintiff's first instruction, and it should have been refused.

Coughlin *vs.* The People, 18 Ill. 266.
Ewing *vs.* Runkle, 20 Ill. 448.

There was no evidence going to show that he swore falsely on any fact.

Pfund *vs.* Zimmerman, 29 Ill. 269.

2. The second instruction of plaintiff would have been proper had Stewart been defendant, but does not apply to this case, for the defendant is liable only for the acts of his servant, negligently done in the course of his employment.

Story on Agency, 452.

This instruction implies that defendant would be liable for the trespass of his servant, and there were no facts on which to base it.

Ewing *vs.* Runkle, 20 Ill., 448.

3. The law does not give to any one person the exclusive right to a street or public highway; nor is a traveler bound to ask another the privilege of passing.

There is no law in this State, or ordinance of the city of Chicago, that requires the driver of a two horse wagon to ask the driver of a carriage the privilege to pass on Clark street.

Instructions must be based on evidence.

Hosley *vs.* Brooks, 20 Ill. 116.

IV.

By the 4th and 5th instructions of the plaintiff, the court disregarded the rules applicable to questions of negligence in an action on the case for injuries, as laid down by this court in The Aurora Branch Railroad Company *vs.* Grimes, 13 Ill. 587; and as established by the weight of authority; and even if the plaintiff may recover, though not wholly without fault, providing the defendant's negligence is *gross*, as seems to be the rule in the Jacobs case, 20 Ill. 496, yet the plaintiff *must exercise ordinary*

care, &c. And when both parties are equally at fault, the plaintiff cannot recover. And the plaintiff must prove he exercised care and caution.

Lucy Lane *vs.* Cromby, 12 Pick. 177.
Stokes *vs.* Saltonstall, 13 Peters 190.
Approvingly referred to in
Chicago, B. & Q. R. R. *vs.* Hazzard, 26 Ill. 387.
Brownall *vs.* Flagler, 5 Hill 283.
Hartfield *vs.* Roper *et al.* 21 Wend. 615.
Rathburn *et al. vs.* Payne, 19 Wend. 399.
Brown *vs.* Maxwell, 6 Hill, 592.
Cook *vs.* Champ. Trans. Co., 1 Denio 97.
Joliet and N. Indiana R. R. *vs.* Jones, 20 Ill. 227
Peoria Bridge Association *vs.* Loomis, 2 Ill. 236.
Galena and Chicago Union R. R. *vs.* Dill, 22 Ill. 265.
Chicago, Burlington & Q. R. R. *vs.* Hazzard 26 Ill. 386, 387.
Illinois Central R. R. Co. *vs.* Buckner, 28 Ill. 299.
Chicago, Burlington & Q. R. R. *vs.* Cauffman, 28 Ill. 513.
Illinois Central R. R. Co. *vs.* Phelps, 29 Ill. 447.
Illinois Central R. R. Co. *vs.* Goodwin, 30 Ill. 117.

The narr avers the plaintiff "was exercising reasonable care, skill and prudence," "and without fault was driving, &c.," which allegations must be proved as laid. The proof shows that Williams was apprised of Stewart's coming, and he was therefore called upon to exercise more diligence, care and caution proportionate to the exigency, but did nothing to prevent the injury. While it may not be true, that the plaintiff, in order to recover, was bound to prove gross neglect or carelessness on the part of the defendant; what we contend for is, that the degree of diligence on the part of the plaintiff must be proportioned to the neglect on the part of the defendant. In other words, if Williams was apprised of neglect on the part of Stewart, the mere exercise of slight diligence on his part will not allow Ely to recover, if by the exercise of ordinary care and caution the accident could have been prevented. And we contend that the only cases where the plaintiff being at fault can recover, is where there has been gross negligence on part of defendant, which cannot be pretended in this case.

See the cases above cited.

V.

The court clearly, by the modifications of defendant's 4th, 5th, and 6th instructions, have ignored the law: "That if by the exercise of care, skill and diligence, on the part of plaintiff in the management of his horse, the injury could have been prevented, the defendant is not liable."

In fact, by these amendments the court says the defendant has no defence, unless it appears the plaintiff's driver, by his carelessness or wilfulness, helped contribute to the collision.

VI.

It is the right of a party in the Superior Court, on proper request, to have his motion for a new trial passed upon and determined by three judges in banc, and not by the arbitrary opinion of one.

The act establishing the Superior Court provides, (Cook's Statutes, page 82, sec. 11,) that "either of said judges of said "court may hold the same for the trial of causes at law or in "chancery and one or more of them may hold court at the same "time in different places, as the judges of said court may direct, "but all cases and points reserved at trials, bills of exception "and demurrers to evidence, motions in arrest of judgment, and "issues in law may be argued or submitted in said court, *before* "*a* majority of said judges, provided that demurrers to pleadings "may be heard and determined by either of said judges, in "court or at chambers."

The damages found are excessive and not warranted by the proof. The proof does not show that the $46 repairs put upon Ely's carriage were all necessitated by the accident. On the contrary, it was painted all over, &c. It was not proved that

the carriage was damaged $46. Apellant ought not to be charged with doctor's bills and loss of time in curing Ely's horse of a pre-existing fever. The horse walked, dragging the buggy only about half a block, and stopped of its own accord. Three or four bruises or cuts in its hind legs, is the sum total of its injuries. The establishment was immediately re-established, carried two men about a mile to overtake Stewart; thence to the armory; thence to Stewart's barn; thence three men to Ely's store, a mile or two more through the dirty streets of Chicago, without proof that either horse or buggy was at that time seriously injured, and Stewart denies there was serious injury done either.

GARRISON & BLANCHARD,

Attorneys for Appellant.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, began and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Fifth day of September in the year of our Lord One Thousand Eight Hundred and Sixty four and of the Independence of the United States of America the Eighty Ninth

Present, The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago.

Van H. Higgins } Judges.
Joseph E. Gary }

Joseph Knox Prosecuting Attorney.

David J. Hammond Sheriff of Cook County.

Attest, Thos. B. Carter Clerk.

Be it remembered that heretofore to wit on the Nineteenth day of February in the year of our Lord One thousand eight hundred and Sixty four there was issued out of and under the Seal of said Court, Peoples Writ of Summons in a certain suit wherein Edward Eby is plaintiff and Abram G. Courson is defendant. Which said Summons with the Sheriffs return thereon endorsed is in the words and figures as follows, to wit.

State of Illinois }
Cook County } ss.

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

We Command you that you Summon Abram A. Coursen if he shall be found in your County, personally to be and appear before the Superior Court of Chicago, of said Cook County on the first day of the term thereof, to be holden at the Court House in Chicago in said Cook County on the first Monday of March next to answer unto Edward Ely in a Plea of trespass on the case to the damage of the said Plaintiff as it is said in the sum of Two hundred and fifty dollars.

And have you there this Writ with an Endorsement thereon in what manner you shall have executed the same.

Witness Hiram. B. Carter, Clerk of our said Court and the Seal thereof at Chicago aforesaid this Nineteenth day of February A.D. 1864.

Seal

50 Cent Revenue Stamp cancelled.

Hiram. B. Carter. Clerk"

"Served this Writ by reading to the within named defendants this 23rd day of February 1864.

David S. Hammond. Sheriff

By Wm Wayman Deputy."

3

Chid thereafter to wit on the fourth day of April A. D. 1864 said plaintiff by his said Attorneys filed in the office of the Clerk of said Court Chirended declaration in said cause; Which declaration is in words and figures as follows, to wit:

"State of Illinois
County of Cook } ss

Superior Court of Chicago
March Term A. D. 1864

Edward Eby, plaintiff in this suit by Gallup & Hitchcock his attorneys complains of Abram G. Coursen, the defendant in this suit, who has been summoned to answer the plaintiff in an action of Trespass on the case. For that whereas the plaintiff heretofore to wit on the fifteenth day of October A. D. one thousand eight hundred and sixty three at Chicago, to wit at said County of Cook was lawfully possessed of a certain Carriage and of a certain horse then and there drawing the same, which said horse and carriage were of great value to wit, of the value of Twelve hundred dollars, and which said horse and carriage were then and there under the Care direction and Control of a certain then Servant of the said plaintiff, who was then and there driving the same along a certain public and common highway in said Chicago, and who then and there Exercised reasonable Care skill and prudence in the management of the said horse and Carriage Chen whereas the said defendant and then and there possessed of a certain other

4

Carriage, and divers of, to wit, two other horses drawing the same then whereas said Carriage and horses of the said defendant were then and there under the care government and direction of a certain then servant of the said defendant who was then and there driving the same in and along the said highway to wit, at Cook County aforesaid.

Nevertheless the said defendant then and there by his said servant so carelessly and improperly drove directed and governed his said Carriage and horses, that by and through the carelessness Negligence and improper Conduct of the said defendant by his said servant in that behalf and without any fault or any want of reasonable care skill and prudence on the part of the said plaintiff, or of the said servant of the said plaintiff, the Carriage of the said defendant then and there struck with great force and violence upon and against the said Carriage of the said plaintiff and then and there overturned the same and crushed broke to pieces damaged and destroyed the same. And thereby then & there the said servant of the said plaintiff was thrown with force from said Carriage of said plaintiff and the said horse of said plaintiff was thereby then and there greatly frightened and ran with the said Carriage of the said plaintiff then by means of the premises aforesaid and without any fault or Negligence of the plaintiff, or his said servant; the said Carriage of the said plaintiff, thereby became and was rendered of no value or use to the said plaintiff, and the said horse of the said plaintiff was then and there greatly bruised, hurt and

5

wounded, and became and was sick sore lame and disordered, and so remained for a long space of time, to wit: hitherto, during all of which time the plaintiff was wholly deprived of the use of the same, and also by reason of the premises was forced to lay out pay and expend and hath paid and expended, divers large sums of money, to wit, the sum of Two hundred and fifty dollars, in and about endeavoring to heal and cure the same of the said wound hurt and bruises occasioned as aforesaid, and also by means of the said premises the said plaintiff was forced to lay out pay and expend and hath paid laid out and expended divers large sums of money to wit, the sum of Two hundred and fifty dollars in and about the repairing of the said Carriage so damaged as aforesaid, to wit, at Cook County aforesaid.

Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of Two hundred and fifty dollars, and therefore he brings suit &c

Galeup & Hitchcock
Attys for Plff."

And thereafter to wit on the twelfth day of April A.D. 1864 came the said defendant by Garrison & Blanchard his attorneys, and filed in the office of the Clerk of said Court his plea to said declaration, in words and figures as follows to wit.

"State of Illinois } Superior Court
Cook County } ss. of Chicago.

6

"Abram G. Coursen
als
Edward Ely ,,,"

And the said Abram G. Coursen by Garrison & Blanchard his attorneys comes and defends the wrong and injury when &c and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said Plaintiff has above thereof complained against him And of this he the said defendant puts himself upon the Country &c.

By Garrison & Blanchard
his Attys."

And afterwards to wit on the twenty second day of September (being one of the days of the September term of said Court) A.D. Eighteen hundred and Sixty four, the following proceedings were had in said cause and entered of record in said Court, to wit.

"Edward Ely
as
Abram G. Coursen } Case

This cause being this day called for trial comes said Plaintiff by Gallup & Hitchcock his attorneys, and the said defendant by Garrison & Blanchard his attorneys also comes and issue being joined herein, it is ordered that a Jury come. Whereupon, upon the agreement of the parties made now here in open Court comes the Jury of law good and lawful men, only, to wit. Who the Coryall

John. V. Haskell, Henry Dike, George Morey. P.D. Whitney. Peter Schwartz. William Stokes. William Schade. Walter G. Tibbets and D. V. Hitchcock. who being duly elected tried and sworn well and truly to try the issues joined herein as aforesaid, after hearing the evidence, arguments of Counsel and instructions of the Court prior to consider of their Verdict, and the hour of adjournment having arrived, it is agreed upon the agreement of the parties that when the Jury shall have agreed upon a Verdict, they shall reduce the same to writing sign and seal the same, and afterwards separate and meet the Court. on the coming in and opening thereof, to-morrow morning.

