14821

No._____

Supreme Court of Illinois

C. B. & Q. R. R. Co.

vs.

Triplett, Admr.

71641

JAMESON & MORSE, Printers, Chicago.

SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1865.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
vs.
SAMUEL TRIPLETT, ADM'R OF WM. H. WELLS, DECEASED.

ABSTRACT OF RECORD.

Record page

DECLARATION.

23 The declaration is in case in the usual form, and alleges in the first count, in substance, that the plaintiff is administrator of Wm. H. Wells, deceased, and that the defendant, in the lifetime of the deceased, and on the 16th day of November, 1861, was possessed of the railroad and train of cars in question, and that the latter, under the direction of defendant's servants, was running upon its railroad, near the point where the same crosses the Princeton and Dover highway, whilst the deceased was ap-
24 proaching the crossing from the northeast, where from a distance, to wit.: seventy-five yards before reaching the crossing, the deceased was unable to see the crossing. That it was the duty of the said defendant to have upon its engine a bell of thirty pounds weight, or a steam whistle; and that it was also the duty of said servant of the defendant to have rung the bell or sounded the whistle continuously for eighty rods before reaching the crossing, so as to give notice to travelers on the highway, of the
25 approach of the cars; that on account of a cut, or excavation in the railroad east of the crossing, and in the highway west of the crossing, and trees and hedge fence between the railroad and highway, the deceased could not see the approaching train, and could only be advised of the approach

of the same by the sounding of the whistle, or ringing of the bell; that whilst the deceased was traveling over such excavated part of the high-
26 way, approaching the crossing from the northeast, the train was approaching from the east at a great rate of speed, to wit., at the speed of thirty miles an hour; that defendant's agents carelessly, negligently and culpably omitted to ring the bell or sound the whistle of the engine as soon as the cars had approached the whistling post, eighty rods east of the crossing, and *also omitted to ring the bell or sound the whistle continuously from said post to the crossing, as it was their duty to have done*, but ran the cars at such rate of speed from the whistling post to the crossing without a *continuous* ringing of the bell, or sounding the whistle; that the deceased, traveling in a buggy upon said highway, and being unable to see the approach of the engine and cars by reason of the premises, with all due caution and care drove upon said crossing,
27 and whilst his buggy was upon the crossing, moving at the usual gait, without any previous notice to him by ringing the bell, or sounding the whistle, or otherwise, of the approach of the train, the said defendant, by its said agents, ran upon said crossing said engine and cars, and struck the buggy, and the deceased sitting therein, with great violence, threw him out at a great distance, and the deceased was thereby so injured that he died. *That said casualty was not the result of any want of proper care and caution on the part of the deceased, but was the result of the neglect and culpable omission of the agents of the defendant to ring the bell or sound the whistle, and to continue to do so from the whistling post to the crossing.* That the deceased was the head of a fam-
28 ily, residing with the same, consisting of his wife and four minor children, dependent upon him for support, and two adult sons, and that plaintiff is administrator, duly appointed, and that defendant is liable to him for the amount of damage and pecuniary loss occasioned to said widow and children, by reason of the death of said deceased.

28 The second count is substantially like the first. It, however, alleges that the train in question was a gravel train, with the cars in front of the
31 engine, and alleges that it was their duty to have commenced ringing or whistling when the west end of the train had reached the whistling post, and to have continued to have rung or whistled till the crossing had been passed, as required by the statute; that the defendant disregarded those requirements of the statute, and did not commence to ring or whistle when the west end of the gravel train reached the whistling post; nor
32 did they *continuously* ring the bell or sound the whistle from the post to the crossing, by reason whereof, the deceased being unable to see the train, seated in his buggy, at the usual gait drove upon the crossing, when the train struck the buggy, and the deceased, and so injured him that he then and there died.

That the *casualty was not the result of the want of proper care and caution on the part of deceased, but was the result of the omisson of the defendant to give notice of the approach of the train by a continuous ringing of the bell or sounding of the whistle, from the whistling post to the crossing.*

To this declaration the defendant plead the general issue, and the case came on to be tried in the Kendall County Circuit Court, before a jury, on the 12th day of April, 1864.

ABSTRACT OF PLAINTIFF'S TESTIMONY.

David S. Greely testifies in substance, that he is a farmer, has lived in the county thirty years, and knew Wells, and saw him on the 16th Nov., 1861. I was returning from the depot at Princeton, with a load of lumber, going east on the Princeton and Dover road. I come along slowly till I got within one hundred and fifty steps of the crossing; heard the whistle of a train coming from the east, but could not see it. I stopped my team, because I never allow myself to drive on to a railroad, when I can hear the whistle. The train then come on to the whistling post, and then blowed one whistle. It came on, and I could see the smoke stack, but I could see no cars where I was, till the train came out to the cattle guard, on the east side of the road. I saw this Mr. Wells coming slowly up the rising ground, southward, and reached the point of the hill, previous to the sound of the whistle I heard.

He had a covered buggy, and came slowly, on the sloping grade. I was standing on my load of lumber, and I should judge, from my position, that his horse was struck; he started quick, and just as he started to cross the track, I saw the cars come on to the cattle guard; the cars were before the engine, and were flat cars. I knew, in a moment, it would be impossible for the man to get out of the way; the end of the car struck the buggy, and it was thrown into the air. I went down to the cars; saw several men, and they said they guessed the man was killed. The engineer cut the train, and I went across the track to see the man that was killed. I examined his pulse, but could find no signs of life, and I soon recognized the body. The sun was then about three-fourths of an hour high. The day was somewhat cloudy, but the sun was shining at the time. Saw the man in the buggy coming on a slow walk up the hill, before I heard the first whistle.

47 Witness is shown a diagram, and says it is correct; deceased was a little west of Phelp's house when I first saw him, and the train was in the east cut. When Wells' horse started, he must have been about the
48 centre of the cut, on the highway, and *right below him was a young man and a young lady in a buggy, and they stopped right at the mouth of the cut, the horse right on the summit.* When I first saw them they were five or six rods behind Wells. I could see the smoke stack down as far as the whistling post, and knew a train was coming because I heard it whistle.

49 I think a person passing down into the cut from the east side, half-way, could not see a train till he gets right on to the railroad. There was a hedge with leaves on, and a fence seven or eight feet high. Will see a person when one-third the way down; could not see a flat car till they got down to the road.

50 The dirt is thrown out of the cuts, both from the highway and from the railroad, forming a bank twenty or thirty feet high, and a person could not see, if in a buggy, even. The pile runs with the state road. There are also a hedge and two fences, the railroad fence and highway
51 fence. The hedge was several feet in length. I should say at fifty feet from the track, going up, you could not see these flats, if you stood up in an open buggy. There would be two strong obstacles, the fences and
52 the dirt. I saw the flats first when they come on to the cattle guards. The obstructions on the south side where I was, were greater than on
53 the north side. Wells was in a covered buggy. From where his horse started, to the track, was fifty feet, I should think. Locomotive was some three or four hundred feet from the crossing when the cars struck
54 the buggy. Think there were fourteen flat cars; my attention was not called to the fact at the time. I counted them at the time, but did not take any notes, so that I could swear to the number. Do not know where the engine was when I heard the whistle first—could not see it. A school house was between me and the train. *When the train passed the whistling post I heard the whistle, and I supposed it was at the whistling post.* The first I saw was the smoke stack, about two-thirds of the way from the post to the crossing. Could see them when they got about half-way from the post to the crossing. It was just one
55 whistle; nothing but an ordinary one, not a long one, at all. It was probably a little more than to take off brakes. I recollect they whistled once, and they whistled twice to put down brakes. When they whistled to put down brakes, the noise of the whistle and the noise of the collision were so near together, that I do not suppose that he whistled till the collision took place. I do not think the cars passed over a space more
56 than half the length of the train, and I think they were going thirty miles an hour—and more than that. I am positive that they were going

more than twelve miles an hour, because they would not have produced the concussion they did at that speed. The end of the car went one hundred feet, up the bank nine or ten feet; and the forward trucks were knocked off the cars, and this shows the speed they were running. The
57 slope of the embankment was forty-five degrees. The car was not on top of bank, but the end of the car when the wheels were off, went to the top.

57 The end was from a half a foot to two feet above the top of the bank. The cattle guard was much torn up, and the axle to the buggy was standing up in the cattle guard, and the ground was considerably torn up. It is forty steps from the crossing to the top of the bank. The
58 whistle did not blow all the way from the post to the crossing; I should have heard it if it had. The bell was not rung, except by the collision, which made it ding once or twice. There were two whistles to down brakes, just as the end of the car passed out of the cut, about fifteen feet from the buggy. The speed was not checked; if brakes had been put on, wheels would have slid, and train could not be stopped in fifteen nor
59 twenty, nor forty feet, at that speed. The horse was just coming on to the track as the whistle blew for brakes. The buggy was badly broken to pieces.

60 Wells was upwards of fifty years of age. His business was sawing wood, principally, had a family, and lived with them; think he was an industrious man. There was not much wind, but what there was
61 would be rather against Wells hearing the whistle. The whistle was a short one. Engineer could have seen Wells all the time, except when
62 he was behind the obstructions, (pointing them out on the map.) Sitting in my buggy, half-way up the slope, I could not see a freight train till it
63 got thirty rods from the crossing, and if they had been flats I could have seen them at the whistling post, looking through the fence.

64 On cross examination he says: I was on the main road with a span of horses and a load of lumber, and was one hundred and fifty steps south
66 of the crossing when I heard the first whistle, and stopped my team and stood still about two minutes, till the collision took place. *I was stand-*
67 *ing up on my load, and got up to see if a train was coming. I generally do this when crossing a track of a railroad; but in a buggy, if I have not time to cross, I stop; I never attempt to drive over a railroad when a train is coming.* A man is more likely to get into trouble if he is loaded than when not loaded.

68 *I stood up on my load and saw a young man—a boy it was—with a lady, driving right behind him—Wells—five or six rods apart.* They stopped at the edge of the cut, four rods from top of hill. *They stopped*

because there was danger; they were in an open buggy, and could see the cars. I saw no other person, but was informed there was also a man on horseback.

74 Standing fifty feet from the track, in the center of the highway, I could not see anything on the track, for thirty rods east; but east of
75 thirty rods I could see. Was never in any manner employed on a railroad, and have no particular means of determining how fast a train runs, except by the eye, and I could not see the cars till they reached the cattle guard, but saw the smoke stack half to two-thirds the way to the whistling post. I took no pains to ascertain how fast the train was running.

77 The brakes were put down, and engine reversed, and the speed was slackened, or at thirty miles an hour all the cars would have been thrown from the track, and broken to pieces. The speed was slackened one-third, whatever it was. *It is my invariable custom when approaching a crossing, to observe and listen, to ascertain whether a train be coming.*
77 I do not think I *ever crossed a railroad track without taking notice; I think it is a proper thing for me to do. I think it is safer for me and my team, and probably it might be safer for some one else, as well as myself. I think it would be prudent for every man to do that.*

78 H. C. Field testified that he lives about a mile northeast of the crossing in question, and about thirty rods from the Princeton and Dover
80 road, and knows the crossing in question; running north from the cross ing seventy to seventy-five feet, *to the sign post the company have there, and immediately after you pass under that,* there is an embankment on the right, thrown out of the highway; never measured it; cannot give its length. If you stop under the sign board, you cannot see the cars anywhere east. Sitting on a load on a wagon you could not see the smoke stack for probably seventy-five rods from the crossing to the east,
81 and when you drove up the bank there was an osage orange hedge and board fence, which obstructed the view of a train coming from the east. The bank extends somewhere from twenty to thirty feet, and all that distance it would hide the train from view; after the bank there would be a few feet where there would be no obstruction, except a board fence. There was but a few rods of hedge that was of any account; the balance
82 was scattering. There was no obstruction in the remainder. The highest part of the hedge might have been ten feet, and I think the leaves were on at time of collision. The hedge stood well for a few rods, and but for a few rods. Between the bank and the hedge there might have
83 been thirty feet, where the view was not so much obstructed. A man traveling on the highway, for three hundred and fifty feet east of the

crossing would not see the flats, but could see the smoke stack. I always considered this a dangerous crossing, and more dangerous on the north or east side.

84 I knew Mr. Wells; have known him ever since I lived in the State, seventeen years, nearly. He was an industrious man; dug wells; was sexton, and dug graves for several years before his death. I have for a number of years employed him to do this. His habits for sobriety were good. I have known him for a grave digger for twelve years, now I come to think. He charged from two to three dollars each; worked in all three of the grave yards. In Princeton there are three thousand, and thickly settled country around. He also dug cisterns and wells;
89 might have been sixty years old when he died, and possibly older. I suppose he could do a day's work easily. He was healthy, except his *eyes. His eyes were not good.* I think the embankment was eight feet high above the railroad track.

89 On his cross examination he says: From the track to the *sign board was* seventy-five feet. This bank is pretty near to the highway, and being slightly higher than a man's head, is what I mean by the obstruc-
90 tion. This extends about thirty feet, but the other side of the knoll there would be some part of the train that could be seen. Between the bank and the hedge you could see the train distinctly. When you reached the end of the hedge, you would be pretty near the top of the
91 hill, and I do not say that the hedge was so thick that, standing on the top of the hill you could not see the train, but when you got north of it, I said I presumed you could see the train through it. On the high ground there would not be a very great way that the hedge would ob-
92 struct the view. Traveling on the highway at a point where the bank would offer an obstruction of the view of the railroad, at an ordinary rate, and a train of cars coming at three times the speed of the team, I could not tell how far the train would be from the crossing, when the view would be obstructed. I am not of opinion that the view of the train would be obstructed on the embankment, and if not you would see it when it came out of the cut, there,—pointing to the map. Standing in front of Phelp's house, the hedge would not obstruct the view of the cars on the embankment between the east end and the cut. There would be but a very short distance that could be obstructed by the hedge at all. Should not think the hedge more than five or six rods in length, that would obstruct the train. Hedge could not have been very large at the
94 time this accident occurred. As you pass northward from the track, there would be seventy or seventy-five feet that there would be no obstruction to seeing a train coming on the track, and only about thirty feet of the bank that afford any obstruction. I did speak of his sight

and hearing. Have heard him call by name, but what ailed him I never knew. His eyes looked sore. He wore spectacles. Knew Wells for fifteen years.

96 Wells lived in Princeton. I don't know where he had been on day of accident, but he had relatives, Mr. Triplett, the plaintiff, living north of the town. Wells had lived in Princeton seventeen years, and this highway was then laid out, and was in constant use all the time; was in Princeton all the time the railroad was being constructed. A man
99 standing near the sign board would have no difficulty in looking down the track and seeing anything that might be upon it.

100 William Cooper, testified that he lives in Bureau County, three miles east of Princeton, and about eight miles from the crossing in question, and has lived there twelve years. At the time of this accident I was riding along the road on horseback, behind the buggy in which Wells was driving; and some little distance before I reached the crossing in going up the hill, the passenger train went along. Wells drove along, and I rode along after him, till the time I stopped, when he was probably one or two rods ahead of me, and at that time a gravel train of
101 flat cars was coming along from the east. I first thought I would have time to cross, and then I changed my mind, and thought I would stop there. Wells kept driving along, and I presume he intended to cross, *but he drove slowly, and when he had got five or six rods from me I called to him, to warn him that he would be too late to cross. He either did not hear me, or paid no attention to what I said;* and I thought he intended to stop when he got near the crossing.

I had no idea he intended to cross at all, till the horse stepped on the track. Just before that, I saw that he made no effort to stop, and I exclaimed at the time, "*Surely, that man is not going to cross!*" *There was no one near me at the time, but I made the exclamation, and aloud, too. It was the anxiety, excitement and agitation of the moment, and the danger which I saw was so evident, that I made the remark.* Just as he struck the track, the whistle blew for breaks, which were put on imme-
102 diately, but the next moment the car struck the buggy. The car which struck the buggy, had a flag. It struck under or on the hind wheel of the buggy, but the horse got clear. I tied my horse in front of Phelp's house, and went to the crossing, and found the man dead.

He was carried by the cars, thirty feet from the crossing. He was not bruised or mangled in any way; he bled at the mouth and nose.
103 The buggy was broken into small pieces. One car was run up the bank, but the engine did not reach the place where the buggy was struck, before it was stopped. The bank was nine or ten feet high. There was about two feet to one of grade. I fell in with deceased, and traveled

behind him for a half a mile—a mile, perhaps. He overtook and passed
104 me. Wells was thirty or forty rods from crossing, when I first saw the gravel train, out eastward, coming out of the cut, near a half a mile, I suppose, from the crossing. We were not up to Phelp's house, by ten or twenty rods, when I first saw them. I stopped in front of Phelp's
105 house, and Wells was one or two rods ahead of me. When I hailed him the cars were running along past the whistling post. He drove along the same slow rate, and the whistle blowed just as the horse was stepping on to the track. There was a place where I could not see the
106 flats. From the crossing there is some little distance north of the crossing, where, if a man looked, he could see the train, and those on the train could see the buggy. From there, perhaps two rods from the warning board, where a man could not see a train on the track—I mean
107 just at the embankment. Wells was in a covered buggy, with the top up. I saw the train when it whistled at the whistling post, and this was about the time I stopped by Phelp's house; Wells was one or two rods ahead of me then—not in the cut, but just going into it.

108 Locomotive was east of the whistling post, and the flats were passing it when I heard the whistle, and perhaps one, or two, or three of the flats had passed the post when I heard it, and the balance had not come to it. Cannot tell how long the whistle sounded; think engine had not reached the post when it stopped; and it did not whistle again; if it had I should have heard it—there was nothing to prevent it. I did not notice the hedge, but there was a fence. The whistle was one blast—not very long or very short—it was as they usually whistle. There was not much wind. The train was running about the speed of a passenger train, and more than twelve miles an hour. They ran with such force that one end of the car climbed up the embankment nine or ten feet.
114 There were ten or twelve flat cars. It was late in the day, near sundown. I heard no bell ring. I think the smoke stack of the engine might be seen from the highway, all the way through the west cut.

116 On his cross examination he says: *The track opposite where I first saw the cars, is on an embankment eight or ten feet high, and might be more, and from that point to where I stopped, I could see the cars all the way; they were on the embankment; any one, by looking towards the*
117 *railroad, could have seen them at any time.* When Wells was half way from where I stopped to the crossing, I hallooed to him, but he paid no attention to it. Two or three rods where the train could not be seen, but when within sixty or seventy feet, the train could be seen, and after he passed the warning board he could stop and look up and see the train
118 on a straight line to Arlington. The first thing that called my attention to that train, was the whistle at the crossing east of the whistling post, and east of the east cut. I saw the cars when they came out of the east

cut, and there was no difficulty in seeing them all the way to the cut at
121 the crossing. *If Wells had put his head out of the buggy, and looked in the direction of the railroad, he could have seen the cars.*

F. H. WINSHIP testifies that he is a surveyor—county surveyor, and has made a map of the highway and railroad at the crossing—and this is it. It is made from notes made on the spot—and the map is exhibited.
123 The railroad cut is five feet at the crossing, and gradually runs out at about six hundred and seventy-one feet east of the crossing, and then there is an embankment of eight feet and more. There is a bank between the railroad and highway, of earth, twenty-eight feet long, and
126 three feet above the natural surface. The cut is eight and one-third feet from top of this bank. There is a board fence four and one-half feet high; a hedge, also, one hundred and twenty-eight feet long, and eight feet high, and well set for a part of the way, as indicated on the map. It is seventy-nine feet from the cattle guard to the crossing. From railroad track north two hundred feet, it is excavated in the highway, and then for six or eight rods more it rises, and then descends for eighty rods. Whistling post is thirteen hundred and twenty-nine feet east of
128 the crossing. From end of cut at crossing to the west end of next cut east is fifteen hundred and fifty-six feet. This cut is about four and a half feet deep. From crossing to top of bank is one hundred and eighty-five feet, and bank is nine feet high; warning board seventy-five feet from track, and extends clear across the highway. The length of the
129 bank which obstructs the view is twenty-eight feet, and here I could not see a passing freight train. The hedge obstructs the view in that direction for three hundred feet. From the warning board to the track, a person can see up the track to the whistling post.

A man at four miles an hour passes over five feet and ten inches a second. A train at thirty, forty-four feet in a second. Eastern cut two thousand feet from crossing, and cars could be seen on highway thirty or forty rods from crossing, when coming out of this cut.

I was acquainted with Wells, and had been for twenty-four years. His general occupation was a carpenter. For a number of years he was employed in different cemeteries as sexton; was about fifty-five years old. He was a tolerably smart man, and could do a day's work. Saw
134 him frequently; know nothing but that his sight and hearing were good.

On his cross examination he says: Wells had sore eyes, and wore spectacles. Do not know his age, it is mere guess-work; he might have been sixty-five. Think he worked at carpentering sometime in 1860, but can't tell where.

At five miles an hour it would take twelve minutes to the mile—six to the half mile—three to the one-fourth mile—one and one-half minutes for forty rods—three-fourths of a minute for twenty rods. A railroad train at thirty miles an hour, would be one mile in two minutes—a half mile in one minute—one-fourth of a mile in one-half minute. Here follows Winship's map.

145 Wm. M. Fisk testified that he resides in Princeton and has known Wells over three years, and lived neighbor to him. Heard Wells was killed at the crossing in question as I came down from Mr. Phelps' barn.
146 Barn was fifty rods from the crossing. I saw a gravel train of flat cars about five o'clock moving towards the depot. As it neared the crossing saw a horse and buggy drive on the crossing, and about the time the
147 train struck the buggy I saw an escape of steam and heard the whistle sound twice. Saw the horse go quickly across the track. Saw nothing of the buggy after the horse crossed the track. Saw the cars pile up on the side and the train stop, and that is all I saw of it. The cars approached the crossing from Malden, and the horse and buggy was going towards Princeton. Saw the cars first not far from their whistling post. I heard no sound of bell or whistle except the two I have mentioned.
148 Think if there had been a continuous sounding or ringing I should have heard it. The night was clear and sun shone. The engine was pushing the flat cars—and ran at about the speed of a passenger train. Speed
149 was not checked that I could see, and if it had been I could have seen it.
150 *A traveler on the highway could have seen the cars approaching the crossing most of the way, but should say there was more than one hundred feet on the railroad near the crossing where the flats could not be seen.*

There was a pleasant breeze from the northwest, but not such as to
151 obstruct the sound. Wells worked at carpentering and gardening. Was sober. Cannot state the pecuniary loss to the family. He left a house
152 and lot. I believe if the whistle had sounded all the way from the whistling post Wells could have heard it.

On his cross-examination he says: At the time I was in a barn pitching hay, and looked through a space between the siding. What
153 first called my attention, was, *I heard the cars coming.* No door or window in the east end of the barn. The crossing was southeast from the barn and as much as fifty rods away. I could see from the barn to the
156 whistling post; *I heard the cars coming before I saw them. Heard the*
157 *train coming two miles before it got to the crossing. Sound was good and weather clear.*

161 GEORGE W. PHELPS testified that he lives in Princeton, and was 60 rods northwest from the crossing at time of accident, husking corn and did not see the train before the accident.

162 *I first heard the train as it was coming down the road. I then heard a whistle and I think at the whistling post. I heard then a whistle twice afterwards. Heard the noise of the collision. Think I heard them reverse their engine.* When I heard that some one was killed I went to the crossing and saw the body of Wells lying there. *The first whistle was about the length of time they usually whistle.* It was not a short blast,
163 it was rather a prolonged blast. Train might have run from six to ten rods if they were on the usual speed of a passenger train, and then would run at same speed I should think fifty rods between the post and second whistle. There was sufficient time between the reversing the engine and blowing the whistle and the noise of the collision to enable me to
164 distinguish them distinctly. This was about five o'clock. *My impression is that the train was not at the time running as fast as the common freight trains.* The engine was taking down a train of from 12 to 15 flat cars, I should judge. I think the whistle was not a continuous one.

165 At the crossing the railroad is in a cut for about two hundred and fifty feet out of the crossing—the highway is a cut, and between the two is an embankment, a fence, and fifty feet from the railroad, a ledge. I do not think a traveller in the cut on highway could see a train of flats approaching from the highway. Think if the whistle had blown continuously from the post Wells could have heard it.

166 On his cross-examination he testified: The barn in which Fisk was pitching hay was one hundred and fifty rods northeast from the crossing. Phelps' house would obstruct the view from the barn of the railroad all the way till it went into the cut about two hundred and fifty feet from the crossing.

169 Since I knew Wells he has followed digging wells, cisterns, graves, working round by the day.

170 WILLIAM BACON testified that he lives at Princeton, and is a physician, and had been acquainted with Wells ten years before his death. Wells left a widow, five minor children, four daughters and one son, and two adult sons. Wells lived with his family while I knew him. He was a sober, industrious, prudent man, his health was good and he was a hard working man—worked in grave yards as sexton, and in his garden. He left his family a house and two lots—no other means of support. Wells was a carpenter and rough joiner and worked at his trade.

172 While I knew Wells, his hearing was slightly impaired, and from this cause he appeared a little stupid.

174 On his cross-examination he says: Wells' vision was also imperfect. He could see large objects distinctly, but not small objects. It was difficult for him to read. He complained of his eyes. He had inflammation
175 in his eyes occasionally. He was troubled a good deal of the time with his eyes.

JOHN VAUGHN testified that he resides at Princeton and has known Wells twenty-five years at Princeton. He was a sober, industrious man. He left a family of three boys, five girls and his widow. He worked at carpentering when I first knew him, but after he had *sore eyes he could*
177 *not see sufficiently to work at that.* His eyes were so bad at that time that he could not well support his family. He afterwards worked at packing pork, digging and plastering cisterns, and lastly at digging
177 graves. *At the time of his death his sight was pretty dim and he could not see to read a hymn. He bought a book with large type but had to give*
178 *up reading it.* I have heard others say he could not hear as well as he had done. Have heard said he was a timid and cautious man. He used to go out with a horse and buggy when he wanted to, and I have known of his going up to his brother-in-law's.

181 On cross-examination he says: *Wells could not see at a distance, and his trouble came upon him at about forty-three or four. He lay about a year and then got partially better, and then he had a spell come on again and he told me he could not tell his own cow from another till he got close up to her. It has continued ever since—sometimes not so bad, sometimes worse.*

E. C. CHAPMAN testified that he lives at Princeton, and is acquainted with the crossing in question, and has examined the ground. The highway is cut down and the dirt thrown out so as to obstruct the view of
183 cars approaching from the east. There is some distance west of the whistling post where the cars might be seen. I consider the crossing a dangerous one. I knew Wells for fourteen years, and considered him a temperate and industrious man. His employment was that of digging graves, cisterns, &c.

On cross-examination witness says: The embankment north of the railroad constituted the obstruction. On the summit of the hill in front of Phelps' house a man could have a better view of the railroad than at ordinary crossings. The embankment *was within the limits of the highways.*

189 The letters of administration on the estate of Wells to the plaintiff were then read to the jury.

DEFENDANT'S TESTIMONY.

