

No. 13553

Supreme Court of Illinois

Galena & Chicago Union R. R.
Co.

vs.

Welch.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 309.

McClellan
June 12th
1860

355

SUPREME COURT OF ILLINOIS.

Third Grand Division, }

APRIL TERM, A. D. 1860. }

THE GALENA & CHICAGO

UNION RAIL ROAD COMPANY,

Appellants,

VS.

PERRY M. WELCH,

Apeller.

APPEAL FROM BOONE
COUNTY CIRCUIT
COURT.

The Defendants in error object to the abstracts of the Plaintiff's in error for the numerous misstatements of the Record, and in numerous instances substituting assertions of Counsel for the facts appearing upon the record, showing their abstract to be unreliable.

One misstatement occurs on the first page in their statement of the case, by way of —The storm commenced about three o'clock in the morning of the third of June, and rained all day—which is not the fact, as will be seen by reference to the evidence of all the witnesses that were at the place of the disaster on that day.

One misstatement commences at the third page, by way of *Nota bene*.

The record shows that the next day after the filing of the demurrer to the original declaration, the Court gave leave to amend, and that an amended declaration was filed November 2d, 1858, leaving the demurrer standing against the old declaration confessed by the amendment.

That the cause was continued at the March term of the Boone County Circuit Court 1859, by agreement.

And that at the September term of said Court, some days before the trial, the defendants filed the general issue.

The amended declaration was signed by James LeRoy, one of the persons whose name was attached to the original declaration.

The allegation on page four of the abstract, that the defendant's Counsel did not know of the existence of the amended declaration, until the trial had commenced; and that the Plaintiff's Counsel then announced that they relied on said amended declaration, is gratuitous.

POINTS ASSIGNED FOR ERROR BY THE APPELLANTS.

To which the Appellee, in reply, says that the appellants ought not to have or maintain their appeal, because he says that there is no error in the record of the Court below, and that the finding of the Jury was in accordance with the law and evidence, and for answer to each and every point raised by the Appellants, shows the following reasons, and respectfully cites the following authorities:

1st. Point assigned.

That this action was commenced in the Winnebago County Circuit Court, on the 28th day of August, 1858, by precipae and summons issued out the same day.

The declaration was filed September 17th, 1858. That the Defendants at the September term of said Court, 1858, and on the fourth day of October, 1858, it being one of the days of the said term, filed a general demurrer to this declaration.

That the Plaintiff by his Counsel moved the Court for leave to amend his declaration—That leave was granted at the same term.

That after leave to amend, and at the same term of said Court, the Defendants prayed the Court for a change of venue to Boone County Circuit Court, which prayer was granted and the change taken, and that the amended declaration was filed Nov. 2d, 1858, leaving the demurrer standing confessed against the old declaration.

That it is no error to draw the papers anew instead of mutilating the old ones.

That the declaration was amended and filed before the records were sent from the Circuit Court of Winnebago County, to that of Boone—that the allegation of the appellants that their Counsel did not know of the existence of the amended declaration until the trial, is simply untrue; and if such was the case, it was a gross neglect of duty on their part, their demurrer standing confessed against the old declaration, and the records showing leave to amend, there was no declaration for them to plead to, except the amended one.

That at the next term of the Boone County Circuit Court after such change of venue had been taken, it being the March term of said Court, A. D. 1859, the cause was continued by consent, and time given for defendants to plead.

That at the next term of the Boone County Circuit Court, it being the September term, A. D. 1859, the defendants by their Counsel, Loop and Hulburt, pleaded the general issue to the Plaintiff's amended declaration. That after such plea was filed and the cause was called for trial, and the Jury were empaneled and sworn, then the Defendants, by their Counsel, moved the Court to strike the said amended declaration from the files.

That if the said declaration was irregularly on the files, the motion came too late.—That it could not be taken advantage of after they had pleaded and the Jury had been called.

2 Point assigned.

That the Court did not err in permitting the question to be asked of and answered by T. J. L. Remington, whether the culvert was of sufficient capacity to pass the water of the stream, as the question was put.

For the reason that the said witness was called as an expert, and testified as such showing that he was a Surveyor and Civil Engineer, and at that time County Surveyor of the county of Winnebago, and that he was well acquainted with the extent of country drained by the stream, and the rapid rise and fall of the water in that stream, and therefore was well calculated to judge of the capacity of a culvert of that size to pass the water of that stream, as will be seen by reference to the record, page 68.

3 Point assigned.

That the Court below did not err in excluding the testimony of John Van Nortwick; for it appeared from his evidence given upon his examination upon his *voir dire*, that he was Chief Engineer of the Defendants, at the time the culvert was built, that it was built under his direction, and according to his diagrams and plans. 1 *Greenleaf's Evidence*, 393 to 397.

That the Defendant's Counsel stated that the witness was called to prove that there was no defect in the mode in which the structure was designed and planned.

That the witness was employed as a Master of the science of Engineering, in whom the Defendants reposed confidence, and he was therefore bound to see that the plans were correct, and the structure built without defect, and if such structure was proven to be materially defective in any part material to its durability, either in workmanship, form, or size, then the said witness would be liable over.

That the appellants proved the plan and mode of construction by John P. Ellsley and William Haven, persons who had the immediate supervision of the building of the culvert, as will be seen by reference to the record, pages 81 to 85. That the evidence of John Van Nortwick could in no way have changed the verdict. That the witness, Van Nortwick, was called by the Appellants out of the proper order of the trial, and had they called him in the proper order, his evidence would not have been objected to. That the Appellee, after he was so excluded, and before the trial was closed waived their objection, and offered to let said witness testify.

4 Point assigned.

That the Court below did not err in admitting said deeds, for they were duly acknowledged and proven by a proper officer in the County where this suit was commenced, and where the land was situated, that they were offered after, and in support of proof of over ten years possession, claiming title. That the deeds were proper evidence under the Statutes of Illinois. Chap. 24—Sec. 25.

5 Point assigned.

That the verdict was not contrary to evidence, and was rightfully for the Appellee.

That great negligence was shown in not keeping the culvert in repair, and great want of prudence was shown on the part of the appellants by their witness, Ellsley, in building their culvert too small to pass the water of the stream, with the full knowledge of its insufficiency, as will be seen by the evidence of the following witnesses: Pages of Record—54 & 55, 57 & 59, 63, 65, 66, 70, 83.

Authorities cited as to amount of diligence—16 Barbor, 113, 363—3d Kernan, 9.

6 Point assigned.

That the instructions given on the part of the Appellee were and are the law, in proof of which the Appellee would respectfully cite the following authorities:—6 English Railway and Canal cases, 656; 3 Comstock, 463; same, 4 vol., 195; 1 Shelford on the law of Railways, 304; E. L. & E. Rept's, vol. 4, page 269; 2 Kernan, 487; 19 N. H. 327; 1 American Railway cases, 288; 23 Peck, 24; 8 Barbor, 429; 19 N. H., 327.

7 Point assigned.

That the Court did not err in refusing the fourth and two last instructions, because they were not the law. That the fourth instruction was not the law, but was intended to mislead the Jury as to what the law was by assuming that if the culvert was well built the defendants were not liable if the culvert became out of repair by reason of prior freshets, and that the water that they had wrongfully obstructed had not run down so that they could ascertain the extent of the damage, the two last instructions are involved in the eighth point raised.

8 Point assigned.

That the Court did not err in refusing the motion, for the reason that there was suf-

ficient evidence of the title to the real estate in question, that the proof of the witnesses Palmer & Laythrop, showed the Appellee in possession over ten years claiming title— That this proof was sustained by the title deeds of the Appellee. Authorities cited in reference to proof necessary: 2d Phillips on Ev., 295; Cowen & Hills Notes; 11 Johnson R. 504; 1 Brown, P. 25; 2 Phillips' Ev., 253; 4 Cowen & Hills Notes; 2 Greenleaf's Ev., 226, Sec. 230, also P. 319, Sec. 303; 11 Johnson, 504 to 10; 2 Johnson, 22; 4 Johnson, 202; 5 Cowen, 200; 9 Wendell, 223.

9 Point raised.

That the evidence shows that verdict was less than the damage proven, as will appear from the evidence of witnesses Lathrop, Palmer, and Miss LeRoy.

Amount of personal property proven by these witnesses was eight hundred dollars and thirty-eight cents.

The average value put upon the house, shop and lots, was five hundred and fifty dollars, in all making the sum of \$1,407 38.

The average value of the house alone, as proven by witnesses Hecox and Cross, was three hundred dollars.

10 Point raised.

That the Court did not err in refusing, as will be seen by reference to the records.

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That there was no variance between the declaration and the proof, as the record will show.

James Lee Roy Attorneys for Appellee.

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Perry M Welch
at the inst of the
Gal. Hk. U. R. R. Co.

Brief of Appeal

Filed May 16. 1860
L. Deland
Clerk

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James Le Roy

Attorneys for Appellee.

T. J. May 16, 1860
L. Helmer
Clerk

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THE GALENA & CHICAGO UNION RAILROAD COMPANY,

Appellant.

v s.

PERRY M. WELCH,

Appellee.

APPEAL FROM BOONE
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STATEMENT OF CASE.

This was an action of trespass on the case, commenced against the Galena and Chicago Union Rail Road Company in the Winnebago County Circuit Court, on the 28th day of August, 1858, to recover damages for injuries done to the defendants premises, on the night of the 3d of June, 1858, by reason of the giving way of a culvert near Roseoe, over the south branch of the Kennekinnick Creek, which was swept away by a great flood of water, and during a tremendous storm of rain.

The defendant in error, was a wagon maker, and resided upon a lot directly abutting upon the creek, and his house within six or eight feet of the bank of the stream. The storm, which caused the damage, commenced about three o'clock in the morning of the 3d of June, and rained all day—the culvert was swept away about eleven o'clock in the evening, and the water rushing down, carried away Welch's house, wagon shop, sweeping away his furniture and doing damage to his premises.

Page R. 3 *Pracipe* filed August 28th, 1858, and summons issued on the same day.

5, 6, 7 & 8 NARR.—1st count charges, as follows :

"The Galena and Chicago Union Railroad Company was summoned by the sheriff of the county, to answer unto Perry M. Welch, of a plea of trespass on the case, and thereupon the said Perry M. Welch, by LeRoy and Dunlap, his attorneys, complains : For, that, whereas, the plaintiff, before and at the time of the committing of the grievances by the defendant herein before mentioned, was, and from thence hitherto, has been and still is, lawfully in possession of certain village lots, whereon was situated a dwelling house and wagon shop, with the appurtenances situated and lying in the village of Roscoe, in the county of Winnebago, and State of Illinois, and by reason thereof, before and at the time of the committing of the grievances hereinafter mentioned, of right had and enjoyed ; and still of right ought to have and enjoy the said premises, yet the defendants well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in this respect, and to deprive him of the use and enjoyment of the said premises, to-wit : on the first day of July, in the year of our Lord, one thousand eight hundred and fifty-three, and on divers other days and times, between that time and the day of the commencement of this suit, wrongfully and unjustly constructed and erected and kept and maintained an embankment across the low lands along the valley of a certain stream of water running through the village of Roscoe, called the South Kennekinick creek, in the county of Winnebago aforesaid, by reason whereof, the water of the said stream or water course, was dammed up, to-wit : on the third day of June, A. D. one thousand eight hundred and fifty eight, to the height of about twenty feet on the said low lands, to-wit : at Roscoe, aforesaid, in the county of Winnebago aforesaid, by reason of the damming up of the water of the said stream, and the heft and force of the said waters so dammed up as aforesaid, the said embankment was forced away thereby, letting the said waters with great force and in a great body down against the plaintiffs said dwelling house and wagon shop with such force that his, the said plaintiff's, dwelling house was swept away with all his household goods, furniture and a large amount of wagon work that was stored in the upper part of his said dwelling house, as well as a part of his said wagon shop and a large amount of property in and about his said premises, and also swept away all the fruit trees on his said premises, and washed away and gullied out the said plaintiff's lots to a great depth, to-wit : of the depth of five feet, and thereby and by reason thereof, the said plaintiff's dwelling house and wagon shop was swept away and destroyed, and a large amount of other property in and about the said premises, was destroyed and damaged, and the said plaintiff during all the time has been deprived of the use of his said premises and kept from carrying on his said business as a manufacturer of wagons, and enjoyment of his said dwelling house and shop aforesaid, to the plaintiff's damage of ten thousand dollars.

And for that, whereas, the said defendant, before and at the time of the committing of the grievances, hereinafter mentioned, was possessed of a certain railroad called the "Belvidere and Beloit branch of the Galena and Chicago Union Railroad," running from Belvidere, in Boone county and State of Illinois, to Beloit in Rock county, in the State of Wisconsin, and to and from other places; a part of the aforesaid road being built through the village of Roscoe, in the county of Winnebago and State of Illinois; yet the said defendant, well knowing the premises, while they were so possessed of and constructing the aforesaid railroad, through the village of Roscoe aforesaid, in the county of Winnebago aforesaid, to-wit: on the first day of July, A. D. one thousand eight hundred and fifty-three, at Roscoe aforesaid, in the county of Winnebago and State of Illinois aforesaid, wrongfully and unjustly erected an embankment across certain low lands lying along the valley of a certain stream of water running through the village of Roscoe aforesaid, without leaving sufficient openings to allow the flood waters of the said stream to escape as accustomed, by means of which they became accumulated, and on the third day of June, A. D. one thousand eight hundred and fifty-eight, at Roscoe aforesaid, by means and in consequence of which improper construction of the said embankment, without sufficient openings as aforesaid, the flood waters became accumulated and afterwards, to-wit: on the night of the day last aforesaid, to-wit: at Roscoe aforesaid, in the county aforesaid, and was forced upon the premises of the plaintiff and overturned and swept away, by the force of the flood waters, the plaintiff's dwelling house and all his household goods and furniture, as well as a part of his shop wherein he manufactured wagons, and a large amount of wagon work, part of which was finished and part unfinished, and a large amount of other property about said premises belonging to the plaintiff; also the land, wherever the said dwelling house and shop for the manufacture of wagons stood, was gullied out and swept away to a great depth, to-wit: the depth of five feet, and thereby the said plaintiff has been and is greatly injured and prejudiced in his said estate and interest of and in the said goods and chattels to the damage of the plaintiff of ten thousand dollars.

LE ROY & DUNLAP,

Attorneys for Plaintiff.

8 *This* declaration was filed September 17th, 1858. A general demurrer was filed
9 to this declaration October 4th, 1858.

1 *Nota bene*—Leave was given to amend this declaration, on motion of plaintiff's

attorneys, on the 5th day of October, 1858, and the Court on its motion, being interested as a stock holder, changed the venue of this case to Boone county.

43 & 45 General issue filed September 12th, 1859.

44 & 45 March 15th, 1859, case was continued.

11—41 New Narr. appears on the files No. 2, 1858, containing seven counts and signed "James Le Roy, attorney for plaintiff." This declaration is new in every particular almost, the party appearing by different counsel; and the defendant's counsel, not knowing of its existence until the trial had commenced, when plaintiff's counsel announce that they relied on said declaration.

46 The defendant then moved to strike said declaration from the files, but the motion was overruled by the Court, and the defendant then and there excepted.

11 The new Narr. contains seven counts. The first count commences as follows: "The Galena and Chicago Union Railroad Company, a body politic and incorporate, were summoned by the sheriff of the county to answer unto Perry M. Welch of a plea of trespass on the case. It then recites that the defendant heretofore, to-wit: on the first day of July, 1858, was and is now the owners of a certain railroad, running and extending from the State line in Wisconsin and to the City of Chicago over a certain stream called the South Kennekinnick whereby it was and became and still is the duty of the said defendant to build and maintain over said creek such culverts or sluice ways as would be sufficient, at all times and all stages of water, to allow and permit the water running or flowing in said creek to pass and flow along through or under said railroad and the embankment and superstructure thereof without obstruction or hinderance—that this being the duty of the defendant—that the said defendant so negligently performed their duty in the premises and put into and constructed the said railroad, where the said railroad crosses the stream, such small, inadequate and insufficient sluice ways, and culverts and material, the same therein that the water flowing and running in said creek could not at all times pass through said sluice ways and culverts without obstruction as it of right ought to have done at all stages of water, but when the water became higher than ordinary was obstructed by embankment and superstructure, &c. and that on the first day of July, 1858, by reason of the smallness, inadequacy and insufficiency of the said culverts, and sluice ways put in and maintained the water accumulated, broke way the dam, culverts, &c. and swept away plaintiff's house, injured his premises, &c. &c. and done great damage.

The second, third, fourth and fifth counts are substantially like the first.

The sixth and seventh counts charges that the sluses, culverts, &c. were out of repair, and that being out of repair, they gave way by reason of the force of water and did the damage.

51 Bill of exceptions, showing motion by defendants to strike from the files the pretended second declaration, filed November 2nd, 1858, because the same was not in conformity with the leave granted by Circuit Court of Winnebago county—motion overruled and exception by defendant.