And afterwards to wit on the twenty third day of the said Month of September (being Sixth one of the days of the said September term of said Court) A. D. Eighteen hundred and sixty four. the following further proceedings were had in said cause, and entered of record in said Court, to wit.

"Edward Ely
vs
Abram G. Coursen } Case.

And now at this day again come the parties to the above entitled cause by their Attorneys and the Jury of ten men empannelled herein for the trial of said cause on yesterday, also come as on yesterday, and pursuant their Verdict and say that the Jury find the said defendant guilty and assess the plaintiff's damages herein against the said defendant to the sum of One hundred and thirty two dollars and twenty five

8

Cents.

And Thereupon the said defendant by his attorneys aforesaid Submits his Motion for a New trial in said Cause."

And afterwards to wit on the twenty first day of October, (being one of the days of the October term of said Court) A. D. Eighteen hundred and Sixty four, the following further proceedings were had in said Cause and entered of record in said Court, to wit.

"Edward Ely
vs
Abram G. Coursen

Motion for New Trial in Case.

And now at this day again comes the said plaintiff by Gallup & Hitchcock his attorneys, and the said defendant by Gallup and Hitchcock his attorneys Harrison & Blanchard his attorneys also comes, and this cause coming on now to be heard upon the Motion of the said defendant heretofore to wit, on the twenty third day of September A. D. 1864 and of the September term last past of this Court; submitted herein for a New trial in said Cause, and Counsel being heard as well in support of said Motion as in opposition thereto, and the Court having carefully considered the same and being now fully advised of and concerning the premises, it is ordered and considered by the Court that the said Motion of the said defendant for a New trial in this Cause be and the same is hereby overruled, and that a New trial be and the same is hereby denied to the said defendant in said Cause.

5

Wherefore said plaintiff ought now to have judgment entered herein on the Verdict of the Jury aforesaid against the said defendant for his damages of One hundred and thirty two dollars and twenty five cents.

Therefore it is Considered that the said Plaintiff do have and recover of and from the said Defendant his damages of One hundred and thirty two dollars and twenty five cents in form aforesaid by the Jury found and assessed, and also his Costs and charges in this behalf expended and have Execution therefor.

$132.25

And thereupon the said defendant prays an appeal herein to the Supreme Court of this State which is allowed to him on filing Bond in the penalty of Two hundred and fifty dollars with security to be approved by one of the Judges of this Court to be filed with his Bill of Exceptions by the first day of the next term of this Court, to wit, the first Monday of November A.D. 1864.

And thereafter to wit on the Seventh day of November A.D. Eighteen hundred and sixty four came said defendant and filed in the office of the Clerk of said Court his Appeal Bond in said cause in words and figures as follows, to wit.

Know all Men by these presents That We Abram G. Courson, Michael Curtin and George L. Scott of the County of Cook and State of Illinois are held and firmly bound unto Edward Ely also of the same County and State in the penal sum of Two hundred and sixty four $\frac{00}{100}$ dollars lawful

Money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs Executors and administrators jointly severally and firmly by these Presents.

Witness our hands and Seals this 4th day of November A. D 1864.

The Condition of the above obligation is such that whereas the said Edward Ely did on the 11th day of October A. D 1864 in the Superior Court of Chicago, in and for the County of Cook and State aforesaid, and of the October term thereof, A. D 1864 recover a judgment against the above bounden Abram G. Coursen for the sum of one hundred thirty two $\frac{25}{100}$ dollars, besides costs of suit; from which said judgment of the said Superior Court of Chicago, the said Abram G. Coursen has prayed for and obtained an appeal to the Supreme Court of said State.

Now therefore if the said Abram G. Coursen shall duly prosecute his said Appeal with effect and moreover pay the amount of the judgment, Costs, interest and damages rendered, and to be rendered, against him in case the said judgment shall be affirmed in said Supreme Court, then the above obligations to be void, otherwise to remain in full force and virtue.

Abram G. Coursen (Seal)
Michl Curtin (Seal)
George L. Scott (Seal)".

11

And thereafter to wit on the Seventh day of November A. D. 1864 came the said defendant by his said Attorneys and filed in the office of the Clerk of said Court, his Bill of Exceptions in said Cause, in words and figures as follows, to wit.

"State of Illinois }
Cook County . } ss Superior Court of Chicago.

Abram M. Coursen
and
Edward Ely . . .

Afterwards to wit on the 22nd day of September A. D. 1864 in the September Term A. D. 1864 of said Court at the Court House in Chicago before the Honorable Joseph E. Gary one of the Judges of said Court and a Jury of the above County duly sworn and impannelled the above Cause came on for trial.

The Plaintiff to maintain the issue on his part called the following witnesses;

Charles Williams. being duly sworn testified;

I am the Driver of the plaintiff, and have been for fourteen Months. I was his Driver last September - he Keeps a Clothing Store under the Tremont House and lives on 3rd Avenue in this City - He Keeps a horse and Carriage. I Know about an injury done to his Carriage about the last of September - I started with his horse & Carriage from Mr Ely's house on 3d Avenue to go to the Store. I had half an hour to get there - I came down 3d Avenue to Van Buren Street, then to Clark Street, walking all the way with the lines

Block. Near the corner of Jackson Street I heard a Wagon behind me - right behind me on the same side of the Street. Coming very fast and making a great noise and racket. - I paid no attention to it. I did not look around. I cast my Eye over my left shoulder to see what it was. It struck my nigh hind wheel and turned the Carriage over & turned me out. My horse went round the corner and stopped. It was about 5 oClock. P. M. I was driving my horse and a light open buggy. I was going North. My horse was walking. The lines were laying loose on the dash. - Had not trotted a step since I left the house. I was on the East side of Clark Street. from 8 to 10 feet from the Sidewalk. It was just South of the South Crossing of Jackson Street - There was a Wagon perhaps 20 feet before me going North. I was going North - The Wagon behind Couldn't pass to the left of me but not on the East Side. The defendants driver did not Call out to me - Couldn't tell how fast he was going - He was driving very fast. I think his off horse struck my near hind wheel with his breast. It threw his off horse down. It threw me out. My buggy was turned on one side. The shafts - one of them - was over my horse's back. He turned the corner with the Carriage and went about three rods to the blacksmiths Shop, and stopped. Defendants driver did not help me. He was getting his own horse up. He then started and drove his horses just as fast as he could drive them.

I followed him after getting a Policeman, and overtook him on the Madison Street Bridge. My

13 Wagon was scratched in the side and seat. The shafts were broke and the reach and springs twisted. My horse was badly cut in his hind legs - two holes in one leg and one in the other. I called a horse doctor. It was about six weeks before the horse could be used. Plaintiffs horse was a Bice bay 15½ hands high. He was well and hearty. I was driving straight forward and did not turn to either side - the Carriage was repaired.

(It was admitted that the driver of the grain Wagon was the defendants driver and all objections were waived by both parties as to the question of interest of either of these drivers, in this suit.) -

Cross Examination

Stewart, the defendants driver, drove a box grain Wagon. I did not see Stewart or his horses before the accident. Just as the accident happened I saw his off horses head, on my left; partly over my left shoulder. I did not turn my head when I heard the noise I heard him coming. Stewart was trying to turn out. The horses plunged [illegible] my near hind wheel I think. I did not see nor can I tell what upset the Carriage - whether it was the horse or the pole between them, I did not see. - I think it was the horse striking the wheel. - I can't tell where the pole of Stewarts Wagon was. I never look behind me when I drive. I did not look behind at this time. I had on my buckskin gloves. My Wagon or Carriage was tipped to the West. I did not say in the former trial of this cause that it was tipped

to the East. I did not then testify either that I was thrown as high as the gas light in the room where the trial was. I did not so testify on the former trial of this cause. I followed right along after my horse to the shop. After defendants driver got his horse up and started down Clark Street, I got a Policeman and followed Stewart in the same carriage. and drawn by the same horse of Ely. The reach was broken short off. The seat was broken on the left side and top. I might have said on the former trial that the Carriage was broken all to pieces. The only use of the plaintiffs horse was for the family of Plaintiff Sometimes used once a day - Sometimes not - Sometimes more often."

Henry Lowe next sworn for plaintiff testified:
I live in Cicero. Am a Justice of the Peace. and Insurance agent. I have seen Williams. Saw the accident last October. I was crossing Clark Street and saw Ely's driver in his Carriage. Also the big Wagon. Saw the teams strike the Carriage going very fast looking. They were going North. Williams was 18 or 20 feet from West side of the Street. His carriage was broke. He lost his Cushion. & Whip. There was a team a-head of me 15 or 20 feet. Williams was nearest to me.

Cross Examination.
I was on the North side of Jackson Street. The collision was just South of the South side of Jackson Street. The big team was 8 feet back where I first saw it. I was taking care of myself. The Carriage struck to the West. I did not see the

Carriage go off. Don't Know how it went off.

Cross Examination

Don't Know what upset it. I might have been on the former trial that the big team was on a gallop. I was on the North Crossing of Jackson. I didn't see any horse of defendants down."

Frederick Lehrkamp.

I am a horse doctor. have been for 25 years. and Know Mr Ely's horse. I doctored him last September, last year. He was scratched in hind legs in three or four places, 3 or 4 holes in them - there was some inflammation. My services were worth $9.50. Horse was hurt in both hind legs, it was a square cut. I stopped the inflammation and gave Medicine to stop the fever. It may be he would have healed up without Medicine. If a horse is driven in the dust and dirt after such wounds I can't tell whether it would cause inflammation or not. I don't Know as it would be worse for the wounds to have dirt in them. He was sick in the barn 6 or 4 weeks. I visited him sixteen times."

D. D. Coan.

I Know Mr Ely's Carriage. She repaired it after the accident. Orders were left to make the Carriage as good as before. She charged $116 for our work. I am not a Judge of the damage done. Though I should not want to pay as much as $45. as though it had not been injured, but it may not be injured much I cannot tell. The

16 Springs were broken and both set over - the Reach bended & the body. I don't know where the reach was broken. The carriage was painted all over. One axle was spring and the dash nearly covered. I know nothing about the accident.

The bill now shown me is the bill & Specification of work and labor done by us on the Carriage and the prices.

" Sept. 30. 1863.

" Edward Eby Esq.

To Coan & Tew Brooke Dr

Carriage Manufacturers

Nos 41 & 43 Randolph Street.

Repg Body	10 " 00
New Reach & arm work	8 " 00
Setting Springs & 1 Main Leaf	6 " 50
Painting	14 " 00
Setting Axles	1 " 50
Repg Dash Covering New	6 " 00
	$46 " 00.

C. C. Tilden.

I am a clerk in Dunton's livery stable.

Question By Plaintiff. What was the value for the use of an able bodied horse per day last fall?

The question was then and there objected to by defendants Counsel.

Said objection was overruled by the Court. To which decision of the Court in overruling said objection and allowing the witness to answer the defendant then and there excepted.

The witness answered;

" It would be worth $3. per day one and

17

above his keeping." I mean a livery stable horse would. I never hired a horse to put in a team, or knew a hackman to hire one by the day for a time. Do not know how much the daily use of a family horse is worth. I suppose one good carriage horse is worth the same as another.

Thereupon the Plaintiff rested.

Thereupon the defendant to maintain the issues on his part called the following witnesses, who testified as follows, to wit:

Niel Stewart.

I was defendants driver last fall and drove the defendants team at the time of the accident.

(The parties here waived all objections to competency of the Witnesses Williams and Stewart on the ground of interest.)