DANIEL MCDONALD testified that he resides at Princeton, Bureau County. Am merchant, and from 1860 to 1862 was sheriff of Bureau County. Knew Wells and had known him since 1848, and am acquainted with the crossing in question. Witness is shown Mr. Hudson's map, introduced by defendant, and says, I have examined the ground and
193 surroundings at the crossings. At this crossing there is a depression of four or five feet. From top of eminence at Phelps' house should think it near ten feet. From railroad track north there were seventy or seventy-five feet where cars could be seen distinctly on the track east, then as I moved up the highway for twenty-five or thirty feet could not see the flats, but could see the smoke stack all through.

The experiment was made with an engine and five or six flats, and when I moved north of this point I could see the flats distinctly. The
194 flats were moving in the cut; only twenty-five or thirty feet of obstruction to seeing the flats. Saw smoke pipe all the way. After passing this twenty or thirty feet, one or two of the flats were obscured, but I could see the hind and forward end of the flats till we got on to the summit, and then we could see them all. When you get on the high ground on the highway, you can see the track itself all the way to the whistling post. I stood up in a buggy on the highway, and then I could see the whole train, flats and all, all the way from the crossing to the whistling
195 post. Phelp's barn is from a half to a quarter of a mile from the crossing. A person in the barn could not have seen a horse and buggy on this crossing, I think. The barn is much lower, and the bank up which the end of the car run would prevent it. On the high ground in front of Phelp's house I think I could see the train all the way from the west cut to the crossing. We made that experiment.

197 Wells was from sixty to sixty-five. His eyesight was always quite poor since I knew him, and failed through some of his last years. Was acquainted with him from 1848. In 1860 I think his eyesight was poor, and do not think he could do much. He was a little deaf. Had he lived, I think, for the next four or five years, his services to his family
198 over his own expenses and support might be worth from fifty to seventy-five dollars per year—after that, nothing.

Wells lived at Princeton from 1848 to the time of his death, and one and a half miles from the crossing, which is on one of the most prominent roads in the county. Wells had two brother-in-laws that lived on this road north of the crossing, and Wells would have to cross it in going to their places.

On cross-examination he says: Never saw Wells labor after 1857.
203 I think any man a pecuniary loss to his family if competent to give advice and direction. I stood up in the buggy and rode slowly to the high ground and observed the cars all the way in the cut. The cars started from the post and backed down. In sitting down, I think there
204 was some twenty or thirty feet in which I could not see the flats, but
207 could see some part of the train. The train ran, I think, to pretty near the second cut. Mr. Kendall, Mr. Walker, Mr. Waleron, Mr. Jones, and another man took his buggy and made the experiment. Some rail-
209 road men were there picking up ties. The railroad party got up this train with a view to making the experiment.

211 O. S. Jones testified that he lives at Princeton, and has for eighteen years, and has known Wells during that time. I saw him as he lay dead at the crossing. He was at my office a good deal. His sight was poor, but could read a newspaper with some difficulty. I lived within eight
212 or ten rods of Wells. Do not think he could hear an ordinary conversation. His difficulty of hearing and seeing had existed for fifteen years, I think. Four or five years ago he used to dig and make cisterns, but then he gave that up and worked in gardens and dug graves.

214 I was present when an examination was made of the ground and crossing in question. For the first seventy feet from the track crossing up the highway, you could see the track eastward to near the second cut, both while sitting in the buggy and standing on the ground, and then there was twelve feet where you could not see the flats. I stood here, pointing on the map, and another man stood twelve feet from me and measured the distance in that way. The flats were standing in the cut at the time. I meant to say that I went up as far as I could keep sight of them and stopped, and another man standing twelve feet further up
216 could see them. Wells lived at Princeton when the road was built, and where the whistle of the trains was freely heard. We hear them every day—and Wells had friends living up beyond this crossing.

217 Cross-examined, he says: Wells was an industrious man, so considered; health good, but eyesight poor. My opinion is, you would have to speak louder than in an ordinary tone to make him hear.

H. W. Kelley testified that he had lived at Princeton since 1852 and knew Wells at Princeton during that time. Am Constable, and have seen as much of Wells as I have of a majority of men there, and know him well. He was about sixty, and has lately worked in gardens
220 and dug graves. His sight and hearing was bad, and his sight has been affected ever since I have known him, and was quite bad a portion of the time. I think the value of his services would be from fifty to seventy-five dollars per year over his own expense and support, and if his eye sight should continue to fail as it had done beyond four or five years, his services would not have been worth anything.

224 I have been on the ground at the crossing in question and made experiments there. Here, pointing to the map, is the sign-board, and this is seventy feet from the track. On the seventy feet, cars could be seen eastward on the track. From seventy to eighty feet is the point where you cannot see the cars if there be any, but you may see the smoke pipe most of the way. Highway is narrow through. The knoll
226 may for twenty feet prevent the cars being seen so distinctly, but I do not think there is any point where you cannot see the smoke stack, but go thirty or forty feet further up and you can see as distinctly as below. From the point of the knoll to the hedge would not be more than one hundred and fifty feet, and not that, I suppose; in this space I think the cars could be seen all the way. That hedge was a scattering one, and a man might say he could not see the cars, and then take another step and he could see them. In the whole distance there is not more than twenty feet where you could not see the train.

On his cross-examination witness says: There is no place but what
232 a train—some part of it—could be seen. I know that Mr. Wells in the fall of 1861 was not fit to do anything on account of his eyes. He stated that he could not see, and came into my office to get the news.

Col. I. T. Thompson testified that he has lived in Princeton since
234 1845, and had been acquainted with Wells since that time. Should think that he was sixty and over; his eyes were affected some years before he was killed. He worked at digging graves and cisterns. The pecuniary value of his services to his family after this age would be nothing. He would not earn more than his expenses.

236 Know the position of Phelps' house at the crossing. His barn is one hundred rods from the crossing, and the bank between the crossing and the barn is ten or twelve feet high and obstructs the view, and I do not think a horse and buggy could be seen.

238 I think, from the circumstances, Wells must have had a knowledge of this crossing. The sound of the whistle at this crossing can be easily heard in town where Wells lived. He lived there at the time the road was built—which was in 1853 or 4—and Mr. Triplett, the plaintiff, is a brother-in-law, and lives north of the crossing; I suppose I do know of Wells going up there, but cannot recall an instance.

240 On cross-examination he says: My examination in coming on the train is quite satisfactory to me that a horse and buggy could not be seen at the crossing from the barn.

242 J. K. Waldron testified that he has resided in Princeton since 1856, and was somewhat acquainted with Wells. Wells was about sixty years of age, and his eye sight was poor, and he complained very much of it to me on several occasions in the summer of 1850. He was a little deaf, and I do not think his services to his family, had he lived would have exceeded the cost of his own support and maintenance.

246 I have examined the ground at the crossing. We went up the cut with a train of flat cars and one engine—placed the engine and cars in the cut and started on the Princeton road and passed up by the cut on the road Wells is said to have traveled, keeping an eye on the train, engine and cars, in passing by this obstruction, with a view to see in what part, if any, we could not see the cars. We then moved the train out of the way and placed ourselves behind the embankment, leaving it to pass by us with a view of seeing it. We then got into a wagon and rode up and down, and then walked up and down, with the train placed
247 in different positions, with that purpose in view. We found that, commencing with the track and walking up the road north for seventy feet, we could see the track to the eastward all the way for a mile and a half. We then came in contact with this mound, which is made out of dirt from the highway, which obstructed our view for probably thirty feet, where we could not see that part of the train which was behind the bank, which was flats, but think an ordinary train could be seen at all points, either one end or the other. With the train we had, I think three cars was the most that were obstructed by the bank. We had five or six flat
248 cars, each of which is in the neighborhood of thirty feet. There are not more than thirty feet in all where the view of any of the train would be obstructed.

On cross-examination he says: For seventy feet from the track there was a good view of the track, and a man in a horse and buggy could see it, and those on the train could also see the buggy. I state that in front of the house any train can be seen for a mile and a half, and perhaps two miles.

252 C. H. HUDSON testified to a map made by him from actual survey, and which is contained in the record; that he is a civil engineer, and has followed the business for ten years exclusively. Surveyed the crossing in question, and the track, and cuts, and grounds in the vicinity. And have made a map and plat thereof, and it correctly represents the ground. The map explains itself fully—and can't be abstracted.

A gravel train is one used to keep the road in repairs—the engine draws the train out and then pushes it back.

WINFIELD GREEN testified that he was stationed at Tullahoma in Tennesee, and has been since July, 1862; have since had no fixed place of residence—before that have resided at Aurora, Ill. Am a soldier in the
261 89th Regiment. Recollect the accident in question. The accident occurred by the man who was killed driving his horse and buggy on the
262 track of defendant's road just as the west end of the train upon which I was reached the crossing. It was a gravel train composed of an engine, tender, and eleven flat cars; it had been out on the track east of Princeton, repairing track, and was returning to Princeton. The engine was pushing the cars before it, and we were running at not to exceed ten or twelve miles an hour. There were on the train, John Kinley, engineer, who had charge of the engine, a German, whose name I forget, brakeman, and I was fireman and attended to the brakes on the tender. The railroad and highway for a half mile east of the crossing were very near together, and approached the crossing at a small angle. Near the crossing is a cut five or six feet deep, and gradually runs out a little east of the crossing, and from where the cut runs out to some distance east of the whistling post, the track is on an embankment eight or ten feet high. When the west end of the train reached the whistling post, the engineer began blowing the whistle. He gave one long continuous whistle, which
263 lasted till the west end of the train was near the crossing. As we approached the crossing we saw on the highway a horse and buggy, and a man driving, and another man on horseback just behind him, both approaching the crossing. The man on horseback stopped on the top of the hill in front of a large house, and we supposed the man in the buggy
263 would also stop, but he did not, and as soon as we saw he was going to drive across the track and not stop, the engineer sounded the whistle loudly, and twice in quick succession to put on brakes, which were immediately applied, the engine reversed and everything done that could be to stop the train and prevent accident, but it was too late. We could not fully stop the train. The west end struck the buggy and threw the man out and killed him. Some of the cars were thrown from the track, but the train was so nearly stopped that but little damage was done to it. After the collision the train ran but a few feet. I think Wells could have seen

the train at all points if he had looked, and especially if he had stood up in his buggy.

272 JOHN MCKINLEY testified that he was engineer on the train in ques-
274 tion, and now resides in San Francisco, California. Recollects the accident. Our train consisted of engine, tender, and eleven flats, and was returning to Princeton. At the whistling post I blew a long, continuous whistle. A short distance before reaching the crossing, and while yet whistling, saw on the highway a horse and buggy, and a man on horseback. Man on horseback stopped before he got to the crossing—I thought the horse and buggy would do the same, but when I saw they did not, I whistled down brakes, and reversed the engine. It was too late; the collision occurred, and the man was killed. When I whistled on brakes, they were instantly applied. The train was not going to exceed twelve miles an hour. The engine did not reach the crossing before it stopped. The deceased must have heard the whistle if he had listened. I think Wells could have seen the train all the way. I saw the horse and buggy ten or fifteen rods off, and my impression is, it did not go entirely out of sight in the cut. He could have seen the train if he had looked.

GEORGE HOLLENBACK testified, and gave in evidence the life tables of Wylesworth, that a man at 60 would live 15–45 years. The present worth of an annuity for such a life would be, at $50 per year, $391; at $75, $686.50. For five years this would be respectively, $210.60, and $315.90.

Thereupon the court, on behalf of the plaintiff, gave the following instructions, to the giving of which, and each of them, the said defendant, by its counsel, then and there objected; which objection was overruled, and the decision of the court in overruling the same, was then and there excepted to by the counsel for the said defendants.

1st. That it was the duty of the defendant, by the statute in force at the time of the occurrence in question, to place on each of its locomotive engines, a bell of at least thirty pounds weight, or a steam whistle, which bell or whistle it was the duty of the agents of the defendants in approaching the crossing in question, to ring or sound continuously for the distance of eighty rods before reaching the said crossing; and independent of the statute, it was the duty of defendants to give timely and reasonable notice of the approach of their engine to the crossing in question.

2d. If the jury believe from the evidence that the plaintiff's intestate, William H. Wells, was approaching and crossing the said way of defendants, and exercising ordinary and proper care in so doing, and was run upon and killed by the gravel train of defendant, under the direction of the agents and servants of defendant; and if they further believe from the evidence, that the said agents and servants neglected to continue ringing a bell or sounding a whistle for the distance of eighty rods before arriving at such crossing; and that by reason of such neglect to ring a bell or sound a whistle, the said Wells came to his death, they will find for the plaintiff; if they further believe from the evidence, that said Wells left a family who sustained a pecuniary loss by reason of his decease.

3d. In measuring the damage in this case, the jury are the judges of the pecuniary value of the life of deceased to his family; and if they believe from all the evidence that the constitution and physical ability of deceased were superior to those of the average of men at his age, the jury would have a right to take into account such superiority in arriving at an estimate of the duration of his life at the time of the accident; and although the testimony of Mr. Hollenback was competent in itself, yet if, from all the evidence, the jury believe that the sums assumed by him do not represent the annual money value of the services of said Wells to his family, but that such value of said services was greater than any of the amounts assumed by Mr. Hollenback, then the jury need not be bound by his statements as to the present value of such annuities respectively, but may increase the damages in proportion to such value of services, as proved to them by the entire evidence, not to exceed the sum of five thousand dollars.

4th. In arriving at the measure of damages, in case the jury find for the plaintiff, the jury are further instructed that they are not necessarily confined to the amount of money paid to the deceased for his labor by those for whom he labored; and if the jury believe from the evidence that the services of deceased in the management of the business and affairs of his family were of actual pecuniary value to such family, it is proper for the jury, in case they so find for the plaintiff, to take into account such value of such other services, if proved.

4½. The degree of care which the deceased was bound to exercise in approaching the crossing in question, was such care, and only such care as is exercised by men of ordinary prudence under like circumstances; and in passing upon this question, the jury will be governed by the evidence in this case, and will pay no attention to the cases read from the books to the court, by counsel for the defendant.

5th. The jury being the judges of the facts, are to determine upon the weight and credibility of the testimony of the several witnesses in this cause; and if the jury believe from the evidence, that the witnesses, McKinley and Green, have wilfully testified falsely upon any material point in the case, the jury would have a right to disregard the whole of the testimony of said witnesses, unless so far as the same is corroborated by the testimony of other and credible witnesses in this cause.

The court then, in behalf of the defendant, gave to the jury the following instructions:

I. The burden of proof is on the plaintiff, and before he is entitled to recover, he must prove, or it must appear from the evidence that there was negligence on the part of the defendant, and no want of ordinary care on the part of the deceased.

II. The burden of proof is on the plaintiff, and to entitle him to recover, he must show, or it must appear from the evidence, that there was negligence on the part of the defendant, and that the deceased, by the exercise of ordinary care and prudence could not have avoided the collision.

III. If the jury believe from the evidence that the defendant, when approaching the crossing where the accident occurred, neglected or omitted to give the proper signal, as required by law. It is not enough to entitle the plaintiff to recover, unless they shall also find that this neglect or omission was the immediate cause of the collision, and that the deceased, by the use of ordinary and proper care could not have avoided the accident.

IV. If the jury shall believe, from the evidence, that the defendant neglected or omitted to ring the bell and sound the whistle, or either of them, during the whole, or any part of the eighty rods next approaching the crossing, as by law required, it is not enough to entitle the plaintiff to recover, unless they shall also find that this neglect or omission was the immediate cause of the damage, and that the deceased, by the use of ordinary and proper care, could not have avoided the accident.

V. If the jury believe from the evidence, that the deceased drove upon the railroad track without looking for the approach of trains, and that if he had looked he could have seen the approaching train in time to have avoided the collision, he was guilty of such a degree of carelessness as precludes his right to recover in this action, and your verdict must be for the defendant.

VI. If the jury believe from the evidence, that the deceased could have seen the approaching train by looking in the direction of it before he reached the crossing, and in time to have avoided the collision, his attempt to cross was a want of ordinary care, and you must find for the defendant, although you shall also find that the defendant was guilty of negligence.

VII. If the jury believe from the evidence that the deceased could have seen the approaching train by looking in the direction of it before he reached the crossing, and in time to have avoided the collision, his attempt to cross without looking for the train was a want of ordinary care, and the jury must find for the defendant.

VIII. If the jury believe from the evidence, that the deceased could have seen the approaching train in time to have avoided the collision by looking in the direction of it, then, whether he did or did not see it, can make no difference, as in either case, his attempt to cross, was a want of ordinary care, and your verdict must be for the defendant.

IX. If the jury believe from the evidence, that the deceased was deaf to such an extent that he could not hear the approach of the train, but could have seen it in time to have avoided the collision, if he had looked in that direction, and if they shall also find that he did not look for the approach of the train, but drove upon the track without first taking any precaution to ascertain whether a train might not be approaching, then the deceased was guilty of gross negligence, and unless they shall find a greater degree of negligence on the part of the defendant, the plaintiff cannot recover, and the jury must find for the defendant.

X. If the jury believe from the evidence, that the deceased was deaf and blind to such extent that he could neither see nor hear the approaching train for a sufficient distance to have enabled him to have crossed the track before it came upon him, then it was gross negligence for him to have attempted to cross the track at all, without some one with him, and you must find for the defendant.

XI. If the jury believe from the evidence, that the damage was occasioned by the fault or negligence of the deceased alone, or by the fault or negligence of both the deceased and the defendant equally, without any intentional wrong on the part of the defendant, then the plaintiff cannot recover, and the jury must find for the defendant.

XII. If the jury believe from the evidence, that the collision was occasioned by the fault or negligence of the deceased alone, or by the default of the deceased and the defendant together, and without any intentional wrong on the part of the defendant, then the plaintiff cannot recover, and the jury must find for the defendant.

XIII. If the jury believe from the evidence, that the deceased did not use ordinary and proper care in driving upon the track, taking into consideration all the circumstances in proof, then they must find for the defendant, although they shall find that the defendant was also guilty of negligence to some extent, if the jury believe from the evidence that the want of ordinary and proper care in driving upon the track, on the part of the deceased contributed to the accident.

XIV. If the jury believe from the evidence, that the deceased could have seen the approaching train, by looking in the direction of it before he reached the crossing, and in time to have avoided the collision, his attempt to cross without taking such precaution was negligence, and the plaintiff cannot recover.

XV. If the jury believe from the evidence, that Wells approached the crossing in question in day-light, sitting in a covered buggy, with top up, so as to prevent his seeing the approaching train; that by looking in the direction of the cars, he could have seen them for a considerable distance, and for a sufficient length of time to have avoided all danger; and that the sounds of an approaching train could have been heard for a distance sufficient to give ample time to have prevented this collision; then said Wells, whether partially blind or not, or partially deaf or not, was guilty of such carelessness and negligence as precludes the right to recover in this case, and the jury will find for the defendant.

XVI. If the jury believe from the evidence, that the deceased, Wm. H. Wells, approached a railroad crossing of the defendant, in the day-time, without looking to see whether or not a train was approaching, then he was guilty of such carelessness as will not permit his representatives to recover in this cause, and the burden of proof is upon the plaintiff to show that he did look, and was not in fault.

XVII. It is the duty of all persons, in going over a railroad crossing, to look and see whether or not a train is approaching; and not looking to discover an approaching train, is such negligence as will be a bar to a recovery.

XVIII. If the jury believe from the evidence, that a loaded team had stopped on one side of the crossing, and a horse and carriage had stopped on the other side, waiting for a train to pass, and a man on horseback had also stopped for the same cause; that the deceased was told by the man on horseback that a train was coming, or that he would not have time to cross, and heard what was told him; that deceased heeded not the caution, but went on to the crossing without looking, or stopping to look for a train, and was killed by a train; then these facts, if proven, constitute such gross carelessness on the part of the deceased, as must preclude his representative from recovering in this action, and the jury should find for the defendant, unless the jury believe from the evidence, that the defendant was guilty of a higher degree of negligence in not continuously ringing the bell, or sounding the whistle.

XIX. The plaintiff has placed his right of recovery upon the neglect of the defendant's agents, in not ringing the bell or blowing the whistle, and if the plaintiff recover he must recover for *that neglect*, and not for the condition of the crossing or the speed of the train, or for the manner in which the cars were placed. And if the jury believe from the evidence that the deceased was so placed in his carriage that he could not hear, or was so deaf that he could not hear, whereby the neglect, (if such neglect is proven,) to ring the bell or blow the whistle did not in any degree produce the casualty spoken of, then the jury should find for the defendant. The law being that the allegations and proof must correspond.

XX. It is not enough to entitle the plaintiff to recover, to show that the defendant's servants neglected continuously to ring the bell or sound the whistle, from the whistling post to the crossing, but he must also prove that the deceased came to his death because of such failure continuously to ring the bell or sound the whistle, and if they shall find that the proof does not establish this additional fact, they will find for the defendant.

XXI. If the jury shall find for the plaintiff, they can only allow such damages as the statute authorizes. The measure of damages it adopts is simply a compensatory one, that is, that which will make good the pecuniary loss sustained. The mental sufferings or grief of survivors, or loss of domestic happiness, or the degree of culpability of the party in fault cannot be taken into consideration in the calculation of damages. The jury cannot award exemplary or vindictive damages, but must ascertain from the evidence the pecuniary loss sustained as nearly as they can approximate thereto, and this alone; and to do this the tes-

timony in the case must have furnished the data upon which the jury may calculate or approximate to an estimate of the pecuniary value of the life to the persons for whose benefit this action is brought.

XXII. To ascertain the value of the life or loss sustained, the jury is not entitled to go outside of the evidence and indulge in mere speculation and conjecture, not reasonably made from the evidence and justifiable thereby; but must found their estimate upon such facts in proof as tend to show the pecuniary extent of the loss sustained, taking into consideration the age of the deceased, and such other evidence as may afford them the means of making the estimate.

Thereupon the jury retired to consider of their verdict, and having been absent for a time, returned into court with the following verdict: "We, the jury, find the issues for the plaintiff, and assess the damages at one thousand dollars."

Counsel for the defendant thereupon move the court for a new trial which motion was submitted to the Court for decision, without argument, and the court then and there over-ruled said motion for a new trial; to the decision of the court in over-ruling which, the counsel for the defendant then and there excepted, and prayed an appeal to the Supreme Court of the State of Illinois, which was allowed upon condition that the defendant file a bond, with J. M. Walker as surety, within ninety days; and on motion of counsel for the defendant, ninety days was given within which to file a bill of exceptions.

The foregoing bill of exceptions contains all the evidence in said cause.

107

C. B. & Q. R. R. Co

vs

Samuel Triplett

107

Abstract

Filed Apl 6. 1865

D. Leland Clk

State of Illinois. In the Supreme Court.

THIRD GRAND DIVISION.

April Term, 1865.

THE C. B. & Q. R. R. Co. appellant.
vs
SAMUEL TRIPLETT, Administrator,
of Estate of WM. H. WELLS, Dec'd appellee.
In Case.

—o—

ARGUMENTS FOR APPELLEE.

This suit was brought by the appellee, under the statute, for the benefit of the widow and children of William H. Wells, deceased, who was killed by a train of cars of appellant, at a highway crossing in Bureau county, in November, 1861, through the alleged negligence of the servants of the appellant, who directed the train at the time of the accident. The suit was originally brought in the Bureau Circuit Court; the *venue* was changed to Kendall county, by appellant for alleged prejudice of the inhabitants of Bureau county against it. At the April Term, 1864, of the Kendall Circuit Court, a trial was had, resulting in a verdict and judgement in favor of the appellee for $1000,00, from which appellant now brings the case into this court.

Before remarking on the merits of this case, we feel that it is due to ourself, and our cause, to say that although counsel for appellant have their argument printed and ready to file, yet they have refused to furnish us with a copy of the same, or permit us to see it at all, until we shall first make and file our argument for the appellees; thus compelling us to anticipate whatever points they have made in their argument, from these tactics of our friends, we deduce the conclusion that even they themselves, do not regard their argument as *unanswerable*, else why their unwillingness to let us try it. If then there be points made by them to which I shall make no allusion, the court will let them take nothing for our silence, as we are unadvised of such points being made.

No objection was made to the declaration in the Circuit Court, we believe it will be found to contain every allegation necessary to fix the liability of the appellant; few instructions were given for appellees, and these are believed to be faultless; scarce an objection was made by the appellant to the introduction of testimony that was not sustained by the court; while every objection taken by appellees was overruled; the instructions asked for the appellant were neither modest in their demands, nor few in numbers (in all 28 we believe) yet they were all given without the slightest qualification. The only question then presented by the record is this: "*Does the verdict of the Jury strike the mind at first blush as manifestly and palpably contrary to the evidence?*"

That the crossing in question was a very dangerous one will scarcely be disputed, a glance at the map made by the witness Winship found in the Bill of Exceptions, will convey a correct idea of the

character of the crossing, the rail road at that point running east and west, while the highway ran
Read page 139 from north east to south west across it, at an angle of 23° at the crossing, the rail road ran through
124 a cut five feet below the natural surface, and continued east of the crossing for 671 feet varying in depth until it ran out, at 100 feet from the crossing measuring a depth of 7 feet; while immedi-
125 ately north of the rail road track, and next to the highway was an embankment of waste dirt, 3 or 3½ feet high and 28 feet long, the summit of which measuring 8½ feet above the track of the rail
126 road; on the south side of the highway ran a five board fence 4½ feet high, making the top of the
132 fence on the embankment 13 feet above the rail road track, parallel with and near the rail road, east
126 of the highway ran a hedge 128 feet long and eight feet high well set and in leaf; the highway for
127 250 feet north east of the crossing ran through a cut, passing within six or eight rods of the sum-
128 mit of said embankment; 1329 feet east of the crossing was a whistling post; 1554 feet east of the east end of said rail road cut was another cut in the rail road 4½ feet deep, besides the waste dirt, on the sides; from the hedge to the cattle guard on the east side of the crossing was 134 feet; the
130 dirt commences to rise to the embankment 9 feet north of the said cattle guard. From the point of
129 collision on the crossing to where the cars were driven upon the bank was 129 feet, 65 feet of which was up grade, the bank on which the end of the cars landed was nine feet above the rail road track;
134 from a point opposite Phelps' on the highway, to the crossing was 400 feet; on the north side of the railroad, and parallel with the hedge, ran another board fence, on the highway and about 70 feet north east of the crossing was a warning board; such are the measurements of the ground by the wit-ness Winship, and its correctness is not questioned by the appellant.

129 The same witness, Winship, also testifies, that he sat in his buggy six or eight feet from said warning board when a train of cars passed, and he was unable to see the cars east of the crossing; that the hedge obstructed the view of a train for about three hundred feet; one hundred feet down
130 the cut of the highway, nothing of a train can be seen *east* of the crossing; witness stationed himself
131 in the cut of the highway opposite to the summit of embankment on four different occasions when trains passed the road, and knows that a train cannot be seen; *that a train going thirty miles per hour on the rail road, and a man four miles per hour on the highway, at any point on the highway*
131 *from which he could see the train, the train would reach the crossing before he would*; the east cut is
132 2,000 feet from the crossing.

