No. 12293

Supreme Court of Illinois

Galena & Chicago Union R.R.Co.

vs.

Yarwood.

United States of America
State of Illinois Kane County

Pleas before the Honorable Isaac G Wilson Judge of the Thirteenth Judicial Circuit and Presiding Judge of the Kane County circuit Court of the State of Illinois at a Term of said Court begun and held at the Court House in Geneva in said County on the fourteenth day of May in the year of our Lord one Thousand Eight Hundred and fifty five

Present The Hon Isaac G. Wilson Judge
Lawrence P Barber Sheriff

Attest Lathin Dearborn clerk

Be it remembered that on the 13 day of October A.D 1853. There was filed in the clerks office of the Kane County circuit Court a precipe which is in the words figures following to wit

State of Illinois Kane County ss

Kane County circuit Court
Oct Tr A.D 1853

Lewis H Garrard
The Galena & Chicago
Union Rail Road Company } Case

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" will the clerk issue a Summons in the above entitled cause to the Sheriff of Lee County to be returnable at the next term of said Court

Damages $10,000.

Oct 3 1853 Edm Gifford

Plff Atty

And upon said precipe a Summons was issued which is in the words & figures following to wit

State of Illinois }
Lee County } The People of the State of Illinois

" the Sheriff of Lee County Greeting

We Command you " Summons the Galena & Chicago Union Rail Road Company if they shall be found in your County personally " be and appear before the Circuit Court of said County on the first day of the next term thereof " be holden at the Court House in Dixon in said County on the first Monday of November next " answer unto Lewis H Garwood in a plea of case " the damages of the said plaintiff as he says in the Sum of Ten Thousand Dollars and have you then & there this writ with an Endorsement thereon in what manner you shall have executed the same

Witness Luther Dearborn clerk of our said Court and the seal thereof at Geneva

in said County this 18th Day of October
A.D. 1853

Curtis Dewitt Clk
By G A Blanchard
Deputy

And upon the back of said Summons was the Endorsement of the Sheriff in the words & figures following & viz

"Served by reading to William Gin Sarrabee Secretary of the within named Rail Road Company October 19 1853. and John S. Turner President of the within named Rail Road Company October 24th 1853, & delivering to Each of them a copy of this writ

Cyrus K Bradley
Sheriff of Lee County
By I A Stratton Deputy

And afterwards & viz on the Day of A.D. 1853 the following Narr was filed in said Clerk office which is in the words & figures following & viz

Narr

State of Illinois } ss
Lee County } Lee County Circuit Court November A.D. 1853

Lewis. P. Garwood

The Galena & Chicago Union Rail Road Company } Case

Lewis H. Garwood by Arnold & Gifford his attornies complains of the Galena & Chicago Union Rail Road Company a corporation duly organized under the Statute of the State of Illinois who have been duly summoned &c in a plea of trespass on the case. For that on the second day of August in the year Eighteen hundred & fifty two at Elgin in the said county of Kane the said Defendants were then & there the owners & proprietors of a certain Rail Road called the Galena & Chicago Union Rail Road then constructed & built from Chicago in the county of Cook in said State to Belvidere in the county of Boone State aforesaid and were then and there common carriers upon said road, and the owners of certain Engines, passenger & freight cars, which the said defendants were then & for a long time before that time had been running over said road every day excepting Sundays from time to time from & to the said Chicago & Belvidere from & to intermediate stations on s^d Road for the carriage & conveyance of passengers from & to the said places for hire & reward to them in that behalf and thereupon afterwards (to wit) on the day & year last aforesaid at Elgin in said county of Kane the said Defendants received the said Plaintiff into one of their said cars as a passenger, & a reasonable compensation to them the said Defendants in that behalf to be conveyed from the said Elgin to Clinton in said county of Kane / said Elgin & Clinton being then the stations or stopping places for the said cars on said road /

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and it then and there became and was the duty of the said Defendants to carry the said Plaintiff safely & carefully & without any loss to him by any carelessness, negligence or breach of duty of the said defendants in that behalf and to furnish suitable cars & engine, & competent, careful & skilful engineers & conductors to conduct & manage the same, and also to provide & furnish a permanent, substantial, safe & secure road & rail to run the said cars and engine upon at the said Kane County, yet the said Defendants not regarding their duty in that behalf knowingly & wilfully violated their said duty, and did then & there suffer & permit their said road & rails to be & remain in an insecure, unsafe & dangerous situation to run said engine & cars upon & more particularly did knowingly carelessly & negligently suffer & permit the iron & wooden rail upon which the said engine & cars then & there ran, to be constructed of poor material & to be improperly & insufficiently fastened & secured to the said wood in so much so, that on the day & year last aforesaid the said plaintiff then being one of the said cars of the said defendants as passenger aforesaid and while the said cars were were being run from the said Elgin to the said Clinton, by the said defendants & being managed & conducted by the engineer & conductor thereof servants of the said defendants, and just before reaching the said station or stopping place at the said Clinton by the action of the wheels of the said engine & cars the said iron & wooden rails were torn up for a great distance (to wit) for the distance of twenty feet in consequence of the said rails being

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constructed of poor material & so insufficiently & insecurely fastened as aforesaid, the said car on which the said plaintiff was then & there a passenger as aforesaid was thrown violently off of the said road by reason of which the life of the said plaintiff was put in great peril & danger & so much so that the said plaintiff was obliged & did jump from the said car to the ground / the said car being then & there off the said track & still running at a rapid rate over the ties of said road & apparently about to run off a very steep bank then & there being / in doing which the said plaintiffs left leg was broken near the ancle, his ancle badly & severely strained & bruised & his body & thereby severely bruised & injured, all of which was caused by the carelessness & carelessness of the said defendants & their servants & by reason of the said injuries so received as aforesaid the said plaintiff was confined to his room for a great length of time (to wit) for the space of four months & was sick, sore & lame for a great length of time (to wit) hitherto & suffered great pain both of body & mind & by reason of the said injuries was obliged & did pay, lay out & expend large sums of money (to wit) five hundred Dollars, for medicine, medical aid & nursing & in & about endeavoring to be cured of the said injuries, and by reason of the said injuries the said plaintiff was hindered & prevented from performing & transacting his necessary business by him during that time at the said Elgin to be performed & transacted to the damage of the said plaintiff Ten thousand Dollars—

And whereas afterwards (to wit) on the day and year last aforesaid, at Legin aforesaid, the said Defendants being then & there the owners & proprietors of a certain Rail Road called the Galena & Chicago Union Rail Road, then constructed from the said Chicago to the said Belvidere & also being then & there the owners & proprietors of certain engines, passenger & freight cars, which the said defendants were then & for a long time before had been running from time to time on the said road from & to the said Chicago & Belvidere & from & to intermediate stations on the said road and carrying passengers & freight therein from & to the said places & from & to the said intermediate stations for hire & reward to them in that behalf, did receive the said plaintiff into one of their said cars to be carried safely & carefully as a passenger for a reasonable compensation to be paid to them in that behalf from the said Legin to Clinton in the said County of Kane, and the said defendants were then & there in law bound to convey the said plaintiff safely & carefully without loss or injury to him by any carelessness, negligence & lack of duty on their part, from the said Legin to the said Clinton, and also to provide a proper & safe road, proper & skilful engineers, conductors & brakesmen, to conduct & run the same on said road & to run the said engine & cars in a safe & lawful manner. Yet not regarding their said duty & obligations in that behalf, the said defendants, on the day & year aforesaid, at Legin aforesaid carelessly & negligently

constructed the said road, and suffered the same to remain & to be & remain dangerously out of repair, & did not in any manner provide a safe & secure road to run their said engine & cars upon & did not provide prudent & skilful engineers, conductors & brakemen to conduct the same, but on the contrary the said cars, into one of which the said plaintiff was received & in one of which he then was being conveyed from the said Begin to the said Clinton, as aforesaid, by the said defendants, was run over the said road at double the ordinary speed & much faster than the same could be run over the said road without putting the lives of all the passengers in said cars in great danger & peril, and in consequence of the great & dangerous speed at which the said Begin cars were then & there run & driven over the said Road from the said Begin to the said Clinton & just before reaching the usual stopping place at the said Clinton the iron & wooden rail of the said road was torn up for a great distance (to wit) for the distance of twenty feet & the car in which the said plaintiff then was as passenger aforesaid was thrown violently off of the said track by reason of which the life of the plaintiff was in great peril and while the said car was so off of the said track & said car being still driven at a very rapid rate over the ties of said road & apparently about to be driven down a very steep bank there & there being the said plaintiff to escape the

impending danger & to save himself jumped from the said car to the ground & by reason of which his left leg was broken near the ankle, his ancle severely ~~skinned~~ strained & bruised & his body otherwise severely bruised & injured, all of which was caused by the impudence, carelessness & negligence of the said defendants & their servants the said engineer conductor & brakemen, by reason of the said injuries so received as aforesaid the said plaintiff was confined to his room for a great length of time (to wit) for the space of four months and was sick, sore & lame & suffered great pain both of body & mind for a great length of time, (to wit,) hitherto and was obliged & did pay, lay out & expend large sums of money (to wit) five hundred dollars for medicine medical aid, nursing & in & about endeavoring to be cured of the s^d injuries, and by reason of the said injuries was hindered & prevented from performing & transacting his necessary affairs & business by him to be performed & transacted during that time at Elgin aforesaid to the damage of the said plaintiff Ten Thousand Dollars &

And whereas afterwards afterwards, (to wit on the day & year last aforesaid at Elgin aforesaid the said Defendants were the owners & proprietors of a certain Rail Road & also of certain cars & engines & were then & there running the same on the said Road & were then & there engaged in carrying freight & passengers for hire & reward

to them in that behalf from Elgin in said County to Clinton also in said County & bring such carriers of passengers, the said defendants then & there received the plaintiff into one of their said cars as a passenger for a reasonable compensation to be paid to them in that behalf to be safely, carefully & securally carried from the said Elgin to the said Clinton it became & was the duty of the said defendants to have & keep in good & good repair a good, safe, & proper & secure track on which their said engine & cars should run in safety & also to have suitable & safe cars & engines for the conveyance & transportation of passengers & also to have good faithful, sober, skilful & discreet engineers, conductors & brakemen & to run said cars & engines with proper speed safely & carefully over & upon said road yet the said defendants not regarding their duty in that behalf, did not provide a good, safe, secure & proper track on which their said cars & engine should run with safety; but on the contrary thereof, their said track was improperly insecurely, negligently & carelessly constructed & was dangerously out of repair so that their said engine & cars were not run over & upon the said Road in safety - nor did the said defendants, to wit, on the day & year & at the place aforesaid employ suitable engineers, conductors & brakemen & run their said cars & engine at a safe & proper speed but on the contrary thereof, the said defendants then & there run their said cars so carelessly & negligently & with such dangerous rapidity over & upon the said road

to them in that behalf from Elgin in said County to Clinton also in said County & bring such carriers of passengers, the said defendants then & there received the plaintiff into one of their said cars as a passenger for a reasonable compensation to be paid to them in that behalf to be safely, carefully & severally carried from the said Elgin to the said Clinton it became & was the duty of the said defendants to have & keep in order & good repair a good, safe, proper & secure track on which their said engine & cars should run in safety also to have suitable & safe cars & engines for the conveyance & transportation of passengers also to have good faithful, sober, skilful & careful engineers, conductors & brakemen & to run said cars & engines with proper speed safely & carefully over & upon said road yet the said defendants not regarding their duty in that behalf, did not provide a good, safe, secure & proper track on which their said cars & engine should run with safety; but on the contrary thereof, their said track was improperly insecurely, negligently & carelessly constructed & was dangerously out of repair so that their said Engine & cars were not run over & upon the said Road in safety - nor did the said defendants, to wit, on the day & year & at the place aforesaid employ suitable engineers, conductors & brakemen & run their said cars & engine at a safe & proper speed but on the contrary thereof, the said defendants then & there run their said cars so carelessly & negligently & with such dangerous rapidity over & upon the said road