I have known Williams and have seen Mr Ely. Have been a driver in this city for last 13 years. I was driving defendants team at the time of the accident. The team weighed about 2400 lbs and the Wagon over a ton. I was coming from Michigan Southern & N. Depot and going to the North Western Depot. Coming along I saw Williams near Harrison Street. I was going on a trot, Williams was ahead of me. I turned out to the left to go by, and as my horse got along side he hauled round and his wheel caught my horses ~~ff~~ forelegs and threw him down on his side. My pole swung around and capsized his buggy. I was standing in the forepart of my Wagon. My team was large and

heavy and loaded heavy loads - When I went up I took four hrs. I was going after another load. My team could not go on a fast trot. As I turned out to go by, Williams turned to the West or left in front of me. He catched my horse and as he fell the pole swung round to the East. My horse was lying on his broad side. I got out to get my horse up and saw Williams horse turn the corner. I got the horse up and drove away towards North Western Depot, At Madison Street Bridge Williams with his horse & buggy and a Policeman came and arrested me and took me to the Armory. The horse and buggy was along - Staid there about fifteen minutes. Then we went to my barn on Monroe Street, and I put out my horses. I then got into Elys buggy with Williams and the Policeman and we went to Mr Elys store. I looked at the buggy, and all the injury I could see was a piece knocked off the side, or back of the seat. The horse did not go lame. and I saw no cuts. The dash was not broken. The Wheels rocked quite enough and I saw Nothing the matter of them. We all rode in the buggy. I was going no faster at the time of the accident than afterwards. The team cannot be made to run; they are old heavy draft horses. My pole went West of the left Carriage wheel. It swung round against the buggy and upset it. It projects a little before the horses - Neck Yoke was four feet long - There was room enough for me to pass if he had not turned out.

I have hired horses and know the price, horses last year were worth a dollar a day. Williams

did not look around like after he turned in front of me. At the Store Mr Ely the plaintiff stated to me his horse had been sick for sometime previous to that and he was out airing him & going slow.

I saw the buggy at Harrison Street. The accident was near Jackson. I think Williams was going at a slow trot. I was 5 or 6 yards off, when I turned out to pass on the West side. I did not try to pass on the East side He turned his horse to the left 2 or 3 feet. Ely's Carriage was tipped to the East side of Street. There was a team ahead of Williams.

Abner Sutton, testified

I am Bailiff of this Court and was present when this case was tried before. I heard Mr Lowe and Mr Williams testify on the former trial. Mr Lowe then swore that the Big team (Defendants) was at the time of the accident going on the gallop very fast. Williams & Lowe both swore that the buggy was tipped to the East.

I attend Court and hear a great many trials. I remember this testimony because I know something about these big team horses, and therefore I paid particular attention to this testimony a great deal more than I usually do, and I also used to drive team with Lowe.

The above was all the testimony in the Case.

Whereupon the Court instructed the Jury as the

part of the Plaintiffs as follows to wit.

1". If the Jury believe from the Evidence that the witness Stewart did as to some of the Materiel facts in this Cause wilfully and intentionally testify falsely then the Jury are instructed that they are at liberty to reject all of his Evidence as unworthy of credit, except so far as the same may have been corroborated by other unobjectionable testimony".

Given

2. It is the duty of any one driving in the Streets of Chicago, to drive at such a rate of speed and in such a manner as that he may have his team under his Control and be able to manage it, and if an injury arise from his driving at an immoderate rate, without fault or Negligence on the part of the person injured, he is liable for such injury".

Given

"3. It is the duty of any one driving along the Streets of this City who desires to pass another Vehicle going in the same direction, to pass on whichever side it may be safest to do so. If there is not sufficient room to pass it is his duty to request the foremost traveller to make room. And such knew, if he fails to do so, he has no right to Effect his passage by a violent Collision".

Given

"4. If the Jury believe from the Evidence that the injuries complained of were Caused by the Negligence or Carelessness of the Servant of the defendant, in the Course of his employment as such Servant,

21

either without any Negligence or fault on the part of Plaintiff's Servant, or without any such fault or Negligence on his part as contributed to the injuries complained of, or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation, then they will find for the Plaintiff."

Given

"5. The jury are instructed that in determining the question of Negligence they are to take into consideration the situation of both parties, and that if they believe from the Evidence that the injury was caused by the Negligence or fault of defendants driver, without any greater want of skill or care on the part of Plaintiff's driver, than could reasonably be expected of a person of ordinary prudence & skill in such a situation as he was, that the Plaintiff is entitled to recover."

Given

"6. The jury are instructed that if, on the Evidence in this cause they shall find for the Plaintiff in determining the amount of their Verdict, they will take into consideration all such damages as have been proved to be the natural and legitimate consequences of the injuries proved to have been sustained."

Given

To each of said instructions the defendant then and there excepted.

Whereupon the Court instructed the Jury on the part of the defendant as follows, to wit.

22

Given

"1st That if they believe from the Evidence that the alleged injury to the Plaintiff's horse and Carriage was produced in whole or in part by the negligence or misconduct of the Plaintiff's Servant then the Jury will find for the Defendant."

Given

"2nd The Plaintiff in this action can only recover for the actual damage by him sustained, and not for mere speculative damages, and in order to render the defendant liable the jury must be satisfied from the Evidence that such damage where wholly owing to the fault or misconduct of the entire Servant."

Given

"3rd That the Jury are instructed that no one complains of the negligence of another should himself be without fault, and they are further instructed that if they believe from the Evidence this collision was an accident or was the result of carelessness of both drivers then the law is for the defendant and he is entitled to the Verdict."

"This is so if the carelessness of the Plaintiff's driver contributed to produce the accident."

Granted

"4th If the Jury believe from the whole Evidence in this cause that Charles Williams the driver of Plaintiff's carriage has and did in some of the material facts in this cause wilfully & intentionally testify falsely then it is their duty to reject his whole testify and they are liberty to do so."

Given

23.

"5. If the Jury believe from the Evidence that the witness Williams wilfully or negligently turned Plaintiffs horse in front of defendant's team to prevent the same from passing him, and that the alleged collision or injury was occasioned in whole or in part thereby that the wilful or negligent act of Williams then the jury will find for the defendant."

Given

Amended

"6. If the Jury believe from the Evidence that the driver of the Plaintiff could by the exercise of reasonable care and caution have prevented the Collission in question then the law is for the defendant & he is entitled to the Verdict. Mere Negligence on the part of plaintiff's driver is insufficient to discharge the defendant, if such Negligence Contributed to the collision in question"

Given

"7. The jurors are further instructed that they have the right to weigh the Evidence in this Cause by the light of their general Knowledge and Experience as applied to the Events and transactions of life."

Given

To the amendments of the defendants 3rd & 5th & instructions defendants did also then and there except

Thereupon the Jury retired, and afterwards rendered their Verdict in favor of the plaintiff and against the defendant for One hundred and Thirty two dollars and twenty five Cents.

And the defendant then and there entered his Motion for a New trial and asked to have the

pause heard before the Court in Banc.

Which said Motion and the records thereof are in the words & figures following to wit.

"Superior Court of Chicago

Abram G. Coursen
vs
Edward Ely } Sus.

And now comes the said defendant by his Attorneys aforesaid and moves for a New trial in this Cause on the following grounds. viz:

1st The Court erred in overruling defendants objection to the admission of improper Evidence and in permitting improper Evidence to go to the Jury

2d The instructions (each of them) given for the plaintiff to the Jury should have been refused.

3rd The Verdict was Contrary to the law and the Evidence in the Case. and not warranted by the Evidence.

4th The Jury disregarded the law as given in the defendants instructions.

Garrison & Blanchard
Attys for Deft."

And afterwards on the Eleventh day of October A.D. 1864 said Motion coming on for hearing, the defendant again moved the Court to send said Motion for a New trial to the Court in banc for hearing and objected to having the said Motion for a New trial argued before & determined by a single Judge of said Court, which said last mentioned Motion was overruled by the said Judge.

To which decision of the said Judge in overruling said Motion to and said said Motion for a New trial to the Court in bane for argument the said defendant then and there Excepted.

And afterwards on the day and year last aforesaid after argument of Counsel the said Judge overruled said Motion for a New trial and Entered a Judgment against said defendant on said Verdict for One hundred and thirty two dollars and twenty five Cents and Costs.

To which decision of said Judge in overruling said Motion for a New trial the defendant then and there Excepted, prior to Entry of said Judgment.

And whereas as the matters aforesaid do not appear of record the Counsel for the defendant presents this Bill of Exceptions and prays that the same may be Signed and Sealed by the Court and made part of record in said Cause. which is done accordingly.

Joseph E Gary Seal
Judge of the Superior
Court of Chicago."

27

State of Illinois }
Cook County } ss.

I Hiram B. Carter, Clerk of the Superior Court of Chicago, in said County and State do hereby Certify the above and foregoing to be a true and correct Transcript of the Summons. Sheriffs return. Declaration plea. Bill of Exceptions and Appeal Bond, now on file in my office, together with the proceedings and order of Judgment. Entered of record in said Court, in a Certain Suit therein, wherein Edward Ely is plaintiff and Abram G. Courser defendant.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court, at Chicago, in said County this Tenth day of March A. D. 1865.

28

Supreme Court of Admiralty
April Term A.D. 1865

Abram S Courson
appellant
vs
Edward Ely
appellee

And the said Abram S Courson by Garrison & Blanchard his attys now comes and says that in the record and proceedings aforesaid there is manifest error in this to wit!

1st The Court erred in overruling the defts objection to the admission of improper evidence and in permitting improper evidence to go to the jury.

2 The Court erred ~~in refusing~~ instructing the jury that defendants driver was bound to ask Pltffs driver permission to pass which was evidence of negligence

3 The Court erred in giving each of the Plaintiffs instructions

4 The Court erred in refusing to give the 3d & 5th of defendants instructions as asked

5 The Court Erred in modifying the 3d & 5th of defendants instructions

6 The Court erred in giving the 3d & 5th instruction of deft as modified by the Court

29 7. The court Erred in overruling the Motion for a New Trial

8 The Court Erred in deciding said motion for a New Trial without giving the defendant a hearing on the same before the three judges in bane.

9 Upon the Evidence the verdict & judgment should have been for the defendant

10 The jury disregarded the Law & found a verdict not warranted by the Evidence

Wherefore the said Abram S Bowers prays that the said judgment be reversed annulled and held for nothing and that he may be restored to all things he has lost by reason thereof

By Harrison & Blanchard
his Attys.

We hereby join in Error and insist that in all things the said judgment ought to be affirmed

Gallup & Hitchcock
Chas. A. Dupee
Defts. Attys.

161

Superior Court.

Edward Ely

vs

Abram. G. Courson

Transcript.

Filed Oct. 5th 1865

Leland

Clk.

$8.05.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1865.

ABRAM G. COURSEN,
APPELLANT.

vs.

EDWARD ELY,
APPELLEE.

Appeal from Superior Court of Chicago.

ABSTRACT OF RECORD.

Page 3 Plaintiff's Declaration in Case. Avers that Defendant (Coursen,) Oct. 16, 1863, was possessed of a certain carriage and two horses driven by his servant in the city of Chicago, and that the same was so carelessly and improperly driven, directed and governed, by said servant, as to strike with great force and violence, a carriage belonging to appellee, under the direction and government of Appellee's servant; which latter was exercising reasonable care, skill and prudence, and was without fault, &c.

Whereby the said Appellee's carriage, &c., was greatly injured, &c.

Damages $250.

6 Plea General Issue.

Trial by Court and Jury Sept. 22, 1864.

7 Verdict of the Jury, finding damages against Appellant, (def't below,) in the sum of $132.25.

8 Motion for New Trial—overruled, and exception.

9 Judgement for Pl'ff $132.25.

Appeal Bond.

Bill of Exceptions.

Shows Plff's proof as follows:

11 CHARLES WILLIAMS was sworn on the trial and testified as follows—

I am the driver of the Pl'ff, (Ely) and have been for fourteen months. I was his driver last Sept. About the last of that month, I started with Mr. Ely's horse and carriage from 3d Avenue, to go to the store. I had half an hour to get there. I came to Clark St. walking all the way, *with the lines slack.*

12 Near the corner of Jackson St. I heard a wagon behind me—right behind me, on the same side of the Street, coming very fast and making *a great noise and racket. I paid no attention to it, I did not look around.* I cast my eye over my left shoulder to see what it was. It struck my right hind wheel, and turned the carriage over and turned me out. My horse went round the corner and stopped. It was about 5 P. M. I was driving my horse and a light open buggy. My horse was going North walking. *The lines where lying loose on the dash.* Had not trotted a step since I left the house. Was on the east side of Clark Street from 8 to 10 feet from sidewalk. There was a wagon perhaps 20 feet ahead of me going North. The wagon behind could pass to the left, but not to the East of me. Deft's driver did not call out to me. Could'nt tell how fast he was going. He was driving very fast. I think his off horse struck my near hind wheel with his breast. It threw his off horse down. My buggy was turned on one side. One shaft was over my horse's back. He went about three rods to the blacksmith shop and stopped. Deft's driver drove away as fast as he could. I got a policeman and followed him. My wagon was
13 scratched on the side and seat—the shafts broke and reach and springs bruised. Horse badly cut in his hind legs. Two holes in one and one in the other. I called a Doctor, It was about 6 weeks before the horse could be used. Plff's horse was well and hearty, I did not turn to either side.