49 DANIEL P. GREELY.—Was standing upon a load of lumber one hundred and fifty steps south
47 west of the crossing on the highway where he witnessed the casuality; sun was shining at the time,
46 three quarters of an hour high; *the train was in the east cut when Wells was near Phelps' house; af-*
47 49 *ter a person goes half way down the cut of the highway, he can't see a train at all till he gets on the*
49 *rail road; there was a hedge between highway and rail road in leaf, seven or eight feet high through which the witness couldn't see a train after the leaves were off*; for a third of the way *along* the cut of the
50 highway, to the crossing *a train could not be seen at all*, on account of a pile of dirt from the high-way and rail road 20 or 30 feet long, a high fence and hedge, two board fence, (the highway and rail road fences); in a covered buggy the cars couldn't be seen at all, and for fifty feet, not even by standing up in the buggy, for a person would have to look against two fences, hedge, dirt, &c. *Witness first saw the flats at the cattle guards near the crossing, he saw the smoke stack of the engine*

52 *at some distance from the crossing but supposed the cars were east of it ; the horse moved briskly for fifty feet when witness first saw the smoke stack, and witness supposed he would clear the crossing easy,*
52 *for he couldn't see that the cars were pushed ahead of the engine, until the end of the flats reached the cattle guards at the crossing ; the engine was right.*

The engine was three or four hundred feet from the crossing, when Wells was struck by the flats;
53
54 *there was fourteen flats besides the engine and tender ; witness counted them at the time ;* witness could not see the train at the whistling post, for a school house in the way, but when he heard the whistle he supposed it at the whistling post; he could see the smoke stack when it got half way from the whistling post to the crossing; the whistle at the post was not a long one at all, probably a little
55 more than to take off the brakes; the whistle for down brakes, and the collision were instantaneous; the train wouldn't run half the length of itself while the whistle continued to sound at the whistling
55 post. "*The train ran over thirty miles per hour ; cars don't often travel as fast over the road as that train did, running over thirty miles per hour, it was almost instantaneous that he saw the flats at the cattle guards, and the collision ; is positive that the train ran faster than twelve miles per hour.* As
56 & 45 additional proof of the speed of the train, the wheels of a car were thrown upon a bank nine or ten feet high, and one hundred feet from the cattle guard, (after being off the track) ; the bank 45 deg. steep, a car went up the bank and turned a circle, lay almost on end ; general smash made , cattle
57 guard torn up, indentation in the bank to be seen there now, it is forty steps from the crossing to the top of the bank, where the wheels lay.

The witness is POSITIVE *that no bell rang, or whistle sounded after the train passed the whistling post to the crossing ; he says : "I am positive of that, for I attacked the engineer in regard to the very*
58 *thing, not whistling, and not giving people warning by the ringing of the bell," (this objected to and objection sustained.)*

58 *No bell rang on the train,* the bell rang from the jar at the collision ; *the flats were not more than fifteen feet (if that,) from the buggy when the whistle sounded; there was no checking of the train;*
45 *at the speed the cars ran the wheels would have slid, if they had been stopped; the buggy was thrown*
59 *instantly into the air,* smashed to atoms, not a spoke but was broken in two, springs and box broke,
61 a speed of twelve miles per hour wouldn't have done so ; the wind was blowing in witness' face, and was unfavorable for Wells to hear the train; the whistle at the whistling post was short and not such a one as the passenger train usually gives, not half nor quarter so long.

62 The engineer could not see the buggy within thirty yards of the crossing ; nor much before he got on the crossing on account of the obstruction, nor could Wells see the cars till he got to the track.

62 Witness stopped in the cut of the highway while a train of top cars passed the rail road, he couldn't see any part of the train till it passed thirty rods ; he couldn't see flats until they got to the whistling post.

64 Witness heard the first whistle at the post, not very distant, while the wind favored him too ;
76 didn't hear the noise of train at all ; he saw the passenger train pass ahead of the flats ; it did not

run as fast as the train of flats; he has often traveled on trains, and heard of their time, *this train ran faster than any train he ever saw pass the road.*

79 H. C. FIELDS.—Lives near the crossing, passes it every week, sometimes every day; view of rail road obstructed from cut in the highway by dirt thrown from the highway and rail road; near
80 the sign board on the highway, the cars can't be seen east of the crossing, not even the smoke stack; *setting on a wagon in the cut of highway the smoke stack could not be seen for sixty or seventy five yards east of the crossing;* and the hedge obstructed the view of a train after you get out of the cut;
81 the bank of dirt also obstructed the view.

83 For 250 feet on the highway north of the crossing a man couldn't see the flats, but might see the smoke stack for thirty feet of the way; *considers the crossing a dangerous one.*

WILLIAM COOPER.—Rode on horseback one or two rods behind Wells' buggy until he got op-
100 posite Phelps' house, then he stopped, Wells drove on; witness hailed Wells but don't think he was
101 heard.

101 "Just as he stepped on the track, the whistle blowed for brakes," the next moment after the
102 whistle the collision occured, carrying Wells thirty feet from the crossing; the buggy was so man-
103 gled, couldn't tell what it was; within two seconds from the collision he saw the cars come up a bank nine or ten feet high at Phelps' and a general wreck was made.

104 Witness and Wells were about eighty rods from the crossing when they saw the passenger train go west; the train of flats was a half mile east of crossing when witness first saw it; and Wells was then within thirty rods of the crossing.

Wells had got down in the cut of the highway when I first hallooed to him; all I said was, "you'll
105 be to late sir." When I hailed him, the cars were running along by the whistling post; dont think he heard me; the sound of the whistle reached my ear just as the horse stepped on the crossing, and the sound of the whistle, and crash of the collision were almost instantaneous; I could not see the flats on a part of the rail road where I stood; there was not a second of time between the sound of the whistle and the collision; if Wells had had one second of time he would have cleared the cross-
106 ing. There is a place on the highway near the warning board, where a man can't even see the smoke stack; Wells was in a top buggy, top up.

107 The whistle sounded at the whistling post, about the time I stopped opposite Phelps', the en-
108 gine was then east of the whistling post; two or three flats passed the post while the whistle sounded, the ballance had not yet come to the post; *the train only ran the length of three flats while the whistle sounded; the locomotive quit whistling before it reached the whistling post.*

109 "*Int.* Was there any more whistling from that time until the brakes were whistled down at the "crossing.

"*Ans. Not any.*

109 "*Int.* Are you *positive* of that?

"*Ans. Yes* sir.

"*Int.* Can you be mistaken about it?

"*Ans. Not at all, for my attention was then particularily directed to the train, seeing a man "driving along with a buggy, and a train coming with the speed it was running; I was looking*

"particularly and noticeing to see the distance, and whether the man could get over safely."

110 The whistle at the post *was not a long one,* was only one blast, not longer than the sound for brakes.

111 The train ran at the usual speed of a passenger train, *in my judgement twenty five or thirty miles per hour.*

Am POSITIVE *that it ran faster than 12 miles per hour;* the train was a half mile behind the passenger train from Malden ; by the rules of the rail road they are not allowed to run a train nearer than a half mile to the one ahead ; and other proof of the speed of the train was the way it drove
112 the cars up the bank and smashed the train at the crossing.

114 Did not hear bell ring ; *I was in a position where I could have heard it if it had rung* ; I was 18 or 20 rods from the crossing, at the time of the accident.

116 We (witness and Wells) traveled on the highway four or five miles per hour ; Wells was half
117 way from the witness to crossing when he hailed him, at the point where witness stopped on the
122 highway ; Wells could not have seen the train, without thrusting his head out of the buggy, and
122 looking diagonally back ; don't know that he could have looked out and seen cars where the whistle blew.

147 WM. FISK.—Was forty or fifty rods north west from the crossing in a barn twenty feet high,
146 from whence he saw the train of flats coming west, and a horse and buggy approaching the crossing at the same time ; about the time of the collision, he heard two blasts of the whistle, and saw the
147 flats piled on the side of the track, and the cars run up the bank.

148 When I first saw the cars they were near the whistling post ; *I looked right at them, and heard no sound of bell or whistle till the cars struck the buggy ; I think if they had sounded before that I would have heard them.*

149 The engine pushed the flats forward, and run with very quick motion, *as fast as a passenger train from the whistling post to the crossing* ; there was no checking in the speed of the train ; the wind blew that day from the north west; remember the fact from having to tie on a load of hay
150
157 which he hauled.

GEORGE R. PHELPS.—Was husking corn in a field sixty rods west of the crossing at the time
161 of the accident ; heard a whistle at the whistling post (as he supposed,) and again heard it at the collision.

162 *Heard only one blast of the whistle at the whistling post* ; the train might have run from six to
168 ten rods while it sounded ; and at that rate of running, the cars must have run fifty rods before another sound of the whistle was heard, which occurred at the collision on the crossing ; did not see
164 the cars till after the collision ; there was twelve or fifteen cars ; *if the whistle had sounded from the whistling post to the crossing I would have heard it* ; found Wells' body near whistling post for next crossing west.

165 The hedge, board fences, and embankments obstructed the view on the rail road so that for 150 feet in the highway out a train couldn't be seen.

E. S. CHAPMAN.—Placed himself in the cut of the highway, holding his head on a range with
183 a mans in a buggy, and watched a train going east after it had passed the crossing from ten to thirty

185 rods, it was entirely lost to view ; the crossing is a very dangerous one ; travellers coming south west wouldn't be likely to see the the cars if they didn't make a noise.

199 DANIEL M. MCDONALD.—The highway over the crossing in question is one of the most important, *and most travelled highway in the county.*

On the question of the ability of Wells to see and hear a train of cars, and his habits &c., worth to his family.

170 171 172 DR. WM. BACON.—Testifies, that he lived within ten rods of Wells for seven years before his death ; his health was good and he performed a great deal of labor ; his hearing *was slightly impaired* ; some times in talking to him in ordinary tone of voice he would request a word to be repeated ; if you had his attention he would hear ordinary conversation ; his vision was not good, he 174 could see large objects, not small ones ; I think he could read a newspaper.

176 178 179 177 JOHN VAUGHN.—Knew Wells and his family, (gives the names of the individual members) ; Wells was a cautious man ; his eyes were poor, could read by holding paper close to his eyes ; he was a very industrious sober man, valuable to his family.

87 HARRY C. FIELDS.—Often talked with Wells, engaged him often to dig graves ; never knew he was hard of hearing until after his death ; he was a very industrious sober man, and always at work.

85 F. W. WINSHIP.—Saw Wells frequently before his death, a dozen times a week ; talked with him ; he had no difficulty in hearing me, and I talked no louder than I do now.

O. E. JANES.—Wells read a great deal in my room, he held the paper close to his eyes ; he 134 kept a fine garden
212

FOR DEFENSE.

WINFIELD GREENE.—Was fireman on the train ; there was 11 flats besides the engine and tender ; flats were pushed before the engine, we were running at a slow rate of speed, not more than 262 ten or twelve miles per hour at the time of the accident ; when the west end of the train reached 263 the whistling post, the engineer sounded the whistle, and continued the whistle until the west end of the train was near the crossing ; we saw from the train a man on horse back, and a buggy on the highway, opposite Phelps' ; the one on horse back stopped, the one in the buggy drove on, but we thought he would stop too, and when we found that he was going on to the crossing we sounded the whistle loudly in quick succession, and reversed the engine, but it was too late ; at the instant of the collision the train was barely moving, we had brought it almost to a stop ; between the time we found the buggy was not going to stop, and the time of the collision, we hadn't time to stop ; I 265 266 think the buggy could have been seen from the engine at all places on the highway till the colli- 267 sion ; think Wells could have seen the flats two hundred yards from the crossing if he had *stopped and stood up.*

268 JOHN MCKINLEY.—Was engineer on the train ; before I arrived at the whistling post, or at

the whistling post; I blew a continuous whistle, while blowing the whistle, and before I reached the crossing: I saw a man on horseback and a buggy in the highway at Phelps'; the man on horse-
174 back stopped; "*I supposed the buggy would do the same, but they did not, and when I saw they did not I stopped blowing the whistle, and whistled down brakes, and reversed the engine*, and done all in my power to prevent the accident, but it was too late."

175 *The speed of the train was not over twelve miles per hour*, and at the time of the collision the
176 train moved very slow; the west end of the flats was within seven or eight feet of the buggy when I
177 first saw the buggy on the crossing, I couldn't see Wells at all as his buggy was covered; I had seen
278 the buggy ten or fifteen rods before it got to the crossing; there was an embankment along the highway, and it is my impression that the buggy don't go entirely out of sight in the cut.

If Wells had stood up, he could have seen the flats all the way through the cut, except two
279 or three rods.

By reference to the Bill of Exceptions, the foregoing will be found a correct abstract of the testimony; and we believe it embraces all the facts necessary to a correct understanding of this case.

There are three very important facts involving the care, or negligence of the witnesses, Greene and McKinley, who directed the train at the time of the casuality.

1st. As to the continuous sounding of the whistle from the whistling post to the crossing.

2nd. As to the speed at which the train was driven upon the crossing; and

3rd. As to the violence of the collision.

Upon all three of these questions there is a clear conflict of testimony. Green, (the fireman) swears that the whistle was sounded continually from the time the train arrived at the whistling post until its west end had nearly reached the crossing; while McKinley (the engineer) swears that the whistle was sounded all the time from the whistling post until the west end of the train had reached within seven or eight feet of the buggy on the crossing, *when he stopped whistling and whistled down brakes*; against these statements, *Daniel P. Greely*, who was at a point one hundred and fifty steps south west of the crossing, swears that there was one short blast of the whistle, when the cars were at a point which he supposed to be the whistling post, and that there was no more whistling until the west end of the flats had reached within fifteen feet of the buggy on the crossing, when the brakes were whistled down; *he swears positive* that there was no continuous whistling from the post to the crossing; that the sound at the post was only a little longer than is blown to whistle off brakes; he chided the engineer too, immediately after the collision, for running at such speed on the crossing without giving people warning by sounding the whistle; though this may not be evidence but it is nevertheless a circumstance showing the impression of the facts on the mind of the witness at the time. WILLIAM COOPER, a very candid witness, was 18 or twenty rods north east of the crossing, where he had a full view of the train at the whistling post; he swears that a whistle sounded when the west end of the train reached the whistling post; and that it continued until about three flats had passed the *whistling post when it ceased, and whistled no more until the brakes were whistled down at the collision*; he too, *swears positive*, that there was no continuous sounding of the whistle, and that no whistle sounded after the engine arrived at the post, until the brakes were whistled down at the crossing; that his whole attention was absorbed

with the train *and that it is impossible that he can be mistaken about this whistling; George R. Phelps* was sixty rods west of the crossing, and although he didn't see the train, he heard a blast of the whistle at what he supposed to be the whistling post, *and then it ceased until in his judgment the train had time to run about fifty rods* when he heard another whistle which he supposed to be for down brakes, and at the same instant he heard the crash of the collison. *William Fisk* was in a barn fifty or sixty rods north west of the crossing looking at the train as it passed the whistling post; heard a short blast of the whistle at the post, *but heard no more of the whistle until he heard it whistle down brakes at the collision* ; and knows that he would have heard it, if it had whistled continuously.

2nd. *As to the speed of the train.* Green and McKinley put the speed of the train at ten or twelve miles per hour, while Daniel P. Greely, swears that it *ran more than thirty miles per hour*; he swears *positive that it was more than twelve miles per hour. Wm. Cooper* says it was running *twenty five or thirty miles per hour*, as fast as a passenger train, that it was only a half mile behind the regular passenger train,which was as near as the rules of the road would permit it to run; he too, *is positive* that it was more than twelve miles per hour. *William Fisk* swears it ran very fast, as fast as a passenger train.

3rd. *As to the force of the collision.* Green and McKinley swear that the train was checked and barely in motion when it struck the buggy ; while Greely swears that it struck the buggy with such violence that it was sent into the air and crushed to atoms ; not a whole spoke to be found; springs and box smashed, the deceased thrown thirty feet, cattle guards torn up, and the train driven forty steps up a steep bank, nine or ten feet high ; a general wreck ; the indentations in the bank visible three years afterwards ; Cooper corroborates Greely's statements ; the next instant after the collision he (Cooper) saw the end of car and wheels fly on top of the bank ten feet high by Phelps' that the buggy was so demolished it was difficult to tell what it was ; by actual measurment the flats were driven one hundred and twenty nine feet over ties and up a bank nine feet high, and shall it be said that all this demolition is the work of a train "almost stopped" "*barely in motion*" ; away with such stuff.

Doubtless the jury believed the testimony of Cooper, Greely, Phelps and Fisk, on these three points, and *disbelieved* the statements of Green and McKinley, on the same points, and we feel sure that this court will not disagree with the jury.

To suppose that the whistle was sounded continuously from the whistling post to within fifteen feet of the crossing, is to suppose, either that Wells was so deaf that he couldn't hear the whistle till the train struck him, (a conclusion wholly unwarranted by the testimony), or that he wilfully committed suicide. We insist that if the respective statements about the occurance made by Green and McKinley on the one side, and by Greely, Cooper, Phelps and Fisk, on the other side, were equally reasonable and probable, (which we by no means admit) that the number, and unbiassed situation of the latter, as compared with the questionable attitude of the former ; (one of whom was engineer, and the other fireman on the train, and who are personably ameniable at least to the judgement of the world, for any mortal terpitude which the careless killing of a fellow being would occasion) ;

that the statements of these unbiassed witnesses ought to prevail against the conflicting statements of the engineer and fireman, or to say the very least, it should be left for the jury to determine from this conflicting testimony, what the real facts are. In the case of *Evans vs Fisher*, 5, *Gil.* 72. this court said: "where the evidence is contradictory, or inconclusive, the court will never disturb the verdict," and again in the case of *Carpenter vs Ambroson*, 20, *Ill.* 170; the court say "the evidence was conflicting, and it was for the jury to determine, which was entitled to the most weight."

It will not do for counsel to say that the testimony of Greely, Cooper, Phelps and Fisk, about the continuous sound of the whistle is negative, and therefore not entitled to the weight of that of the engineer and fireman who swear affirmatively that there was a continuous whistling to the crossing; for after these four witnesses heard the first blast of the whistle east of the whistling post, they could tell as well as the engineer whether that whistle continued to sound until the train reached the crossing; and especially is this the fact, when the train every moment after the first sound of the whistle was approaching nearer these witnesses, where the sound of the whistle must have become the more distinct to their ears every foot of the way from the post to the crossing, near which the witnesses were; so confident are the witnesses Greely and Cooper, that they would have heard the whistle if it had continued to sound; after it passed the whistling post, that they both *swear positively that it did not so sound.* In the case of *Coughlin vs The People*, 18, *Ill.* 256. The court say that "positive testimony, that a defendant did not strike a blow, is entitled to as much weight as affirmative testimony that he did strike the blow." So in *G. W. R. R. vs Hanks*, 25, *Ill.* 242. The court say, "positive testimony that a party did not buy a lot of wood, is as weighty as testimony that he did buy the wood." We assume then that the facts are established by the record at least so far as this court has to deal with these facts; that the train in question ran on to the crossing at an extraordinary speed of twenty-five or thirty miles per hour, without the sounding of bell or whistle from the whistling post to the crossing.

The train was made up of an engine, tender and fourteen gravel cars or flats, by the actual count of Greely; Phelps thought there was twelve or fifteen, while the engineer puts the number at eleven; whatever the number of flats may have been, all the witnesses agree that *these flats were running forward of the engine and tender*, thereby rendering the approach of the train to the crossing ten folds more perilous to travellers on the highway than if the flats had been running behind the engine where they habitually run.

The highway at the crossing in question was one of the most travelled and most important thoroughfares in Bureau county, as proved by appellants own witness, *Daniel McDonald*; the rail road at the crossing ran west, while the highway ran south-west, crossing the rail road at an angle of 23°; the highway approaching the crossing through a cut 250 feet long, and the rail road through a cut 671 feet long, and five feet deep, while between the highway and rail road, near the crossing was two board fences, one five boards to the panel, a bank of dirt thirty feet long and three, or three and a half feet high, and twenty eight feet of hedging, eight feet high; all these contributing to render the crossing, as characterized by the witness Fields, *a most dangerous one*, and especially so to a traveller going towards the south west, as the deceased was travelling.

The engineer and fireman, swear that they saw the buggy of the deceased, in the highway north-east of the crossing, near Phelps' house, approaching the crossing; and that they also saw that the buggy *didn't stop to let the train go by.*

The engineer, McKinley *also swears that it is his impression that there was no place in the cut of this highway where he (the engineer) could not have seen the top of the buggy from the train, from the time he first saw the buggy at Phelps' until the collision;* (see record P. 278) he also states that it was a covered buggy, and he was unable to see who was in it; what then can be said in extenuation of his conduct, if it be true as we have established, (at least for the purposes of this hearing) that after seeing a covered buggy approaching the crossing apparantly unwarned of the proximity of his train; for to use his own language, "we saw that he didn't stop," and when he must have known that a collision was inevitable unless the buggy did stop; knowing the hazard of the crossing, the interveneing obsticles to prevent the deceased from seeing his train, himself seeing or able to see (at least according to his opinion, and the whole theory of the defense), the top of the buggy passing down the cut of the highway to certain destruction; his train geared like a great *Land Ram* (if we may so express it) with its death dealing proboscis four hundred feet long, and only three feet high, flying through the cut of the rail road at the frightful speed of thirty miles per hour; *and yet give no warning by sound of bell or whistle of the approach of his train to the crossing, until the fatal flats are within fifteen feet of the buggy on the crossing* (according to Greely) but within seven or eight feet of the crossing by his own statement, when he whistled down brakes; and the only excuse he has to offer is, "*we thought he was going to stop, and when we found he wasn't, it was to late to save him.*

We challenge the history of rail roading for a parallel of such wicked and wanton neglect of duty; such reckless disregard of human life as that which characterized the conduct of the engineer on this occurrence; and right here seems a good place to say that we think our Legislators will not have discharged a duty which they owe to the people for the protection of human, life until they shall have provided quarters for such fellows as this engineer is proved to be, in the penitentiary of our state; to say that his conduct in the management of the train was *grossly* negligent, is the mildest form in which it can be expressed, for if it be true as he says that he did, or could have seen the top of the buggy from the time he first saw it opposite Phelps' until the collision, and yet ran his train on to the buggy on the crossing, without sound of bell or whistle from the whistling post to the crossing; we may justly characterize his conduct as *foul, barbarous, murderous;* why did he not sound the whistle? What excuse can be offered for this omission? It was duty under the law of the land to have done so if the highway had been clear, but in view of the fact that he was running across a highway much frequented by the public; the crossing a dangerous one; his train running at extraordinary speed, with several hundred feet of low flat cars running ahead of the engine through a cut where they couldn't be seen from the highway running a stray train too, that had no regular time of its own, following close after a regular passenger train, and at the same time seeing a buggy approach the crossing, *without stopping*, and whichto all appearance ignorant of the proximity of his train; we say that under all these circumstances that

this duty to give warning by the continuous sounding of the bell or whistle from the post to the crossing *was increased a hundred fold* and yet it was shamefully disregarded; and as an inevitable, result *Wells was killed.*

The only real question presented by the record in this case is: did the negligence of Wells so far contribute to occasion the accident as to exculpate the defendant from all liability in this cause?

That the deceased was free from *any degree of negligence in the premises*, we do not claim, nor is it necessary to our recovery that he should have been, as we shall presently show by the authorities but we do insist that the negligence of the deceased, as compared with that of the engineer was so *slight, so disproportioned* in occasioning the accident, that under the law the plaintiff must recover.

The deceased was lawfully traveling on the highway in a covered buggy, approaching the crossing from the north east: a cool afternoon in November; the wind blowing from the north west, (as stated by Fisk); when within eighty rods of the crossing he saw the regular passenger train go west along the rail road; this was a circumstance well calculated to a little relax the caution of a man of ordinary prudence, he would naturally enough conclude that the regular train had gone by and that the danger at the crossing was a little lessened for the present by the incident; not one man in twenty would have stopped at Phelps', thrust his head out and looked diagonally back to see if another train was coming, which Cooper swears he would have had to do, to have seen the train of flats at all, while Winship swears that if Wells was travelling four miles, and the train 30 miles per hour, that for the train and buggy to meet on the crossing the buggy would of necessity have to be in a position in the cut where it would be impossible to see the train, at any time, and though a short blast of the whistle sounded on the train *several rods before the locomotive got to the* whistling post, (ceasing before it reached that point) yet owing to the shortness of its duration, the distance at which it sounded, the adverse wind, intervencing fences, hedge, embankment, cut, the buggy top, and buggy rattling, (perhaps) and his hearing not being the most acute *he did not hear this short blast of the whistle,* and therefore "*did not stop*" (as the engineer expressed his action) but moved on at his accustomed gait for the crossing passing under the warning board, from which glared in his face in bold and striking letters, the false and deceiving words: "LOOK OUT FOR THE CARS WHILE THE BELL RINGS OR WHISTLE SOUNDS," the last vestage of apprehension perhaps being removed by these decoying words, and the silence that prevailed for the moment, he moved on to the crossing so, suddenly from the covert of the interveneing obsticles that even the engineer swears that the west end of his train was within seven or eight feet of his buggy, before he discovered him on the crossing, and in an instant he is sent into eternity so suddenly that he was perhaps not conscious of the means of his death for the locomotive and tender, (the only visible parts of the train), were yet four hundred feet from the crossing, when the stealthy flats done their fatal work.

