No. 8555

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

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vs.

John H.Fahrs et al

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State of Illinois Edwards County ss

Pleas began and held before the Honourable Circuit Court within and for the County and State aforesaid at the Court House in Albion at the September Term thereof in the Year A D 1858. Court on the 27th day of September 1858.

Present the Honourable Edwin Beecher Sole Judge of the said Court

Be it remembered that on the day and year last aforesaid the following Record was filed in said Court to wit

State of Illinois }
Richland County } ss

Pleas held at Olney in Richland County Illinois on Monday the 12th day of October in the Year of our Lord One Thousand Eight hundred and fifty seven the Hon Justin Harlin Presiding Judge &c.

John P. & Catharine Yeats his wife complains of the Ohio and Mississippi Rail Road Company being Summoned &c of a plea of Trespass on the case for that whereas said defendants was owner & proprietor of a certain Rail Road & cars for the Carriage & conveyance of passengers from Vincennes to Olney in the County aforesaid for hire and reward to the said defendants in that behalf Court at the County of Richland aforesaid and the said defendant being such owner of the said Road & Cars as aforesaid heretofore Court on the 25th day of July A. D. 1855

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at the county aforesaid the said plaintiffs aver that said plaintiffs were passengers on the Cars of said defendant on the said 25th day of July 1855 to be safely and securely carried and conveyed thereby from Vincennes to Olney in the county of Richland aforesaid for a certain fare and reward to the said defendants then & there paid that just before making the said station or stopping place at said Olney by the action of the said wheels of the said Engine & Cars the said iron and wooden rails were torn up for a great distance to wit the distance of one hundred feet in consequence of the said rails being constructed of poor material and so insecurely and insufficiently fastened and the track was very much out of repair otherwise so much so that the said Cars on which the said Catharine Fahs (wife of the said John Fahs) was then and there a passenger as aforesaid was thrown violently off of the said Road and overturned by reason of which the life of the said Catharine was put in great peril and danger that her right arm was broken and dislocated in the wrist as well as in the Elbow her arm badly and severely strained & bruised and her body otherwise severely bruised & injured all of which was caused by the unskillfulness and carelessness of the said defendant and its servants and also by means of the premises the said Catharine became and was sick sore

lame and disordered & so continued for a long space of time to wit hitherto during during all which said time the said Catharine suffered great pain and was hindred and prevented from transacting and attending to her necessary affairs and was deprived of great gains & profits which might and otherwise would have gained & acquired and thereby also the said plaintiff were forced and obliged to and did them & there pay and lay out and expend large sums of money to wit $1000 in & about the endeavoring to be cured of the said fractures bruises & injuries so received as aforesaid and also thereby the said plaintiffs was hindered & detained at a certain town town at & Bridlharts at Olney in the County aforesaid a long space of time to wit for twelve weeks & during that time incured great Expenses to wit $300 in and about their necessary support and whereas also heretofore town on the 25th day of July 1855 at the county of Richland aforesaid the said plaintiffs aver that the said Catharine Hahs wife of the said John Hahs was a passenger on the cars of the defendants from Vincennes to Olney in the County of Richland on the 25th day of July 1855 that just before reaching the said Station or Stopping place at said Olney by the neglect and unskillfulness of said defendant and its servants the said car in which the said Catharine was there & then a passenger as aforesaid was thrown violently

off of said road by reason of which the said Catharine's Right wrist and Elbow were broken dislocated & her Arm otherwise badly strained and injured & her body otherwise severely bruised & injured all of which was caused by the Carelessness and unskillfulness of said defendants and its servants and whereas also heretofore towit on the 25th day of July 1855 at the county aforesaid the defendant received into its Cars one Catharine Fahs the wife of the said John Fahs as a passenger there on to be carried and conveyed there by towit from Vincennes to Olney aforesaid for certain fare & reward to the said defendants in that behalf & by reason thereof the said defendant ought carefully to have conveyed or caused to be conveyed the said Catharine Fahs by said Cars from Vincennes to Olney aforesaid yet the said defendant not regarding his duty in this behalf conducted himself so carelessly by and through the carelessness negligence unskillfulness & default of himself & its servants and for want of due care and caution the said Cars afterwards towit on the day & year aforesaid and in the County of Richland aforesaid just before reaching the Station or stopping place of Olney in the County aforesaid the Cars were overset & thrown off the track by means whereof the said Catharine Fahs then being there on was cut bruised & wounded & divers bones & arms were broken

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so much that the said Catharine then and there became very sick & remained so for a long space of time to wit weeks during all which time the said Catharine was unable to manage the usual business viz attending to the sale and carrying on a Milliners fancy shop and the said Jim Fahs was obliged to expend the sum of $300, in and about attending the care of his said wife & the procuring necessary assistance & attendance during her said confinement which ensued in consequence of her being so wounded as aforesaid and by reason of the said injuries so received as aforesaid the said plaintiffs sustained damage to the amount of ten thousand dollars & therefor they bring their suit &c

Hazeward & Constable
Attys for Ptffs

The foregoing Declaration was filed on the 30th of Sept 1857

M B Snyder Clerk

Summons issued on the 29th day of September 1857 to wit

The State of Illinois } Set
Richland County }

The People of the State of Illinois to the Sheriff of said County Greeting we command you that you Summon the Ohio & Mississippi Rail Road Company if they

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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 Olney on the Second monday in the month of October next to answer John Fahs & Catharine Fahs his wife of a plea of Trespass on the case to the damage of them the said John Fahs & Catharine Fahs his wife ten thousand dollars as they say And have you then and there this writ and make return thereon in what manner you execute the same Witness M B Snyder Clerk of our Circuit Court at Olney this 29th day of September in the year of our Lord one thousand Eight hundred and fifty seven

Test M B Snyder Clerk Circuit Court

Returned.

Served by reading to William McCullough agent of the O & Mc R, R, Company this 31st day of Sept 1857

Jas H Parker Sheriff R C

and afterwards to wit at the October term 1857 of the said Circuit Court the following proceedings were had and order made in said Court to wit

John Fahs & Catharine Fahs his wife vs O & M R R Co,

Trespass on the Case

7.

Continued and leave to ammend
the declaration &c
and afterwards to wit at the may term 1858
of the said Circuit Court the following
proceedings were had and order made to wit

The Ohio & Miss Rail Road Company
ats
Fahs & Fahs

The said defendant shows
to the court that she cannot safely proceed to
the trial of the issue in this cause for the
reason of the absence of Edward Wyman
John E Tripp and Edward Carney who are
as she is advised material witnessed for her
in this behalf but whose attendance cannot
be procured at this term of the Court for reasons
herein after set forth by Edward Wyman and
the other named person defendant Expects to
show that the catastrophe refered to in the
declaration in which the said Catharine
was injured was not the result of defective
machinery negligence or other cause which
could have been foreseen or prevented but
that the same was the result of the act of
god in this that a sudden and heavy rain
storm had so softened and penetrated the
road bed of this defendants rail road
that in passing over the same at reasonable
speed and with proper Caution the superstruc-
ture Cars ties & rails slide from their position
and were thus and thereby unavoidably

[illegible]

over thrown whence the said Catharines injury occured Defendant Shews that said Edward Wyman resides in Saint Louis and was at the time in the employ of the defendant and was present on the train at the time of the accident and had general superintendance of the passengers and procured relief and assistance for them that defendant relying on its being in her power to bring said Wyman here when wanted and not wishing to interfere with his pressing engagements in Saint Louis telegrafied for him to be here as a witness in this case this morning but received for answer that he was a Grand Juror in the Criminal Court of Saint Louis now in session and could not be possibly here at this term of the Court Defendant also shews that Sripp and Carney are Employes of the Road residing here and who could at any time have been called upon as witnesses up to Yesterday but owing to a sudden and serious injury to the road by which public travil and the mails are impeded and which requires all the attention of Road Master Sripp and Foreman Carney in repairing said injury said witnesses cannot now be produced affiant Shews that she cannot go to trial safely without the testimony of said witnesses who have a more correct knowledge touching the matters involved in the issue

9 at bar than any other persons known unto affiant Defendant shews that She Expects to procure this testimony and the attendance of these witnesses at the next term of this Court until which time She asks a continuance &

Homes Ritchell & c
Defendants attys

State of Illinois
Richland County
Fahs & Fahs
Betwen Vs
Ohio & Miss Rail Road Co

Richland Circuit Court
May term A D 1858
Plaintiffs
Case
Defendant

William Homes being sworn says that the foregoing affidavit is true as he is informed & believes

Subscribed & Sworn to in Open Court this 14th day of May A D 1858
M B Snyder Clerk

William Homes
attorney & agent for said Ohio & Miss Rail Road Co

John Fahs & Catharine his wife Vs
Ohio & Mississippi Rail Road

Richland Co Circuit Court May Term 1858
Case

Be it remembered that on this day Fryday the same being the fourteenth day of May and fifth day of said term in the year of our Lord 1858 the foregoing cause was pending & undetermined in the Richland County Circuit Court before Honorable justin Harlan Judge & the said cause

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Coming on for hearing the defendant presented the following affidavit to wit

State of Illinois Richland County ss
Richland Circuit Court May Term A. D.
1858

The Ohio & Miss. Rail Road Co
ats
John Fahs & Catharine Fahs his Wife } Case.

The said defendant by William Holmes her agent and attorney in this suit comes and says that she cannot have an impartial trial of this cause in this County where the same is pending for the reason that the minds of the inhabitants of this County are prejudiced against her the defendant and the said affiant shews that he has become satisfied of such prejudice existing only since the commencement of this Term of this Court affiant further shews that he fears that a fair and impartial trial herein cannot be had in any County upon the line of said road for reason of the like prejudice in the minds of the inhabitants against the defendant wherefore defendant prays a change of the venue herein to some other County where the like cause of objection does not exist as is by the statute in such cases governing made and provided and further affiant says not

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William Haines

Subscribed and Sworn to in open Court
this 14th day of May A.D 1858

J. Harlan Judge &c

Filed May 14th 1858.

M. B Snyder Clerk

And accompanied said affidavit with a motion to change the venue in said cause to which motion the plaintiffs then & there objected and after argument the venue in said cause was ordered to be changed to Edwards county to the allowing such motion & ordering the venue in said cause changed as aforesaid the plaintiffs by their counsel then made Exceptions and tendered this their bill of exceptions & prays the same may be signed sealed & made a part of the Record in said cause which is done

J Harlan (Seal)

John Fahs &
C. Fahs his wife
vs
the O & M Rail Road Co,

Bond on the Case

Now at this time the defendants by their attornies and made and filed their affidavit according to law and moves the Court for a change of venue herein & the Plaintiffs by their Counsel Excepts which motion is sustained and a change of venue awarded to the County of Edwards whereupon it is ordered by the court that the Clerk make

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out the necessary Transcript and transfer the papers herein to the Clerks office for the said Edwards County Circuit Court duly certified according to law &c

State of Illinois } ss
Richland County }

I, Mc B Snyder Clerk of the Circuit Court of said County do hereby certify that the foregoing is a true and complete copy of the proceedings had in said court in the above ~~entitled~~ cause as appears from the records and files of said court & that the papers enclosed are the true papers.

In witness where of I have hereunto set my hand and affixed the Seal of said court at Olney this 6th day of August AD 1858

Mc. B. Snyder Clerk

On the 27th day of September 1858 being the first day of the said September Term 1858 of the said Edwards Circuit Court the following ~~was~~ order was had towit

John Starks and Wife
vs
the Ohio and Mississippi
Rail Road Co

} Trespass on the Case

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At this day came the parties by their Attournies and on motion leave is had to open depositions filed herein

which said depositions are in words and figures following to wit

"State of Illinois } Set
Edwards County & Circuit Court }

The People of the State of Illinois, To Jacob Glesner, a Justice of the Peace of the County of York in the State of Pennsylvania Greeting; Know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give unto you full power & authority and do hereby authorise and require you that at a certain time and place to be designated and appointed by you for that purpose you do cause the Witnesses whose names are mentioned in the enclosed interrogatories as well on the part of the said John Fahs and Catherine Fahs plaintiffs as on the part of the Ohio and Mississippi Rail Road Company Defendants, to come before you and them and there diligently and faithfully examine each of them apart upon said interrogatories on their respective corporeal oaths first taken before you, both on the part of the said plaintiffs, and defendants, and none others and that you do take such their examinations and cause the said interrogatories as they are propounded, together with the answers of the said Witnesses thereto, to be reduced to writing, in the order in which they shall be proposed and answered, and when you shall have so taken

[illegible]

them you shall cause the said Witnesses to sign them in the proper places; in your presences, and thereupon you will annex at the foot thereof a certificate subscribed by yourself, in which you must state that they were sworn to, and signed by the deponents and the time and place when & where the same were taken, After which you are to send the said depositions together with this Commission and the enclosed interrogatories carefully enclosed and sealed up, to the Clerk of the Circuit Court, in, and for the County of Edwards and State of Illinois with the names of the said parties litigant endorsed thereon, and this you shall in no wise omit-

Witness Walter L Mayo, Clerk of the Circuit Court in and for said County of Edwards at Albion and Official seal this 19th day of August A. D. 1858

Walter L Mayo, Clerk

To The Ohio & Mississippi Rail Road Company

Sir

You will take notice that on the 19 day of August A. D. 1858 between the hours of 8 o clock A. M. and 4 o clock P. M. of said day we shall apply to the Clerk of the Circuit Court, in and for the County of Edwards and State of Illinois, for a commission or dedimus potestatem, directed to Jacob Glesner

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A Justice of the Peace of the County of York in the State of Pennsylvania

To take the deposition of John Shive, Jacob Hauk, Frederick Baugher, William Wagoner, Robert Fisher Daniel Ellinger, James Carr, Jacob Hay citizens of the County of York and State of Pennsylvania on the subjoined interrogatories, which depositions are to be read in evidence on the trial of a cause in the Circuit Court, in and for the County of Edwards and State of Illinois pending wherein you are Defts and we Plaintiffs when and where you may attend and file cross interrogatories

Yours &c John Fahs &
Catharine Fahs

Interrogatories to the above named Witnesses

1st Are you acquainted with Catharine Fahs wife of John Fahs of the City of York in the County of York and State of Pennsylvania and if so how long have you known her

2nd Do you know anything of injuries she has received by accident on a Railroad if so describe those injuries

3d What business was said Catharine engaged in before she received said injury and does she still carry on said business and are those injuries which she received any disadvantage to her in carrying on said business and if so state to what extent

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4th How much less are her services worth if any less in said business in each year in consequence of said injury.

5 what is the age of said Catharine and what is her general health aside from said injury.

The said Defts hereby waives further notice of the taking said Deposition as above proposed but reserving all further objections Aug 16th 1858

O & M R R Co
By A Kitchell
Atty

John Fahs &
Catharine Fahs
vs
Ohio & Mississippi
Rail Road Company

In the State of Illinois
Edwards County
Circuit Court

Depositions of John Shive of the Borough of York in the county of York in the State of Pennsylvania a witness aged about sixty one years produced sworn and examined before Jacob Gleiser in and for the County of York and State aforesaid on the eighth day of September at his office in the South Ward in the Borough of York in said County and State aforesaid, by virtue of a commission issued out of the Clerks Office of the Edwards County Circuit Court of the State of Illinois, to us directed for the examination of the said John Shive a witness in a suit depending in the said Edwards County

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Circuit Court in the State of Illinois, between
John Fahs & Catharine Fahs Plaintiffs and
Ohio & Mississippi Rail Road Company Defendants

First—To the first Interrogatory this deponent says:
Answer
I have known Catharine Fahs from a small girl
up to this time, and live neighbor to her for the last
Eleven Years

Second — To the second Interrogatory this deponent says
Answer
What I know about it I read in a letter sent home
by Wm John Fahs in the Summer of 1855 in which
he informed us of the accident and injury of
his wife and himself on the Ohio & Mississippi Rail
Road my daughter being employed by

Excluded

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Mr. Hales, and I had access and attended to her ~~papers~~ books and money, during their absence, after their return I saw her right-arm which was stiff and still remains so.

Third = To the third Interrogatory this deponiant says:

Answer

Millinery business.- Still engaged in the same business, a great disadvantage, as her business amounts to between six and seven thousand dollars a year, her attention and labour is constantly needed, but in consequence of her arm being stiff and weak, She cannot handle, measure, or put up goods, nor do the finishing as She done before She received the injury.

Fourth = To the fourth Interrogatory this deponiant says

Answer

Her services are less in her busines each year $568. for the reason She cannot take girls to learn the business as formerly who paid her for six months instruction on an average Sixty dollars a year, their labour during the time was worth $312, dollars and which labour She must now have done by hiring girls and paying them, She is now obliged to pay extra to finish work $156. dollars each year, which She done herself, besides various other additional expenses in going to the City loss of trade during the absence of the hand to finish amounting at least to $40. a year.

Fifth- To the fifth Interrogatory this deponant Says:
Answer
On the neighborhood of 40 years- her health is very good with the exception of a great deal of pain pregnatly in her injured arm.

Sworn and Subscribed by the said John Shire Sept 8th 1858 before me Jacob Glessner — John Shise

Deposition of James W. Kerr, of the Borough of York, in the County of York, in the State of Pennsylvania, a Witness aged about forty four Years, produced Sworn and examined before Jacob Glessner, in and for the County of York, and State aforesaid, on the eight day of September, at his office, in the South Ward, in the Borough of York, in said County and State aforesaid, by Virtue of a Commission issued out of the Clerks office of the Edwards County Circuit Court of the State of Illinois to me directed, for the examination of the said James W. Kerr, a Witness in a suit depending in the said Edwards County Circuit Court, in the State of Illinois, between John Hahs and Catharine Hahs Plaintiff and Ohio and Mississippi Rail Road Company Defendants.

First- To the first Interrogatory this deponant Says:
Answer
Yes I have known her 13 or 14 years.

21 Second = To the Second Interrogatory this deponant Says
Answer
Yes. I know of an injury to her right arm said to have been received by an accident on a Rail Road - The injury seems now to be a dislocation of the right elbow-joint, in this the natural connections of the joint have been entirely deshoyed. The arm is nearly straight having but very little motion at this joint. She is unable to comb her hair or dress herself with it. There also appears to have been a fracture of one of the bones of the fore-arm at the Wrist, producing a good deal of distortion.
Third = To the third Interrogatory this deponant Says:
Answer
Millinery busines. Yes! These injuries are seriously disadvantageous to her in this business, To What extant I cannot say.

Fourth = To the fourth Interrogatory this deponant Says:
Answer
I do not Know not being familiar with it.

Fifth = About 35. Health very good

Sworn and Subscribed } James H. Reed
Sept. 8th 1858 before me }
Jacob Klessner. }

" Deposition of Dr. Jacob Hay, of the Borough of York, in the County of York, in the State of Pennsylvania, a Witness aged about fifty Seven Years produced Sworn and examined before Jacob Glessner, in and for the County of York, and State aforesaid, on the eighth day of September, at his Office in the South Ward, in the Borough of York, in said County and State aforesaid by virtue of a commission issued out of the Clerks office of the Edwards County Circuit Court of the State of Illinois, to me directed, for the examination of the Dr. Jacob Hay, a Witness in a Suit depending in the said Edwards County Circuit Court, in the State of Illinois, between John Fahs and Catharine Fahs, Plaintiffs, and Ohio and Mississippi Rail Road Company Defendants.

First=To the first Interrogatory this deponant says:
Answer
Yes!—have known her for twelve Years.

Second—To the Second Interrogatory this deponant Says'
Answer
I know that she is suffering from injuries said to have been occasioned by an accident on Rail Road; There is a loss of the use of the elbows joint of the right arm from a dislocation of both bones of the fore arme at that joint, There is too some loss of power in the hand from a fracture of one of the bones

— of the fore arme near the Wrist

Third — To the third Interrogatory this deponant Says:
Answer
She was engaged in the Millienary business before she received said injuries, and is now engaged in the same busines and the condition of that joint must operate seriously to her disadvantage, to what extent I am not prepared to say.

Fourth — To the fourth Interrogatory, this deponant Says:
Answer
I can not undertake to put a estimate upon the value of her services but they are certainly worth considerably less than they were before She received the injury.

Fifth — To the fifth Interrogatory this deponant Says:
Answer
Heer age is I presume between 35 and 40 years
Heer general health good
Sworn and Subscribed } Jacob Hay
September 8th 1858 before me }
Jacob Gleesner

Deposition of Fredrick Baugher of the Borough of York, in the County of York in the State of Pennsylvania, a witness age about fifty seven Years; produced, Sworn and examined before Jacob Gleesner in and for the County of York and State aforesaid

on the eighth day of September, at his Office in the South Ward, in the Borough of York, in said county and State aforesaid by Virtue of a Commission issued out of the Clerk's Office of the Edwards County Circuit Court of the State of Illinois, to me directed, for the examination of the said Frederick Baugher, a Witness in a suit depending in the said Edwards County Circuit Court in the State of Illinois, between John Fahs and Catharine Fahs Plaintiffs and Ohio and Mississippi Rail Road Company Defendants,

First - To the first Interrogatory this deponant Says: Answer

Yes, And have been acquainted with her about twenty Years.

Second - To the Second Interrogatory this deponant Says: Answer

Yes: the arm was broken at the wrist and broken and fractured at the elbow, and is stiff on account of the injuries received.

Third - To the Third Interrogatory this deponant Says: Answer

She caries on the Millenary business and Still continues it

Yes: It prevents her Sewing, measuring, and putting up goods, and is unable

from her inability to sew, or finish work to instruct apprentices in the business.

Fourth = To the fourth Interrogatory this deponant says. Answer
I consider her services worth about $300. less than they were, independant of other disadvantages and discomforts, the expenses from them.

Fifth = To the fifth Interrogatory this deponant says; Answer
Her age is about 40 Years and aside from her injuries, her general health is very good.
Sworn and Subscribed } Fred^k Baugher
September 8th 1858 before me }
Jacob Glessner

Deposition of Jacob Hantz of the Borough of York, in the County of York, in the State of Pennsylvania, a Witness aged about fifty [illegible] Years produced, sworn and examined before Jacob Glessner, in and for the County of York, and State aforesaid, on the eighth day of September, at his Office in the South Ward, in the Borough of York, in said County and State aforesaid, by Virtue of a Commission issued out of the Clerks Office of the Edwards county Circuit Court of the State of Illinois, to me directed, for the examination of the said Jacob Hantz a Witness in a suit depending in the said Edwards County Circuit Court, in the State of Illinois between John Fahs & Catharine Fahs

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Plaintiffs and Ohio and Mississippi Rail Road Company Defendants.

First - To the first Interrogatory this deponant says: Answer
I am acquainted with Mrs. Catharine Fahs about 18 Years

Second - To the second Interrogatory this deponant says: Answer
Yes: She has received by accident on a Rail Road, very severe injuries. She had her right arm broken above Wrist - and her elbow dislocated and badly fractured, which caused her elbow to be stiff and her wrist crooked.

Third - To the third Interrogatory this deponant says: Answer
She was engaged in the Millenry busines before she received the said injuries, and does still continue in the same busines. The injuries she received are a great disadvantage to her, in carrying on said busines in as much as it deprives her, in a great measure from sewing and finishing, and from measuring goods, and from putting up and tieing packages, and also from instructing apprentices in said busines.

Fourth - To the fourth Interrogatory this deponant says: Answer
Her services in her busines is worth $480. Dls

in each Year, in consequence of said injuries.

Fifth - To the fifth interrogatory this deponant says!
Answer
She is about forty Years of age - her health is
generally good, aside from said injuries;
but suffers much pain, in the injuied arm.
Sworn and Subscribed
September 8th 1858, before me } Jacob Hantz
Jacob Glessner

Deposition of Hon. Robert S. Fisher of the Borough of York, in the County of York, in the State of Pennsylvania a Witness aged about Forty five Years, produced Affirmed and examined before Jacob Glessner, in and for the County of York, and State aforesaid, on the eighth day of September, at his Office in the South Ward, in the Borough of York, in said County and State aforesaid by Virtue of a commission issued out of the Clerks Office of Edwards County Circuit Court of the State of Illinois to me directed, for the examination of said Hon. Robert S. Fisher, a Witness in a suit depending in the said Edwards County Circuit Court, in the State of Illinois between John Fahs and Catharine Fahs Plaintiffs and Ohio and Mississippi Rail Road Company Defendants.