PLAINTIFF'S TESTIMONY.

Francis Griswold

52 Plaintiff's first witness, testified—that he knew the lot of land occupied by the plaintiff. Knew where Welch lived at the time of the freshet. There was a dwelling house and good wagon shop on the lot. The south end of the lot was bounded by the creek, one corner of the house was within six or eight feet of the bank of the creek. This bank was from two to three feet high above the bottom of the creek. The bottom of the house within two or three feet of the water at the usual stage. There was about 3 or 4 inches of underpinning.

The house was about 16 feet by 20, one and a half storeys high.

The plaintiff was a wagon maker. The shop was used as a wagon shop. I was 16 or 17 rods off when the house was swept away. It was carried off by the water which had accumulated above the embankment. I saw the water coming and went down to my blacksmith's shop and barn to get out a calf. The wave was from 8 to 12 feet high in the main current of the stream. This wave struck two houses above Welch's, then struck Welch's house and tore it down. It went off in the wave, part of the house has not been seen since. Nothing was left of it next morning.

It was a heavy swell of water. The water had risen before this, two or three feet; this was a minute or two of three, before. The heavy swell seemed to shove

this smaller one before it. The heavy wave was like any heavy body of water forcing its way along. There were sticks of timber, tree tops, brush and such like. The most of it followed the body of the main creek. The wave was not perpendicular. I was on the bank, about 10 or 12 rods off; it came along like a heavy sea—it rolled in like a swell on a beach. The usual width of the bed of the creek, at Welch's, is 2 or 3 rods; on the south side the bank sloped gradually. I think the wave I saw there was 8 or 10 feet high. The water was about 20 rods wide after the wave. It was about a half hour before the water ran off, but this main wave passed right along and left the water some 8 or 9 feet deep on the bed of the stream. The water was three feet deep between my house and Fassett's. I was at the railroad about 5 or 6 o'clock the evening before. It gave way about 11 o'clock P. M. (This big wave was about 11 o'clock P. M.)

I saw a pond of water there, and the mouth of the culvert was filled, as near as I could tell, within 18 or 20 inches of the top of the arch. I did not go down to it. The lower end where the water came out was full. The pond above extended as far as I could see, although it was nearly dark. It went over Mr. Blair's meadow. This was on the *night of the 3d of June, 1858*. I could not tell whether the water was then rising.

I have resided in Roscoe four years. The next morning part of the house lay north from the place where it stood. The chamber floor lay across the street in an eddy. The lot was all torn to pieces. The back end of the shop was partly gone—a very small portion was gone. The lot was cut out to the depth of the bottom of the cellar, I should judge. The materials of the culvert were scattered all about on the flat. There were large sticks of timber and plank strung along from the culvert along the flats to Rock river, (that is, I was told, these were materials of the culvert.) It is about a half mile from the culvert to Welch's house, and half a mile thence to the river. The stone lie principally within 20 to 25 rods from the track, some further down as far as the street. I should think the largest would weigh 8 or 9 *cwt*. I saw some of near a ton weight, at 8 or 10 rods from culvert. I have been at the culvert many times before that—I was there a year before. *Then* the upper end of the culvert was washed, so that plank were loose, some of them on the floor of the culvert. I saw a hole in under there and stone thrown in. There was a hole at the upper end of the culvert. I judged that the water was working under the culvert. One of the wings was standing—stone had been thrown in above the timbers, and there was nothing at the end of the plank but stone to prevent the water from running under the plank and timbers. There is now a large hole where the culvert stood.

I cannot tell how deep it was. Have been in swimming there several times since. I was at the culvert within two hours after it went out. I saw the place.

55

On cross-examination—the witness testified—I have lived in Roscoe 4 years. I think it was raining slightly at the time of the break. It began in the morning and continued showery all day. I had not been to the culvert for some days prior to this day. When I was there on this day, there was a large pond on the lower side of the culvert. The water was up to the highest. I mentioned I saw it once before as high—this was from a gorge of ice.

In an ordinary freshet I never saw it as high by three or four feet.

The water came up to Welch's house or in his door yard before I went to the culvert at five or six o'clock ; when I came back I saw Welch and told him not to stay there, it was not safe. This was at six o'clock. I was at Welch's during the heaviest shower we had ; the water increased slowly until about nine P. M. when it fell some two or three inches, and I came to the conclusion it was all over. I cannot say whether it rose again before the break. The bridge was carried off, but when I do not know.

At night both ends were covered with water. When I went down after the calf there was no current where I was. *I suppose the creek was backed up by Rock river ; the ordinary stream is rapid towards the river.* The stable, where I had the calf, did not go off ; it spread out and fell in, and lay there after the freshet.

I saw the wave coming before I went to the stable ; I first saw it between the mill and factory ; it moved with a noise, and faster than a man could walk. The summer before I saw a plank loose at the culvert. I started to walk across, the plank lay up and down ; this plank was nearer the side than the center. There were eight or ten inches of water in the culvert. The hole I saw was in the bed of the creek ; I thought the water had worn out a hole in the bed of the stream ; this hole was above the culvert. I noticed no sucking in nor twirl of water at this hole. The current was about ten inches deep on the floor of the culvert ; where the culvert was, I threw down a board sixteen feet long to see how deep the water was ; it all went under. I was there several times that summer, *but not the summer of the freshet until that night.*"

Re-Examined.

Said: "I cannot say how much the plank gave; it was very slippery. I put my foot on it, nearly slipped and went back."

SAMUEL LATHROP,

Plaintiff's second witness, testified as follows:

57 I have been acquainted with the lot Welch lived on thirteen years. He has
occupied it ten or eleven years. The bank on the south side is two and a half or
three feet high. The house is twenty-five feet by thirty or twenty feet by twenty-
five; I never was round it; it was a story and a half high. There was a grout
shop, sixteen feet by thirty, occupied as a wagon shop by plaintiff. The lot I can-
not give the size of; I can guess, say five rods by eight or nine rods. The house
58 is three feet above the level of the bank. The cellar was six and a half to seven
feet deep; it was dry except in high water. The cellar wall was stone. I was
in Roscoe when the house was swept away by the flood. It had rained very hard
about 5 o'clock. I was in my house and heard that the culvert was gone. I went
and got my horses out of the barn—water to my knees. I then went and helped
Griswold. Welch's house had gone, it was then 12 o'clock. Mr. Illsley's clock,
found in the ruins, had stopped at half past eleven. Welch's family were then at
Andrews'. They did not save anything; they were left destitute—children had
on nothing but night clothes. Welch had a wife and four children. I did not
see Welch's folks till next morning.

The creek, before this, ran on the south side of Welch's lot, now runs in the
cellar. The water is from six to ten inches deep. The house, lot and wagon shop
was worth from five to six hundred dollars; I think the lot is worth less now.
There had been two or three or more showers in the day, and about 8 or 9 P. M.
a tremendous shower. The water two days before had risen as high as at this
time below the culvert. There have been floods before. In August, 1857, there
was a heavy rain. I was at the culvert then; the water was within a foot and a
half of the top of the culvert—the culvert was not large enough to pass the water;
the water set back to the top board of William T. Smith's fence. There were
floods before, I think, as high—eight years ago Rock river was four feet higher
than at this time. I should think the creek was higher than at the time of the
59 accident. Those floods did not effect Welch's property.

The country drained by the creek is quite extensive—hills and barrens. The creek rises right up and goes down as quickly; it rises within an hour or two and goes down accordingly. I saw the culvert in 1857, both wings on west side were broken off and the north wing on the east side. The west wings were undermined by washing of water and one thrown down, the other upright but cracked off from the main work; the culvert was not big enough, so that the water boiled up and washed back; I looked down but could not see how deep the water was. The boil did not go under the main culvert, but did under the wings. Timbers were laid across the culvert and planked. The upper north wing had undermined and fallen away from the main part, and there was a plank missing from the upper row of planks; the planks were twelve feet long and rested on timbers, two feet filled in with loose stones.

They dug down to as secure a foundation as they could find, then laid down timbers and small stone between them, then planked over. Timbers flatted on two sides, ten to twelve inches thick, and twelve to eighteen inches apart.

In August, 1857, there was a hole near the wing cut out, but did not extend under the plank as I could see; I walked across on the railroad. Saw a hole. They put in three or four cart loads of loose stone, which did not come to the top of the water. In my opinion, the stone put in did more harm than good. The stone were not near enough to the mouth of the culvert, but that the water would wash between them and the culvert.

We went up about one A. M. of that night. The opening in the bank was from 200 to 300 feet on the top of the bank. They have now a bridge of 100 feet span. The bank and culvert were gone. The water was from fourteen to sixteen feet deep. Where the culvert was I threw down a board sixteen feet long, to see how deep the water was, and it came up most of its length. I was there when the culvert was built.

I saw some of Mr. Welch's personal property, bed clothes and bedding. I do not know all his personal property—he had a soda fountain—there was a turning lathe. One half of it was dug out of sand in fixing the road. He had a cook stove, chairs, bedstead, bedding, bed clothes, secretary with books filling the upper part, can't say how much nor what they were worth. Part of the soda fountain was found, the whole was worth \$30 to \$40. The turning lathe was of iron.

Cross-Examined

By Defendant's counsel.

61 The soda fountain was copper casks and lead pipes and pumps and all the apparatus for it. I suppose I had known it running at Wilson's Drug store the year before. I think it must have been in his house, but never saw it there. He had two beds up, I saw; found some quilts; a feather bed and straw bed, what was found, was worthless. A part of the chamber floor and roof went across the road and lodged at Palmer's. The house had three rooms below. The lot and shop may be worth ten dollars. I was at the culvert after the flood of 1857. The wings were there, one cracked off, and had been for two years, this was the north one of the lower side. After the flood of 1857, I went down on the other (up stream) side, and found them out of order. The north-east wing was bent over, broken during the flood. The south-west wing was also cracked off; the crack six or eight inches wide. I do not know that the culvert and its foundations are independent of the wings. There was one plank loose and one gone. The one gone was on the north side of the culvert. The next one was loose and lay across the culvert, held by a nail at the lower end. Below the culvert was a hole with stone in it. These stones were put in two or three weeks after the flood of August, 1857.

62

All along in May and up till the third of June, 1858, the creek was full, and ten days before this, it overflowed its banks; it overflowed and came up into the yard of plaintiff. I think the overflow of May and June before the culvert broke, was about equal. There were no planks between the wings on the upper side, cannot say as to the lower.

JOHN A. CORNWELL,

Called by plaintiff, testified as follows :

I drew stone to this culvert, was there when it began, saw the foundation laid; so far as my memory serves me, the foundation was eighteen inches or two feet, the pit was dug one side of the then channel. The planking was about level with the top of the water. I think stone was put in first, then timbers, then planks. The stones were all sizes from a man's fist, up to as big as his head. There was a bed laid under the whole of the culvert. I can't tell how deep the bed of stone was. I was there through the whole work. Cannot tell the size of the timbers.

EBENEZER BROWN,

63

Called by plaintiff, testified as follows :

I lived a mile above the culvert on the stream. Have lived these two years, and for twelve years before that in the village. There was a flood in June, seven years ago, very high, before the road was constructed. A year or two before there was a heavy flood in the winter. The flood above the culvert in June, 1858, was very high, four feet in my garden. The flood in June, 1857, went over Mr. Welch's lot, and the one in the winter of 1856, was still higher. I do not think so much water fell as in this last.

In both floods of 1858, the water was dammed up by the railroad, on my lands; the last one (June 3d) was the highest. The creek had been high all along before the break, for several days. I do not know what caused the water to flow back to my place, unless it was the railroad, but it flowed across two 80 acre lots. The creek is said to rise in a marsh from five to seven miles from its mouth and passes through bluffs, with six or seven ravines on each side. The stream rises pretty quick, it rises and falls in twenty-four hours.

On the 3d June, 1858, I saw the waters rise twenty feet from the foundation of the culvert to the highest point, several feet higher than the top of the culvert. I think this enough, the one in May was about a foot higher than the top of the culvert. The last flood removed fences that had never been moved before, and flooded about 400 acres of land.

Cross-Examined

By defendant's counsel.

I was not at the culvert at the time of the flood. The valley between the culvert and my place is about seventy rods wide. The water has to run so as to come up about four inches on the side of a house in the channel, in order to overrun its banks. On 3d June, 1858, it rained all day, there were two heavy showers fell towards night. The last shower was unprecedented. I never knew so much water fall in the same time.

ASA ABBOTT,

Called by the plaintiff, testified as follows :

I knew the situation of the culvert under the Beloit branch of the Galena and

65

Chicago Union Railroad prior to the flood; I have known it for two years. The wing walls were rather out of repair; the wing on south side of lower end was broken and on the other side cracked off. The planks came out as far as the wings and extended under them. The north wing was pretty much broken down. The lower end of the planks under the wings seemed loose and had settled down.

The floor in the main culvert was good. The wing on the upper side was cracked off; the planks on wings of upper side were tight—one plank was gone between wings on upper side; the planks rested on timbers and they on dirt.

The culvert was twelve feet wide and twelve feet high to the crown of the arch; it was six feet high to the spring of the arch.

On the occasion (of flood of 3d June, 1853) the water rose twenty-one feet six inches above low water mark; above the railroad the water at usual stage was ten or twelve inches. Ten days before that the water covered the mouth of the culvert; the culvert was as full as it could discharge at the lower end. It set the water back above the railroad one mile or more; it must have been a foot or more above the top of the culvert at that time.

Cross-Examined

By defendant's counsel.

66

The water before the rain of 3d June was in a midling stage and the rise of twenty-one feet six inches was entirely due to the rain of that day. I have known as much water to fall before in one day—seven years before. I was at the culvert before it went out at half past 5 P. M.; the culvert was a little more than half full then. The heavy shower commenced about 9 P. M. I have seen as heavy rain before.

GEORGE SMITH,

Called by the plaintiff, testified as follows:

I reside in Roscoe and have lived there thirteen years—have seen the culvert, noticed it about a year before it went out; two-thirds of the north wing had cracked off and fallen in on the culvert; the crack commenced four feet in the body of the

67

culvert and extended out diagonally to the wing about six feet from the bottom. The floor of the wings was sunk at the west side of the culvert some four or five inches. The earth under the plank was gone about six or eight feet deep next to culvert; the floor in main culvert was good. There were two planks out between the wings at the upper end of the culvert. The timbers in the foundation of the culvert were flatted on the top for the plank to be laid upon; they were from twelve to fourteen and eighteen inches through; they were calculated to be laid eighteen inches from center to center; they laid them as near together as they could. The timber was crooked and left holes between, from five to six inches. They filled the holes with dirt and small stones. I saw the culvert a few days before it went off. The crack in the culvert was large. A year before I saw the arch within eight inches of the crown full of water.

At the upper end of the culvert the water had washed out the bed of the creek but not up to the wings nor under them. The natural stream ran five or six rods north of the culvert. The Railroad Company cut a new channel to the culvert; I saw the timbers laid, think there were no stone under them, think the timbers were laid upon the earth; it was sand and gravel—I was working on the road at the time.

Cross-Examined

By defendant's counsel.

The cracks in the main body of the culvert were seen by me after the flood of August, 1857, and remained so up to the time when the calamity occurred. The crack in the main body of the culvert was scarcely visible, you could just see it when it commenced, but was under on the wing.

F. J. S. REMINGTON,

Called by plaintiff, testified as follows :

68

I am a surveyor. The witness here introduced and proved two plats, put in evidence by plaintiff, showing the situation of the lots in question.

I am the county surveyor of Winnebago county. These plats were made by actual survey last June (1859). The lot on main street, west side, is six and one-fifth rods, on the north line nine rods, on the east line two and a half rods, thence

west four and a half rods, thence south to center of creek, according to the record of plat, thence down the creek to the place of beginning, a little over four and a half rods. The bed of the creek covers nearly three quarters of the tract of land in question. There is nothing to show where the house was. Part of the shop stands there; is of no material value. I have been over the old bed of the creek; the old bed is where the dotted line is on the diagram, it is changed in some places five rods.

69

The valley at this lot is twenty rods wide, above much wider; bluff bank on north, gradual slope on south. The usual stage of water is from six to ten inches deep, about a rod wide. The buildings marked on the diagram were not there when the survey was made; I put them on from information received on the spot. Have been nine years in Winnebago county; think the flood in Rock river in 1851 was as great as in 1858. The usual mode of constructing culverts is to dig down, lay foundation with stone and timbers, plank over and build up. The rule is to get below the bed of the stream to lay the foundation; if piling is used, it is usual to drive piles as thick as possible, and lay foundation on piles. I have had experience in such constructions. In laying timber foundations they are laid below the bed of the stream so as to permit plank to be level with the bed of the stream; I know of no fixed rule that can apply for allowance for use of water.

This creek is six miles long and the country drained varies from one and a half miles to three miles wide. I have seen water high in that creek; it rises rapidly from the fact that the banks are hilly.