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car in consequence of such improper & careless speed & improper condition of the said track, that heretofore to wit, the day & year aforesaid, at Kane County aforesaid & while the plaintiff as such passenger as aforesaid the car in which said plaintiff was riding was thrown with great violence off the said track & the said plaintiff without fault on his part & by reason of said carelessness and improper conduct of said defendants thereby came with great force & violence upon the earth, and his left leg was thereby broken near the ancle, his ancle severely strained & bruised & other parts of his body severely bruised injured by reason of which injuries the plaintiff was confined to his room for a great length of time to wit for the space of four months, and suffered great pain both of body & mind was sick, sore lame for a long time, to wit hitherto by reason of the said injuries was obliged said pay, lay out & expend large sums of money, to wit, - five hundred dollars - about endeavoring to be cured thereof & was also by the said injuries so received as aforesaid hindered & prevented from performing & transacting his necessary business by him then & there at Elgin aforesaid to be performed and transacted, to the damage of the said plaintiff Ten thousand Dollars -

And whereas afterwards (to wit) on the day & year last aforesaid at Elgin in said County of Kane the said defendants were common carriers and were so possessed of a locomotive with cars thereto attached, engaged & employed upon the Rail Road track of the said defendants in the business of the said defendants & about carrying passengers in said County of Kane

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& while the said train was driven, guided, managed & controlled along the said track by an engine and servants of the said defendants & ~~their~~ direction & while the said Defendants by their servants aforesaid had the management of the said train, the said plaintiff, at the special instance & request of the said defendants became & was a passenger in & upon said train to be conveyed & carried from Elgin in the said County of Kane to Clinton also in the said County for a certain fair & reward in that behalf, and the said Defendants then & there received the said plaintiff as such passenger aforesaid & thereupon it became & was the duty of said defendants, to have a good, safe & proper track & have due & proper care that the said plaintiff should be safely & securely conveyed & carried to the said Clinton in the said County of Kane yet the said defendants, not regarding their duty in that behalf then & there had a track so improperly insecurely & dangerously made & so badly and dangerously out of repair & by their said engineer so carelessly & improperly drove, managed & directed ~~carried~~ said train & so conducted that by & through the carelessness, negligence & improper conduct of the said defendants by their said engineer in consequence of said improper track the said car of the said defendants in which said plaintiff was a passenger as aforesaid was then & there thrown off the track with great violence & then by the said plaintiff came with great violence & thereby the said plaintiff came with great force & violence upon the earth & his left leg was thereby broke near the ankle, his ankle badly ~~strained~~ bruised, and other parts of his body severely bruised & injured & by reason of said injuries so received as aforesaid the plaintiff was confined to his room for a great length of time (to wit) for the space of four months & was obliged & did pay, lay out & expend large sums of money (to wit) five hundred dollars, in & about endeavoring to be cured of the said injuries and suffered great pain both of body & mind & was sick, sore & lame for a long time, to wit, hitherto, and during that time was hindered & prevented for performing & transacting his necessary business by him during that time to be performed and transacted at Elgin aforesaid to the damage of the plaintiff Ten Thousand Dollars

Louis H. Isherwood

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And afterwards to wit on the 10th day of November A.D. 1853 the following Plea was filed in said Court which is in the words & figures following to wit

" Vane Circuit Court
" The Galena & Chicago Union Rail Road Company
vs
Lewis & Yarwood

And the said defendants by James H Collins their attorney comes and defends the wrongs and injuries when &c and says that they are not guilty of the said several supposed grievances above laid to their charge in manner and form as the said plaintiffs hath above thereof complained against them & of this they put themselves upon the country &c

Jas H Collins
Defts atty

And the Plff doth the like Nov 17, 1853
Goffe & Dilcr Attys for Plff

And afterwards to wit on the 23rd day of May A.D. 1855 there was a Record from the Supreme Court of the State of Illinois filed in said office which is in the words & figures following to wit

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At a Supreme Court begun and held at Ottawa on Monday the 12th day of June in the Year of our Lord one Thousand Eight Hundred and fifty four within and for the Third Grand Division of the State of Illinois

Present the Honorable Samuel D. Lockwood Chief Justice
" " John D. Caton Associate Justice
" " Walter B. Scates " "

Friday August 4. 1854.

Galena & Chicago Union Rail Road Company
v
Lewis A. Norwood
} Error to Kane

On this day came again the said parties and the court having duly & carefully examined and inspected as well the Record and Proceedings aforesaid as the matters and things therein assigned for Error and being now sufficiently advised of and concerning the premises are of opinion that in the Record and Proceedings aforesaid and in the rendition of the Judgment aforesaid there is manifest Error. Therefore it is considered by the court that for that Error and others in the Record and Proceedings aforesaid the Judgment of the circuit court in this behalf rendered be reversed annulled & set aside & wholly for

15 nothing returned and that this cause be remanded to the Circuit Court for such other and further proceedings as to Law and Justice shall appertain And it is further considered by the court that the said plaintiff in Error recover of & from the Defendant in Error its costs by them in this behalf expended and that it have Execution therefor

I Lorenzo Leland Clerk of the Supreme Court of the State of Illinois do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above entitled cause of record in my office

In Testimony whereof I have set my hand and affixed the seal of the said Supreme Court at Ottawa this 18 day of May in the year of our Lord one thousand eight hundred and fifty five

Seal

L Leland
Clerk of the Supreme Court

State of Illinois }
Henderson County } ss

Thereupon a Summons was issued in said cause from the Circuit court of Henderson Co aforesaid which is in the words & figures following to wit

State of Illinois }
Henderson County }

The People of the State of Illinois to the Sheriff of said County Greeting

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We Command you that you Summons. The Galena & Chicago Union Rail Road Company if they shall be found in your County personally to be and appear before the Circuit Court of said County on the first day of the next Term thereof to be holden at the Court House in Geneva in said County ~~this~~ on the 3rd Monday of January next to answer unto Lewis H Yarwood in a plea of Case to the damage of said Plaintiff as he says in the sum of Ten Thousand Dollars and have you then and there this writ with an Endorsement thereon in what manner you shall have Executed the same.

Witness Luther Dearborn Clerk of our said Court and the Seal thereof at Geneva in said County this 21st day of Dec A.D. 1854

Luther Dearborn
Clerk

And upon the back of said Summons is the Endorsement of the Sheriff in the words & figures following to wit

" Personally Served the within writ by delivering a copy of the within writ to Charles D Smith as State Agent of the Galena & Chicago Union Rail Road Company this 21st day of December A.D. 1854.

L A Burke
Sheriff

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And whereas on the 15th day of January A.D. 1855 the same being one of the days of the January Special Term of said Court the following among other proceedings were had to wit

Lewis & Yarwood
Galena & Chicago
Union R.R. Co
} Case

This day comes the parties to this suit by their attorney & by consent of parties it is ordered by the court that this suit be continued

And afterwards to wit on the 23rd day of May the same being one of the days of the May Term Term of said Court A.D. 1855 the following among other proceedings were had to wit

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Lewis & Yarwood
The Galena & Chicago
Union Rail Roads Co
} Case

This day comes the Plaintiff by Blackwell Fenton & Sidley his attorney & the Defts by Hute and Farnsworth also come & on motion of Plaintiff it is ordered by the court that a jury come whereupon came a jury of good and lawful men to wit Nathaniel Grant Charles G Hamlin Erwin Dana Seth Sherwood

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Timothy Garfield Timothy Crowley John K Robinson Amos Cox John Van Sickle Charles Thomas Amis Hinds Harvey E Dunkle who being severally elected tried & sworn also come & after hearing a portion of the Evidence it is agreed that the jury may separate & meet the court in morrow morning at 8 o'clock

And afterwards to wit on the 24th day of May A.D. 1853 the same being one of the days of the regular term of said Court the following among other proceedings were had to wit

Lewis A Yarwood }
vs } Case
Galena & Chicago
Union Rail Road Co }

This day comes the parties in this suit by their attorneys & the jury herein impannelled herein also come & after hearing a portion of the ballance of the Evidence & a portion of the argument of Counsel it is agreed that the jury may separate & meet the court in morrow morning at 8½ o'clock

And afterwards to wit on 25th day of May the same being one of the days of the aforesaid May term of said Court the

19 Following among other proceedings were had to wit

Lewis A Yarwood }
v
59 The Galena & Chicago } This day comes the parties
Union Rail Road Co } to this suit by their attorneys
& the jury heretofore impannelled
herein also come. And after hearing
the ballance of the argument of Counsel and being instructed
by the court retire under charge of a Sworn officer of
this court to consider of their verdict and Subsequently
return into court and for a verdict upon their oaths
say we the jury find the issues joined in favor of the
plaintiff and assess his damages at the Sum of Seven
five Hundred Dollars. And thereupon comes the
Defendants by its attorney & moves the court for
a new trial. After argument of Counsel the
Court being fully advised overrules said motion
It is therefore considered by the court
that the said plaintiff have and recover from the
defendant the aforesaid Sum of Seven five
Hundred Dollars damages together with his costs
in this behalf Expended & have Execution therefor
And thereupon the Defendants pray an appeal
to the Supreme court of the State of Illinois
which is allowed on condition that the
Defendants file a Bond herein conditioned
according to Law with John B Bunn
& Hiram W Brown as Security

in the Sum of Four Thousand Dollars.
Bond & to be filed & Bill of Exceptions to be settled
in thirty days from this date

And afterwards to wit on the
18th Day of June A.D. 1853 the following bill
of Exceptions was filed in said Cause which
is in the words & figures following to wit

Levi H Yarwood
&
Galena & Chicago
Union Rail Road Co

} Kane circuit Court
May Term 1853

Be it remembered that
on the trial of this cause the Plaintiff introduced
the following testimony in this cause

Samuel L Jones who testified as follows I reside
in Elgin & did in August 1852 about
the first day of August 1852 I took passage
there on the rail road on the west side of the river
to Clinton about three or four miles. Myself, Fay
and Yarwood went together. Wm Hopkins
was Conductor on that day we left Elgin in
the forepart of the afternoon. From Elgin to
Clinton the first part of the road was T. rail
the rest Strap — Think the T rail was near
half of the way it is a down grade to Clinton