First - To the first Interrogatory this deponant says!
Answer
I am acquainted with Catharine Fahs Wife of John Fahs
I have known her for about twenty years.

Second - To the second Interrogatory this deponant says:
Answer
Som Six or eight months after the return of Mrs Fahs
to York from the West, I met her in her store and observed
that her arm was stiff at the elbow joint and that
there wassome want of power at the wrist joint, and
that she was unable to attend to busines and
serve her costomers with the same facility that I had
previously observed that she was capable of doing She
showd me her arm, I thought I felt some disarrangem
=ent of the joint; but as I am neither a Physian or
Surgeon, I do not consider myself a competent Judge
of the cause what produced the State of things that
I saw. This was the first interview that I had
had, with her after her return from the west-
and after I had read in the Newspapers that She
had met with an accident while traveling in
the Cars of the Ohio and Mississippi Rail Road
Company.

Third - To the third Interrogatory this deponant Says:
Answer
Said Catharine Fahs at the time of the accident and
ever since, has been engaged in carrying on a large
Millinary establishment and a retail Store for the sail
of the finer articles of ladies attire. Her injuries
certainly disable her from carrying on her busines
with the same facility as formerly but of the
extent of the disadvantage, I can form no
Opinion as I have not been engaged in or

29 have any knowledge of any branch of Mercantile
business.

Fourth— To the fourth Interrogatory this deponant says;
Answer
For the reasons I have already given in my answer to
the third interrogatory, I cannot fix any estimate as
to how much less her services are worth annually
in consequence of her injury

Fifth—
Answer
The age of Catharine Hahs in my opinion
is about 36 years
Robert J. Fisher

Affirmed and Subscribed
by Hon. R J. Fisher President Judge
of the Judicial District Composed
of the Counties of York and Adams,
State of Pennsylvania.
Sept 8th 1858 before me
Jacob Glessner

Deposition of William Wagner of the Borough of York
in the County of York, in the State of Pennsylvania,
a Witness aged about fifty eight Years produced
Sworn and examined befor Jacob Glessner in and
for the County of York and State aforesaid
on the eighth day day of September, at his Office
in the South Ward, in the Borough of York in said
County and State aforesaid, by Virtue of a
commission Issued out of the Clerks Office of the

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Edwards County Circuit Court of the State of Illinois, to me directed for the examination of the said William Wagner, a Witness in a suit depending in the said Edwards County Circuit Court in the State of Illinois, between John Fahs and Catharine Fahs Plaintiffs and Ohio & Mississippi Rail Road Company Defendants.

First: To the first Interrogatory this deponant Says:
Answer
Yes I have been acquainted with Catharine Fahs Wife of John Fahs since 1840,

Second: To the second Interrogatory this deponant Says:
Answer
The arm was broken between the wrist and elbow and the elbow fractured and dislocated - the arm is stiff in consequence,

Third: To the third Interrogatory this deponant Says:
Answer
She was engaged in the Millinary busines and still continues in the same. - The injuries She received are a great disadvantage to her in as much as she cannot sew but little and when she does she is obliged to hold the work some distance from her which fatigues the shoulder very much - She cannot measure goods as she could before the accident happened nor put goods in the shelves or make them up in packages,

Fourth - To the fourth Interrogatory this deponant says;

Answer

About - $500, (five hundred dollars)

Fifth - To the fifth Interrogatory this deponant says;

Answer

She said Catharine is about 40 Years of age. General health good except occasional pain in the injured arm.

Sworn and Subscribed
Sept 8th 1858 before me
Jacob Glessner

J. Wagoner

Deposition of Daniel Mc Ettinger of the Borough of York in the County of York in the State of Pennsylvania, a Witness aged about fifty seven Years, produced Affirmed examined before Jacob Glessner and for the County of York and State aforesaid, on the eighth day of September, at his Office in the South Ward in the Borough of York in said County & State aforesaid by Virtue of a commission issued out of the Clerks Office of the Edwards county Circuit Court of the State of Illinois, to me directed, for the examination of the said Daniel Mc Ettinger, a Witness in a suit depending in the said Edwards County Circuit Court in the State of Illinois, between John Fahs and Catharine Fahs Plaintiffs and Ohio and Mississippi Rail Road Company Defendants.

First - To the first Interrogatory this deponant says;

Answer

[9555-15]

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I am acquainted with Catharine Fahs, wife of John Fahs. I have known her 10 or 12 Years.

Second - To the second Interrogatory this deponant says:
Answer
I know she was well before she left York for the West and since her return she is so much injured in her right arm that it is not posble she will ever recover the natural free use of it any more.

Third - To the third Interrogatory this deponant says:
Answer
She was engaged in the Millinery busines which She still carries on by means of hired assistance - The injuries she has received must seriously interfear in doing any thing, in which the hands or arms are necessary; - her right arm being of little use to her

Fourth - To the fourth Interrogatory this deponant says
Answer
As near as I can judge her services are not worth as much as before her injuries, in paid busines by $450. to $500. a year

Fifth - To the fifth Interrogatory this deponant says:
Answer
The age of Catharine Fahs is about 40 Years. - Her general health aside from her injuries is very good

Affirmed and subscribed
September 8th 1858 before me
Jacob Glessner

D. McE. Ettinger

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State of Pennsylvania }
County of York } SS.

I Jacob Glessner a Justice of the Peace in and for said County and State aforesaid do hereby Certify that the above depositions were taken by me at the time and place mentioned in the Caption thereof; that the said Witnesses were first duly sworn and affirmed, and that the said depositions were carefully read to said Witness and signed by them.

In Witness Whereof I have hereunto set my hand and seal at the South Ward in the Borough of York, County of York and State aforesaid this eighth day of September A.D. 1858.

Jacob Glessner (Seal)

State of Pennsylvania
York County SS

I Henry G Bussey Prothonotary of the Court of Common Pleas of said County Certify that Jacob Glessner Esq before whom the annexed depositions were taken and certified is and at the time of doing the same was an acting Justice of the Peace in and for said County duly commissioned and qualified to all whose official acts full faith and credit are due and that the signature above is genuine

(Seal)

In Testimony whereof I have hereto set my hand and affixed the Seal of said Court at York this 9th September 1858

H G Bussey Pro.

[illegible]

34

State of Illinois }
Edwards County } ss The People of the State of Illinois,

To Charles Tillson Esqr a Commissioner &c of the City of St Louis, County of St Louis and State of Missouri appointed to take Depositions &c for the State of Illinois Greeting,

Know ye that we, in confidence of your prudence and fidelity have appointed you, and by these presents do give unto you, full power and authority, and do hereby authorise and require you, that at a certain time or times and place or places to be designated and appointed by you for that purpose, you do cause the witnesses whose names are mentioned in the caption of the inclosed interrogatories as well on the part of the said Isaac Wise, plaintiffs as on the part of the Ohio & Mississippi Rail Road Co, defendants, to come before you, and them and each diligently and faithfully examine each of them apart upon the said interrogatories on their respective corporeal oaths first taken before you, both on the part of the said plaintiffs and Defendants, and none others, and that you do take such their examinations, and cause the said interrogatories as they are propounded, together with the answers of the said Witnesses, thereto, to be reduced to writing in the order in which they shall be propounded and answered, and when you shall have so taken them, you shall cause the said Witnesses to sign their names to the same, in their proper places, in your presence, and thereupon, you will annex at the foot thereof, a certificate subscribed by yourself, in which you must State that they were sworn to, and signed by the deponents, and the time or times, and place or places,

when & where, the same were taken, After which you are to send the said depositions, together with this Commission, and the enclosed interrogatories carefully enclosed and sealed up, to the Clerk of the Circuit Court, in and for the County of Edwards and State of Illinois, with the names of the parties litigant endorsed thereon and this you shall in nowise omit.

Witness Walter L. Mayo, Clerk of the Circuit Court in and for the said County of Edwards and the Judicial Seal thereof at Albion this 6th day of September A.D. 1858.

W. L. Mayo, Clerk

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Fahs & Wife
vs
Ohio & Mississippi Rail Road Co.

Edwards C. C.

The Plaintiff will hereby take notice that the Defts by their Counsel will apply to the Clerk of the Circuit Court of Edwards County at his office in Albion on the 6th day of Septr next for a Dedimus Potestatem or Commission directed to Charles Gillison Esqr of the City of St Louis County of St Louis & State of Missouri a commissioner appointed to take Deeds for the State of Illinois in and for said City authorizing and requiring him to take the Depositions of the following named Witnesses to wit Edward Wyman Thomas Spooner Thomas Ross all of whom

[8656-11]

are non residents of this State and whose testimony is desired and intended when so taken to be read in evidence in behalf of the Dfts in in the trial of the above entitled cause The said Plffs is further notified that the following Interrogatories will be put to said Witnesses respectively as hereafter set forth and that said Plffs may if they choose at the time & place first aforesaid appear & file cross Interrogatories

A Ketchell Atty for
O & M. R.R. Co

1st Do Edward Wyman
Please State whether you were upon the Train of cars on the O & M R R about the 25th July 1855 when an accident occurred near Olney by ~~which~~ which part of the passenger Cars were thrown off and if so please state whether you were acting in any capacity of Contract or authority over said Road its Trains or business, and of what character

2d Please State whether you took any pains to ascertain the cause of the accident and you will also please State all the facts and circumstances coming under your own observation connected with the accident State fully and particularly.

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3rd Please state if you know whether the usual care or any greater care than usual was taken by the O & M RR Co. in running said train - and in this Connection please state whether if you know the Train was running at any unusual or unsafe speed at the time of the accident -

4th Please state who was the Engineer and also the Conducter in charge of the Train and their characters respectively if you know them for skill and carefulness &c and where they now reside

5th State what was the condition of the weather about the time and the track at the time of the accident.

6th Please state whether you are acquainted with Rail Road affairs such as the running of trains and the condition of the track machinery &c and whether you would be able from such knowledge to ascertain the probable cause of an accident in a case similar to the one in question.

7th Please state what your opinion is as to the cause of the accident in question

8th Do you know of the Plff Mrs Fahs being hurt in the accident spoken of and if so please state what attention and help was given to her by the Company or any other persons in behalf of the company for her relief -

[6555-12]

State particularly all you know on this point and whether the Bill made by the Physician on her account was paid or assumed by the Defts state

9th " State whether you had been over the Road frequently or not and whether or not the cause of the accident was a matter of such enquiry and investigation by among those concerned as would have enabled you to have learned of any other cause had produced it than the one spoken of

10th " If you know of any fault or want of care on the part of the Dept or any of her agents which might have caused the accident please state it

12th " Please state how long the Road had been completed for the runing passenger trains whether it was a new Road or an old one.

13th " State any other matter or thing within your knowledge which you may deem of importance to either Plff or Deft in this cause.

14th " Are you now in the employ of Defts and where do you reside

2d " Witness Thomas Spooner

Question 1st " Please State whether you was on the Passenger Train of the O & M R R Co " about the 25th July 1855 at the time of an accident near

39 Whether in which part of the passenger cars were thrown off, and Mr. Fahs one of the plaintiffs is said to have been injured

And if so please State whether under the employ of the Defts and in what capacity.

2nd Please State what your profession or business then was and had been, and how long you had been engaged in such business or profession and how long in the employ of Defts.

3rd Please State whether the cause of the accident was investigated by you sufficiently to enable you to state it - and if so please state that cause giving all the particulars of time weather condition of track, rate of speed, or other matters that you may think necessary to explain the cause, or your opinion in regard thereto.

4th Who was conductor and who Engineer of the Train at the time. How long had you known them and what were their characters respectively for skill and carefulness.

5th Please State whether any and if so what unusual pains or care was taken by the Defts, to run the Train safely and avoid accidents.

6th State whether the Road bed was a new or an old one and if a new one whether the speed of the Train was or was not made slower on account thereof.

[8555-12]

7th " If you know the rate of speed at the time of the accident, please state it or whether it was slower or faster than usual "

8th " If you know of any fault or want of skill in any of the agents of the Dept which might probably have caused the accident, in any other way than the one you have given please state it

9th " Where do you now reside and are you now in the employ of the Dept. if not how long since you left his employ

10th " Please state as nearly as you can the usual speed of Rail Road Trains on other Road of the country and the comparative speed used upon new Roads first opened and older ones well finished & settled,

11th " State whether the rate of speed used at that time on Defts Road was or was not safe, taking into consideration its road bed & all other matters connected with it

12th " State any other matters or thing which you may know that you may regard as important to either plaintiff or Defendant in this investigation of this cause,

3d " Witness Thomas Reed

1st " Question Are you an Engineer accustomed to running Rail Road Locomotives & Trains & if so how long have you been engaged in that busines,

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2d " Please State if you was the Engineer in charge of and running the Engine & Train on the Dells Road about the 25th " July 1855 at the time of an accident near Olney in which part of the passenger Trains were thrown off and turned over.

3d " Please State all the particulars connected with that accident giving to show its cause

4th " State whether or not any signal or warning was given you in approaching the place where the accident happended or whether you were in anywise admonished of danger in that particular place.

5th " If any unusual care or trouble was taken by the Defts to have the Trains run with safety State what it was

6th " Please State if you predict at what rate of speed the Train was running at the time, and whether the rate was greater or less than usual.

7th " Please State also the condition of the weather, and of the track bed of the road - and of the night as fully you recollect.

8th " If you know of any other important facts for either party in this cause State them

[8555-20]

42 Hale & Wife vs O & M R R Co

I. Horace Hayward as atty for the plffs do hereby acknowledge the service of notice of the issuing out a Dedimus to take the above Depositions, and do hereby waive all objection to the notice or the issuing out said Dedimus, but reserving all other objections to the Depositions when taken Olney Aug 28th 1858. H Hayward Atty

Cross Interrogatories
To Thos Ross

1st What rate of speed was required to be made by the passenger trains on the O & M R.R. on and about the 25th July 1855 and was such rate of speed safe considering the new & unsettled condition of said Road

2nd Did you previous to & about the 25th of July 1855 say any thing to the defendants or any of her agents about the Road not being safe to run the rate of speed they were running if so state you conversation fully and to whom it was ~~made~~, made

3rd Did you soon after the accident spoken of on your direct examination after you had run a platform with three hunt up to the Olney and while at the said Station say in the presence of

Andrew Hood I have told them time & again that the Road was not safe to run the speed they were running if so was such statement true

Cross Interrogatories

To E. Wyman

1st. Did you immediately after the accident alluded to on your direct examination at the Olney Station speaking of said accident in the presence of Andrew Hood that you were running at a rapid rate of speed if so was such statement true

The Depositions of Edward Wyman and Thomas Spooner of the City and County of St Louis and State of Missouri, witnesses of Lawful age produced, sworn and examined on their respective corporal oathes on the twenty third day of September A.D. Eighteen hundred and fifty-eight at the office of Charles H. Tillson in the City of St Louis in the State of Missouri by me the said Charles H Tillson a Commisoner appointed to take Depositions &c for the State of Illinois and named in the annexed Dedimus Potestatem issued out of the Clerks Office of the Circuit Court of Edwards County in the State of Illinois. bearing teste in the name of Walter L Sharp Esqr with the seal of said Court Clerk of the said Circuit Court affixed

thereto and to me directed as such Commissioner for the examination of the said Edward Wyman and Thomas Spooner Witnesses in a certain suit, and matter in controversy now pending and undetermined in the said Circuit Court wherein Sahs and wife are plaintiffs, and the Ohio and Mississippi Rail Road Company are Defendents in behalf of the said Defendants, as well upon the Cross Interrogatories of the Plaintiffs, as upon the Interrogatories of the Defendents which were attached to or enclosed with said Dedimus Potestatem or Commission, and upon none others The said Edward Wyman and Thomas Spooner being first duly sworn by me as witness in the said cause previous to the commencement of their examination to testify the truth as well on the part of the Plaintiffs as the Defendents, in relation to the matters in controversy between the said Plaintiffs and Defendant so far as they should be interrogated Testified and Deposed as follows,

Interrogations propounded to Edward Wyman a Witness Produced Sworn & examined as aforesaid on the part of the said Defendants, and his answers thereto as follows.

Interrogatory first—

Please State whether you were upon the Train of Cars on the O & M. R. Road about the 25th July 1855, when an accident occurred near Olney, by which part of the

45 passenger cars were thrown off. and if so Please State whether you were acting in any capacity of Controle or authority over said Road, its trains or busines, and of what character;

Answer to first Interogatory: Yes I was on that train, I had no official connection with the road, I was acting for our House Page & Bacon, attending to the settlement of claims &c; I had no controle over the train or officers of the road.

Interrogatory Second "Please State Whether you took any pains to ascertain the cause of the accident, and you will also please State all the facts and circumstances coming under your own observation connected with the accident—State fully and particularly

Answer to Second Interrogatory: " I took pains after I got out from the wreck to ascertain the cause of the disaster as far as I could ascertain the accident was caused by the Sinking Sliding or Spreading of the track, one or all, produced by the thorough Saturation of the soft clay embankment with rain, which for many hours had been incessant; and which was falling at the time. In groping about over the embankment after the accident the mud was so soft and deep that we sunk in it half way to our knees

[8555-22]

Interrogatory third. "Please state if you know if the usual care, or any greater care was taken by the O. & Mi. R. R. Co in the running said Train. And in this connection please state whether if you know the Train was running at any unusual or unsafe speed at the time of the accident

Answer to third Interrogatory About this time unusual caution and pains were taken in the running of the trains at various points on the road a hostility had been manifested to it in the way of obstructions or interference with the track. This was owing I suppose to the existence of unsettled claims against the road, as several accidents of this kind had occured great care was used in the running of Trains particularity at night. On the night of this accident a Pilot Engine was sent ahead so that if any obstruction were found on the road it would be ascertained before the coming up of the Train, I recollect seeing the Pilot Engine ahead a short time before the accident — When the accident occured the Pilot-Engine had gone ahead, and made no signal of danger — I do not suppose the Engineer on the Pilot engine thought there was any danger to the train behind him, I do not think this accident was caused by any wilful interference with the track, but caused as I have stated, I do not think

The train was running at an unusual or unsafe speed at the time of the accident We were going, so far as I could judge about 20 or 25 miles per hour

Interrogatory Fourth. Please state who was the Engineer and who the conductor in charge of the Train, and their characters respectively if you know them for Skill and carefulness. And where they now reside.
Answer to fourth interrogatory The Engineer was Joe, whom I have known some months. He was regarded as a good Engineer. ~~He heard Major Whittle say he was a first rate Engineer and had been under his employ a great deal in the construction of the Eastern end of the road.~~ I am not positive who was conductor that night - { I understand that Joe the Engineer is now employed in the same capacity on the Iron Mountain Rail Road in this State }

Excepted to Excluded

Interrogatory Fifth - State what was the condition of the weather about the time, and the track at the time of the accident.
Answer to fifth Interrogatory. The weather was very wet - It was raining quite hard. and had been for many hours previously. The embankment was very soft in consequence

Interrogatory Sixth Please state whether you are acquainted with Rail Road affairs.

such as the running of trains and the condition of the track, machinery &c, and whether you would be able from such knowledge to ascertain the probable cause of an accident in a case similar to the one in question.

Answer to Sixth Interrogatory I have had little practical experience in the running of trains - have had good opportunities for observation, and think I could judge with sufficient correctness as to the cause of such an accident - I did not then and do not now think it was owing to any carelessness neglect or imprudence on the part of any one, but a Providential circumstance that could not be foreseen.

Interrogatory Seventh - Please state what your opinion is as to the cause of the accident in question.

Answer to Seventh Interrogatory The combined weight and speed of a train on a track resting on a road bed too soft to resist without displacement the sudden and perhaps indirect pressure of the Train.

Interrogatory Eighth Do you know the Plaintiff Mrs. Fahs being hurt in the accident spoken of and if so please state what attention and help was given to her by the Company or any other persons in behalf of the Company for her relief.

49 State particularely all you know on this point and whether the bill made by the Physician on her account was paid or assumed by the Defendants - State

Answer to Eight Interrogatory. " When we had all got out of the cars after the overthrow I observed Several persons who were complaining of injuries thinking some of them might be serrious I left the wreck, and hurried on - on foot - to Olney leaving Mr. Spooner to right up matters as well as he could and bring the passengers along - I went ahead to engage rooms at the Hotel, and medical and other attendance for such as might require it - I did this for the Company knowing that it would meet their approval - I did not observe Mrs. Fahs particularly at the time of the accident - but afterwards at the Hotel I saw her, and from the complaint made judged her elbow or Shoulder was dislocated. She seemed in a great deal of pain, but no one judged any limb or bone was broken and that if the dislocated part of the arm could be replaced her pain and trouble would end - I employed the best Physicians I could find to attend to her and promised that the Company would pay the Hotel and Physicians bills which I am quite positive were presented and paid by the Company I also instructed the Landlord to make no charges charges against any who were detained on account of the accident either for

[0555-24]

Excluded

for lodging or breakfast -. Some of the
pasengers availed themselves of this offer and
some would not. ~~saying the accident was~~
~~unavoidable the Company were not to blame~~
~~and they would not have the company pay~~
~~for them~~

Interrogatory Ninth State whether you had
been over the road frequently or not and
whether or not the caus of the accident
was a matter of such inquery and investigation
by or among those concerned as would have
enabled you to have learned if any other cause
had produced it than the one Spoken of
Answer to 9th Interrogatory "I had been frequently
over the road; conversed freely with many about
the cause of the accident and do not recolect
hearing it attributed to any other or similar
cause to that I have named.

(Excluded)

Interrogatory Tenth If you know of any
fault or want of care on the part of the
Defendant or any of her agents which might
have caused the accident - State it -
Answer to Tenth Interrogatory I know of no
want of care on the part of the Defendant
or any of its agents which could have caused
the accident - Never heard of any -

57. Interrogatory Eleventh Please state how long the road had been completed for the running passenger Trains - Whether it was a new road or old an road

Answer to Eleventh Interrogatory The road was Comparitively new - Do not recollect - how long regular passenger Trains had been running over it - but many weeks -

Interrogatory Twelfth State any other matter or thing within your knowledge which you may deem of importance to either Plaintiff or Defendent in this cause

Answer to Twelfth Interrogatory I can only say in a general way that considering the attentions of myself and others in behalf of the Company to the Plaintiff considering the responsibilities in the way of medical attendance and other expenses assumed by me in behalf of the Company and recognized and paid by them, and considering the nature of the accident, attributable in no way as I conceive to the negligence or carelessness of any of the employees of the Company but a purely Providential occurrence and considering further the extent of the injury received by the Plaintiff, so far as I could understand it - I should say it would be hard to have to respond in damages

Excused

[9555-25]

Interrogatory Twelveth Are you now in the employ of the Defendants and where do you reside

Answer to Twelveth Interrogatory I am not now in the employ of the Defendants- I reside in St Louis, Missouri

Edward Wyman

Interrogatorys propounded to the said Thomas Spooner, a witness produced sworn and examined as aforesaid on the part of the Defendants, and his answers thereto as follows.

Interrogatory first Please state whether you were on the passenger train of the O & M R R Co about the 25th July 1855 at the time of an accident near Olney, in which part of the passenger cars were thrown off, and Wm Fahs one of the Plaintiffs is said to have been injured. And if so Please State whether under the employ of the Defendants and in what capacity.

Answer to first Interrogatory - I was on such train, I was under the employ of the Defendants, in the capacity of assistant Superintendent of the Road.

Interrogatory Second. Please State what your profession or business then was and had been and how long you had been engaged in such business or profession, and how long in the employ of the Defendant.