Plaintiff's counsel then asked the following question :

"From your knowledge of the country drained by that stream, state whether that culvert was or was not of sufficient capacity to pass the water in that stream."
(Defendant's counsel objected to question, objection overruled and exception taken.

Answer.

70

It was not. Welch's house was about 100 rods below the culvert and half a mile to Rock river. The house stood within a few feet of the bank of the creek westerly from the culvert. I was at the creek on June 5th, 1858; I noticed the water marks on embankment and measured with a level; it was nineteen and a half feet above the level of the water in the stream; the water was then at low

stage, at that height it flowed back two miles. The creek in the embankment was about one hundred feet at bottom and about three hundred feet at the top; the embankment was forty feet higher. The valley at that point is above one hundred and fifty feet wide at the bottom.

Cross-Examined

By defendant's counsel.

In 1851, just after the flood, I crossed this creek, and from the marks, I thought it as high as this flood in 1858.

JOHN VAN NORTWICK,

70, 71

Witness for defence, was by consent, here offered.

Was sworn on his *voir dire*, and testified that he owned no stock in the Galena and Chicago Union Railroad. That he was chief engineer of the defendant, at the time the culvert was made, that it was built under his direction, and according to his diagrams and plans; that he was not then chief engineer, and that he ceased to be in 1854.

The defendant's counsel stated, that the witness was called to prove that there was no defect in the mode in which the structure was designed and planned.

The plaintiff moved the Court to exclude the witness, on the ground of his liability over in case the defendants are held liable, by reason of a defect in the plan or mode in which the culvert was constructed.

The Court excluded the witness on the ground of interest or liability over, to which ruling of the Court the defendant's counsel excepted.

71, 72

Plaintiff offered in evidence two deeds, one from Palmer and wife to the plaintiff and one from Tuttle and wife to the plaintiff, and proved execution of same.

Defendant objected to the reading of said deeds. Objection overruled and exception by defendants.

The deeds are marked A. and B. and made part of the bill of exceptions.

P. J. L. REMINGTON,

72

Recalled by plaintiff, testified

That land described in deeds, same as described in witness' diagrams.

NATHANIEL PALMER,

72 Witness for plaintiff, testified

That he owned lands described in deeds, from himself to plaintiff, and had been in possession for a year before he sold to plaintiff.

The plaintiff's counsel then asked the following question : State whether or not you were in possession, claiming to be the owner? Objected to by defendant's counsel, objection overruled and defendant excepted.

The witness answered, that he did claim to be the owner. That the other lot was owned by Shaw, and witness was in possession, as tenant, from July to October, 1851. Witness further testified to loss of property and value.

73 The plaintiff then proceeded to prove by this witness, the value of the house and lot. Objected to by defendant's counsel, objection overruled and exception.

74 The witness testified that the house and lot were worth \$600. I offered to give this amount to plaintiff—he asked \$650

Cross-Examined

By defendant's counsel.

The plaintiff recovered after the flood four sets of wheels, one set two horse, three sets one horse. The stuff recovered was worth half price.

D. M HEACOCK,

74-75 Called by plaintiff, testified as follows :

I live in Roscoe, and have lived there ten or twelve years, was in Rockford time of flood, was at Roscoe Sunday before the flood. The water was then as high in the creek as ever I saw it. In 1851, I think we had as great a freshet as on that Sunday. I know the property of plaintiff, he has lived there ever since I came to the country. House and lot was worth \$500 in cash. Property was all gone after flood, the house was worth \$400. Witness here gives a description of the house. House was well furnished with necessities for a family. Can't give particulars. Welch had a large quantity of books, don't know their character. I worked on embankment.

MISS JENNY L. LE ROY,

Called for plaintiff, testifies as follows :

I know plaintiff ; am his sister-in-law. Was not at Roscoe during the flood, was there ten days before. The witness here gave a detailed account of the property lost by plaintiff, specifying each article and the value of the same. (See record).

Cross-Examined

By defendant's counsel.

78 I was there two or three days at the time spoken of. I made this memorandum by myself, without help, at the hotel this morning. Plaintiff has kept house ten or twelve years. Plaintiff's wife bought the \$4 table, a short time before in Belvidere. They had the big table five years ago. Have never seen anything of the stuff in the chests since. His house, as to the kitchen, was furnished better than other people in his condition. They cooked for parties. The witness here describes the house.

This was all the testimony offered by plaintiff.

79 Motion by defendant to exclude from the jury all testimony in relation to injury to real estate, other than to the possession. Motion overruled and exception by defendant.

ROBERT A. CROSS,

79-80 Called as witness for plaintiff, testifies

That plaintiff's furniture was of a common kind, and house was an old one, not worth \$200, (and on cross-examination,) and that the freshet of June, 1858, was a great many feet higher than the one in 1851.

DEFENDANT'S TESTIMONY.

JOHN P. ILLSLEY,

Witness for defendant, testified

81 That he was assistant to the chief engineer of defendant, and the culvert was constructed under his superintendence. Has been an engineer for sixteen or

seventeen years. Describes the manner in which culvert was constructed. The foundation was dug out four or five feet, from one to two feet below the bed of the creek, to gravel so hard that we could scarcely pick it, could not drive sheet piling. We dug down to hard bottom, and then placed timbers crossways and plank on top. Sheet piling was placed at the ends to prevent water from running in. That the wing walls were only used to keep the embankment from running down. The wing walls are connected with the main body, only by the bond of masonry, but all rest on the same foundation of timber and planking. The culvert was built in 1852 and 1853, and was as good as could be got in that neighborhood.

Defendant's counsel then put the following question :

82

" Did you, at that time, think the aperture sufficient to discharge the waters of the creek ? "

Plaintiff's counsel objected to question, objection overruled and exception taken by plaintiff's counsel.

Answer.

83

" I did not think the aperture sufficient. In building a culvert, where there is such a high embankment, we calculate that it may not all pass through at once, but that the culvert and bank would be strong enough to hold it for two or three hours till it would pass off, and the culvert was made extra strong, with reference to that fact, and the high embankment. The embankment was from 125 to 140 feet wide at the base, and forty-three feet high, fifteen feet wide at the top. The culvert was 105 feet long on the top of the arch. The wings then ran out 18 feet farther. The foundation timbers and plank extended beyond the wings. I do not think the water was ever twenty-one feet high, while the culvert stood. I think the culvert evidently washed from the lower end, washing under the lower end till the foundation fell in and the embankment on it, and made a dam. I do not believe this washing was done at this time, but think it was the result of previous washings from long rains. I was familiar with the country drained by this creek. It is about five or six miles long and the valley quite narrow. The wings are not essential to the culvert. They may be carried away and the culvert remain. Witness here verified the drawings of culvert, which were then put in evidence, a reduced copy of which is hereto appended.

Cross-Examined

By Defendant's counsel.

The wing walls are four and a half or five feet at bottom and about three feet

at top as appears by the plan in evidence. We did not expect the water in times of freshet to run off immediately, but that strength of culvert, height and thickness of embankment and weight of earth on top of culvert would hold the water back until culvert would discharge it.

WILLIAM HAVENS,

83 Called by the defendant, testified as follows :

84 I am an engineer—was in the immediate supervision of building this culvert. We dug a pit five feet deep and one hundred and fifty feet long, thirty feet wide, till we came to a hard compact gravel, too hard to pick—timbers to square twelve inches face were laid across the whole width of the pit and filled in between with broken stones rammed in securely; the timbers were about eighteen inches apart, on these timbers we placed three inch oak plank; we attempted at first to drive sheet piling, we then dug down four or five feet below the foundation a pit about two feet wide, in that we put down plank and fastened them to the timbers and plank above, we then put in heavy rubble stone and filled the hole with them rammed down, on this put the mason work. The main wall of the culvert was five and a half feet at the bottom and four and a half feet at the top, the thickness tapering at the back. The wing walls where they joined the culvert at the bottom were four and a half feet thick and decreased an inch to the foot as they went up and became lighter as they ran back, tapering about six inches to every ten feet of length, which would make the wall about three feet thick at the back end. The stones used were heavier than usual. The courses were from fourteen inches to two feet, some of them went through from face to back in the main culvert.

85 I had then been engaged for four or five years in railroad and in heavy mason work in Boston. I had aided in building culverts in the Ogdensburgh road. I considered the culvert and bank sufficient to hold the water until it could pass and the embankment heavy enough to keep the culvert; I considered that culvert to have been built and put in with extraordinary skill and faithfulness.

WILLIAM S. POPE,

 Called by the plaintiff, testified as follows :

 I am in the employ of the defendant—am resident engineer; have been a professional engineer for ten years. Have seen this culvert—have heard the testi-

mony as to the mode of building; think it was as firmly founded as could be got, and the culvert *was thoroughly built from the statement of the other engineers. The wing walls are to hold up the embankment from sliding down—for nothing else—they have nothing to do with solidity and permanence or capacity of the culvert.* William Donnan is in charge of the track and road *bed from Belvidere to Afton.* His business is to examine and report on the condition of the road, &c. under my superintendence.

Witness here introduced (by consent of parties) rain tables, kept by Professor Porter, of Beloit, Wisconsin. From said tables testified as follows:

The average fall of rain per year for twenty or thirty years is thirty-six inches. In the shower of 23d May, 1858, there fell at Beloit, six miles from Roscoe, inches 3,637 in six days, including 23d May 9,725.

In May, 1851, fourteen days of that month raining	15.46.
" June " in nine "	5.52.
" April " " six "	2.35.

On cross-examination the said witness testified from said tables:

The rain fall in June, 1858, was inches	6.29.
" " " " May "	10.294.
" " " on 3d June "	2.35.
" " " in August, 1850,	15.73.
" " " about 21st August, 1850,	3.21.
From 1st to May 31st, 1821,	4.50.

ORSON P. ROGERS,

86

A witness for defendant, testified—

That he kept observations on papers from Smithsonian Institute of rain fall. One mile east of Marengo, in May, 1858, there fell of rain 7.69 inches. On June 3d from 1 A. M. to 3 A. M. of June 4th there fell 3.98 inches.

J. W. TALLINAN,

86

A witness for defendant, testified—

That he resided near Winnebago station, and keeps registers on Smithsonian

Institute papers. There fell of rain in May, 1858, 6.86 inches. On 3d June, 1858, 4.20 inches. On 3d June, 1858, from 3 to 7 A. M. there fell .79; from 5 P. M. to 7.45 P. M. 2.30; 9 P. M. to 9.20 P. M. 1.08.

ENOCH BABCOCK,

87 A witness for defendant, testified—

That he resides at Riley, McHenry county, twenty-five miles from Roscoe. Keeps rain tables on system of Smithsonian Institute; that there fell in the month of May, 1858, 7.78 of rain; on the 2nd June, 1858, .35, and on June 3d 3.35.

ALMUS DORMAN,

88 A witness for defendant, testified—

Was engaged as overseer of Beloit branch in 1857 to 1858. Remembers the high water of August 1857. One of the wings of this culvert was injured; there was a hole washed out below the end of the culvert, the hole was near the center six or eight feet deep. I was there and put in stone on the upper side where the upper wing settled from washing. The north wing on the lower side settled some by earth washing out. In September witness put in six car loads of stone and filled the hole up with stone. There was high water in February, 1858, which did no harm. The next high water was in May, 1858, about the 23d, ten days before that of 3d of June, and during that time the water kept up all the time. It did not go down, so that we could see what the damages, if any, were, until the culvert went out. On the 11th May, 1858, Mr. Turner, the President of the road, and Mr. McAlpine, the superintendent, and the witness, examined the culvert and its condition was good; the stone witness had put in were in sight. Witness was at the culvert at 5 P. M. of June 3d, 1858; the water was high, the culvert was nearly full on the upper side, not near full at the lower end.

89 & 09 PLAINTIFF'S INSTRUCTIONS, given by the Court and excepted to by defendant.

89 Instruction No. ONE for plaintiff.

The defendants, in constructing their railroad were obliged by law to leave a sufficient opening through the embankment for the free passage of the water so

that the same should not accumulate unreasonably above the road, and if they failed to do so and the embankment burst in consequence thereof they are liable to the plaintiff for all the damage he sustained, if any, in consequence of such failure.

Second instruction given for plaintiff and excepted to by defendant.

89 If the defendant failed to provide a passage way of sufficient capacity to convey the water freely through the embankment, so as to prevent its unreasonable accumulation above the road, it would have been no excuse for them if the passage way, they did provide, was well constructed.

Third instruction given for plaintiff, and excepted to by the defendant.

90 If the culvert which the defendants provided for the passage of the water through their embankment was not properly constructed, and in consequence of the bad or insufficient construction thereof, the same gave way by the force of the water, the defendants are liable for all the damages sustained by the plaintiff, if any, in consequence of such giving way of the culvert.

Fourth instruction given for the plaintiff, and excepted to by defendant.

90 The defendants were under obligations to keep the culvert through their embankment in repair, and if they neglected to keep the same in repair, and in consequence thereof, the culvert gave way, the defendants are liable for all the damages which resulted to the plaintiff, if any, from such giving way of the culvert.

Fifth instruction given for the plaintiff, and excepted to by the defendants.

90 The defendants were bound to know the extent of country drained by the water course in question, and to ascertain the floods to which it was subject, and to provide a passage way under their railroad, reasonably sufficient for their free and safe passage.

Sixth instruction given for plaintiff, and excepted to by the defendant.

90 The defendants were bound to provide a sufficient and safe passage under their railroad, not only for ordinary floods, but for extraordinary floods also.

3 Because the Court excluded the testimony of John Van Nortwick, upon the ground of interest.

4 Because the Court admitted deeds of Palmer and wife, and Tuttle and wife, without sufficient proof.

95 5 Because the verdict was contrary to evidence, and should have been for the defendant, no negligence being shown, but on the contrary proper skill, care and diligence.

6 Because the instructions given on the part of the plaintiff, were erroneous.

7 Because the Court refused to give the fourth and last two instructions, asked by the defendant.

8 Because the Court on motion of defendant, should have ruled out and excluded from the consideration of the jury, all of the evidence in respect to permanent injuries to the real estate, no sufficient evidence of title having been given.

9 Because the damages are excessive.

96 Order filed, refusing motion for a new trial, November 30th, 1859, and judgment, entered as of proper term, September 1859. Defendant excepted.

Appeal prayed and allowed.

97 Bond filed.

98-100 Deed Tuttle and wife to Welch.

100 Acknowledgment.

102 Warranty deed from Palmer to Welch.

104 Proof of acknowledgment.

106 Appeal bond.

108 Bill of costs Winnebago county.

108 Costs in Boone Circuit Court.

110 Certificate of Clerk of Boone county that the foregoing is a true copy of the records of the said cause.

ASSIGNMENT OF ERRORS.

All of the nine reasons, assigned in the motion for a new trial, are assigned as errors, together with the following:

10. Because the Court erred in refusing to grant a new trial.

11. Because there was a variance between the evidence and the declaration, and the said judgment should have been arrested.

E. ANTHONY,

Attorney for Appellant.

309

The Galena & Chicago
Union Rail Road Company

^{vs}
Perry M. Welch

Abstract

Filed May 16, 1860

L. Leland
Clerk

(Spencer in error)

Supreme Court. of the 3rd Grand Division
April term 1860

The Galena & The cars Mining	}	Appel from Barnes
Rail Road Co		
vs		
Perry M Welch	}	

And now comes the appellee & says that there
is no such error in the record & proceedings in
this case as is in the argument alleged &
error is alleged. He therefore prays an
affirmance of the judgment
Seland & Seland
for appellee

Galena - Chicago Union
Rail Road Co

to

Per my Mtd etc

Joiner in error

File Apr. 20/60
L. Leland
@H

United States of America }
 State of Illinois Winnebago County } p

Pleas before the Hon. Benjamin R. Sheldon Judge
 of the Fourteenth Judicial Circuit of the State of Illinois at
 a Term of the Winnebago County Circuit Court began &
 held at the Court in said County of Winnebago on the
 27th day of September 1858;

Present Hon. Benj^r R. Sheldon Judge
 W. D. Meacham States Attorney
 Samuel J. Church Sheriff

Attess Mr. B. Derrick Clerk

And afterwards to wit on the 5th day of
 October 1858 it being one of the days of the afore-
 said term, the following entry was made as appears
^{Court}
 of Record:

Perry M. Welch } The Pass

vs.

G. & C. W. R. R. Co }

And now comes the Plaintiff
 by L. Roy & Dunlap his Attorney

And on their motion leave is granted to Amend the
 caption: It is Ordered by the Court that the venue in
 this cause be changed to the Circuit Court of Boone County,
 the Judge of this Court being interested as a stockholder
 in said Rail Road the Defendant in this cause; &
 that ^{the} Clerk of this Court transmit a ~~certified~~ copy of the
 records & the original papers on file in this cause to the
 Circuit Clerk of Boone County:

State of Illinois }
 Winnebago County } p

I Morris B. Derrick Clerk of the Circuit Court
 in and for said County do hereby certify that the fore-

going is a true copy of the records in the above entitled cause & that the accompanying papers marked from "A" to "E" are all of the original papers filed in this cause which are hereby transmitted to the Clerk of Boone County: -

Witness my hand & the seal of said Court
this 3^d day of Nov. 1858

M. B. Derrick Clerk

By O. A. Pennoyer Dep. Clerk



Permy M. Welch
vs.