Elgin to the bridge it is about thirty feet to the mile. Think it is a down grade most of the way I discovered no change in the speed after leaving the said. The cars ran off the track nearer Clinton than Elgin. I and others jumped off. I saw Yarwood lying on the ground. he said he felt faint. I went to get some water for him. I jumped from the platform of the Bazzage car. a great deal of motion to that car at the time not steady - rough riding. I was a little a little back of the center of the Bazzage car. could not walk steady got to the platform - dust blew till the wind blowed away the dust I saw what was the matter and jumped alighted on all fours. It was the motion of the cars and not the speed that made me fall it was apparently from ~~things~~ the Bazzage car that something had happened. I knew something was wrong in the train when I jumped. I knew from the motion of the cars I supposed that it was a sunken head that caused the accident a part of the train was off of the track. The first class car was off or partly off I am certain the hind end of the second class & fore end of the first class were off. don't know when the Plaintiff was when he jumped don't know when Say was he must have been in the second class car when cars ran off. Dont recollect any alarm

from Locomotive. Was going slow when I jumped cant tell the rate of speed from the time I first noticed my self we ran about two hundred feet. from Examination of the position and when the flanges of the wheels had been on the ties from the cars were off. On the East side of the track was graded off quite level when we stoped a Bank on the west side and a ditch cut I was not injured by jumping of any consequence — did not examine the track particularly — noticed a peice of flat rail that broken Six or Eight feet long it was back of which I found Yarwood back of the hind end of the first clap Car. Dont remember more than one peice of rail. After the accident got a Small car and took Yarwood and Gang to Elgin on the track on the East side of the River took Yarwood to Packers rode on the hand car with them. then noticed the track part of the way noticed 2 or 3 places where the end of the rail was up we went back part of the way on the Same track we had passed down my impression that one of the loose rails was broken he was confined to his bed room from 6 to Six weeks. When he got out used two crutches then a crutch and a cane was confined to his bed

23 Some time. He had attendance day & night was attended by Drs. McClure, Vacy and Kerr

Cross Examination Witness said

There was three or four Cars in the train the Baggage car, Second Class car and first Class car passenger car dont know whether there was a freight car or not. Higgins asked plaintiff to go so did Fay & I. Maybe we asked him first Higgins said we had better go into the Baggage car as the passenger car was full or nearly full I first asked plaintiff to go then Higgins said Come along Higgins said we had better go into the Baggage car as the passenger car was full. that passenger car was full and we better go into the Baggage car the former words are correct as near as I can recollect Dont reccollect that I swore on the other trial that conductor said the passenger car was full and we would have to get into the Baggage car We all three got into the Baggage car it was warm weather They had coats and pants on and no vests. John Demond and some others was in the Baggage car. Yarwood Fay and I began playing We commenced pulling up shirts Each others shirts I went out of the Baggage car Saw Yarwood go out first then Fay followed

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my impression is that Gearwood pulled up Fay's shirt and started. Fay pulled down his shirt + started followed him. I went forward into the second class car. Gearwood was then on the platform or just going into first class car. I then turned and went back this was a very short time before the accident Fay had not got back don't know the rate of speed my attention was otherwise taken up I noticed on the T rail we was running pretty fast. I am an Engineer or have been a civil engineer never was an Engine. The cars were in a shallow cut we were all single men. There was no scuffling about pulling up the linen. There was some exertions used to do it and some to prevent it. Gearwood had had been at Elgin more than two years before that time + had been on this road before

On the Examination by Plaintiff witness said

Higgins said we had better go into the Baggage car that he would be in there pretty soon or in a few minutes we were all then acquainted with the Conductor Higgins Gearwood and Higgins are related Higgins is his uncle they had not been out before this shirt pulling they quit about that time we crossed the Bridge just before we struck the Straight rail had run a quarter or half a mile after we quit blazing on the Straight rail. On cross Examination again witness said Higgins said

cars are full. Nearly full or pretty full and we must take the Baggage Car. Cant speak the exact Language. I have been Stated as near as I can.

Abbott Cr Hays

I certified that he was on the train we got aboard of the train on the west side of the river to go to Clinton. I was myself & Plaintiff it was I said from Elgin to the Junction with the East branch nearly three quarters of a mile. half way of the way to Clinton Strap rail It is down grade the speed was as I thought pretty fast no great change in the speed accident occurred over two miles from Clinton we had been going about a mile on the flat rail when the accident occurred the cars ran off the track I was on the Platform of the 2nd Class car when I jumped next to the Baggage car I was injured by the fall the first I saw of Yarwood he was on the hand cars. I turned up the track once or twice and jumped I suppose the ties were the usual distance apart. the motion of the cars when I jumped was violent and zig zag & careened over I jumped because I thought I was in danger the Brakeman was on the opposite platform Yarwood was on the bed when I next saw him some six weeks afterwards his leg an ankle began to swell on the way up

Yanwood before the accident was Employed by the Elgin Manufactoring Company he did not get out for six weeks. I did not know of his going into business until January afterwards

Cross Examination Witness said I dont recollect whether I heard the whistle or not. I was inside of the second class car when the cars ran off. I followed Yanwood and he passed to the first class car. I went to the middle of the second class car and was standing there — there was but very few in there. I did not go into the first class car at all. I noticed when the cars had cut the ties. I was not in much pain at first. I came down in a heap when I lighted. the cars ran nearly the length of two cars after I jumped. Yanwood & I had been pulling each other shirt only the scuffling and shirt pulling occupied but a short time my shirt was pulled but once. I think Mr. pulled my shirt we were only going to clinton we paid no fare. I expected to pay fare before the time when the accidents happened we had not seen the conductor after leaving Elgin I had rode to clinton several times before. Our Conductor at Elgin. he made some remark that the cars were pretty full & that we had better go

into the Bazzyze car andwe did so. We then went into the Bazzyze car and I suppose from the remarks the conductor made. I have a suit against the company for the same injury. I have heard some remarks about the decission of the Supreme Courts have not read the decission

Direct Examination resumed by Plaintiff we were not commanded to get into the Bazzyze car I cannot use his precise words. There was something said about the cars being full and conductor said we had better get into the Bazzyze car Passengers sometimes consider it a privilege to get into a bazzyze car. There was no particular bargain about going into the bazzyze car the kind of shirt tail scuffling we had was the shirts were pulled out some I dont know by whom pulled I dont know whose shirts were pulled first we had no Suspenders our shirts were pulled up some and puffed out and we pulled them there was no chasing We all went out into the other car before the accident which I plain

Cross Examination resumed

At some time prior ~~sitting~~ riding in the Bazzyze I was in the second class car I did not sit in the second class car we sat down on the bazzyze. The scuffling began while we were sitting. part of us were sitting

Most of the time we were in the Baggage Car the Scuffling Commenced Soon after we left Elgin when the Cars Stopped I was at the hind end of the first Class car The Plaintiff had a seat and could see

I D Johnson Testified as follows

I was an Engineer of the train. I saw the Snake head before Locomotive passed Some ten or fifteen rods ahead Could not have avoided it by reversing the engine we were running between or fourteen miles in the hour. at the rate of Speed it could probably be brought at from Seventy to one hundred feet if brakes were applied at the Signal if grade was level had run over the track before had seen Snake heads there before Such a rail is subject to Snake heads don't run as fast on flat rail always slowed the train on the flat rail Never Ran twenty five miles an hour on T rail

Cross Examination Ordinary

Twelve or fourteen miles is a Safe rate of Speed on that road. This road was a better road than the Mad River Road which is the only flat rail Road I ever Ran before then they run the same Speed we did here I do not recollect whether

I sounded the whistle or rang the bell or
not but have no doubt I did. when I thought
I saw a train ahead. The reason I am not willing
to swear I sounded the whistle is because I com
did it so constantly as never any thing I
Count. say whether I did or not at any particular time

Direct Examination resumed
by Plff

Strap rail is not as safe as T rail
and that is the reason we run slower Train hands
will raise with the best of care on flat rail.

The Plaintiff here admitted that this road
was as good as flat and could be made

Walter M Duley Testified as follows

I was on the train on the hind
most passenger car It was not full it was
not over 3/4 full the Plaintiff Counsel then asked
the witness the following question. What was the
condition of things on that car at the time of the
accident. To which question the Defendant
by their Counsel objected. the Court overruled
the objection and allowed the question to be answered
to which ruling and decision of the Court in
allowing said question to be put and answered the
jury the Defendants by their Counsel at the time excepted
the witness answered there was a good deal of

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(12293-15)

of Confusion in the cars. was very unpleasant and I thought rather dangerous but I was not very much excited If I had been where I could have jumped off I think I should have done so the cars run about Six rods off the track the first class car leaned toward the west I thought at one time it probably would turn over

On Cross Examination witness Stated I got on at Elgin I was near the center of the cars. those who continued in the cars were not injured Baggage car was not off the track I had a little girl setting beside me I dont recollect seeing any one standing in the cars. No passengers jumped from that car the Passengers went on in the Baggage Car to the junction

Wm H Wiggins testified as follows — I was conductor of the train at the time am still in the employ of the company — I think the speed was fifteen or sixteen miles an hour — I think I stated so on the other trial, just before the accident I had seen Garwood in the first class car — he rushed off the platform — told Garwood the cars were off the track before he jumped

On Cross Examination witness said —

I first saw Garwood after we left Elgin about the middle of the first class car — he said to me we have had a regular tear in the baggage car — I think I replied, take care you dont tear yourself off the track — I went to the door and he followed me and said I believe our cars

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off the track now— cannot recollect whether car was full or not— Mr Garwood did not take a seat in the cars — that rate of speed was safe, it was the usual practice to slacken speed on flat rail— no one was injured, that remained in the car— Garwood and Fay jumped off and they were the only persons injured— the hind truck of the second class, and the forward truck of the first class were off the track— no other car was off the track— The train consisted of a locomotive, tender, baggage car 2d class car & 1st class car

John N. Brown— testifies as follows— I was on the train on the forward platform of the first class car— I turned the Brakes and got off the train, the train went a little over half the length of a car before stopping, after I got off I went over the road of the every day for some days— I passed over the road four times a day till accident happened— I was in employ of Michigan Central Rail Road at that time

On cross examination Witness said— I heard the whistle and took hold of the brake immediately— Wiggins took hold also— I jumped off— no head car half of the length of a car after I jumped— part of the trucks only were off the track— I dont think there was any danger on the inside of the car— there is always more danger on the platform than on the inside of the car— Passengers were not allowed to stand on the platform— could not say whether any printed rules to that effect on that train or not—

122-93-26

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Fredrick Swain — testified as follows — I was on the train as brakeman — I was on the hind end of the second class car. I turned the break and jumped off, because I thought I was safer on the ground — I thought I was in danger on the train therefore I jumped Mr Brown and I jumped together — I was not hurt. Cars ran about the length of a car and a half after they left the track

John Cox testified as follows

I was in the employ of the company as track repairer, my instructions were to keep the road in order — the road in question had not been examined, after the preceding had passed over — one freight train went over the road. —

On cross examination Witness said — I had charge of the road — I went over the road twice a day — I went over twice that day — I proceeded the Passenger train on a hand car — I passed the road to see that it was in order, it was in order, it was a good ~~road~~ road for a strap rail road, well guarded — it was as good as any road

The plaintiff has admitted that it is impossible to make a strap rail road without having snake heads. —

John Clark testified as follows —

I was in the employ of the road as Superintendant of track repairs — Mr Cox was under me, the instructions were that men should pass over as often as was necessary — as a general thing it was necessary

after every train — the passage of every train has a tendency to make snake heads — dont know what care was taken on the day of the accident

On Cross examination Witness said — All due and proper care was taken of this road by the ~~road~~ company to keep it in order — it was in good repair

Doct Thos Kerr testified as follows —

Forms plaintiff at Begin with a fracture of the left leg on the out side and of the ancle on the inside — both broken — dont think the leg will be as good as before — he was confined several weeks —

Defendants admits they ~~are~~ are a rail road company and were common carrier of passengers —