If it is urged that the sight and hearing of the deceased was so impaired that it was negligence in him to venture alone upon the highway and crossing; we say that the testimony of the witnesses Winship, Janes, Dr. Bacon, Fields, and Vaughn on the subject of his ability to see, and to hear,

forbid any such an inference ; he could, and did read the papers, made and hoed gardens &c. Tho' his hearing was slightly impaired he could hear ordinary conversation ; the witness Fields who often called on him up to the time of his death, to dig graves, in his many conversations with deceased never made the discovery that he was hard of hearing until after his death ; we say then that the testimony does show that he had both the capacity to see a train of cars if obsticles did not prevent, and of hearing a whistle if it were continuously sounded for eighty rods on its approach to him, but we insist that even if his vision was so poor, that he could not have seen the approach of a train of cars, (which we by no means admit) that even that fact would not be a legitimate bar to the plaintiff recovery in this suit, if the deceased had still left him the faculty to hear the continuous sounding of a rail road whistle or bell for eighty rods, for the statute expressly enjoined it upon the defendant to have caused a continuous sounding of the whistle, or bell on the train from the whistling post to the crossing, and in case of neglect, pay all damages which shall accrue from such neglect. Had this requirement of the statute been complied with, who in his senses will pretend that this accident would have accrued,even if the deceased had been as blind as an owl ? For we say that even then, on the hypothesis that the deceased was blind, yet if he had the capacity to hear a continuous rail road whistle or bell for eighty rods, then the defendant will be liable. It don't lie in the mouth of this defendant to say to the widow, and orphans of the man whom its servants have so barbarously killed ; "*O your husband and father being blind,was guilty of great negligence in venturing upon the crossing under the foolish supposition that our servants would give him warning of the approach of the train, by a continuous ringing of the bell or sounding of the whistle, as the statute in that case required them to do.*"

If he was blind that was his misfortune not his fault,the statute had wisely and humanely provided for his safety if he still had the faculty to hear a steam whistle, or bell ; and had the engineer but half complied with this requirement of the statute, or had the flats been behind the engine, or had the highway approached the crossing over ground from which the flats could have been seen, this accident would not have occurred. Wells was not required by the rules of ordinary care to stand up in his buggy as he passed through the cut, to see if a train of flats was coming, (which according to the statement of the engineer and fireman themselves, he would have to do, to have seen the flats from the cut in the highway), nor was it negligence, in him to ride in a top buggy over the crossing, he was only bound to exercise ordinary care. In the proportion that intervening obsticles increased the difficulty of his seeing the flats, in that proportion is his negligence diminished, and the negligence of the engineer correspondingly increased, and especially is this so, when the engineer had the advantage of seeing the buggy, and could have prevented the accident by the exercise of any care at all, while according to *the showing of the appellants own witnesses,* (*Green & McKinley*) after the deceased got into the cut of the highway,he would have had to stand up in his buggy to have seen the flats at all, a degree of care which would have been extraordinary indeed.

In the case of Lynch vs Nurdin, 1, Adol and Ellis, 28, (41, E. C. L. 422,) Lord Denman, C. J. said : "Between wilful mischief, and gross negligence the boundry line is hard to trace, I

would rather say impossible, the law runs them into each other. It is then a matter strictly within the province of a jury, deciding on the circumstances of each case."

In a case involving the question of negligence of the servants of a rail road company, whereby an injury was sustained. The supreme court of Wisconsin, after an elaborate review of most of the leading cases in England and in this country on the subject, in 8, *Wis.* (text) 212 say: "When the facts show *such a degree of rashness or wantonness on the part of the servants of the company, as evince a total want of care*, though the injury be not intentional *it is no departure from principle to hold the rail road company responsible, unless it appear that the defendant was equally negligent,"* and in the same case the learned Judge said, "any other rule would confer upon the rail road company priviliges and immunities, not enjoyed by other individuals."

In the case of *Trow vs The Vermont Central R. R.* Co. 24, *Vt.* 487, which is also a leading case on this subject. The court say: "If there be negligence on the part of the plaintiff, yet if at the time the injury was committed, *it might have been avoided by the defendant in the exercise of reasonable care, and prudence, an action will lie for the injury."* The same principle is approved by the Supreme Court of Wisconsin, with this qualification, that "both parties are in the exercise of a lawful right," and in the same connection the court say, "It however applies *to road crossing where men and horses have a right to be in going from one place to another."* *See* 9, *Wis.* (text) 215.

The Supreme Court of Vermont in 25, *Vt.* (text) 162, say that "*Even where cattle are wrongfully upon a highway, the railroad company can not justify either recklessness, want of common care, at the time and after the cattle are discovered, or wanton injury.* But short of that they are not liable, either upon principle, or upon the decided cases."

The case of *Kerwhacker vs C. C. & C. R. R. company* 3, *Ohio* 172 will be found a case of great value, as it makes refference to many cases on the relative duties and liabilities of parties doing, and sufforing injuries from accidents, and after a thorough examination of the leading cases in England, and in this country the court say:

"The doctrine that where both parties are in fault the party sustaining the injury can not recover, is subject to several material qualifications," and in the same case on *page* 189, the court say;

"The mere fact that one is in the wrong, does not of itself absolve the other, from due care towards him. There are numerous cases both in England, and in this country, where parties have been held responsible for their neglect, although the party at the time of the occurance was *culpable*, and in some of the cases in the actual commission of a trespass."

From all the cases there cited the court, deduce the conclusion that, "While it is the general rule that where the parties are mutually in fault, or in their words where negligence of the same nature in each party has co-operated to produce the injury, the party sustaining the loss is without remedy, but that this rule is subject to the following qualifications:

1st. The injured party although in fault to some extent, may notwithstanding this, be entitled to reparation in damages for an injury which could not be avoided on his part by ordinary care.

3rd. Where a party has in his custody dangerous implements, or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person although at the time, even in the commission of a trespass or otherwise somewhat in the wrong, sustains an injury

he may be entitled to redress." (Text) *P.* 195.

The case of the *N. H. Steam Boat & Trans. Co. vs Vanderbilt*, 16, *Conn.* 420, was a case where the plaintiff's vessel ran into the defendant's steamer, *Belle*, the *Belle* having out no lights as required by the statute of the state ; the defendant recovered a judgement for the damages thus sustained, and the Supreme Court refused to disturb the finding, the court remark, "That while on the one hand, a party shall not recover damages for an injury which he has brought upon himself, *neither shall he be permitted to shield himself from an injury which he has committed, because the party injured was in the wrong*, unless such wrong contributed to produce the injury, and even then, it would seem a party is bound to be in the *right.*"

In the case of the C. *B. & Q. R. R.* Co. *vs Dewey Administrator*, 26, *Ill.* 258, where a party was killed while in the act of attempting to get through a train of freight cars standing temporarily on the track, without notice to the engineer, his family could not recover, because his negligence was gross ; in that case the court said "where the party injured has been guilty of a slight degree of negligence contributing to produce the injury, to recover he must show that the other party has been guilty of *gross negligence.*" admitting (for the argument) that Wells was slightly in fault : if the oaths of the witnesses Greely, Cooper, and Fisk, are to be credited, the engineer *was* guilty of *gross* negligence for ommitting to give the signals required by the statute. In this same case the court say : "whilst the party upon whom the injury is inflicted must use all reasonable care, he is not held to the highest degree of precaution, nor to recover need he be wholly free from negligence, if the other party *has been culpable.*"

In the case of the C. *B. & Q. R. R.* Co *vs Hazzard*, decided at the same term of court ; this court qualified the rule laid down in *Forrester's case* 11, *Ent.* 50, and explain the words "*any negligence* of the plaintiff," in this wise, "that all care, and negligence is at least but relative, the absence of the highest possible degree of care, shows the presence of some degree of negligence, slight as it may be, and that the true doctrine is, that in proportion to the negligence of the defendant, should be measured the degree of care on the part of the plaintiff. *The degrees of negligence should be measured, and compared and considered, and whenever it appears that the plaintiff's negligence is slight, as compared with the defendant's greater or gross negligence, he must not be deprived of his action,*" the same just reasoning and principle, was recognized by this court in the *Jacobs' case*, 20, *Ill.* 485, apply this reasoning to the present case, and credit the testimony of *Greely, Cooper, Fisk, and Phelps*, as against the testimony of *Green and McKinley*, and can there remain a doubt but that the negligence of Wells at the occurence was slight, as compared with the gross and culpable neglect of the engineer. But who shall gauge or weigh, these relative degrees of negligence of the parties, from the varied circumstances which surrounded the parties respectively ? We say that the jury alone must determine that matter.

In the case of the *G. & C. U. R. R. Co. vs Dill*, 22, *Ill.* 271, this court said, "the question of negligence is one of fact which must be left to the determination of a jury. It depends to so great an extent on the surroundings of each case, that unless it is gross, no rule can be adopted. The jury must necessarily determine from the situation of the parties, and all the surrounding circumstances whether there has been negligence on either part. *The court has no power to deter-*

mine the fact of negligence, unless it be in the non-observance of a positive requirement of law, *whether the failure to ring a bell or sound a whistle is negligence is a question of fact for the jury.*"

In the same case this court say, "when the company have erected the proper signs and notices at the point of intersection, the highway traveller should under ordinary circumstances heed its warning, and use the proper precaution to avoid a collision, and failing to do so, negligence *more gross on the part of the company only* will render them liable for injuries received." If this be so that a railroad company may be liable even where a traveller fails to heed the signals of bell or whistle, when they are given, much more must the company be liable if no such signals are given at all, and the negligence of the company, or its servants is as gross as the testimony in this case shows it to be.

In the case of *Dawson vs Robbins*, 5, *Gil.* 71, this court said, "it is only in cases where the verdict of the jury strike the mind at first blush, as manifestly, and palpably contrary to the evidence that the court will for that reason interfere to set it aside." And in *Allen vs Smith*, 3, *Scam.* 97, the court say, "where the evidence in a case is contradictory; the jury have a right to weigh it, and decide as the balance preponderates, and unless they decide manifestly against the evidence, the verdict will not be disturbed."

We believe as we have already said, that no technical objection can be sustained to any matters appearing in the record. But even should there be found such. This court in *Leigh vs Hodges* 3, *Scam.* 15, say, "it does not always follow that a new trial will be granted, *even if the jury find against the instructions of the court, or through misdirection of the court on a point of law, provided the court is satisfied that justice has been done.*"

On the question of the damages little need be said ; all the witnesses for the plaintiff swear, that the deceased was a hail healthy man, possessed of good health, and activity, being about sixty years of age, that he was very industrious, sober, and always at work for his family, was the sexton of all the cemetaries of Princeton ; we think the damages are not excessive, it was a question for the jury to say what the deceased was worth to his family. In the case of *Schlenker & al. vs Riley*, 3, *Scam.* 484, the court say, "it will not disturb a verdict on account of excessive damages, in cases of *tort*, unless it is probable from the amount of damages assessed that the jury has acted under the influence of prejudice or passion."

Certainly there is nothing in the amount of the verdict in this case to indicate the work of prejudice or passion. The deceased with his age , and experience of the world, his sober and industrious habits, at the head of a numerous young family, was worth the amount of the verdict in the value of his counsels and instruction to his children, yet aside from this consideration, we think the testimony will support the amount of the verdict.

Without further remarks we submit the matter to the court.

J. I. TAYLOR,
Att'y for Appellee.

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The C. B. & Q. R. R. Co.

vs.

Samuel Triplett Admr
of Estate of Wm. H. Kelly dec'd

abstract, argument & Brief
for the appellee

Filed Apl. 21. 1865
L. Leland
Clk

United States of America
State of Illinois } ss.
Kendall County

Pleas before the Hon. Madison E. Wallace
judge of the Ninth Judicial Circuit
of the State of Illinois and Presiding
judge of the Kendall County Circuit Court
at a Term thereof began and held at
the Court House in Oswego in said
County on the first Wednesday following
the first Monday of the Month of April
being the Sixth day of said Month in
the Year of our Lord one thousand Eight
Hundred and sixty four and of the Independence of
the United States of America the Eighty Eighth.
Present the Honorable Madison E. Wallace judge
David S. Jones Esqr. State's Attorney
Geo. M. Wallenbeck Clerk
and Almiris D. Newton Sheriff
Attest G. M. Wallenbeck Clerk

The Court opened by Proclamation.

Be it remembered that on the 13th day of
December A.D. 1862 there was transmitted from the office
of the Clerk of the Circuit Court of the County of Bureau
in said State of Illinois to the office of the Clerk of the Circuit
Court of said County of Kendall which was duly filed thereon the
record proceedings in the words and figures following to wit:

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Clerks office of the Supreme Court of the State of Illinois
Judge of the Ninth Judicial District of the State of Illinois
at a Special Term of the said Court within and for
the County of Bureau in said State begun and held
and Continued at the Court House in Princeton in said
County on the 5th Monday in the month of September
being the 29th day of said month in the year of our
Lord one Thousand Eight Hundred and sixty two

Present Hon. W. E. Mallister Judge
Geo. W. Radcliffe Clerk
David McDonald Sheriff
David P. Jones States attorney.

On the second day of said Term
To Wit: September 30th A. D. 1862.

Present same as Yesterday.

Samuel Diffell administrator
of the Estate of William H. Wells dec'd.
vs.
The Chicago Burlington and Quincy
Rail Road Company

Case

This day
come the said Defendant by Kendall & Lee
its attorneys, and filed its demurrer to the said Plain-
tiffs Declaration filed, herein in the words and figures
following, to wit:

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Circuit Court of Bureau County

State of Illinois
County of Bureau } ss

The Chicago Pendington and Quincy Rail Road Company

vs

Samuel Triplett administrator of the Estate of William H. Wells

Action on the Case for Damages

And the said Defendant by Walker and Davis its attorneys comes and defends the wrong and injury when &c and says that the said first and second Counts of the said declaration, and each of them, and the matters and things therein contained in manner and form as the same are above stated and set forth are not sufficient in Law for the said Plaintiff to have or maintain his aforesaid action thereof against the said Defendant, and the said Defendant is not bound by Law to answer the same, and this he is ready to verify, wherefore by reason of the insufficiency of the said first and second Counts of the said Declaration, and of each of them respectively in this behalf the said Defendant prays judgment and that the said Plaintiff may be barred from having or maintaining his aforesaid action against it.

And the said Defendant according to the form of the Statute in such case made and provided states and shows to the Court here this

following further causes of demurrer to the said first & second Counts of the said declaration and to each of them separately: that is to say; That it is not alleged in said first and second Counts or in either of them anywhere that the said Plaintiff exercised due and proper care and caution or was so exercising proper care at the time said accident took place and also the said first and second Counts of the said declaration and each of them respectively are in other respects uncertain informal and insufficient &c

Walker & Dexter

Attys for Defft.

Filed Sept. 29th A.D. 1872.

E. S. McRadcliffe Clk.

(On the 6th day of said Term)

To Wit: October 4th A.D. 1872.

Present the same as on Yesterday.

(And as before)

Samuel Trickett administrator
of the Estate of William H. Wells dec'd.

vs

The Chicago Burlington and Quincy
Rail Road Company

This day came the said Plaintiff by Taylor and Paddock his Attorneys and the Defendant comes by Randall & Lee its Attorneys and files its Affidavit and Petition for a change of Venue herein in the words and

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figures following to wit;

Circuit Court of Bureau County.
September Special Term A.D. 1852.

State of Illinois } ss
Kendall County }

Samuel Tristett administrator
of the Estate of William H. Wells dec'd
vs.
The Chicago Burlington & Quincy
Rail Road Company
Action on
the case for
Damages

To the Hon Wm. T. Hollister Judge of
the ninth Judicial Circuit and of the Circuit Court
of Bureau County aforesaid,

Your petitioner the Chicago Burlington
and Quincy Rail Road Company respectfully
represents unto your Honor that it is the same
Defendant named in the above entitled cause
and against which said action is brought,
that said Cause is now pending in the said
Circuit Court of said County of Bureau
in the Circuit aforesaid on the law side
thereof. Your petitioner further represents unto
your Honor that the inhabitants of the said County
of Bureau wherein the said Cause is so pending
as aforesaid, are prejudiced against your
petitioner in said Cause, and that your petitioner
fears and has reason to fear, and is so advised,
and believes it to be true that he cannot have

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Especially and will not receive a fair Trial in said cause in the said Circuit Court of Bureau County on the part side thereof as aforesaid, wherein the said cause is now pending as aforesaid, on account of, and for the reason of the said prejudices of the inhabitants of said County of Bureau as aforesaid in favor of the Complainant in said cause and against your petitioner herein and sole defendant in said cause as aforesaid.

Your petitioner therefore prays that a change of venue may be awarded by your Honor in said cause to some other ~~County~~ and different County other than the said County of Bureau in said Circuit aforesaid wherein the said cause do not exist in pursuance of the Statute in such case made and provided

The Chicago Burlington & Quincy Rail Road Company by J. W. Wallace Sol. Atty.

State of Illinois } ss
County of Cook }

John Allen Kenwick of the City of Chicago in the State of Illinois being first duly sworn deposes and says that he is the agent & President of the Petitioner named in the above petition and makes this affidavit in its behalf; that he has read the foregoing petition and knows the contents thereof and that the same and the matters and things therein stated and set forth are true of his own knowledge Except as to the matters therein stated to be on information

and belief, and as to those matters he believes it to be true

John Van Matre

Seal Notarial

Subscribed and sworn to before me the undersigned a Notary Public in and for said County this day; Witness my hand and Notarial seal this 26th day of September A.D. 1862. Peter Haggy Notary Public

Filed Sept. 29. 1862
Geo. M. Radcliffe Clk.

And by agreement of the said parties the Court orders that said Petition be granted and that the venue in this cause be changed to Kendall County in the State of Illinois and that the Clerk of this Court forthwith certify and transmit to the Clerk of the Circuit Court of said Kendall County a copy of the Record together with all the papers on file in this cause

State of Illinois } ss
County of Bureau }

I George M. Radcliffe Clerk of the Circuit Court in and for said County in the State aforesaid do hereby certify that the foregoing is a true Copy of the Record of

Proceedings, and the accompanying papers
thereto from 1 to 6 inclusive are all the papers
on file in my office in said cause

Witness my hand and the seal
of said Court at Princeton in
said County this 12th day of
December A.D. 1862.

Geo. M. Radcliffe Clk.
By Cairo D. Trimble Depy.

Seal

Filed Dec. 13th A. D. 1862
S. W. Hallenbeck
Clerk

And also be it further remembered that on the 16th
day of September A. D. 1862 there was filed in the office
of the Clerk of the Circuit Court of said County of Bureau
a certain precipe in the words & figures following, to wit:

State of Illinois } ss.
Bureau County }

In Circuit Court
September Special Term A. D. 1862

Samuel Triplett Administrator
of the Estate of William H. Wells deceased

vs

The Chicago Burlington and
Quincy Rail Road Company

In Case
Damages $5000.00

The Clerk of said
Court will please issue a Summons in the above
entitled cause against the above defendant

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lay the action in Case and the Plaintiffs damages
the administrator aforesaid at Ten Thousand Dollars
Princeton Sept 16. 1862.

Taylor & Paddock attys for
Plaintiff.

Filed Sept. 16. 1862
Geo. M. Radcliffe Clk

Filed Dec. 13. 1862
E. Wm. H. Allen Deputy Clerk

The Summons issued out of the office of the
Clerk of the Circuit Court of said Bureau County
upon the filing of the above Precipe with the Sheriffs
return indorsed thereon is in the words and figures
following that is to say:

State of Illinois } ss
Bureau County } The People of the State of Illinois
To the Sheriff of said County
Greeting:

We Command you that you summon
The Chicago Burlington and Quincy Rail
Road Company if they shall be found in your
County, personally to be and appear before the Circuit
Court of said County on the first day of the next
Term thereof to be holden in the Court House in the
Town of Princeton in said County on the first Monday
in the month of September inst. to answer unto
Samuel Triplett administrator of the Estate of

William H. Wells deceased in a plea of case to the damage of the said Plaintiff as administrator aforesaid as he says in the sum of Five Thousand Dollars; and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness George W. Radcliffe, Clerk of our said Circuit Court and the seal thereof, at Princeton in said County this 16th day of September in the year of our Lord one thousand eight hundred and sixty two,

Geo W. Radcliffe Clerk
By Cairo D. Trimble D. Clerk.

State of Illinois } ss
Bureau County }

I have served this within writ by delivering a true and certified copy thereof to Charles Parris an agent of the within named Chicago Burlington & Quincy Rail Road Company The President of said Company not residing in my County — Princeton September 18. 1862

D. M. Donald Sheriff
By W. L. Stacy D. Sheriff.

Filed Sept. 18. 1862
G. W. Radcliffe Clerk.

The declaration in said cause was and is in the words and figures following that is to say:

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State of Illinois } ss
Bureau County } In Circuit Court
September Special Term A.D. 1862

Samuel Triplett Administrator of all and singular the goods ~~and~~ Chattels and Credits which were of William H. Wells deceased at the time of his death who died intestate by Tayler and Paddock his attorneys Complains of the Chicago Burlington and Quincy Rail Road Company in a plea of Case,

For that whereas the said Defendants in the lifetime of the said William H. Wells to wit; on the Sixteenth day of November in the year of our Lord one thousand eight hundred and sixty one at said County of Bureau was possessed of a certain Rail Road leading from Chicago (18) Burlington and Quincy through the said County of Bureau, and also of a certain Locomotive Engine and Train of Cars thereto attached, which Locomotive & Cars was then and there running on the said Rail Road under the Control charge and direction of certain agents & Servants of the said Defendants and then and there whilst the said Locomotive and Cars were so being driven in a west direction along the said Rail Road by the said agents and Servants of the defendants at a point on said Rail Road near where the said Rail Road Crosses the

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the public Highway leading from Dover to Princeton in said County of Bureau and East of the said Crossing the said Highway there and there running from a North Easterly to a South Westerly direction across the said Rail Road, the said William H. Wells was there and there lawfully being and travelling upon the said public Highway in a buggy approaching the said Crossing along the said Highway from the North East, the said Rail Road there and there running from East to West across the said Highway and the Plaintiff avers that according to the statute in such cases made and provided it was there and there the duty of the Defendant to have upon the said Locomotive Engine a Bell of at least Thirty pounds Weight or a Steam Whistle and it was there and there the duty of the said agents and servants of the defendant in having the said Locomotive Engine and cars in charge to have rung said Bell, or sounded said Whistle as soon as said Locomotive & Cars had approached to a certain Whistling post on the said Rail Road Eighty rods East of the said Crossing, and it was there and there the duty of said agents and servants to have continued to ring such bell, or sound such Whistle from the said Whistling post Eighty rods East of the said Crossing, until the said Locomotive and Cars had passed the said Crossing so as thereby to give Notice to travellers upon the said Highway of the approach of said Engine & cars and the Plaintiff further avers

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that for the distance of six Rods along the said highway immediately North East of the said Crossing on which part of said highway the said William H. Wells then and there was, it was then and there impossible for the said William H. Wells to have seen the said ~~Locomotive~~ Engine & cars as the same approached the said Crossing on account of a cut or Excavation of the said Rail Road and an Embankment of earth on the north side of said Rail Road made at said point, which prevented the said Engine & cars from being seen by the said William H. Wells so that the said William H. Wells as he approached the Crossing of said Rail Road along the said Highway could only have been advised of the approach of said train by the sounding of its Whistle or the ringing of its Bell, and the Plaintiff says that while the said William H. Wells was so travelling along the said Highway upon the said Crossing, the said Engine & Cars as directed by the agents and servants of the Defendant as aforesaid, was then and there driven upon the said Crossing at a rapid rate of speed to wit at the rate of thirty miles per hour and the Plaintiff avers that the said agents and servants in directing & controlling the said Engine & cars then and there carelessly negligently and culpably omitted to ring the said Bell or sound the said Whistle upon the said Locomotive as soon as the train had approached to the said Whistling post Eighty rods East of the said Crossing and then and there carelessly and

negligently, neglected and omitted to continue (to
ring said Bell or to sound said Whistle from the said
Whistling post to the Crossing but then and there
ran the said Train at the Extraordinary speed aforesaid
upon the said Crossing without a continuous ringing
of said Bell or sounding of said whistle from said
Whistling post to said crossing, and the Plaintiff
avers that the said William H. Wells then & there so
lawfully being and travelling upon the said highway in
a buggy as aforesaid was then and there unable to see
the train approach the said Crossing by reason of the
said Rail Road Cut or Excavation and the embankment
aforesaid and did know of the approach of said Train
by reason of the Careless & negligent misconduct of the
said servants and agents of defendant in directing
the said Train to ring and keep ringing said Bell or
sound and keep sounding said Whistle (on said Train)
from said Whistling post to said Crossing, the said
William H. Wells by reason of the premises then &
there drove his said Buggy upon the said Crossing
& then & there while seated in the same upon the said
Crossing or the said highway in the act of crossing
the same at his usual gait of ~~traveling~~ and whilst
he was then and there upon the said Crossing moving
at his accustomed gait and without any notice
to him whatever of the approach of said Train the
said Train then and there so being directed and controlled
as aforesaid and at the rate of speed aforesaid then and
then struck the said Buggy and the said buggy and the

said William H. Wells with such great violence that he was thrown a distance of three rods and thereby so maimed bruised and crushed that he then and there died and the Plaintiff further avers that the said William H. Wells before and at the time of his said decease was the head of a family & there & there residing with them in the Town of Princeton in said County of Bureau, said family then and there consisting of Lucinda Wells his wife and Temperance C. Wells Lidora Wells Lucy Wells and Lucius Wells his Children said Children then were all minors living with him and depending upon him for their support and also Brenkney Wells & Edna Wells his adult sons and by reason of the death of said William H. Wells his said Widow & Children have suffered great pecuniary loss and damage and the Plaintiff as such administrator aforesaid says that by virtue of the statute in such case made and provided. And by reason of the premises aforesaid the said Defendant became and is liable to the Plaintiff as such administrator aforesaid for the damages and pecuniary loss occasioned to the said Widow and Children of the said William H. Wells Deceased.