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Answer to Second Interrogatory — I was then and have been for about 17 years in the Railroad business — I had then been in the employ of the Defendants about a year and a half as assistant Superintendent —

Interrogatory Third. Please state whether the cause of the accident was investigated by you sufficiently to enable you to state it? And if so — Please state what cause — giving all the particulars of time weather, condition of track rate of speed or other matters that you may think necessary to explain the cause or your opinion in regard thereto

Answer to third Interrogatory — I can state the cause of the accident, It had been raining very severely that night and I suppose that the bank had washed away under the track, It was between 8 & 9 oclock at night or there abouts, We were going at the rate of about 20 miles an hour,

Interrogatory Fourth. Who was conductor and also Engineer of the train at that time. How long had you known them and what were their character respectively for skill and carefulness?

Answer to fourth Interrogatory — William Gale was Conductor and Rouse was Engineer. I had known Gale for 10 years and Rouse for 2 or 3 years I considered them skillful and careful men —

Wm Gale Exd

[0555-06]

Interrogatory fifth Please state whether any and if so what unusual pains or care were taken by the Defendants to run the Train safely & avoid Accidents.

Answer to fifth Interrogatory - A Pilot Engine was sent ahead of the train

Interrogatory Sixth, State whether the road bed was a new or an old one, and if a new one. Whether the Speed of the train was or was not made slower on account thereof.

Answer to Sixth Interrogatory. It was a new road bed - They run slower than they would have done over a settled road

Interrogatory Seventh - If you know the rate of Speed at the time of the accident - Please State it. or whether it was slower or faster than usual.

Answer to Seventh Interrogatory It was about the usual Speed - from 18 to 20 miles an hour

Interrogatory Eighth. If you know of any fault or want of skill in any of the Agents of the Defendants, which might have possibly caused the accident - in any other way than the one you have given. Please State it -

Answer to Eight Interrogatory. I know of none -

Interrogatory Ninth - Where do you now reside? and are you now in the Employ of the Defendants

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Q. not how long since you left the employ?

Answer to Ninth Interrogatory – I reside in St Louis Missouri – I left the employ of the Defendant about a year and a half ago – and am not now in their employ –

Interrogatory tenth Please State as nearly as you can the usual speed of rail road trains on other roads of the country, and the comparative speed used upon new roads first opened and older ones well finished & Settled?

Answer to tenth Interrogatory. Old settled roads run their trains from 23 to 25 miles an hour, on new rods they generally run slower. It depends entirely on the Condition of the road.

Interrogatory Eleventh State whether the rate of speed used at that time on Defendants Road was or was not safe? taking into Consideration its road bed and all other matters connected with it?

Answer to Eleventh Interrogatory – I considered it safe –

Interrogatory twelfth – State any other matter or thing which you may know that you may regard as important to either Plaintiff or Defendant in the investigation of this case –

Answer to 12th Interrogatory – I know of nothing more that I think would be important with the exception, that it was my own wish at the time to put up the speed to 23 miles an hour

[9555-27]

56 Accepted to ~~~~ { Which was objected to by the Engineer and Superintendent. I myself considered it safe at 23 Miles an hour

Thos C Spooner

Cross Interrogatory to Edward Wyman

Cross Interrogatory First —

Did you immediatly after the accident alluded to in your direct examination at the Olney Station Speaking of said accident, Say in the presence of Andrew Hood that you were running at a rapid rate of speed? If so was such statement true?

Answer to 1st Interrogatory. I do not recollect saying anything about it to or in the presence of Andrew Hood, If I said we were running rapidly, I meant no greater rapidity than 20 Miles which is considered comparatively both rapid and slow

Edward Wyman

I Charles H. Tillison of the County of St Louis, and State of Missouri, a Commissioner of Deeds &c for the State of Illinois in the City of St Louis Missouri duly appointed to take the Depositions of the said Edward Wyman & Thomas Spooner witnesses whose names are subscribed to the foregoing Depositions

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do hereby certify that previous to the commencement of the examination of the said Edward Wyman and Thomas Sponner, as witnesses in the said suit between Fahs & Wife Plaintiffs and the said Ohio & Mississippi Rail Road Defendants, they were duly sworn by me as such Commissioner to testify the truth in relation to the matters in controversy between the said Fahs & Wife Plaintiffs and the said Ohio & Mississippi Rail Road Company Defendants so far as they should be interrogated concerning the same, That said Depositions were taken at my Office on the 23rd day of September A.D. 1858 in the City & County of St Louis and State of Missouri and that after said Depositions were taken by me as aforesaid the interrogatories and answers thereto, as written down were read over to said witnesses respectively, and that thereupon the same were signed and sworn to by the said Deponents before me the oath being administered by me as such Commissioner at the place and on the day and year last aforesaid And I further certify that the said Thomas Ross named as a Witness in the said Dedimus Potestatem or Commission, I have been unable to find and have been informed and believe that he is in the State of New York. I also certify that I am not a party to this suit, nor Agent nor Attorney for either party, nor at all interested in the event of the suit.

Witness my hand & seal at my

[35552]

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Office in the City of St Louis Missouri
this 23d day of September 1858
Charles H. Dillon
Commissioner of Deeds &c in the City
of St Louis Missouri for the State of
Illinois, Specially named in
the annexed Commission

The following is the statement taken by agreement to be read in evidence on the trial of the case of Jahs vs the O & M R R in Edwards Circuit Court. The deponent says that he was in Olney at the time of the accident to the train on the O & M R R when Mrs Jahs the Plff was injured that one Joseph Dolbeck was an Engineer on said road in the employ of the Company that this witness is well acquainted with the reputation and character of said Engineer and his general reputation and almost universal reputation among Railroad men was that he was totaly incompatent to have charg of a Engine and also utterly reciless of consequences when running the trains on said road.
This witness is acquainted with the track of said road where said accident occured and it was such that after a hard rain as to be soft and liable to spread or get out of line from the passing of trains over the same and requiring at such times more than usual prudance in running said road with reference to speed

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Witness knows nothing of his own knowledge of how the accident referred to occured I am not an Engineer but state the foregoing from what I have from Rail road men

G. Powers

Mr. J. D. Tripp

Dear Sir

Will you please give me your answers as fully as you can to the following Interrogatories.

1st Were you in the employ of the Ohio & Mississippi Rail Road Co in July 1855 about the time of an accident on said Road near Olney in which Mrs Stahs is said to have been injured and if employed, please State in what capacity.

2d. Were you present at the time of the accident & if so please state if you know the cause of the accident. If not present when it occured were you there afterwards, and did you examine the track and the train with a view to ascertaining the cause. if so please state what you saw and what you know of the cause of the accident

3d. Do you know whether the road bed or track was in good condition or not just preceding the accident and at the the place where it occured.

2 2555-25

60

4. State if you know whether any unusual care or pains had been taken by the company to carry their trains safely and if so state what they were

A. Ketchell Esq^r.

Dear Sir

The following are the answers to the Interrogatories requested

1st I was employed by the O & M R Rly in July 1855 as a General Clerk setting accounts &c for Budd and others on the line of Road

2nd I was not present at the time of the accident I passed over the Road a day or two previous to the accident and examined the track from Olney to Calaremont. Did not see any thing out of place at that time. I examined the embankment after the accident, and was convinced that it occured in consequence of a slide in the embankment caused by the Heavy Rains, the work being new and had not time to settle

3d I believe the track at that place was as good as the generality of the Road

4th I know that the Engineers had received Special instructions to be very careful to avoid accidents and to run as safely as possible

5th The weather at the time of the accident and for several days previous was very wet which no doubt was the cause of the slide &c

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Witness knows nothing of his own knowledge of how the accident referd to occured I am not an Engineer but state the foregoing from what I have from Rail road men

S. Peters

Mr. I. D. Kripp

Dear Sir

Will you please give me your answer as full as you can to the following Interrogatories

1st Were you in the employ of the Ohio & Mississippi Rail Road Co. in July 1855 about the time of an accident on said road near Olney in which Mr. Sabs is said to have been injured and if employed please State in what capacity

2nd Were you present at the time of the accident & if so please State if you know the cause of the accident. If not present when it occured were you there afterwards, and did you examine the track and the Train with a view to ascertaining the Cause if so please State what you saw and what you know of the cause of the accident.

3d Do you know whether the road bed or track was in good condition and at the the place where it occured.

4th State if you know whether any unusual care or pains had been taken by the Company to carry their trains safely and if so State what they were

5th State if you recolect what was the condition of the weather at the time of the accident and whether the accident was probably caused by rain at the time or just before the accident State fully all you know upon this point

6th State whether watchmen or signals were placed on the road to guard against dangers &c and if any were placed at this point.

[1855-38]

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7th State any other matter or circumstance you may know in relation to this matter that you may deem important to either party

A. Kitchell Esqr

Dear Sir

The following are the answers to the Interrogatories requested

1st I was employed by the C & M. R.R. Co in July 1855 as a General Clerk settling accounts &c for Budd and others on the line of Road

2d I was not present at the time of the accident I passed over the Road a day or two previous to the accident and examined the track from Olney to Claremont did not see any thing out of place at that time. I examined the embankment after the accident and was convinced that it occured in consequence of a Slide in the embankment caused by the Heavy Rains the work being new and had not time to settle

3d I believe the track at that place was as good as the Generality of the Road.

4th I know that the Engineers had received Special instructions to be very careful to avoid accidents and to run as safely as possible

5 The weather at the time of the accident and for several days previous was very wet which no doubt was the cause of the Slide &c

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6. Watchmen and Signals were placed at several points on the Road but none at that place there being nothing to indicate danger in ordinary weather

7 I do not think there is the least doubt but the accident was caused by the Heavy Rains which would affect any new work like the embankment in question It was as well made and of sufficient width for laying the track on and equal to any work of the same discription, but being newly made and not having sufficient time to settle the wet weather would undoubtly cause it to Slide –

And Afterwards on the 27th day of September A.D. 1858 being the first day of the said Circuit Court in and for the said County of Edwards the following further proceedings were had in said cause Namely

John Yokes & Wife }
vs } Trespass on the case
The Ohio & Mississippi Rail Road Company }

At this day came again the parties by their Attorneys and the Defendant by her Attorney moved the Court to exclude the depositions of John Shive Jacob Hartz, Fredrick Boughen, William Wagner, Robert Fisher, D. M. E Unger, James W. Kerr, and Jacob Hay which Motion was overruled by the Court to which overruling Defendant Excepts.

The Defendants further move the Court to exclude the answers of the several witnesses to 3d & 4th Interrogatories as also the questions which motion was overruled by the Court to

L9555-31

which said overruling Defendant Excepts &c court

And the Defendant further move the Co exclude the several answers of Shive, Baugher, Hantz, Wagner, and Ettinger, to the 4th Interrogatory which motion was also overruled by the Court to which overruling Dependant Excepts and presents her Bill of Exception which is signed sealed and made a part of the record which said Bill of Exceptions is in words and figures following to wit:

John Fahs & Wife
vs
O & M. R. R. Co.

Edwards C. C. Sept Term 1858

Be it remembered that upon the

1 calling of this cause at this Term the Deft by her counsel move the Court to exclude the Depositions of John Shive, Jacob Hantz, Fredrick Baugher, William Wagner Robert Fisher, D M Ettinger, James M Kerr and Jacob Hay taken at York County Pennsylvania for divers errors and insufficiencies in the same and the certificates thereto which motion was overruled by the Court and the Deft Excepts

2 The Deft also move to exclude the answers of the several witnesses to the 3rd & 4th Interrogatories as also the questions as improper and illegal which motion was also overruled Deft Excepts

3 The Deft als move to exclude the several answers of Shive, Baugher, Hantz, Wagner, and Ettinger to the 4th Interrogatories as improper

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and illegal which motion was also overruled and Defs Excepts

Edwin Beecher Clerk
Judge Circuit Court

Be it remembered that on the 27th day of September 1858 being the first day of the said September Term of the said Edwards Circuit Court the following cost bond was filed in the foregoing entitled cause to wit

State of Illinois } ss
Richland County }

October Term of Richland County Circuit Court 1857

John Fahs & Catharine Fahs his wife
vs
The Ohio & Mississippi Rail Road Company

Trespass on the case
Damages $10000

I do hereby enter myself security cost in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any officers of this court, in pursuance of the laws of this State. Dated this 28th day of September 1857

John Brillhart

Afterwards towit on the 27th September 1858 being the first day of the September term 1858 of the circuit Court of the county of Edwards aforesaid the following plea was filed in the foregoing entitled cause towit

The Ohio & Mississippi Rail Road Co
vs
John Sahs & Wife

Plea

And the Deft by Constable & Kitchel Attys comes and defends the wrong an injury when &c and says she is not guilty of the said supposed grievancies above laid to her charge or any or either of them in maner and form as the same are above set forth and alledged by said Plffs and of this she puts herself on the county

Homes, xxxxxxxxx & Kitchel
Attys for Dft

& Plff doth the like
Narrow atty

And afterwards towit on Thursday being the 30th day of September A.D. 1858 the same being the fourth day of the said September Term 1858 of the said Edwards County Circuit Court the following further proceedings were had and entered of record in the foregoing entitled cause towit

67 John Tipton & Wife } Trespass on the case
vs
The Ohio & Mississippi Rail Road Company

At this day come again the parties by their Attorneys and issue being joined therefore let a jury come and thereupon there came a jury Sworn

John, C. Stone, Semple Shelby, Starling Hill, Samuel H. Vaughn, William B Schofield, Benjamin L Stevens, John Standring, William Stanthope, Charles Stapleton John Livingston, James Stott, and Charles Smith Twelve good and lawful men who being duly elected tried and sworn the truth to speak upon the issue joined upon their oath do say, We the jury find for the Plaintiffs and assess their damages at four thousand Dollars and hereupon the Defendant moved the Court for a new trial in arrest of judgment which motion was overruled by the Court. Whereupon it is considered and adjudged by the Court now here that the said Plaintiffs recover of the said Defendant the said sum of four Thousand Dollars being their damages aforesaid by the jurors aforesaid assessed together with their cost and charges by them about their suit in this behalf expended and thereof have execution &c

Thereupon the Defendant tendered her bill of exceptions which is signed sealed and made a part of the record which said bill of

exceptions is in words and figures following to wit

Fay & Wife
vs
O & M R R Co

Evidence of Witnesses

1st Jacob Fahs Brother of the said Plaintiff (John) testifies that he was in company with the Plffs on the train at the time of the accident got on altogether at Vincennes said John Fahs Pay the fare for himself & wife to the conductor The Plffs reside in York Pennsylvania and keep a Milliner Shop at the time of the accident witness thought the train was moving very fast he thought 30 miles per hour that he said to Plffs that if the train should be run long at that rate it would go off the track that the time he made this remark was but a short time before the train went off the track was very rough all the way from Vincennes just before the accident occured he saw the breakman setting in side of the car thought he was asleep when the accident occured he blew the whistle but the breakman did not get out before the train went over Mrs Fahs was hurt in the accident her arm broken on her wrist and elbow injured and her arm is still stiff and crippled so that she cannot put it to her head to feed herself or to use it to any advantage in dressing and herself. After the accident the Plffs were detained for sometime at the wreck while getting the

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hind Trucks of the Engine or tender on after which they were taken down to the Station at Olney on a flat car which the Locomotive had went after and got for that purpose saw the wreck next day and the two passenger cars were both turned over on the north side of the road and the whole track rails and ties had slid over toward the north side the first that witness felt of the accident was the train going very rough and there was not more than time enough for a man to rise to his feet until the car was going over it was the first time witness or Pliffs had ever been in Illinois or on the road and did not know that the road was running when they started from Pennsylvania they reached Vincennes by another Rail road and in about an hour and about 7 Oclock P. M, took the Defts train the weather was rainy had been raining that day it was cloudy night after leaving the Station that night they were taken to Yeakums Hotel and Medical aid was called for Pliff Pliffs remained at Olney 3 or 4 Days and then went by Defts cars to the Illinois Centeral and down to Centralia staying a few days there with a Brother they went to Fulton County and after a few weeks returned to Pa Home Pliff suffered a good deal with her arm the night of the accident and for some time afterwards Croft examined

Witness said he was not a rail road Engineer

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train come along it would go off there that Brommlee nor none of his men that witness knew of went to fix it that he had just gone to bed when the train went off he heard it and went to it it had been raining for some time and the ground was very soft when the accident occured the whole track seems to have slipped rails ties and all and went over to the north to gether

Witness had been doing a good deal of work on the road before then and while it was

at that time boarding hands while going towards the wreck after night witness remarked to Brommlee I told you they would go off there Witness said that Defts had kept sentinals along the road of nights and had them on the road that night for the purpose of watching the track and warning the trains of danger that he saw a signal lamp that near where the accident occured and saw the two Buttles who had been out for that purpose witness did not remember to have seen the Pilot Engine go by

witness said a rail at the place of accident before the accident was bent and the spikes were not then all put in along the tracks and that since then been a larger number put in

3 Andrew Hood

Stated that he did not know the first name of Dolbeck an Engineer but thinks it was Joseph he was acquainted Joseph Rouse got acquainted with him when the cars were

first running, and before the track was laid through to Vincennes had seen him and a good many others of the conductors had seen Rouse take heavy drams of Brandy after leaving the train and before going in more than he thought any man ought to who was in that business sometimes a half and sometime two thirds of a glass— has drank with him

Cross examined

Witness said he was not acquainted with Rail road business nor with the character of said Rouse as an Engineer but had the character of being a dissipated man

4th Joseph H. Gracum

Stated that he was keeping a hotel in Olney and that the Pliffs as well as the most of the other passengers were brought to his House after the accident Drs. McClure & McComaghey were called to attend Mrs. Fahs injuries

5th A. Ketchel

Being sworn at instants of Pliffs Stated that the cars have been usualy run until this summer at the rate of about 20 miles per Hour as well as can recollect

The foregoing statements of witnesses together with the Depositions and Statements made by G. F. Powers and J. D. Tapp on file constitute all the

-evidence in the cause upon which the jury after retiring to consider of their verdict brot in a verdict for the Plff for $4000, Whereupon the Defts by their counsel move the Court to arrest the judgment and for new trial and assign the following causes namely

1st The verdict is contrary to the law and evidence

2 The court should have excluded the Depositions offered by Plff of the witnesses John Shive and others named in a bill of exception before taken herein

3 The instructions given by the court in behalf of the Plffs marked instructions for Plff viz

Jahs & Wife
vs
Ohio & Miss'ippi R.R

The court instructs the jury for the Plaintiff

1 That if the jury believe from the testimony that Mrs Jahs the Plff was on the train of O & M R R as a passenger which they were bound to carry that the said company are bound to the exercise such caution as would to their utmost protect the life and persons of passengers

2 That R. Road companies are answerable for injuries to a passenger resulting from a

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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 neglect of the Company its agents or servants to examine the track prior to the passage of the train on which the accident occured they will find for Plff and ass[illegible] their damages

3 If the jury believe from the evidence that the accident and injury occured by reason of too rapid and unsafe speed of the train by reason of neglect to apply the break in time or because of any other neglect or unskilfulness in the management of the train they will find for Plaintiff and assess their damages

4 Proof that the Plff was a passenger on Defts road of the accident and the injury make a primai facia case of negligence and throws the burthen of justifying on the Defendant

5 In determining the question of damages if the jury find for Plff they will consider the character of injury its results to the injured party her condition and business in life and all the circumstances and facts permitted in proof and give such sum as they believe Plff should receive

Pls 4th The Plffs declaration is not sufficient in law to maintain said verdict and judgment

5th That the said verdict is otherwise contrary to law. The following instructions were given for Deft- Viz.

The court instructs the jury as follows

1st This being an action to recover damages for an injury arising from an accident on the Defendants cars it is necessary that the Plaintiff shall prove to the satisfaction of the jury that the injury was caused by the negligence or unskillfulness of the Defendants agents or servants otherwise they must find for the Defendant

2 The plaintiffs in this case are bound to prove the same substantially as laid in their declaration to the extent of showing a substantial ground action and if they have failed to do so they cannot recover

3 The mere facts that an accident happened and the Plaintiff (Mistie Jahn) was hurt is not sufficient and will not entitle the plaintiffs to a verdict if it shall appear from the whole case that the accident and injury did not arise from negligence or unskillfulness

4th Rail Road companies are not insurers of the personal safety of their passengers against

[P555-91]

76 all accidents and are only liable for injuries which are caused by negligence or unskilfulness

5 Travelers by Rail road as well as by other public conveyances must take the risks incident to the mode of travel they adopt subject only to the claims for damage arising from negligence or unskilfulness of Defts and in this case if the accident was not the result of any want of care or skill by the Deft or her agents or servants then the Plaintiffs injury is but a misfortune for which the defendant is not responsible

6 Carriers of passengers are not held responsible to the same extent of carriers of goods for they are only bound for the safety of their passengers to the utmost care of cautious and prudent men

7 The contract to carry safely means not that they will insure the lives and limbs of their passengers but that they will take due care as far as competent skill and humane foresight will go in the preformance of that duty

8 The degree of care and skill required of the Defts in the construction of their road and the running of their trains is not the highest degree attainable by humane skill but that extra ordinary care and skill which competent

77 and cautious persons exercise in like busines and under like circumstances.

9 The jury are the judges of the evidence and it is their duty in considering all the facts and circumstances addduced before them on both sides to so weight and consider them as to bring their minds to the most reasonable conclusion upon the whole case to reconcile if possible all conflicting statements so that all may have due weight and to disregard such as the proof or the circumstances show is not entitled to credit

10 In considering the statements of witnesses and the deposition the jury should look at the circumstances the character impression and opportunity of each witness to know and testify to the facts he speaks of in order to give to each so much and no more weight than they are respectively entitled to

11 Although a breakman in the car where the witness was riding was inside of the car at the time of accident and was not at the break, yet if the accident did not result from a failure to apply the breaks but from the sliding of the track or some other cause then the jury should not find the guilty on the ground of such fault of the breakman,

[2555-37]

78 12. If the jury shall find the Defendant guilty then they are to asses the damages at so much as they may think the plaintiff may be reasonably entitled to receive and that the defendant should be reasonably bound to pay taken into consideration all the circumstances of the case

All of which said motions were overruled by the Court and judgment rendered on the verdict accordingly whereupon the Defts Excepts and prays this his bill of Exceptions may be allowed and made a part of the record herein including the said testimony of the witnesses as aforesaid which is done accordingly Witness the Judge of said Court the 31th Day of September A.D. 1838

Edwin Beecher Esqr
Judge Cir Court

Seals Shfs
vs
O M.R.R. Co

Edwards Co, Sept Term 1838

Be it remembered that on the trial of this cause the Defts excepted to all the instructions given by the Court on the part of the Pffs. and the Clerk of the Court is hereby directed in making up the record in said Cause to insert this notice of said Exceptions in said record

Edwin Beecher, Judge
Cir. Court

State of Illinois } S.S
Edwards County }

I Walter L. Mayo Clerk of the Circuit Court in and for the said County of Edwards do hereby certify that the foregoing pages from one to Seventy Seven inventing inclusive contain a full complete and true transcript of the record and proceedings had in the foregoing entitled cause namely, John Fahs and Catharine Fahs his Wife against The Ohio and Mississippi Rail Road Company as the same appears by the records of said Court and the papers on file in said cause in my Office

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at Albion this 10th day of October A.D. 1858.

Walter L Mayo. Clerk

O & M. R.R.
John Fahs & Wife } vs — And now comes the said plff by his Attys and says that there is in the foregoing record manifest error, and that the same ought to be reversed, and for causes of error assigns the following

1st. The Court below erred in not excluding the depositions of John Shire and others taken before Jacob Glissner,

2d The court erred in not excluding the 4th question and the several answers thereto in the depositions of John Shire, Jacob Baugher, William Waggoner, Jacob Hantz and Daniel Ettinger.

3d. The court erred in instructions No. 2. 3. & 5 given in behalf of the plff below, the same being contrary to law,

4. The court erred in not setting aside the verdict of the Jury and in not granting a new trial, for reasons of errors above stated,

5, The damages were excessive and the Court erred in not granting a new trial for that reason.

6. And the same is otherwise full of error, and should be reversed.

Jany 13th 1859. A. Kidwell & Wm Homer Attys for plff in Error

O. & M. R. R. Co Plffs in Error vs John Fahs & wife — defts in error

Error to Edwards.