Friespar

Plaintiffs Corts

G. & C. to N. D. Co Dec 10. Ap 25 Sum 40 fl 20. .95
M. C. to 20 ord 20. W. L. A. Dec 20. Ord do 20. P. L. 20. ²⁰ 20. ch 25. 1.55
Stiff ser. Sum 1.15
\$ 3.65

Defendants Corts:

Ap 15. fil pat 5 Sum 20. C. to 20. .60
Ord 20 20. M. C. 20 C. do 20 ch 25. 7. of Dec 100 2.05
\$ 2.65

State of Missouri

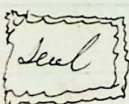
Winnemago County

I Morris B. Derrick Clerk of the Circuit Court in & for said County do hereby certify that the foregoing is a true copy of Plaintiffs & Defendants Corts in above entitled cause from the fee book in my Office

Witness my hand and the seal of my Office said Court this
3^d day November A. D. 1858.

M. B. Derrick Clerk

By O. A. Pennoyer Dep. Clerk



"Filed Nov. 30th 1858.
J. M. McKinstry, clerk."

In the Winnebago County Circuit Court

Of the September Term in the
Year of Lords One Thousand Eight
Hundred and fifty Eight

Winnebago
County

vs The Clerk of the Circuit Court
will cause the Sheriff of Winnebago County
to Summon the Galena & Chicago Union Rail
Road Company to answer unto Perry M Welch
in an action of trespass on the Case and
lay the damage at ten thousand dollars

Le Roy & Dunlap
Plffs Atty

4
Receipt

Filed Aug 28, 1858

M B Derrick Clerk

By C A Penoyer Dep. cl^k
A

Filed Nov 30, 1858

A H Whitney Clerk

State of Illinois,

Winnebago COUNTY.

ss. The People of the State of Illinois, to the Sheriff of said County, Greeting:

WE COMMAND YOU that you summon *The Galena & Chicago Union Rail Road Company*

if ~~he~~ *he* shall be found in your County, personally to be and appear before the Circuit Court of said *Winnebago* County, on the first day of the next Term thereof, to be holden at the Court House in *the City of Rockford* in said *Winnebago* County, on the *fourth* Monday of *September* A. D. 1858 to answer unto *Peary M. Welch* in a plea of *Fresphs on the Case*

to the damage of said plaintiff as he say in the sum of *Ten thousands* Dollars.

And have you then and there this Writ with an endorsement thereon, in what manner you shall have executed the same.

Witness *Morris B. Derrick*, Clerk of our said court, and the seal thereof, at *his Office in the City of Rockford* in said *Winnebago* County, *28th* day of *August* A. D. 1858

M B Derrick Clerk.
By A P Penoyer Depts Secy

2020 20th / 16 / 22

CIRCUIT COURT SUMMONS.

G. Docket No. _____ Page _____

Minneapolis Circuit Court.

Perry M. Welch

vs.

St. C. M. R. Co.

Summons

State of Illinois, }

Minneapolis COUNTY. } 1858

I have duly served the within by reading
the same to the within named _____

B

Filed Nov 30 - 1858
is I am therein commanded.

Sheriff.

Fees—Service _____

Mileage _____

Return _____

Filed in Circuit Court this _____

day _____ 1858

Clerk.

Henry S. Dunlap Attorney.

By James Mann Atty

James Mann
Atty

City of
St. Paul

Room 10

and
Denver, 15

August 17, 1858

being a record
of the 28th day of

from my company
company being absent

the present of and

Minneapolis Road Company

and Denver & Chicago

agent at St. Paul

Minneapolis & St. Paul

and Denver to 1858

delivering a true copy of

the Road Company by

the Denver & Chicago Minn

the within named

the within named

the within named

the within named

the within named

the within named

5

"C"
Exhibit

In the Winnebago County Circuit Court,
 Winnebago County, S.S. } Of the Term of September in
 the year of our Lord one thousand eight hundred
 and fifty eight

The Galena and Chicago Union
 Rail Road Company was summoned by the
 Sheriff of the County to answer unto Perry M. Welch
 of a plea of trespass on the case, And thereupon
 the said Perry M. Welch by Le Roy & Dunlap his attor-
 neys complains, For that whereas the plaintiff,
 before, and at the time of the committing of
 of the Grievances by the defendants hereinafter men-
 tioned, was, and from thence hitherto has been and
 still is, lawfully possession of certain village lots
 whereon was situated a dwelling house and
 wagon shop with the appurtenances situated
 and lying in the village of Roscoe in the County of
 Winnebago and State of Illinois And by reason thereof
 before and at the time of the committing of the griev-
 ances hereinafter mentioned of right had and enjoyed
 and still of right ought to have and enjoy the said
 Premises, yet the defendants, well knowing the prem-
 ises but contriving and wrongfully and unjustly in-
 tending to injure and prejudice the plaintiff in this
 respect and to deprive him of the use and enjoyment
 of the said premises, to-wit: On the first day of July
 in the year of our Lord one thousand eight hundred
 and fifty three and on diverse other days and times

6
between that time and the day of the commencement
of this suit wrongfully and unjustly constructed
and erected and kept and maintained an embank-
ment across the low lands along the valley of a
certain stream of water running through the village
of Roscoe called the South Kennebec creek in
the County of Winnebago aforesaid, by reason whereof
the water of the said stream or water course
was dammed up, so that on the third day of June
in the year of our Lord one thousand eight hun-
dred and fifty eight to the height of about twenty
feet on the said low lands & sit at Roscoe
aforesaid in the County of Winnebago aforesaid by
reason of the damming up of the water of the said ~~the~~
stream and the height and force of the said water so
dammed up as aforesaid, the said Embankment was forced
away thereby letting the said waters with great force
and in a great body down against the plaintiffs
said dwelling house and wagon shop with such
force that his the said plaintiffs dwelling house was
swept away with all his household goods, furniture
and a large amount of wagon work that was stored
in the upper part of his said dwelling house as
well as a part of his said wagon shop and ~~also~~ a
large amount of property in and about his said premises
and also swept away all the fruit trees on his said
premises and washed away and gullied out the
said plaintiffs lots to a great depth & sit of the
depth of five feet and thereby and by reason thereof

7
the said plaintiffs dwelling house and wagon shop was swept away and destroyed, and a large amount of other property in and about the said premises was destroyed and damaged and the said plaintiff during all that time has been deprived of the use of his said premises and kept from carrying on his said business as a manufacturer of wagons and enjoyment of his said dwelling house and shop aforesaid to the plaintiffs damage of ten thousand dollars.

And for that whereas the said defendants ^{before and} at the time of the committing of the grievances hereinafter more mentioned was possessed of a certain Rail Road ~~called~~ called the Belvidere & Beloit branch of the Galena and Chicago Union Rail Road running from Belvidere in Boone County, and State of Illinois to Beloit in Rock County in the State of Wisconsin and to and from other places apart of the aforesaid Road being built through the village of Roscoe in the County of Winnebago and State of Illinois, yet the said defendants well knowing the premises while they were possessors of and constructing the aforesaid Rail Road through the village of Roscoe aforesaid in the County of Winnebago aforesaid, to wit: on the first day of July in the year of our Lord one thousand eight hundred and fifty three at Roscoe aforesaid in the County of Winnebago and State of Illinois aforesaid wrongfully and unjustly erected an embankment across cer-

8

tain low lands lying along the valley of a certain stream of water running through the Village of Roscoe aforesaid without leaving sufficient openings to allow the flood waters of the said stream to escape as accustomed by means of which they became accumulated and on the third day of June in the year of our Lord one thousand eight hundred and fifty eight at Roscoe aforesaid, by means and in consequence of which improper construction of the said embankment without sufficient openings as aforesaid the flood waters became accumulated and afterwards to wit, on the night of the day last aforesaid, to wit, at Roscoe aforesaid in the County aforesaid and was forced upon the premises of the Plaintiff and over turned and swept away by the force of the flood water the Plaintiff's dwelling house, and all his household goods and furniture as well as a part of his shop wherein he manufactured wagons, and a large amount of wagon work, part of which was finished and part unfinished and a large amount of other property about said premises belonging to the Plaintiff & also the land whereon the said dwelling house and shop for the manufacture of wagons stood was gullied out and swept away to a great depth, to wit, the depth of five feet and thereby the said Plaintiff, has been damaged and is greatly injured and prejudiced in his said estate and interest of and in the said goods and chattels, to the damage of the Plaintiff of ten thousand dollars.

Le Roy L. Dunlap Atty for Plff.

"Filed Nov. 30. 1858"

"Filed Sept. 17. 1858"

M. D. Barrick, Clerk
By O. C. Penoy, ex. p. clerk"

S. H. Whitney Clerk.

11,20

9 In the Winnebago Circuit Court
Of the Sept Term 1858

The Galena & Chicago
Union Rail Road Company

ad
Perry M. Welch

And the said defendant
by J. L. Loop its Attorney comes and defends
the wrong and injury when &c and says
that the said declaration and the matters
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 and maintain his aforesaid
action thereof against the said defendant
and if the said defendant is not bound
by Law to answer the same, and this it
is ready to verify wherefore by reason of
the insufficiency of the said Declaration
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 &c

J. L. Loop
Atty for Deft

D

Hemmer

Filed Oct 4, 1858

M. B. Derrick clerk

Filed Nov. 30, 1858

A. N. Whitney clerk

11.

In the ^{County} ~~Winnipeg~~ Circuit Court

Winnipeg
County } pp

Of the term of September in the
year of Our Lord one thousand
eight hundred and fifty eight

Body politic

The Galena and Chicago Union Rail
Road Company a body politic and incorporate
were summoned by the Sheriff of the County to
answer unto Perry M Welch of a plea of trespass
on the Case; and thereupon the said Perry M.
Welch by James Le Roy Complains.

For that

Defendants of
R Road
passing the
Roses, over
Shannon

Whereas the said defendants, heretofore, to wit,
on the first day of July in the year of Our Lord
One thousand eight Hundred and fifty Eight at
and within the County of ~~Boone~~ ^{Winnipeg}, were
and now are the owners, and in the use Occupa-
tion and Enjoyment of a certain Rail Road
running and extending from the State line be-
tween the State of Wisconsin and Illinois near
the City of Beloit in said State of Wisconsin to
the City of Chicago in the State of Illinois, which
said Rail Road passes through the town of Roses
in the County of ~~Winnipeg~~ ^{Winnipeg} of said and
over a certain running Stream of Water or Creek
commonly called the South Kinnikinnick Creek
Whereby it was and became, and still is the
duty of the said Defendants to build and

Keep only to
maintain interests
210 1/2

maintain over said Creek such Culverts or
 Sluice ways as would be sufficient at all
 times and at all Stages of water, to allow and
 permit the water running and flowing in said
 Creek to pass and flow along through or under
 said Rail Road and the Embankment and Super-
 structures thereof without obstruction or hindrance
 and that the said plaintiff was the owner of
 Village Lots situated on the north side of said
^{South} Hennikenick Creek below and on the down
 Stream side of the said Rail Road, which Lots
 were and are bounded on the South side by the
 said Creek and that the Water thereof should
 of right and ought to have flown and passed
 down the same without obstruction thereof by
 the said Rail Road Company and the said plain-
 tiff avers, that such being the duty of the Defendants
 in that behalf, in respect to the plaintiff, the said
 Defendants so negligently performed their duty in
 the premises, and put into and constructed the
 said Rail Road, where the said Rail Road
 crosses the aforesaid Creek and Stream of Water and
 small inadequate and insufficient Sluice ways and
 Culverts, and maintained the same therein, that the
 Water flowing and running in said Creek could
 not at all times pass through said Sluice ways and
 Culverts without obstruction as it of right ought
 to have done at all times and all Stages of water,
 but on the contrary thereof, when water flowing

performance of

Village Lots

negligence of
 Deft

13.

in said Creek was and should become above and higher than the ordinary stage of water flowing in the same the said water flowing in said Creek would by the, embankment, banks and Superstructures of said Rail Road become greatly obstructed, dammed up and caused to flow back, and rise above or on the upstream side of said Rail Road, to a great height thereby collecting a large body of water above said Embankment, and the plaintiff in fact says that while the said defendants were in the use and occupation of the aforesaid Rail Road, and while their duty remained, as aforesaid in their behalf to wit: On the first day of July, in the year of our Lord one thousand eight hundred and fifty eight aforesaid, the water running and flowing in said Creek by reason of the smallness, inadequacy and insufficiency of the said Culverts and sluice ways put in and maintained by said Defendants for the passage of the water of said Creek under and through said Rail Road, and its inability to pass the water same, was caused, greatly to flow back and to rise to a great height, to wit: to the height of twenty five feet higher than it otherwise would have done, had the aforesaid sluice ways and culverts been large enough and sufficient for the passage thereof, and that by reason of such great rise and accumulation of said water above the said Rail Road, of the said defendants the banks, embankment

Water dammed
up by one of the
of sluices

Embankment
broken away
266 feet

114

Water flowing
on pebbles

and Superstructure of said Rail Road, were suddenly
by the force of said Water so accumulated as afore-
said Carried away and the said Water above
the said Rail Road, which had accumulated, as
aforesaid, did with great force, violence power
and rapidity, flow and rush down upon the
Lots of the plaintiff lying below said Rail Road,
as aforesaid and by reason of such rapid flow
of the same so caused, as aforesaid, one frame house,
one dwelling house, one Grout Shop, one Wagon
Shop and two other buildings of the plaintiff, being
then and there standing upon the said Lots, then
and there being of great value, to wit, of the value
of five thousand Dollars, were wholly washed
away and ^{damaged and} destroyed, and also by reason of the
rapid and violent flow of the said Water a large
quantity of the soil of the said Lots, to wit, one
fourth of an acre thereof of great value, to wit,
of the value of five hundred Dollars, was gullied out
and washed away to a great depth, to wit, to the
depth of five feet, and the said Lots were wholly
spoiled, and rendered valueless to the said Plaintiff
and also a large amount of personal property
that was in and about the aforesaid dwelling
house, consisting of household furniture, beds bedding
books, provisions, and the wearing apparel of the said
plaintiff and his family, to wit, one Bureau, one
Secretary, two looking glasses, one Lounge, two arm
chairs, two Rocking chairs, three sets of chairs

15.