(It was admitted that the driver of the grain wagon was deft's driver, and all objections were waived by both parties as to the question of interest of both Williams and Stewart.)

Defendant's driver drove a box grain wagon. I did not see Stewart or his horses before the accident. Just as the accident hap-

pened, I saw his off horse's head, on my left and partly over my left shoulder. I did not turn my head when I heard him coming. *Stewart was trying to turn out.* I did not see, nor can I tell, what upset the carriage. Wheter it was the horse or pole, I did not see. I think it was the horse striking the wheel. I cant tell where the pole of Stewarts wagon was. *I never look behind when I drive. I did not look behind at this time.* I had on my buck skin gloves. My wagon was tipped to the west. I did not say on the former trial, it
14 was tipped to the East. I did not then testify either that I was thrown as high as the gas light in the room where the trial was.

I followed Stewart in the same carriage, and drawn by the same horse of Ely. The reach was broken short off. The seat was broken on the left side and top. I might have said on the former trial, that the carriage was broken all to pieces. The use of plff's horse was for family purposes. It was used sometimes once a day and sometimes not.

14 HENRY LOWE testified.

I saw the accident. I saw the team strike the carriage going very fast trotting. Williams was 18 or 20 feet from the west side of the street. The carriage was broke. Williams was nearest to me. I was on the North side of Jackson street. The collision was just south of the south side of Jackson street. The big team was 8 feet back when I first saw it. I was taking care of myself. The carriage tipped to the West. I dont know what upset the carriage.
15 I might have sworn on the former trial, that the big team was on a gallop. I did 'nt see any horse of defendant's down.

FREDERICK LEHRKAMP.

Am a horse doctor, for 25 years, and doctored Ely's horse last September. He was scratched in hind legs in three or four places, 3 or 4 holes in them. There was some inflamation. My services were worth $9.50. Horse was hurt in both hind legs. It was a square cut. I stopped the inflamation and gave medicine to stop the fever. It may be he would have healed up without medicine. If a horse is driven in the dust and dirt after such wounds, I cant tell whether it will cause inflamation or not. I dont know as it would be worse for the wounds to have dirt in them. He was sick in the barn 6 or seven weeks. I visited him 16 times.

15 D. W. COON testified:

I know Mr. Ely's Carriage. We repaired it after the accident. Orders were left to make it as good as before. We charged $46. I am not a judge of the damage done, though I should not want to pay as much into $75, as though it had not been injured. But it may not be injured much I cannot tell. The carriage was painted all over.

C. C. TILDEN testified:

16 I am clerk in Dunton's Livery Stable.

Question by Plff. What was the value of the use of an able bodied horse, per day, last fall?

Objected to, and objection overruled.

Ans. Three dollars per day besides keeping. I mean a livery stable horse would. I never hired a horse to put in a team. Do not know how much the daily use of a family horse is worth.

Thereupon the Plff. rested.

Defendant's Testimony.

17 NEIL STEWART testified:

I was deft's driver last Fall and drove deft's team at the time of the accident. Have been a driver for 12 years. The team I drove weighed 2400 pound and the wagon over a ton. I was coming form Mich. Southern Fright Depot and going to the North Western Depot. I saw Williams near Harrison st. I was going on a trot. Williams was ahead of me. I turned out to the left to go by. As my horse got along side Williams hauled round, and his wheel caught my off horse's fore leg, and threw him down on his side. My pole swung round and capsized his buggy. I was standing in the fore part of my wagon. My team was large and heavy
18 and hauled heavy loads. Going up I hauled four tons. I was going after another load. My team could not go on a fast trot. As I turned out to go by *Williams turned to the West or left* in front of me. He catched my horse and as he fell, the pole swung round to the East. My horse was lying on his broad side. I got my horse up, and drove away towards N. W. Depot. At Madison street Bridge, Williams with his horse and buggy and a Policeman come up with his horse and buggy. We went to the Armory and then to my barn on Monroe st. I then got into Ely's buggy with Williams, and the Policeman, and we went to Mr. Ely's store. I looked at the buggy, and all the injury I could see, was a piece knocked off the side or end of the seat. The horse did not go lame and I saw no cuts. The dash was not broken. The wheels tracked well enough, and I saw nothing the matter with them. We all rode in the buggy. I was

going no faster at the time of the accident than afterwards. *The team cannot be made to run.* They are old heavy draft horses.

My pole went West of the left carriage wheel. It projected a little before the horses. Neckyoke was four feet long. There was room enough for me to pass if he had not turned.

I have hired horses and know the price. Horses last year were worth a dollar a day. Williams did not look around till after he turned in front of me. At the store, Mr. Ely, the plff., stated to me his horse had been sick for some time previous to that, and he was out airing him and going slow. I think Williams was going at a slow trot. I was five or six yards off when I turned out to pass. He turned his horse to the left 2 or 3 feet Ely's carriage tipped to the east side of street.

19 ABNER SUTTEN testified:

I am Bailiff of this court, and was present when this case was tried before, (This was the second trial of the case,) and heard Mr. Williams and Mr. Lowe testify then. Mr. Lowe then swore that the big team (Deft.) was at the time of the accident *going on a gallop* very fast. Williams and Lowe both swore that *the buggy was tipped to the East.*

The above was all the testimony in the case.

The Court instructed the Jury on the part of the Plaintiff as follows:

20 1. If the jury believe from the evidence that the witness Stewart did as to some of the material facts in this case wilfully and intentionally testify falsely then the jury are instructed that they are at liberty to reject all of his evidence as unworthy of credit, except so far as the same may have been corroborated by other unobjectionable testimony.

2. It is the duty of any one driving in the streets of Chicago, to drive at such a rate of speed and in such a manner, as that he may have his team under his control and be able to manage it; and if an injury arise from his driving at an immoderate rate, without fault or negligence on the part of the person injured, he is liable for such injury.

3. It is the duty of any one driving along the streets of this city, who desires to pass another vehicle going in the same direction, to pass on whichever side it may be safest to do so. If there is not sufficient room to pass, it is his duty to request the former traveller to make room; and if he fails to do so, he has no right to effect his passage by a violent collision.

4. If the jury believe from the evidence, that the injuries complained of were caused by the negligence or carelessnes of the servant of the defendant, in the course of his employment as such servant, either without

any negligence or fault on the part of plaintiff's servant; or without any such fault or negligence on his part as contributed to the injuries complained of; or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation then they will find for the plaintiff.

21 5. The jury are instructed that in determining the question the Negligence, they are to take into consideration the situation of both parties, and that if they believe from the evidence that the injury was caused by the negligence or fault of defendant's driver, without any greater want of skill or care on the part of plaintiff's driver, than could reasonably be expected, of a person of ordinary prudence and skill, in such a situation as he was, that the plaintiff is entitled to recover.

6. The jury are instructed, that if on the evidence in this cause, they shall find for the plaintiff, in determining the amount of their verdict, they will take into consideration all such damages, as have been proved to be the natural and legitimate consequences of the injuries proved to have been sustained.

22 & 23 The Defendant's instructions, five of which were given, and two of which were refused, as asked, but were modified by the court as follows.

Deft's. 3d. Instruction, as asked.

3d. And the jury are instructed that one who complains of the negligence of another should himself be without falt; and they are further instructed that if they believe from the evidence this collision was an accident, or was the result of carelessness of both drivers, then the law is for the defendant and he is entitled to the verdict.

The court against objection added to the 3d. Inst. the words (underscored with red lines in Record) as follows, "This is so if the carelessness of the plaintiff's driver contributed to produce the accident."

23 Deft's. 5th Instruction, as asked.

5th. If the jury believe from the evidence that the Witness, wilfully or negligently, turned plaintiff's horse in front of defendant's team to prevent the same from passing him, and that the alleged collision or injury was occasioned in whole or in part thereby, and by the act of Williams then they will find for the defendant.

The court against objection of deft. inserted in said 5th instruction after the word "thereby" the words (underscored in Record with red lines) "Neglect or wilful."

23 & 24 Motion for New Trial and request of deft. to have the same heard and determined before the three judges of said court in banc, and objection of deft. to having the same determined by a single judge, which motion was denied and exception taken.

24

25 Motion for New Trial also overruled and defendant excepted.

The Errors Assigned Are.

28 1. The court erred in overruling defendants objection to the admission of improper evidence and in permitting improper evidence to go to the jury.

2. The court erred in instructing the jury that defendant's driver was bound to ask plff's. driver permission to pass and that was evidence of negligence.

3. The court erred in giving each of the Plaintiff's Instructions.

4. The court erred in refusing to give the 3d, and 5th, of defendant's Instructions as asked.

5. The court erred in modifying the 3d, and 5th, of defendant's instructions.

6. The court erred in giving the 3d, and 5th, of defendant's Instructions as modified by the court.

7. The court erred in overruling the motion for a New Trial.

8. The court erred in deciding said motion for a New Trial without giving the defendant a hearing on the same before the three judges in banc.

9. Upon the whole evidence the verdict and judgement should have been for the defendant.

10. The jury disregarded the law and found a verdict not warranted by the evidence.

GARRISON & BLANCHARD,

Attorneys for Appellant.

161

Supreme Court

Abram L. Courser

vs.

Edward Eby

Abstract

Filed Apl 5. 1865

D. Pelamater Clk

Merriam & Blanchard

Attys for Appellant

has filed a further abstract, under the 14th Rule of this Court.

161

Supreme Court of Illinois.

THIRD GRAND DIVISION.

April Term, A. D., 1865, at Ottawa.

ABRAM G. COURSEN, *Appellant*,
vs.
EDWARD ELY, *Appellee.*

} APPEAL FROM SUPERIOR COURT OF CHICAGO.

POINTS AND AUTHORITIES FOR APPELLEE.

I.

The jury were correctly instructed as to the law in regard to negligence applicable to the case. The 5th instruction for the plaintiff was as follows:

"If the jury believe from the evidence, that the injuries complained of were caused by the negligence or carelessness of the servant of the defendant, in the course of his employment as such servant, either without any negligence or fault on the part of plaintiff's servant, or without any such negligence or fault on his part as contributed to the injuries complained of, or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation, then they will find for the plaintiff.

The testimony shows, and it was conceded, that both servants were acting in the course of their employment as such servants.

As regards the first clause of the instruction, when there is no negligence or carelessness on the part of plaintiff's servant, there can be no question of its correctness.

Filed Apl. 14. 1865.
L. Leland
Clk.

Again, if the injuries were caused by the negligence or carelessness of defendant's servant, without any such fault or negligence of plaintiff's servant, as contributed to the injuries, the plaintiff ought to have recovered. If the carelessness or negligence of defendant's servant *caused* the injuries, and the negligence or carelessness of plaintiff's servant, (assuming for argument's sake, that there was such carelessness or negligence,) had nothing to do with the accident, in no way *caused* or *contributed* to it, and the injuries must have occurred, in any event, independently of his action, then his conduct is an immaterial element, and, in estimating the liability of the defendant, should be dismissed from the calculation.

In Kinnard vs. Burton, 12 Shepley 39, the Court say "An examination of all the cases, leads to the conclusion that the correct rule is, that if the party, by the want of ordinary care, contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not, by the want of it, produce the injury, he will be entitled to recover."

This case is cited, and the doctrine approved by this Court in

The Aurora Branch R. R. Co. vs Grimes, 13 Ill., 588
Dyer vs. Talcott, 16 Ill., 300.
Galena and Chicago Union R. R. Co., vs. Fay, 16 Ib., 558.
Galena and Chicago Union R. R. Co. vs. Dill, 22 Ill., 271.