Filed Oct. 7. 1859 N. Johnston Clk

Paid by Homer $5.50

St Louis Sept 26. 1859

To the Clerk of the Supreme Court of Illinois, Mt Vernon

Dear Sir

I Enclose to you record & abstracts in the suit of Dale Smith vs Ohio & Miss. R.R. Co. which please file. Enclosed also please find $5— which I am informed by Judge Stamps is the fee I should forward to you— Please at once make publication, as the Attys in the Court below are non-residents— & it may be that without it the Attorneys will not consent to a trial. I desire to obtain from you a certified Copy of the decision of the Supreme Court in the Cause of Ill. Cent. R.R. vs the Co— decided last—

Springtown. If I knew what
your fee for it would be, I would
at once transmit it. I am anx-
ious to have the decision this week
as next Monday we have a suit
at Bellville involving all the
points of that case. Will you
oblige me by making a copy of
the decision & forwarding to
me. I presume you have time
enough to do it. Please send
me word what your fee is &
I shall be at once transmitting
direct home at this city.
Hope you will not disappoint
me. The case to which I refer
involves the question whether
the master is liable for injuries
received by a servant, from a fellow
fellow servant in the regular
course of the employment.

Very Respectfully Yours
Wm Comes
Atty C. & M. R.R. Co.

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O & M. R.R. Co

vs

John Fiske & wife

Letter of Attorney

Homes—

Note.

No Affidavits on file, and, if there was, it is too late for Notice for next Court—

Cin'y Dec 4th 1860

Clerk of Supreme Ct
Mt Vernon

Dear Sir

will you do us the favor to inform us by return mail what has been done in the case of J. Fahs & wife vs C & M R R Co. (as we have just learned that it is or was in your court) please send us a copy of the steps taken under Section 30th of Rules of Practice entitled "Notice to Non Residents" in 19 Ohio Rept, and let us know what condition the case is in, whether it has been finally disposed of or not send bill of charges & will remit by return mail Very Truly

Raymond & Kitchell

Hayward & Mitchell

Olney

6c Dist Co - Stating what is done - and asking as to means of Fixing

Clerks Offin- Supreme Court-
First Grand Division-
Mount Vernon Illinois.
August 27. 1860.

Dear Sir.

I am directed to send enclosed Scirfacias to you for service upon John Hales and Catharine Hales- if they are to be found in your County. If they are not found, of course you will so return-

I am very respectfully.
Josh Johnston Clk

Shff Edwards Co.
Albion Ill

E6585-43

Page 66 & 67 of Record -

Edwards County Circuit Court - September term 1858 -

John Fahs and Catharine Fahs his wife - Pltffs below -

vs

The Ohio & Mississippi Rail road company - Defts below

Suspense on the Case -

Judgment upon verdict of Pltffs for $4000 Damages and for Costs of Suit -

Supersedeas - Fifth Grand Division - September Term 1859 -

The Ohio & Mississippi Rail road company - Plaintiffs in Error

vs

John Fahs and Catharine Fahs his wife - Defts in Error

} Error to Edwards -

[9655-43]

O & M. R. R. Co

Plff in Err

vs

John Sachs & wife

Defts in Err

Memorandum

Office Ohio & Mississippi Rail Road Company.

Saint Louis, Sept 7 1860

Noah Johnston Esq

My dear Sir

Yours containing Caper & Publication in Paris Case is just rec'd. Enclosed please find $3 — which oblige us by having Printed. You notice that Haynie & Howes appear as Attys for Plffs in Error. It should be Kitchell. — Haynie was now in the case — Kitchell originally defended, & prepared bill of Exceptions &c. Please see that correction is made & oblige

Yours very truly

W. H. Coons

Atty O. & M. R.

[9555-44]

8

Letter from Mr
Homes — fee of
$3 Paid over to
E. V. ~~Satterfield~~

Office Ohio & Mississippi Rail Road Company.

Saint Louis, Aug 17. 1860

Noah Johnson Esq

Dear Sir

Rec'd on my return to the City today, yours advising me that no publication has been made in the Pahs case. — If you ever wrote me reminding me of the necessity of filing affidavit &c, I never rec'd the letter.

I herewith send affidavit & praecipe —

You allude to publication fees, & say they must be supplied at once — but you do not tell me how much. If you will let me know I shall be very happy to forward at once. But do not let us suffer by any delay in this matter of publication. You can always have your fees on notifying us of the amount.

Please give this matter your immediate attention & oblige, Yours very truly

William Stoms

Atty O & M R R Co

[8555-45]

Noah Johnson Esq

Mt Vernon

Alton Illinois

January 22, 1861

Noah Johnston Esq

Mt Vernon Ills

Dear Sir

Yours of 11th inst is before me, I was from home when your letter was rec'd, hence the delay in answering. My fees for the transcript in case Ohio & Mo R.R. Co. vs John Yates Adm'r was paid by plaintiff, in Evansville $20

Yours truly

W. L. Mago

Circuit Clerks
Salaries to be
fixed for Rundi

$2000

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Edwards Greeting:

Because, *In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of* Edwards *county, before the Judge thereof between* John Jake and Catharine Jake

plaintiff and The Ohio and Mississippi Railroad Company

defendant it is said manifest error hath intervened to the injury of the aforesaid Ohio and Mississippi Railroad Company *as we are informed by* It *complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at* **Mount Vernon,** *in the County of Jefferson, on the* 1st Monday after the 2d Monday of November *next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.*

WITNESS, *the Hon.* John D Caton *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* 27th *day of* August *in the year of our Lord one thousand eight hundred and* Sixty.

Wade D Newton

Clerk of the Supreme Court.

[6555-47]

8

SUPREME COURT.

First Grand Division.

Ohio & Mississippi Railroad Co.

Plaintiff in Error,

VS.

John Jakeway

Defendant in Error.

WRIT OF ERROR.

Issued & FILED August 2d 1860.

N. Johnston Clk.

Office Ohio & Mississippi Rail Road Company.

Carlyle
~~Saint Louis~~, Aug 9 1860

Noah Johnston Esq

Dear Sir

You remember I forwarded to you abstract of Bill of Exceptions in the Suit of Fabs &c. vs. O & M. R R Co. It was too late for publication (the parties being nonresidents) & to request you to give such notice in season for next Court. Judge Kitchell who was counsel in the case, asked me last week, if publication had been made. Will you please write me at St Louis, whether it has been done. If not, will you oblige us by giving it your immediate attention.

Very sincerely Yours

W. G. Comes
Atty O & M R.R.

[8555-48]

6

Answd 13 August
60 Sayr 7 20
? Filed

[8555-49]

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Edwards *County.*

Because, *In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of* Edwards *county, before the Judge thereof between* John Jacks and Catharine Jacks *plaintiff and* Obed and Mississippi Bridge Company *defendant it is said that manifest error hath intervened to the injury of said* Obed and Mississippi Bridge Company *as we are informed by their complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at* Mount Vernon, *before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said* John Jacks and Catharine Jacks *that they be and appear before the justices of our said Supreme Court, at the next term of said Court, to be holden at* **Mount Vernon**, *in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if they shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said* John and Catharine Jacks *notice together with this writ.*

WITNESS, *the Hon.* John D. Caton *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* 7th *day of* August *in the year of our Lord one thousand eight hundred and* Sixty.

Noah Henderson
Clerk of the Supreme Court.

[8555.00]

8

SUPREME COURT.

First Grand Division.

Ohio & Mississippi Rail road Co.

Plaintiff in Error,

VS.

John Fahs & Catharine Fahs

Defendant in Error.

SCIRE FACIAS.

FILED.

The within named John & Catharine Fahs not found in my County
Nov 10th 1860
W. Montgomery Shff
C C Ill

State of Illinois }
County of Jefferson } ss.

The Ohio & Miss. R.R. Co.
vs
John & Cathrine Fahs

State of Illinois. ss.
In the Supreme court of said state.
First Grand Division.

The Ohio and Mississippi Railroad company, pl'ff in error, vs John Fahs and Catharine Fahs, defendants in error. } Error to Edwards.

An affidavit having been filed, setting forth that the said defendants are non-residents of this state, the said defendants are hereby notified that the Record of the circuit court of the foregoing cause has been filed in the clerk's office of this court, and a writ of error and scirefacias sued out, and the scirefacias directed to the sheriff of Edwards county, commanding him to summon said defendants to appear before this court, on the first day of the next November term, to be holden at the court house in Mt Vernon on the 13th day o November next, and show cause if any they have, why the said judgment shall not be reversed; and unless they do so appear, the cause will proceed as if they had been personally served with process.

Witness Noah Johnston clerk of said court, this 27th day of August, 1860.

NOAH JOHNSTON, Clerk.

Messrs Haynie & Kitchell
atlys for pl'ffs in error.

aug 31.

Edward V. Satterfield, one of the firm of Satterfield & Brother, Editors & proprietors of the "Mt Vernon Star" a paper published in the town of Mt Vernon County of Jefferson, being first duly sworn, says that the annexed Notice to the defendants in the above Entitled Cause, Commanding them to appear before the Supreme Court of Illinois at the Court House in Mt Vernon on the 13th day of November 1860, was first published in the issue of said "Star" of September the 4th day, & thence afterward for four Consecutive weeks as appears by the files of the paper preserved in the office of said Star, the first insertion of said notice having been not less than Sixty days before the return day of the writ mentioned in said Notice, that is to say, not less than Sixty days before the 13th day of November 1860.

Edward V. Satterfield

Sworn & subscribed before me
this 12th day of November 1860

Noah Johnston Clk

[0565-5]

The Ohio & Mississippi R.R. Co.

vs

John Pahs & Catherine Pahs

Affidavit of Publication

Filed Nov. 13, 1860

N. Johnston clk

The Ohio & Mississippi Railroad Company - Appellant
vs
John Fahs & Catharine Fahs

State of Illinois
Supreme Court

William Homes. Attorney for above named Company being duly sworn deposes & says. that said John Fahs. & Catharine his wife, are as he is informed & believes, non-residents of the State of Illinois. & have so been & continued to be from the commencement of this action in the Circuit Court of Richland County against said Company until the present time. & are beyond the reach of Summons from this Court. Affiant further deposes & says that said John Fahs & wife, are as he is informed & believes residents of the State of Pennsylvania. having their domicil there at the present time.

Sworn to & Subscribed by said Affiant. Homes. this 17th day of August A.D. 1860 ~~Subscribed~~ before the undersigned clerk of the circuit Court of Marion Co Ills. at office in Salem.
H. W. Eagan Clk.

William Homes
Attorney O & M. R. R. Co.

[8555-52]

8

O & M. R. R. Co.

vs

John & Catherine Pates

Affidavit

Filed August 27, 1860

N. Johnston. Clk

The Ohio & Mississippi Railroad Company — Appellant

vs

John Oaks & Calhoun Oaks } In Supreme Court of Illinois —

To Noah Johnson Esq
Clerk Supreme Court Illinois
at Mt Vernon —

You will please give notice by publication to the above named John Oaks & Calhoun Oaks of the pendency of the above named cause in the Supreme Court of Illinois, as the law provides, said Oaks being non residents as appears by affidavit herewith filed, non residents of said State.

William Stones
Atty. O & M. R. R. Co.

St Louis Aug 17. 1860

[0556-52]

8

O. & M. R. R. Co.

vs

John & Catharine Parks

Praecipe

Filed August 27th 1860

N. Johnston clk

State of Illinois } ss
County of Jefferson }

In the Supreme Court
November 1860

The Ohio & Mississippi Railroad Company
vs
John Fahs & Catherine Fahs

William Homes, Attorney & Agent for the Plaintiff, deposes & says, that at the time of the publication of the notice to the above named defendants, of the pendency of this Cause here, & of the term & time of the Court to which the Scire facias mentioned in said notice was returnable, said notice or a copy of the paper containing the same, was not sent to said defendants, because upon diligent inquiry their usual post office could not be ascertained, nor their precise place of residence in the State of Pennsylvania, where this affiant is informed & believes they reside.
And this affiant further states that at no time since said publication has he upon diligent inquiry been able to ascertain the residence or post office of said defendants. Except upon such information as he gained by reference to the depositions taken in this Cause, in the month of September 1858 - said depositions being taken in the Borough of York, & County of York, State of Pennsylvania, upon such informa

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tion as this affiant obtained from said depositions, said affiant some time in the month of October last directed to said defendants the "Mt Vernon Star" containing said notice, so delivered by marked with heavy black lines that attention would be called thereto, & mailed said paper, addressed to said defendants at said Borough of York. And affiant further says, that since this month of November came in, he has also directed & forwarded to said defendants at said Borough of York another paper containing said notice.

Affiant further states that the attorneys of said defendants, Messrs Bowman & Harrow who tried said cause in the Court below, & their associate, — Hayward, all practising attorneys in this State, are fully apprised of the pendency of this cause here, & have had personal notice thereof, & one of them stated to this affiant, since this month came in, that he should be at this term of this Court, to defend this cause.

And further affiant saith not.

William Downs
Atty & Agt for
A W & R Co

Subscribed & Sworn to before
me this 13th day of November 1860.

A. Johnston Clk

The Ohio & Miss. R.R Co.

vs

John Fahs & Catherine Fahs

Affidavit as to
notice sent to Defendants

Filed 13 Nov. 1860
N. Johnston Clk

State of Illinois---Supreme Court.

Ohio and Missippi Railroad Company,

Against

John Fahs and Catharine Fahs,

Error to Edwards.

Declaration filed 30th September 1857, in Richland Circuit Court.

1st Count.

1 John Fahs and Catharine Fahs his wife, complains of the Ohio and Mississippi Railroad Company being summoned, &c., of a plea of trespass on the case. For that, whereas, said defendants were owners and proprietors of a certain Railroad and cars for the carriage of passengers from Vincennes to Olney in the county aforesaid, for hire and reward, to the said defendants in that behalf, to wit; at the county of Richland aforesaid, and the said defendant being owner of said road and cars as aforesaid, heretofore, to
2 wit: on the 25th day of July, 1855, at the county aforesaid, the said plaintiffs aver; that said plaintiffs were passengers on the cars of said defendant, on said 25th day of July, 1855, to be safely, and securely carried and conveyed thereby, from Vincennes to Olney, in the county of Richland aforesaid, for a certain fare and reward to the said defendant, then and there paid, that just before making the said station or stopping place at said Olney, by the action of said wheels of the said engine and cars, the said iron and wooden rails were torn up for a great distance; to wit; the distance of one hundred feet, in consequence of the said rails be constructed of poor material, and so insecurely and insufficiently fastened, and the track was very much out of repair otherwise, so much so, that the said cars on which the said Catharine Fahs, (wife of the said John Fahs,) was then and there a passenger as aforesaid, was thrown violently off the said road, and overturned; by reason of which the life of the said Catharine was put in great peril and danger, that her right arm was broken and dislocated in the wrist, as well as in the elbow, right arm badly and severely strained and bruised, and her body otherwise severely bruised and injured, all of which was
3 causeed by the unskillfulness and carelessness, of its servants, and also by means of the premises, the said Catharine became and was sick, sore, lame and disordered, and so continued for a long space of time, to wit; hitherto, during all which said time, the said Catharine suffered great pain and was hindered and prevented from transacting and attending to her necessary affairs, and was deprived of great gains and profits, which might and otherwise would have gained and acquired, and thereby, also, the said plaintiffs were forced and obliged to and did then and there pay lay out and expend large sums of money to wit; $10,000 in and about the endeavoring to be cured of the said fractures, bruises and injuries, so received as aforesaid, and also, thereby, the said plaintiffs was hindered and detained at a certain town to wit: at John Brillhart's at
4 Olney, in the county aforesaid, a long space of time, to wit; for twelve weeks and during that time incurred great expenses, to wit; $500, in about their necessary support.

2d Count. And whereas, also, heretofore, to wit on the 25th day of July, 1855, at the county of Richland, aforesaid, the said plaintiffs aver that the said Catharine Fahs, wife of the said John Fahs was a passenger on the cars of the defendant from Vincennes to Olney, in the county of Richland on the 25th day of July, 1855. That just before reaching the station or stoppping place, at said Olney, by the neglect and unskillfullness of said defendant and its servants, the car on which the said Catharine was there and then a passenger, as aforesaid, was thrown violently off said road by reason of which the said Catharine's

1855-56

right wrist and elbow were broken, dislocated and her arm otherwise badly strained and injured, and her body otherwise severly bruised and injured, all of which was caused by the carelessness and unskillfulness of said defendant and its servants.

3d Count! And whereas, also, heretofore, to wit; on the 25th day of July, 1855, at the county aforesaid, the defendant received into its cars, one Catharine Fahs, the wife of the said John Fahs as apassenger thereon to be carried and conveyed thereby, to wit: from Vincennes to Olney, aforesaid, for certain fare and and reward to the said defendants in that behalf, and by reason thereof, the said defendant ought carefully to have conveyed, or cause to be conveyed, the said Catharine Fahs, by said cars, from Vincennes to Olney, aforesaid, yet the said defendant not regarding his duty in this behalf, conducted himself so carelessly, by and through the carelessness, negligence, unskillfulnes and default of himself and its servants, and for want of due care and caution, the said cars, afterwards to wit: on the day aud year aforesaid, and in the county of Richland aforesaid, just before reaching the station or stopping place of Olney, in the county of Richland aforesaid, the cars were overset and thrown off the track, by means where of the said Catharine Fahs then being thereon, was cut, bruised and wounded, and divers bones of her arms were broken, insomuch that the said Catharine then and there became very sick and remained so for a long space of time to wit———week, during all which time the said Catharine was unable to manage the usual busines, viz. attending to the sale and carrying on a milliners fancy shop, and the said John Fahs was obliged to expend the sum of $500, in about attempting the cure of his said wife, and the procuring necessary assistance and attendance during her said confinement, which ensued in consequence of her being so woudded as aforesaid, and by reason of the said injuries so received as aforesaid, the said plaintiffs sustained damages to the amoun of ten thousand dollars, and therefore they bring their suit.

HAYWARD & CONSTABLE,
Att'ys for Pl'ff.

6 Summons, Sheriff's return, &c.

7 8 Affidavit of Wm. Holmes, Attorney for defendant, for continuance at May Term, 1858, Richland Circuit Court.

9 10 Affidavit of Holmes, Attorney for defendants for change of Venue,

11 Bill of exception by plaintiffs, to order of Court changing Venue to Edwards.

11 12 Order of Richland Circuit Court, May Term, 1858, for change of venue to Edwards.

12 Certificate of M. B. Snyder, Clerk Richland Circuit Court, to Transcript of Record send to Edwards.

13 September 27, 1858, being 1st day of Edwards Circuit Court, on motion leave was given to open depositions.

Didimus or Commission issued by Walter L. Mayo, Clerk of Edwards Circuit Court dated August 12 14 19th, 1858, directed to Jacob Gleaner, a Justice of the Peace, of the county of York, Pennsylvania, to take depositions of "*witnesses whose names are mentioned in the enclosed interrogatories,*" directing him to "*cause the said interrogatories as they are propounded together with the answers of the said witnesses thereto to be reduced*

to writing, in the order in which they shall be proposed and answered;" and also that in his certificate thereto
14 he "*must state that they were sworn to and signed by the defendants and the time and place, and when and where the same were taken.*"

15. Notice by John Fahs and Catharine Fahs.

15 6th. Ohio and Mississippi Railroad Company to take depositions of John Shive, Jacob Hanty, Frederick Boughen, William Waggoner, Robert Fisher, Daniel Ettinger, James Carr and Jacob Hay.

"Interrogations to the above named witnesses."

1st. Are you acquainted with Catharine Eahs, wife of John Fahs, of the city of York, in the county of York and State of Pennsylvania; and if so how long have you known her.

2d. Do you know anything of injuries she has received by accident on a Railroad? if so describe hese injuries.

3d. What business was said Catharine engaged in, before she received said injury, and does she still carry on said business, and are those injuries which she received any disadvantage to her in carrying on said business? and if so, state what extent.

16 4th. How much less are her services worth, if any less, in said business, in each year, in consequence of said injury?

5th. "What is the age of said Catharine, and what is her general health asrde from said injury?"

"The said defendant hereby waives further notice of the taking said depositions, as proposed, but waives no further objection."

O. and M. R. R. Co.,
by A. KITCHELL, Att'y.

16 JOHN FAHS and CATHARINE FAHS,
vs.
Ohio and Mississippi Railroad Company.
} In the State of Illinois, Edwards County Circuit Court.

Depositions of John Shive, of the Borough of York, in the county of York, in the State of Pennsylvania, a witness aged about sixty-one years, produced and sworn and examined before Jacob Glisner, in and for the county of York and State aforesaid on the eighto day of September, at his office in the South Ward, in the Borough of York, in said county and State aforesaid by virtue of a commission issued out of the Clerks office by the Edwards county Circuit Court, of the State of Illinois, to me directed, for the ex-
17 amination of the said John Shive; a witness in a suit, depending in the said Edwards county Circuit court in the State of Illinois, between John Fahs and Catharine Fahs, plaintiffs, and Ohio and Mississippi Railroad Company defendants.

(The questions embraced on retort in the depositions anywhere, except as the following:)

19. Third.—To the third interrogatory this deponent says:

Answer.—' Millinery business; still engaged in the same business; a great disadvantage, as her

[Loose-sheet]

business amounts to between six and seven thousand dollars a year; her attention and labor is constantly needed, but in consequence of her arm being stiff and weak, she cannot handle, measure or put up goods, nor do the finishing, as she done before she received the injury.

Fourth.—To the fourth interrogatory, this deponent says:

Her services are less in her business each year, $568, for the reason she cannot take girls to learn the business as formerly, who paid her for six months' instruction, on an average, sixty dollars a year; their labor, during that time was worth $312, and which labor she must now have done by hiring girls, and paying them. She is now obliged to pay extra to finish work $156 each year, which she done herself, besides various other additional expenses in going to the city, loss of trade, during the absense of the hand to finish, amounting to at least $40 a year.

20 Sworn and snbscribed by the said John Shive, Septemb-r 8th, 1858, before me,

JACOB GLISNER. JOHN SHIVE.

20 The caption to deposition of James W. Kerr in same words as that of Shive, and attested in same form.

To first question, says he has known h e r 13 or 14 years.

21 To second interrogatory he says, "yes, I knew of an injury to her right arm, said to have been received by an accident on a Railroad—seems to be a dislocation of wrist and elbow joint; the natural connections of the joint have been entirely destroyed—arm nearly straight, with but little motion at this joint. She is unable to comb her hair or dress herself with it—appears to have been a fracture of one of the bones of the fore-arm, producing a good deal of distortion.

Third.—Millinery business—injures and a great deal of disadvantage to her in her business.

Fourth.—Does not know,

22 Caption and attestation of deposition of Jacob Hay, in same form as Shive.

Question 1st. Known her for 12 years.

2d. She is suffering from injuries said to have been received by an accident on Railroad; elbow of right arm dislocated; some loss of power in the hand from fracture of the bones near wrist.

23 3d. She was engaged in millinery business before she received said injuries and is now engaged in the same business, and the condition of that joint must operate seriously to her disadvantage; to what extent I am not prepared to say.

4th. I cannot undertake to put an estimate upon the value of her services, but they are certainly worth considerably less than they were before she received the injury."

Caption and attestation of deposition of Frederick Boughen same as the first.

Question 1st. Know her twenty years.

2d. Arm broken at wrist—fractured at elbow and stiff.

3d. Millinery business—still continues. It prevents her sewing, measuring or putting up goods.—Unable to sew or finish work, or instruct apprentices in the business.

[illegible]

25 4th. I consider services worth about $500 less than they were, independent of other disadvantages and discomfits she experiences from them.

5th. Age, about forty years: general health very good.

26 Deposition of Jacob Hauntez caption and attestation same.

1st- Known her about eighteen years.

2d. She received injury from a Railroad. Right arm broken, elbow dislocated and stiff, wrist crooked.

3d. She was engaged in Millinery business before she received the said injuries and does still continue in the same business. The injuries she received are a great disadvantage to her in carrying on said business, in asmuch as it deprives her in a great measure from sewing and finishing, and from measuring goods, and from putting up and tieing packages, and also from instructing apprentices in said business.