The Plaintiff here rests his case and the defendants introduce as Witness Gilman N. Merrill who testifies as follows —

I know the Plaintiff — I had conversation with him some six or eight weeks after he was injured, he was at the office — he said he "didnt blame any one but himself for his injury because he was such a damned fool as to jump off — he said he had passed through the train from the Baggage car — he blamed himself for his want of self possession"

John Ox (recalled) testifies as follows

I had some talk with Garwood some after he was hurt — he said he "did not care so much about the hurt as about how foolish he done it" — I have been over

[22.93-17]

this part of the road the week before – and made a thorough overhauling of it by removing the injured rails – I did not think it necessary to go over this part of the road after each train – it is impossible to prevent snake heads – that was the best part of my road – it was in as good repair as it could be – it was a fine rich bottom – this is better than coal – I passed over the road between eleven and Twelve o'clock of the same day – The accident was about 4 O'C P.M. – there was no snake heads when I passed over it –

On cross examination – witness said – if there came a snake head after 12 o'clock I should not have known it –

John Desmond testified as follows – I was on the train as Stage Agent – I was in the Baggage car from Elgin until the accident – Garwood – Fay – Jones and baggageman Clark were there, these young men Jones, Garwood and Fay were scuffling when we first left Elgin, they continued until a short time before the accident – I saw them all go out – just before they left they were pulling up their shirts – they were scuffling together on a sort of a good natured spree – I remained in the Baggage car with the Baggage man – Garwood, Jones and Fay went out together, they went out first – they seemed to be chasing one another – there was some ~~thing~~ extra motion in that car – not violent – I did not consider myself in any danger – that car was on the tracks all the time – the Baggage man went to the brake – Garwood and the others left

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the Baggage car three or four minutes before the cars ran off

On cross examination witness said — The scuffling was pulling out shirt tails — they sized hold of each others shirts, they walked out of the car rather quicker than usual

Wm. N. Wiggins being recalled testified as follows — It was not safe for passengers to run about the cars or stand on the platform — Mr Garwood had frequently passed over this road — those standing about the cars are most liable to be injured

On cross examination witness said — I dont remember that there were any printed rules, not in the habit of having rules in the ~~Baggage~~ baggage cars — Garwood was on the platform when I told him the cars were off the track I dont remember what directions I gave as to where Garwood Fay and Jones should go — we ~~remember~~ endeavor to keep the passengers off the Platform —

The foregoing was all the evidence given in the cause the Plaintiff then asked the Court to instruct the jury as follows —

Kane County Circuit Court

Lewis K. Garwood } May Term A.D. 1853

vs

The Galena & Chicago

Union Rail Road Co } And now comes the said plaintiff by his counsel and moves the Court to instruct

[2293-18]

the jury empannelled herein as follows—

1st That if the jury believe from the evidence that the Plaintiff was a passenger on board of the cars of the Defendants in the month of August 1852 at the County of Kane, that the cars of the Defendants were thrown off the track of the road by reason of the unskilfulness or negligence of the Defendants or their agents and that by means of such accident the Plaintiff was injured in his person they will find a verdict for the Plaintiff and assess his damages.—

Granger

2d That if the plaintiff was injured by means of an accident occurring on the said road of the Defendants while was a passenger on their cars, that then the burden of proving that such accident was not the result of the negligence or unskillfulness of the Defendants or their agents is cast upon the said Defendants.—

Granger

3d That in order to entitle the Jury to find a verdict for the plaintiff it is not necessary for the jury to be satisfied that the Defendants were guilty of gross or even ordinary neglect in the reparation of their road or management of their train, but if the jury believe from the evidence that slight neglect of the Defendants or their agents was the cause of the accident endangering of the plaintiff and assess his damages, provided the jury believe from the evidence that the plaintiff was a passenger on board the cars of the defendants at the time of such accident and injury

Granger

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4th That carriers of passengers by railroad are bound to use all precautions as far as human foresight will go, for the safety of their passengers, and are answerable to injured passengers for slight neglect of themselves and agents in the operation of the track and conduct and management of their trains whereby injury ensues.

Given

5 The omission of any precaution which would produce or increase the safety of or reduce the probability of danger to the passenger, constitutes such a neglect in carriers of passengers as will render them answerable in damages to a passenger injured by means of such neglect.

Given

6th That Railroad Companies are answerable for injuries to a passenger resulting from a defect in their track which might have been discovered by a most careful and thorough examination, and if the jury believe from the evidence, that the injury complained of in this case was occasioned by the neglect of the Company or their agents to examine the track prior to the passage of the train on which the accident occurred they will find a verdict for the plaintiff and assess his damages.

Given

7th

8th That if the jury believe from the evidence that the accident and injury occurred by reason of the too rapid speed of the train by reason of the neglect to apply the brake in time or because of any other neglect or unskillfulness in management of the train they will find a verdict for the plaintiff

Given

and apeps his damages.

9th That if the jury believe from the evidence that the accident and injury complained of happened by reason of the neglect of the engineer in charge of the locomotive attached to the Defendants train to blow his whistle in time, or by reason of the neglect of the conductor to warn the Engineer in time, or by reason of the neglect of the brakeman to apply the brakes in season, they will find a verdict for the plaintiff and apeps his damages.

10th That if the jury believe from the evidence that the accident and injury happened by reason of the bad order of the track and want of due care and attention of the Company or any of their agents in the reparation of the track, or in the management and conduct of the train on which the Plaintiff was, they will find a verdict for the plaintiff and apeps his damages.

11th That the mere fact that the Plaintiff jumped from the cars, while they were in motion, to the ground and thus sustained the injury complained of, will not alone operate him of his right to a recovery against the Defendants, if the jury believe from the evidence that an accident had occurred, that the cars were off the track and running at the rate of from 3 to 5 miles an hour and the plaintiff had reasonable ground to believe and did believe, that his life or limb were in danger, and that it was necessary to leap from the cars in order to avoid the danger which threatened him, provided

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that the injury was not occasioned by the plaintiff's own neglect, nor that his negligence contributed to produce the injury complained of

11½ That although the jury may believe that the Plaintiff would not have received injury had he not leaped from the cars, and that as the event proved his jumping was an unwise act that does not necessarily prevent the Plaintiff from recovering in this case. The question is not so much whether there was in point of fact any danger as whether the Plaintiff was reasonably apprehended danger and so leaped from the cars and in judging of his state of mind the jury should take into consideration whatever circumstances of alarm and confusion existed at the time, the law not requiring the same coolness and accuracy of judgment in a person under a state of excitement and alarm as under other circumstances.

12th That in determining the question whether the plaintiff had reasonable ground to believe himself in danger the jury have the right to consider the experience and knowledge of the plaintiff in regard to perils of this character, the commotion and consternation if among the passengers and the fact if it be so that one of the trainmen abandoned his post and leaped from the cars

13th That the mere fact that the plaintiff was a few minutes previous to the occurrence of

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the accident and injury, coupling and keeping in a spurious manner with others on the cars, will not deprive the Plaintiff of his right to recover from the Defendants ~~or their agents were guilty~~ if the jury believe from the evidence that the Defendants or their agents were guilty of any neglect however slight whereby the accident and injury occurred provided the injury was not occasioned by the Plaintiff's own neglect nor that his negligence contributed to produce the injury complained of.

given

14th That in estimating the damages which the Plaintiff may have sustained by reason of the injury complained of, the jury if they find for the Plaintiff are not confined to such damages as may have resulted to the Plaintiff by loss of time, and expence of medical attendance, but may give such additional damages for the loss of natural use of the Plaintiff's limb which the jury exercising a sound discretion and in view of all circumstances may see proper to award not exceeding the amount claimed in the declaration.

given

15th That unless the jury believe from the evidence that the passenger cars were full and that it was a part of the contract that the Plaintiff should occupy during the trip the baggage car the mere fact that the Plaintiff left that car and went into the first class passenger car is not of itself such negligence on the Plaintiff's as to defeat a recovery in this case.

given

41 16th That passengers upon Rail Road are not to be bound or affected by rules established by such Roads in relation to the conduct of passengers unless the proof shows that the passenger had a knowledge of such rules and regulations —

Which instructions were given by the court to the ~~jury~~ giving of which instructions, on the part of the said Plaintiff the Defendants by their counsel at the time excepted —

The Defendants then asked the Court to instruct the jury as follows —

1st A That if the jury believe from the evidence that the injury to the Plaintiff in this suit happened to him by mere accident without fault on the part of the Defendants then the plaintiff cannot recover in this action

5th B If the jury believe from the evidence that the plaintiff while on his passage from Elgin to Clinton was guilty of carelessness and unnecessarily exposed himself to danger by standing and ~~scuffling~~ on the cars, or by imprudently passing from one car to another while the cars were in motion, and that said carelessness or imprudence contributed in any degree to produce the injury, then the plaintiff cannot recover —

6th 6 If the jury believe from the evidence that the plaintiff while on Defendants cars imprudently and carelessly exposed

12293-B

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himself to danger by scuffling, playing, running or jumping and that the injury to him was in any way produced by such carelessness & imprudence or that such carelessness and imprudence in any way contributed to produce the injury then the plaintiff cannot recover even though the Jury may believe that the defendants have also been guilty of negligence

Given

7th Refused

If the Jury shall believe from the evidence that the plaintiff was guilty of negligence while a passenger upon the defendants cars and that his negligence concured with the negligence of the Defendants in producing the injury then the plaintiff cannot recover

Given

10th Refused

If the Jury shall believe from the evidence that the plaintiff leaped from the cars the Defendants under a rash and undue apprehensions of danger when in reality there was no danger and that the injury to the plaintiff was the result of such leaping then the plaintiff cannot recover

Given

13th Refused

If the jury believe from the evidence that the plaintiff carelessly leaped from the cars of the defendants and that such ~~carelessness~~ manner of leaping contributed to produce the injury to the Plaintiff then the Jury should find for the Defendant

Given

15th Refused

If the Jury believe from the evidence that the Plaintiff leaped from the car of Defendants ~~without~~ while it was in motion under a rash and undue apprehension of danger when in reality there was not

danger, and that the injury was caused by such leaping they should find for the defendants, although the Plaintiff might honestly thought himself in danger and leaped from to the ground to save himself from harm the question is whether under the circumstances, his jumping was an act of rashness.

16th If the Jury believe from the evidence that the injury to the Plaintiff was the result of the negligence or inpercance of both Plaintiff and Defendants their verdict should be for the Defendants.

Which was done by the Court.

The Defendants then also asked the Court to instruct the jury as follows viz

3 If the Jury shall believe from the evidence that the Defendants exercised due care, diligence and skill in the preservation and repair of their track, and in managing and operating their road at the time of the accident and that the accident could not have been prevented by the use of said care, diligence and skill then the plaintiff cannot recover in this action — but due care required the use of the utmost prudence & caution; a carrier of passengers being liable for slight negligence.