In the last case the Court say, "The omission to ring the bell or sound the whistle could not be negligence unless its omission produced the injury complained of. It may be that the result would have been the same if the bell had been rung or the whistle sounded, and if so, it was not negligence to omit it."

This, evidently, was the view taken of the law by defendant's counsel on the trial of this cause, and, in substance, is contained in the instruction given at his instance. Defendant's 3d instruction, as offered, is as follows: "The jury are instructed that one

who complains of the negligence of another, should himself be without fault. And they are further instructed, that if they believe from the evidence, this collision was an accident, or was the *result* of carelessness of *both* drivers, then the law is for the defendant, and he is entitled to the verdict." That is, in order to discharge the defendant, whose servant had been guilty of carelessness, resulting in injuries, the plaintiff's servant must not only have been guilty of carelessness, but his carelessness must have *affected the result*. To this instruction the Court added as follows: "This is so if the carelessness of plaintiff's driver contributed to produce the accident." To say that the carelessness of plaintiff's driver must have contributed to produce the accident, differs from a statement that the accident must have resulted in part from the conduct of plaintiff's servant, in form of expression only.

But this Court has in many cases gone farther than is claimed by plaintiff's instructions in this case to be law, and has held, in a large number of cases, that the Jury may weigh degrees of negligence, and that, when plaintiff's negligence is slight, and that of defendant gross, the plaintiff may still recover.

Chicago & Rock Island R. R. Co. vs. Still. 19 Ill., 509.
Peoria Bridge Association vs. Loomis, 20 Ill., 251.
Galena and Chicago Union R. R. Co. vs. Jacobs, 20 Ill., 496.
C. B. & Q. R. R. Co. vs. Dewey, 26 Ill., 258.
C. B. & Q. R. R. Co. vs. Hazzard, Ib., 386.
Ill. Cent. R. R. Co. vs. Goodwin, 30 Ill., 117.

Again, the utmost care and skill is not required of plaintiff's servant. It is only necessary that he should have shown no want of such care and skill as could reasonably have been expected of a man of ordinary prudence and skill in such a situation.

1 Hilliard on Torts, pp. 146, 159, 177.
Payne vs. Smith, 4 Dana (Ky.), 497.
Aurora Branch R. R. Co. vs. Grimes, 13 Ill., 587.
C. B. & Q. R. R. Co. vs. Dewey, 26 Ill., 258.
And Ill. cases before cited.

II.

The facts in the case show not only gross carelessness on the part of defendant's servant, but as much care and skill as could reasonably be expected of a man of ordinary prudence and skill in such a situation. Defendant's servant, driving a two horse grain team, overtakes and runs into plaintiff's carriage, with such force as to upset the carriage, throw out the driver and throw down his own horse. It can hardly be possible that this could happen without gross negligence on the part of defendant's driver. He was driving at a rapid rate, as is shown directly by the testimeny on this point, and by the violence with which it was proved the teams collided. Williams swears "he was coming very fast." Lowe says, "he was trotting very fast." Williams says that Stewart did not call out to him. There is nothing in Stewart's testimony to show that he made any effort to call Williams' attention. Williams says "his horse was walking." Stewart "thinks he was going at a slow trot." Williams says he "was going straight forward, and did not turn to either side." Stewart says, "Williams turned to the left two or three feet." However this may be, it cannot be seriously contended that it is anything but gross carelessness for a driver to drive in such a manner as to make a collision inevitable if a carriage in front deflects two or three feet from a straight line.

Defendant's counsel have claimed that Williams was guilty of negligence, in not looking behind him. It can hardly be seriously claimed that it is the duty of a driver, in the crowded streets of a city, to watch for and avoid vehicles coming toward him from behind. Williams, Lowe and Stewart all testify that there was a team in front of Williams. It was his business to look for this. To have looked behind would have made a collision with the forward team probable. Nor was he to presume that a team coming behind, "even with much noise and racket," as is always the case

with an empty wagon, driven at a rapid rate, on a paved street, was intending to run over him. But, assuming, contrary to the fact, that it was his business to know of and avoid the team coming from behind, even then he cannot be charged with carelessness. In the excitement of the danger, even the most prudent and skilful man would be as likely to sheer two feet in the wrong as in the safest direction. And the evidence, showing that the team horses ran directly into the back of the carriage, makes it clear that going straight forward, or deviating several feet in any direction, by Williams, would not have prevented the collision.

But the jury have found that the carelessness of Coursen's servant caused the accident, and that Williams was guilty of no fault or carelessness which contributed to it.

This Court say in Dawson vs. Robbins, 5 Gil., 74: "It is only in cases where the verdict of the jury strikes the mind at first blush as manifestly and palpably contrary to evidence that the Court will for that reason interfere to set it aside."

See also Johnson vs. Moulton, 1 Scam., 533.
Gallup vs. Smith, 24 Ill., 586.

III.

The testimony of Stewart was contradicted in some essential particulars by other witnesses—as to his rate of speed and that of Williams', and as to other circumstances of the collision by both Williams and Lowe; as to the injuries to the carriage by both Williams and Coan—hence, the first instruction for the plaintiff, which gave to the jury the right to attach such value as they chose to his uncorroborated testimony, was justified by the circumstances of the case.

The second instruction for the plaintiff, as to the duty of one driving in the streets, is, of course, to be taken in connection with the other instructions and the facts in the case. The proof shows, and it was conceded, that Stewart was acting in the course

of his employment as defendant's servant. It is impossible that the jury were misled by the instruction.

The fourth instruction for the plaintiff was a general instruction, intended to instruct the jury as to the law of the road. The language of the instruction is that employed in 1 Angell on Highways, p. 326.

The jury cannot have been misled by it.

IV.

Tilden, who was clerk in a livery stable, was asked, "What was the value of the use of an able-bodied carriage horse per day." He answered "three dollars per day over and above his keeping," and, on cross-examination, adds that he "means a livery-stable horse," and that "he supposes the use of one good carriage horse worth as much as another." Objection was made by the counsel for the defendant on the ground that the best evidence would have been the value of the use of a family horse such as plaintiff's was. It is immaterial whether plaintiff's horse was used for livery or family purposes; for drawing persons or grain; the value of the use of an able-bodied carriage horse in the market was the question to be ascertained, and for this purpose the party called was a competent witness. It would be a hypercritical refinement to require in such a case proof of the value of the use of a carriage horse used as the plaintiff's was, and in a family of the same size and habits as his.

V.

The amount of the damages recovered is fully warranted by the evidence.

Williams says plantiff's horse was "well and hearty" at the time of the accident; Lehrkamp, who doctored the horse, says, "three or four holes were cut in the horse's hind legs," and that

the wounds were attended with inflammation; that his services were worth $9.50; both Williams and Lehrkamp say that the horse could not be used for six or seven weeks after the accident; Tilden says the value of the use of a horse was $3 a day; Stewart fixes it at $1 per day. An average of the two estimates would make the plaintiff's loss, from the loss of the horse's services, $84. Both Williams and Coan testify that the carriage was badly injured; Coan says his instructions were to make it as good as new, and that his charges for so doing were $46. No objection was made to this testimony. The items of repair proved to have been made by him, show their necessity, and the extent of the injuries. Coan thinks the carriage was worth $75 less after the repairs put on it, than before the accident.

It is difficult to see how the verdict of the jury could have been for a smaller amount than it was.

VI.

The eighth error assigned is, "that the Court erred in deciding said motion for a new trial, without giving the defendant a hearing on the same before the three judges in banc."

The following is the language of the act establishing the Superior Court, upon which is based the error assigned:

* * * "All cases and points reserved at trial, bills of exceptions and demurrers to evidence, motions in arrest of judgment, and issues in law, *may* be argued and submitted in said Court *before a majority of said Judges.*"

The Superior Court consists of three Judges. The error assigned does not raise the question of the right of the defendant to have his motion for a new trial heard "before a majority of said Judges." Counsel claimed the right to be heard before *all* the Judges, (see pages 23 and 24 of Record,) and assigns for error that the Court decided his motion without giving him a hearing

before *all the three Judges*. There is nothing in the act giving him this right, and there was no error in overruling the motion.

Besides, the word "may," in the act, may be construed as giving to the Court a discretionary power, and not as making it imperative upon them to give a hearing in such a case, even before a majority of said Judges. Such has been the construction always put upon it by the Superior Court, and, in accordance with a rule of this Court, adopted in 1859, that Court has set in banc "only in such cases, or where such questions arise as the Judge before whom they may be brought shall deem of sufficient importance and difficulty to be referred for disposition to the Court in banc." A construction which would make it the imperative duty of the Court to give a hearing before a majority of said Judges upon every trivial point reserved, or motion for a new trial, ought not to be adopted, unless such is most plainly the intention of the Legislature.

But, however this may be, "it is a well settled principle that a party can never avail himself of an error to reverse a judgment which does him no wrong." If this Court, on an inspection of the record in this cause, is satisfied that no sufficient reasons for a new trial existed, then the refusal of the Court to give a hearing to the defendant's motion for a new trial before all the three Judges, cannot have produced an injury to the defendant, and there was no error in overruling his motion.

Thorn vs. Watson, 5 Gil., 30.
Smith vs. Shultz, 1 Scam., 491.
Gillett et al. vs. Sweat, 1 Gil., 490.
Greenup vs. Stoker, 3 Gil., 216.
Newkirk vs. Cone, 18 Ill., 454.
Dishon et al. vs. Schorr, 19 Ill., 62.
Schwarz vs. Schwarz, 26 Ill., 81.

CHARLES A. DUPEE,
Attorney for Appellee.

Supreme Court of Illinois.

THIRD GRAND DIVISION,

April Term, A. D., 1865.

ABRAM G. COURSEN, APPELLANT,

vs.

EDWARD ELY, APPELLEE.

APPEAL FROM SUPERIOR COURT OF CHICAGO.

ABSTRACT OF RECORD.

Page 3 Plaintiff's Declaration in Case. Avers that defendant (Coursen), to wit: Oct. 16, 1863, was possessed of a certain carriage and two horses, driven by his servant in the city of Chicago, and that the same was so carelessly and improperly driven, directed and governed, by said servant, as to strike, with great force and violence, a carriage belonging to appellee, under the direction and government of appellee's servant, which latter was exercising reasonable care, skill and prudence, and was without fault, &c.

Whereby and without any want of reasonable care, skill and prudence on the part of plaintiff's servant, the said appellee's carriage, &c., was greatly injured, &c., and became of no value to said plaintiff, and the horse of the said plaintiff was greatly hurt, &c., and so remained for a long space of time, during which the plaintiff was deprived of the use of the same, and, by means of the premises, was forced to lay out large sums of money, &c., in curing said horse, &c., and in repairing said carriage, &c.

Damages, $250.

6 Plea, general issue.

Trial by Court and jury, Sept. 22, 1864.

7 Verdict of the jury, finding damages against appellant (defendant below), in the sum of $132.25.

8 Motion for new trial—overruled and exception.

9 Judgment for plaintiff $132.25.

Appeal bond.

BILL OF EXCEPTIONS.

Shows plaintiff's proof as follows:

11 CHARLES WILLIAMS was sworn on the trial and testified as follows:

I am the driver of the Pl'ff (Ely), and have been for fourteen months. I was his driver last Sept. About the last of that month I started with Mr. Ely's horse and carriage from 3d Avenue, to go to the store. I had half an hour to get there. I came to Clark street, walking all the way, with the lines slack.

12 Near the corner of Jackson St. I heard a wagon behind me—right behind me, on the same side of the street, coming very fast and making a great noise and racket. I paid no attentien to it, I did not look around. I cast my eye over my left shoulder to see what it was. It struck my right hind wheel, and turned the carriage over and turned me out. My horse went round the corner and stopped. It was about five P. M. I was driving my horse and a light open buggy. My horse was going north walking. The lines were lying loose on the dash. Had not trotted a step since I left the house. Was on the east side of Clark street, from eight to ten feet from sidewalk. There was a wagon perhaps twenty feet ahead of me going north. The wagon behind could pass to the left but not to the east of me. Deft's driver did not call out to me. Couldn't tell how fast he was going. He was driving very fast. I think his off horse struck my near hind wheel with his breast. It threw his off horse down. My buggy was turned on one side. It threw me out. One shaft was over my horse's back. He went about three rods to the blacksmith shop and stopped. Deft's driver drove away as fast as he could. I got a policeman

13 and followed him. My wagon was scratched on the side and seat, the shafts broke and reach and springs twisted. Horse badly cut in his hind legs. Two holes in one and one in the other. I called a doctor. It was about six weeks before the horse could be used. Pl'ff's horse was well and hearty. I did not turn to either side.