4th. Her services in her business is worth $480 less each year, in consequence of said injuries.

28 Deposition of Robert J. Fisher and attestation same as the others.

1st. Known Catharine Fahs, wife of John Fahs for about twenty years.

2d. Some six months after the return of Mrs. Fahs to York, from the west, met her in her store—observed her arm was stiff at elbow joint and want of power at the wrist joint, not able to attend to business or serve her customers with same facility as formerly; showed me her arm, I thought I felt some disarrangement of the of the joint, but am no physician or surgeon and could not tell.

3. Engaged in Millinery busines, had a large establishment and retail store of finer articles of ladies attire. The injuries certainly disable her in her business, but extent of the injury I can form no opinion.

29 4th. Cannot form any opinion.

Deposition and attestation of William Waggoner same as the others.

30 1st. Known Catharine Eahs since 1840.

2d. Arm broken, elbow fractured and arm stiff.

3d. She was engaged in the millinery business and still continues in the same. The injuries she received are a great disadvantage to her inasmuch as she cannot sew but little and when she does she is obliged to hold the work some distance from her, which fatigues the shoulder very much, she cannot measure goods as she could before the accident happened, nor put goods in the shelves or make them up in packages.

31 4th. About $500, (five hundred dollars.)

Deposition of Daniel Ettinger, caption and attestation same.

1st. Known Catharine Fahs 10 or 12 years.

2d. Well—before she left York for the West, and since her return, her right arm injured so she will probably never have the use of it.

3d. She was engaged in millinery business, which she still continues by means of hired help. The injuries must seriously interfere in doing anything with hands, on account of her right arm being of little use to her.

As near as I can judge her services are not worth as much as before her injuries in said business by $450 to $500 a year.

State of Pennsylvania, county of York. } ss.

I, Jacob Glisner, a Justice of the Peace, in and for said county and State aforesaid, do hereby certify that the above depositions were taken by me at the time and place mentioned in the caption thereof. That the said witnesses were first duly sworn and affirmnd, and that the said depositions were carefully read to said witnesses, and signed by them.

In witness whereof I have hereunto set my hand and seal at the South Ward in the Borough of York and State aforesaid, this 8th day of September, A. D. 1858. JACOB GLISNER, *Seal.*

The official character of Glesiner is attested by H. G. Bussy, Prothonatory of the Court of Common Please of York county, Pa., September 9th, 1858, with seal of said Court.

Didimus or commission to take deposition of E. Wyman, Thos. Spooner, and J. Rouse, witness daff.

Notice of taking, and interrogatories.

Cross interrogatories by plaintiff to Wyman.

Evidence of E. Wyman.

1st. Question. Was on train 25th July, 1855, in accident, no official connection with road, but acting for house of Page and Bacon.

2d. Took pains to ascertain the cause of disaster; as far as could ascertain, it was caused by the sinking, sliding or spreading of track, from thorough saturation of embankment with rain which for many hours had been incessant.

3d. Unusual caution and pains were taken in the running the trains and particularly at night; on the night of the accident, a pilot Engine was sent ahead to guard against obstructions, saw it a short time before accident, it had gone ahead and made no signal, does not think that train was running at any unusual or unsafe speed, as near as could judge, 20 or 25 miles per hour.

5th. Weather was very wet, raining for many hours previous, embankment very soft.

6th. Does not think the accident was caused by any want of care or skill, but from causes stated before.

8th. Saw Mrs. Fahs after accident, was hurt, employed physician to attend to her.

11th. The road was new—had been running but a few weeks.

Evidence of Thos. Spooner.

1st Question. Was on train at time of accident, was assistant superintendent.

2d. Have been about seventeen years in Railroad business, and one year and a half in employ of defendant.

3d. I can state the cause of accident. It had been raining very severely that night, and I suppose the bank had washed away under the track about 8 or 9 o'clock at night; were going at the rate of about twenty miles per hour.

[P556-41]

4th. Gale was conductor and Rouse engineer, they were skillful and careful men.

54

5th. A pilot engine was sent ahead to guard against accidents.

6th. The road bed was new and they run slower than if it had been a settled road.

7th. The speed at time of accident was from 18 to 20 miles per hour.

8th. Knows of no fault or want of skill or other thing that caused the accident, except as above state.

55

10th. Old settled roads run their trains at from 23 to 25 miles per hour.

11th. Considered the rate of speed of the Road at the time of accident as safe.

56

Answer of E. Wymen, cross-examined; does not recollect of any conversation in presence of Hood.

57

Certificate and seal of Tilson, Notary Public, to said depositions.

58

Statement of Powers.

States that Dolbec, an engineer, has character of recklessness, and track was in bad condition when accident happened.

59

Statement of Tripp, Road Master.

62

Passed over the track a day or two previous and examined track, saw nothing out of place, examined embankment after accident, and was convinced the accident occurred by reason of a slide in the embankment caused by heavy rains.

Knows the engineers were instructed to run carefully.

Rainy time, had been raining for several days. Watchmen and signals were placed at several points on the road, but none at the place of accident as nothing indicated danger there.

63

Has no doubt but the accident was the result of the heavy rain causing the embankment to slide. The embankment was good there.

Bill of exceptions to exclude the depositions of John Shive and others, on 27th day of September, 1858, being first day of Court, (Edwards Circuit Court.) Motion to exclude all the depositions over-ruled and defendant excepts. Motion to exclude the answers of the several witnesses to the 3d and 4th questions —as also, the questions, over-ruled—except s.

64

Motions to exclude answers of John Shive and Bougher, Hantz, Wagner and Ettinger to 4th question, overruled, and defendants except.

65

Bill of exceptions signed.

Cost Bond filed on 27th day of September, 1858. in Edwards Circuit Court.

66

Plea of not guilty filed by defendants.

67

On the 30th September, being 3d day of court—cause tried and order for trial, verdict for jndgment

68

Bill of exceptions, containing 1st testimony of witnesses viz:

1st. Jacob Fahs, brother of plaintiff, John Fahs, was on train at time of accident, got on at Vincennes—saw John Fahs pay fare to conductor for himself and wife. Plaintiffs reside in York Pennsylva-

[8555-62]

nia and kept a Miliner shop—thought train was running very fast, thought 30 miles per hour. Said train would go off if run long so fast, it soon went off—road was very rough all the way from Vincennes. Just before the accident, saw brakeman in the car sitting on seat; thought he was asleep when accident occurred. Heard the whistle, but brakeman did not go out till train went over. Mrs. Fahs was hurt by the accident; her arm broken, and her wrist and elbow injured and her arm still stiff and crippled so that she cannot put it to her head to feed herself. or use it to advantage in dressing. After accident,
69 were taken on flat cars to station at Olney, two cars were thrown over where track rails, ties and all had slid to the north side. The first witness felt of the accident, train was going very rough and there was not more than time enough for a man to rise to his feet until the car was going over.

The weather was rainy; had been raining that day. It was first time witness or plaintiff had been in Illinois, or on the road. Were taken to Yocom's Hotel; medical aid was procured for Mrs. Fahs, she suffered a good deal.

70 Cross examined.—Said he was not an engineer, or in any way acquainted with Railroad affairs or the running of trains; formed his opinion of the speed from the sensation produced on him; were on a down grade at the time of accident. Don't know what speed they were running, but thought they were running faster than usual.

Second witness, A. Lambert.—Lived about two miles from Olney and half a mile from place of accident, was over the track at place of accident in afternoon before and saw at that place the track was on swing or out of line in consequence of the embankment not being made straight at first and which require the track to be put down the way it was. Observed about where the accident occurred, there was a ch ir slipped and rail drawn. When he got home that night, he saw Brownlee who was a section boss and had
71 hands at work on that section keeping it in repair; told him of the place he saw out of fix, and that he had better go and fix it, or when the train come along it would go off there—that Brownlee had been at work with his men, eastward, and that none of them went to fix the place that he knew of.

He had just gone to bed, when he heard the train go off; He went to it, had been raining and ground was very soft when the accident occurred; the whole track seemed to have slipped—rails, ties and all went over to the north.

Witness has done a good deal of work for the road and was then boarding hands. Said to Brownlee as they went to the wreck after night, "I told you they would go off there."

The Company had kept sentinels all along the road at nights to give warning and had them on the road that night, saw a signal lamp near where the accident occurred, and saw the two Butlers who had been out for that purpose. A rail at the place of accident was bent before the accident, and the spikes were not then all put in along the track; that since then, there has been a large number put in.

Third—Andrew Hood. Knew Rouse, the engineer, had seen him drink at some times very heavy drams of brandy on leaving the train, and before going on it—more than he thought any man ought to
72 drink who was engaged in that business. Witness was not acquainted with Railroad business nor with the character of Rouse as an Engineer, but he had the character of being a dissipated man.

Fourth—Joseph M. Yocom. Kept a Hotel and plaintiffs were brought to his house. Drs. called &c.

(2555-43)

The foregoing being all the evidence, and a verdict for $4000 being returned by the jury, the defendant moved for an arrest of judgement and new trial, and assign the following causes:

1st. "The verdict is contrary to law and evidence.

2d. The Court should have excluded the depositions offered by plaintiff, of the witnesses—of Shive and others, named in a bill of exceptions before taken herein.

3d. The instructions given by the Court in behalf of the plaintiffs marked instructions for plaintiffs

Fahs and Wife

73 VS.

Ohio and Mississippi Railroad.

78 The Court instructs the Jury, for the plaintiffs as follows, to all of which defendant excepted at the time; viz:

1st. "That if the Jury believe from the testimony that Mrs. Fahs, the Plaintiff, was on the train of
74 Ohio and Mississippi Railroad, as a passenger which they were bound to carry, that the said company are bound to the exercise of such caution as would to their utmost protect the life and persons of passengers.

5d. 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 thorough and careful examination, and if the Jury believe from the evidence that the injury complained of in this case was occasioned by neglect of the company, its agents or servants to examine the track, prior to the passage of the train on which the accident occurred, they will find for the plaintiff and assess their damage.

3d, "If the Jury believe from the evidence that the accident and injury occurred by reason of too rapid and unsafe speed of the train, by reason of neglect to apply the brake in time, or because of any other neglect or unskillfulness in the management of the train, they will find for plffs. and assess their damage.

4th. "Proof that the plaintiff was a passenger on defendant's road, of the accident and the iniury, make a prima faciæ case of negligence and throws the burthen of justifying on the defendant.

5th. "In determining the question of damages if the Jury find for plaintiffs, they will consider the character of the injury, its results to the injured party, her condition and business in life, and all the circumstances and facts permitted in proof, and give such sums as they believe plaintiffs should receive.

4th. "The plaintiffs declaration is not sufficient in law to maintain said verdict, and judgment.

5th. "That the said verdict is otherwise contrary to law. The following instructions were given for
75 defendants, viz·

1st. "The Court instructs the Jury as follows:

"This being an action to recover damages for an injury arising from an accident on defendants cars it is necessary that the plaintiff shall prove to the satisfaction of the jury that the injury was caused by the negligence or unskillfulness of defendants agents or servants, otherwise they must find for defendant.

2d The plaintiffs in this case are bound to prove the same substantially aslaid in their declaration to the extent of showing a substantial ground of action and if they have failed to do so, they cannot recover.

3d. "The mere facts that an accident happened, and the plaintiff, (Mrs. Fahs) was hurt, is not sufficient and will not entitle the plaintiffs to a verdict, if it shall appear from the whole case that the accident and injury did not arise from negligence or unskilfullness.

4th, "Railroad Companies are not insurers of the personal safety of their passengers against all accid ents, and are only liable for injuries which are caused by negligence or unskillfulness.

[8555-4]

5th. Travellers by Railroad, as well as by other public conveyances, must take the risks incident to
76 the mode of travel they adopt, subject only to claims for damage, arising from negligence or unskillfulness, and in this case, if the accident was not the want of skill or care by the defendant or her agents or servants, then the plaintiff's injury is but a misfortune, for which the defendant is not responsible.

6th. 'Carriers of passengers are not held responsible to the same extent of carriers of goods, for they are only bound for the safety of their passengers to the care of cautious and pendent men.

7th. "The contract, to carry safely, means not that they will insure the lives and limbs of their passengers, but that they will take due care as far as competent foresight wil' go in the performance of that duty.

8th. "The degree of care and skill required of defendant in the construction of their Road and the running of their trains is not the highest degree attainable by human skill, but that extraordinary care and skill, which competent and cautious persons exercise in like business and under like circumstances.

77 9th. "In considering the statements of witnesses, and the depositions, the jury should look at the circumstances, the character, profession and opportunity of each witness to know and testify to the facts he speaks of, in order to give to each, so much, and no more, weight than they are respectively entitled to.

11. "Although a brakeman on the car, when the witness was riding, was inside the car at the time of the accident and was not at the brake, yet if the accident did not result from a failure to apply the brakes but from the sliding of the track or some other cause, then the jury should not find the defendant guilty on the ground of such fault of the brakeman.

78 12th. If the juryshall find the defendant guilty, then they are to assess the damages at so much as they may think the plaintiff may be reasonably entitled to receive, and that the defendant should be reasonably bound to pay, taking into consideration all the circumstances of the case."

"All of which said motions were over-ruled by the Court and judgment rendered on the verdict accordingly. Wherefore the defendant excepts and prays th's, his Bill of exceptions may be allowed and made a part of the record herein, including the said testimony of the witnesses as aforesaid, which is done accordingly. Witness the Judge of said Court the 30th day of September, A. D, 1858.

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EDWARD BEECHER, Judge C. C.

Cirtificate and Seal of W. L. Mayo, Clerk Edwards Circuit Court, October 18th, 1858.

ERRORS ASSIGNED.

1st. The deposition of John Shive and others taken at York, Pa., should have been excluded. They no where show, nor does it otherwise appear in testimony that the witnesses were acquainted with, or speak of the plaintiff in the suit. The Catharine Fahs of which they all speak, may be another person.

The law also requires that the interrogatories, as well as the answers, should be written out in their order in each deposition, which is not done. Nor are the interrogatories so refered to by numbers as to show that they were put as set forth in the commission.

2nd. The 4th interrogatory in the commission was improper, and the several answers of Shive Bougher, Hautz, Wagoner and Ettinger, to the 4th question as numbered in their answers were illigal and should have been excluded.

The loss of service, as investigated was not properly a subject of examination in the case, and having a direct tendency to mislead the Jury in estimating the damages.

3rd. Instructions Nos. 2 3 and 5 given for the plaintiff below were contrary to law.

4th. The damages were excessive.

5th. The verdict should have been arrested and a new trial granted.

ARGUMENT AND AUTHORITIES.

1st. In actions for personal injuries and suffering to the wife, nothing should be stated in the declaration, for which the husband alone can sue, it should not allege any loss of assistance or expense of cure.

2 Saunders P. E. - - - - - - - - - - - - - - P. 188.

1 Chitty P. - - - - - - - - - - - - - - - P. 73.

2nd. The husband *must sue alone* for loss of service or expense of cure, growing out of injuries to the wife.

They must *both* sue for compensation for personal injury and suffering.

Hence in such cases there may be two suits, the one by the husband and wife, for the direct, and the husband alone for the consequential injury.

1 Saunders, - - - - - - - - - - - - - - - 141.

31 Law Library, - - - - - - - - - - - - - 159.

Pierce on American Railroad Law, - - - - - - - - - - 255.

Redfield on Railways, - - - - - - - - - - - - - 341.

In like cases the father may sue for loss of service of ~~his~~ child, but cannot recover for wounded parental feelings insuit &c
Whitney vs Hitchcock 4 Denio — 461
Flemington vs Smithers — 2 C & P — 292

In an action by husband and wife, damages for loss of service cannot be given in evidence.

1 Saunders, P. E. - - - - - - - - - - - - - - 154.

Hunt vs Hoyt & Wife. 20 Wks. 548

A new trial will be granted where ~~impressive~~ improper evidence has been admitted.

1. Gardner and Patterman on New Trials, - - - - - - - - 245.

[6655-46]

4th. The opinion of Witnesses as to the amount of damages or loss of business are inadmissable,

Lincon vs. Saratoga R. R. Co. 23 wend - - - - - - - - 425.

Norman vs. Wells, - 17 " - - - - - - - - - - - - 161.

Even if it were allowable to prove the character and extent of business engaged by the plaintiffs still the opinions of witnesses as to the amount of loss of service in such business was impropper and should have been excluded.

21 Mud - 342
23 " 431
24 " 668

5th. Damages are to be given in cases like this for the direct and necessary results of the injury but such as are speculative and contingent are not allowed.

Pierce on American R. R. Law, - - - - - - - - - - - - 494.

5th. The 2nd instruction given for plaintiff below, required the Railroad Company to make thorough and careful examination of the track prior to the passage of every train, a degree of diligence never exercised by the most cautious, and not required by the law. To require a careful examination of the track prior to the passing of every train where perhaps a dozen trains per day are running would require an army of men for the purpose, and incur an amount of cost that never has been deemed necessary by the most extreme carefulness.

The 8th instruction given for defendant below contains the true rule, and conflicts with No. 2 of the plaintiffs.

6th. The 5th instruction for plaintiff below directs the jury in assessing damages to take into consideration "*the business*" of the plaintiffs, "*and all the circumstances and facts permitted in proof.*" By this the Jury were required from the depositions of Shive and others to take into their account the loss of business, of Mr Fahs by reason of his wife's injury which was improper.

7th. The excessive damages must be attributed to the opinions of the Witnesses as to the loss of service in business, and it cannot be doubted but the Jury have been influenced by those opinions in measuring the damages, and although there may be sufficient other evidence to sustain a verdict for some damages, yet if the amount of these damages have probably been increased by improper evidence their verdict should be set aside and a new trial granted.

8th; The words in the declaration alledging that by reason of the injuries, the plaintiffs had suffered in her (or their) business and sustained damage on that account, are to be treated as *alia enorma* or as *surplusage*, and either view proof of the loss of *service* was improper as that was a distinct ground of action.

1 Chitty P. - - - - - - - - - - - - - - - 388

Lewis & Wife vs. Babcock, 18 Johns. - - - - - - - - 444

[8555-47]

W. H. Comstock A. KITCHELL, for Plaintiff in Error

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O. & M. R. R. Co

Deed

to

John Jacks Lewis

Abstract

6144 Mondeau

Filed Oct. 7. 1859

A. Johnston Clk

SUPREME COURT OF ILLINOIS,

NOVEMBER TERM, 1860.

At Mt. Vernon.

JOHN FAHS AND CATHERINE FAHS,

vs.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

BRIEF

OF

WILLIAM HOMES,

Attorney for Defendant.

IN THE

SUPREME COURT OF ILLINOIS.

AT MT. VERNON, NOVEMBER TERM, 1860.

JOHN FAHS & CATHERINE FAHS,
vs.
THE OHIO & MISSISSIPPI RAILROAD COMPANY.

Appeal from Circuit Court of Edwards County in Error.

STATEMENT OF THE CASE.

The plaintiffs were passengers in the cars of the defendant on the 25th of July, 1855. The cars were thrown from the track in Richland county, near Olney, and Catherine Fahs, one of the plaintiffs, received an injury to her right arm.

In September, 1857, the plaintiffs joined in a complaint against the Railroad Company, filing their declaration in Richland Circuit Court. In this declaration they alleged injuries and claimed damages jointly on the following grounds :

1. A serious injury to the right arm of Catherine Fahs, her pain and suffering, and incapacity for attending to her necessary affairs.

2. That said Catherine Fahs was deprived of great gain and profits.

3. That the plaintiffs, jointly, were put to large expense for purposes of cure, and for their necessary support.

4. That said Catherine was unable to manage the usual business, to wit: attending to the sale and carrying on a milliner's fancy shop.

By these injuries to the body of the said Catherine, and her pain and suffering, by her loss of gains and profits in carrying on a milliner's business, and by the expenses incurred in her cure, and in the support of both John and Catherine Fahs, the plaintiffs say they have sustained damage to the amount of $10,000, and therefore they jointly bring this suit.

The venue of the cause was changed to Edwards County Circuit Court, where it was tried at the September term, 1858. At the trial, testimony was allowed not only as to the personal injuries suffered by Catherine Fahs, but also as to the profits of her millinery business, and the loss of those profits in consequence of the injury she had received.

The plaintiffs obtained a judgment against the Railroad Company, with an award of damages in the sum of $4000. Upon the rendition of the verdict the defendant moved in arrest of judgment and for a new trial, which motions the court overruled.

The defendant relies for a reversal of the judgment, on the correctness of the motion in arrest and for a new trial, for reasons which will appear below in the points, argument and authorities offered:

1. The wife cannot join with the husband for injuries peculiar to the latter. For personal injuries suffered by her during coverture, she may join her husband, and must do so, as she cannot sue alone. But for expenses of her cure, or of her support, or for the loss of her society and her services, she cannot join, as these injuries are peculiar to her husband alone. The following authorities settle this point:

Saunder's Pleading and Evidence, vol. 2, p. 188: "For any injury to the person of the wife during coverture, an action may be brought by both, for her personal suffering or injury, and she cannot sue alone. But when she joins in the action no injury peculiar to the husband can be joined, as for expenses of cure, &c., or for loss of her society," &c.

1 Chitty's Pleading, p. 72: "When an injury is committed to the person of the wife during coverture by battery, slander, &c., the wife cannot sue alone in any case, and the husband and wife must join if the action be brought for the personal suffering or injury to the wife, and in such case the declaration

ought to conclude to *their* damage, and not to that of the husband alone. * * * * Care must be taken not to include in the declaration by the husband and wife, any statement of a cause of action for which the husband alone ought to sue. Therefore, after stating the injury to the wife, the declaration ought not to proceed to state any loss of assistance or expenses sustained in curing her. If the battery, imprisonment, or malicious prosecution of the wife deprive the husband for any time of her company or assistance, or occasion him expenses, he may and ought to sue separately for such consequential injuries."

1 Saunders' Pleading and Evidence, p. 141: "To recover damages for the personal suffering and annoyance, the action must be brought in the name of the party injured. But the husband may sue alone to recover any damages resulting to him for an assault on his wife, child or servant, such as the loss of service, of his wife's society, expenses to which he has been put, &c. Hence, in such cases each party may sue, the one for the direct, the other for the consequential damages."

Redfield on Railways, page 341: "In a suit in the name of husband and wife, when the wife survives, a recovery cannot be had for the expenses of cure. In such action recovery can only be had for the personal injury and suffering of the wife. The action in such case for the loss of service and for the society of the wife, and for the expenses of the cure, must be brought in the name of the husband alone."

20th Illinois, Hunt vs. Hoyt & wife, page 548. In this case the court below gave the following instruction: "In estimating the damages, if they found for the plaintiff, the jury should take into consideration the length of time Mrs. Hoyt was sick in consequence of the injury, the effect of the injury upon her, and the bodily suffering consequent thereupon."

The defendant objected to this instruction on the ground that it was too broad, and involved damages for loss of time for which the husband alone would be entitled to an action. The Supreme Court, remarking upon this instruction, says: "there is no color for the idea that the jury were so misled as to give damages for loss of time." Is there any other inference from this, but that in the opinion of the Supreme Court it would have been error to instruct the jury to give damages in an action by husband and wife for loss of time, an injury peculiar to the husband, and for which he alone ought to sue?

2. If the wife join in an action for injuries peculiar to the

husband, it is bad on demurrer, or good reason for arrest of judgment, or will support a writ of error.

In immediate connection with the doctrine that the wife cannot join her husband in an action for injuries peculiar to himself, such as expenses of cure, loss of her assistance, &c., Chitty says, p. 74, vol. 1, "if the wife be improperly joined in the action, and the objection appear from the declaration, the defendant may in general demur, move in arrest of judgment, or support a writ of error." Much more would it be ground for a new trial if the improper allegations of the declaration were allowed, in the face of objection, to be supported by proof, and the jury, as in this case, were instructed by the court to regard that proof in making up their verdict.