Three tables, two Stands, one Sitter Cradle, five bed-
 Steads, three feather beds, one (mattress) four Straw
 ticks, Six pairs of pillows, eight pairs of Quilts, ten
 pairs of Pillows Cases, two sets of bed Valences, three
 table Cloths, twelve towels, one set of Silver tea
 Spoons, three sets of Embroidered Window Curtains
 One Kitchen Stove and furniture therefor, one
 parlor Stove, forty four joints of Stove pipe and six elbows,
 one clock, five chests, two large Lamps, one fluid
 Can and fluid, one Embroidered Lamp map, three
 new Bonnets, one Silk Scarf, one set of Ladies
 fans, one Workbox and Contents thereof, four Au-
 guretypes, one locket, one breast pin, three brush-
 es, two pairs of Shears, two pairs of Scissors, one
 Shovel and tongs, four flat Irons, one Cupboard,
 four hundred plates and dishes, forty Cups
 and Saucers, twenty pieces of tin ware, seven
 barrels, three wash tubs, one wash board to-
 gether with five other Chirts Wearing Apparel,
 and the Contents thereof and numerous other articles
 of Wearing Apparel, and other Conveniences
 which the said plaintiff, Cannot Enumerate, a
 Library Consisting of One Hundred Volumes
 of Books, one Sack of flour of One Hundred
 pounds in weight fifteen bushels of potatoes
 twenty pounds of Sugar, five pounds of Coffee
 two pounds of tea, ~~ten~~ dozen Eggs; twenty pound
 of butter One Hundred pound of pork of great value
 to wit of the value of one thousand dollars, were

then and there by force of the said Water wholly swept away and lost to the said plaintiff, and divers other good and chattels of the said plaintiff to wit, two Wagons, two buggys Wagons, six sets of Wagon Wheels, two sets of One horse Wagon Gearing, four sets of Shafts, one set of buggy gearing, One one horse Sleigh, One Cutter, One Soda fountain and the pump and fixtures thereof, One grain Cradle, two Sash Doors, forty eight Yards of Calico for quilts, twelve yards of factory Cloth, fifty Skeins of black Sewing Silk, fifty Skeins of Worsted, Eighteen Skeins of Embroidering Silk, Seventy five pounds of Carpet rags, thirty three hens, fifty felter, twenty five hyses, One thousand feet of lumber, One ton of Alder iron, One turning lathe and set of turning tools, One work bench and vice, One wheel bench, one set of Saw benches, and one set of Wagon makers tools, of great value to wit of the value of One Thousand dollars, were then and there by the force of the said Water, wholly swept away and lost to the said plaintiff, and the said plaintiff and his family were thereby Compelled to flee from the said dwelling house to save their lives and were left destitute and without Home, and the business of the said plaintiff was ruined and destroyed to wit at Roscoe in the County of Winnebago aforesaid

2 counts

And whereas also the said Defendants afterwards, to wit, on the day and year aforesaid, within the County of Winnebago aforesaid

Plffs vs. Defs of RR
117

Chas. of Defs

were in possession of a Rail Road, which
passed over and crossed a certain Stream of
Water Commonly Called the South Winnebago
in the town of Roscoe in the County of Winnebago
aforesaid, whereby it became the duty of the said
defendants to keep and maintain at all times in
said Rail Road embankment where the same so
crossed Streams of Water and the lowlands along
the same as aforesaid such large and sufficient
Culverts and sluice ways and openings for water
as should at all times and all stages of water be large
enough and sufficient to permit the water flowing
along and in said Stream to pass said Rail Road
and its works, embankments and track without
obstruction and the plaintiff in fact says that
such being the duty of the ~~duty~~ of the defendants
in that behalf, the said Defendants so negligently,
unskillfully and carelessly conducted them
selves in the premises and put in and maintained
in said Rail Road, where it crosses said Creek such
small insufficient and inadequate Culverts, passage
ways and sluices for water that the same were en-
tirely insufficient and inadequate for the flow and
passage of the water along said Creek where it
crossed said Rail Road and greatly obstructed and
hindered the flow and passage of said water along
the same and the plaintiff in fact further says
that on the day and year aforesaid at the place
aforesaid the said water passing and flowing

Defendants answer

19

One frame house, one frame dwelling house
 one Grout Shop. One Grout Wagon Shop, other
 buildings of of the said plaintiff. then and there
 being and standing upon other the Lands of the said
 plaintiff of great value, to wit, of the value of five
 thousand dollars were wholly washed away and
 destroyed and upon and against the fences of
 the said plaintiff then being upon the said lands,
 and broke, prostrated, carried and washed away
 and wholly destroyed, the said buildings and
 fences, and the materials of which the same were
 composed, and also the household furniture, beds
 bedding, books provisions, and the wearing apparel
 of the said plaintiff, and of his family, and
 other good and chattels of the said plaintiff then
 and there being of the like description number
 and value as those in the said first Count above
 mentioned and the said buildings, furniture
 beds bedding, clothing books provisions goods and
 chattels were then and there by force of the said
 water wholly swept away and destroyed and
 lost to the said Plaintiff, and the said plaintiff
 and his family were thereby Compelled to flee
 from the said dwelling house to save their lives
 and were left destitute and without a home
 and the business of the Plaintiff was ruined
 and destroyed, and further the Earth and
 soil ^{of said} Lands of the said plaintiff were then and
 there by the force and action of the said water

gullied, dug up and swept and Carried away to a great depth, to wit, to the depth of five feet and the said Lands Were thereby Spoiled and rendered Valueless to the said plaintiffs, to wit at Roscoe in the County of Winnebago aforesaid.

3^d Count

Reff. ams of

village lots

enclosing them

And Whereas also afterwards to wit, On the day and year aforesaid at and within the County aforesaid the plaintiff Was seized of Certain Village Lots in the Village and town of Roscoe in said County of Winnebago to wit Commencing at a stake fourteen Rods and eleven links South from the North West Corner of Block marked (A) in the Town of Roscoe thence East four and one half rods thence South to the line of James Thompsons land thence in a Westward direction on the line of said Thompsons land to the East line of Main Street in Roscoe thence on the East line of said Street four rods and fourteen links to the place of beginning and also one other Lot Commencing at the North West Corner of a Lot deeded by Amos Tuttle to John Jeffrey and William Richardson being in the South West Corner of Block, A, in the Town of Roscoe running thence North two Rods and twenty links to a post on the East side of Main Street in said town of Roscoe thence East nine rods to a post thence South five Rods and seven links to the middle of the

21.

South Kinnikinnick Creek thence West
 along the middle of said Creek four rods and
 Seventeen Links, thence down along the West
 line of the said Lot decreed to Jeffrey and
 Richardson three Rods and Seventeen Links to
 a post, thence West along the North line of said
 Jeffrey and Richardson's Lot, four and ^{one}/_{half}
 rods to the place of beginning, lying on the north
 side of a certain Creek, which runs over
 and along the South line of the aforesaid
 Lots, Commonly Called the South Kinnikinnick
 Creek, And that a Rail Road of the
 said Defendants crosses the said Creek and
 the Lowlands along the Valley of the said Creek
 a short distance above on the up Stream side
 of the said Lots, and was and is a Rail Road
 belonging to the said Defendants and was built
 by the said Defendants, and was used and
 occupied by the said defendant on the day
 and year aforesaid and being in the occupation
 and enjoyment of said Rail Road as the owner
 thereof in the place aforesaid, it became and
 was the duty of the said Defendants to provide
 and leave in said Rail Road at all times when
 said Rail Road crosses said Stream such
 large and sufficient openings and passage
 ways for the passage of the water of said creek
 as would be at all times and all stages of the
 Water. would be fully large enough and

+

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sufficient for the flow through the same of the Water flowing in said Creek without obstruction, damming, flowing or setting back and the said Plaintiff in fact says that such being the duty of said Defendants in that behalf the said Defendants, so Carelessly, negligently and unskillfully performed said duty and left and maintained in the said Rail Road Where it crossed said Creek as aforesaid such narrow small and insufficient openings and passage ways for the Water flowing along the said Creek that on the day and year aforesaid the Water flowing in said Creek by reason of the insufficiency, smallness ^{and} and narrowness of the openings and passage ways through and under said Rail Road over and across said Creek, and by reason that the banks and works of said Rail Road were built in and near to the proper bed of said Creek, and the water flowing in said Creek became thereby greatly obstructed, dammed-up and caused to flow back and above on the up stream side of said Rail Road to a great height, to wit, to the height of twenty five feet higher than it would have done had not the said Water become so dammed-up and obstructed as aforesaid and that by reason of the damming-up and obstruction of said Water by said Rail Road as aforesaid and the vast accumulation of said Water above the said Rail Road

2 3

the said banks. Works and Superstructure of said Rail Road over and near the said Creek suddenly gave way burst and broke and by reason of such breaking, bursting and giving away as aforesaid the said Water flowing in said Creek and so accumulated as aforesaid with great force violence and rapidity, rushed and flowed down upon the aforesaid Lots of the plaintiff lying below said Rail Road as aforesaid, and by the force of such violent flowing and rushing of the said Water upon the said Lots of the plaintiff in consequence of the sudden breaking of said Rail Road embankment across the said Creek aforesaid divers buildings of the said Plaintiff upon the said Lands and Lots of the plaintiff then and there being and standing, to wit, one dwelling house, one frame house one front or gravel Shop, one Wagon Shop, of great Value, to wit, of the Value of five thousand dollars were then and there by the force of said Water undermined, torn down and washed away and destroyed and divers other buildings of the said plaintiff then and there standing on the said Lots of like character description and Value were then and there by the action and force of said Water impelled as aforesaid, undermined, torn down and washed away and by the action of said Water greatly damaged the Lots of the said plaintiff, by gullyng out and washing away the Earth and soil

thereof to a great depth, to wit, to the depth of five feet, thereby greatly damaging the said plaintiff, to wit, in the sum of five Hundred dollars, and other Lots of like dimensions and Value, were by the action of said Water impelled as aforesaid, torn up gullied out and greatly impaired and washed away, with the fences wherewith the same was fenced, and other of the said plaintiff Lots of like description and Value was by the said Water washed and gullied out and swept away to a great depth, to wit, to the depth of five feet, of great Value, to wit, of the Value of five hundred dollars, and also a large Amount of other personal property of the plaintiffs, in and about the said dwelling house and wagon Shop Consisting of household furniture, beds bedding, ^{clothing} and wearing apparel of the plaintiffs and his family and also Wagens buggies, Wagon Work finished and some unfinished, and other goods and Chatters of the said plaintiff then and there being of the like description number and Value as those in the said first Count above mentioned of great Value, to wit, of the Value of two thousand dollars were then and thereby by force of the said Water washed and swept away and wholly lost to the said plaintiff, and the said plaintiff and his family were thereby compelled to flee from the said dwelling house

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to save their lives, and were left destitute and without home to wit at Roscoe in the County of Winnebago aforesaid

4th County

off possession
of parcel of
land belonging
hence on
which was for a
parcel

And Whereas also afterwards to wit; on the day and year aforesaid at and within the County aforesaid, and on the day and year aforesaid, the said Plaintiff was the owner of a certain other parcel of land, containing about one half of an Acre of land, situated in the town and Village of Roscoe in the said County of ~~Winnebago~~ Winnebago, and which lies on the North bank of a certain Stream of Water, in said town Commonly called the South Winnekenick Creek, and flowing over and along the South line of said land in a westerly direction, which said land lies West of the Rail Road track of the Defendants running through said town upon which land were dwellings houses, shops and other buildings belonging to the said Plaintiff as aforesaid also a large amount of other personal property in and about the said buildings aforesaid and on the said land and premises, consisting of household furniture and household goods, Wagon buggies, and Wagon work finished and unfinished brook and other goods chattels then and there being in about the aforesaid building of the same number description and value as those in the said first Court, above mentioned, and divers fences whereon the said land were fenced

which were then and there standing and being
 and the Plaintiff further says, that the Defendants
 Were then and there the owners of and in the use
 Occupation and Enjoyment of a Certain Rail Road
 Commonly Called and Known as the Beloit branch
 of the Galena and Chicago Union Rail Road, which
 said Rail Road crossed and passed over the aforesaid
 South Kinnickinnick Creek a short distance East
 of and near the aforesaid land of the Plaintiff and
 the said Rail Road of the Defendants passes over
 and crossing the said Stream of Water at the place
 aforesaid, it thereby became and was the duty of
 said defendants at all times to keep and maintain
 in the said Rail Road and in the Works, banks,
 and Superstructures thereof when the same passed
 over said Creek, such sufficient Openings and
 passage Ways for the water, which should be at
 all times sufficient in size to permit the water
 flowing in said Stream to pass through, and by
 said Rail Road, without obstruction thereof
 by said Rail Road. And the said Plaintiff
 in fact further says, that such being the duty of the
 defendants in that behalf they the said defendants
 so negligently, unskillfully and carelessly performed
 their duty in the premises left and maintained
 in the said Rail Road where it crossed said
 Creek at the place aforesaid such small narrow
 and insufficient openings and passage ways for
 water and built the said Rail Road with its

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Banks and Structures so near and in said Creek that the water flowing therein could not flow along the said Creek at the place where it crossed by said Rail Road, without Obstruction and the Plaintiff further says that in consequence of the aforesaid negligence and unskillfulness and Carelessness of the said Defendants in having and maintaining small and insufficient Openings and passage ways as aforesaid, on the day and year aforesaid the Water flowing along and in said Creek became greatly obstructed, dammed up, and caused to flow and set back by said Rail Road, and to rise to a great height, to wit, to the height of twenty five feet higher than but for the insufficiency and narrowness of the said Openings and passage ways aforesaid, than it would, have done and in consequence of such damming up and rise of the said Water, the said Works, banks and Superstructures of said Rail Road were by the great pressure and force of the Water, which had so become dammed up and accumulated as aforesaid burst broke and was carried away ^{by} reason thereof the said Water which had so accumulated as aforesaid above said Rail Road was caused to flow and rush with great force violence and rapidity along and upon the aforesaid lands of the said Plaintiff and by the force and violence of the said Water caused as aforesaid divers of the said

buildings of the said plaintiff on the said
 lands, then and there being and standing
 to wit; one dwelling house, one frame house
 one gravel Shop one Wagon Shop and two
 other buildings of great Value to wit of the Value
 of five thousand dollars, were undermined, thrown
 down broke to pieces and washed away and
 wholly destroyed, and divers other buildings
 of the same description and Value then and
 there being were by the Action of ^{the} said Water
 undermined, thrown down and damaged and
 a part of said land, to wit, one fourth of an
 Acre was washed and galled out to a great
 depth, to wit, the depth of five feet, thereby being
 greatly damaged, to wit, in the sum of five
 hundred dollars, and also then and there a
 large amount of personal property, the property
 of the plaintiff by the Action and force of the
 said Water was washed and carried away
 and wholly lost, Consisting of household
 furniture, and household goods, Wagons
 Buggies and also a large amount of Wagon
 Work some finished and some unfinished
 and other goods and Chattels of like
 description number and Value as above in
 the said first Count Statute, of great Value,
 to wit, of the Value of two thousand
 dollars was washed and swept away
 by the said Water as aforesaid, to wit,

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at Roscoe in the County of Winnebago
aforesaid

3rd Count

Plffs. Engage

in building RR

for their own

use & occupation

And Whereas also the said defendants
heretofore and during the year of our Lord one thousand
eight hundred and fifty three were engaged
in building for their own use and occupation
within the State of Illinois a certain Rail Road
commonly known and called the Beloit branch
of the Galena and Chicago Union Rail Road
the line of which extended from the City of Beloit
in the State of Wisconsin to the main line of said
Rail Road near the town of Belvidere in the
State of Illinois, and which crossed a certain
running stream of water in the town of Roscoe
in the County of Winnebago in the said State
of Illinois known as the South Kinnickinnick
Creek near the lands of the Plaintiff by him
as hereinafter stated and maintained and being
so engaged in the building and construction
of said Rail Road on the line aforesaid it
became and was the duty of the said defendants
to build and construct their said
Rail Road where the same crossed said creek
and after to keep and maintain the same
that at all times thereafter the said Creek
where it flows through and across the said
Rail Road should and could so flow through
and across the said Rail Road that the same
should not in any manner be obstructed or

Duly to

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dammed up but should be free at all times
to flow across and through said Rail Road,
in the same manner as it had been accustomed
to do and the plaintiff in fact says that
the said defendants so negligently performed
their duty in that behalf and so Carelessly
unskillfully and negligently built and Construc-
ted said Rail Road, over upon and near
said Creek that the said Creek was not
left free at all times and in all stages of
Water to flow along its Channel through
said Rail Road as it had been accustomed
to do without obstruction from said Rail
Road but on the contrary thereof the said
Rail Road from such negligence, Careless
and improper Construction on every rise of ~~rise~~ of
Water in said Creek would and did obstruct
the flow of the Water therein and would and
did cause the same to rise and flow back
and dam up on the up stream side of
said Rail Road to a great height, to wit,
the height of twenty five feet above its
Original Level which was well known
to the defendants and of which they had
due notice and the Plaintiff in fact fur-
ther says that although the negligent
and imperfect manner in which said
Rail Road was Constructed was well
known to the Defendants and although

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it was the duty of the defendants to repair
 and remedy such Careless imperfect Construction
 and so to keep up and maintain the said
 Rail Road that the same would not in any
 manner obstruct the flow of said stream, yet they
 so Carelessly and Negligently Constructed themselves
 in that respect that the same imperfections and
 insufficiencies in the said Rail Road was continued
 therein to the day and ^{year} aforesaid and by reason
 of such insufficiencies and imperfections in the
 Construction of the said Rail Road and which
 had been continued as aforesaid on the day and
 year first aforesaid, the Water then flowing
 along said Creek became by said Rail Road
 when it crosses the said Creek and the low
 lands along the Valley thereof, the Water of
 said Creek was greatly obstructed dammed
 up and by reason of such obstruction caused
 to flow back upon the aforesaid low lands and
 rise to great height, to wit, to the height of
 twenty five feet above the Ordinary level and
 by reason of the accumulation thereof and
 by reason of such flowing back and
 rise the said Water by its accumulation
 pressure weight and force pressing upon the
 works, banks and Structures of said Rail
 Road suddenly and with great force
 and violence tore up and broke burst
 and carried away the same and with

3 2

great force violence rapidity and in a great body flowed and pushed down upon a certain parcel of land there being and to the Plaintiff then and there belonging in his own right and by the force rapidity and violence of such water so rushing down as aforesaid divers Buildings on said Land to the Plaintiff belonging as aforesaid, to wit, one dwelling house one frame house one Groat Shop, one Wagon Makers Shop and one other building of great value, to wit, of the value of five thousand Dollars were undermined thrown down greatly damaged and destroyed and a large proportion of said Land and the Soil and Earth thereof, and the fences where with the same was fenced, to wit, one fourth of an acre thereof of great value to wit, of the value of five hundred Dollars was by the action of said Water and by its violent and rapid flow washed away dug and torn up gullied damaged and destroyed and also a large amount of personal property of and belonging to the said Plaintiff Consisting of house hold furniture house hold goods and Clothing of great value to wit, of the value of one thousand Dollars and also a large amount of Wagons buggies and Wagon Works some finished and some unfinished and other goods and Chattels of like number description and value as

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above in the said first Count mentioned,
was then and there in and about the said
premises and stored, and used in and about
the said dwelling house and Wagon Shop and
was then and there washed and swept
away by the violent and rapid flow of the
said water, to wit, at Roscoe in the County
of Winnebago aforesaid.