4th If That every traveller in a public which must meet the risks incident to the mode of travel he accepts and if the Jury shall believe that the injury to the Plaintiff was the result of an accident which could not be avoided

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by the exercise of due care and skill in the preparation and management of the means of conveyance on the part of the defendants then the plaintiff cannot recover but due care requires the use of the utmost prudence & caution

8th 16

That the Plaintiff before he can recover in this action must not only show that the injury to him was the result of carelessness or negligence of the defendants but also that he himself was without fault in procuring said injury *

Given as the plaintiff's instruction

9th 11 L

That in this action the Plaintiff cannot recover unless the Jury shall believe that he exercised proper care and circumspection which on his passage from Elgin to Clinton and that the defendants were guilty of negligence from which the injury received, and the burden of proof is upon the Plaintiff to show not only that the defendants were negligent but he himself was not guilty of negligence *

Given with the qualification

13th M

Unless the Plaintiff has proved to the satisfaction of the Jury, that the defendants was guilty of ~~the~~ negligence or misconduct, and also that Plaintiff used proper care and prudence, and that his own misconduct, want of care or negligence did not contribute to produce the injury complained of the Jury should find for the Defendants *

Given with a qualification

Qualification to Defts 8th 9th & 13th Instructions

* "But proof that the plff was a passenger of the

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accident, and the injury, make a *prima facie* case of negligence & throws the burden of explaining upon the defendant

18th

The Jury are also instructed that it is their duty to regard and obey the law as given them by the Court — and the Jury are not at liberty to disregard or override it —"

Which the Court refused to give as asked but gave with the following qualifications viz — by adding to the first of said instructions these words — "But due care required the use of the utmost prudence and caution, a carrier of passengers being liable for slight negligence" — And by adding to the 2d of said instructions these words "But due care required the use of the utmost prudence and caution."

And by adding to the next three of said instructions, these words — Qualification to Defts 8th 9th & 15th instructions " But proof that the Plff was a passenger of the accident, and the injury, make a *prima facie* case of negligence and throws the burden of explaining upon the defendant" —

And the last of said instructions by striking out the following words therefrom viz — "Once that the law as laid down by the Supreme Court in their decisions is the highest judicial authority of the land"

To which Decision of the Court in refusing said instructions as asked each of them and qualifying them each of them as aforesaid the

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Defendants then and there excepted.—

And the Defendants then also asked the Court to give the Jury the following instructions

14th O

If the Jury believe from the evidence that the Plaintiff leaped from the car of Defendants under circumstances that would not have justified such an act on the part of a prudent careful man, and that the injury was the result of such jumping from the cars, then the plaintiff cannot recover, unless the jury believe that such injury was wilfully caused by the Defendant—

Refused

8 D

That the Defendants as a common carrier of passengers is not an insurer of the personal safety of the passengers against all accidents but is liable only for the want of such care and diligence as is characteristic of cautious persons, and if the defendants exercised such care and diligence in the transportation of the plaintiff, then the plaintiff cannot recover in this action

Refused

Galena & Chicago Rail Road Company } Instructions for Defendants

ads

Yarwood

"2"

The court is asked to instruct the Jury on the part of the said Defendants.—

That if they believe from the evidence that Yarwood and his companions when they took passage in the cars of Defts at Elgin were told by the conductor that the passenger cars were

Refused

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full. but they could go in the baggage cars. and that then upon they got into the baggage car to ride to Clinton, then it was the duty of Garwood to remain and ride in that car

R

And if the Jury further believe from the evidence that at the time of the accident, and when the plaintiff jumped off the cars. the baggage car was not off the track, nor in any danger, but that the plaintiff with his companions had got into a play and scuffle, which brought on a racing through the other cars and in one of which Garwood was brought to that apprehension of imminent peril, which induced him to leap from the cars, and thereby received the injury complained of — then the Plaintiff cannot recover, and the Jury should find for the Defendants —

Refused

S

And the Jury are further instructed that if they ~~from~~ believe from the evidence that Garwood the plaintiff with his companions, at the time they took passage in defendants cars at Elgin to ride to Clinton were told by Capt. Wiggins the Conductor, to go in the Baggage car, as the passenger cars were full, and that plaintiff in pursuance thereof went into said baggage car, then it was his duty to continue therein to the said Clinton —

Refused

T

And if the jury further believed from the evidence at the time of the accident, the plaintiff had left the baggage car and gone into another car — and had thereby placed himself into a position of apprehension of imminent peril, which induced him to leap

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from the cars, and thereby received the injury complained of and that the baggage car was not off the track at all or in any danger — then such conduct of the plaintiff was culpable negligence and the jury should find for the defendants —

W

If the jury believe from the evidence, that the standing upon the platform of cars or going about from car to car by a passenger, whilst the cars are running, are acts of imprudence & negligence, and if they further believe that at the time the cars run off the track, the plaintiff was so standing, or going about and that such conduct of the plaintiff increased his apprehensions of peril, and he was thereby induced to leap from the cars when in motion, and in consequence of such leap received the injury, when, had he remained in the cars he would not have been injured, he is not entitled to recover in this action —

Refused

V

If the jury believe from the evidence that the Plaintiff leaped from the cars of the Defendant under circumstances that would not have justified such an act on the part of an ordinarily prudent careful man and that the injury was the result of such leaping, then the Plaintiff cannot recover —

Refused

Qualification asked by Defendants to Plaintiffs Instruction No 9

W.

But unless the plaintiff has proved to the satisfaction of the jury that his own carelessness or negligence did not

Refused

contribute or assist to produce the injury complained of then the Jury should find for the Defendant and the burthen of such proof is upon the Plaintiff —

2 If the Jury believe from the evidence that at time the plaintiff took passage on the Defendant's cars at Elgin he was ~~not~~ directed by the Conductor to take his place in the Baggage Car because there was not room for him in the passenger cars, and that the Plaintiff did go on board of the baggage car at the time of starting and that whilst on the way from Elgin to Clinton he left said car without any reasonable cause and that the injury to the Plaintiff happened in consequence of his so leaving the car then he is not entitled to recover in this action *

Which the Court refused, and marked the same refused. To which decision of the Court in refusing to give said last mentioned instructions, the Defendants then and there excepted

And the Defendants then also asked the Court to give the Jury the following instructions

4 If the jury believe from the evidence that the plaintiff with his companions, at the time they took passage in Defendants cars at Elgin to ride to Clinton were told by the Conductor of the train that the passenger car was full, or nearly full, and that they could go in the baggage car, and that plaintiff in pursuance thereof went into said baggage car, then

5-0

then it was his duty to continue there unless it was necessary to leave the same and if the Jury further believe from the evidence, that at the time of the accident the plaintiff had unnecessarily left the baggage car and gone into another car, and was walking about, or standing upon the platform of the hind car - and had thereby placed himself in a position of peril, or apprehension of great kind peril - while the baggage car was not off the track, or in damage, then such conduct was culpable negligence -

If the Jury believe from the evidence that Garwood was unnecessarily standing upon the platform of one of defendants cars at the time of accident then he was guilty of improper conduct and negligence in so doing

That it is the duty of every passenger on a rail road car, to take his place in the car in which he takes passage, and to remain therein unless it is necessary to leave the same for reasonable refreshment or some other necessary purpose. -

Which the Court marked "given" "consent", and when the Court read the last mentioned instructions to the Jury, he remarked to the Jury and in their hearing presence, that he gave them by the consent of plaintiff - To which remark of the Court as aforesaid the Defendants then and there excepted. -

The Jury thereupon retired and afterwards came into Court, and rendered the following verdict -

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"We the jurors find the defendants guilty and
assess the damages Twenty five Hundred Dollars"
Forman ___ John VanDickle"

Upon
the rendition of said verdict the defendants by their counsel
moved the Court for a new trial, which motion
was overruled by the Court and judgment rendered for the
Plaintiff on said verdict, to which decision of the Court
in overruling the said Defendants motion for a new trial,
the said Defendants by their Counsel at the time excepted
and prays that this their Bill of Exceptions may be signed
and sealed — which is done

Isaac. G. Wilson
Judge.

And afterwards, to wit, on the 8th day of July 1853 the following Appeal
bond was filed, to wit,

Know all men by these Presents that the
Galena and Chicago Union Rail Road Company as princi-
pal and John. B. Turner as surety are held and firmly bound
unto Lewis. H. Garrood in the penal sum of Four Thousand
Dollars lawful money of the United States to be paid unto the
said Lewis. H. Garrood or his certain Attorney, Executors, Admin-
istrators or assigns, for which payment well and truly to
be made, we bind ourselves, our Executors, heirs, Executors and Ad-
ministrators and each and every of them, jointly and severally
firmly by these presents Sealed with the Seal of the said
Galena and Chicago Union Rail Road Company & dated

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by their President and Secretary and with the seal of the said this Eighth day of June AD 1853

Whereas at the May Term of the Kane County Circuit Court AD 1853 judgment was rendered by the said Court in favor of the above named Lewis N. Sawyer against the said Galena and Chicago Union Rail Road Company for the sum of twenty-five hundred Dollars damages, besides costs of suit and whereas the said Galena and Chicago Union Rail Road Company have prayed an appeal from said judgment to the Supreme Court of the State of Illinois Now therefore the condition of this obligation is such that if the above bounden Galena & Chicago Union Rail Road Company shall duly prosecute the said appeal and will pay or cause to be paid the said judgment, costs and interest and damages in case the said judgment shall be affirmed then the above obligation to be void otherwise to be and remain in full force

In Witness whereof the said Galena & Chicago Union Rail Road Company have attached their Corporate Seal to this Bond and have caused the same to be signed by their President and Secretary — and the said John B. Turner has hereunto set his hand and seal the day and year above written

Corporate Seal

W. H. Sanford Secretary

John B. Turner President

John B. Turner (Seal)

State of Illinois }
Kane County }

I, Luther Dearborn Clerk of the Circuit Court in & for said County in the State aforesaid do hereby Certify that the above & foregoing is a full perfect and complete copy of all the Pleadings, Bill of Exceptions, Record of Supreme Court and of all orders in said Cause (since the filing of the Record of Supreme Court reversing the Judgment in this cause,) as appears from the Records & files of said Circuit Court

Witness Luther Dearborn clerk of said Court & the Seal thereof at Geneva in said County this 28th day of May A.D. 56

Luther Dearborn
clerk

$12893-97

And now the said appellants by E. Peck & J. F. Farnsworth their attorneys assign for error in the foregoing record the following

1 The Court Erred in overruling the objection to the question asked the witness Walter Mc-Canly, and allowing the said witness to answer it-

2 The Court Erred in giving each of the instructions asked & given on the part of Yarwood.

3 The Court Erred in refusing to give the Second. fourth Eighth. Ninth. fifteenth. & Eighteenth instructions as asked by the appellants. & each of them.

4 The Court erred in qualifying the said last mentioned instructions, and each of them.

5. The Court Erred in refusing to give the jury the instructions numbered 14-8.3- and lettered Q-R-S-T- U- V- W- and X. and each of them.

6. The Court Erred in telling the jury that he gave them the instructions marked. Y- Z- & and "Consent". by the consent of the plaintiff-

7- The Court Erred in overruling the motion of appellants and refusing to grant a new trial.

E. Peck. & J. F. Farnsworth
attys for appellts

And the said appellee by Leland & Macdonald his attorneys comes and says that there is no error in the record aforesaid in manner & form as above alleged & this &c
Leland & Macdonald
p.d.

Jn Hall

Galena & Chicago
Union Rail Road Com
appellants
vs
Lewis H. Garrood
appellee

Transcript &c

Filed June 10, 1858
S Lebaron
Clerk

SUPREME COURT.

GALENA & CHICAGO UNION RAIL R. Com.
APPELLANTS.
VS.
LEWIS H. YARWOOD
APPELLEE.

Appeal from Kane.

ABSTRACT OF RECORD.