(It was admitted that the driver of the grain wagon was deft's driver, and all objections were waived by both parties as to the question of interest of both Williams and Stewart.)

Deft's driver drove a box grain wagon. I did not see Stewart or his horses before the accident. Just as the accident happened I saw his off horse's head on my left, and partly over my left shoulder. I did not turn my head when I heard him coming. Stewart was trying to turn out. I did not see nor can I tell what upset the carriage. Whether it was the

horse or pole I did not see. I think it was the horse striking the wheel. I can't tell where the pole of Stewart's wagon was. I never look behind when I drive. I did not look behind me at this time. I had on my buckskin gloves. My wagon was tipped to the west. I did not say on the former
14 trial, it was tipped to the east. I did not then testify either that I was thrown as high as the gaslight in the room where the trial was.

I followed Stewart in the same carriage, and drawn by the same horse of Ely. The reach was broken short off. The seat was broken on the left side and top. I might have said, on the former trial, that the carriage was broken all to pieces. The use of plaintiff's horse was for family purposes. It was used sometimes once a day, and sometimes not, sometimes more often.

14 HENRY LOWE testified:

I am a Justice of the Peace, and an Insurance Agent. I saw the accident. I saw the team strike the carriage going very fast, trotting. I was crossing Clark street. Williams was eighteen or twenty feet from the west side of the street. The carriage was broke. Williams was nearest to me. I was on the north side of Jackson street. The collision was just south of the south side of Jackson street. The big team was eight feet back when I first saw it. I was taking care of myself. The car-
15 riage tipped to the west. I don't know what upset the carriage. I might have sworn, on the former trial, that the big team was on a gallop. I didn't see any horse of defendant's down.

FREDERICK LEHRKAMP:

Am a horse doctor for twenty-five years, and doctored Ely's horse last September. He was scratched in hind legs in three or four places—three or four holes in them. There was some inflammation. My services were worth $9.50. Horse was hurt in both hind legs. It was a square cut. I stopped the inflammation and gave medicine to stop the fever. It may be he would have healed up without medicine. If a horse is driven in the dust and dirt after such wounds, I can't tell whether it will cause inflammation or not. I don't know as it would be worse for the wounds to have dirt in them. He was sick in the barn six or seven weeks. I visited him sixteen times.

15 D. W. COON testified:

I know Mr. Ely's carriage. We repaired it after the accident. Orders were left to make it as good as before. We charged $46 dollars for our

work. I am not a judge of the damage done, though I should not want to pay as much into $75, as though it had not been injured. But it may not be injured much—I cannot tell. The carriage was painted all over. The springs were broken and both set over, the reach mended and the body. One axle was sprung. The dash was newly covered.

16 C. C. TILDEN testified:

I am clerk in Dunton's livery stable.

Question by Plaintiff: What was the value of the use of an able-bodied horse, per day, last fall?

Objected to, and objection overruled.

Ans.: Three dollars per day, besides keeping. I mean a livery stable horse would. I never hired a horse to put in a team. Do not know how much the daily use of a family horse is worth. I suppose one good carriage horse is worth the same as another.

Thereupon the plaintiff rested.

DEFENDANT'S TESTIMONY.

17 NEIL STEWART testified:

I was defendant's driver last fall, and drove defendant's team at the time of the accident. Have been a driver for twelve years. The team I drove weighed 2,400 pounds, and the wagon over a ton. I was coming from Michigan Southern Freight Depot, and going to the North-Western Depot. I saw Williams near Harrison street. I was going on a trot. Williams was ahead of me. I turned out to the left to go by. As my horse got along side Williams hauled round, and his wheel caught my off horse's fore leg, and threw him down on his side. My pole swung round and capsized his buggy. I was standing in the fore part of my wagon. My team was large and heavy and hauled heavy loads. Going up I hauled four tons. I was going after another load. My team could not
18 go on a fast trot. As I turned out to go by Williams turned to the west, or left, in front of me. He catched my horse, and as he fell, the pole swung round to the east. My horse was lying on his broad side. I got my horse up, and drove away towards North-Western Depot. At Madison street bridge, Williams, with his horse and buggy and a policeman, come up with his horse and buggy. We went to the Armory and then to my barn on Monroe street. I then got into Ely's buggy, with Williams and the policeman, and we went to Mr. Ely's store. I looked at the buggy, and all the injury I could see, was a piece knocked off the side or

19 end of the seat. The horse did not go lame, and I saw no cuts. The dash was not broken. The wheels tracked well enough, and I saw nothing the matter with them. We all rode in the buggy. I was going no faster at the time of the accident than afterwards. The team cannot be made to run. They are old heavy draft horses.

My pole went west of the left carriage wheel. It projected a little before the horses. Neckyoke was four feet long. There was room enough for me to pass if he had not turned.

I have hired horses and know the price. Horses, last year, were worth a dollar a day. Williams did not look around till after he turned in front of me. At the store, Mr. Ely, the plaintiff, stated to me his horse had been sick for some time previous to that, and he was out airing him, and going slow. I think Williams was going at a slow trot. I was five or six yards off when I turned out to pass. He turned his horse to the left two or three feet. Ely's carriage tipped to the east side of the street. There was a team ahead of Williams.

ABNER SUTTEN testified:

I am Bailiff of this Court, and was present when this case was tried before, (this was the second trial of the case,) and heard Mr. Williams and Mr. Lowe testify then. Mr. Lowe then swore that the big team (defendant's,) was, at the time of the accident, going on a gallop very fast. Williams and Lowe both swore that the buggy was tipped to the east.

The above was all the testimony in the case.

The Court instructed the jury on the part of the plaintiff as follows:

20 1. If the jury believe from the evidence that the witness Stewart did, as to some of the material facts in this case, willfully and intentionally testify falsely, then the jury are instructed that they are at liberty to reject all of his evidence as unworthy of credit, except so far as the same may have been corroborated by other unobjectionable testimony.

2. It is the duty of any one driving in the streets of Chicago, to drive at such a rate of speed and in such a manner as that he may have his team under his control and be able to manage it; and if an injury arise from his driving at an immoderate rate, without fault or negligence on the part of the person injured, he is liable for such injury.

3. It is the duty of any one driving along the streets of this city, who desires to pass another vehicle going in the same direction, to pass on whichever side it may be safest to do so. If there is not sufficient room

to pass, it is his duty to request the former traveler to make room; and if he fails to do so, he has no right to effect his passage by a violent collision.

4. If the jury believe, from the evidence, that the injuries complained of were caused by the negligence or carelessness of the servant of the defendant, in the course of his employment as such servant, either without any negligence or fault on the part of plaintiff's servant; or without any such fault or negligence on his part as contributed to the injuries complained of; or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation, then they will find for the plaintiff.

21 5. The jury are instructed that in determining the question of negligence, they are to take into consideration the situation of both parties, and that if they believe from the evidence that the injury was caused by the negligence or fault of defendant's driver, without any greater want of skill or care on the part of plaintiff's driver than could reasonably be expected of a person of ordinary prudence and skill in such a situation as he was, that the plaintiff is entitled to recover.

6. The jury are instructed that if on the evidence in this cause they shall find for the plaintiff, in determining the amount of their verdict they will take into consideration all such damages as have been proved to be the natural and legitimate consequences of the injuries proved to have been sustained.

22 & 23 The following instructions were given for the defendant:

1. That if they (the jury) believe from the evidence that the alleged injury to the plaintiff's horse and carriage was produced in whole or in part by the negligence or misconduct of the plaintiff's servant, then the jury will find for the defendant.

2. The plaintiff in this action can only recover for the actual damage by him sustained, and not for mere speculative damages, and, in order to render the defendant liable, the jury must be satisfied from the evidence that such damages were wholly owing to the fault or misconduct of the witness, Stewart.

4. If the jury believe from the whole evidence in this cause that Charles Williams, the driver of plaintiff's carriage, has and did in some of the material facts in this cause. wilfully and intentionally testify falsely, then it is their duty to reject his whole testimony, and they are at liberty to do so.

6. If the jury believe from the evidence that the driver of the plaintiff could, by the exercise of reasonable care and caution, have prevented the collision in question, then the law is for the defendant, and he is entitled to the verdict; mere negligence on the part of plaintiff's driver is sufficient to discharge the defendant, if such negligence contributed to the collision in question.

7. The jurors are further instructed that they have the right to weigh the evidence in this cause by the light of their general knowledge and experience as applied to the events and transactions of life.

Two of defendant's instructions were refused as asked, but were modified by the Court as follows:

Defendants third instruction as asked.

3d. And the jury are instructed that one who complains of the negligence of another should himself be without fault; and they are further instructed that if they believe from the evidence this collision was an accident, or was the result of carelessness of both drivers, then the law is for the defendant and he is entitled to the verdict.

The Court against objection added to the third instruction the words (underscored with red lines in Record) as follows: "This is so, if the carelessness of the plaintiff's driver contributed to produce the accident."

Defendant's fifth instruction as asked.

23 5th. If the jury believe from the evidence that the witness wilfully or negligently turned plaintiff's horse in front of defendant's team to prevent the same from passing him, and that the alleged collision or injury was occasioned in whole or in part thereby, and by the act of Williams, then they will find for the defendant.

The Court against objection of defendant inserted in said fifth instruction, after the words "thereby, and" the words (underscored in Record with red lines) "negligent or wilful."

23 & 24 Motion for new trial and request of defendant to have the same heard and determined before the three judges of said Court in banc, and

24 objection of defendant to having the same determined by a single judge, which motion was denied and exception taken.

25 Motion for new trial also overruled and defendant excepted.

THE ERRORS ASSIGNED ARE.

28 1. The Court erred in overuling defendant's objection to the admission of improper evidence, and in permitting improper evidence to go to the jury.

2. The Court erred in insfructing the jury that defendant's driver was bound to ask plaintiff's driver permission to pass, and that was evidence of negligence.

3. The Court erred in giving each of the plaintiff's instructions.

4. The Court erred in refusing to give the third and fifth of defendant's instructions as asked.

5. The Court erred in modifying the third and fifth of defendant's instructions.

6. The Court erred in giving the third and fifth of defendant's instructions as modified by the Court.

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

8. The Court erred in deciding said motion for a new trial without giving the defendant a hearing on the same before the three judges in banc.

9. Upon the whole evidence the verdict and judgment should have been for the defendant.

10. The jury disregarded the law and found a verdict not warranted by the evidence.

161 81

Ebersen

vs.

Ely

This abstract of the record is furnished by the appellee herein.

Filed Apl 14. 1865

S. Schmidt Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION,

April Term, A. D., 1865.

ABRAM G. COURSEN, APPELLANT,

vs.

EDWARD ELY, APPELLEE.

APPEAL FROM SUPERIOR COURT OF CHICAGO.

ABSTRACT OF RECORD.

Page 3 Plaintiff's Declaration in Case. Avers that defendant (Coursen), to wit: Oct. 16, 1863, was possessed of a certain carriage and two horses, driven by his servant in the city of Chicago, and that the same was so carelessly and improperly driven, directed and governed, by said servant, as to strike, with great force and violence, a carriage belonging to appellee, under the direction and government of appellee's servant, which latter was exercising reasonable care, skill and prudence, and was without fault, &c.

Whereby and without any want of reasonable care, skill and prudence on the part of plaintiff's servant, the said appellee's carriage, &c., was greatly injured, &c., and became of no value to said plaintiff, and the horse of the said plaintiff was greatly hurt, &c., and so remained for a long space of time, during which the plaintiff was deprived of the use of the same, and, by means of the premises, was forced to lay out large sums of money, &c., in curing said horse, &c., and in repairing said carriage, &c.

Damages, $250.