6th Count

Pff prepared
9 lots houses

And for that Whereas also Afterwards, to wit, on
the day and year aforesaid, at and within the
County aforesaid on the day and year aforesaid
the said plaintiff in his own right, was seized
in fee of Certain Village Lots in the Village
of Roscoe situated in the County of Winnebago
and State of Illinois which lies on the North
side of a Certain Stream of Water running in
a Westerly direction through said Village of Roscoe
Commonly Called the South Kinnickinnick Creek
and over and along the South line of said
Lots, that said Lots lie West of the Rail Road
track of the Defendants running through said
Village upon which lots were divers dwelling
houses, Shops and other buildings belonging to
the said plaintiff, and the plaintiff further
says that the defendants were then and there
owners of and in the use Occupation and
enjoyment of a Certain Rail Road Commonly
Known and Called as the Beloit Branch

Wagon RR

of the Galena and Chicago Union Rail Road, which said Rail Road crosses and passes over the aforesaid South Kishkennick Creek just East of and near the aforesaid lots of the plaintiff, and the said Rail Road of the defendants passing over and across the said Stream of Water at the place aforesaid, it thereby became and was the duty of said defendants at all times to keep and maintain in the said Rail Road and in the Works and Banks and Superstructures thereof when the same passes over said Creek such sufficient Opening and passageways for the Water which should be at all times sufficient in size to prevent the Water flowing in said Creek to pass through and by said Rail Road without obstruction thereof and the said plaintiff in fact further says that such being the duty of the defendants in that behalf they, they the said defendants so negligently unskillfully and carelessly performed their duty in the premises, that the masonry and lumber Works of the Culverts and Openings through and under the said Rail Road, when the said Road crosses the said Stream of Water became impaired and weak so that there was great danger of their falling down and obstructed^{ing} the said Stream of Water and that the defendants

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Wilfully, Wrongfully, and negligently left the said
 Culverts and Openings so impaired and weakened
 as aforesaid for a long Space of time, to wit, for
 the Space of twelve months of which the said
 defendants had notice and by reason of the
 Wilful and Wrongful negligence of the said de-
 fendants in not repairing the Structures of the
 aforesaid Culverts and Openings as they ought
 to have done the said Wood Structures and Masonry
 of the said Culverts and Openings through and
 under the said Rail Road where the said Rail
 Road crosses the aforesaid Stream of Water
 and for the passage of the Water as aforesaid
 gave way, broke and fell down thereby and by
 reason of the Wrongful and Careless negligence
 of the said defendants and the breaking in and
 falling down of said Wood Structures Culverts
 and Masonry of the said defendants the
 Waters of the said Stream were obstructed and dam-
 med up and caused to flow and set back above
 and on the up Stream side of said Rail Road
 and to rise to a great height, to wit, to the height
 of twenty five feet higher than than but for
 the falling and breaking down and falling
 in of the said Culverts Masonry and Wood
 Structures of the said defendants Rail Road where
 it crosses the aforesaid Creek thereby obstructing
 the flow of the Water in the said Creek as
 aforesaid and in consequence of such damming

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up and rise of the said Water the said Works
 banks and Structures of said Rail Road were
 by the great pressure and force of the Water
 which had become accumulated and
 dammed up as aforesaid burst broke and
 was Carried away by reason thereof the said
 Water which had accumulated, as aforesaid
 above the said Rail Road, was caused to flow
 and rush with great force and violence and
 in a great body along and upon the aforesaid
 Lots of the said plaintiff and by the force and
 violence of the said Water caused as aforesaid
 divers of the said buildings of the said plaintiff
 on the said Lots then and there being to wit; one
 dwelling house, one frame house, one Hunt Shop, one
 Wagon Shop and one other building of great value
 to wit, of the value of five thousand Dollars were
 Washed ~~washed~~ away and broke to pieces and
 wholly destroyed, and divers other buildings of
 like description number and value then ^{then} being and
 standing, were by the action of said Water under-
 mined, thrown down and broke to pieces Washed
 away and damaged and part of said Lots, to wit;
 one fourth of an acre thereof of the value of
 five hundred dollars was then and there by
 the action of said Water impelled as aforesaid,
 was gullied out, torn up and washed away
 to a great depth, to wit, to the depth of five
 feet, and upon and against the fences of the

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said plaintiff then being upon the said
 lots, and broke ~~washed~~ prostrated car-
 ried and washed away and wholly
 destroyed the said buildings and the ma-
 terial of which the the same were composed
 and also the house hold furniture, beds bedding
 books, provisions and the wearing apparel of
 the said plaintiff and of his family and other
 goods and chattels of the said plaintiff then
 and there being of the like description number
 and value as those in the said first Count
 above mentioned, and the said buildings fur-
 niture, beds, bedding, clothing books provisions
 goods and ^{and} chattels were then and there by
 force of the said water wholly swept away
 and lost to the said plaintiff, and the said
 plaintiff and his family were thereby compelled
 to flee from the said dwelling house to save
 their lives and were left destitute and
 without home and the business of the said
 plaintiff was ruined and destroyed; to wit:
 at Roscoe in the County of Winnebago aforesaid

7th Count And for that whereas also afterwards, to wit,
 on the day and year last aforesaid the said
 plaintiff was the owner of certain other lots of
 land situated in the said Village of Roscoe
 and County of Winnebago, lying on the North
 side of the South Kinnickinnick Creek and

bounded thereby, Wherem the said Plaintiff
 dwelt and had his residence and Carried on
 his business of Wagon making and that the
 said Defendants Were at the same time and
 for a long time before and ever since at and
 Within the said County of Winnebago the owners of
 a certain Rail Road across the said Creek
 above and on the up stream side of the said Lots
 and used and occupied the same, and by
 reason of being the owners and Occupiers of the
 said Rail Road, it became and was the duty
 of the said Defendants to Construct, maintain
 and Keep in repair a sufficient Culvert or
 Other Opening through and under the said
 Rail Road and the Embankment and Super-
 Structure thereof When the same Crossed the
 said Creek as aforesaid, to allow and permit
 the Water running along the said Creek at all
 times to pass freely and unobstructed through and
 under the said Rail Road and the embankments
 and Superstructures there, Yet the said de-
 fendants not regarding their duty in that
 behalf did not so Construct, maintain and
 Keep in repair a sufficient Culvert or
 Other Opening through or under the said
 Rail Road and Embankment and Super-
 Structures of the same but on the contrary
 thereof Constructed and Kept a small and
 insufficient Culvert through and under

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the said Rail Road and the Embankment and Superstructures thereof at the place aforesaid and suffered and permitted the same to be out of repair: inasmuch that on the day and year last aforesaid the Waters which should and naturally would have run along the said Creek had it not been for the said rail road, and embankment and Superstructures thereof were thereby obstructed and hindered in their flow, and were caused to set back some and accumulate above the said Rail Road and embankment thereof, and against the same, to a great height, to wit, to the height of twenty five feet over and above the natural level of the same had it not been for the said obstruction, and by reason of the said accumulation of the said Water, and the pressure thereof upon and through the said Culvert, and of the said Culverts being out of repair as aforesaid, the said Culvert became and was undermined and consequently broke and fell, and was carried away by the force of the said Water there; and by reason of the pressure of the said accumulated Water ^{above} upon and against the said embankment and of the breaking of the said Culverts the said embankment and Superstructures suddenly yielded to the force of the said Water, and fell and gave way, and the said accumulation

of Water in consequence thereof rushed, with
 great swiftness, force and violence and, in a
 great volume down and along the Course of
 the said Creek and of the banks thereof over
 the said lots of the said plaintiff and there struck
 upon and against the dwelling house and upon
 and against other houses thereof the said plain-
 tiff and a wagon Shop, and one other Shop
 and other building of the said Plaintiff there
 of great value, to wit, of the value of five thou-
 sand Dollars, and upon and against the
 fences of the said plaintiff then being upon the
 said lots, and broke prostrate. Carried and
 washed away and wholly destroyed, the
 said buildings and fences, and the materials
 of which the same were composed, and also the
 household furniture beds, bedding, books, provisions
 and the wearing apparel of the said plaintiff and
 of his family and other good chattels of the
 said plaintiff then and there being of the like
 description number and value as those in the
 said first Count above mentioned and the
 said buildings, furniture, beds, bedding, clothing
 books provisions goods and chattels were then
 and there by force of the said water wholly
 swept away and lost to the said plaintiff
 and the said plaintiff and his family were
 thereby compelled to flee from the said dwelling
 house to save their lives and were left destitute

4 1

business

without home and the business of the said
 plaintiff was ruined and destroyed
 And furthermore, the earth and soil of
 the said lots of the said plaintiff were then
 and there by the fire and action of the
 said water gullies, dug up and ~~of~~ swept
 and ^{carried} away to a great depth, to wit, to the
 depth of five feet and the said ~~lots~~ ^{lots} were thereby
 spoiled and rendered worthless to the said
 plaintiff, to wit, at Roseau in the County of
 Wennebag, aforesaid. Wherefore the said
 plaintiff says that he is injured and hath
 sustained damage to the amount of ten
 thousand Dollars, and therefore he
 brings suit &c

James Set Roy Atty for Plaintiff

11345

69282

4690

78300

8783

Galena & Chicago
W R R Co

Perry ^{ads} M Welch

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And the Said defendant
by J. L. Loop its Attorney comes and
defends &c and says that it is not
guilty of the Said several promises in
plaintiff declaration against it charged
or any or either of them or any part
thereof and of this the Said defendant
puts itself upon the country &c

J. L. Loop
Atty for Deft

1000

Plew

Filed Sept 12 1859

H. N. Whitney Clerk

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United States of America:

State of Illinois }
 County of Boone } p.

Pleas before the Honorable Isaac G. Wilson
 Judge of the Thirteenth Judicial Circuit ~~Circuit~~ in the
 State of Illinois, and Presiding Judge of the Boone
 County Circuit; ^{Court;} At a Regular Term thereof began
 and held at the Court House, in Richview, in ^{the} said
 County of Boone, on the 14th day of March A.D.
 1859.

Present - Hon. Isaac G. Wilson, Judge Presiding,
 W. S. Johnson Esq., State's Attorney,
 W. F. Garrison Esq., Sheriff.

Attest - D. W. Whitney:

And the said Court being duly organized;
 and Proclamation thereof made by the
 Sheriff;

And afterwards to wit, on the 15th day
 of March A.D. 1859, it being yet one of the days of the
 said March Term of said Circuit Court for A.D.
 1859, the following, amongst other proceedings were
 had, ordered and entered of Record, that is to say,

Perry M. Welch
 vs.

The Galena & Chicago

Union Rail Road Company

} Change of venue from Winnebago
 County -

And afterwards, to wit, on
 this same 15th day of March A.D. 1859; Comes
 the said Plaintiff by Le Roy & Dunlap his Attorneys,
 and the said Defendants by Bull & Wood
 their Attorneys also come, and the said

4 5

defendants by their said attorneys now move
the Court for continuance herein; whereupon it
is Ordered that said motion be ^{granted} ~~allowed~~: And
it is further Ordered that this cause be continued
to the next Term of this Court, at the costs of
the ^{said} defendants.

And afterwards, to wit; on the 28th day of
September A.D. 1859, It being one of the days of
the September Term of the Boone County Circuit
Court for A.D. 1859, Hon. Isaac S. Wilson, Presiding,
The following proceedings were had, to wit;

Perry M. Welch } Charge, ven. from Minn. & Co.
vs. }

Galena & Chicago

Union Rail Road Corp.

And heretofore, to wit; on the 12th
day of September A.D. 1859, comes the said
defendant by its attorney J. S. Loop, and
files the following plea, to wit =

"Galena & Chicago

U. R. R. Co.

vs.

Perry M. Welch

And the said defendant by
J. S. Loop its attorney comes and defends
it, and says that it is not guilty of the said
several premises in Plaintiff's declaration against
it charged, or any or either of them or any part thereof,
and of this the said defendant puts itself upon
the Country &c.

J. S. Loop atty for Deft."

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And afterwards to wit, on the 31st day
of September A.D. 1859. It being one of the days
of the September Term of the Circuit Court, for
the said County of Boone for the year A.D. 1859.
The Hon. Isaac E. Wilson Judge, Presiding.
The following proceedings were had and enter-
ed of Record, to wit:

Perry W Welch	}	Change of Venue from Winnebago County
is		
The Galena & Chicago	}	
Union Rail Road Company		

And now on this day comes the
said Plaintiff by Le Roy & Burnap his attorneys
and the said Defendant by Loop & Hurst
their attorneys also come and the said Defen-
dants by their said attorneys move for Rule
on Plaintiff to enter security for costs, and
the said Plaintiff having justified. It is ordered
that said rule be discharged - and issue
being joined herein. It is ordered that
a jury come. Whereupon a jury of good
and lawful men to wit D. Spencer Wm
Newton, E. Bliz S. Lambert E. Cronk S R
Woodruff J S Carpenter S Thorne J Dean
W P Smith C R Rix J H Bennett
being severally elected tried & sworn also come
and the Deft by their said attorneys now
move to strike the Reclamation filed

Nov 2^d 1858 Marked "E" from the files
 which said motion is denied by to which
 said Order and ruling of the Court the said
 Defendants by their said Attorneys now here
 except & having proceeded for some time in
 the trial of this Cause, by Consent of the Attorney
 herein. It is ordered that the Jury separate and
 meet the Court at 9 O'clock to morrow morning

And afterwards to wit on the 22^d day of
 September A.D. 1859 being yet one of the days
 of the said September Term of said Circuit
 Court for A.D. 1859, The following proceedings
 were had and entered of Record, to wit,

Perry W. Welch	}	Change of Venue from Winnebago County
vs		
The Galena & Chicago Union Rail Road Company		

And now on this day comes the
 said Plaintiff as well as the said Defendant by
 their respective Attorneys as of yesterday & the
 Jurors being called answer to their respective
 names. Whereupon It is ordered that the trial
 of this Cause do now proceed & the said trial
 having continued until the evidence of the Plain-
 tiff is in the Defendant by their said Attorneys
 move to exclude all evidence of permanent
 injury to the freehold which said motion is

Nov 2^d 1858 Marked "E" from the files
 which said motion is denied by to which
 said Order and ruling of the Court the said
 Defendants by their said Attorneys now here
 except & having proceeded for some time in
 the trial of this Cause by Consent of the Attorneys
 herein. It is Ordered that the Jury Separate and
 meet the Court at 9 O'clock to morrow morning

And afterwards to wit on the 22^d day of
 September A.D. 1859 being yet one of the days
 of the said September Term of said Circuit
 Court for A.D. 1859. The following proceedings
 were had and entered of Record - to wit,

Perry W. Welch	}	Change of Venue from Winnebago County
as		
The Galena & Chicago Union Rail Road Company		

And now on this day Comes the
 said Plaintiff as well as the said Defendant by
 their respective Attorneys as of yesterday & the
 Jurors being Called answer to their respective
 names. Whereupon It is Ordered that the trial
 of this Cause do now proceed & the said trial
 having Continued until the evidence of the Plain-
 tiff is in the Defendant by their said Attorneys
 move to exclude all Evidence of permanent
 injury to the franchise which said motion is

denied, to which said order & ruling of the Court Defendant by their Attorneys excepts. And by Consent of the Attorneys of the respective parties herein. It is Ordered, that the jury have leave to separate and that they meet the Court at 9 o'clock to morrow morning —

And afterwards, to wit, on the 23^d day of September A.D. 1859. It being yet one of the days of the said September Term of the said Boone County Circuit Court for the year A.D. 1859. the following proceedings were had and entered of Record, that is to say —

Perry M. Welch	}	Ch. Ven. from Wm. Co. — Case
vs		
The Galena & Chicago Union Rail Road Company		

And now on the 23^d day of September A.D. 1859, Come the said parties herein by their respective Attorneys as of yesterday, and the said jurors being Called Answer to their ^{respective} names Whereupon it is Ordered that the trial of this Cause do now proceed and the said jury having heard the evidence produced on the part of the said plaintiff. and also on the part of the said Defendants and listened to the arguments of the respective Counsel, and received the instructions of

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the Court, retire under ^{the} charge of a sworn
officer of this Court to Consider of their Verdict,
and Subsequently upon returning into Court
and for a Verdict say We the jury find the
Defendant guilty and also the plaintiffs dam-
ages at Eleven hundred Dollars.