Trespass on the case, by Yarwood against the Appellants, for personal injuries.

4 The 1st count of the declaration avers that Yarwood was a passenger on the cars of the appellants from Elgin to Clinton in the county of Kane, on the second of August 1852.

That "just before reaching the said station or stopping place at the said Clinton, by the ac-
5 tion of the wheels of the said engine and cars, the said iron and wooden rails were torn up for a great distance (to wit) for the distance of twenty feet, in consequence of the said rails being constructed of poor material, and so insufficiently and insecurely fastened as aforesaid, the
6 said car on which the said plaintiff was then and there a passenger as aforesaid, was thrown violently off of the said road, by reason of which the life of the said plaintiff was put in great peril and danger, insomuch so that the said plaintiff was obliged, and did jump from the said car to the ground (the said car being then and there so off the said track, and still running at a rapid rate over the ties of said road, and apparently about to run off a very steep bank then and there being) "in doing which the said plaintiff's left leg was broken near the ankle, "his ankle badly and severely strained and bruised, and his body otherwise severely bruised "and injured, all of which was caused by the unskillfulness and carelessness of the said defend-"ants and their servants, and by reason of the said injuries so received as aforesaid, the said "plaintiff was &c"—concluding with the damage.

8 The second count is substantially like the first, only avering that the cars were run at double their usual rate of speed, and at a dangerous rate of speed, &c.

And avering that the car which the plaintiff was a passenger in, was off the track &c., like the first count.

The third count avers that "the car in which said plaintiff was riding was thrown with great vio-
11 "lence off the said track, and the said plaintiff without fault on his part, and by reason of said "carelessness and improper conduct of said defendants, thereby came with great force and vio-"lence upon the earth, and his left leg was thereby broken near the ankle" &c. &c.

12 Fourth count substantially like the third.

13 *Plea. General Issue.*

17 The case was tried the 23rd of May 1855, by a Jury.

19 Verdict for plaintiff of twenty-five Hundred Dollars.

Motion for new trial overruled and Judgment upon the verdict—and exceptions, and appeal.

Testimony.

Samuel C. Jones., a witness for Yarwood, testified :

20 That about the first of August 1852, he took passage on the said Road at Elgin for Clinton—about three or four miles. Himself, Fay and Yarwood went together. Wm. Wiggins was conductor on that day. We left Elgin in the forepart of the afternoon. From Elgin to Clinton the first part of the Road was 'T' rail, and the rest strap. Think the 'T' rail was near half of
21 the way—it is a down grade to Clinton. Elgin to the bridge it is about thirty feet to the mile. Think it is a down grade most of the way. I discovered no change in the speed after leaving the "T" rail. The cars ran off the track nearer Clinton than Elgin. He and others jumped off. He saw Yarwood lying on the ground. He (Yarwood) said he felt faint. Witness went to get some water for him—he jumped from the platform of the baggage car—a great deal of motion to that car at the time—not steady—rough riding. He, (witness) was a little back of the centre of the baggage car—could not walk steady—got to the platform—dust thick till the wind blowed away the dust. Saw what was the matter, and jumped—alighted on all fours. It was the motion of the cars and not the speed, that made him fall—it was apparently from the Baggage car that something had happened—knew something was wrong when he jumped; knew from the motion of the cars. Supposed it was a snake head that caused the accident. A part of the train was off the track. The first class car was off, or partly off. Was certain the hind end of the second class, and fore end of the first class were off; did'nt know where the Plaintiff was when he jumped; din'nt know where Fay was; he
22 (Fay) must have been on the second class car when car ran off; did'nt recollect any alarm (22) from Locomotive; were going slow when he jumped ; could'nt tell the rate of speed; from the time he first noticed roughness ran about two hundred feet ; from examination of the po-

sition, and when the flanges of the wheels had been on the ties, knew the cars were off.—
On the east side of the track was graded off quite level where they stopped ; a bank on the
west side, and a ditch cut ; was not injured by jumping of any consequence; did not examine
the track particularly; noticed a piece of flat rail, fresh broken, six or eight feet long. It was
back of where he found Yarwood; back of the hind end of the first class car; didn't remember
more than one piece of rail; After the accident, got a small car and took Yarwood and Fay to
Elgin, on the track on the east side of the river; took Yarwood to Padelford; rode on the
hand car with them; then noticed the track part of the way; noticed two or three places
where the end of the rail was up; they went back part of the way on the same track they had
passed down. His impression that one of the loose rails was broken. He (Yarwood) was con-
fined to his room four to six weeks; when he got out used two crutches; then a crutch and a
23 cane; was confined to his bed (23) sometime. He had attendance day and night; was at-
tended by Doctors Mc Clure, Vacy & Kerr.

On cross examination Witness said:

There were three or four cars in the train; the Baggage car; second class car; and first class passenger car; did'nt know whether there was a freight car or not. Wiggins asked Plaintiff to go: so did Fay and Witness. May be they (F. and Witness) asked him first. Wiggins said we had better go into the baggage car, as the passenger car was full, or nearly full. Witness first asked Plaintiff to go; then Wiggins said come along.
Wiggins said they had better go into the Baggage car, as the passenger car was full, that passenger car was full, and they better go into the baggage car— the former words are correct, as near as he could recollect. Did'nt recollect that he swore on the other trial that Conductor said the passenger car was full, and they would have to get into the baggage cars. They all then got into the baggage car; it was warm weather. They had coats and pants, and no vests. John Demond and some others was in the baggage car. Yarwood, Fay, himself began playing. They commenced pulling up each others shirts; he went out of the baggage car; saw Yarwood go out front; then Fay
24 followed (24) His impression is that Yarwood pulled up Fay's shirt and started. Fay pulled down his shirt and followed him. He (Witness) went forward into the second class car. Yarwood was then on the platform, or just going into first class car. He (Witness) then turned and went back. This was a very short time before the accident. Fay had not got back. Did'nt know the rate of speed; his attention was otherwise taken up; he noticed on the "T" rail they were running pretty fast. He was an Engineer, or had been; a civil Engineer; never saw an engine. The cars were in a shallow cut. They were all single men; there was no scuffling about pulling up the linen; there was some exertions used to do it, and some to prevent it. Yarwood had been at Elgin more than two years before that time, and had been on the road before.

On Re-examination by Plaintiff, Witness said:

Wiggins said they had better go into the baggage car, that he would be in there pretty soon, or in a few minutes. They were all then acquainted with the Conductor Wiggins. Yarwood & Wiggins were related; Wiggins is his uncle; they had not been out before this shirt pulling; they quit about the time they crossed the bridge, just before striking the strap rail; had near a quarter or half a mile after they quit playing, on the strap rail. On cross ex-
25 amination again Witness said: Cars were full, nearly full, or pretty full, and they must take the baggage car; could'nt repeat the exact language; had before stated as near as he could.

Albert R. Fay :

Testified, was on the train with Jones and Yarwood; the speed he thought pretty fast; no great change in the speed—accident occurred over two miles from Clinton; had been running about a mile on the flat rail when the accicent occurred. The cars run off the track.— He was on the platform of the second class car when he jumped, next to the baggage car. He was injured by the fall—the first he saw of Yarwood he (Yarwood) was on the hand car. He (witness) turned up the brake once or twice and jumped—supposed the ties were the usual distance apart—the motion of the cars when he jumped was violent and zig zag, and careened over. He jumped because he thought he was in danger—the brakeman was on the opposite platform. Yarwood was on the bed when he (witness) first saw him, some six weeks afterwards—his leg and ancle began to swell on the way up. Yarwood, before the accident, was book-keeper to the Elgin Manufacturing Company—he did not get out for six weeks.— He (witness) did not know of his going into business until January afterwards.

On Cross Examination, Witness said did'nt recollect whether he heard the whistle or not. Was inside of second class car when the cars ran off; followed Yarwood; he passed to the first class car. He (witness) went to the middle of second class car, and was standing there; they were but very few in there; did not go into the first class car at all; noticed when the cars cut the ties. He (witness) was not in much fear at first; he came down in a heap when he *alighted*; the cars were ran nearly the length of two cars after he jumped. Yarwood and witness had been pulling each others shirt out; the scuffling and shirt pulling occupied but a short time. His, witness, shirt, pulled but once he thought; Jones pulled his shirt; they were only going to Clinton; they paid no fare; he expected to pay fare before the time when the accident happened. They had not seen the conductor after leaving Elgin; he rode to Clinton several times before; saw Conductor at Elgin; he (conductor) made some remark that
27 the cars were pretty full, and that they had better get into the baggage car, and he (witness) supposed from the remark the conductor made. He had a suit against the company for the same injury. Had heard some remarks about the decision of the Supreme Court; had not read the decision.

Direct examination resumed by Plaintiff.

They were not commanded to get into the baggage car; he could not use the precise words; there was something said about the cars being full, and conductor said they had better get into the baggage car. Passengers sometimes consider it a privilege to get into a baggage car. There was no particular bargain about going into the baggage car. The kind of shirt tail scuffling they had was—the shirts were pulled some: did not know by whom first. Did not know whose shirt was pulled first; had no suspenders over shirts; were pulled out some and puffed out, and they pulled them; there was no chasing. We all went into the other car before the accident took place.

Cross-Examination Resumed:—At some time prefer riding in the baggage car to the second class car. He did not sit in the second class car; they sat down on the baggage; the scuf-
28 fling began while they were sitting; part of them were sitting most of the time; they were in the baggage car; the scuffling commenced soon after leaving Elgin; when the cars stopped he was at the hind end of the first class car. The Plaintiff had a vest and coat on.

L. D. Johnson, Testified as follows:

Was an Engineer of the train; saw the snake head before locomotive passed, some ten or fifteen rods ahead. Could not have avoided it by reversing the engine. They were running twelve or fourteen miles to the hour. At this rate of speed it could probably be brought up from seventy to one hundred feet, if brakes were applied at the signal, if grade was level.—Had run over the track before; had seen snake heads there before; such a rail is subject to snake heads; dont run as fast on flat rail; always slowed the train on the flat rail; run twenty five miles to the hour on "T" rail.

Cross-Examination, Witness said,

Twelve or fourteen miles is a safe rate of speed on that road. This is a better road than the Mad River Road, which is the only flat rail road he ever saw before; there they run the same
29 speed they did here. Did not recollect whether he sounded the whistle or reversed the engine, or not, but had no doubt he did, for he always did, when he thought he saw a snake head. The reason he was not willing to swear he sounded the whistle, was because he sounded it so constantly whenever anything h———; could not say whether he did or not, at any particular time.

Direct Examination resumed by Plaintiff:

Strap rail is not so safe as "T" rail, and that is the reason they run slower. Snake heads will raise with the best of care on flat rail.

The Plaintiff here admitted that this road was as good as flat rail could be made.

Walker McAuley, Testified as follows:

Was on the train on the hindermost passenger car; it was not full; it was not over three-fourths full. The Plaintiff's counsel then asked the witness the following question:

"What was the condition of things in that car at the time of the accident? To which question the defendants, by their counsel objected. The court overruled the objection, and allowed the question to be answerd, to which ruling and decision of the court, in allowing said question to be put and answered to the Jury, the defendants by their counsel, at the time,
30 excepted. The witness answered—"there was a good deal of confusion in the cars—was very

unpleasant, and I thought rather dangerous, but I was not very much excited. If I had been where I could have jumped off, I think I should have done so; the cars ran about six rods off the track; the first class car leaned toward the west; I thought at one time it probably would tip over."