6 Plea, general issue.
Trial by Court and jury, Sept. 22, 1864.

7 Verdict of the jury, finding damages against appellant (defendant below), in the sum of $132.25.

8 Motion for new trial—overruled and exception.

9 Judgment for plaintiff $132.25.
Appeal bond.

BILL OF EXCEPTIONS.

Shows plaintiff's proof as follows:

11 CHARLES WILLIAMS was sworn on the trial and testified as follows:

I am the driver of the Pl'ff (Ely), and have been for fourteen months. I was his driver last Sept. About the last of that month I started with Mr. Ely's horse and carriage from 3d Avenue, to go to the store. I had half an hour to get there. I came to Clark street, walking all the way, with the lines slack.

12 Near the corner of Jackson St. I heard a wagon behind me—right behind me, on the same side of the street, coming very fast and making a great noise and racket. I paid no attentien to it, I did not look around. I cast my eye over my left shoulder to see what it was. It struck my right hind wheel, and turned the carriage over and turned me out. My horse went round the corner and stopped. It was about five P. M. I was driving my horse and a light open buggy. My horse was going north walking. The lines were lying loose on the dash. Had not trotted a step since I left the house. Was on the east side of Clark street, from eight to ten feet from sidewalk. There was a wagon perhaps twenty feet ahead of me going north. The wagon behind could pass to the left but not to the east of me. Deft's driver did not call out to me. Couldn't tell how fast he was going. He was driving very fast. I think his off horse struck my near hind wheel with his breast. It threw his off horse down. My buggy was turned on one side. It threw me out. One shaft was over my horse's back. He went about three rods to the blacksmith shop and stopped. Deft's driver drove away as fast as he could. I got a policeman
13 and followed him. My wagon was scratched on the side and seat, the shafts broke and reach and springs twisted. Horse badly cut in his hind legs. Two holes in one and one in the other. I called a doctor. It was about six weeks before the horse could be used. Pl'ff's horse was well and hearty. I did not turn to either side.

(It was admitted that the driver of the grain wagon was deft's driver, and all objections were waived by both parties as to the question of interest of both Williams and Stewart.)

Deft's driver drove a box grain wagon. I did not see Stewart or his horses before the accident. Just as the accident happened I saw his off horse's head on my left, and partly over my left shoulder. I did not turn my head when I heard him coming. Stewart was trying to turn out. I did not see nor can I tell what upset the carriage. Whether it was the

horse or pole I did not see. I think it was the horse striking the wheel. I can't tell where the pole of Stewart's wagon was. I never look behind when I drive. I did not look behind me at this time. I had on my buckskin gloves. My wagon was tipped to the west. I did not say on the former
14 trial, it was tipped to the east. I did not then testify either that I was thrown as high as the gaslight in the room where the trial was.

I followed Stewart in the same carriage, and drawn by the same horse of Ely. The reach was broken short off. The seat was broken on the left side and top. I might have said, on the former trial, that the carriage was broken all to pieces. The use of plaintiff's horse was for family purposes. It was used sometimes once a day, and sometimes not, sometimes more often.

14 HENRY LOWE testified:

I am a Justice of the Peace, and an Insurance Agent. I saw the accident. I saw the team strike the carriage going very fast, trotting. I was crossing Clark street. Williams was eighteen or twenty feet from the west side of the street. The carriage was broke. Williams was nearest to me. I was on the north side of Jackson street. The collision was just south of the south side of Jackson street. The big team was eight feet back when I first saw it. I was taking care of myself. The car-
15 riage tipped to the west. I don't know what upset the carriage. I might have sworn, on the former trial, that the big team was on a gallop. I didn't see any horse of defendant's down.

FREDERICK LEHRKAMP:

Am a horse doctor for twenty-five years, and doctored Ely's horse last September. He was scratched in hind legs in three or four places—three or four holes in them. There was some inflammation. My services were worth $9.50. Horse was hurt in both hind legs. It was a square cut. I stopped the inflammation and gave medicine to stop the fever. It may be he would have healed up without medicine. If a horse is driven in the dust and dirt after such wounds, I can't tell whether it will cause inflammation or not. I don't know as it would be worse for the wounds to have dirt in them. He was sick in the barn six or seven weeks. I visited him sixteen times.

15 D. W. COON testified:

I know Mr. Ely's carriage. We repaired it after the accident. Orders were left to make it as good as before. We charged $46 dollars for our

work. I am not a judge of the damage done, though I should not want to pay as much into $75, as though it had not been injured. But it may not be injured much—I cannot tell. The carriage was painted all over. The springs were broken and both set over, the reach mended and the body. One axle was sprung. The dash was newly covered.

16 C. C. TILDEN testified:

I am clerk in Dunton's livery stable.

Question by Plaintiff: What was the value of the use of an able-bodied horse, per day, last fall?

Objected to, and objection overruled.

Ans.: Three dollars per day, besides keeping. I mean a livery stable horse would. I never hired a horse to put in a team. Do not know how much the daily use of a family horse is worth. I suppose one good carriage horse is worth the same as another.

Thereupon the plaintiff rested.

DEFENDANT'S TESTIMONY.

17 NEIL STEWART testified:

I was defendant's driver last fall, and drove defendant's team at the time of the accident. Have been a driver for twelve years. The team I drove weighed 2,400 pounds, and the wagon over a ton. I was coming from Michigan Southern Freight Depot, and going to the North-Western Depot. I saw Williams near Harrison street. I was going on a trot. Williams was ahead of me. I turned out to the left to go by. As my horse got along side Williams hauled round, and his wheel caught my off horse's fore leg, and threw him down on his side. My pole swung round and capsized his buggy. I was standing in the fore part of my wagon. My team was large and heavy and hauled heavy loads. Going up I hauled four tons. I was going after another load. My team could not
18 go on a fast trot. As I turned out to go by Williams turned to the west, or left, in front of me. He catched my horse, and as he fell, the pole swung round to the east. My horse was lying on his broad side. I got my horse up, and drove away towards North-Western Depot. At Madison street bridge, Williams, with his horse and buggy and a policeman, come up with his horse and buggy. We went to the Armory and then to my barn on Monroe street. I then got into Ely's buggy, with Williams and the policeman, and we went to Mr. Ely's store. I looked at the buggy, and all the injury I could see, was a piece knocked off the side or

19 end of the seat. The horse did not go lame, and I saw no cuts. The dash was not broken. The wheels tracked well enough, and I saw nothing the matter with them. We all rode in the buggy. I was going no faster at the time of the accident than afterwards. The team cannot be made to run. They are old heavy draft horses.

My pole went west of the left carriage wheel. It projected a little before the horses. Neckyoke was four feet long. There was room enough for me to pass if he had not turned.

I have hired horses and know the price. Horses, last year, were worth a dollar a day. Williams did not look around till after he turned in front of me. At the store, Mr. Ely, the plaintiff, stated to me his horse had been sick for some time previous to that, and he was out airing him, and going slow. I think Williams was going at a slow trot. I was five or six yards off when I turned out to pass. He turned his horse to the left two or three feet. Ely's carriage tipped to the east side of the street. There was a team ahead of Williams.

ABNER SUTTEN testified:

I am Bailiff of this Court, and was present when this case was tried before, (this was the second trial of the case,) and heard Mr. Williams and Mr. Lowe testify then. Mr. Lowe then swore that the big team (defendant's,) was, at the time of the accident, going on a gallop very fast. Williams and Lowe both swore that the buggy was tipped to the east.

The above was all the testimony in the case.

The Court instructed the jury on the part of the plaintiff as follows:

20 1. If the jury believe from the evidence that the witness Stewart did, as to some of the material facts in this case, willfully and intentionally testify falsely, then the jury are instructed that they are at liberty to reject all of his evidence as unworthy of credit, except so far as the same may have been corroborated by other unobjectionable testimony.

2. It is the duty of any one driving in the streets of Chicago, to drive at such a rate of speed and in such a manner as that he may have his team under his control and be able to manage it; and if an injury arise from his driving at an immoderate rate, without fault or negligence on the part of the person injured, he is liable for such injury.

3. It is the duty of any one driving along the streets of this city, who desires to pass another vehicle going in the same direction, to pass on whichever side it may be safest to do so. If there is not sufficient room

to pass, it is his duty to request the former traveler to make room; and if he fails to do so, he has no right to effect his passage by a violent collision.

4. If the jury believe, from the evidence, that the injuries complained of were caused by the negligence or carelessness of the servant of the defendant, in the course of his employment as such servant, either without any negligence or fault on the part of plaintiff's servant; or without any such fault or negligence on his part as contributed to the injuries complained of; or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation, then they will find for the plaintiff.

21 5. The jury are instructed that in determining the question of negligence, they are to take into consideration the situation of both parties, and that if they believe from the evidence that the injury was caused by the negligence or fault of defendant's driver, without any greater want of skill or care on the part of plaintiff's driver than could reasonably be expected of a person of ordinary prudence and skill in such a situation as he was, that the plaintiff is entitled to recover.

6. The jury are instructed that if on the evidence in this cause they shall find for the plaintiff, in determining the amount of their verdict they will take into consideration all such damages as have been proved to be the natural and legitimate consequences of the injuries proved to have been sustained.

22 & 23 The following instructions were given for the defendant:

1. That if they (the jury) believe from the evidence that the alleged injury to the plaintiff's horse and carriage was produced in whole or in part by the negligence or misconduct of the plaintiff's servant, then the jury will find for the defendant.

2. The plaintiff in this action can only recover for the actual damage by him sustained, and not for mere speculative damages, and, in order to render the defendant liable, the jury must be satisfied from the evidence that such damages were wholly owing to the fault or misconduct of the witness, Stewart.

4. If the jury believe from the whole evidence in this cause that Charles Williams, the driver of plaintiff's carriage, has and did in some of the material facts in this cause. wilfully and intentionally testify falsely, then it is their duty to reject his whole testimony, and they are at liberty to do so.

6. If the jury believe from the evidence that the driver of the plaintiff could, by the exercise of reasonable care and caution, have prevented the collision in question, then the law is for the defendant, and he is entitled to the verdict; mere negligence on the part of plaintiff's driver is sufficient to discharge the defendant, if such negligence contributed to the collision in question.

7. The jurors are further instructed that they have the right to weigh the evidence in this cause by the light of their general knowledge and experience as applied to the events and transactions of life.

Two of defendant's instructions were refused as asked, but were modified by the Court as follows:

Defendants third instruction as asked.

3d. And the jury are instructed that one who complains of the negligence of another should himself be without fault; and they are further instructed that if they believe from the evidence this collision was an accident, or was the result of carelessness of both drivers, then the law is for the defendant and he is entitled to the verdict.

The Court against objection added to the third instruction the words (underscored with red lines in Record) as follows: "This is so, if the carelessness of the plaintiff's driver contributed to produce the accident."

Defendant's fifth instruction as asked.

23 5th. If the jury believe from the evidence that the witness wilfully or negligently turned plaintiff's horse in front of defendant's team to prevent the same from passing him, and that the alleged collision or injury was occasioned in whole or in part thereby, and by the act of Williams, then they will find for the defendant.

The Court against objection of defendant inserted in said fifth instruction, after the words "thereby, and" the words (underscored in Record with red lines) "negligent or wilful."

23 & 24 Motion for new trial and request of defendant to have the same heard and determined before the three judges of said Court in banc, and

24 objection of defendant to having the same determined by a single judge, which motion was denied and exception taken.

25 Motion for new trial also overruled and defendant excepted.

THE ERRORS ASSIGNED ARE.

28 1. The Court erred in overuling defendant's objection to the admission of improper evidence, and in permitting improper evidence to go to the jury.

2. The Court erred in instructing the jury that defendant's driver was bound to ask plaintiff's driver permission to pass, and that was evidence of negligence.

3. The Court erred in giving each of the plaintiff's instructions.

4. The Court erred in refusing to give the third and fifth of defendant's instructions as asked.

5. The Court erred in modifying the third and fifth of defendant's instructions.

6. The Court erred in giving the third and fifth of defendant's instructions as modified by the Court.

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

8. The Court erred in deciding said motion for a new trial without giving the defendant a hearing on the same before the three judges in banc.