And for that whereas also the said Defendant afterwards to wit on the sixteenth day of November in the year A.D. Eighteen hundred and sixty one at said County was possessed of a certain other Rail Road leading from Chicago to Burlington and Quincy through the said County of Bureau, and was also then

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and there possessed of a certain other Locomotive Engine & Train of Gravel Cars Commonly Called flats attached to said Engine which said Engine & Cars were then and there under the control & management and direction of certain agents and servants of the Defendant, and were then and there running upon & along the said Rail Road under the control of said agents & servants running both at great speed the said Train of flats or cars running ahead of the said Engine, said train then & there being of great length to wit, of the length of one hundred & fifty yards, and the Plaintiff says that there was also then and there a public Highway leading from Dover to Princeton in said County of Mercer which Highway then & there crossed the said Rail Road in Princeton Township in said County running a South westerly direction as the same crossed the said Rail Road and the Plaintiff says that at the distance of Eighty Rods East of the said Crossing and near the said Rail Road there was then and there a Whistling post and according to the statute in such cases made and provided it was then and there the duty of the said agents and servants of the defendant so having the said grand train in charge to have ringing the Bell or sounded the Whistle upon the said Locomotive as soon as the west end of said flats had reached the said Whistling post Eighty rods East of the said Crossing and to have so continued the ringing of said Bell or the sounding of said Whistle from the time that the west end

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of said Train reached the whistling post Eighty rods East of the said Crossing until the said Train had passed the said Crossing so as thereby to signal and give notice to Travellers upon the said Public Highway of the approach of said Train to the said Crossing and the Plaintiff avers that the said Rail Road at the said Crossing there and there runs in a direction in a direction from East to west and that the said Highway at said Crossing and for a great distance East of the said Crossing to wit; for the distance of 200 yards there & there ran through an Excavation or cut through the Earth of great depth to wit; of the depth of fifteen feet, and for the same distance on the north side of the said Rail Road and immediately East of said Crossing, there was there and there an embankment of earth of great height to wit of the height of fifteen feet, and there was also there and there a hedge on the north side of said Rail Road track at the same place and the plaintiff further avers that said Highway there & there for one Hundred yards North East of the said Crossing and next to said Crossing approaches the said Crossing through a cut or Excavation of the Earth of great depth to wit; of the depth of ten feet and the plaintiff avers that while the said Cars or Flats and the said Locomotive thereto attached were so approaching the said Crossing from the East (the said Flats running ahead & attached to said Locomotive the said William H. Wells was there and there lawfully travelling upon and along the said Highway in a Buggy approaching the said Crossing from the north East and

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as the said Train Approached to the said Whist-
-ling post Eighty rods each of said Crossing the
said William H. Wells was there and there
Travelling along the said Highway near to
the said Crossing to wit at the distance of
forty yards from the said Crossing and the Plaintiff
avers that on account of the Excavation and Em-
-bankment of the Rail Road Track and of the
said Highway at the same time and there Approached
the Crossing of each other as aforesaid and the
embankment and Ledge aforesaid, that it was
then and there impossible for the said William
H. Wells to have seen the said Train Approach
the said Crossing from the East so as to have kept
himself out of the way of said Train at the
said Crossing and the Plaintiff avers that it
was then and there the duty of the said agents
and servants of the Defendant so having said Train
in Charge to have commenced to ring the Bell
or to sound the whistle upon the said Locomotive
as soon as the front end of said Train of Cars
or Platform had reached a point Eighty rods East
of said Crossing and to have so continued the
ringing of said Bell or the sounding of said Whistle
from said point until the said Train had passed
the said Crossing so as thereby to have given notice
to the said William H. Wells of the Approach of
said Train, Yet the said Agents and Servants of
the Defendant so having said Train in Charge & Controlling

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the same then and there carelessly negligently and culpably, negligently and omitted to ring the said Bell or sound the said Whistle when the west end of said Train had reached a point 80 rods East of said Crossing and then and there carelessly & negligently omitted to continue the ringing of said Bell or the sounding of said Whistle upon the said Engine from the said point Eighty rods East of said Crossing to the said Crossing as it was then duty to have done and as required by the Statute in such case made and provided and the plaintiff avers that the said William H. Wells then and there receiving no warning by bell or whistle of the Approach of said Train and being unable to see the said Train for the causes aforesaid then and there rode along the highway and upon the said Rail Road Crossing in his said Buggy and then and there whilst upon the said Crossing and in the act of Crossing the same at his usual gait in his said Buggy, the said train then and there running at great speed to wit at the rate of 30 miles per hour ran upon the said Crossing whilst the said William H. Wells was as upon the said Crossing in the act of Crossing the same (and without any notice to him by bell whistle or otherwise of its Approach) the west end of said Cars or Platform (the said Locomotive being attached to the other end) then and there struck the said Buggy and the said William H. Wells with great violence & then and there threw him forty feet

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along the said Rail Road Track and thereby so maimed bruised and crushed the said William H. Wells that he then & there died, and the plaintiff avers that the said William H. Wells before and at the time of his Decease left surviving him Lucinda Wells his widow Franklin Wells Edson Wells (adults) Jemima E. Wells Lidora Wells Lucy Wells & Lucius Wells (minors) his Children and heirs at Law all of whom are still living and the Plaintiff avers that the said William H. Wells in his lifetime and until his Decease was an industrious ~~man~~ and frugal husband & father that up to the time of his Decease his said widow and Children with whom he was then living in Princeton in said County were then & there dependent upon him the said William H. Wells for their support and by reason of the grievances aforesaid and the killing of the said William H. Wells as aforesaid his said Widow and Children have sustained great pecuniary loss and damage in thereby being deprived of his said William H. Wells protection support & Labor and the plaintiff says that by reason of the premises in this Count mentioned and by virtue of the statute in such cases made and provided the said defendant became and still is liable to the plaintiff as such administrator aforesaid for the pecuniary loss and damage occasioned to the said Widow and Children aforesaid said damages amounting to the sum of five Thousand Dollars and therefore he sues &c

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And the Plaintiff brings into Court his Letters of Administration which give sufficient evidence to the Court that he is administrator of the said William H. Wells deceased.

Taylor & Paddock Attys for Plff.

Filed Sept 19, 1862
F. M. Radcliffe Clk

Filed Dec. 13, 1862
C. M. Kellenbark Clerk

And afterwards to wit on the 12th day of January A.D. 1863 the same being one of the days of the January Term A.D. 1863 of the Kendall County Circuit Court sitting for the dispatch of Business in the Court House in Oswego in said County the following proceedings among others were had in said Court and entered of Record to wit;

Samuel Triplett administrator of the Estate of William H. Wells dec'd.
vs
The Chicago Burlington and Quincy Rail Road Company } Case

This day this cause is continued the cost of the Continuance to abide the result of the suit.

21 And afterwards to wit; on the 9th day of April A.D. 1863 the

Same being one of the days of the April Term A.D. 1863 of the Kendall County Circuit Court sitting for the dispatch of Business in the Court House in Oswego in said County the following proceedings were thus were had in said Court and entered of Record to wit

Samuel Inglish administrator of the Estate of William H. Wells Dec.

vs.

The Chicago Burlington & Quincy Rail Road Company

} Case

This day this cause is set down for Trial next Tuesday Morning —.

And Afterward to wit: on the 14th day of April A.D. 1863 the same being still one of the days of April Term A.D. 1863 of the Kendall County Circuit Court sitting for the despatch of Business as aforesaid the following proceedings were had in said Court in said cause and entered of Record to wit:

Samuel Inglish administrator of the Estate of William H Wells dec.

vs.

The Chicago Burlington and Quincy Rail Road Company

} Case

And now the Plaintiff by Taylor one of his Attorneys comes and the Defendant by Walker attorney also comes and agree to the following to wit: viz. the Plaintiff to have leave to confess the Demurrer of the Defendant to the Plaintiffs declaration and that he be permitted to Amend the same; Second, that this cause be continued at the Defendants Cost. It is therefore considered by the Court that the Plaintiff have leave to Amend his declaration herein and that this cause be continued and that the Plaintiff have execution of and from of and from the said Defendant the Costs by him in and about the said Continuance Expended and that he have Execution therefor.

And afterwards to wit: on the 27th day of July A.D. 1863 there was filed by the said plaintiffs in the office of the Clerk of the Circuit Court of said Kendall County, his amended Declaration in said cause in the words and figures following to wit:

State of Illinois } ss
Kendall County } In Circuit Court
To October Term A.D. 1863.

Samuel Triplett Administrator of all and singular the goods chattels and Credits which were of William H. Wells Dec'd at the time of his death, who died intestate by Taylor and Paddock his attorneys complains of the Chicago Burlington & Quincy Rail Road Company in a plea of case. For that whereas the said Defendants in the lifetime of the said William H. Wells to wit: on the sixteenth day of November in the year of our Lord one thousand Eight hundred and sixty one at said County of Bureau, was possessed of a certain Rail Road leading from Chicago to Burlington and Quincy, through said County of Bureau, and also of a certain Locomotive Engine and Train of Cars thereunto attached which Engine and Cars were then and there running on the said Rail Road under the control and direction of certain agents and servants of the Defendants at a point on said Rail Road East of and near to where the said Rail Road

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(Running East and West) Crossed the public
Highway leading from Princeton to Dover (running from
a Southwesterly to a North Easterly direction) and whilst
the said Engine and Cars were so running upon
the said Rail Road at a point to wit, Eight hundred
yards East of the said Crossing running west to the
said Crossing the said William H. Wells was there
and there lawfully travelling and being upon the said
Highway in a buggy approaching the said Crossing
along the said Highway from the north East to wit
seventy five yards from the said Crossing from which
~~said~~ point to said Crossing the said Wells was
unable to see the approach of said Train; And the
Plaintiff avers that according to the Statute in
such cases made and provided it was then and
there the duty of said Defendants to have had upon the
said Engine a Bell of at least thirty pounds weight or
a Steam whistle, and it was then and there the duty
of the said agents and servants so having said Engine
and Cars in charge to have rung such Bell or sounded
such whistle, as soon as said Engine and Cars
had approached to a certain whistling post on the
said Rail Road, Eighty rods each of the said Crossing
and it was then and there the duty of the said agents
and servants to have so continued to ring ~~said~~ Bell
or to sound said whistle from said whistling post
Eighty rods east of the said Crossing until the said
Engine and Cars had passed the said Crossing
so as timely to give notice to travellers upon the said

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highway at the approach of said Engine and Cars and the Plaintiff further avers that for a great distance to wit for the distance of twenty rods along the said highway north Eastly from the said Crossing on which part of said Highway the said William H. Wells then and there was that it was then and there impossible for the said William H. Wells to have seen the said Engine and Cars as the same approached the said Crossing on account of a cut or Excavation of the said Rail Road a great distance to wit, the distance of one hundred rods immediately East from the said Crossing and a like Excavation of said Highway for a great distance to wit; twenty rods north Eastly from said crossing, and on account of a board and Hedge fence and an embankment of Earth on the north side of said Rail Road and a Board fence on the south East side of said Highway which prevented the said Engine and Cars from being seen by the said William H. Wells as he approached the Crossing of the said Rail Road along the said High-way so that the said William H. Wells could only have been advised of the approach of said Engine and Cars by the sounding of its whistle or the ringing of its Bell and the Plaintiff says that whilst the said William H. Wells was so travelling along the said Highway as aforesaid on the part thereof excavated as aforesaid with proper care and diligence approaching said Crossing from the north East that the said Engine and Cars as directed by the agents and servants of the Defendants

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aforesaid, was also then and there approaching the said Crossing along the said Rail Road from the East at a rapid rate of speed to wit; at the rate of Sixty Miles per hour and the Plaintiff avers that the agents and servants of the Defendants so directing the said Engine and Cars then and there carelessly negligently and culpably omitted to ring the said Bell or to sound the said Whistle upon the said Engine as soon as the said Engine and Cars had approached to the said Whistling post Eighty rods East of the said Crossing and then and there carelessly and negligently omitted to continue to ring the said Bell or to sound the said Whistle on said Engine from said Whistling post to the said Crossing as it was their duty to have done, and as is required by the Statute in such case made and provided. But then and there ran the said Engine and Cars at the Extraordinary speed aforesaid from the said Whistling post to the said Crossing ~~and then and there carelessly and negligently omitted to continue to ring the said Bell or to sound the said Whistle on said Engine from the said Whistling post to the said Crossing as it was their duty to have done and as is~~ without a continuous ringing of said Bell or sounding of said Whistle from the said Whistling post to the said Crossing and the Plaintiff avers that the said William H. Wells then and there so lawfully being and travelling in a Buggy upon the said Highway as aforesaid and being unable to see a person the approach of the said Engine and Cars to make the said Crossing by reason of the premises

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aforesaid, then and there with all due caution and care drove his said Buggy along the said Highway upon the said Crossing and then and there while seated in the said Buggy upon the said Crossing on the said Highway moving at the usual gait & speed in the act of Crossing on the said ~~Highway~~ Rail Road South westerly along said Highway and without any previous notice to them whatever by ringing of Bell or sounding of Whistle or otherwise of the approach of said Engine and Cars the said Engine and Cars so directed by the agents and servants of the Defendant as aforesaid at the time ordinary speed aforesaid run upon the said Crossing and then and there struck the said Buggy and the said William H. Wells whilst seated therein as aforesaid with great violence so that the said William H. Wells was then and there thrown a great distance to wit the distance of three rods so that he the said William H. Wells was thereby so maimed bruised and crushed that he then and there died and the Plaintiff avers that the said casualty was not the result of any want of proper care and caution on the part of the said William H. Wells but was the result of the negligent and culpable omission of the said agents and servants of the Defendants so directing the said Engine and Cars in neglecting to ring the said Bell or sound the said Whistle and in neglecting to continue the ringing of said Bell or sounding of said Whistle from the said whistling post to said Crossing so as thereby to give warning to said Wells of the approach of said Engine and Cars.

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And the plaintiff further avers that the said William H. Wells before and at the time of his said decease was the head of a family residing with the same in the Town of Princeton in the said County of Bureau the said family then and still consisting of Lucinda Wells his wife Josephine Wells, Lydia Wells, Lucy Wells and Lucius Wells (minor Children) dependant upon the said William H. Wells for their support, and Granbury Wells and Edwin Wells (adult sons) and the Plaintiff as such administrator aforesaid says that by reason of the death of the said William H. Wells as aforesaid that his said Widow and Children have suffered great pecuniary loss and damage thereby, and the Plaintiff says that by reason of the premises aforesaid and by virtue of the Statute in such cases made and provided that the said Defendants became and is liable to the Plaintiff as such Administrator aforesaid for the amount of damages and pecuniary loss occasioned to the said Widow and Children of the said William H. Wells deceased by his death as aforesaid.

2d Count

And that Whereas also the said Defendants afterwards to wit: on the sixteenth day of November in the year A.D. Eighteen hundred and sixty one at said County of Bureau was possessed of a certain other Rail Road leading from Chicago to Burlington & Quincy through said County of Bureau and was also possessed of a certain other Engine and Train of Freight Cars commonly called "Flats" attached to the said Engine which said Engine and Freight Cars were then and there

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running upon and along the said Rail Road said Engine and grand cars running from East to West. East of and near the point on said Rail Road where the public highway leading from Princeton to Dover in said County crossed the said Rail Road the said Grand Train of Cars then and there being of great length to wit of the length of one hundred and fifty yards and the said Grand Cars or Flats then and there running forward of and ahead of the said Engine attached to the same, the said grand Train so disposed was then and there approaching the said Crossing from the East at a great rate of speed to wit; at the rate of thirty miles per hour under the control and direction of certain agents & servants of the Defendants. And the Plaintiff avers that the said Highway then and there crossed the said Rail Road running from a South Westerly to a North Easterly direction in said County and the Plaintiff says that on the said Rail Road the distance of Eighty rods East of the said crossing, there was then and there a Whistling post and that according to the Statute in such cases made and provided it became and was the duty of the said Agents and servants of having the said grand Train in charge to have then and there rang the Bell or sounded the whistle upon the said Engine (attached to said grand Train) as soon as the west end of said grand Train had approached to the said Whistling post. Eighty rods East of the said Crossing and to have so continued to ring the said Bell or to sound the said Whistle from the time the west end of said

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Train approached to the said Switching post until the said Train had passed the said Crossing so as thereby to give Notice and warning to travellers upon the said Highway of the approach of said Train to the said Crossing and the Plaintiff says that the said Rail Road for a great distance to wit; for the distance of five hundred yards East from the said Crossing there and then runs through an Excavation or cut through the lands of great depth to wit, of the depth of Ten feet, that there was also there and then an Embankment of Earth on the north side of the said Rail Road and immediately East of the said Crossing of the same distance with the said cut or excavation, of great ~~length~~ heights to wit; of the heights of five feet above the natural ~~land~~ surface of the Earth, that there was also there and then on the north side of said Rail Road immediately East from the said crossing for the same distance a board fence of great heights to wit of the heights of five feet, and an osage hedge fence of great heights to wit; of the heights of Twelve feet and the Plaintiff further avers that the said Highway for a great distance to wit; for one hundred yards immediately north East from the said crossing there and then approached to the said Crossing through a cut or Excavation of great depth to wit; of the depth of Ten feet and on the north East side of the said Highway for a great distance to wit, for five hundred yards immediately north East from said Crossing there was there and then a Board fence of great heights to wit of the height of five feet and the Plaintiff avers that whilst the said Train

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of Grand Cars or Flats were so approaching the said Crossing as aforesaid from the East that the said William H. Wells was then and there lawfully being and travelling in a buggy upon the said public Highway approaching to the said Crossing from the North East along the said Highway near to the said Crossing, and the Plaintiff avers that the said William H. Wells then and there approached the said Crossing with proper care and caution but on account of the Excavations of the said Rail Road and Highway as aforesaid, and the Embankment, fences and Hedge aforesaid, that it was impossible for the said William H. Wells to see or perceive the said Train approach the said Crossing and the Plaintiff avers that it was then and there the duty of the agents and servants of the Defendants having in charge and directing the said Grand Train to have commenced to ring the Bell or to sound the Whistle (on the Engine attached to said Grand Train) so soon as the west end of said Grand Train approached to the Whistling post and to have so continued to ring the said Bell or to sound the said Whistle from the time the west end of said Train approached to the said Whistling post until the said Train had passed the said Crossing so as thereby to have given notice to the said William H. Wells of the approach of said Train to the said Crossing according to the Statute in such case made and provided yet the said agents and servants of the Defendant so directing the said Train then and there negligently carelessly and culpably omitted their duty and

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disregarded the requirements of the Statute in that behalf in this to wit, that they did not commence to ring the said Bell or to sound the said Whistle as soon as the said Train approached within 80 rods of the said Whistling post nor did they continue to ring said Bell or to sound the said Whistle on the said Engine from the said Whistling post to the said Crossing thereby and by reason of the premises the said William H. Wells being unable to see the said Train approach the said Crossing by reason of the premises aforesaid and receiving no notice by ringing of the Bell or sounding of the Whistle on said Train, or otherwise then and there moved along the said Highway (seated in his said Buggy) upon the said Crossing moving at his usual gait and whilst upon the said Crossing moving at his usual gait and in the act of Crossing the said Rail Road upon the said Highway the said Train of Freight Cars as being directed by the agents and servants of the Defendants aforesaid and whilst running at the Speed aforesaid, then and there ran upon the said Crossing from the East and then and there struck the said Buggy and the said William H. Wells with great Violence throwing him the said William H. Wells a great distance to wit, Forty feet along the said Rail Road and thereby so maimed bruised and crushed the said William H. Wells that he then and there died and the Plaintiff avers that the said casualty was not the result of the want of proper care and caution

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on the part of the said William H. Wells but was caused by the wrongful neglect and default of the said agents and servants of the said Defendant so having the said Train in charge in omitting to give the said Notice or Signal of the approach of the said Train to said Crossing by a continually ringing of Bell or sounding of Whistle on said Train from said Whistling post to said Crossing as it was their duty to do. And as is required by the Statute in such case.

And the Plaintiff avers that the said William H. Wells began and at the time of his ~~death~~ said decease left ~~him~~ surviving him a family with whom he resided in Princeton in said County of Bureau, consisting of his wife Lucinda Wells, and his Children Granberry Wells and Edna Wells adults and Josephine C. Wells Lidora Wells Lucy Wells and Lucius Wells minors all of whom still survive, and the Plaintiff avers that the said William H. Wells in his lifetime and until his death was a most industrious and frugal Husband and Father in his said family that at the time of decease his said Widow and Minor Children with whom he lived as aforesaid were in a large degree dependant upon the said William H. Wells for their maintainance and support. And the Plaintiff avers, that by reason of the grievances aforesaid, and the said killing of the said William H. Wells as aforesaid that his said Widow and Children have sustained great pecuniary

loss and damages in thereby being deprived of his (said William H. Wells) protection, labor and support and the plaintiff says that by reason of the premises in this count mentioned and by virtue of the statute in such case made and provided the said defend= =ant became and is liable to the Plaintiff as such Administrator aforesaid for the amount of the pecuniary loss and damage which has accrued to the said Widow and Children of the said William H. Wells by reason of the grievances afore= =said. To the damage of the Plaintiff as such Administrator aforesaid of Five Thousand Dollars and therefore he sues &c

And the Plaintiff brings into Court his letters of administration which give suffi= cient Evidence to the Court that he is Administrator of the said William H. Wells dec'd.

Taylor and Paddock attys
for Plff.

Filed July 27th 1863.
J. M. Hollenbeck Clk.

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And afterward to wit: on the fourteenth day of October the same being one of the days of the October Term A.D. 1863 of the Kendall County Circuit Court sitting for the dispatch of Business in the Court House in Oswego in said County the following proceedings among others was had in said Court and Entered of Record therein to wit;

Samuel Driskell Administrator of the Estate of William Wells dec.

v

The Chicago Pantington and Quincy Rail Road Company

} case

This day came the parties and by agreement heretofore filed herein this cause is continued at the Defendants costs. It is therefore considered by the Court that the Plaintiff have and recover of and from the said Defendant the costs by him in this behalf expended and that he have Execution therefor.

And afterward to wit; on the 11th day of January A.D. 1864 the Defendant caused to be filed in the office of the Clerk of the Circuit Court of said Kendall County the plea of the Defendant herein to wit in the words and figures to wit.

Kendall County Circuit Court
January Term 1864.

State of Illinois }
Kendall County }

The Chicago Burlington and
Quincy Rail Road Company

vs

Samuel Triplett

And the said Defendant
by J. M. Walker it attorney comes and defends the wrong
and injury when &c and says that it is not guilty
of the said supposed grievances above laid to it charge
or any, or either of them, or any part thereof in manner
and form as the said plaintiff above thereof in his said
Amended declaration complained against it and for
the said Defendant puts itself upon the country &c.

J. M. Walker Atty for Def.

Filed January 16th 1864.

E. W. Rosenbaum Clerk

And afterwards to wit, on the sixth day of April A.D.
1864 the same being one of the days of the April Term of the
Kendall County Circuit Court sitting for the Dispatch of Bus-
iness in the Court House in Oswego in said County the following
proceedings among others was had in said Court and entered of
Record therein to wit:

Samuel Triplett administrator
of the Estate of William N. Wells dec.

vs.

The Chicago Burlington and Quincy
Rail Road Company

} Case

This day by agreement
of the parties hereto
this cause is set down

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for a hearing next Tuesday Morning

And afterwards to wit on the 12th day of April A.D. 1864 the same being still one of the days of the April Term of the Court aforesaid sitting as aforesaid the following proceedings among others were had in said Court and entered of Record therein to wit;

Samuel Triplett administrator of the Estate of William H. Wells dec'd.
v.
The Chicago Pekin and Quincy Rail Road Company

Case

And now upon this day comes the Plaintiff in his own proper person as well as by Taylor and Paddock his attorneys and the Defendant by Walker and Kendall its attorneys also comes and the issues being joined herein it is considered by the Court that a Jury do come and thereupon comes a Jury of Jurors to wit; Elias L. Herrin Walter L. Wiseth John Kellett Orin C. Austin William Stroseman William Pease Earl S. Palzer Samuel P. Parish William H. Wormley Cyrus Haven John A. Cook and William Loveday each of whom are duly elected tried and sworn and the Court and Jury in hearing the Evidence herein until the hour of the adjournment of the Court

And afterwards to wit; on the next day to wit; on the 13th day of April A.D. 1864 the same still being one of the days of the Term of the Court aforesaid sitting as aforesaid the following proceeding among others were had in said Court and entered

of Record Term to wit;

Samuel Dinsdell administrator
of the Estate of William N. Wells dec'd.
v.
The Chicago Burlington and
Quincy Rail Road Company } Case

And now at this day
again come the parties
hereto and the jury aforesaid
also come and the Court and jury proceed in hearing the Evidence herein
until the time of adjournment.

And afterward to wit; on the next day to wit; on the 14th
day of April A.D. 1858, the same still being one of the days
of the Term of the Court aforesaid the following proceedings among
others were had in said Court and entered of Record to wit;

Samuel Dinsdell administrator
of the Estate of William N. Wells dec'd.
v.
The Chicago Burlington and Quincy
Rail Road Company — } Case

And now on this day
again come the parties
hereto and the jury aforesaid
also come into Court and after hearing the Evidence and receiving
the instructions of the Court the jury have leave to retire in charge
of an officer to consider of their Verdict and afterward the
jury return into Court and say we the jury find the issues
herein for the Plaintiff and assess his damages at one
thousand Dollars which is entered of Record — and —
thereupon the Defendant by Walker one of its attorneys comes

[illegible] new trial herein which said
Motion was submitted by the Court without argument. The Court
being advised considers that said Motion be overruled and a
new trial denied. It is therefore further considered by the Court
that the Plaintiffs have and recover of and from the said Defendant
the sum of one thousand Dollars assessed by the Jury aforesaid
as well as the Costs and charges by him in this behalf expended
and that he have Execution therefor, And afterwards comes the
Defendant by Walker attorney and has leave of the Court to file a
Stipulation in the words and figures following to wit:

"State of Illinois } Kendall County Circuit Court April Term A.D. 1844.
"Kendall County } Saml. Triplett &c

vs

The Chicago Rock Island and Pacific
Rail Road Company

"It is Mutually agreed in this case by the parties that upon
"the rendering of the Verdict of the Jury in this cause the Court shall enter
"the motion for a new trial for the party against whom such Verdict
"shall be, and the motion shall be submitted without argument
"and overruled by the Court, an order on appeal may be entered by the
"Court for the party, upon such party filing a Bill of Exceptions
"and Bond in $1000.00 in 90 days. If the Defendant appeals the
"Defendant shall enter Bond with J. H. Walker security. If Plaintiff
"appeals he shall enter Bond with M. Taylor Triplett as security
"Appeal Bond and Bill of Exceptions to be filed within 90 days
"as of the date of the order of the Court. Taylor & Paddock for Plff
"Kendall & Walker attys for Defts

Upon the Reading and filing of said Stipulation it is considered
by the Court that an appeal be allowed herein to the Supreme

Court of the third Grand Division of the State of Illinois upon the Defendant entering into Bond in the sum of one thousand Dollars with J. W. Walker as surety and that said Bond and Bill of Exceptions of the said Defendant be filed herein within ninety days from the rising of the Court.

And afterwards to wit on the 20th day of June A.D. 1864 the Defendant filed in the office of the Clerk of the Circuit Court in and for said Kendall County his Appeal Bond in the words and figures following to wit:

Know all men by these presents that we the Chicago Burlington and Quincy Rail Road Company John Vanderwick and James W. Walker of the State of Illinois are held and firmly bound unto Samuel Triplett administrator of W. K. Wells of the County of Kendall in the State of Illinois in the sum of three thousand Dollars, Lawful money of the United States to be paid to the said Samuel Triplett his successors or assigns, for which payment well and truly to be made, the said Chicago Burlington and Quincy Rail Road Company bind itself its successors and assigns and we the said John Vanderwick and James W. Walker bind ourselves our and each of our heirs Executors and Administrators jointly and severally firmly by these presents— Sealed with our seals and dated the 19th. day of June A.D. 1864.

Whereas the said Samuel Triplett as administrator as aforesaid did on the fourteenth day of April A.D. 1864 in the Circuit Court of Kendall County in the

State of Illinois recover a judgment against the said Chicago Burlington & Quincy Rail Road Company for the sum of one thousand Dollars and Costs of Suit from which said judgement the said Chicago Burlington and Quincy Rail Road Company has taken an Appeal to the Supreme Court of the State of Illinois Now therefore the Condition of this obligation is such that if the said Chicago Burlington & Quincy Rail Road Company shall prosecute its said Appeal with effect and shall pay the said judgement Cost interest and damages in case said judgement shall be affirmed then this obligation shall be void otherwise to remain in full force and effect

The Chicago Burlington & Quincy Rail Road Company by J. Van Nortwick President

The Chicago Burlington and Quincy Rail Road Company Seal

J. W. Walker

John Van Nortwick

Attest:

A. T. Hall Secretary.

Filed June 20. 1864.

Wm Vollenbark Clerk.