On cross-examination witness stated he got on at Elgin. Was near the centre of the cars; those who continued in the cars were not injured. Baggage car was not off the track. He had a little girl sitting beside him. Did'nt recollect seeing any one standing in the cars. No passenger jumped from that car; the passengers went on in the baggage car to the Junction.

Wm. Wiggins, testified as follows:

He was conductor of the train at the time, and is still in the employ of the Company. He thought the speed was fifteen or sixteen miles an hour; thought he stated so on the other trial; just before the accident he had seen Yarwood in the first class car; he rushed off the platform; told Yarwood the cars were off the track before he jumped.

On cross-examination, witness said he first saw Yarwood after they left Elgin, about the middle of the first class car. He (Yarwood) said to him "we have had a regular tear in the baggage car" He (Wiggins) thought he replied—"take care you dont tear yourself off the track," He
31 (witness) went to the door, and Yarwood followed him and said "I believe we are off the track now;" did not recollect whether car was full or not. Mr. Yarwood did not take a seat in the cars; that rate of speed was safe; it was the usual practice to slacken speed on flat rail; no one was injured that remained in the car. Yarwood and Fay jumped off, and they were the only persons injured; the hind truck of the second class, and the forward truck of the first class were off the track. The train consisted of a locomotive, tender, baggage car, 2nd class car, and 1st class car.

John J Brewer—testified as follows:—Was on the train, on the forward platform of the first class car. He turned the brakes, and got off the train; the train went a little over half the length of a car before stopping, after he got off. He went over the road often, every day for some days. He passed over the road four times a day till accident happened. He was in employ of Michigan Central Rail Road at the time.

On cross-examination witness said he heard the whistle and took hold of the brake immediately; Wiggins took hold also. He (witness) jumped off; he ran half the length of a car after he jumped; part of the trucks only were off the track. He dont think there was any danger on the inside of the car—there is always more danger on the platform, than on the inside of the car. Passengers were not allowed to stand on the platform; could not say whether any printed rules to that effect on that train or not.

32 Frederick Swain—testified as follows:—Was on the train as brakeman; was on the hind end of the second class car; he turned the brake and jumped off, because he thought he was safer on the ground; he thought he was in danger on the train, therefore he jumped. Mr. Brewer and he jumped together. He (witness) was not hurt. Cars ran about the length of a car and a half after they left the track.

John Cox—testified as follows:—Was in the employ of the Company as track repairer.—His instructions were to keep the road in order; the road in question had not been examined after the preceding train had passed down; one freight train went over the road.

On cross examination, witness said—he had charge of the road; he went over the road twice a day; went over twice that day; he preceded the passenger train on a hand car; he passed the road to see that it was in order; it was a good road for a strap rail road; well graveled; it was as good as any road.

The plaintiff here admitted that it is impossible to make a strap rail road without having snake heads.

John Clark testified as follows:—

He was in the employ of the road as Superintendent of track repairs; Mr. Cox was under him. The instructions were that men should pass over as often as was necessary; as a general thing it was necessary after every train; the passage of every train has a tendency to make snake heads; dont know what care was taken on the day of the accident.

On cross examination, witness said, all due and proper care was taken of this road by the Company, to keep it in order; it was in good repair.

Doct. Thos. Kerr, testified as follows:—Found plaintiff at Elgin with a fracture of the left leg on the outside, and of the ankle on the inside; both broken; did'nt think the leg would be as good as before; he (plaintiff) was confined several weeks. Defendants admitted they are a rail road company, and were common carriers.

The plaintiff here rested his case, and the defendants introduced as witness, Gilman H Worrell—who testified as follows:

He knew the plaintiff; had conversation with him some six or eight weeks after he was injured; he (plaintiff) was at the office; said he "did'nt blame any one but himself for his injury, because he was such a damned fool as to jump off"; he said he "had passed through the train from the baggage car"; he blamed himself for his want of self-possession.

John Cox (recalled) testified as follows:

Had some talk with Yarwood soon after he was hurt; he (Yarwood) said he "did'nt care so much about the hurt as about how foolish he done it." He (witness) had been over this
34 part of the road the week before, and made a thorough overhauling of it by removing the injured rails; he did not think it necessary to go over this part of the road after each train; it is impossible to prevent snake heads; that was the best part of his road; it was in as good repair as it could be; it was a pine ribbon; this is better than oak; he passed over the road between eleven and twelve o'clock of the same day; the accident was about 4 o'clock P. M. There were no snake heads when he passed over it.

On cross examination, witness said, if there came a snake head after 12 o'clock he should not have known it.

John Drummond, testified as follows:—Was on the train as stage agent. He was in the baggage car from Elgin, until the accident; Yarwood, Fay, Jones and Baggageman Clark were there; these young men, Jones, Yarwood and Fay were scuffling when they first left Elgin; they continued until a short time before the accident; he saw them all go out; just before they left, they were pulling up their shirts; they were scuffling together on a sort of a good natured spree. He remained in the baggage car with the baggageman. Yarwood, Jones and Fay went out together; they went out fast; they seemed to be chasing one another; there was some extra motion in that car; not violent. He (witness) did not consider himself in any danger; that car was on the track all the time; the baggageman went to the brake;
35 Yarwood and the others left the baggage car, three or four minutes before the car ran off.

On cross examination, witness said—the scuffling was pulling out shirt tails; they seized hold of each others shirts; they walked out of the car rather quicker than usual.

Wm. H. Wiggins, being recalled, testified as follows: It was not safe for passengers to run about the cars, or stand on the platform. Mr. Yarwood had frequently passed over the road; those standing about the cars are most liable to be injured.

On cross examination, witness said—he did'nt remember that there were any printed rules; not in the habit of having rules in the baggage cars. Yarwood was on the platform when he (witness) told him the cars were off the track; he did'nt remember what directions he gave as to where Yarwood, Fay and Jones should go; endeavored to keep passengers off the platform.

The foregoing was all the evidence given in the cause. The Plaintiff then asked the court
36 to instruct the jury as follows:

KANE COUNTY CIRCUIT COURT.

LEWIS H. YARWOOD
vs.
THE GALENA & CHICAGO UNION RAIL ROAD CO. } May Term, A. D. 1855.

And now comes the said Plaintiff by his counsel, and moves the court to instruct the Jury empannelled herein as follows:

1st. That if the Jury believe from the evidence that the Plaintiff was a passenger on board of the cars of the Defendants, in the month of August 1852, at the county of Kane; that the cars of the Defendants were thrown off the track of the road by reason of the unskillfulness or negligence of the Defendants or their agents, and that by means of such accident the Plaintiff was injured in his person, they will find a verdict for the Plaintiff, and assess his damages.

2. That if the Plaintiff was injured by means of an accident occurring on the rail road of the Defendants, while was a passenger on their cars; that the burden of proving that such accident was not the result of the negligence or unskillfullness of the defendants or their agents is cast upon the said defendants.

3. That in order to authorize the jury to find a verdict for the Plaintiff, it is not necessary for the jury to be satisfied that the Defendants were guilty of *gross* or even *ordinary neglect* in the reparation of their road, or management of their train: but if the Jury believe from the

evidence that SLIGHT NEGLECT of the Defendants or their agents, was the cause of the accident and injury of the Plaintiff, and assess his damages; provided the jury believe from the evidence that the Plaintiff was a passenger on board the cars of the Defendants, at the time of such accident and injury.

37 4. The carriers of passengers by rail road are bound to use all precautions, as far as human foresight will go, for the safety of their passengers; and are answe able to injured passengers for SLIGHT NEGLECT of themselves and agents, in the reparation of the track, and conduct and management of their trains, whereby injury ensues.

5. The omission of any precaution which would produce, or increase the safety of, or reduce the probability of danger to the passenger, constitutes such a neglect in carriers of passengers, as will make them answerable in damages to a passenger injured by means of such neglect.

6. That Rail Road Companies are answerable for injuries to a passenger resulting from a defect in their track, which might have been discovered by a most thorough and careful examination; and if the Jury believe from the evidence, that the injury complained of in this case, was occasioned by the neglect of the Company, or their agents, to examine the track prior to the passage of the train on which the accident occurred, they will find a verdict for the plaintiff, and assess his damages.

8. That if the Jury believe from the evidence that the accident and injury occurred by reason of the too rapid speed of the train; by reason of the neglect to apply the brake in time, or because of any other neglect or unskillfulness, management of the train, they will
38 find a verdict for the plaintiff, and assess his damages.

9. That if the Jury believe from the evidence that the accident and injury complained of happened by reason of the neglect of the engineer in charge of the Locomotive attached to the defendants train, or to blow his whistle in time; or by reason of the neglect of the conductor to warn the engineer in time; or by reason of the neglect of the brakeman to apply the brakes in season, they will find a verdict for the plaintiff, and assess his damages.

10. That if the Jury believe from the evidence, that the accident and injury happened by reason of the bad order of the track, and want of due care and attention of the Company, or any of their agents, in the reparation of the track, or in the management and conduct of the train on which the Plaintiff was, they will find a verdict for the Plaintiff and assess his damages.

11. That the mere fact that the plaintiff jumped from the cars, while they were in motion, to the ground, and thus sustained the injury complained of, will not alone deprive him of his right to a recovery against the Defendants, if the Jury believe from the evidence that an accident had occurred; that the cars were off the track, and running at the rate of from 3 to 5 miles an hour; and the Plaintiff had reasonable ground to believe, and did believe, that his life or limb were in danger, and that it was necessary to leap from the cars in order to avoid
39 the danger which threatened him, provided that the injury was not occasioned by the Plaintiff's own neglect, nor that his negligence contributed to produce the injury complained of.

11½. That although the Jury may believe that the Plaintiff would not have received injury, had he not leaped from the cars, and that as the event proved his jumping was an unwise act; that does not necessarily prevent the Plaintiff from recovering in this case. The question is not so much whether there was *in point of fact* any danger, as whether the Plaintiff reasonably apprehended danger, and so leaped from the cars; and in judging of his state of mind, the Jury should take into consideration whatever circumstances of alarm and confusion existed at the time, the Law not requiring the same coolness nor accuracy of judgment, in a person under a state of excitement and alarm, as under other circumstances.

12. That in determining the question whether the Plaintiff had reasonable ground to believe himself in danger, the Jury have the right to consider the experience and knowledge of the Plaintiff in regard to perils of this character, the commotion and consternation if among the passengers; and the fact, if it be so, that one of the brakemen abandoned his post and leaped from the cars.

13. That the *mere fact* that the Plaintiff was a few minutes previous to the occurrence of
40 the accident and injury, scuffling and playing in a sportive manner with others on the cars, will not deprive the plaintiff of his right to recover from the defendant's, if the Jury believe from the evidence, that the Defendant's or their agents were guilty of any neglect, however

slight, whereby the accident and injury occurred; provided the injury was not occasioned by the Plaintiff's own neglect, nor that his negligence contributed to produce the injury complained of.

14. That in estimating the damages which the Plaintiff have sustained by reason of the injury complained of, the Jury if they find for the Plaintiff, are not confined to such damages as may have resulted to the Plaintiff by loss of time, and expense of medical attendance, but may give such additional damages for the loss of natural use, of the Plaintiff's limb, which the jury, exercising a sound discretion—and in view of all circumstances, may see proper to award, not excluding the amount claimed in the declaration.