And the said Defendants by their said
attorneys now ~~move~~ ^{more} for a new trial, in
arrest of judgment herein. It is ordered that
the time for hearing said motion for new trial
in arrest of judgment be extended by agreement
and that the Defendant present his points and
authorities to the Counsel for Plaintiff by the 8th
day of November next, and the points on both sides
to be handed to the judge at Chambers by the 15th
day of November next. The said motion for new
trial to be there after decided by the judge & the
judgment to be entered as of this Term by agreement
of parties, with the benefit of excepting and per-
fecting appeal to the Supreme Court Grant (if the
said motion shall be denied) as though the
decision were made in Term time. And the
aforesaid orders and agreements of the respective
parties to enable the judge to determine the afore-
said motion for new trial, in arrest of judgment
herein having been fully complied with, and the
Court being fully well advised in the Premises
overrules the said motion for new trial, in arrest

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of judgment herein, and orders that the
said Defendant, pursuant to the aforesaid
agreement, be and hereby is allowed the benefit
of accepting and perfecting appeal to the Supreme
Court; and it is further ordered that ^{the} said
Plaintiff have judgment against the said De-
fendant of the verdict aforesaid.

It is therefore
Considered and adjudged by the Court that
the said Plaintiff Perry (W. Welch) have and
recover of and from the said Defendant, The
Galena & Chicago Union Rail Road Company, the
sum of Eleven Thousand Dollars his Damages
herein, occasioned by the Wrongs & injuries done
the said Plaintiff by the said Defendant
as charged in the Plaintiff's Declaration filed
herein, as also his Costs and Charges in and
about this suit expended, and that he have
execution therefor.

Attest, D. M. McIntire, Clerk

Perry McMelch

Galena & Chicago Union
Rail Road Company

In Circuit Court of Boone
Co Sept Term 1859—

Change of Venue from Winnebago
Circ. Court

5 1

Be it remembered that on this 21st day
of September being one of the days of the September
Term of the Circuit Court of Boone County in the
year 1859 before the Hon Isaac G. Wilson Judge of
the 13th Judicial Circuit came the said Plaintiff
by Le Roy Warner & Barnap his attorneys and
the said Defendant by Loops & Harbitt their attor-
neys - And a Jury of good and lawful men
in the record of this cause named were severally
elected tried and sworn in this cause -

And
thereupon the said Defendant by their said Attorneys
moved the Court now here to strike from the files
the pretended Second Declaration filed Nov. 2^d 1858
and marked Q. because the same was not in
conformity with the leave granted by said
Circuit Court of Winnebago County - which
motion was overruled by the Court to which
ruling of the Court the said Defendant then
& there excepted -

And thereupon in support of the several
allegations in said Plaintiff's Declaration

Contained the following evidence was introduced
on the trial of the Cause before the Jury
Francis Griswold - being Sworn testified as follows

I know the Lot of Land Occupied by the
the Plaintiff

I know where Welch lived at the time of the time
of the freshet. It was on a lot now washed away
by the freshet. There was a dwelling house and
Grout Wagon Shop on the lot. The South end of the
Lot was bounded by the Creek. One Corner of the
House was within six or eight feet of the bank
of the Creek. This bank was washed from two to
three feet high above the bottoms of the Creek.
The bottoms of the House within two to three
feet of the water at the usual stage. There was
about 3 or 4 inches of underpinning.

The House was about 16 feet by 20. One & a half
story high. The Plaintiff was a wagon maker.

The Shop was used as a Wagon Shop. I was
16 or 17 Rows off when the house was swept
off. It was carried off by the water which
had accumulated above the embankment.

I saw the water coming and went down to my
Blacksmiths Shop & barn to get out a calf.
The wave was from 8 to 12 feet high in the
main current of the Stream. This wave
struck two Houses above Welch's. Then it struck
Welch's house and tore it down. It went off
in the wave part of the house has not been

5 3

seen since. (Nothing was left of it next morning)
It was a heavy swell of water. The water had
run before this two or three feet, this was a
minute, or two of three before.

The heavy swell seemed to show this smaller
one before it. The heavy wave was like any
heavy body of water forcing its way along.
There were sticks of timber, tree tops, brush and

such like. The most of it followed the body
of the main creek, ^{the wave} was not perpendicular

I was on the bank about 10. or 12 Rods off.
It came along like a heavy sea, it rolled in
like a swell on a beach. The usual width
of the bed of the creek at Welch is 2 or 3

rods. On the South Side the bank sloped gradually.
I think the wave I saw there was 8. to 10 feet
high. The water was about 20 Rods wide

after the wave. It was about a half ^{hour} before
the water ran off. but this main wave passed
right along and left the water some 8 or 9 feet
deep in the bed of the stream. The water was

3 feet deep between my house and Fajeter's
I was at the Rail Road about 5. or 6 O'clock
the evening before. It gave way about 11. O'clock
P.M. (This big wave was about Eleven O'clock P.M.)

I saw a pond of water there, and the mouth of the
culvert was filled as near as I could see within 18
or 20 inches of the top of the arch. I did not go
down to it. The lower end where the water came out

5 4

was full. The pond above extended as far as I could see though it was nearly dark. It went over Mr Plains meadow. This was on the night of the 3rd June 1858. I could not tell whether the water was then rising. I have resided in Roscoe 4 years. The next morning part of the House lay north from the place where it stood. The Chamber floor lay across the Street in an eddy. The Lot was all torn to pieces. The back end of the Shop was partly gone. a very small portion was gone. The Lot was cut out to the depth of the bottom of the Cellar. I should judge. The Creek now runs on the bottom of the Cellar where Welch's house stands. The materials of the Culvert were scattered all about on the flat. There were large sticks of timber and plank string along from the Culvert along the flats to Rock River (that is I was told there were materials of the Culvert). It is about half a mile from the Culvert to Welch's house. and half a mile thence to the River. The stones lie principally within 20. to 25 rods from the track some further down as far as the street. I should think the largest would weigh 8 or 9 cwt. I saw some of near a ton weight at 8 or 10 Rods. from Culvert. I have been at the Culvert many times before that. I was there a year before. Then the upper end of the Culvert was washed so that plank were loose some of them in the floor of the Culvert.

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I saw a hole in under there and Stone thrown in. There was a hole at the upper end of the Culvert. I judged that the Water was Working under the Culvert One of the Mings was Standing Stone had been thrown in above the timbers and there was nothing at the end of the plank but Stone to prevent the Water from running under the plank and timbers. There is now a large hole where the Culvert stood. I Cannot tell how deep it was. Have been in Swimming there several times since I was at the Culvert within two hours after it went out. I saw the place

Being Cross examined by Defendants Counsel the said Mitry testified as follows.

I have lived in Roscoe 4 years. I think it was raining slightly at the time of the break. It began in the morning and continued showering all day. I had not been to the Culvert for some days prior to this day. When I was there on this day there was a large pond on the lower side of the Culvert. The Water was up to the highest I mentioned I saw it once before as high, this was from a gorge of ice. In an ordinary fresh I never saw it as high by 3 or 4 feet. The water came up to Welch's house or in his door yard before I went to the Culvert at 5 or 6 O'clock. When I came back I saw Welch and told him not to stay there. it was not safe.

5 6

This was at 6 O'clock. I was at Welch's during the heaviest Shower we had The Water increased slowly until about 9 P.M. when it fell some 2 or 3 inches. and I came to the Conclusion it was all over. I cannot say whether it rose again before the break. The bridge was Carried off but when I do not know. At night both Ends were Covered with Water. When I went down after the Calf there was no Current where I was. I suppose the Creek was backed up by Rock River. The Ordinary Stream is rapid towards the River. The Stable where I had the Calf did not go off - it sprang out and fell in, and lay there after the freshet. I saw the wave coming before I went to the Stable I first saw it between the Mill and Factory. It moved with a noise and faster than a man could walk.

The Summer before I saw a plank loose at the Culvert. I started to walk across. The plank lay up and down. This plank was nearer the side than the Centre. There were 8 or 10 inches of Water in the Culvert. The hole I saw, was in the bed of the Creek. I thought the Water had worn out a hole in the bed of the Stream. This hole was above the Culvert. I noticed no sucking in, nor swirl of Water at this hole. The Current was about 10 inches deep on floor of the Culvert. where the Culvert

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was I threw down a board 16 feet long to see how deep the water was. it all went under I was there several times (that summer) but not the summer of the freshest until that night

Being examined in reply by Plaintiff said
Witness testified

I cannot say how much the plank gave. It was very slippery. I put my foot on it. Nearly slipped and went back

Samuel Sathrop called by Plaintiff testified as follows. I have been acquainted with the Lot Welch lived on 13 years. He has occupied it 10. or 11 years. The Bank on the South side is 2 1/2 or 3 feet high. The House is 20 feet by 30. or 20 feet by 25. I never was under it. It was a story & a half high. There was a great Shop 16 feet by 30 occupied as a wagon Shop by Plaintiff.

The lot I cannot give the size of I can only say 5 Rods by 8 or 9 Rods. The house is three feet above the level of the Bank. The Cellar was 6 1/2 to 7 feet deep. It was dry except in high water. The cellar walls were stone. I was in Rome when the house was swept away by the flood. I had rained very hard about 5 o'clock. I was in my house, and heard that the Calvert

5 8

was gone. I went and got my horses out of the barn. Water to my knees. I then went and helped Griswold.

Welch's house had gone. It was then 12 o'clock. Mr. Wesley Clock found in the ruins had stopped at 1/2 past 11. Welch's family was then at Andrews. They did not save any thing.

They were left destitute. Children had on nothing but night clothes. Welch had a wife and four children. I did not see Welch's folks till next morning. The Creek before this ran on the South side of Welch's Lot. Now runs in the Cellar. The Water is from 6 to 10 inches deep.

The house lot & wagon Shop was worth from 5 to 600 dollars. I think the Lot is worth 1/3 now. There had been two or three or more Showers in the day and about 8 or 9 P.M. a tremendous Shower. The Water two days before had risen as high as at this time below the Culvert.

There have been floods before. In August 1857 there was a heavy rain. I was at the Culvert then the water was within a foot and a half of the top of the Culvert. The Culvert was not large enough to pass the water. The water set back to the top board of Mr. J. Smith's fence. There were floods before. I think as high eight years ago. Rock River was four feet higher than at this time. I should think the creek was higher than at the time of the accident.

59.

Then Floods did not affect Welch's property
The Country drained by the Creek is quite extensive. Hills and Barrens

The Creek rises right up and goes down as quickly. It rises within one hour or two and goes down accordingly. I saw the Culvert in 1857 both Wings on West side were broken off and the North Wing on the East side

The West Wings were undermined by washing of Water and one thrown down, the other upright but cracked off from the main work the Culvert was not big enough so that the Water boiled up and washed back. I looked down but could not see how deep the Water was. The boil did not go under the main Culvert, but did under the Wings. Timbers were laid across the Culvert and planked

The upper North Wing had undermined and fallen away from the main part. and there was a plank (ripping) from the upper rows of planks. The plank was 12 feet long and rested on Timbers. two feet filled in with loose Stone. They dug down to as became a foundation as they could find. then laid down Timbers and Small Stone between them then planked over. Timbers flattened on two sides 10. to 12 inches thick and were 12. to 18 inches apart

In August 1857 - There was a hole near the Wing. Cut out but did not extend under the

6 0 plank as I could see. I walked across on the
m Rail Road, saw a hole. They put ⁱⁿ 3 or 4 cart
n loads of Loose Stone which did not come to the
d top of the water in my opinion the stone put
in did more harm than good. The Stone
were not near enough to the mouth of the
Culvert, but that the water would wash
between them and the Culvert.

8 We went up about 1 A M of that night
The opening in the bank was from 200 to 300
feet on the top of the bank. They have now
a bridge of 100 feet Span. The Bank & Culvert
were gone. The water was from 14 to 16 feet
deep. Where the Culvert was I threw down a
board 16 feet long to see how deep the water was
and it came up most of its length.
I was there when the Culvert was built.

0 I saw some of Mr Melch's personal property, bed
Clothes & bedding &c. I do not know all his
personal property. He had a Soda fountain
There was a turning Lathe. One half of it was dug
out of the sand in fixing the road.
He had a Cook Stove, Chains, bedstead, bedding, bed
clothes, Secretary with books filling the upper part. Can
say how much nor what they were worth.
Part of the Soda fountain was found the whole was
worth \$30 to \$40.

The turning Lathe was of Iron

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Being Cross examined by Defts Counsel said
Witness testified as follows.

R The Soda fountain was Copper Casks & lead
S pipe & pump and all the apparatus. for it I sup-
pose I had known it running at Wilsons Drug Store
the year before. I think it must have been in his
house but never saw it there. He had two bears up
5 I saw found some Quills, a feather bed, & straw bed
What was found was worthless
W A part of the Chamber Floor & roof went across the
W road and lodged at Palmers.

The House had three rooms below. The Lot and
Shop may be worth ten Dollars.

I was at the Culvert after the flood of 1857 - the
Wings were there, One cracked off, and had been
for two years - this was the North one of the
lower side. After the flood of 1857 - I went
down on the other (up Stream) side and found them
out of order. The North East wing was bent over,
broken during the flood.

The South West Wing was also cracked off
the crack 6 or 8 inches wide. I do not know
that the Culvert and its foundation are in-
dependent of the Wings. There was one plank
loose and one gone. The one gone was on the
North side of the Culvert the next one was
loose, and lay across the Culvert, held by
a nail at the lower end.

6 2

Below the Culvert was a hole, with Stone in it. Then Stone were put in 3 or 3 weeks after the flood of August 1857.

x All along in May and up till the 3rd of June
1858 the creek was full and ten days before this it overflowed its banks.

It overflowed, and Came up into the yards of Plaintiff. I think the overflow of (May and) June before the Culvert broke was about Equal. There were no planks between the Wall on the upper side, Cannot say as to the lower

John A Cornwell Called by Plff testified as follows

I drew Stone to this Culvert. was there when it began. Saw the foundations laid. So far as my memory serves me, the foundation was 18 inches or two feet. the pit was dug one side of the then channel. The planking was about level with the top of the Water. I think Stone was put in first. then Timbers. And then planks. The Stone were all sizes from a Mans fist up to as big as his head. There was a bed laid under the whole of the Culvert. I Cant tell how deep the bed of Stone was. I was there through the whole work. Cannot tell the Size of timbers

15104
Elmer Brown - Called by Plaintiff testified as follows

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I lived a mile above the Culvert on the Stream. Have lived there two years, and for twelve years before that in the village. There was a flood in June seven years ago, very high - before the road was constructed. A year or two before there was a very heavy flood in the winter.

The flood above the Culvert in June 1858 was very high, four feet in my garden.

The flood, in June 1857, went over Mr Welch's Lot. And the one in the winter of 1856 was still higher. I do not think as much water fell as in this last.

In both floods of 1858 the water was dammed up by the Rail Road, on my lands; the last one (June 3^d) was the highest.

The Creek had been high all along before the break for several days.

I do not know what caused the water to flow back to my place, unless it was the rail road, but it flowed across 280 acres of lots. The Creek is said to rise in a marsh from 5 to 7 miles from its mouth and passes through bluffs with 6 or 7 ravines on each side. The Stream rises pretty quick it rises and falls in 24 hours.

On the 3^d June 1858 I saw the water rise 20 feet from the foundation of the Culvert to the highest point I think this is enough several feet higher than the top of the Culvert.

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I think this is enough. the one in May, was about a foot higher than the top of the Culvert. The last flood removed fences that had never been moved before and flooded about 400 acres of land.

Being Cross Examined by Defts. Counsel he testified as follows

I was not at the Culvert at the time of the flood. The Valley between the Culvert and my place is about 70 Rods wide. The Water has to rise so as to come up about four inches on the side of a horse in the Channel in order to overrun its banks. On 3rd June 1858 it rained all day there were two heavy Showers fell toward night. the last Shower was unprecedented. I never knew so much water fall in the same time.

Asa Abbott was Called by the Plaintiff and testified as follows.

I knew the Situation of the Culvert under the Beloit branch of the Gal. & Chi W Rail road prior to the flood.

I have known it for two years the Wing walls were rather out of repair the Wing on South side of lower end was broken and on the other side cracked off. The planks, ^{came out} as far as the Wings, and extended under them.

The North Wing was pretty much broken down

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The lower end of the planks under the Wings
seemed loose & had settled down. The floor in
the main Culvert was good. The Wing
on the upper side was cracked off.

The planks on Wings of upper side were tight.
One plank was gone between Wings on upper side.
The Planks rested on timbers and they on dirt.

The Culvert was 12 feet wide and
12 feet high to the Crown of the Arch.
It was 6 feet high to the Spring of the Arch.

On the Occasion (of flood of 3^d June 1858) the
water rose 21 feet 6 inches above low water mark
above the Rail road, the water at usual stage was
10 or 12 inches. Ten days before that the
water covered the mouth of the Culvert. The Cul-
vert was as full as it could discharge at the
lower end. It set the water back above the Rail Road
one mile or more. It must have been a foot or more
above the top, the top of the Culvert at that time.