And afterward to wit: on the same day to wit: on the 20th day of June A.D. 1864 the Defendant files Their its Bill of Exceptions herein in the words and figures following to wit

State of Illinois
Kendall County } ss

In the Circuit Court April Term A.D. 1864

D. Triplett
Administrator of
W. H. Wells

vs.

The Chicago Burlington and Quincy
Rail Road Company

Bill of Exceptions

Be it Remembered that on the trial of this cause at the April Term A.D. 1864 of the said Circuit Court the following proceedings were had to wit

— First day —

Tuesday — 12th April 1864.

Morning Session —

The Jury was empannelled and the opening Statements on behalf of the Plaintiff was made by Mr. Taylor After which the opening Statement on behalf of the Defendants was made by Mr. Walker.

At 15 minutes past 12 p. m. the Court Adjourned until ½ past 1 p. m. Mr. Walker not having concluded his opening argument Statement.

Afternoon Session

Opening Statement on behalf of the Defendant concluded by Mr Walker —

And thereupon the said Plaintiff to maintain the issues on his part gave the following testimony in evidence to the Jury,

D. P. Forsly; called on behalf of the Plaintiff being first duly sworn was Examined in Chief by Mr. Taylor and testified as follows;

Ques — When do you live?

Ans — I live near Princeton Bureau County Illinois.

Ques — How long have you lived there?

Ans. — Upwards of thirty years.

Ques — What have you been doing during that time?

Ans — Farming.

Ques — All the time?

Ans — Yes sir —.

Ques — You have lived in our neighborhood thirty years?

Ans — Yes sir.

Ques — I will enquire if you was acquainted with the late William Wells?

Ans — I was sir.

Ques — State to the Jury when and where it was and under what circumstances you last saw him?

Ans — On the 16th. November 1861, as near as I can recollect — I was returning from the Depot at Princeton with a load of lumber.

Ques — Which way were you going?

Ans — Going East on what is called the Chicago and Quincy road; that is, it was originally laid out as a State road, called the Chicago and Quincy Road.

Ques — The Princeton and Dover Road)?

Ans — Yes sir.

Jur. The Highway?

Ans. Yes Sir.

Jur. What had you for freight?

Ans. I had a heavy load of lumber and I came very slowly: it was nearly night, and I came to the crossing: 150 steps south of the Crossing - there is another road runs east and west across this road I was on and I heard the whistle of a train coming from the East but could not see it. I stopped my team, because I knew allen myself, to drive onto a Rail road with a loaded Team so long, when I can hear a whistle. This train then came on to the whistling post, and when them just blowed one whistle, I came on and I could see the smoke pipe, but could see no cars when I was till the train came out to the Cattle guard on the East side of the Road, I saw the Mr. Wells, not knowing who it was at the time, coming slowly up the rising ground, coming Southward, and he came on to the point of the Hill previous to the sound of this whistle each, as I heard it, and was coming along very slowly (his horse was) he had a covered buggy, and he came on the sloping grade of the road, and I should judge from the position I was standing (I was on the top of my load of Lumber) that his horse was struck - It stalled quick, and apparently to cross the track and just as the Horse stalled to cross the track, I saw these Rail Cars passing over the Cattle guard. I supp.

=posed before, that the train was behind the Engine, but I then found the cars were before the Engine.

Int— what kind of cars were they?

Ans— Flat cars, no top on them. I knew in a moment when I saw the cars there, that it would be impossible for the man to get out of the reach of them in time the end of the car on the South side struck the hind wheel of the Buggy, and it was instantaneously thrown into the air— went up a considerable distance and passed to the West, and the buggy and contents of the Buggy passed to the west. It frightened my horses and it took some minutes before I could pacify them, when I had done so, I went down to the Rail Road Track and I saw several men there and I asked them if the man was killed, and they said they guessed he was. I asked for the Conductor, and a young man said he was the Conductor, and also stated that he was the engineer and the Conductor too.

Mr. Walker objected to the Declaration of the Engineer being admitted in Evidence— Objection sustained.

Int— You need not make any statement about what he told you?

Ans— I wish to tell the truth as near as I can, I asked the Gentleman to cut his Train, as I did not wish to climb over his cars nor enter fear with his mules, he did cut his Train and I went across the Track. Then I went down to see the man

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that was Killed, there was a little small dog sitting on him. I spoke to the dog but it appeared to be vicious I then says that I could not coax the dog, and I wished to know if the man could be helped any way by having assistance, and I put my hand on his bosom to see if I could see any sign of life and the dog bit me very severely. I took his arm up and felt of his pulse, and I could see no signs of life about him His head was very much bruised

Int — Did you recognize his body?

Ans — I did not then sir.

Int — Did you afterwards?

Ans — Yes sir — about 3 or 4 hours after.

Int — What time in the day was this?

Ans — It was pretty late in the Evening. It must have been probably 7 o'clock when I left home.

Int — What kind of a day was it?

Ans — It was some Cloudy — perceptibly Clear, but some clouds. At the time that he was killed there, it was not very Cloudy. The sun was shining pretty fair.

Int — Did you see this man in the buggy before you heard the first whistle?

Ans — Yes sir, I could see him and his horse coming up the Hill, as I was standing on my Land below Mr Phelps, on the East of Mr Phelps.

Int — Can you him coming before you heard the whistle?

Ans — Before I heard the first whistle.

Int — What gait was he going then?

Ans – walking slowly.

Int – How far was he from the mouth of this cut, the cut on the Highway?

Ans – I should have to guess at that.

(Winship's Map is now handed to the Witness)

Int – Did you examine that diagram?

Ans – Yes sir.

Int – Is that correct?

Ans – Yes sir I should think it was.

Int – Where was Mr. Wells when you first saw him?

Ans – He was away down on this rise of ground (pointing to the Map.) right near Phelps house, just a little north East of the house.

Int – And the train was down in the other cut?

Ans – Yes sir.

Int – Did you see him in that cut there?

(pointing to the Map.)

Ans – I did sir, I saw him all the way and his horse started about the center of the Cut, as near as I could judge probably about the center of this cut, when he started quick.

Int – Will You detail that again?

Ans – It is about 150 steps from the center of the road to where I was, and Mr. Wells when I first saw him was a little north East of Mr. Phelps House, and at the time his horse started up he must be about the center of this cut [pointing to the map] I and right behind was a young man and a Young Lady in a buggy they stopped right at the mouth

of the Cab, the Horse right on the Summit here (pointing to the Map)

Int— How far was he ahead of the young man and the young Lady?

Ans— I should think about ¼ of a mile or when I first observed them.

Int— Did you see a Man on Horseback?

Ans— I have not any recollection of a Man on Horse-back at all.

Int— I understand you to say you were one hundred and fifty rods South west from the crossing?

Ans— Yes Sir.

Int— State to the Jury what the prospect was in looking up the Rail Road from where you was?

Ans— When I first saw them I could not see any cars till they came on by the Cattle Guard; I could see the Engine and the smoke pipe but I could not see the cars; the Hedge is quite thick there there is a very heavy grade, I could see the smoke pipe and knew there was a Train coming because I could hear it whistle. I heard it whistle it only whistled once.

Int— You stated you could see nothing but the tops of the Smoke Stacks. How far down could you see that?

Ans— I could see it somewhere about the whistling post

Int— You could not see the flats?

Ans— Yes Sir.

Int— What was your position?

Ans I was standing on a load of Lumber.

Int. What was the Relative prospect of the Road and the Embankment from where you were looking up on the opposite side?

Objected to as it was not competent & irrelevant & immaterial.

Int Did you Examine the Ground on the opposite side of the Rail Road Track?

Ans. After a person passes down into the cut half way, he could not observe a train at all till he gets right on to the Rail Road — this was a thick Hedge, and also had leaves on (The witness pointed out the different positions on the map.)

Int There was leaves on the fence on the north side?

Ans Yes Sir —

Int How high was that fence?

Ans About 7 or 8 feet, I should think.

Int And you say there was leaves on it?

Ans Yes Sir.

Int State whether a person could see a train coming looking through that Hedge?

Ans I should say they could not because I have been there since when there was no leaves on and I could not see.

Int You Examined the ground there with a view of seeing and ascertaining the fact whether a man Travelling in a buggy at that time could see a Train?

Ans I will tell a person when one third of the body down

could not see a flash at all till they had got clear down to the road, which would endanger the Hide any way, because the Horse must get on the Track. I think, before a man could see up the Track to see a flash.

Int ~~Stated~~ Just state what obstacles are in the way of a man going down there on the Highway to the Crossing, from seeing a Train?

Ans There was quite a pile of dirt thrown out here (Pointing to the map) both from the Track, and from the Road that is made to go down to the Rail Road

Int When?

Ans On that point there — and also when the Crossing is cut — It is thrown out here on the Crossing (pointing to places on the Map)

Int How long is that pile of dirt?

Ans I should judge it was some 20 or 30 feet — a person could not see if he was in a Buggy even.

Int Which way does the pile of dirt run?

Ans It runs north East and South west.

Int Which way in reference to the Road?

Ans It runs with the State road — It is thrown out of the Rail Road to the north.

Int What other object were there?

Ans A good high fence and that Hedge.

Int Is there more than ~~one~~ a fence?

Ans Yes in there are two — the fence running with the Rail Road and then the fence running South

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crossing with the Highway.

Int Was there a Hedge again?

Ans. A Hedge again on the North – there was there – it is cut away now.

Int – How long after was it cut away?

Ans I guess the next Spring.

Int About how long was that Hedge?

Ans I should not dare to say because I never measured it. But it was round flat at least.

Int Did you Examine at that time with a View of seeing how much of an obstruction the Hedge was to the sight of an approaching Train

Ans I travelled it with a View to see how far a person would be able to trust himself down there, and I trust himself with a load. I did it for my own safety, for I had never thought of it ~~this~~ when this man was killed.

Int How far did you pick it up where those flats could not be seen.

Ans – I should say at least fifty feet there you could not see a flat at all going up this track, and getting up in open Buggy (he was in a covered Buggy) You could not see a Train at all. There points come to gether something like that (showing an acute angle with his hands, as indicated by the Map) a person would have to look against two very strong obstacles, that fence, and the dirt, and a Hedge, which made pretty strong obstacles with the short Space

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Int You say you could not see the flats till they came to the Crossing?

Ans No Sir.

Int How near were they when you first saw them?

Ans They was just Crossing the Cattle Guard, the first one was, I saw the Smoke pipe, but supposed that the Cars was to the East of it.

Int You say the Smoke pipe?

Ans Yes Sir.

Int Did you see any difference between the Embankments on the north and the south side?

Ans Yes Sir. I think the obstructions are stronger on the South side than they are on the north because that train could not be seen so well

Int Did you ever measure them?

Ans No Sir, Lorenzo did.

Int Wells was in a covered Buggy?

Ans Yes Sir, a covered Buggy.

Int How much of a distance or space was it that his Horse moved Briskly, from the time it started Briskly till it got on the Crossing?

Ans I should suppose not far from 50 feet, but then I could not judge Except by looking at that distance I supposed when I saw the Smoke ~~Stack~~ pipe, and saw his Horse that formed rapidly, he could get clear of the Train without trouble, for I did not suppose there was any Cars in front of the Engine.

Int Was the Engine running?

Ans As I remember right the Engine was right for a

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train running the other way.)

Int. If the Train had been in the rear of the Locomotive would there have been any danger in Crossing?

Objected to.

Objection Sustained

Int. How far was the Locomotive from the Crossing at the time that Wells was struck by the Car?

Ans. I should like to guess at that; I would judge somewhere in four hundred feet.

Int. The Engine was that distance from the Crossing at the time the Collision took place with the Flat and the Buggy?

Ans. Yes Sir.

Int. How many flat cars were there in the Train?

Ans. I could not be positive but it is my best impression now, after so long a time that there were fourteen flat cars?

Int. Was that Exclusive of the Engine and Tender?

Ans. Yes Sir, I do not call them cars - that is my impression.

Int. Was your attention called to that fact at the time of the Collision

Ans. No Sir, I never thought of being brought into Collision with a Court at the time, or I should have taken more notice than I did, My object in writing that Statement was not because I objected to be called upon on a trial of a case, but for my own safety; I had never thought of it before.

Int. Is there any circumstance or coincidence that

Calls that to your mind, State it?

Ans. It has been my impression ever since; I do not think I told anybody else.

Int. You did not count them?

Ans. Yes sir, I counted them at the time but I did not take any notes so that I could swear to the number now, now more.

Int. Then you counted them?

Ans. Yes sir, I counted them.

Int. State to the Court and Jury when that Engine was when you heard the Whistling for the crossing at which that man was killed; at what point on the Road, and how far from the crossing

Ans. Well sir I suppose — this is all guess work — the Train was out of sight.

Int. I want to know where it was when it whistled at the whistling post 80 rods east of the crossing?

Ans. I could not see the Engine at the time they whistled them, but there was a School House came in between me and the Train at that time, but when they passed the Whistling post, I heard the whistle and I supposed it was at the whistling post — the first I could see was the smoke stack — It was probably two thirds of the way between the the whistling post and the road — The School house hid me from the main part of the Eastern portion of the Track — and when they came about half way from the whistling post to the Road I could see the smoke stack but no cars till they came out of the Cattle guard — right on the south of the Cattle guard.

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Qst How long a whistle was that?

Ans It was just one whistle – nothing but an ordinary one – not a long one at all. It probably be a little more than to take brakes off. Recollect they whistled once, they whistle, twice, to put down brakes, when he whistles to put down brakes, the noise of the whistle, and the noise of the collision was so near together, that I do not suppose that he whistled till the collision took place.

Qst Suppose them to have been going at the usual speed of a passenger train how far in your judgment would the cars have passed during the space of that whistle

Ans Well sir, I would not suppose that they could go half the length of the train from the way they whistled. I do not suppose they moved half the length of the train of the train, because it was so short. I think they was passing on 30 miles an hour – That would be the best of my judgment – I have not very frequently gone on them, but the cars do not very often travel as fast on the road as that dirt train was going.

Qst Is it your opinion they were going thirty miles an hour?

Ans Yes sir, and upwards of that. It was almost instantaneous, the time I saw them on the cattle guard, and it struck the Buggy.

Qst Can you position it was going more than twelve miles an hour?

Ans Of course I be, I am very positive that twelve miles an hour would not have produced the concussion

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this did and throws them when it did.

Dft What other Evidence have you, if any that they were going very fast?

Ans - The greatest Evidence is that the forward four trucks were knocked out from the Train, I contend that the cars were running right only not in their proper place - they should have been behind the Engine The wheels were knocked out and thrown on the Embankment 40 or 50 feet high, and it is over 100 feet certainly to where the left the Cattle Guard to where they lay + and that proves a very great Speed in my estimation

Dft How high did you say the Embankment was?

Ans I have not measured it, but I should say it was 40 or 50 ft. when the wheels lay.

Dft What was the character of the Embankment as to Slope?

Ans Pretty steep die - 45 degrees I would judge anyhow.

Dft Did any thing else go up on the Bank but the wheels?

Ans Yes sir, the same car raised on it end and went up to the top of the Embankment and turned a circle to the north, and lay almost on the top the end of it projecting almost to the top of the Bank, and the other part down in the ditch, and others lay right north across the track, and the wheels knocked out of that

Dft Do you mean to say that any of the cars were on the top?

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Ans They was not entirely on the top, but the end of it with the Wheel Knocked off

Qst How much above the track was it?

Ans I should think from a half to two feet.

Qst State if there was any other damage?

Ans One of the Cattle guards was very much torn to pieces. The front Axle of the Buggy was setting in the cattle guard, something like that (Here the witness indicated by position) shape, and broke right down, and either the forward car or the second car had cut the ties back of the Cattle guard, and tore them so that they had to be taken up, and it also tore the dirt very much

Qst How bad?

Ans So bad that they can see it to this day a considerable hole.

Qst When did you last see it?

Ans Last Saturday.

Qst How much is observable of it?

Ans There is considerable of a place, and there is some fragments of the car. Picked up some on Saturday.

Qst How far is it from the Crossing by the top of the Bank, to where the wheel lay?

Ans It is about forty steps.

Qst Can you be mistaken about the short whistle at the Whistling post then?

Ans I do not think I could, because I was listening with all my ears for what was coming.

Qst Could it be possible for that train to have whistled from

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the whistling post & within a few rods of the crossing and you not have heard it?

Ans It did not do it.

Qst Are you positive of that?

Ans I am positive of that, I attended the Engineer in regard to the very thing — not whistling and not giving people warning by ringing the Bell

Objected to

Objection Sustained

Qst Was any Bell rung on that Train?

Ans No sir, it never rung till the Collision took place, and I dont think that any one rung it then, I think it was merely the jar that made it ~~ring~~ rang once or twice

Qst You spoke about a second whistle?

Ans Just instantaneously on the passing of the car out of the cut there was a couple of whistles — down brakes I think.

Qst How far was this Platt from the Buggy when the train=
=the Locomotive?

Ans I should not think over fifteen feet if they was that.

Qst Was there any locking up in the Head of the car?

Ans Of Course not, He could not stop a train running at the rate that, that was running in fifteen, nor twenty, nor forty feet, If it had been locked up it would have ~~the~~ slid

Qst You think it was about 15 feet from the Buggy?

Ans Yes sir, my impression just about fifteen feet, from the

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time I heard the blowing.

Int. Where was the Buggy at that time?

Ans. The Horse was just coming on to the Track I supposed, at the time that I heard that whistle, and seeing the Train coming out of the Cut, I thought that the Horse would be killed as well as the man

Int. State how severely the Buggy was broken?

Ans It was smashed all to pieces — I never saw such a wreck of anything in my life. I did not see a Spoke but what was broke twice and some of them in three pieces. The tires was smashed off, the Springs was broke and the Buggy frame demolished.

Int. Would a speed of twelve miles an hour demolish a Buggy so?

Ans I should think not.

Mr. Walker — You had better examine the witness in a proper way; it will save us making objections.

Int. Did you know Mr. Hill in his lifetime?

Ans I did

Int. About what age was he?

Ans I could not tell you about what his age was, because I never asked him the Question — something like fifty or upwards — upwards of fifty perhaps.

Int. How long had you known him?

Ans Over twenty years.

Int. Where had he resided during that time?

Ans In Princeton.

Int. What was his business?

Ans I could not tell you what his business was particularly; he used to do a good many things; he was a man of all trades pretty much; he worked at whatever he could get to do - sawing wood principally

Int Confine yourself to what he did?

Ans I never saw him lazy - he always was at work when I was near him - he was a Working man.

Int Was he an Industrious man?

Ans I think he was sir.

Int Was he a family?

Ans Yes sir, a large family.

Int Did he live with them?

Ans Yes sir, I never knew of his living any where else.

Int Where did his family live?

Ans His family lived, the last I knew of them in Princeton - rather at the North Eastern part of that town

Int You think he was an industrious man?

Ans I think he was.

Int Do you know to what extent he contributed to the support of his family?

Ans I do not sir.

Int Can you say, if that whistle had continued up to the crossing, what the -

Objected to

Objection Sustained

Int What was the State of the atmosphere?

was there any wind?

Ans Very light — not very heavy.

Int Which way was it blowing?

Ans I would not be positive, but I felt it on my face. It was pretty much in my face.

Int And you was going North East?

Ans I could not say so. It was more than North East — that is my impression now.

Int And the cars were running from the East?

Ans Yes sir.

Int This wind would blow against the bells hearing the train would it not?

Ans Yes sir. It would rather blow against the north side hearing, but would help me better.

Int Can you give the jury any idea of how long that whistle was?

Ans It was just an ordinary whistle and about at that. It was not such a one as they usually give from a passenger train; It was nothing like what a passenger train gives.

Int Not so long?

Ans Not half, nor quarter.

Int And it is your judgement that it was running faster than a passenger train?

Ans I think faster than I have ever rode on a passenger train here: faster than we did yesterday.

Int Was there other men there beside you?

Ans I did not notice any but the Road men when I was there.

Int Were you sufficiently acquainted with the noise

of the Track to say whether the Engineer, Approaching that Crossing, could have seen Wm Wells before he went on to the Crossing there when the West end of the Train was within fifteen feet?

Ans The Engineer could have seen it very where after he came out of the cut East. If they were down behind the Pump in the Hollow there they could not see it but if they came out of that Cut they could see them from there till they came to within about 30 rods of the Track, and then they could not see them again – they would go behind these obstructions (showing on the Map.)

Int I allude now to the point ~~next~~ next to the track, or the Highway. You stated that when you first heard the second whistle sound, that the west end of the flats, were within fifteen feet of the Buggy?

Ans Yes Sir.

Int I want to know whether from his position, the Engineer could have seen him before he got on the Crossing?

Ans Not Much Sir: the way his horse travelled, I do not think the Engineer would have much chance of seeing him till he struck the Track

Int That is on account of the Embankment?

Ans Yes Sir.

Int And he would not have the chance of seeing the Cars.

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Ans Not on that position. He would not.

Qst He could not see any one there till he got close to the Track?

Ans Did he get close to the Track & there would be no chance of stopping there.

Qst This Embankment on the crossing there on the Highway towards Dover Did you Ever make any Examination or ask to determine with any accuracy as to the Chance of seeing the Cars coming there?

Ans I never have. I merely stopped there once in my buggy to see how far I could see it.

Qst When did you stop?

Ans I stood just about this fence about half way up (showing on the map).

Qst Which way was the Train going that you watched

Ans It was going East.

Qst How far could you see it?

Ans I could not see it till it got onto about this road and that was a freight Train, with top of the Cars.

Qst But suppose they had been flat cars?

Qst How far could you have seen them?

Ans I could have seen them by the time they got to the Whistling post pretty plain because I could have seen them through the fence north of the Rail Road not the Rail Road fence. I would not have to look through the Rail Road fence when they got onto them. When I was setting

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Here in my buggy, my horses head was round and I sat right in here, and when they risen out I could see the Train of Cars and I could see the Wheels of them as they reached the Whitting post. I was right against the Rail Road fence, out of the cut

(Witness pointed to the Map to indicate the position)

Cross Examination by Mr Walker.

Int Do you recollect when this was? when this accident occured?

Ans I said Before that was, as near as I could recollect, the 16th November 1861

Int About what time of the day was it?

Ans I should think the sun was about three quarters of an hour high.

Int A pleasant Evening was it?

Ans It was not a very pleasant Evening, thought the sun would shine out, It did not shine all the time,

Int You had been to Princeton?

Ans No sir. I had been to the Depot for Lumber,

Int You were on the road leading from the Crossing to Princeton direct?

Ans Oh Yes, I was on the main road there, leading to Princeton, but there is no other road to go to Princeton to get to the Depot.

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Dist You had a Span of Horses?
Ans Yes Sir.
Dist And a Load?
Ans Yes Sir; up Town to the top of an ordinary Logs Standard Wagon — I suppose Six or Eight Thousand feet of such Stuff.
Dist And you Were Approaching the Crossing?
Ans Yes Sir.
Dist And you heard the Cars Coming?
Ans I did.
Dist Could you hear them very distinctly?
Ans I heard the whistle the first time, not so distinctly, but distinctly enough to know they were Coming.
Dist You heard the noise of the Cars?
Ans No Sir, I could not hear the noise of the Cars at all.
Dist About how many rods were you from the top of the hill, ascending the Crossing when you first heard the whistle?
Ans I was close to the Road one Hundred and fifty steps South of the Crossing: I had then stopped to let a lady go by in a Carriage.
Dist You mean one Hundred and fifty paces?
Ans What I call a step is this (Here the witness stepped across the room in long strides).
Dist There were one Hundred and fifty of those?
Ans Yes Sir.
Dist When you first heard the whistle?
Ans Yes Sir.

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Int. And you were standing still?

Ans. Yes Sir;

Int. What did you do when you heard that Whistle immediately after that?

Ans. I still stood still.

Int. For how long a Space?

Ans. It did not take long for the Cars to come up

Int. Ask you how long a space you stood still?

Ans. I could not tell you sir not very long.

Int. How long? one Minute?

Ans. Oh Yes.

Int. Two Minutes?

Ans. Yes two Minutes.

Int. About two Minutes?

Ans. I cannot tell.

Int. Then you started your Team.

Ans. No sir I did not start my Team.

Int. Then you remained?

Ans. I remained there till the Collision took place, and I had quieted my horses so that I could hitch them.

Int. Then you did not climb the embankment at all?

Ans. No sir.

Int. You were 150 feet away from the embankment

Ans. No sir, from the Crossing

Int. Then you were 150 feet from the Crossing on the Princeton Road when the Collision took place?

Ans Yes Sir,

Int You were standing up?

Ans Standing up on the top of my load.

Int What did you get on the top of your load for?

Ans I got up to see if I could see a train coming

Int You always do that when you approach a Crossing?

Ans Pretty generally, if I am crossing.

Int If not you stand up in your buggy or wagon?

Ans No Sir, I do not take the trouble to do that. If I have not time to cross, I stop.

Int If you are loaded and have a team to get across you could do the same thing?

Ans No Sir, I never attempt to drive over a Rail Road never did - when there is a Train coming.

Int Then in your opinion, it is necessary for a man to take precautions in crossing a Rail Road track, if he is loaded?

Ans A man is ten times as liable to get into trouble if he is loaded as he is if he is not loaded. It dont require as great caution, when a person isnt loaded, with a good horse, as it does when he is loaded.

Int You got on the top of your load to see for the train?

Ans Yes Sir.

Int Mr Reid you have a young man and a Lady driving up?

Ans A young man - a boy it was, with a lady, driving right

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behind him.

Int. Were they very close together?

Ans. Five or six rods apart probably.

Int. A boy, or Gentleman, and a lady driving up, did they drive by the top of the Bluff or hill?

Ans. They drove to a point in the cut.

Int. Was it on the top of the hill they stopped?

Ans. Yes sir, they drove by the Edge of the cut.

Int. What do you mean by the Edge of the cut?

Ans. If you will let me have the Diagram I will tell you.

Counsel. No sir, I do not want the Diagram. Can you know where the place is on the Diagram?

Ans. Yes Sir.

Int. Does the Cut commence at the top of the hill?

Ans. No sir, part of the way down the hill.

Int. How many rods?

Ans. I would guess it would probably be four rods.

Int. Then they drove down the hill four rods and stopped?

Ans. Yes Sir.

Int. What did they stop for?

Ans. Because they was in danger I guess they could see the train very plain where they was; they was in an open buggy, and the other man in a covered buggy.

Int. They remained there till after the Collision?

Ans. Yes sir, they remained till after the train was Cut.

Int. Did you see any other persons there?

Ans. I did not see any, I have been informed there was a Man on Horseback, but I did not see him. I do not

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know if there was one there.

Int You do not think there was one there?

Ans I said I had some doubts about there being any one there, for I do not remember seeing one.

Int You think, now, it is doubtful?

Ans Yes Sir, till after the collision took place.

Int You are very careful to observe everything that takes place, and therefore you think it was doubtful whether he was there. If there had been one I think I should have been likely to have seen him.

Int About what time was it you counted these cars was it immediately after you saw the man was killed?