9. Upon the whole evidence the verdict and judgment should have been for the defendant.

10. The jury disregarded the law and found a verdict not warranted by the evidence.

161
Courzen
v.
Ely.

This abstract of the record is furnished by appellant herein.

Filed April 14, 1865.
S. Sherwood Clk.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1865.

ABRAM G. COURSEN,
APPELLANT.

vs.

EDWARD ELY,
APPELLEE.

Appeal from Superior Court of Chicago.

ABSTRACT OF RECORD.

Page 3 Plaintiff's Declaration in Case. Avers that Defendant (Coursen,) Oct. 16, 1863, was possessed of a certain carriage and two horses driven by his servant in the city of Chicago, and that the same was so carelessly and improperly driven, directed and governed, by said servant, as to strike with great force and violence, a carriage belonging to appellee, under the direction and government of Appellee's servant; which latter was exercising reasonable care, skill and prudence, and was without fault, &c.

Whereby the said Appellee's carriage, &c., was greatly injured, &c.

Damages $250.

6 Plea General Issue.
Trial by Court and Jury Sept. 22, 1864.

7 Verdict of the Jury, finding damages against Appellant, (def't below,) in the sum of $132.25.

8 Motion for New Trial—overruled, and exception.

9 Judgement for Pl'ff $132.25.
Appeal Bond.

Bill of Exceptions.

Shows Plff's proof as follows:

11 CHARLES WILLIAMS was sworn on the trial and testified as follows—

I am the driver of the Pl'ff, (Ely) and have been for fourteen months. I was his driver last Sept. About the last of that month, I started with Mr. Ely's horse and carriage from 3d Avenue, to go to the store. I had half an hour to get there. I came to Clark St. walking all the way, *with the lines slack.*

12 Near the corner of Jackson St. I heard a wagon behind me—right behind me, on the same side of the Street, coming very fast and making *a great noise and racket. I paid no attention to it, I did not look around.* I cast my eye over my left shoulder to see what it was. It struck my right hind wheel, and turned the carriage over and turned me out. My horse went round the corner and stopped. It was about 5 P. M. I was driving my horse and a light open buggy. My horse was going North walking. *The lines where lying loose on the dash.* Had not trotted a step since I left the house. Was on the east side of Clark Street from 8 to 10 feet from side-walk. There was a wagon perhaps 20 feet ahead of me going North. The wagon behind could pass to the left, but not to the East of me. Deft's driver did not call out to me. Could'nt tell how fast he was going. He was driving very fast. I think his off horse struck my near hind wheel with his breast. It threw his off horse down. My buggy was turned on one side. One shaft was over my horse's back. He went about three rods to the black-smith shop and stopped. Deft's driver drove away as fast as he could. I got a policeman and followed him. My wagon was
13 scratched on the side and seat—the shafts broke and reach and springs bruised. Horse badly cut in his hind legs. Two holes in one and one in the other. I called a Doctor, It was about 6 weeks before the horse could be used. Plff's horse was well and hearty, I did not turn to either side.

(It was admitted that the driver of the grain wagon was deft's driver, and all objections were waived by both parties as to the question of interest of both Williams and Stewart.)

Defendant's driver drove a box grain wagon. I did not see Stewart or his horses before the accident. Just as the accident hap-

pened, I saw his off horse's head, on my left and partly over my left shoulder. I did not turn my head when I heard him coming. *Stewart was trying to turn out.* I did not see, nor can I tell, what upset the carriage. Wheter it was the horse or pole, I did not see. I think it was the horse striking the wheel. I cant tell where the pole of Stewarts wagon was. *I never look behind when I drive. I did not look behind at this time.* I had on my buck skin gloves. My wagon was tipped to the west. I did not say on the former trial, it
14 was tipped to the East. I did not then testify either that I was thrown as high as the gas light in the room where the trial was.

I followed Stewart in the same carriage, and drawn by the same horse of Ely. The reach was broken short off. The seat was broken on the left side and top. I might have said on the former trial, that the carriage was broken all to pieces. The use of plff's horse was for family purposes. It was used sometimes once a day and sometimes not.

14 HENRY LOWE testified.

I saw the accident. I saw the team strike the carriage going very fast trotting. Williams was 18 or 20 feet from the west side of the street. The carriage was broke. Williams was nearest to me. I was on the North side of Jackson street. The collision was just south of the south side of Jackson street. The big team was 8 feet back when I first saw it. I was taking care of myself. The carriage tipped to the West. I dont know what upset the carriage.
15 I might have sworn on the former trial, that the big team was on a gallop. I did 'nt see any horse of defendant's down.

FREDERICK LEHRKAMP.

Am a horse doctor, for 25 years, and doctored Ely's horse last September. He was scratched in hind legs in three or four places, 3 or 4 holes in them. There was some inflamation. My services were worth $9.50. Horse was hurt in both hind legs. It was a square cut. I stopped the inflamation and gave medicine to stop the fever. It may be he would have healed up without medicine. If a horse is driven in the dust and dirt after such wounds, I cant tell whether it will cause inflamation or not. I dont know as it would be worse for the wounds to have dirt in them. He was sick in the barn 6 or seven weeks. I visited him 16 times.

15 D. W. COON testified:

I know Mr. Ely's Carriage. We repaired it after the accident. Orders were left to make it as good as before. We charged $46. I am not a judge of the damage done, though I should not want to pay as much into $75, as though it had not been injured. But it may not be injured much I cannot tell. The carriage was painted all over.

C. C. TILDEN testified:

16 I am clerk in Dunton's Livery Stable.

Question by Plff. What was the value of the use of an able bodied horse, per day, last fall?

Objected to, and objection overruled.

Ans. Three dollars per day besides keeping. I mean a livery stable horse would. I never hired a horse to put in a team. Do not know how much the daily use of a family horse is worth.

Thereupon the Plff. rested.

Defendant's Testimony.

17 NEIL STEWART testified:

I was deft's driver last Fall and drove deft's team at the time of the accident. Have been a driver for 12 years. The team I drove weighed 2400 pound and the wagon over a ton. I was coming form Mich. Southern Fright Depot and going to the North Western Depot. I saw Williams near Harrison st. I was going on a trot. Williams was ahead of me. I turned out to the left to go by. As my horse got along side Williams hauled round, and his wheel caught my off horse's fore leg, and threw him down on his side. My pole swung round and capsized his buggy. I was standing in the fore part of my wagon. My team was large and heavy
18 and hauled heavy loads. Going up I hauled four tons. I was going after another load. My team could not go on a fast trot. As I turned out to go by *Williams turned to the West or left* in front of me. He catched my horse and as he fell, the pole swung round to the East. My horse was lying on his broad side. I got my horse up, and drove away towards N. W. Depot. At Madison street Bridge, Williams with his horse and buggy and a Policeman come up with his horse and buggy. We went to the Armory and then to my barn on Monroe st. I then got into Ely's buggy with Williams, and the Policeman, and we went to Mr. Ely's store. I looked at the buggy, and all the injury I could see, was a piece knocked off the side or end of the seat. The horse did not go lame and I saw no cuts. The dash was not broken. The wheels tracked well enough, and I saw nothing the matter with them. We all rode in the buggy. I was

going no faster at the time of the accident than afterwards. *The team cannot be made to run.* They are old heavy draft horses.

My pole went West of the left carriage wheel. It projected a little before the horses. Neckyoke was four feet long. There was room enough for me to pass if he had not turned.

I have hired horses and know the price. Horses last year were worth a dollar a day. Williams did not look around till after he turned in front of me. At the store, Mr. Ely, the plff., stated to me his horse had been sick for some time previous to that, and he was out airing him and going slow. I think Williams was going at a slow trot. I was five or six yards off when I turned out to pass. He turned his horse to the left 2 or 3 feet Ely's carriage tipped to the east side of street.

19 ABNER SUTTEN testified:

I am Bailiff of this court, and was present when this case was tried before, (This was the second trial of the case,) and heard Mr. Williams and Mr. Lowe testify then. Mr. Lowe then swore that the big team (Deft.) was at the time of the accident *going on a gallop* very fast. Williams and Lowe both swore that *the buggy was tipped to the East.*

The above was all the testimony in the case.

The Court instructed the Jury on the part of the Plaintiff as follows:

20 1. If the jury believe from the evidence that the witness Stewart did as to some of the material facts in this case wilfully and intentionally testify falsely then the jury are instructed that they are at liberty to reject all of his evidence as unworthy of credit, except so far as the same may have been corroborated by other unobjectionable testimony.

2. It is the duty of any one driving in the streets of Chicago, to drive at such a rate of speed and in such a manner, as that he may have his team under his control and be able to manage it; and if an injury arise from his driving at an immoderate rate, without fault or negligence on the part of the person injured, he is liable for such injury.

3. It is the duty of any one driving along the streets of this city, who desires to pass another vehicle going in the same direction, to pass on whichever side it may be safest to do so. If there is not sufficient room to pass, it is his duty to request the former traveller to make room; and if he fails to do so, he has no right to effect his passage by a violent collision.

4. If the jury believe from the evidence, that the injuries complained of were caused by the negligence or carelessnes of the servant of the defendant, in the course of his employment as such servant, either without

any negligence or fault on the part of plaintiff's servant; or without any such fault or negligence on his part as contributed to the injuries complained of; or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation then they will find for the plaintiff.

21 5. The jury are instructed that in determining the question the Negligence, they are to take into consideration the situation of both parties, and that if they believe from the evidence that the injury was caused by the negligence or fault of defendant's driver, without any greater want of skill or care on the part of plaintiff's driver, than could reasonably be expected, of a person of ordinary prudence and skill, in such a situation as he was, that the plaintiff is entitled to recover.

6. The jury are instructed, that if on the evidence in this cause, they shall find for the plaintiff, in determining the amount of their verdict, they will take into consideration all such damages, as have been proved to be the natural and legitimate consequences of the injuries proved to have been sustained.

22 & 23 The Defendant's instructions, five of which were given, and two of which were refused, as asked, but were modified by the court as follows.

Deft's. 3d. Instruction, as asked.

3d. And the jury are instructed that one who complains of the negligence of another should himself be without falt; and they are further instructed that if they believe from the evidence this collision was an accident, or was the result of carelessness of both drivers, then the law is for the defendant and he is entitled to the verdict.

The court against objection added to the 3d. Inst. the words (underscored with red lines in Record) as follows, "This is so if the carelessness of the plaintiff's driver contributed to produce the accident."

23 Deft's. 5th Instruction, as asked.

5th. If the jury believe from the evidence that the Witness, wilfully or negligently, turned plaintiff's horse in front of defendant's team to prevent the same from passing him, and that the alleged collision or injury was occasioned in whole or in part thereby, and by the act of Williams then they will find for the defendant.

The court against objection of deft. inserted in said 5th instruction after the word "thereby" the words (underscored in Record with red lines) "Neglect or wilful."

23 & 24 Motion for New Trial and request of deft. to have the same heard and determined before the three judges of said court in banc, and objection of deft. to having the same determined by a single judge, which motion was denied and exception taken.

24

25 Motion for New Trial also overruled and defendant excepted.

The Errors Assigned Are.

28 1. The court erred in overruling defendants objection to the admission of improper evidence and in permitting improper evidence to go to the jury.

2. The court erred in instructing the jury that defendant's driver was bound to ask plff's. driver permission to pass and that was evidence of negligence.

3. The court erred in giving each of the Plaintiff's Instructions.

4. The court erred in refusing to give the 3d, and 5th, of defendant's Instructions as asked.

5. The court erred in modifying the 3d, and 5th, of defendant's instructions.

6. The court erred in giving the 3d, and 5th, of defendant's Instructions as modified by the court.

7. The court erred in overruling the motion for a New Trial.

8. The court erred in deciding said motion for a New Trial without giving the defendant a hearing on the same before the three judges in banc.

9. Upon the whole evidence the verdict and judgement should have been for the defendant.

10. The jury disregarded the law and found a verdict not warranted by the evidence.

GARRISON & BLANCHARD,

Attorneys for Appellant.

161 81

Supreme Court

Abram L. Conover

vs

Edward Ely

Abstract

Filed Aug 5. 1815

S. Sedgwick

Harrison & Blanchard

Attys for Appellant