3. The error is not cured by the verdict. The doctrine of "*intendment after verdict*" does not apply to this case.

The general principle of this doctrine is, that when there is any defect, imperfection or omission, in substance or form, in any pleading, which would have been fatal on demurrer, yet if the issue joined necessarily required on trial proof of the facts omitted or defectively stated in the declaration, and without which proof it could not be presumed the judge would direct the jury to give the verdict, then in such case the defect or omission is cured by the verdict. The intendment must arise from the united effect of the verdict and the issue upon which it was given. The particular thing which is presumed to have been proved, must always be such as can be implied from the allegations on the record by fair and reasonable intendment. Such is the doctrine as laid down in Chitty, vol. 1, pp. 673–683, where it is also stated that the main rule on the subject of intendment is that a verdict will aid a *defective statement* of title, but will never assist a statement of a *defective title* or cause of action.

The doctrine of intendment is one of *presumptions*. But such presumptions are never violent, or inconsistent with the record, or with fact. For example, the doctrine does not apply to cases of judgment by default, since no presumption can arise in reference to proof in such a case, there having been no trial, nor would courts ever presume, after verdict in such case, that there had been any proof to support the verdict. Nor will

it ever be allowed that there are any presumptions to support the verdict, if the presumptions are negatived by, and inconsistent with, statements in the record. Chitty is explicit in this statement of the doctrine. It would seem to be straining very greatly this principle of intendment to apply it to cases like the present, which in fact is one of defective cause of action, there being several causes of action united in this declaration, which are not sustainable jointly by husband and wife, and the strongest proof having been admitted by the court to support the improper allegations of the complaint.

There are cases of husband and wife joining in such actions, where it has been held that after verdict such declarations are good. But an examination of these cases shows that the verdicts have been sustained expressly on the ground of the presumption, that no proof was allowed to support the action for the injuries peculiar to the husband, and also, that the judge duly directed the jury not to find for such injuries. In the case of Russell and wife vs. Corne, reported in 1 Salkeld, a leading case often referred to, where it was alleged that by reason of injuries to the wife "the husband's business remained undone," in overruling the motion in arrest of judgment, C. J. Holt said he "would not intend the judge suffered the husband's business being undone to be given in evidence."

But in the case now before the court, the principal portion of the testimony received related to the millinery business and profits of the wife; and the judge, in the 5th instruction for the plaintiffs, directed the jury to consider the "condition and business in life of the wife, and all the circumstances and facts permitted in proof." Any presumption or intendment after verdict that such proof was not permitted, or that the jury were directed not to regard it, is negatived by, and is inconsistent with, the record, which exhibits the proof in full, with the objections thereto, and the express instruction of the judge to take into consideration this testimony in determining the question of damages.

It is only upon the ground that proof was not permitted to be given, or that the jury were duly directed not to regard it, that Chitty, vol. 1, p. 682, allows, where a declaration con-

tains two causes of action, one of which is sustainable and the other not, that after verdict the declaration will be held not fatally defective. It is believed that no case can be found among either the earlier or later authorities, where, after proof of the improper averments in the declaration had been allowed, and the jury had considered it, a new trial was refused.

4. A reversal of this case cannot be refused on the ground that the injury to the millinery business is laid as matter in *aggravation of damages*. Even if it be admitted that there are cases in which it has been held that expenses of cure, though laid as matter of damage in a declaration by husband and wife, have not vitiated the declaration, but have been held good after verdict, being regarded in the light of aggravation of damages, yet this is the extent to which any such indulgence has been granted. It has been upon the ground that the expenses of cure are so naturally and immediately connected with the primary injury, and may be so accurately estimated, approximately at least, that they may be considered as part of the damage. But no case can be found where, after verdict, it has been held that the profits of business could be sued for in such a case as this, and the judgment not be reversed. A careful examination of the authorities warrants the statement that wherever, in such a case as this now before the court, damages were claimed and given for injuries peculiar to the husband only, or were allowed to be laid at all, it has been where the circumstances of aggravation were naturally, directly and immediately connected with the original wrong. Not a case appears, where, under the pretence of aggravation of damages, the annual value of business was allowed to be given, or anything of the kind. If in this case it should be held that though the husband and wife have joined for expenses of cure as well as for personal injuries to the wife, yet it is good after verdict, it will be solely on the ground that the expenses of cure are to be regarded as the immediate consequential damages and as aggravating the injury suffered. But beyond this the court will not go. Any thing further would be sustained neither by authority nor principle.

In Lewis vs. Babcock, 18th Johnson, p. 443, expenses of cure were allowed after verdict. Various authorities are refer-

red to, in the opinion of the court. But they all show that the "aggravating circumstances" meant, are such only as are immediately connected with the primary tort. They all negative the idea that the verdict would be allowed to stand when full proof had been allowed of damage to business.

In 21 Conn, Fuller & wife vs. Naugatuck R.R. Company, p. 571, the court says: "It is clear that the plaintiffs could not recover for the wife's personal injury and also for the expenses of her cure in the same action. On the former ground of damages the husband would have no interest, while the latter would accrue to him alone, and so the two claims would be incompatiible with each other. But we do not think this declaration open to that objection. Indeed it may fairly be doubted whether it was framed with that object in view. The ground of the action was the wife's personal injury alone ; otherwise she could not have been made a party at all; and we think the statement in regard to the expenses of her cure may well enough be considered as descriptive of the extent of injury, rather than as a distinct and substantive ground of damages—as saying, in substance, that she was so hurt that it had already cost two hundred dollars to cure her. In this aspect the allegation, though unnecessary, is still very proper.

" But suppose the pleader intended it as a distinct ground of recovery, and it is so expressed as to bear that construction only, still we think it clear that it does not vitiate the declaration. In every instance this claim is inserted as matter of aggravation and not of itself constituting a ground of recovery. The gist of the action is the breach of contract in not carrying the wife safely. It is stated as one consequence of that, that the plaintiffs were obliged to expend money in paying for medical attendance. For that the plaintiffs cannot recover, and if that was the sole ground of damages it would be fatal to their case. But as there was a ground of damages for which they could recover, *it will be presumed that the court allowed no proof to be given* of any ground on which they could not, although stated in the declaration."

The above case shows, 1st. That whatever circumstances in aggravation are allowable, are immediately connected with, or a very near consequence of the original injury, e. g. expenses of cure. 2d. That it will be presumed that no proof was allowed to be given of any ground of damages on which the parties could not recover. 3d. As a corollary from this it follows that if it appears from the record that proof was given of the ground

of damages on which a recovery could not be had, and the jury was directed to regard it, then the presumption cannot arise that it was not permitted, and then, too, the declaration is vitiated and the judgment will be reversed.

It can scarcely be doubted in this case, upon an examination of the declaration and the evidence, that the plaintiffs regarded the injury to business, and loss of profits, as a substantive cause of action and ground for recovery. And it can as little be doubted, on an examination of all the evidence, that the jury in awarding the heavy damages given, were controlled and stimulated almost exclusively by the testimony as to the large annual profits lost in consequence of the injury received.

5. Even if it should be held that husband and wife may join in an action for the recovery of damages for injuries peculiar to the husband, yet those injuries, of a consequential character, must be near, capable of being accurately estimated, certain,—not remote, contingent, speculative or conjectural. If proof is allowed of that which is remote and conjectural, the judgment will be reversed.

1 Saunders, Pl. & Ev., p. 141: "Nor can the plaintiff give in evidence any consequential injury not being the natural, and as it were the necessary result of the trespass, unless it be alleged as special damage; nor even then if it be not the approximate but remote consequence of the act. In an action by husband and wife, the husband cannot give damages for loss of service."

Sedgwick on Damages, chap. 3, vol. 1: "The rule is well established, that in cases of torts it is necessary for the party complaining to show that the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant." This is quoted by Sedgwick on page 84, from 18th Wend. 213–229.

Sedgwick again, vol. 1 p. 69: "The early cases in both the English and American courts generally concurred in denying profits as any part of the damages to be compensated, and that whether in cases of contract or tort. So in a case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage, and held this general language: 'Independent however of all authority, I am satisfied upon principle that an allowance of damages on the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would

be involved in utter uncertainty. The calculation would proceed upon uncertainties. * * * * * * * After all, it would be a calculation upon conjectures and not upon facts.'"

20 Barbour, page 292—Curtiss vs. Roch. & Syr. R.R. Co.: "In respect to all the subjects of damage, it was requisite that they should be the legal, direct and necessary results of the injury, and that those which at the time of the trial were prospective should not be conjectural. It was also requisite that they should be supported by such clear and certain evidence as ought to produce conviction in fair minds. All such results, in the aggregate, constituted the injury. There is nothing contingent or speculative in a legal view in regard to such damages. *They are wholly unlike the loss of uncertain profits by the breaking up of a bargain, or the derangement of one's business resulting from an injury.*"

2 Kent's Com., p. 480: "Speculative profits are not allowed."

1 Sedgwick, p. 74, C. J. Nelson's opinion cited: "It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent on the fluctuations of markets and the chances of business to enter into a safe or reasonable estimate of damage." Sedgwick also in same connection cites Nelson as saying, "the rule is that when profits are recoverable it is where the profits are the direct and immediate fruits of the contract entered into between the parties." The same rule applies in cases of tort.

4 Barbour, p. 262, Giles vs. O'Toole. This is a case directly in point. A milliner sued for damages resulting from a refusal of her landlord to let to her a certain store according to agreement. Two witnesses testified as to the value of her business and what her profits would have been in the store. The Supreme Court says: "But the idea of founding a claim to damages on the part of the plaintiff, upon proof of what her profits would be in the millinery business, and of proving those damages by the opinions of witnesses, is sanctioned by no authority."

Sedgwick again, vol. 1, p. 84: "But as a general rule, it may be said that in cases of tort without aggravation, where the conduct of the defendants cannot be considered so morally wrong or grossly negligent as to give a right to exemplary or vindictive damages, the extent of remuneration is restricted, according to the principle we have been considering, to the immediate consequences of the illegal act."

The damages suffered in the business of Mrs. Fahs, plaintiff, with her husband in this case, are too remotely consequential, speculative and contingent to be considered. Business fluctuates. There is no fixed standard by which to judge of the profits of a milliner's business. Mrs. Fahs might die, or business might leave the neighborhood, or she might go out of the business, or, having a husband to support her, she might decline labor, or business might be dull and demand cease, or population might diminish, or a more fashionable rival milliner might set up by her side, or the number of girls desiring to learn dress-making might abate. There is no end to the contingencies upon which this question of Mrs. Fah's profits rests, all going to demonstrate the entire speculative and uncertain character of such proof, and the thorough impropriety of allowing it to go to the jury.

6. It was improper to receive the *opinions* of witnesses as to the amount of damage, for they are not competent evidence.

In the case of Giles vs. O'Toole, cited above, the court says: "The opinions of witnesses as to damage or loss are not competent evidence, even in cases where the damages claimed are a proper subject of recovery. The facts and *all* the facts going to show what the damages would be should be given in evidence, and the jury must then draw their conclusion from the testimony of the witnesses as to the amount of the damage. But, notwithstanding the plaintiff might be entitled to the value of her bargain, yet she could not recover for the profits which she might have made had she occupied the shop."

There is a double reason then for reversing the judgment in this case. 1st. The damages claimed for loss of profits are not a proper subject of recovery. 2d. The *opinions* of witnesses were incompetent evidence, even if given in reference to a proper subject of recovery.

17 Wendell, p. 161–163, Norman vs. Wells. The court in this case says: "Ought the opinions of witnesses to have been received as to the amount of damages? * * * * * The ordinary, and, in general, the only legal course, is to lay such facts before the jury as have a bearing on the question of damages and leave them to fix the amount. They are the only

proper judges. They are impartial and capable of entering into these ordinary matters. Witnesses are in such cases unavoidably governed by their feelings and their prejudices, gathered fom many sources." After speaking of the admissibility of the opinions of experts in matters of science, the court says: "this is the only evidence of the kind, I venture to say, which can be received. * * * * I can perceive no analogy between such a case and the one at bar. Surely there can be nothing like science in ascertaining the loss of this plaintiff from a rival factory. * * * There is no reason for receiving opinions, but a very powerful argument against it. The single opinion of no man can be followed. The best would be utterly delusive. Even where a witness is able to speak to all the facts of the particular case, his opinions are not to be received." And a new trial was granted in this case on the sole ground that the opinions of witnesses as to damages were received.

For this same doctrine fully discussed, see case of Lincoln vs. Saratoga and Schenectady R. R. Co. 23 Wend. page 425. In these cases it is said, "the difficulty, if not absolute impossibility, of knowing all the facts which would warrant an opinion in a witness, the variety of circumstances to be considered upon which different witnesses would pronounce different opinions, render it unsafe and unjust to subject juries to the influence of such opinions."

These various decisions upon the competency of the opinions of witnesses as evidence, are peculiarly applicable to the case before the court. It does not at all appear that the witnesses who testify as to the business of Mrs. Fahs, have any such knowledge of it as qualified them to testify concerning it. The proof nowhere shows that they knew all the facts requisite to form a definite opinion. Nor does it appear that the facts which they did know were such that any two witnesses would entertain concerning them the same opinion. Of ten witnesses testifying as to the business and profits of a milliner, it would not be surprising if no two of them should agree. They might, and probably would, differ in opinion as to a score of circumstances going to determine the question of profits, and the opinion of one of them would be as good as that of another. Such testimony can not be satisfactory or conclusive.

7. If improper or illegal testimony has been admitted on the trial, the judgment will be reversed.

Graham & Waterman on New Trials, vol. 1, p. 237: "If the judge at the trial decide to admit illegal testimony on the merits, the verdict will be set aside and a new trial granted."

Same, p. 238: "This rule has been held in the State of New York to apply to a judgment in error when improper evidence has been admitted, although only cumulative."

Same, p. 240: "It is well settled that if improper evidence be given, although it may be cumulative only, the judgment must be reversed; for who can say what effect such evidence may have had on the mind of the jury?"

It may be difficult to determine in the present case what portion of the verdict of $4,000 is to be ascribed to the proof concerning the millinery business. But no one, on examination of the proof, can evade the conviction that this testimony contributed largely to the excessive verdict. It presented in figures, with somewhat of definiteness, the amount of injury to business suffered as a consequence of the personal injury. It is unreasonable to suppose that such estimates presented to the mind of the jury did not contribute essentially to form their verdict. There is reason to believe, indeed, that this injury to business was the only thing which seemed really tangible to the jury, and from it they drew their conclusions as to the amount of compensation to be paid to Mrs. Fahs. But as the testimony on this point was wholly illegal, the judgment will be reversed.

8. It follows from the above points, that the 5th instruction of the judge was erroneous. That instruction was as follows: "In determining the question of damages, if the jury find for the plaintiffs, they will consider the character of the injury, its results to the injured party, her condition and business in life, and all the circumstances and facts permitted in proof, and give such sums as they believe plaintiffs should receive."

This instruction was calculated to mislead the jury as to the law. 1. It implied that in this action it was proper to unite the personal injuries to the wife, with the injuries peculiar to the husband. 2. It implied that remote and conjectural injuries were proper subjects for damages. 3. It implied that the testimony in reference to such contingent and speculative injuries was proper and legal. 4. It implied that the *opinions* of witnesses were competent testimony in a case of this kind. 5. It ex-

pressly instructed the jury that they should consider this testimony in determining the question of damages; all of which was erroneous and contrary to law, and furnishes cogent reasons for a reversal of the judgment.

The above points are the chief ones which the defendant in the court below would urge here, in support of the application for a new trial of this case. There are, however, other reasons which may be mentioned as auxiliary to those already presented.

1. The second instruction for the plaintiffs, in effect, lays down as law, that the defendant was bound to make an examination of the railroad track prior to the passage of each train over it, and of each portion of the track on which the train was to pass. Is that the law? or is a railroad company chargeable in law with negligence if they do not give a careful examination to the track prior to the passage of every train over it? Such carefulness is so nearly impracticable that it is not to be held as required by law, and the instruction is therefore erroneous.

2. The damages are excessively large. There is no aspect of the case which would warrant the jury in giving vindictive damages. There was nothing in the conduct of the defendant so morally wrong, or culpably negligent, as to call for exemplary damages. By the testimony of three competent witnesses, two of them, old and experienced practical railroad men, and one of them for years a builder of track, it was proved that the accident was due to a cause not within the control of the defendant. There is but one witness, Lambert, whose testimony would seem to prove negligence. But an examination of his evidence shows that, even by the testimony of plaintiffs' own witness, due care was exercised by the defendant on the night in question. He says: "The company had kept sentinels all along the road at nights to give warning, and had them on the road that night. Saw a signal lamp near where the accident occurred, and saw the two Butlers who had been out for that purpose."

Lambert does indeed say that he "observed about where the accident occurred there was a chair slipped and rail drawn."

But that this was not the cause of the accident is proved by the fact that a pilot engine passed safely over the spot. This same Lambert, too, in his testimony, concurs with three other witnesses in stating that it "had been raining and the ground was very soft when the accident occurred; the whole track seemed to have slipped; rails, ties and all went over to the north." This is plaintiffs' testimony, and in fact assigns the true cause of the accident, as three other witnesses do, to wit, the heavy and continued rains softening and saturating the entire embankment, so that it settled away and yielded under the weight of the train, having undoubtedly commenced settling before being reached by the train. The fact of a chair having slipped is so far from being conclusive as to the cause, that it would be very unreasonable to seize upon that as the sole cause, in the presence of another one much more plausibly and reasonably to be regarded as the true and adequate cause of the disaster. There is not the slightest evidence that the train left the track at the point designated by Lambert. It might have deserted the rails ten or fifty feet on either side of the misplaced chair. If it did go off near it, that precise point would have been involved in the general sinking of the embankment, but it would furnish no proof that it was the efficient cause of the catastrophe.

Lambert's opinion that an accident would occur where the chair was out of place, is no proof of liability to disaster there, for there is no evidence that he was a competent judge as to whether there was danger or not. Perhaps another man, and a better judge, would have had the opinion there was no danger. According to Lambert's own testimony, the two Butlers had been out on the track to do sentinels' duty where the accident occurred, and if there was any chair to be seen out of place, they may have judged the place safe notwithstanding, and from all that appears their opinions were as reliable as Lambert's. It is by no means an accepted and established railroad fact, that a misplaced chair threatens danger; and the proof is, that a pilot engine travelled safely over it. But the 2d instruction of the court not only taught the jury that the law held railroads to a degree of carefulness never practised and next to impracticable, but also was calculated to mislead the jury into the belief

that the misplaced chair was the sole cause of the accident, and that a due examination of the track there would have prevented it, when there was a very great preponderance of evidence, furnished by both plaintiffs and defendant, showing that another, altogether natural and sufficient cause had induced the disaster, and that cause not controllable by the defendant. There was, therefore, no such culpable negligence as would warrant the jury in finding vindictive damages, and the judgment should be reversed on account of the excessive amount given.

WILLIAM HOMES,
Attorney for Defendants.

State of Illinois---Supreme Court.

Ohio and Missippi Railroad Company,

Against

John Fahs and Catharine Fahs,

Error to Edwards.

Declaration filed 30th September 1857, in Richland Circuit Court.

1st Count.

1 John Fahs and Catharine Fahs his wife, complains of the Ohio and Mississippi Railroad Company being summoned, &c., of a plea of trespass on the case. For that, whereas, said defendants were owners and proprietors of a certain Railroad and cars for the carriage of passengers from Vincennes to Olney in the county aforesaid, for hire and reward, to the said defendants in that behalf, to wit; at the county of Richland aforesaid, and the said defendant being owner of said road and cars as aforesaid, heretofore, to
2 wit: on the 25th day of July, 1855, at the county aforesaid, the said plaintiffs aver; that said plaintiffs were passengers on the cars of said defendant, on said 25th day of July, 1855, to be safely, and securely carried and conveyed thereby, from Vincennes to Olney, in the county of Richland aforesaid, for a certain fare and reward to the said defendant, then and there paid, that just before making the said station or stopping place at said Olney, by the action of said wheels of the said engine and cars, the said iron and wooden rails were torn up for a great distance; to wit; the distance of one hundred feet, in consequence of the said rails be constructed of poor material, and so insecurely and insufficiently fastened, and the track was very much out of repair otherwise, so much so, that the said cars on which the said Catharine Fahs, (wife of the said John Fahs,) was then and there a passenger as aforesaid, was thrown violently off the said road, and overturned; by reason of which the life of the said Catharine was put in great peril and danger, that her right arm was broken and dislocated in the wrist, as well as in the elbow, right arm badly and severely strained and bruised, and her body otherwise severely bruised and injured, all of which was
3 causeed by the unskillfulness and carelessness, of its servants, and also by means of the premises, the said Catharine became and was sick, sore, lame and disordered, and so continued for a long space of time, to wit: hitherto, during all which said time, the said Catharine suffered great pain and was hindered and prevented from transacting and attending to her necessary affairs, and was deprived of great gains and profits, which might and otherwise would have gained and acquired, and thereby, also, the said plaintiffs were forced and obliged to and did then and there pay lay out and expend large sums of money to wit; $10,000 in and about the endeavoring to be cured of the said fractures, bruises and injuries, so received as aforesaid, and also, thereby, the said plaintiffs was hindered and detained at a certain town to wit: at John Brillhart's at
4 Olney, in the county aforesaid, a long space of time, to wit; for twelve weeks and during that time incurred great expenses, to wit; $500, in about their necessary support.

2d Count. And whereas, also, heretofore, to wit on the 25th day of July, 1855, at the county of Richland, aforesaid, the said plaintiffs aver that the said Catharine Fahs, wife of the said John Fahs was a passenger on the cars of the defendant from Vincennes to Olney, in the county of Richland on the 25th day of July, 1855. That just before reaching the station or stoppping place, at said Olney, by the neglect and unskillfullness of said defendant and its servants, the car on which the said Catharine was there and then a passenger, as aforesaid, was thrown violently off said road by reason of which the said Catharine's

right wrist and elbow were broken, dislocated and her arm otherwise badly strained and injured, and her body otherwise severly bruised and injured, all of which was caused by the carelessness and unskillfulness of said defendant and its servants.

3d Count! And whereas, also, heretofore, to wit; on the 25th day of July, 1855, at the county aforesaid, the defendant received into its cars, one Catharine Fahs, the wife of the said John Fahs as apassenger thereon to be carried and conveyed thereby, to wit: from Vincennes to Olney, aforesaid, for certain fare and and reward to the said defendants in that behalf, and by reason thereof, the said defendant ought carefully to have conveyed, or cause to be conveyed, the said Catharine Fahs, by said cars, from Vincennes to Olney, aforesaid, yet the said defendant not regarding his duty in this behalf, conducted himself so carelessly, by and through the carelessness, negligence, unskillfulnes and default of himself and its servants, and for want of due care and caution, the said cars, afterwards to wit: on the day and year aforesaid, and in the county of Richland aforesaid, just before reaching the station or stopping place of Olney, in the county of Richland aforesaid, the cars were overset and thrown off the track, by means where of the said Catharine Fahs then being thereon, was cut, bruised and wounded, and divers bones of her arms were broken, insomuch that the said Catharine then and there became very sick and remained so for a long space of time to wit———week, during all which time the said Catharine was unable to manage the usual busines, viz. attending to the sale and carrying on a milliners fancy shop, and the said John Fahs was obliged to expend the sum of $500, in about attempting the cure of his said wife, and the procuring necessary assistance and attendance during her said confinement, which ensued in consequence of her being so woudded as aforesaid, and by reason of the said injuries so received as aforesaid, the said plaintiffs sustained damages to the amoun of ten thousand dollars, and therefore they bring their suit.

HAYWARD & CONSTABLE,
Att'ys for Pl'ff.

6 Summons, Sheriff's return, &c.

7 8 Affidavit of Wm. Holmes, Attorney for defendant, for continuance at May Term, 1858, Richland Circuit Court.

9 10 Affidavit of Holmes, Attorney for defendants for change of Venue,

11 Bill of exception by plaintiffs, to order of Court changing Venue to Edwards.

11 12 Order of Richland Circuti Court, May Term, 1858, for change of venue to Edwards.