Ans No sir, I did not count them for some time afterwards.

Int What did you count them for? So that you could be a good witness?

Ans No sir, I did not.

Int Did you back and take special pains in counting them?

Ans I went back to the Engine, to see if I could see any other injury except these three cars that were thrown off.

Int And you say there were fourteen cars?

Ans To the best of my ability.

Int You counted them did you not?

Ans Yes Sir, but I made no note of them.

Int All that you know is that you counted them at that time? And you do not remember what they were?

Ans No Sir.

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Int How many were injured?
Ans Three that I saw.
Int The balance remained on the Track?
Ans Yes Sir,
Int The forward car was pushed upon the embankment by the other cars was it not?
Ans I do not know Sir, I cannot say that.
Int You saw the Collision?
Ans I saw the Collision.
Int And saw the cars go up there? (pointing to the embankment)
Ans I saw the cars go up there.
Int How do you think it did go up there unless it was pushed up by the car preceding it, and next to it?
Ans The impetus with which it was moving, would force it up there when it struck off the Track,
Int The car by which the buggy was broken, was thrown from the Track was it not? and the force of the other cars threw it up on the Embankment did it not?
Ans I do not view it in that light
Int What force was it then?
Ans The force of the Engine that propelled it would cause it to go up there,
Int It was the force of the Engine - not of the cars. That is the distinction you must be made, is it?

Not Answered

Int How the three cars entirely off the Track?
Ans Three were there cars off the Track.
Int Was the third car from the west end of the train entirely

from the track.

Ans It lay across the track.

Int How did the second car from the meat end stand?

Ans The first car run up almost north of where it lay - the rest was inclining to the west behind it.

Int In the same direction but not so much north?

Ans Yes Sir, - the rest was laying across the track the heaviest part of it south.

Int Did you ever take the pains to see if a man, standing on the outer edge of the right of way, or fifty feet from the track, and looking up the road to mark the Whittling post whether he could see objects in the track?

Ans I should think he could not.

Int I did not ask you that. Did you ever make the Experiment?

Ans No Sir,

Int All you have said then, is conjecture?

Ans I do not know that I have said anything about it.

Int Do you mean to say now that you have not testified upon that point?

Ans I said that I did think that a man could be seen, or see a train.

Int I asked you if you had made any experiments to see whether as a matter of fact, a man standing on the right of way could see objects on the track. You say you have not. I then ask you if all you have testified on that subject is guesswork, and

you that you have not testified upon that point do you mean to be so understood?

Ans I said that I did not think that a person could see east if he was fifty feet off the track.

Int You said that?

Ans Yes Sir,

Int And you say that now?

Ans I do

Int Do you know whether that is true or not?

Ans I believe it is,

Int I do not ask you what you believe. Do you know whether it is true or not?

Ans Well Sir, I never measured fifty feet off to know

Int How do you know that is true? Is it not the merest guesswork on your part and that is all? Is it not even, mere guesswork? Tell the Jury whether it is guesswork or not?

Ans I testified that I stood on there the other day, and could not see the cars for thirty rods.

Int I ask you, did you ever make the Experiment or not?

Ans I could not say fifty feet from the inn.

Int Did you ever go over the ground for the purpose of seeing if you could?

Ans I did not make that statement Sir, I never said that I could, standing fifty feet from the inn.

Int Do you swear that you have been over to make Experiments and see whether you could see up the track or not?

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Ans I said that I had been down there on Saturday last;
Int I ask you now whether you have been down there to make Explanations?
Ans I stated to the jury that I went down last Saturday and that I could not see a train for thirty rods, I will state that again.
Int When did you go?
Ans I went into the Centre of the Road on the west of the Rail Road fence.
Int To the west of the Rail Road fence?
Ans Yes Sir, the Centre of the Road,
Int On the top of the Bluff?
Ans No Sir, in the Centre of the Road,
Int How far is that from the ties?
Ans I do not know I never measured it;
I stood right there, and I could not see a train neither Engine nor cars I was standing in the Centre of the Road, west of the Rail Road fence and I could not observe a Train.
Int That is, if the fence be fifty feet from the track, you were standing fifty feet from it?
Ans Yes Sir, right opposite to the end of that fence west.
Int That you went in a line with the fence of the Rail Road, and that you looked up the Rail Road track?
Ans Yes Sir,
Int And could you not see anything on the Track
Ans I could not see a thing on the Track for thirty rods.
Int Were you alone?
Ans Yes Sir.

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Qst What did you go there for?
Ans I had been to Princeton on Business and I saw a Train coming, and I stopped for my own satisfaction
Qst When did you put your horse?
Ans I hitched him to the fence.
Qst And you stood there and watched the Train?
Ans Yes Sir,
Qst And there was thirty rods you could not see?
Ans Yes Sir, from the Cattle guard thirty rods I could not see
Qst Beyond that could you see?,
Ans Yes Sir
Qst You full confident about that?
Ans Yes Sir.

By Mr. Kendall

Qst How far from the crossing?
Ans I did not see how far from the crossing, I say I was West of that fence, in the Center of the Road.

By Mr. Walker.

Qst You were standing in the line of the North Rail Road fence and you looked Eastward along the track and for thirty rods you could not see anything?
Ans Yes Sir.
Qst Beyond there you could see?
Ans Yes Sir.

Int What is your business?
Ans I am a farmer.
Int You have never railroaded a great deal?
Ans Very little.
Int Have you ever been an Engineer?
Ans No Sir.
Int Or acted as Brakeman?
Ans No Sir.
Int Have you acted in any manner upon a Rail Road?
Ans No Sir.
Int How do you know how fast a train is running when you see it? How do you determine that? Have you any means of ascertaining that fact?
Ans Well, nothing in particular sir,
Int Do you have any means of measuring the speed of the train
Ans Nothing only my eye.
Int Sir I understand you did not see it, Except at the instant as it came upon the Buggy?
Ans I did not, Except as it came upon the Cattle guard.
Int Do that the instantaneous sight you obtained was the means of determining the speed of that train?
Ans No sir, I was looking at the Smoke stack before that.
Int How far could you see that?
Ans Half a mile I think the distance to the whistling post.
Int You stood and watched the Smoke stack?
Ans Yes Sir.

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Qust Did you for the purpose of knowing how fast the train was running?

Ans No Sir.

Qust Did you make a note of it and examine for yourself to determine what speed it was running?

Ans No Sir, I had seen the passenger train pass down, and noticed the speed of that, and noticed that the train was apparently running faster than that,

Qust Where were you when the passenger train passed?

Ans Just below Mr. Waterfords

Qust How fast was that running?

Ans I do not know

Qust Then how do you know how fast this was running? is it not the merest guess work? Is it not mere imagination?

Ans Well, I have been on trains, and run a great many trains runs, but never run any myself, I have often heard them speak of the speed they run, and seen them run,

Qust You swear absolutly and positively that it was running more than thirty miles an hour, I want you to state how you are absolutly positive?

Ans I say that it is my eye that measured the time and the speed at which it went

Qust Did you take your watch out and see how long they were coming?

Ans I did not take no watch out.

Qust Did you move for any time, to see how much space you went over in the same time?

Ans I did not.

Qst Did you take any pains to ascertain?
Ans No Sir.
Qst Did you have it in your mind as to what speed it was?
Ans I had it in my mind it was running too fast for any train – that it was running faster than any train I had seen pass over the Road.
Qst Suppose a train of fourteen cars, and running thirty Miles an hour, and suppose they were to come to an instantaneous stop, do you not think there would be more than one, two or three cars thrown ~~off~~ from the track? Would it not drive them all from the track and make a complete wreck of them?
Ans I think it would have thrown them all off if the Engineer had not whistled to put down the brakes.
Qst He put them down did he?
Ans Yes Sir.
Qst About what time?
Ans Just as the cars came in sight.
Qst Then were two Whistles?
Ans Yes Sir,
Qst One sound, and then another?
Ans Yes Sir,
Qst And the brakes were put down?
Ans Yes Sir.
Qst And the speed slackened?
Ans Yes Sir, And the Engine reversed – as the gentleman told me at the time
Qst And the speed slackened?

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Ans Of Course it was.

Int. How much? One half?

Ans I could not say one half one third perhaps.

Int Now whatever the speed was it was slackened as this by putting on the brakes and reversing the Engine?

Ans Yes Sir.

Int Can full rely on that?

Ans I should think that it would stop it at least one third.

Int Do you recollect having told Mr. Taylor here that the Speed was not checked at all?

Ans No sir I do not recollect it.

Int You stated in your direct Examination that it was your invariable custom when you approached a crossing always to observe and listen whether cars were coming or not. Is that your custom?

Ans Yes Sir, I do not think I ever crossed a Rail Road Track without taking notice.

Int You think it is a proper thing for you to do?

Ans Yes Sir.

Int You think it is a proper thing for you to do?

Ans Yes Sir.

Int. It is a prudent Measure for every man to take? Why do you do that?

Ans Because I think it is a safe for me, and my Team; Probably it might be safe for some one else, as well as myself.

Int You think it is a duty Every man owes to himself

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And the Community?

Ans Well I think it would be prudent for Every man to do that.

M. L. Field Called on behalf of the Plaintiff, being first duly Sworn was Examined in Chief by W. Taylor, and Testified as follows;

Int Where do you live? ~~Princeton~~

Ans Princeton.

Int How near do you live to the Crossing in Question?

Ans About one Mile.

Int In what direction from the Crossing?

Ans A little East of North.

Int State to whether you live on the Princeton and Dover Highway in Question?

Ans My house is about Sixty rods probably from the Princeton and Dover Highway north.

Int How long have you lived there?

Ans Seventeen years last October.

Int Before the Rail Road was built there?

Ans Yes Sir.

Int Are you acquainted with this crossing in Question?

Ans Yes Sir, Ever since it was made.

Int How frequently do you Cross there or pass there?

Ans Quite often, perhaps too often for my own ~~good~~ interest I go to Town pretty often.

Int How far is it from your ~~House~~ Place to Town?

Ans Three Miles.

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Dft. About how often on an average, since the Rail Road was built?

Ans. Very generally in summer when I have got plenty of work to do, I do not go down during a week, other seasons I go once a week Certain — sometimes every day in the week.

Dft. Well Sir, you can tell what your Knowledge and Observation of that Crossing is with respect to the Hazards of Travel there?

Objected to
Question Withdrawn

Dft. You can state, if you Know, the condition of that Crossing about the middle of November 1861, do you Know where this Killing was?

Ans. Yes Sir.

Dft. Was you acquainted with the Crossing at that time?

Ans. Yes Sir.

Mr. Taylor. I propose to show that a traveller passing down there could not see an approaching train of Cars.

Mr. Walker. I have no objection to that.

By Mr. Taylor

Dft. You can state if there was any obstacle at that time that intervened between the Highway say for 200 feet North of the Crossing?

Objected to as Leading

Def'ts Q. For 250 feet, on the Highway, north east of the Crossing?

Objected to as Leading

Objection overruled

Def'ts Q. State now, the relative situations of the Highway and the Rail Road at that time, and if there were obstructions for 250 feet, where the tracks come together, just state what they are?

Ans. A. Running North from the Crossing, I suppose it to be (never measured it) I would suppose it to be somewhere the neighborhood of 70 to 75 feet from the Rail to Signpost that the Company have there, Immediately after you pass under that, running north, there is an Embankment on the right hand East - thrown out of the Highway, out of the cuts the Rail Road planks that land running North, I have never taken the trouble to measure it I cannot say what distance it extends running north and south, but if you stop immediately after you get under the Signboard you cannot see the cars any where East, I do not care where it is - they cannot be seen, not even the Smoke Stack. Sitting in a lumber Wagon, on the top of a Box of boards you cannot see the Train nor even the Smoke stack for probably 65 or 75 yards from the Crossing to the East before you can see the Engine top. The first tel-

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-approach pole is only a few feet from the Rail Road fence, and from the next one you can see the Smoke pipe tills it more west of the second one from the fence. That is only I judge of the distance, and I believe the poles are about 60 yards apart. Then after you get up, driving along there, there used to be a hedge fence of Osage orange but cut out by the Rail Road Company including a board fence they have built, that Hedge obstructed sight of a Train coming from the East, even when you got up on the bank. That was cut down last year. It stood there when the Casualty happened

Int How far would you go up the Road now before you could see an approaching Train?

Ans I could not tell you. I do not know how far the distance is that you could be out of sight, I should suppose that that bank of dirt was somewhere in the neighborhood of twenty to thirty feet long, and it would hide the Train all the distance up the Bank

Int After you left the Bank of dirt what obstructions were in there

Ans There would be a few feet that there would not be any Except a board fence.

Int In the fall of 1861 was there more than one fence that intervened between the Highway and the Rail Road?

Ans There was the rail road, the Highway and a board fence

Dft. There was two board fences & a Hedge fence?

Ans. Yes Sir.

Dft. How long was that Hedge - did you ever measure it?

Ans. No Sir, but it was both a few rods in length that was of any Amount, the rest was very scattering; there was no obstruction in the remainder.

Dft. Was your attention called to this fence in the fall of 1861?

Ans. No Sir.

Dft. What was the condition of that fence at that time?

Ans. I think the leaves were on at that time.

Dft. How old was the Hedge at that time?

Ans. They set it down pretty soon after they started - I do not know how soon probably five or six years ago - it might be longer.

Dft. How high was it?

Ans. The highest point probably might be two feet. I should think likely it was. I do not know. I saw the bushes after they were cut down.

Dft. When the leaves were on, as it is, you can state what its character was?

Ans. It stood very well there for a few rods, but only for a few rods.

Dft. Can you state how much of an interval there was between the Embankment of ditch and the Hedge, when the trees was not so much obstructed?

Ans. I do not know, I suppose it may have been thirty feet probably.

Dft. State to the jury whether in that thirty feet there was any obstructions?

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Ans Nothing but the board fence.

Int Was there not anything else?

Ans Nothing there: the Rail Road fence comes up to a point.

Int Have you now made any observations in going down that cut, with a view of seeing what the light was for seeing an approaching train of cars?

Ans Yes Sir, I stopped my team there for that purpose and sat on my board there to see what I could see

Int What is the instance you told about?

Ans Yes Sir.

Int What would have been the Probability or chance what was the prospect for seeing a train of flats coming running a head of the Engine, in November 18th, for 250 feet North of the Crossing down by the Crossing; supposing a man to be travelling in a buggy?

Ans I would not suppose he would see flats, but I would see the Smoke Stack in that Space I speak of.

Int You do not think he could see the flats?

Ans No Sir.

Int In your Judgement, is that a dangerous Crossing?

Ans I have always considered it so.

Int You have always considered it a dangerous Crossing?

Ans Yes Sir. More dangerous than it would be if that Embankments were removed If I might be allowed, I can state what was once agreed on by the rail road Company

Wm Wallace Jr Sir.

By Mr. Taylor Ques Is there any difference in the peril or danger, as between one side and the other?

Objected to.

Objection sustained on the ground that the witness statement must be confined to the place when the accident occured.

Ques Is it more dangerous approaching the north east side of the Crossing?

Ans Yes Sir, I consider it so,

Ques Have you ever been travelling down there & been surprised by the approach of a train of cars?

Ans

Objected to

Objection sustained

Ques If you have ever travelled down there & knew there has been a Train Coming, and you could not see it for the obstructions, will you state that?

Objected to

Objection sustained

Ques Was there ever any other occasion when you exper-amented or examined, with a view of ascertaining the feasibility of seeing an approaching train?

Ans Never — I drove there at the time I have named and stopped my team for the purpose.

Ques Did you know Mr. Wells?

Ans Yes Sir,

Ques How long ~~had~~ did you know him?

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Ans Ever since I have lived in the State, up to his death.

Int Forty years?

Ans No sir, not quite that; he has been dead some time, I got acquainted with him shortly after I came to the State.

Int State how often you saw him, and whether you knew his pecuniary value to his family?

Ans He was a very industrious man, always at work, I have known him dig well, and he has for several years, acted as sexton, and dug graves at the different grave yards, I have frequently employed him myself to dig graves.

Int How long had he been engaged in that business?

Ans I cannot tell; but for a number of years.

~~Int~~ I have employed him for a number of years —.

Int Do you know whether he was skilled in any of the ~~acts~~ mechanical arts?

Ans No sir, I do not.

Int What were his habits for sobriety?

Ans I guess they were good.

Int Had he a family?

Ans Yes sir, a large family.

Int What were the condition of his family with respect to their ages?

Ans I must have known him a grave digger for ~~ten~~ years certainly, now I come to think back.

Int How much was it worth to dig a grave?

Ans He charged from two to three dollars according to the

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State of the ground.

Int Was he Sexton of all the Cemeteries in Princeton?

Ans Yes Sir, I have seen him work in all of them.

Int How many deaths would there be per week?

Ans Oh. I dont Know; for a Number of years past it is a great many.

Int Will you Know now about it does this June?

Ans I could not tell. There was as a matter of Course, a good many deaths.

Int Could you not approximate the average number per week?

Ans I could not; It is something I never thought of.

Int How many Cemeteries were there?

Ans There was three that he worked in.

Int Do people bury there from the Country?

Ans Yes Sir, from the Surrounding Country.

Int How much of a Town is Princeton?

Ans I forget the Number of Inhabitants.

Int Is there three thousand?

Ans I should think there was from my impression.

Int Has a heavy Country around it?

Ans Yes Sir, for quite a distance.

Int He dug Wells & Cisterns, besides grave digging, did he?

Ans Yes Sir, I recollect now he did dig Cisterns.

Int Do you Know anything about his mechanical Skill - as a Carpenter or Mason?

Ans No Sir,

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Int What age was he?
Ans I dont Know, but I would judge from his looks that he might have been something in the neighborhood of sixty when he died; he might have been older.
Int What was his physical capacity for a man of his age, with regard to his activity.
Ans He was tolerably smart — quite active, I think, for a man of his age.
Int Could he do a days work?
Ans I suppose he could easily.
Int A healthy man was he?
Ans Healthy for anything I ever Knew, Except his Eyes.
Int His Eyes were not good?
Ans No Sir,
Int Do you Know anything about his hearing.
Ans No Sir, I do not, I have often talked to the man, and never Knew that he was hard of hearing till his death.
Int I do not Know whether I orally understand you with reference to a traveller passing in a buggy, say 200 feet north East of the Crossing, down to the Rail Road track, what his chances of observation were for seeing a train going on the Crossing?
Ans I said that I would not suppose that a person would see the flats at all — he would see the Smoke Stack — I would not say from actual observation in regard to the matter, for I never have been there when a train was passing, a train of flats.

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Int. But your judgement is that they could not be seen at all?

Ans. That would be my judgement.

Int. How far on the Rail Road would it be when they could be seen?

Ans. I should suppose they could be seen easily by the Whistling post.

Int. Could be seen from what point on the Highway?

Ans. North of the obstruction and the Hedge. It could be seen between the Hedge and the Embankment.

Int. It might be seen from the Crossing from there?

Ans. Yes sir, without any trouble.

Int. But could not be seen, from the Hedge, from there till it got to the Embankment?

Ans. No sir.

Int. How high, in your judgement is the embankment from the level of the Rail Road track — say from the top of the Rails?

Ans. I do not know that, I have never looked at that with a view of knowing, except in regard to Building a Bridge that was once talked of for the Safety of the Town, I should suppose it was eight feet from the track. I think they have raised it but a Eight inches since that time. I cannot be Certain.

Int. Was you down at the Crossing when Mr Wells was Killed?

Ans. No sir, I did not see Mr. Wells after his death, till I saw him in the Church, a Corpse.

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Int Was you down to the crossing that Evening?
Ans No Sir,
Int Next day?
Ans No Sir, only as I crossed to the Church, I was in bed, about when my hired help came home and he told ~~me~~ us of it.
Int You was not there at the Killing?
Ans No Sir,

Cross Examined by Mr. Kendall

Int How near to the travelled track of this highway, ~~did~~ as you passed, in relation to the Rail Road Crossing, is this Embankment upon your right as you go north?
Ans I stated to the Jury that I thought it would be somewhere in the neighborhood of twenty five feet to the sign post board; and immediately after you cross or go under that, north, is the embankment, at least I stopped immediately after I got through & there was the Embankment on my right hand about 75 or 80 feet from the Commencement
Int How far was it from the center of the Road?
Ans I would not suppose it to be over twenty feet from the center of the Road,
Int Is not this travelled track pretty narrow between the Embankment
Ans Yes Sir, it is quite narrow.
Int The Bank is pretty near you?
Ans It pretty near you on both sides.
Int This bank being near you, and being slightly steep

than a mans head, that is what you mean by the obs-truction?

Ans Yes Sir,

Qst And Extends about thirty feet?

Ans That is what I thought.

Qst But to the other side of this Knoll of thirty feet, which is near you, You can see some part of the Train?

Ans Yes Sir, there would be some part of the train, could be seen.

Qst So that on the whole road north of the said road, there is no point where a train could not be seen, Except this point of thirty feet?

Ans Yes Sir, where the Hedge was there, that was a point there you could not see.

Qst Well that Hedge runs along the rail road fence, and if you approach that you approach the line of it, and still you do approach the line of it you can see between the Hedge and distinctly cannot you?

Ans The Hedge runs along in this direction (Showing its position on the map.)

Qst I mean before you pass the line of the Hedge going North?

Ans Oh Yes Sir, there is a place there.

Qst You can see distinctly?

Ans Yes Sir; You can see the Engine there no doubt.

Qst Looking right up the night of May?

Ans Yes Sir.

Qst Now Sir, that would only cover a space of what the Hedge in line would cover?

Ans Yes Sir.

Qst When you stand on the End of the Hedge, are you not pretty near the top of the hill?

Ans I think we are.

Qst Will you say that that Hedge was so thick that standing in the line of it, and on the top of the hill, you could not see the train?

Ans No, Sir I do not say so, I said that when you get North of the Hedge that the Hedge was so thick that I presumed it would hide the cars.

Qst When you got to that place, how far from the track are you? Would not that be in front of Phelps' house?

Ans No Sir, not quite as far East as that.

Qst You would be on high ground?

Ans Yes Sir.

Qst Now as you approach this Highway ~~ground~~ from the other way – going up the slope from the North) – going south – How much would you go in front of Phelps' House. Say taking a space of ten or fifteen rods from the line of the Hedge north some ten or fifteen rods – How much space would that Hedge cover? You say that the Hedge was but very few rods long.

Ans No Sir, I do not know. It would not be a very great ways. I have always looked out before I got that far.

Qst Travelling along the highway at that point would the Hedge would offer an obstruction to the view of the

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Railroad from there to the crossing, at an ordinary rate of a Team traveling a train of cars that were coming on the Railroad at those times the rate of the Horse would be travelling; how far from the Crossing do you think the train would be when it would be obstructed?

Ans I have never looked, but I am not of opinion that the train would be obstructed at the Embankment, and if not you would see it when it came out of the Cut there

Hudson Map shown to witness

Inq As you are standing here, in front of Phelps' House, would not your view be right across here on this Cut? (Showing the points on the Map)

Ans It might possibly be on the East end of the Cut, between the Cut and the Embankment

Inq Now, then is your Hedge, and you will stand right in front of Mr. Phelps House?

Ans Yes Sir.

Inq The Hedge would not obstruct the view of the Cars on the embankment at all?

Ans No Sir, on the Embankment, between the East end and the Cut.

Inq There would be but a very short distance that could be obstructed by the hedge at all?

Ans No Sir.

Inq How many rods do you think?

Ans I don't know, I should think that the hedge would not be more for a few rods in length that would

obstruct a train, it might have been two rods.

Int Would a person passing along have his view obstructed that much even, to the length of the hedge?

Ans Oh! I dont know. if they are on their guard perhaps they would not, I have never looked upon it with that view. thing to I after we had it was cut down before it was.

Int Do you know about the time that hedge was set?

Ans I do know Exactly the time ~~it was set~~ but I could not date it back, I recollect the time it was done all through.

Int You know it was some years after the road was in operation?

Ans Very likely.

Int At the time this accident occurred this hedge could not have been very large?

Ans I have said that it might be two feet.

Int That is the stalks running up?

Ans Yes Sir.

Int Then some of it would not afford much obstruction?

Ans Oh, the top branches would not.

Int Do you think the leaves of the hedge continue on as late as the 16th of November?

Ans Yes Sir, unless it is rather a cold fall the leaves of the Osage Orange continues on very late; they start very late in the Spring and stay late in the fall.

Inst What time in the fall do they begin to freeze and die away?

Ans It takes a hard frost.

Inst Late in November we begin to have hard frosts do we not?

Ans Oh sometimes we do, last fall we did

Inst When you passed from this crossing did you not notice how far you could proceed from that crossing up the Highway and still keep a view of the entire track?

Ans Looking up along this slip near the bank — (showing on Map) your view of the track is obstructed. When you pass north I suppose it would be 70 to 75 before you come to the obstruction.

Inst Then there would be a distance of 75 feet next the railroad that a person, if he should look, could have seen a train coming?

Ans Yes Sir.

Inst And why about 70 feet of bank that offered any obstruction?

Ans That would be my guessment.

Inst You say you were acquainted with Wells?

Ans Yes Sir.

Inst You spoke of his sight and hearing?

Ans Yes Sir.

Inst What was his trouble with his sight?

Ans He had sore eyes I supposed. I have often heard him called by name; what ailed him I never knew

– his Eyes looked sore.

Int Was his sight obstructed – his vision ~~obstructed~~ affected?

Ans I don't know as to that. I never asked him, and he never told me. He wore Spectacles for two or three years I think; the latter part of his life he was wearing them I think – his Eyes were better as I supposed.

Int You say you have been acquainted with him some 15 years?

Ans Yes Sir,

Int You say you had to cross the line very frequently?

Ans Yes Sir.

Int Were there a good many trains running there?

Ans Yes Sir

Int When you cross them what are the precautions you use?

Objected to

Objection sustained

Ans I have noticed this fact on the road, that a man has got to look out for himself for it is accidental – whether they whistle or not. This I will swear to any where.

Objected to, and motion made to strike it out

The Court. The Court decided that the answer was inadmissable & therefore it was ~~relevant~~ irrelevant.

By Mr. Walker

Int Were you pretty well acquainted with the Deceased Mr. Wells?

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Ans Yes Sir, I suppose I was.

Int When did he live?

Ans At Princeton Village two years I have known him.

Int Did you employ him to go into the Country to dig graves or only in the Cemeteries?

Ans Three yards I spoke of – one was a mile to a mile and a half South of the Village another half a mile North of the Court House, and another a mile and a half North West of the Village.

Int Do you know when he had been on the day of the accident?

Ans I do not know only from hearsay. I did not see him.

Int Had he any relations living North of the Town?

Ans Yes Sir, Mr. Triplett.

Int The Plaintiff in this cause?

Ans Yes Sir.

Int Did he make frequent visits to his relations?

Ans I could not say, I very seldom saw him. Mr Griffin, my neighbor on the north side, he was, perhaps a distant relation

Int How long had Mr. Wells lived there?