15. That unless the Jury believe from the evidence, that the passenger cars were full, and that it was part of the contract, that the Plaintiff should occupy during the trip, the baggage car; the mere fact that the Plaintiff left that car and went into the first class passenger car, is not of itself such negligence in the Plaintiff as to defeat a recovery in this case.

41 16. That passengers upon Rail roads are not to be bound or effected by rules established by such roads in relation to the conduct of passengers, unless the proof shows that the passenger had a knowledge of such rules and regulations.

Which instructions were given by the Court, to the giving of which instructions on the part of the said Plaintiff, the Defendants by their counsel, at the time excepted.

Defendants then asked the Court to instruct the Jury as follows:—

1, A.—That if the Jury believe, from the evidence, that the injury to the Plaintiff in this suit, happened to him by mere accident without fault on the part of the defendants, then the plaintiff cannot recover in this action.

5, B.—If the Jury believe from the evidence that the Plaintiff while on his passage from Elgin to Clinton, was guilty of carelessness, and unnecessarily exposed himself to danger by wrestling and scuffling on the cars, or by imprudently passing from one car to another while in motion, and that said carelessness or imprudence contributed in any degree to produce the injury, then the plaintiff cannot recover.

6, C.—If the Jury believe from the evidence, that the plaintiff, while on defendants cars
42 imprudently and carelessly exposed himself to danger, by wrestling, playing, running or jumping; and that the injury to him was in an way produced by such carelessness or imprudence, or that such carelessness and imprudence in any way contributed to produce the injury, then the plaintiff cannot recover, even though the Jury may believe that the defendants have been guilty of negligence.

7, D.—If the jury shall believe from the evidence that the plaintiff was guilty of negligence while a passenger upon the defendants cars, and that his negligence concurred with the negligence of the Defendants in producing the injury, then the Plaintiff cannot recover.

10, E.—If the Jury shall believe from the evidence that the Plaintiff leaped from the cars
43 of the Defendants under a rash and under apprehensions of danger, when in reality there was no danger, and that the injury to the Plaintiff was the result of such leaping, then the Plaintiff cannot recover.

12, F.—If the Jury believe from the evidence that the Plaintiff carelessly leaped from the cars of the Defendants, and that such careless manner of leaping contributed to produce the injury to the Plaintiff, then the Jury should find for the Defendant.

13, G.—If the Jury believe from the evidence that the Plaintiff leaped from the car of the Defendant while it was in motion, under a rash and undue apprehension of danger, when in reality there was not danger, and that the injury was caused by such leaping, they should find for the Defendants, although the Plaintiff might have really thought himself in danger, and leaped to the ground to save himself from harm; the question is whether under the circumstances his jumping was an act of rashness.

16, H.—If the Jury believe from the evidence that the injury to the Plaintiff was the result of the negligence or imprudence of both Plaintiff and Defendants, their verdict should be for the Defendants.

Which was done by the Court.

The Defendants then also asked the Court to instruct the Jury as follows, viz:—

2, I.—If the Jury shall believe from the evidence that the Defendants exercised due care, dilligence and skill in the preservation and repairs of their track, and in managing and operating their road at the time of the accident, and that the accident could not have been prevented by the use of said care, dilligence and skill, then the Plaintiff cannot recover in this action.

4, J.—That every traveler in a public which must meet the risks incident to the mode of travel he adopts, and if the Jury shall believe that the injury to the Plaintiff was the

44 result of an accident which could not be avoided by the exercise of due care and skill in the preparation and management of the means of conveyance on the part of the Defendants, then the Plaintiff cannot recover.

8, K.—That the Plaintiff, before he can recover in this action must not only show that the injury to him was the result of carelessness or negligence of the Defendants, but also that he himself was without fault in producing said injury.

9, L.—That in this action the Plaintiff cannot recover, unless the Jury shall believe that he exercised proper care and circumspection while on his passage from Elgin to Clinton, and that the Defendants were guilty of negligence, from which the injury was received, and the burden of proof is upon the Plaintiff to show not only that the defendants were negligent, but he himself was not guilty of negligence.

15, M.—Unless the Plaintiff has proved to the satisfaction of the Jury that the Defendants was guilty of negligence or misconduct, and also that Plaintiff used proper care and prudence, and that his own misconduct, want of care, or negligence, did not contribute to produce the injury complained of, the Jury should find for the Defendants.

1 Qualification to Defendants 8th. 9th, and 15th Instructions.

45 "But proof that the Pl'ff. was a passenger, of the accident, and the injury make a *prima facie* case, of negligence, and throws the burthen of explaining upon the Defendant.

18, N.—The Jury are also instructed that it is their duty to regard and obey the Law as given them by the Court, *and that the law as laid down by the Supreme Court in their decisions, is the highest Judicial authority of the law*—and the Jury are not at liberty to disregard or override it.

Which the court refused to give as asked, but gave with the following qualifications, viz:—by adding to the first of said instructions these words—"But due care required the use of the utmost prudence and caution; a carrier of passengers being liable for slight negligence;" and by adding to the second of said instructions these words—"But due care required the use of the utmost prudence and caution."

And by adding to the next three of said instructions these words—"Qualification to Defendants 8th 9th and 15th instructions—"But proof that the Pl'ff was a passenger, of the accident, and the injury, make a *prima facie* case of negligence, and throws the burden of explaining upon the Defendant."

And the last of said instructions by striking out the following words therefrom, viz: "And that the law as laid down by the Supreme Court in their decisions, is the highest Judicial authority of the land."

To which decision of the Court in refusing said instructions as asked, and each of them, and
46 qualifying them and each of them as aforesaid, the defendants then and there excepted.

And the defendants then also asked the court to give the jury the following instructions—

14, O.—If the jury believe from the evidence that the plaintiff leaped from the car of defendants under circumstances that would not have justified such an act on the part of a prudent careful man, and that the injury was the result of such jumping from the cars, then the plaintiff cannot recover, unless the jury believe that such injury was willfully caused by the defendant.

3, P.—That the defendants as a common carrier of passengers, is not an insurer of the personal safety of the passengers against all accidents, but is liable only for the want of such care and dilligence as is characteristic of cautious persons. And if the defendants exercised such care and dilligence in the transportation of the plaintiff, then the plaintiff cannot recover in this action.

GALENA & CHICAGO RAIL ROAD COMPANY *ads* YARWOOD. } Instructions for Def'ts.

The court is asked to instruct the jury on the part of the said defendants,

Q.—That if they believe from the evidence that Yarwood and his companions when they took passage in the cars of defendant at Elgin, were told by the conductor that the passenger
47 cars were full, but they could go in the baggage cars, and that thereupon they got into the baggage car to ride to Clinton, then it was the duty of Yarwood to remain and ride in that car.

R.—And if the jury further believe from the evidence that at the time of the accident and when the plaintiff jumped off the cars, the baggage car was not off the track, nor in any danger, but that the plaintiff with his companions had got into a play and scuffle, which brought on a racing through the other cars, and in one of which Yarwood was brought to that appre-

hension oimminent peril which induced him to leap from the cars, and thereby received the injury complained of, then the plaintiff cannot recover, and the jury should find for the defendants.

S.—And the jury are further instructed, that if they believe from the evidence, that Yarwood, the plaintiff, with his companions, at the time they took passage in defendants cars at Elgin, to ride to Clinton, were told by Capt. Wiggins, the conductor, to go in the baggage car, as the passenger cars were full, and that plaintiff, in pursuance thereof, went into said baggage car, then it was his duty to continue therein to the said Clinton.

T.—And if the jury further believe from the evidence, at the time of the accident, the plaintiff had left the baggage car, and gone into another car, and had thereby placed himself
48 into a position of apprehension of imminent peril, which induced him to leap from the cars and thereby received the injury complained of, and that the baggage car was not off the track at all, or in any danger, such conduct of the plaintiff was culpable negligence, and the jury should find for the defendants.

W.—If the jury believe from the evidence that the standing upon the platform of cars, or the going about from car to car by a passenger whilst the cars are running, are acts of imprudence. and if they further believe that at the time the cars run off the track, the plaintiff was so standing or going about, and that such conduct of the plaintiff increased his apprehension oi peril, and he was thereby induced to leap from the cars when in motion, and in consequence of such leap received the injury; when had he remained in the cars, he would not have been injured, he is not entitled to recover in this action.

V.—If the jury believe from the evidence that the plaintiff leaped from the cars of the defendant under circumstances that would not have justified such an act on the part of an ordinarily prudent careful man, and that the injury was the result of such leaping, then the plaintiff cannot recover.

Qualifications asked by defendants to plaintiff's instruction Number 9.

W.—But unless the plaintiff has proved to the satisfaction of the jury that his own care-
49 lessness or negligence did not contribute or assist to produce the injury complained of, then the jury should find for the defendant, and the burden of such proof is upon the plaintiff.

X.—If the jury believe from the evidence, that at time the plaintiff took passage on the defendants cars at Elgin, he was directed by the conductor to take his place in the baggage car, because there was not room for him in the passenger cars, and that the plaintiff did go on board of the baggage car at the time of starting, and that whilst on the way from Elgin to Clinton he left said car without any reasonable cause, and that the injury to the plaintiff happened in consequence of his so leaving the car, then he is not entitled to recover in this action.

Which the court refused, and marked the same refused—to which decision of the court in refusing to give said last mentioned instructions, the defendants then and there excepted.—And the defendants then also asked the court to give the following instructions—

Y.—If the jury believe from the evidence that the plaintiff with his companions at the time they took passage in defendants cars at Elgin, to ride to Clinton, were told by the conductor of the train, that the passenger car was full, or nearly full, and that, they could go in the bag-
50 gage car, and that plaintiff in pursuance thereof went into said baggage car, then it was his duty to continue there, unless it was necessary to leave the same; and if the jury further believe from the evidence, that at the time of the accident, the plaintiff had unnecessarily left the baggage car and gone into another car, and was walking about or standing upon the platform of the hind car, and had thereby placed himself in a position of peril, or apprehension of great peril, while the baggage car was not off the track, or in danger, then such conduct was culpable negligence.

Z.—If the jury believe from the evidence that Yarwood was unnecessarily standing upon the platform of one of defendants cars at the time of accident then he was guilty of improper conduct and negligence in so doing.

&.—That it is the duty of every passenger to take his place in the car in which he takes passage, and to remain therein, unless it is necessary to leave the same for a reasonable refreshment, or some other necessary purpose.

Which the court marked "given" "consent," and when the court read the last mentioned instructions to the jury, he remarked to the jury, and in their presence, that he gave these by the consent of plaintiff—to which remark of the court as aforesaid, the defendants then and there excepted.

The jury thereupon retired, and afterwards came into court, and rendered the following verdict:

51 "We the jurors find the Defendants guilty, and assess the damages Twenty Five Hundred Dollars.

Foreman—JOHN VAN SICKLE."

Upon the rendition of said verdict, the defendants by their counsel moved the court for a new trial, which motion was overruled by the court, and a judgment rendered for the plaintiff on said Verdict, to which decision of the court in overruling the said defendants motion for a new trial, the said defendants by their counsel at the time excepted, and prays that this their Bill of Exceptions may be signed and sealed—which is done.

E. PECK & J. F. FARNSWORTH, Att'ys for Appellants.

ISAAC G. WILSON, Judge. (Seal)

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Galena & Chicago
Union R. R. Com
vs
Lewis H. Garrood
Abstract

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