12 Certificate of M. B. Snyder, Clerk Richland Circuit Court, to Transcript of Record send to Edwards.

13 September 27, 1858, being 1st day of Edwards Circuit Court, on motion leave was given to open depositions.

13 14 Didimus or Commission issued by Walter L. Mayo, Clerk of Edwards Circuit Court dated August 19th, 1858, directed to Jacob Gleaner, a Justice of the Peace, of the county of York, Pennsylvania, to take depositions of "*witnesses whose names are mentioned in the enclosed interrogatories,*" directing him to "*cause the said interrogatories as they are propounded together with the answers of the said witnesses thereto to be reduced*

to writing, in the order in which they shall be proposed and answered;" and also that in his certificate thereto
14 he "*must state that they were sworn to and signed by the defendants and the time and place, and when and where the same were taken.*"

15 Notice by John Fahs and Catharine Fahs.

15 6th. Ohio and Mississippi Railroad Company to take depositions of John Shive, Jacob Hanty, Frederick Boughen, William Waggoner, Robert Fisher, Daniel Ettinger, James Carr and Jacob Hay.

"Interrogations to the above named witnesses."

1st. Are you acquainted with Catharine Eahs, wife of John Fahs, of the city of York, in the county of York and State of Pennsylvania; and if so how long have you known her.

2d. Do you know anything of injuries she has received by accident on a Railroad? if so describe these injuries.

3d. What business was said Catharine engaged in, before she received said injury, and does she still carry on said business, and are those injuries which she received any disadvantage to her in carrying on said business? and if so, state what extent.

16 4th. How much less are her services worth, if any less, in said business, in each year, in consequence of said injury?

5th. "What is the age of said Catharine, and what is her general health aside from said injury?"

"The said defendant hereby waives further notice of the taking said depositions, as proposed, but waives no further objection."

O. and M. R. R. Co.,
by A. KITCHELL, Att'y.

16 JOHN FAHS and CATHARINE FAHS,
vs.
Ohio and Mississippi Railroad Company. } In the State of Illinois, Edwards County Circuit Court.

Depositions of John Shive, of the Borough of York, in the county of York, in the State of Pennsylvania, a witness aged about sixty-one years, produced and sworn and examined before Jacob Glisner, in and for the county of York and State aforesaid on the eighto day of September, at his office in the South Ward, in the Borough of York, in said county and State aforesaid by virtue of a commission issued out of the Clerks office by the Edwards county Circuit Court, of the State of Illinois, to me directed, for the ex-
17 amination of the said John Shive; a witness in a suit, depending in the said Edwards county Circuit court in the State of Illinois, between John Fahs and Catharine Fahs, plaintiffs, and Ohio and Mississippi Railroad Company defendants.

(The questions embraced on retort in the depositions anywhere, except as the following:)

19 Third.—To the third interrogatory this deponent says:

Answer.—' Millinery business; still engaged in the same business; a great disadvantage, as her

[8555-79]

business amounts to between six and seven thousand dollars a year, her attention and labor is constantly needed, but in consequence of her arm being st ff and weak, she cannot handle, measure or put up goods, nor do the finishing, as she done before she received the injury.

Fourth.—To the fourth interrogatory, this deponent says:

Her services are less in her business each year, $363, for the reason she cannot take girls to learn the business as formerly, who paid her for six months' instruction, on an average, sixty dollars a year—their labor, during that time was worth $312, and which labor she must now have done by hiring girls, and paying them. She is now obliged to pay extrata to finish work $156 each year, which she done herself, besides various other additional expenses in going to the city, loss of trade, during the absence of the hand to finish amounting to at least $40 a year.

20 Sworn and subscribed by the said John Shrive, September 8th 1858, before me,

JACOB GLISNER. JOHN SHIVE.

20 The caption to deposition of James W. Kerr in same words as that of Shive, and attested in same form,

To first question, says he has known her 13 or 14 years.

21 To second interrogatory he says, "yes I knew of an injury to her right arm said to have been received by an accident on a Railroad—seems to be a dislocation of wrist and elbow joint; the natural connections of the joint have been entirely destroyed; arm nearly straight, with but little motion at this joint. She is unable to comb her hair or dress herself with it, appears to have been a fracture of one of the bones of the fore-arm, producing a good deal of distortion.

Third. Millinery business—injures and a great disadvantage to her in her business.

Fourth. Does not know.

22 Caption and attestation of deposition of Jacob Hay, in same form as Shive.

Question 1st. Known her for 12 years.

2d. She is suffering from injuries said to have been received by an accident on Railroad; elbow of right arm dislocated; some loss of power in the hand from fracture of the bones near wrist.

23 3d. "She was engaged in Milinery business before she received said injuries and is now engaged in the same business, and the condition of that joint must operate seriously to her disadvantage; to what extent I am not prepared to say.

4th. I cannot undertake to put an estimate upon the value of her services, but they are certainly worth considerably less than they were before she received the injury."

Caption and attestation of deposition of Frederick Roughen same as the first

24 Question 1st. Know her twenty years.

2d Arm broken at wrist fractured at elbow and stiff.

3d. Millinery business—still continues. It prevents her sewing, measuring or putting up goods.—Unable to sew or finish work, or instruct apprentices in the business

[6555-80]

25 4th. I consider services worth about $500 less than they were independent of other disadvantages and discomforts she experiences from them.

5th. Age, about forty years; general health very good.

26 Deposition of Jacob Hauerez caption and attestation same.

1st. Known her about eighteen years.

2d. She received injury from a Railroad. Right arm broken, elbow dislocated and stiff, wrist crooked.

3d. She was engaged in Millinery business before she received the said injuries and does still continue in the same business. The injuries she received are a great disadvantage to her in carrying on said business, inasmuch as it deprives her in a great measure from sewing and finishing, and from measuring goods, and from putting up and tieing packages, and also from instructing apprentices in said business.

4th. Her services in her business is worth $480 less each year, in consepuence of said injuries.

28 Deposition of Robert J. Fisher and attestation same as the others.

1st. Known Catharine Fahs wife of John Fahs for about twenty years.

2d. Some six months after the return of Mrs. Fahs to York, from the west, met her in her store —observed her arm was stiff at elbow joint and want of power at the wrist joint, not able to attend to buiness or serve her customers with same facility as formerly; showed me her arm, I thought I felt some disarrangement of the joint, but am no physician or surgeon and could not tell.

3d. Engaged in Millinery business, had a large establishment and retail store of finer articles of ladies attire. The injuries certainly disable her in her business, but extent of the injury I can form no opinion.

29 4th. Cannot form any opinion.

Deposition and attestation of William Wagoner same as the others,

30 1st. Known Catharine Fahs since 1840.

2d. Arm broken, elbow fractured and arm stiff,

3d. "She was engaged in the millinery business and still continues in the same. The injuries she received are a great disadvantage to her in as much as she cannot sew but little and when she does she is obliged to hold the work some distance from her, which fatigues the shoulder very much; she cannot measure goods as she could before the accident happened, nor put goods in the shelves or make them up in packages."

31 4th. About $500, (five hundred dollars.)

Deposition of Daniel Ettinger; caption and attestation same.

1st. Known Catharine Fahs 10 or 12 years.

2d. Well before she left York for the west, and since her return her right arm injured so she will probably never have the use of it.

[8555-81]

32 3d. She was engaged in Millinery business which she still continues by means of hired help. The injuries must seriously interfere in doing anything with hands, on account her right arm being of little use.

"As near as I can judge her services are not worth as much as before her injuries in said business by $150, to $500 a year."

33 State of Pennsylvania, County of York. } ss.

I, Jacob Glessner, a Justice of the Peace, in and for said county and State aforesaid, do hereby certify that the above depositions were taken by me at the time and place mentioned in the caption thereof.— That the said witnesses were first duly sworn and affirmed, and that the said depositions were carefully read to said witnesses, and signed by them

In witness whereof I have hereunto set my hand and seal at the South Ward in the Borough of York and State aforesaid, this 8th day of September A. D. 1858. JACOB GLESSNER. *Seal.*

The official character of Glessner is attested by H G. Bussey, Prothonatory of the Court of Common Please of York county, Pa., September 9th 1858. with seal of said Court.

34 Dedimus or commission to take depositions of E. Wyman, Thos. Spooner, and J. Rouse, witness deff.

35 36 Notice of taking and interrogatories,

37 38 Cross interrogatories by plaintiff to Wyman.

44 Evidence of E. Wyman.

45 1st Question. Was on train 25th July, 1855, in accident, no official connection with road, but acting for house of Page and Bacon.

2d. Took pains to ascertain the cause of disaster, as far as could ascertain it was caused by the sinking, sliding or spreading of track, from thorough saturation of embankment with rain which for many, hours had been incessant.

46 3d. Unusual caution and pains were taken in the running the trains and particularly at night, on the night of the accident, a pilot Engine was sent ahead to guard against obstructions, saw it a short time 47 before accident, it had gone ahead and made no signal, does not think train was running at any unusual or unsafe speed, as near as could judge 20 or 25 miles per hour.

5th Weather was very wet, raining for many hours previous, embankment very soft.

48 6th, Does not think the accident was caused by any want of care or skill, but from causes stated before.

8. Saw Mrs. Fahs after accident, was hurt, employed physician to attend to her.

51 11th. The Road was new—had been running but a few weeks.

52 Evidence of Thomas Spooner.

1st Question. Was on train at time of accident, was assistant Superintendent.

53 2d. Have been about 17 years in Railroad business, and one year and a half in employ of defendant.

3d. I can state the cause of accident. It had been raining very severely that night, and I suppose the bank had washed away under the track about 8 or 9 o'clock at night, were going at the rate of about twenty miles per hour.

[5555-82]

4th. Gale was conductor and Rouse engineer, they were skillful and careful men,

54

5th. A pilot engine was sent ahead to guard against accidents.

6th. The road bed was new and they run slower than if it had been a settled road.

7th. The speed at time of accident was from 18 to 20 miles per hour.

8th. Knows of no fault or want of skill or other thing that caused the accident, except as above state.

55 10th. Old settled roads run their trains at from 23 to 25 miles per hour.

11th. Considered the rate of speed of the Road at the time of accident as safe.

56 Answer of E. Wymen, cross-examined; does not recollect of any conversation in presence of Hood.

57 Certificate and seal of Tilson, Notary Public, to said depositions.

58 Statement of Powers.

States that Dolbec, an enginer, has character of recklesness, and track was in bad condition when accident happened.

Statement of Tripp, Road Master.

59

62 Passed over the track a day or two previous and examined track, saw nothing out of place, examined embankment after accident, and was convinced the accident occurred by reason of a slide in the embankment caused by heavy rains.

Knows the engineers were instructed to run carefully.

Rainy time, had been raining for several days. Watchmen and signals were placed at several points on the road, but none at the place of accident as nothing indicated danger there.

63 Has no doubt but the accident was the result of the heavy rain causing the embankment to slide. The embankment was good there.

Bill of exceptions to exclude the depositions of John Shive and others, on 27th day of September, 1858, being first day of Court, (Edwards Circuit Court.) Motion to exclude all the depositions over-ruled and defendant accepts. Motion to exclude the answers of the several witnesses to the 3d and 4th questions —as also, the questions, over-ruled—accept s.

64 Motions to exclude answers of John Shive and Bougher, Hantz, Wagner and Ettinger to 4th question, overruled, and defendants accepts.

65 Bill of exceptions signed.

Cost Bond filed on 27th day of September, 1858. in Edwards Circuit Court.

66 Plea of not guilty filed by defendants.

67 On the 30th September, being 3d day of court—cause tried and order for trial, verdict for jndgment

Bill of exceptions, containing 1st testimony of witnesses viz:

68 1st. Jacob Fahs, brother of plaintiff, John Fahs, was on train at time of accident, got on at Vincennes—saw John Fahs pay fare to conductor for himself and wife. Plaintiffs reside in York Pennsylva-

[555-93]

nia and kept a Milliner shop—thought train was running very fast, thought 30 miles per hour. Said train would go off if run long so fast, it soon went off—road was very rough all the way from Vincennes. Just before the accident, saw brakeman in the car sitting on seat; thought he was asleep when accident occurred. Heard the whistle, but brakeman did not go out till train went over. Mrs. Fahs was hurt by the accident; her arm broken, and her wrist and elbow injured and her arm still stiff and crippled so that she cannot put it to her head to feed herself. or use it to advantage in dressing. After accident,
69 were taken on flat cars to station at Olney, two cars were thrown over where track rails, ties and all had slid to the north side. The first. witness felt of the accident, train was going very rough and there was not more than time enough for a man to rise to his feet until the car was going over.

The weather was rainy; had been raining that day. It was first time witness or plaintiff had been in Illinois, or on the road. Were taken to Yocom's Hotel; medical aid was procured for Mrs. Fahs, she suffered a good deal.

70 Cross examined.—Said he was not an engineer, or in any way acquainted with Railroad affairs or the running of trains; formed his opinion of the speed from the sensation produced on him; were on a down grade at the time of accident. Don't know what speed they were running, but thought they were running faster than usual.

Second witness, A. Lambert.—Lived about two miles from Olney and half a mile from place of accident, was over the track at place of accident in afternoon before and saw at that place the track was on swing or out of line in consequence of the embankment not being made straight at first and which require the track to be put down the way it was. Observed about where the accident occurred, there was a ch ir slipped and rail drawn. When he got home that night, he saw Brownlee who was a section boss and had
71 hands at work on that section keeping it in repair; told him of the place he saw out of fix, and that he had better go and fix it, or when the train come along it would go off there—that Brownlee had been at work with his men, eastward, and that none of them went to fix the place that he knew of.

He had just gone to bed, when he heard the train go off; He went to it. had been raining and ground was very soft when the accident occurred; the whole track seemed to have slipped—rails, ties and all went over to the north.

Witness has done a good deal of work for the road and was then boarding hands. Said to Brownlee as they went to the wreck after night, "I told you they would go off there."

The Company had kept sentinels all along the road at nights to give warning and had them on the road that night, saw a signal lamp near where the accident occurred, and saw the two Butlers who had been out for that purpose. A rail at the place of accident was bent before the accident, and the spikes were not then all put in along the track; that since then, there has been a large number put in.

Third—Andrew Hood. Knew Rouse, the engineer, had seen him drink at some times very heavy drams of brandy on leaving the train, and before going on it—more than he thought any man ought to
72 drink who was engaged in that business. Witness was not acquainted wtih Railroad business nor with the character of Rouse as an Engineer, but he had the character of being a dissipated man.

[1855-84]

Fourth—Joseph M. Yocom. Kept a Hotel and plaintiffs were brought to his house. Drs. called &c.

The foregoing being all the evidence, and a verdict for $4000 being returned by the jury, the defendant moved for an arrest of judgment and new trial, and assign the following causes:

1st. The verdict is contrary to law and evidence.

2d. The Court should have excluded the depositions offered by plaintiff, of the witnesses—John Shive and others, named in a bill of exceptions before taken herein.

3d. The instructions given by the Court in behalf of the plaintiffs marked instructions for plffs. viz:

Fahs and Wife

vs

73 Ohio and Mississippi Railroad.

78 The Court instructs the Jury, for the plaintiffs as follows, to all of which defendant excepted at the time, viz;

1st. "That if the Jury believed from the testimony that Mrs. Fahs, the plaintiff, was on the train of
74 Ohio and Mississippi Railroad, as a passenger which they were bound to carry, that the said company are bound to the exercise of such caution as would to their utmost protect the life and persons of passengers.

2d. 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 thorough and careful examination, and if the Jury believe from the evidence that the injury complained of in this case was occasioned by neglect of the company, its agents or servants to examine the track, prior to the passage of the train on which the accident occurred, they will find for the plaintiff and assess their damage

3d. "If the Jury believe from the evidence that the accident and injury occurred by reason of too rapid and unsafe speed of the train, by reason of neglect to apply the brake in time, or because of any other neglect or unskillfulness in the management of the train, they will find for plffs. and asses their damage

4th. "Proof that the plaintiff was a passenger on defendants' road, of the accident and the injury, make a prima facie case of negligence, and throws the burthen of justifying on the defendant.

5th. "In determining the question of damages if the Jury find for plaintiffs, they will consider the character of the injury, its results to the injured party, her condition and busines in life, and all the circumstances and facts permitted in proof, and give such sum as they believe plaintiffs should receive.

4th. "The plaintiffs declaration is not sufficient in law to maintain said verdict, and judgment,

75 5th. "That the said verdict is otherwise contrary to law. The following instructions were given for defendants, viz."

1st. "The Court instructs the Jury as follows:

"This being an action to recover damages for an injury arising from an accident on defendants cars it is necessary that the plaintiff shall prove to the satisfaction of the jury that the injury was caused by the negligence or unskillfulness of defendants agents or servants, otherwise they must find for defendant.

2d The plaintiffs in this case are bound to prove the same substantially as laid in their declaration to the extent of showing a substan ial ground of action and if they have failed to do so, they cannot recover.

3d. "The mere facts that an accident happened, and the plaintiff, (Mrs. Fahs) was hurt, is not sufficient and will not entitle the plaintiffs to a verdict, if it shall appear from the whole case that the accident and injury did not arise from negligence or unskilfullness.

4th. "Railroad Companies are not insurers of the personal safety of their passengers against all accidents, and are only liable for injuries which are caused by negligence or unskillfulness.

[2555-85]

and in this case, if the accident was not the want of skill or care by the defendant or his agents or servants, then the plaintiff's injury is but a misfortune, for which the defendant is not responsible.

6th. 'Carriers of passengers are not held responsible to the same extent of carriers of goods, for they are only bound for the safety of their passengers to the care of cautious and pendent men.

7th. "The contract, to carry safely, means not that they will insure the lives and limbs of their passengers, but that they will take due care as far as competent foresight wil' go in the performance of that duty.

8th. "The degree of care and skill required of defendant in the construction of their Road and the running of their trains is not the highest degree attainable by human skill, but that extraordinary care and skill, which competent and cautious persons exercise in like business and under like circumstances.

77 9th. "In considering the statements of witnesses, and the depositions, the jury should look at the circumstances, the character, profession and opportunity of each witness to know and testify to the facts he speaks of, in order to give to each. so much, and no more, weight than they are respectively entitled to.

11. "Although a brakeman on the car, when the witness was riding, was inside the car at the time of the accident and was not at the brake, yet if the accident did not result from a failure to apply the brakes but from the sliding of the track or some other cause, then the jury should not find the defendant guilty on the ground of such fault of the brakeman.

78 12th. If the juryshall find the defendant guilty, then they are to assess the damages at so much as they may think the plaintiff may be reasonably entitled to receive, and that the defendant should be reasonably bound to pay, taking into consideration all the circumstances of the case."

"All of which said motions were over-ruled by the Court and judgment rendered on the verdict accordingly. Wherefore the defendant excepts and prays th's, his Bill of exceptions may be allowed and made a part of the record herein, including the said testimony of the witnesses as aforesaid, which is done accordingly. Witness the Judge of said Court the 30th day of September, A. D, 1858.

79

EDWARD BEECHER, Judge C. C.

Cirtificate and Seal of W. L. Mayo, Clerk Edwards Circuit Court, October 18th, 1858.

ERRORS ASSIGNED.

1st. The deposition of John Shive and others taken at York, Pa., should have been excluded. They no where show, nor does it otherwise appear in testimony that the witnesses were acquainted with, or speak of the plaintiff in the suit. The Catharine Fahs of which they all speak, may be another person.

The law also requires that the interrogatories, as well as the answers, should be written out in their order in each deposition, which is not done. Nor are the interrogatories so refered to by numbers as to show that they were put as set forth in the commission.

2nd. The 4th interrogatory in the commission was improper, and the several answers of Shive Bougher, Hautz, Wagoner and Ettinger, to the 4th question as numbered in their answers were illigal and should have been excluded.

The loss of service, as investigated was not properly a subject of examination in the case, and having a direct tendency to mislead the Jury in estimating the damages.

3rd. Instructions Nos. 2 3 and 5 given for the plaintiff below were contrary to law.

4th. The damages were excessive.

5th. The verdict should have been arrested and a new trial granted.

[illegible]

ARGUMENT AND AUTHORITIES.

1st. In actions for personal injuries and suffering to the wife, nothing should be stated in the declaration, for which the husband alone can sue, it should not alledge any loss of assistance or expense of cure.

2 Saunders P. E. - - - - - - - - - - - - - - P. 188.

1 Chitty P. - - - - - - - - - - - - - - - P. 73.

2nd. The husband *must sue alone* for loss of service or expense of cure, growing out of injuries to the wife.

They must *both* sue for compensation for personal injury and suffering.

Hence in such cases there may be two suits, the one by the husband and wife, for the direct, and the husband alone for the consequential injury.

1 Saunders, - - - - - - - - - - - - - - - 141.

31 Law Library, - - - - - - - - - - - - - - 159.

Pierce on American Railroad Law, - - - - - - - - - - 255.

Redfield on Railways, - - - - - - - - - - - - - 341.

In these cases the father may sue for loss of service & child, but cannot recover for wounded parental feeling insult &c.
Whitney vs Hitchcock 4 denio — 461
Huntington vs Smithers. 2 C & P — 292

In an action by husband and wife, damages for loss of service cannot be given in evidence.

1 Saunders, P. E - - - - - - - - - - - - - - 154.

Hunt vs Boyt & wife X X Ills — 548

A new trial will be granted where ~~impressive~~ improper evidence has been admitted.

1. Gardner and Matterman on New Trials, - - - - - - - 215

4th. The opinion of Witnesses as to the amount of damages or loss of business are inadmissable

Lincon vs. Saratoga R. R. Co. 23 wend - - - - - - - - 425.

Norman vs. Wells, - 17 " - - - - - - - - - - - - 161.

Even if it were allowable to prove the character and extent of business engaged by the plaintiffs still the opinions of witnesses as to the amount of loss of service in such business was impropper and should have been excluded.

23 Wend 431
17 " 161
24 " 668
21 " 342,

5th. Damages are to be given in cases like this for the direct and necessary results of the injury but such as are speculative and contingent are not allowed.

Pierce on American R. R. Law, - - - - - - - - - - - - 494.

5th. The 2nd instruction given for plaintiff below, required the Railroad Company to make thorough and careful examination of the track prior to the passage of every train, a degree of diligence never exercised by the most cautious, and not required by the law. To require a careful examination of the track prior to the passing of every train where perhaps a dozen trains per day are running would require an army of men for the purpose, and incur an amount of cost that never has been deemed necessary by the most extreme carefulness.

The 8th instruction given for defendant below contains the true rule, and conflicts with No. 2 of the plaintiffs.

6th. The 5th instruction for plaintiff below directs the jury in assessing damages to take into consideration "*the business*" of the plaintiffs, "*and all the circumstances and facts permitted in proof.*" By this the Jury were required from the depositions of Shive and others to take into their account the loss of business, of Mr Fahs by reason of his wife's injury which was improper.

7th. The excessive damages must be attributed to the opinions of the Witnesses as to the loss of service in business, and it cannot be doubted but the Jury have been influenced by those opinions in measuring the damages, and although there may be sufficient other evidence to sustain a verdict for some damages, yet if the amount of these damages have probably been increased by improper evidence their verdict should be set aside and a new trial granted.

8th; The words in the declaration alledging that by reason of the injuries, the plaintiffs had suffered in her (or their) business and sustained damage on that account, are to be treated as *alia enorma* or as *surplusage*, and either view proof of the loss of *service* was improper as that was a distinct ground of action.

1 Chitty P. - - - - - - - - - - - - - - 388

Lewis & Wife vs. Babcock, 18 Johns. - - - - - - - - 444

Com Homes & A. KITCHELL, for Plaintiff in Error

[255-88]

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O. & M. R. R. Company

Plff in Error

vs

John Fahnestock

Deft in Error

Abstract

8555

Filed Oct 7. 1859

A. Johnston Clk

SUPREME COURT OF ILLINOIS,

NOVEMBER TERM, 1860.

At Mt. Vernon.

JOHN FAHS AND CATHERINE FAHS,

vs.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

BRIEF

OF

WILLIAM HOMES,

Attorney for Defendant.

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SUPREME COURT OF ILLINOIS.

AT MT. VERNON, NOVEMBER TERM, 1860.