Ans He was living in Princeton Village when I came there, seventeen years ago last October.

Int Was the Road then laid out?

Ans Yes Sir.

Int Has it continued use from that time to the time of the accident?

Ans Yes Sir, and is yet.

Int Mr Wells has lived in Princeton during the time

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the Railroad was constructed, and has lived there since?

Ans Yes Sir, Never has lived out of it that I Know of; he may have worked out on account of digging wells and Cisterns.

By Mr. Taylor

Int You stated here in reply to Mr. Kendall that you did not Know whether he could see at all or not?

Ans Mr. Kendall asked the Question whether the view was obstructed.

Int No, whether he could see?

Ans No, I did not understand it as, He could see, I supposed he could see, or he could not see to Cross.

Int You supposed he could see?

Ans Yes Sir,

Int How far was it after you left this cut at the Crossing in Question, before you came to another cut east?

Ans I do not Know, but you come to it soon after you cross the Embankment. It is Crossing two Eighties before you come to the Crossing.

Int Do you go across the two Eighties before you come to the cut?

Ans No Sir, I say you come out of the Eighties and probably twenty rods. There is a Space about Halfway between Bacon's Mill that you can not see the train if you are after they go into the cut.

Int One of these two Eighties you speak of?

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Ans It is on the East Eighty, on the west side of the east Eighty,

Int There is a Space there where no part of the Cars could be seen ?

Ans Yes Sir, they go out of sight there for a good many rods.

Int When you are standing in the way of Phelps House can they be seen in the second cut or not ?

Ans I cannot tell whether they could be seen or not; that's what is when ~~when~~ you get where there is no obstruction.

Int Now, Can they be seen in the Eastern cut, at any place on the Highway ?

Ans There is a place, probably 75 or 80 feet from the rail road crossing where they cannot be seen at all, and then I guess that it is 20 feet after you pass the Embankment, when you come in contact with the Ledge; whether they can be seen in that cut I dont Know.

Int Can a train of Cars be seen from the highway ?

Ans I do not Know what you mean. Do you mean near Mr Phelps House ?

Counsel Yes Sir.

Ans Well I should suppose they could now the fence is out, but they could not when the Ledge was up — that is my impression.

By Mr. Walker.

Int You say you did not think he was so blind

that he could not tell, but that he says at any conjectureable distance?

Ans I could not tell.

Int Do you think if he had been standing at that point he could have seen the cars?

Ans I could not tell you anything about that.

Int If his Eyesight was good?

Ans He always worked well enough digging Graves, but how good his Eyes were I do not know.

Int A man standing at that place & looking down the track, would have no difficulty at all in seeing anything on the track, would he?

Ans No sir, a man standing near that Sign post would have no difficulty at all.

Int How high is that Embankment, East of the Crossing?

Ans I never took any notice there.

Int How high do you think it is?

Ans I think there is no dirt thrown out of any account, out of the Bank.

Int Suppose that is the Eastern end of the Cut then commences the Embankment — the bank upon which the Rail Road track runs; how high is it?

Ans I do not Know; that is quite a high Embankment

Int How many feet?

Ans It must be seven feet high — it is quite a hollow there.

Int If a train of twelve, thirteen, or fourteen cars were coming along there at ten or twelve miles an hour, a man standing still and listening, would

would hear the noise, would he not, unless the wind carried it the other way?

Objected to

Objection sustained

William Cooper called on behalf of the Plaintiff, being first duly sworn was Examined in Chief by Mr. Taylor and testified as follows:

Int What do you live?

Ans I live in Bureau County, about three miles East of Princeton (Query Princeton?) 2

Int How far from this Crossing in Question?

Ans About Eight miles I presume.

Int How long have you lived there?

Ans I have lived there in the neighborhood of twelve years.

Int Please state to the Jury whatever you may have seen about a casualty that happened on this Crossing on the 16th of November 1861, state if you saw the Deceased, when you first saw him, and give in your own Version in your own way; what you saw and done, and what you saw deceased do, and what you saw the Cars do?

Ans At the time of this accident I was driving along the road, on horseback, behind the buggy in which this man Wells was driving, and some little distance before I reached the Crossing, in going up the hill, the passenger train must along. He drove along and I rode along after him till

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till he got near the Crossing, I was riding along after him, at the time I stopped he was probably one or two rods ahead of me, and at that time a train of Cars was coming along from the East.

Q by Dw What kind of a train was it?

Ans A grain train I called it — flat cars. I thought in the first place I would have time to cross, but afterwards changed my mind and thought I would stop him. He kept driving along ~~slowly and when he was past me~~ and I presumed he intended to cross, but he was driving along very slowly and when he was past me, some five or six rods probably from me, I called to him to warn him that he would be too late to cross; not knowing his name I did not call him by name, and he either did not hear me or paid no attention, or did not know that I was hailing him, and I thought he intended to stop when he got near the crossing. I had no idea he intended to cross at all, till the team stepped on the track. Just before that I saw that he made no efforts to stop, and I exclaimed at the time "surely that man is not going to cross" There was no one near me at the time that I know of, but I made that exclamation, and aloud too, It was the anxiety, the Excitement, the agitation of the moment, and the danger which I saw, was so evident that I made that remark. Just as he stepped down on the track, the whistle blew for brakes and I presume

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the Brakes was put on, immediately - but the whistle was so instantaneous that the whistle blowed for brakes, and the next moment the cars struck the Buggy, The car that struck the buggy had a flange. It struck the buggy within on the hind wheel on between the wheel, and the Horse getting a good foot-hold. he got clear, Then I turned round and dismounted from my horse and tied him to a little sapling in front of Mr Phelps' house and walked down to the crossing; of course expecting to find the man dead, which I did, He gasped, I think, very faintly, once or twice, after we reached the place. The force the car had struck the buggy with, had carried him I presume thirty feet from the crossing on the North side of the Track, He lay with his feet in the ditch, with his head towards the Rail, probably some two feet.

Int How far from the Whistling post?

Ans I should say 30 feet from the Crossing.

Int It was 30 feet from the Crossing?

Ans As near as I can recollect.

Int Did he breathe after you got there?

Ans Well, except faintly once or twice after I reached the spot, I never handled him but to all appearance there was not any bruise that I could perceive particularly; his body was not mangled in any way that I know of.

Int Did you notice the side of his face any?

Ans Not particularly The blood was streaming out of his

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month and more I know. I supposed that his injuries was internal. The buggy was broke up in such a shape that there was not a man who knew what kind of a buggy it was before. It was in small pieces – some the time, some of it, was broken to pieces.

Int Just state what was the condition of the Train?

Ans I did not notice particularly the condition of the train – that is, the number of them and the position of them. I did not take any particular notice, only just casually. I did not expect to be called into a court to testify; but one thing I noticed, coming up the embankment near the Phelps house and before I moved at all from where I stood on the Horse, immediately after the collision, it appeared not more than two seconds. I saw the car climbing the bank. I expected to find a general wreck, which I did. I don't know how many cars was off the track but there was some and the Engine had not reached the place where the car struck the buggy before it was stopped entirely.

Int How much of an embankment was that when you saw the car up?

Ans I never measured it, but to the best of my judgment it is for 10 feet high.

Int What was the steepness of it?

Ans I should think about two to one of a grade that is two feet of rise to one of slope or something like that.

Int How far had you travelled with the Deceased before he reached the Crossing? When did you get behind him?

Ans Some where down below – down in the hollow – on ½ half a mile, perhaps or a mile.

Int Was the deceased travelling or stopped? when you first overtook him?

Ans He was travelling; he overtook me.

Int And passed you?

Ans Yes sir.

Int Did you see anything train than this grain train as you and him journeyed together up that road?

Ans I saw the Passenger train come along.

Int How far were you from the crossing then?

Ans I cannot say exactly, but I here some perhaps it might be Eighty rods.

Int Which way was that passenger train going?

Ans Going west.

Int Could you have a good view from where you were?

Ans A good view:– Oh Yes.

Int You went on up, and how far were you from the Crossing? And how far was Wells from the Crossing when you first discovered the train of flats?

Ans Well I suppose he was about probably somewhere in the neighborhood of thirty rods, or from that to forty rods. I could not say how far we were apart.

Int When were you when you first saw them?

Ans Away out eastward about half a mile pretty near I suppose. They might be that a little over that. They was coming. I believe out of the west only when I first discovered them.

Int You rode along after Wells, what kind of a gait

were you travelling?

Ans Quite slowly; not in a trot - I may call it a jog.

Int Had you got as far as Mr Phelps' house when you first discovered them?

Ans No sir not quite.

Int How far from his house?

Ans From two to three rods probably; I should think it was that much; it might be more, I cannot recollect exactly for I did not measure the distance

(Priestley map shown to Witness)

Int Suppose that to be Phelps' house, and this (the) highway - there is the Railroad, and there is the cut on the highway; where did you stop on the highway?

Ans I stopped as near East of Mr Phelps house, as I can recollect.

Int How far was Mr Wells ahead of you when you stopped?

Ans Probably one or two rods - he might be a little more - he might not be.

Int How far had he got when you hollered to him?

Ans He had got down here, in the cut on the highway, and I still stood here, and he going in this direction not any faster nor any slower, apparently, than what he had been going, and I hailed him when he got down here; all I said was "you will be too late sir"

(Witness then points out the different positions on the Map)

Int When was the cars at that time? Had they approached the whistling post?

Ans Yes sir, when I hailed him the cars then I think

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was running along past the whistling post.

Inty And he was down in there? (pointing on the map)

Ans Yes Sir.

Inty And you made that on remark?

Ans Yes Sir,

Inty You dont know whether he heard you or not?

Ans I do not.

Inty Was there any visible change in the movement of his buggy?

Ans Not in the least – no difference – I presume he did not know I was calling Him, a otherwise he did not hear me.

Inty You dont Know that he saw there cars?

Ans No Sir, I do not, I presume he did not, for he drove along at the same rate, right along till his horse was stepping on to the crossing; the sound of the whistle reached my ears just as his horse was stepping on the crossing, the Horse bounded forward and the cars caught the buggy and it was all so instantaneous that I could not tell it. Here was the place that I could not see the plate (Witness points to a place on the map.)

Inty Although you was opposite that house?

Ans Although I was opposite that house,

Inty Where is the highest point of the Road?

Ans. That is the highest point, the next instant it seemed like that his horse stepped along here, and before he stepped on the track the probability is they blowed the whistle for the brakes.

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Inty How much interval was there between the sound of the whistle

for down brakes and the collision itself?.

Ans I should think not a second; it appeared to me instantaneous. The whistle sounded and the horse bounded forward and the car struck the buggy. You can judge ~~yourself~~ from that how much time there was; It could not be calculated because at the instant the sound of the whistle reached my ears, the Horse bounded forward, and if it had been one second he would have been clear of it. I presumed neither horse, nor buggy, nor man would escape.

Int Suppose a train to be passing along down at the whistling post, have you ever made any observation with a view of determining how far the Engineer on the Train could see a horse and buggy approach the crossing, before they got to the crossing, looking across on the highway?

Ans Well, I could not say sir.

Int You never made the Examination?

Ans No sir, I never made an Examination for the purpose of fixing that. From the Crossing there is some little distance north of the crossing where if a man looks out he could see the train, and when the People on the Train could see a horse and buggy.

Int Did you ever examine this road in the Highway?

Ans There is a place after you pass under the warning board, of probably two rods, that a man cannot see a train anywhere on the road (smokestacks or anything else

Int Is there any point in this cut at all where a man could see a train of flats anywhere on that Rail road, from the crossing by the whistling post?

Ans I have not made any observation in regard to seeing the flats, because I have never seen a train exactly of flats, and I could not tell how far they could see such a train on the railroad.

Int You state that for two rods there was no part of the train could be seen?

Ans Somewhere about two rods; that is, not anywhere, but just at the Embankment I mean.

Int Looking East you mean that you could not see anything?

Ans Yes Sir,

Int You was on horseback?

Ans Yes Sir,

Int And the deceased was in a buggy?

Ans Yes Sir.

Int What kind of a Buggy?

Ans A covered buggy - a top buggy - one horse.

Int Was the top up?

Ans Yes Sir,

Int Did you see the train when it sounded the whistle at or near the whistling post?

Ans Yes Sir,

Int Was that after or before you stepped by Phelps'?

Ans That was about the time, I think, somewhere about the time I pulled up.

Int Do you say that at that time Wells was in the cut below?

Ans When I stopped he was some – probably about, as I stood, one or two rods ahead of me.

Int Had he got into the cut at that time?

Ans He was just going into it?

Int Did you notice the whistling post East of the Crossing?

Ans Yes Sir, I believe I did.

Int State the situation of the Locomotive at the time you heard that whistling at or near the whistling post?

Ans It was East of the whistling post

Int When was the flats?

ans Int They was passing along the post?

Int How far was the Locomotive east of the whistling post when it blew the whistle?

Ans Well I dont Know exactly – the train was passing along – then ~~was~~ probably might have been two or three or perhaps more had passed.

Int Of the flats?

Ans Of the flats when the whistle was sounded.

Int And the balance had not come to it?

Ans And the balance had not come to it —.

Int What Kind of a whistle was that; How long in duration was the sound of the whistle?

Ans Well I do not Know exactly as to the time as near as I can recollect I think probably the train ran about the length of perhaps of three cars, perhaps two or three, perhaps three length of cars, of flats cars.

it might be three or four.

Dft. State to the Jury where the Locomotive was; what its relative position was to the whistling post when it stopped whistling?

Ans. It did not quite reach the whistling post when it stopped whistling.

Dft. Was there any more whistling from that time till it whistled down brakes there?

Ans. Not any.

Dft. Are you positive of that?

Ans. Yes Sir.

Dft. Can you be mistaken about it?

Ans. Not at all, for my attention then, was particularly directed to the train, seeing a man driving along with a buggy and a train coming with the speed it was then running; I was looking particularly and noticing to see the distance and whether that man could get over safely.

Dft. You had your mind particularly directed to the case to see what the fate of this man was going to be?

Ans. Yes Sir, at that time I had.

Dft. And then was no more whistling?

Ans. No more whistling — one blast of the whistling.

Dft. That was before it got to the whistling post?

Ans. Yes Sir.

Dft. Was there any obstacle that would break the sound, or make it difficult to hear if it had sounded?

Ans I do not know, that there is any particular difficulty from the position I occupied, for I was on the highest point of ground I believe.

Int Was there any from the position I left occupied in the mouth of the cut? There is the highway that would render it more difficult for him to hear than you?

Ans I don't know of any other obstacle than the one I have already stated that is, this piece of Embankment

Int Would the Hedge be any obstacle?

Ans I do not recollect noticing anything in particular about the Hedge.

Int There was a fence there?

Ans Yes there was the fence of the road, and the fence of the rail road,

Int Would you call that blast of the Whistle a long one or a short sound?

Ans It was longer than the sound they sound for brakes ordinarily; It was not very long nor very short; It was not a sudden short, it was as they usually whistle, it was just one blast.

Int Do you know in what direction the wind was blowing?

Ans I do not know there was much wind.

Int It was a light top buggy was it?

Ans Yes Sir, I could not see the man at all.

Int Was your attention directed to the speed with which that train was moving? Did you see the

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Speed of the Train?

Ans The Speed was, I presume, about the same rate as a passenger train ordinarily runs, I think, as near as I can judge, I dont know about how many mils an hour it would be, I have no means of ascertaining that fact particularly.

Int You have travelled on a passenger train have you not?

Ans Yes Sir,

Int You can give your judgement to the jury about how many miles an hour it would be that they were travelling from the shunting post to the crossing?

Ans Well probably from twenty five to thirty miles ~~an hour~~ at that rate of that an hour.

Int Are you positive, absolutely positive, that it was more than twelve miles an hour?

Ans Yes Sir, I am positive it was more than twelve miles an hour.

Int If there is any other circumstance in your knowledge that makes it positive of that aside from looking at the cars, you can state what it was?

Ans One circumstance would be that it was probably not much more than half a mile behind the passenger train, consequently it must have run from Malden after the passenger train left, and I believe they are not allowed to run within a less distance than half a mile it probably left there about the same distance

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behind that it was when it reached the crossing.

Int How far is Waldon from that crossing?

Ans Well, probably four or five miles, I do not know exactly, Under ordinary circumstances, after it struck the Buggy and broke it to pieces, it ran with such force, that one of the cars climbed up the Embankment on the north side, till I saw it on my hand a little over the Embankment which was 9 or ten feet high and pretty steep at that.

Int Did you see any of the trucks or the beam?

Ans I did not notice anything so particularly as the end of the flat car and I certainly thought then that it was going right over, but it stopped, and then I walked down and saw the rest of the cars. I did not pay any particular attention and I judge that there was two or three flat cars. I do not know how many there were off the track, but perhaps three four or five.

Int Did you look to see any sparks of the trucks when these cars came in contact?

Ans I cast my eye on that after, at that time I did not pay particular attention to it, afterwards I saw a track as it went up there and that place is perceptable yet I believe, it was the last time I was down there.

Objected to as incompetent & immaterial inasmuch as the single ground of Negligence alledged in the Declaration was that of failing to blow the whistle at the whistling post and entire neglect to blow the

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it from that point to the Crossing.

Mr. Taylor, denied that this was the fact

Mr. Walker, then Read from the Declaration to the Court

The Court, It seems to be conceded by Mr. Taylor that the rate of Speed is immaterial, and therefore I cannot see what the use of prosecuting the testimony would be. The rate of Speed cannot increase the liability of the Defendants. It is sufficient to show, that the plaintiffs set forth enough, that the train was in motion, to cause the accident, and injury & to the particular rate of Speed is of no importance.

Mr. Taylor. It is material in showing the relative Speed of this man and the train so as to enable one to tell when the train was and when the man was at any given time. In that point of View I suppose it would not be objectionable.

Objection sustained.

Court adjourned until 7 P. M.

—— Evening Session ——

Wm. Cooper recalled.

Examination in Chief resumed by Mr. Taylor.

Int. Were you acquainted with the deceased?

Ans. No Sir.

Int. You did not Know him?

Ans. No Sir.

Int What time in the day did this casualty occur?

Ans Well I dont know exactly the time of day it was somewhere well towards sundown. I dont recollect how long.

Int Can you tell what the state of the atmosphere was with reference to its being Calm or Windy?

Ans Not very Windy I think, I do not recollect particularly, but I think not very.

Int Was there any wind that you can remember?

Ans I perceive there was but I dont recollect much about it.

Int Can you tell what direction the wind was blowing

Ans No Sir, I do not recollect the direction.

Int Did you hear any bell ring?

Ans I did not hear any bell ring.

Int No bell rung?

Ans I did not hear any.

Int Was you in a position that you could have heard one if rung?

Ans Well I think so.

Int Did you hear no bell?

Ans No Sir,

Int Have you any knowledge of the lay of the Country each of that Crossing, & the other Cut which is mentioned by witnesses, on the rail road?

Ans Very Slightly.

Int Have you ever been through that Cut?

Ans I think I have.

Int Can you state whether a train of Cars in that

east Cab (that is the Cab Crossing on the East 8 th which the witness has mentioned here) could be seen from where you was at Bells ~~House~~ when you stood in the highway there

Ans I dont Know whether the cars could be seen or not; I think the smoke stack might be seen probably - I am not certain of that, I dont Know that, I have ever stood there when a train of cars have been going through the Cab. I dont Know whether a train of cars from that place, in the Cab next east, could be seen or not; probably the smoke stack could be seen; I think it might, but am not certain of that.

Int Not certain of that?

Ans No sir, I have never stood there ~~to~~ to my Knowledge & see a train of cars.

Int Did you see Mr. Greely, the witness who testified as being on the Lumber?

Ans Not to my recollection. I do not recollect seeing him at all.

Int Did you see any other person on the other side of the track, waiting for the cars?

Ans ~~Not to my recollection~~ I dont recollect ~~#~~ noticing

Int How far in your judgment are you from the crossing from the position where you stood on the street?

Ans I presume from 8 to 25 rods.

Int And as you approached this crossing the

115 ~~stood~~ stood Mr. Wells, did you walk or trot your

Ans Horse on the walk, It might be called jogging along.

Int What speed was he going?
Ans About the same speed that I was ~~going~~; what you might call a very slow trot.
Int How far would you go to the town?
Ans Well, I suppose not more than 4 or 5 miles on town. not more than 5 miles on town I presume — more than four, probably not more than five.

Cross Examination by Mr. Walker

Int You were 30 or 40 rods from the crossing when you first discovered the train?
Ans Yes Sir, as near as I can recollect; I do not know exactly the distance now; that is as near as I can recollect.
Int You spoke of a hollow, of a depression in the ground on the highway; how far was that from where you saw the car?
Ans Along there.
Int Now right opposite you what is the character of the track there, is it an Embankment or a level?
Ans It is an Embankment.
Int How high is that Embankment?
Ans Probably it might be 8 or 10 feet on the deepest part, I presume.
Int Ten or twelve is it not?
Ans I do not know; It might be more.
Int Travelling from that point, to the top of the hill where

you stopped, there was not the slightest difficulty in seeing the cars all the way was there?

Ans From here to the point where I stopped I could see the cars.

Int They were above you were they not; that is they were higher than you were?

Ans They were on the Embankment.

Int Any one who had turned his head to look over towards the Railroad, could have seen them could he not?

Ans I suppose they could.

Int At any point between that embankment and the point where you first saw them

Ans. Yes, Sir, by turning and looking towards the Rail road any where along till you got pretty near towards where I stopped, all the way.

Int When you stopped he was about one rod ahead of you?

Ans A little more than that.

Int And he went on to the Crossing?

Ans Yes Sir.

Int How long you hollered to him?

Ans After he had passed me and gone down off on the road perhaps half way between, me and the Crossing I hailed him and said "you will be too late".

Int He paid no attention to it?

Ans That is so.

Int Then as you were on here (pointing on the map)

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you saw the west end of the flats pass in behind the Bank, and immediately after you passed here (again pointing on the map) you saw it come out at the other end of the Bank?

Ans Yes Sir.

Qst What is about twenty or thirty feet that the train was obscured?

Ans That is in the travelled way, there about two or three rods, that the train could not be seen at all.

Qst And a man after he had got down by the crossing within sixty or seventy feet could have seen the train?

Ans Yes Sir. after he got past the warning board, then he could step and look up the track and see.

Qst Is it not a straight track for some distance?

Ans I believe it is on an air line from Arlington by Princeton

Qst At the time you stopped how far had the train passed the wheeling post?

Ans I think it had not all passed the wheeling post post when I first stopped.

Qst It was passing?

Ans Yes Sir, I believe it was passing along, I could not tell Exactly the position of it. It was some where along here (pointing to the wheeling post on the map).

Qst What first attracted your attention to this train on that day?

Ans The Whistle at the Crossing east of that.

Deb Each of the whistling post?

Ans Yes Sir,

Deb You heard them first, the whistling for the crossing lying each of the whistling post and east of the cut?

Ans It was then that the sound of the whistle attracted my attention, previous of the sound of the whistle I had no idea there was any other train only the Passenger.

Deb After that whistle did you hear the noise of the cars till the second whistle?

Ans Well, I do not know that I did. I might might hear them but I do not know that I did particularly. I cannot recollect.

Deb The next thing that attracted your attention was another whistle was it?

Ans The thing that attracted my attention more particularly was when the cars reached about the other whistling post I thought "Will I have time to cross before that train reaches the crossing I think I have", I was riding on horse and looking another person, and if it had not been for that fact I should have crossed.

Deb From the time of the first whistle till the time of the second, did you look to see the cars. Did you see the cars when they came out of the east cut?

Ans Yes Sir,

Deb And heard the whistle at the whistling post?

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Ans I heard the whistle on a about that point

Qst Can there was no difficulty in a man seeing it at that point?

Ans No sir, there was no difficulty, in seeing them after they left the East Cab, till they entered the cut East of the Crossing.

By Mr. Taylor

Qst Can you say whether that buggy he was driving made any noise?

Ans An ordinary noise nothing particular, that I noticed out of the ordinary way. An ordinary noise that a buggy would make running along the road, the road was what we called very good.

Qst Can say that you was a rod or two behind Wells when you stopped up there?

Ans Yes sir.

Qst I will enquire if he had been at a greater distance ahead of you before you stopped?

Ans Well he might have been a little more than that. Of course I did not pay any particular attention after he passed by me.

Qst You was on horseback?

Ans Yes sir, and he was in a Buggy.

Qst Did you see what road he travelling?

Ans He was travelling on the main road.

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Ans which goes Southwest or about that direction.

Qst Was there any point or anytime from the time these cars came in hearing that Mr Wells could have looked out as Mr Walker said and seen the cars anywhere?

Ans He could not see the train by looking just as he sat there he must put his head out by right entirely,

Qst And then he would have to look back?

Ans He would have to look in a diagonal not exactly behind him. Of course the Franklin road runs east and west and the Rail Road west by South consequently they do not run at right-angles. If I was running at right-angles a person might look ahead and see the train.

Qst If you had been down at a point going up that hill from that hollow, and you had looked and seen the cars, or the grade there, could not the cars have passed the crossing before you had got there?

Ans Oh yes, If I had been down in that Hollow and they had been upon that Embankment.

Qst If you had been west of that Embankment on the Highway any where would they not have passed over the Embankment before you got there.

Ans Yes Sir,

By Mr Walker

Qst I understand you that if Wells had put his head

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out and looked to the left, he could have seen the cars?

Ans If, at the point of the hill, when I first stopped at that time he had put his head out of the buggy and looked pretty nearly behind him, then (the road going so near parallel to cars) he must look back this way across he could have seen the cars.

By Mr. Taylor

Int At the point where he was when the whistle blowed at the Whistling post, could he have looked out and seen the cars?

Ans I do not know whether he could or not.

Int You are not prepared to say that?

Ans No sir, I do not know whether he could or not.

Mr. Hinkle called on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Taylor and testifies as follows;

Int Where do you live?

Ans At Princeton

Int How long have you lived in the county?

Ans Within a mile and a half of Princeton, for most seven years.

Int What is your business?

Ans Surveyor.

Int Are you County Surveyor?

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Ans Yes Sir

Int How long have you been?

Ans Ever since 1855 except two years.

Int I will inquire if you have Examined the topography of the Country around the place where the Casualty occured?

Ans I have.

Int Have you made a plat of the Highway and the Railroad, and the ground around them?

Ans I have

(The Map, or plat) shown Witness)

Int Did you make that plat Sir?

Ans I did.

Int State whether it is a profile of the ground, the railroad and the highway?

Ans It is made from notes taken on the spot.

Int This Represents the Town and Princeton Highway, And that, the railroad?

(Counsel showed the points on the Map)

Ans Yes Sir,

Int Have you measured the cut at the crossing of the highway and Railroad, levelled it and compared it with the general surface of the ground at the crossing?

Ans Yes Sir,

Int What is the depth of the Railroad track below the general surface of the ground?

Ans It varies but little from five feet going through them.

12[illegible]