JOHN FAHS & CATHERINE FAHS,
vs.
THE OHIO & MISSISSIPPI RAILROAD COMPANY.

Appeal from Circuit Court of Edwards County in Error.

STATEMENT OF THE CASE.

The plaintiffs were passengers in the cars of the defendant on the 25th of July, 1855. The cars were thrown from the track in Richland county, near Olney, and Catherine Fahs, one of the plaintiffs, received an injury to her right arm.

In September, 1857, the plaintiffs joined in a complaint against the Railroad Company, filing their declaration in Richland Circuit Court. In this declaration they alleged injuries and claimed damages jointly on the following grounds :

1. A serious injury to the right arm of Catherine Fahs, her pain and suffering, and incapacity for attending to her necessary affairs.

2. That said Catherine Fahs was deprived of great gain and profits.

3. That the plaintiffs, jointly, were put to large expense for purposes of cure, and for their necessary support.

4. That said Catherine was unable to manage the usual business, to wit: attending to the sale and carrying on a milliner's fancy shop.

By these injuries to the body of the said Catherine, and her pain and suffering, by her loss of gains and profits in carrying on a milliner's business, and by the expenses incurred in her cure, and in the support of both John and Catherine Fahs, the plaintiffs say they have sustained damage to the amount of $10,000, and therefore they jointly bring this suit.

The venue of the cause was changed to Edwards County Circuit Court, where it was tried at the September term, 1858. At the trial, testimony was allowed not only as to the personal injuries suffered by Catherine Fahs, but also as to the profits of her millinery business, and the loss of those profits in consequence of the injury she had received.

The plaintiffs obtained a judgment against the Railroad Company, with an award of damages in the sum of $4000. Upon the rendition of the verdict the defendant moved in arrest of judgment and for a new trial, which motions the court overruled.

The defendant relies for a reversal of the judgment, on the correctness of the motion in arrest and for a new trial, for reasons which will appear below in the points, argument and authorities offered:

1. The wife cannot join with the husband for injuries peculiar to the latter. For personal injuries suffered by her during coverture, she may join her husband, and must do so, as she cannot sue alone. But for expenses of her cure, or of her support, or for the loss of her society and her services, she cannot join, as these injuries are peculiar to her husband alone. The following authorities settle this point:

Saunder's Pleading and Evidence, vol. 2, p. 188: "For any injury to the person of the wife during coverture, an action may be brought by both, for her personal suffering or injury, and she cannot sue alone. But when she joins in the action no injury peculiar to the husband can be joined, as for expenses of cure, &c., or for loss of her society," &c.

1 Chitty's Pleading, p. 72: "When an injury is committed to the person of the wife during coverture by battery, slander, &c., the wife cannot sue alone in any case, and the husband and wife must join if the action be brought for the personal suffering or injury to the wife, and in such case the declaration

ought to conclude to *their* damage, and not to that of the husband alone. * * * * Care must be taken not to include in the declaration by the husband and wife, any statement of a cause of action for which the husband alone ought to sue. Therefore, after stating the injury to the wife, the declaration ought not to proceed to state any loss of assistance or expenses sustained in curing her. If the battery, imprisonment, or malicious prosecution of the wife deprive the husband for any time of her company or assistance, or occasion him expenses, he may and ought to sue separately for such consequential injuries."

1 Saunders' Pleading and Evidence, p. 141: "To recover damages for the personal suffering and annoyance, the action must be brought in the name of the party injured. But the husband may sue alone to recover any damages resulting to him for an assault on his wife, child or servant, such as the loss of service, of his wife's society, expenses to which he has been put, &c. Hence, in such cases each party may sue, the one for the direct, the other for the consequential damages."

Redfield on Railways, page 341: "In a suit in the name of husband and wife, when the wife survives, a recovery cannot be had for the expenses of cure. In such action recovery can only be had for the personal injury and suffering of the wife. The action in such case for the loss of service and for the society of the wife, and for the expenses of the cure, must be brought in the name of the husband alone."

20th Illinois, Hunt vs. Hoyt & wife, page 548. In this case the court below gave the following instruction: "In estimating the damages, if they found for the plaintiff, the jury should take into consideration the length of time Mrs. Hoyt was sick in consequence of the injury, the effect of the injury upon her, and the bodily suffering consequent thereupon."

The defendant objected to this instruction on the ground that it was too broad, and involved damages for loss of time for which the husband alone would be entitled to an action. The Supreme Court, remarking upon this instruction, says: "there is no color for the idea that the jury were so misled as to give damages for loss of time." Is there any other inference from this, but that in the opinion of the Supreme Court it would have been error to instruct the jury to give damages in an action by husband and wife for loss of time, an injury peculiar to the husband, and for which he alone ought to sue?

2. If the wife join in an action for injuries peculiar to the

husband, it is bad on demurrer, or good reason for arrest of judgment, or will support a writ of error.

In immediate connection with the doctrine that the wife cannot join her husband in an action for injuries peculiar to himself, such as expenses of cure, loss of her assistance, &c., Chitty says, p. 74, vol. 1, "if the wife be improperly joined in the action, and the objection appear from the declaration, the defendant may in general demur, move in arrest of judgment, or support a writ of error." Much more would it be ground for a new trial if the improper allegations of the declaration were allowed, in the face of objection, to be supported by proof, and the jury, as in this case, were instructed by the court to regard that proof in making up their verdict.

3. The error is not cured by the verdict. The doctrine of "*intendment after verdict*" does not apply to this case.

The general principle of this doctrine is, that when there is any defect, imperfection or omission, in substance or form, in any pleading, which would have been fatal on demurrer, yet if the issue joined necessarily required on trial proof of the facts omitted or defectively stated in the declaration, and without which proof it could not be presumed the judge would direct the jury to give the verdict, then in such case the defect or omission is cured by the verdict. The intendment must arise from the united effect of the verdict and the issue upon which it was given. The particular thing which is presumed to have been proved, must always be such as can be implied from the allegations on the record by fair and reasonable intendment. Such is the doctrine as laid down in Chitty, vol. 1, pp. 673–683, where it is also stated that the main rule on the subject of intendment is that a verdict will aid a *defective statement* of title, but will never assist a statement of a *defective title* or cause of action.

The doctrine of intendment is one of *presumptions*. But such presumptions are never violent, or inconsistent with the record, or with fact. For example, the doctrine does not apply to cases of judgment by default, since no presumption can arise in reference to proof in such a case, there having been no trial, nor would courts ever presume, after verdict in such case, that there had been any proof to support the verdict. Nor will

it ever be allowed that there are any presumptions to support the verdict, if the presumptions are negatived by, and inconsistent with, statements in the record. Chitty is explicit in this statement of the doctrine. It would seem to be straining very greatly this principle of intendment to apply it to cases like the present, which in fact is one of defective cause of action, there being several causes of action united in this declaration, which are not sustainable jointly by husband and wife, and the strongest proof having been admitted by the court to support the improper allegations of the complaint.

There are cases of husband and wife joining in such actions, where it has been held that after verdict such declarations are good. But an examination of these cases shows that the verdicts have been sustained expressly on the ground of the presumption, that no proof was allowed to support the action for the injuries peculiar to the husband, and also, that the judge duly directed the jury not to find for such injuries. In the case of Russell and wife vs. Corne, reported in 1 Salkeld, a leading case often referred to, where it was alleged that by reason of injuries to the wife "the husband's business remained undone," in overruling the motion in arrest of judgment, C. J. Holt said he "would not intend the judge suffered the husband's business being undone to be given in evidence."

But in the case now before the court, the principal portion of the testimony received related to the millinery business and profits of the wife; and the judge, in the 5th instruction for the plaintiffs, directed the jury to consider the "condition and business in life of the wife, and all the circumstances and facts permitted in proof." Any presumption or intendment after verdict that such proof was not permitted, or that the jury were directed not to regard it, is negatived by, and is inconsistent with, the record, which exhibits the proof in full, with the objections thereto, and the express instruction of the judge to take into consideration this testimony in determining the question of damages.

It is only upon the ground that proof was not permitted to be given, or that the jury were duly directed not to regard it, that Chitty, vol. 1, p. 682, allows, where a declaration con-

tains two causes of action, one of which is sustainable and the other not, that after verdict the declaration will be held not fatally defective. It is believed that no case can be found among either the earlier or later authorities, where, after proof of the improper averments in the declaration had been allowed, and the jury had considered it, a new trial was refused.

4. A reversal of this case cannot be refused on the ground that the injury to the millinery business is laid as matter in *aggravation of damages*. Even if it be admitted that there are cases in which it has been held that expenses of cure, though laid as matter of damage in a declaration by husband and wife, have not vitiated the declaration, but have been held good after verdict, being regarded in the light of aggravation of damages, yet this is the extent to which any such indulgence has been granted. It has been upon the ground that the expenses of cure are so naturally and immediately connected with the primary injury, and may be so accurately estimated, approximately at least, that they may be considered as part of the damage. But no case can be found where, after verdict, it has been held that the profits of business could be sued for in such a case as this, and the judgment not be reversed. A careful examination of the authorities warrants the statement that wherever, in such a case as this now before the court, damages were claimed and given for injuries peculiar to the husband only, or were allowed to be laid at all, it has been where the circumstances of aggravation were naturally, directly and immediately connected with the original wrong. Not a case appears, where, under the pretence of aggravation of damages, the annual value of business was allowed to be given, or anything of the kind. If in this case it should be held that though the husband and wife have joined for expenses of cure as well as for personal injuries to the wife, yet it is good after verdict, it will be solely on the ground that the expenses of cure are to be regarded as the immediate consequential damages and as aggravating the injury suffered. But beyond this the court will not go. Any thing further would be sustained neither by authority nor principle.

In Lewis vs. Babcock, 18th Johnson, p. 443, expenses of cure were allowed after verdict. Various authorities are refer-

red to, in the opinion of the court. But they all show that the "aggravating circumstances" meant, are such only as are immediately connected with the primary tort. They all negative the idea that the verdict would be allowed to stand when full proof had been allowed of damage to business.

In 21 Conn, Fuller & wife vs. Naugatuck R.R. Company, p. 571, the court says: "It is clear that the plaintiffs could not recover for the wife's personal injury and also for the expenses of her cure in the same action. On the former ground of damages the husband would have no interest, while the latter would accrue to him alone, and so the two claims would be incompatible with each other. But we do not think this declaration open to that objection. Indeed it may fairly be doubted whether it was framed with that object in view. The ground of the action was the wife's personal injury alone; otherwise she could not have been made a party at all; and we think the statement in regard to the expenses of her cure may well enough be considered as descriptive of the extent of injury, rather than as a distinct and substantive ground of damages—as saying, in substance, that she was so hurt that it had already cost two hundred dollars to cure her. In this aspect the allegation, though unnecessary, is still very proper.

"But suppose the pleader intended it as a distinct ground of recovery, and it is so expressed as to bear that construction only, still we think it clear that it does not vitiate the declaration. In every instance this claim is inserted as matter of aggravation and not of itself constituting a ground of recovery. The gist of the action is the breach of contract in not carrying the wife safely. It is stated as one consequence of that, that the plaintiffs were obliged to expend money in paying for medical attendance. For that the plaintiffs cannot recover, and if that was the sole ground of damages it would be fatal to their case. But as there was a ground of damages for which they could recover, *it will be presumed that the court allowed no proof to be given* of any ground on which they could not, although stated in the declaration."

The above case shows, 1st. That whatever circumstances in aggravation are allowable, are immediately connected with, or a very near consequence of the original injury, e. g. expenses of cure. 2d. That it will be presumed that no proof was allowed to be given of any ground of damages on which the parties could not recover. 3d. As a corollary from this it follows that if it appears from the record that proof was given of the ground

of damages on which a recovery could not be had, and the jury was directed to regard it, then the presumption cannot arise that it was not permitted, and then, too, the declaration is vitiated and the judgment will be reversed.

It can scarcely be doubted in this case, upon an examination of the declaration and the evidence, that the plaintiffs regarded the injury to business, and loss of profits, as a substantive cause of action and ground for recovery. And it can as little be doubted, on an examination of all the evidence, that the jury in awarding the heavy damages given, were controlled and stimulated almost exclusively by the testimony as to the large annual profits lost in consequence of the injury received.

5. Even if it should be held that husband and wife may join in an action for the recovery of damages for injuries peculiar to the husband, yet those injuries, of a consequential character, must be near, capable of being accurately estimated, certain,—not remote, contingent, speculative or conjectural. If proof is allowed of that which is remote and conjectural, the judgment will be reversed.

1 Saunders, Pl. & Ev., p. 141: "Nor can the plaintiff give in evidence any consequential injury not being the natural, and as it were the necessary result of the trespass, unless it be alleged as special damage; nor even then if it be not the approximate but remote consequence of the act. In an action by husband and wife, the husband cannot give damages for loss of service."

Sedgwick on Damages, chap. 3, vol. 1: "The rule is well established, that in cases of torts it is necessary for the party complaining to show that the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant." This is quoted by Sedgwick on page 84, from 18th Wend. 213–229.

Sedgwick again, vol. 1, p. 69: "The early cases in both the English and American courts generally concurred in denying profits as any part of the damages to be compensated, and that whether in cases of contract or tort. So in a case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage, and held this general language: 'Independent however of all authority, I am satisfied upon principle that an allowance of damages on the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would

be involved in utter uncertainty. The calculation would proceed upon uncertainties. * * * * * * * After all, it would be a calculation upon conjectures and not upon facts.'"

20 Barbour, page 292—Curtiss vs. Roch. & Syr. R.R. Co.: "In respect to all the subjects of damage, it was requisite that they should be the legal, direct and necessary results of the injury, and that those which at the time of the trial were prospective should not be conjectural. It was also requisite that they should be supported by such clear and certain evidence as ought to produce conviction in fair minds. All such results, in the aggregate, constituted the injury. There is nothing contingent or speculative in a legal view in regard to such damages. *They are wholly unlike the loss of uncertain profits by the breaking up of a bargain, or the derangement of one's business resulting from an injury.*"

2 Kent's Com., p. 480: "Speculative profits are not allowed."

1 Sedgwick, p. 74, C. J. Nelson's opinion cited: "It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent on the fluctuations of markets and the chances of business to enter into a safe or reasonable estimate of damage." Sedgwick also in same connection cites Nelson as saying, "the rule is that when profits are recoverable it is where the profits are the direct and immediate fruits of the contract entered into between the parties." The same rule applies in cases of tort.

4 Barbour, p. 262, Giles vs. O'Toole. This is a case directly in point. A milliner sued for damages resulting from a refusal of her landlord to let to her a certain store according to agreement. Two witnesses testified as to the value of her business and what her profits would have been in the store. The Supreme Court says: "But the idea of founding a claim to damages on the part of the plaintiff, upon proof of what her profits would be in the millinery business, and of proving those damages by the opinions of witnesses, is sanctioned by no authority."

Sedgwick again, vol. 1, p. 84: "But as a general rule, it may be said that in cases of tort without aggravation, where the conduct of the defendants cannot be considered so morally wrong or grossly negligent as to give a right to exemplary or vindictive damages, the extent of remuneration is restricted, according to the principle we have been considering, to the immediate consequences of the illegal act."

The damages suffered in the business of Mrs. Fahs, plaintiff, with her husband in this case, are too remotely consequential, speculative and contingent to be considered. Business fluctuates. There is no fixed standard by which to judge of the profits of a milliner's business. Mrs. Fahs might die, or business might leave the neighborhood, or she might go out of the business, or, having a husband to support her, she might decline labor, or business might be dull and demand cease, or population might diminish, or a more fashionable rival milliner might set up by her side, or the number of girls desiring to learn dress-making might abate. There is no end to the contingencies upon which this question of Mrs. Fah's profits rests, all going to demonstrate the entire speculative and uncertain character of such proof, and the thorough impropriety of allowing it to go to the jury.

6. It was improper to receive the *opinions* of witnesses as to the amount of damage, for they are not competent evidence.

In the case of Giles vs. O'Toole, cited above, the court says: "The opinions of witnesses as to damage or loss are not competent evidence, even in cases where the damages claimed are a proper subject of recovery. The facts and *all* the facts going to show what the damages would be should be given in evidence, and the jury must then draw their conclusion from the testimony of the witnesses as to the amount of the damage. But, notwithstanding the plaintiff might be entitled to the value of her bargain, yet she could not recover for the profits which she might have made had she occupied the shop."

There is a double reason then for reversing the judgment in this case. 1st. The damages claimed for loss of profits are not a proper subject of recovery. 2d. The *opinions* of witnesses were incompetent evidence, even if given in reference to a proper subject of recovery.

17 Wendell, p. 161–163, Norman vs. Wells. The court in this case says: "Ought the opinions of witnesses to have been received as to the amount of damages? * * * * * The ordinary, and, in general, the only legal course, is to lay such facts before the jury as have a bearing on the question of damages and leave them to fix the amount. They are the only

proper judges. They are impartial and capable of entering into these ordinary matters. Witnesses are in such cases unavoidably governed by their feelings and their prejudices, gathered from many sources." After speaking of the admissibility of the opinions of experts in matters of science, the court says: "this is the only evidence of the kind, I venture to say, which can be received. * * * * I can perceive no analogy between such a case and the one at bar. Surely there can be nothing like science in ascertaining the loss of this plaintiff from a rival factory. * * * There is no reason for receiving opinions, but a very powerful argument against it. The single opinion of no man can be followed. The best would be utterly delusive. Even where a witness is able to speak to all the facts of the particular case, his opinions are not to be received." And a new trial was granted in this case on the sole ground that the opinions of witnesses as to damages were received.

For this same doctrine fully discussed, see case of Lincoln vs. Saratoga and Schenectady R. R. Co. 23 Wend. page 425. In these cases it is said, "the difficulty, if not absolute impossibility, of knowing all the facts which would warrant an opinion in a witness, the variety of circumstances to be considered upon which different witnesses would pronounce different opinions, render it unsafe and unjust to subject juries to the influence of such opinions."

These various decisions upon the competency of the opinions of witnesses as evidence, are peculiarly applicable to the case before the court. It does not at all appear that the witnesses who testify as to the business of Mrs. Fahs, have any such knowledge of it as qualified them to testify concerning it. The proof nowhere shows that they knew all the facts requisite to form a definite opinion. Nor does it appear that the facts which they did know were such that any two witnesses would entertain concerning them the same opinion. Of ten witnesses testifying as to the business and profits of a milliner, it would not be surprising if no two of them should agree. They might, and probably would, differ in opinion as to a score of circumstances going to determine the question of profits, and the opinion of one of them would be as good as that of another. Such testimony can not be satisfactory or conclusive.

7. If improper or illegal testimony has been admitted on the trial, the judgment will be reversed.

Graham & Waterman on New Trials, vol. 1, p. 237: "If the judge at the trial decide to admit illegal testimony on the merits, the verdict will be set aside and a new trial granted."

Same, p. 238: "This rule has been held in the State of New York to apply to a judgment in error when improper evidence has been admitted, although only cumulative."

Same, p. 240: "It is well settled that if improper evidence be given, although it may be cumulative only, the judgment must be reversed; for who can say what effect such evidence may have had on the mind of the jury?"

It may be difficult to determine in the present case what portion of the verdict of $4,000 is to be ascribed to the proof concerning the millinery business. But no one, on examination of the proof, can evade the conviction that this testimony contributed largely to the excessive verdict. It presented in figures, with somewhat of definiteness, the amount of injury to business suffered as a consequence of the personal injury. It is unreasonable to suppose that such estimates presented to the mind of the jury did not contribute essentially to form their verdict. There is reason to believe, indeed, that this injury to business was the only thing which seemed really tangible to the jury, and from it they drew their conclusions as to the amount of compensation to be paid to Mrs. Fahs. But as the testimony on this point was wholly illegal, the judgment will be reversed.

8. It follows from the above points, that the 5th instruction of the judge was erroneous. That instruction was as follows: "In determining the question of damages, if the jury find for the plaintiffs, they will consider the character of the injury, its results to the injured party, her condition and business in life, and all the circumstances and facts permitted in proof, and give such sums as they believe plaintiffs should receive."

This instruction was calculated to mislead the jury as to the law. 1. It implied that in this action it was proper to unite the personal injuries to the wife, with the injuries peculiar to the husband. 2. It implied that remote and conjectural injuries were proper subjects for damages. 3. It implied that the testimony in reference to such contingent and speculative injuries was proper and legal. 4. It implied that the *opinions* of witnesses were competent testimony in a case of this kind. 5. It ex-

pressly instructed the jury that they should consider this testimony in determining the question of damages; all of which was erroneous and contrary to law, and furnishes cogent reasons for a reversal of the judgment.

The above points are the chief ones which the defendant in the court below would urge here, in support of the application for a new trial of this case. There are, however, other reasons which may be mentioned as auxiliary to those already presented.

1. The second instruction for the plaintiffs, in effect, lays down as law, that the defendant was bound to make an examination of the railroad track prior to the passage of each train over it, and of each portion of the track on which the train was to pass. Is that the law? or is a railroad company chargeable in law with negligence if they do not give a careful examination to the track prior to the passage of every train over it? Such carefulness is so nearly impracticable that it is not to be held as required by law, and the instruction is therefore erroneous.

2. The damages are excessively large. There is no aspect of the case which would warrant the jury in giving vindictive damages. There was nothing in the conduct of the defendant so morally wrong, or culpably negligent, as to call for exemplary damages. By the testimony of three competent witnesses, two of them, old and experienced practical railroad men, and one of them for years a builder of track, it was proved that the accident was due to a cause not within the control of the defendant. There is but one witness, Lambert, whose testimony would seem to prove negligence. But an examination of his evidence shows that, even by the testimony of plaintiffs' own witness, due care was exercised by the defendant on the night in question. He says: "The company had kept sentinels all along the road at nights to give warning, and had them on the road that night. Saw a signal lamp near where the accident occurred, and saw the two Butlers who had been out for that purpose."

Lambert does indeed say that he "observed about where the accident occurred there was a chair slipped and rail drawn."

But that this was not the cause of the accident is proved by the fact that a pilot engine passed safely over the spot. This same Lambert, too, in his testimony, concurs with three other witnesses in stating that it "had been raining and the ground was very soft when the accident occurred; the whole track seemed to have slipped; rails, ties and all went over to the north." This is plaintiffs' testimony, and in fact assigns the true cause of the accident, as three other witnesses do, to wit, the heavy and continued rains softening and saturating the entire embankment, so that it settled away and yielded under the weight of the train, having undoubtedly commenced settling before being reached by the train. The fact of a chair having slipped is so far from being conclusive as to the cause, that it would be very unreasonable to seize upon that as the sole cause, in the presence of another one much more plausibly and reasonably to be regarded as the true and adequate cause of the disaster. There is not the slightest evidence that the train left the track at the point designated by Lambert. It might have deserted the rails ten or fifty feet on either side of the misplaced chair. If it did go off near it, that precise point would have been involved in the general sinking of the embankment, but it would furnish no proof that it was the efficient cause of the catastrophe.

Lambert's opinion that an accident would occur where the chair was out of place, is no proof of liability to disaster there, for there is no evidence that he was a competent judge as to whether there was danger or not. Perhaps another man, and a better judge, would have had the opinion there was no danger. According to Lambert's own testimony, the two Butlers had been out on the track to do sentinels' duty where the accident occurred, and if there was any chair to be seen out of place, they may have judged the place safe notwithstanding, and from all that appears their opinions were as reliable as Lambert's. It is by no means an accepted and established railroad fact, that a misplaced chair threatens danger; and the proof is, that a pilot engine travelled safely over it. But the 2d instruction of the court not only taught the jury that the law held railroads to a degree of carefulness never practised and next to impracticable, but also was calculated to mislead the jury into the belief

that the misplaced chair was the sole cause of the accident, and that a due examination of the track there would have prevented it, when there was a very great preponderance of evidence, furnished by both plaintiffs and defendant, showing that another, altogether natural and sufficient cause had induced the disaster, and that cause not controllable by the defendant. There was, therefore, no such culpable negligence as would warrant the jury in finding vindictive damages, and the judgment should be reversed on account of the excessive amount given.

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