Being Cross examined by Defts Counsel the
said Witness testified as follows:

The water before this rain of
3^d June was in a muddling stage and the rise
of 21 feet 6 inches was entirely due to the
rain of that day. It seems to me that I have
known as much water to fall before in one
day. It was seven years before

I was at the Culvert before

6 6

it went out. at $\frac{1}{2}$ past 5 P.M. The Culvert was a little more than half full then

The heavy Shower Commenced about 9 P.M. I have seen as heavy a rain before

George Smith, a witness Called by the Plaintiff testified as follows:

I reside in Roseau
Have lived there 13 years I have seen the Culvert - I noticed it about a year before it went out Two thirds of the North Wing had Cracked off and fallen ^{on} the Culvert The Crack Commenced four feet in the body of the Culvert and extended out diagonally to the Wing about 6 feet from the bottom

The floor of the Wings was sunk at the West side of the Culvert some 4 or 5 inches. The Earth under the plank was gone about 6 or 8 feet deep next to Culvert. The floor in main Culvert was good. There were two planks out between the Wings at the Upper end of the Culvert The Timbers in the foundation of the Culvert were flattened on the top for the planks to be laid on. They were from 12 to 14 and 18 inches though they were Calculated to be laid 18 inches from centre to centre. They laid them as near together as they could the timber was crooked & left holes between from one to six inches. They filled the holes with dirt & small stones
I saw the Culvert a few days before

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it went off. The Crack in the Culvert was larger. A year before, I saw the arch within 18 inches of the Crown full of water.

At the Upper end of the Culvert the water had washed out the bed of the Creek, but not up to the Wings, nor under them.

The natural Stream ran 5 or 6 Rods North of the Culvert. The Rail Road Company cut a new Channel to the Culvert.

I saw the timbers laid. I think there were no Stone under them. I think the timbers were laid up on the earth. It was of Sand & gravel - was working on the road, at the time.

Being Cross Examined by Defts Counsel said mitnup testified as follows.

The Crack is in the main body of the ~~main body of the~~ Culvert testified to by me was seen by me after the flood of August 1857 - and remained so up to the time the Calamity occurred.

The Crack in the main body of the Culvert was scarcely visible you could just see it when it commenced. but was wide on the Wing.

D. J. S. Remington - being Called by the testified as follows;

I am a Surveyor

The Witness here introduced, proved two plates

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put in evidence by Peff. Shewing the Situation
of the Lots in question.

I am the County Surveyor
of Winnebago County.

These plats were made by
actual Survey last June (1859)

The Lot on Main
Street, West side is 6 $\frac{1}{2}$ Rods. On the North line
9 rods, on the East line 2 $\frac{3}{4}$ Rods. Thence West
4 $\frac{1}{2}$ Rods. Thence South to Centre of Creek
according to the Record of plat thence down the
Creek to the place of beginning a little over 4 $\frac{1}{2}$ rods

The Bed of the Creek covers nearly three
quarters of the Tract of land in question;

There is nothing to show where the River
was. Part of the Ship Island there, is of no
material value. I have been over the old bed
of the Creek. The old bed is where the dotted
line is on the Diagram it is changed in some
places 5 Rods

The Valley at this Lot is 30 Rods
wide, above much wider. Bluff bank on north
gradual Slope on South. The usual Stage of Water
is from 6 to 10 inches deep. about a rod wide

The buildings marked on the diagram were
not there when the Survey was made. I put
them on from information received on the Spot

I have been nine years in Winnebago
County. I think the flood on Rock River in 1857

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was as great as in 1858

The usual mode of Constructing Culverts is to dig down - lay foundation with Stone and timber planks over and build up. The rule is to get below the bed of the Stream to lay the foundation

If piling is used, it is usual to drive piles as thick as possible and lay foundation on piles. I have had experience in such Constructions. In laying Timber foundations they are laid below the bed of the Stream so as to permit planks to be level with the bed of the Stream. I know of no fixed rule that can apply for allowance for use of water. This Creek is 6 miles long and the Country drained varies from one & a half miles to three miles wide. I have seen Water high in that Creek. It rises rapidly from the fact that the banks are hilly.

Plaintiffs Counsel then Propounded the following Question -

From your Knowledge of the Country drained by that Stream, State whether that Culvert was or was not of sufficient Capacity to pass the Water in that Stream?

To which question the Defendants by their Counsel then & there Objected.

The Court overruled the objection

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permitted the question to be put to which ruling of the Court, the Defendant by their ^{said} Counsel then & there excepted

The said Witness, in Answer to said, Question testified, - It was not. Welch's House was about 100 Rods below the Culvert and half a mile to Rock River - The House stood within a few feet of the Bank of the Creek West of from the Culvert - I was at the break on June 5 1858 - I noticed the Water marks on Embankment and measured with a level - It was $19\frac{1}{2}$ feet above the Level of the Water in the Stream - The water was then at low stage - At that height it flowed back two miles

The break in the embankment was about 100 feet at Bottom, and about 300 feet at the top The Embankment was 40 feet high The Valley at that point is about 150 feet wide at the bottom

Being Cross Examined by Defts Counsel said Witness testified, as follows -

In 1851 just after the flood I crossed this Creek - and from the marks I thought it as high as this flood, in 1858

John Van Nortwick. a witness for the Defense, being desirous of leaving was by Consent of parties here

7 1.

Offered, and at the request of the Plaintiff was sworn on his Voir Dire, and having been so sworn testified as follows; I own no stock in the Galena & Chicago Union Rail Road

I was Chief Engineer of said Company at the time the Culvert was made. It was built under my direction & according to my designs and plans. I am not now Chief Engineer. I ceased to be such in 1854. Whereupon the Plaintiff moved the Court to exclude the Witness on the ground of his liability over in case the Defs are held liable by reason of a defect in the plan or mode in which the Culvert was constructed.

And the Defendant having stated that the Witness is called to prove that there was no defect in the mode in which the structure was designed and planned - The Court having heard Argument Excluded the Witness on the ground of Interest or liability over to which ruling of the Court the Defendant by their Counsel then & there excepted

The Plaintiff then Offered in Evidence two Deeds - One from Palmer & wife to the Plff and the other from Amos Tuttle & wife to the Plaintiff - to the reading of which in Evidence, the Defendant by his Counsel objected, but the Court permitted the same

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to be read to the Jury, the execution of the same, having been first duly proven, to which the Defendants by their Counsel then & there excepted which Deeds are respectively marked A. B. and made part of this Bill of Exceptions being Appended hereto

The Plaintiff then recalled Mr T. J. S. Remington who testified

The Land described in said Deeds is the same Land set forth in the Diagram mentioned in and part of my evidence

Nathaniel Palmer being Called by the Plaintiff testified as follows:

I owned land described in Deed from me to Welch. Had been in possession for a year before I sold to Welch

Plaintiffs Counsel then asked the following question - State whether or not you were in possession, claiming to be the owner: which question was objected to by the Defendants Counsel but the Court overruled the objection and permitted the question to be put, to which the Defendants then & there excepted -

The Witness answered I did claim to be the owner. The other Lot was Owned by Shaw I was in possession as Tenant from

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July to October of 1851. I worked for Plaintiff before the flood. I made four sets new wheels and gearings for wagons. One Set Two Horse Wagon Wheels. I Spoked and ringed two Sets One Horse Wagon Wheels. One extra Set Phillys. These were stored in the Attic of Dwelling House. I presume this stuff was in the house when swept away.

I saw them gathering it up the next day and fetching it home. Can't say how much he got back Double Wagon Wheels &c were worth by the Set (wheels + gearings) \$30.

There were four sets of these
Two Horse Wagon Wheels worth 14.
Two sets One Horse Wheels at 12. a set
One Set Philly 2.

There was also a Turning Lathe \$25.

I cannot recollect any thing else

Some planes and such tools were lost
Two beading planes worth say \$1.12 1/2
Two jointing planes worth may be \$2.00
Work bench \$5.00
Iron such as boxes + gearings \$25.00

The Plaintiff then proceeded to prove by this Witness the value of the House and Lot to which defendant then and there objected but the objection was overruled by the Court to which ruling the Defendants by their Counsel

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then and there excepted, and the said
Mitnys testified as follows

I called the Lot
on which the House stood worth \$400. The
House alone without the Lot ^{was} worth \$200.
I offered ten months before to give \$600
for the whole premises including both Lots
He asked \$650.

Being Cross Examined by Defendants Counsel
said Mitnys testified as follows

The Plaintiff recovered after the flood. 4 sets
Wheels. On sets Two Horses - 3 sets one Horse -
they were injured by water. Some of them split.

The stuff recovered was worth half price
I have seen one part of the Turning Lathes
The price recovered was of little value
It was worth as much to get the property
& repair it as it was worth

D. W. Heacock a Mitnys called on the part of the
Plaintiff testified as follows:

I live in Roscoe,
have lived there for ten or twelve years
I was not there, at the time of the flood. I was
at Rockford. I was there the Sunday before the
flood. The water was then very high in the
Creek as high as I ever saw it.

7 5

In 1857. I think I think we had as great a
freshet as it was on that Sunday -

I know the property Occupied by the Plaintiff
He has lived there ever since I Came into the
Country - The House and lot was worth \$500 -
in Cash - The property was all gone after
the flood. The house alone was worth \$400 -
I knew it well The House was 20 feet by 24 -
Two Rooms fronting Road and bed room off
South Room - Rec room and Pantry off the North
Room. One and a half stories high - House was
well furnished with necessaries for a family. I
cannot give particulars - Welch had a large
quantity of Books, but I was not conversant with
them - I worked on Embankment - The Rail
Road ran from Beloit to Belvidere. The Culvert
washed away was under the Beloit branch of
the Galena & Chi. W Rail Road

Miss Jenny L. LeRoy a Witness Called by Plaintiff
testified as follows.

I know the Plaintiff - I saw
his Sister in Law - I was not present at Roscoe
at the Flood. I was there ten days before
The Plaintiff had in his House 3 tables -
1 at \$6 1 at \$4 - + 1 at \$2 \$12
1 Secretary 15
Library - 70 or 80 volumes Medical
+ Miscellaneous } 90

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1 Lounge		6.00
1 Set Parlor Chairs		6.00
2 Common Settees for settee		8.00
1 Settee cradle		3.00
2 Rockers 1 @ 3. 1 @ 1.50		4.50
2 Arm Chairs @ 1.		2.00
2 Light Stands @ 1.50		3.00
1 Parlor Stove		11.00
1 Cook Stove		25.00
4 Bedsteads 2 @ 3.00 2 @ 2.00		10.00
1 Common Bedstead		1.00
4 Straw beds @ 1.25		5.00
3 Feather beds 12.00		36.00
6 pair pillows 2.00		12.00
18 Quilts + Coverlets 3.00		54.00
8 pr Shirts 1.75		14.00
3 - pillow Cases .62		5.00
1 Husk Mattress		3.00
2 Settee Valances for beds .75		1.50
1 - Red Curtain Sawn		1.25
2 Mirrors 1 @ 3.00 1 @ .75		3.75
3. Settee Embroidered Mitre curtains		3.00
5. Linen table Cloths 1.25		6.25
Towels &c		3.00
8. fine Towels + Napkins		6.00
One Embroidered Lamp Map		15.00
One Marble bottomed Lamp		3.50
One large Glass Lamp.		1.50
2 Glass Fluid Lamps @ .80		1.60

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One Cupboard	(Cost)	10.00
One Set of Ironstone China	(Cost)	15.00
Large Quantity of ^{other} Small dishes	(Common ware)	5.00
1 Set Silver Teaspoons	(Cost)	7.00
2 Set German Silver Tea Spoons	.75	1.50
1 Set German Silver Table Spoons		1.25
3 Sets Knives & Forks		14.00
1 Castor & Cruets &c		2.00
4 Glas Salt Cellars		.75
1/2 Dozen Glas Goblets		1.50
1 Glas Sugar Bowl Creamer &c		1.50
Great Quantity Tin Ware for all uses for all kinds of Cakes &c		5.00
Large Quantity Glas Ware jars &c		3.00
Large Apartment Oil & Expenses for cooking purposes		
Cannot tell the value		
1 block		3.00
3 Wash Tubs		3.00
1 Wash Stand board		.75
1 pr Shovel & Tongs		.75
4 Flat Irons		.50
2 Brass Kettles @ 2.00 + 1 @ 1.50		3.50
75 lbs Carpet Rags @ 12 ^{1/2} pr lb		9.37
les. Yards new Calico @ 10		6.00
1 1/2 a Umbrella factory @ 12 ^{1/2} pr		1.50
8 fine Shirts @ \$2.		16.00
1 Work Box & Contents		15.00
50. Shirts Embroidered Silk @ 4		2.00

7 8	100 Skins Wonsted	@ 01	1.00
	1 Embroidered Scarf		3.00
	3 Bonnets 2 @ 6.00 1 @ 4-		16.00
	1 Muff + Victorine		5.00
	1 Bonnet pin		4.00
	3. Daguerotypes + Cases		4.50
	1 Black Silk Cape		3.00
	1 Beadwork bag & Purse		5.00
	Chinw Mantle Ornaments		3.00
	5. Chests & Trunks Containing		
	Wearing Apparel of all kinds		
	Hammers &c 1 chest + contents \$40-		
	2 @ \$30 - 2 @ \$25-		150.00

There was also an abundant supply of provisions among others 15 bushels of Potatoes, also 1 broom, Dustpans and many other ^{small} articles - I was frequently at Plaintiff's House - I saw his wife Sister

Being Cross Examined by Defts Counsel the said Witness testified as follows; I was there two or three days at the time spoken of I made this memorandum myself alone without help at the Hotel this morning - The Plaintiff has been keeping House 10. to 12 years - (His wife) bought one table the \$4.00 one a short time before in Belvidere - They had the big Table when I first knew them 5 years since.

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I have paid 75 to 100 for Common chairs in Rockford. I have never seen anything of the stuff in the chests since. Mr Welch was a Wagon maker and lived in Roscoe - His House was furnished, so far as Kitchen things were concerned much better than other people in his Condition. They cooked for parties for other people in the neighborhood. The bed room was small just big enough for Bureau, Bedstead, and Wash Stand. There was a Bureau there ~~was a Bureau there~~ which I forgot worth \$12.00

The big room was 14 by 15 feet. The up stairs of the House was not used - part of it was lathed & plastered. The House was not painted. I think the Clapboards were Oak and Oak Shingles. This was all the testimony offered on behalf of the Plaintiff.

Thereupon the Defendant by his Counsel moved the Court to exclude from the Jury all testimony in relation to injury to real estate other than to the possession - Which motion the Court overruled, to which ruling of the Court the Defendant then and there excepted.

The Defendant then introduced the following testimony

Robert J. Cross --- who testified as follows

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I know the former residence of Plaintiff I have been in the house but not often - I cannot state particularly as to his house furniture.

I have been there in the best room once - The furniture was of an ordinary kind, quite common - I myself keep house in a larger house - This was an old frame house quite old - 12 or 13 years old - Covered with Oak Clapboards, and Oak Shingles - It was not painted, inside nor out - except where Plaintiff had tried his brushes on it.

It was an old house nearly gone to decay - I do not think it could have been moved - Most old frame houses of that sort will tumble to pieces when you move them.

I cannot tell the value of this house particularly - I do not think it was worth \$300.

Being Cross Examined by Plaintiff the said Witness testified as follows;

The House was in Winnebago County - I do not know anything of the filling in or frame - It stood on a foundation but not a solid one - It did not seem like a finished house - It had doors and windows - Was a common, ordinary house of the kind - Do not think the flood of 1837

8.1

was as high as the flood of June 1858. The last one was a great many feet higher than in 1857.

John P. Alleley being called as a Witness for Defendant testified as follows.

I was Assistant to the Chief Engineer. The Culvert was Constructed under my Superintendence.

I am an Engineer - Have been for 16 or 17 years - I superintended the Construction of the Culvert. The foundation was dug out four or five feet - from one to two feet below the bed of the Creek to gravel so hard that we could scarcely pick it - could not drive Sheet piling. We dug down to hard bottom we then placed timbers, crossways, and planks on the top.

Sheet piling was placed at the ends to prevent water running in. The Wing Walls were placed and are only used to keep the Embankment from running down - The Wing Walls are connected with the main body only by the bond of Masonry - but all rest on the same foundation of timber & planking. The Culvert was built in 1852 and 1853 - The foundation was good, as good as could be got in that neighborhood.

Defendants Counsel then put the following question. "Did you at that time think the aperture sufficient to discharge

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the Waters of the Creek - To which Question the Plaintiff by his Counsel Objected.

The Objection was overruled to which the Plaintiffs Counsel then & there excepted

In answer to said Question the said Mitrop testified. I did not. In building a Culvert where there is such a high Embankment. We Calculate that it may not all pass through at once, but that the Culvert and Bank would be strong enough to hold it for two or three hours, till it would pass off, and the Culvert was made extra strong with reference to that fact & the high Embankment. The Embankment was from 125 to 140 feet wide at the base and forty three feet high - fifteen feet wide at the top.

The Culvert was 105 feet long on the top of the Arch. The Wings then ran out 18 feet further. The foundation timbers and planks extended beyond the Wings - I do not think the Water was ever 21 feet high while the Culvert stood - I think the Culvert evidently washed from the lower end; Washing under the lower end until the foundation fell in and the embankment on it, and made a dam - I do not believe this washing was done at this time - but think it was the result of previous washings from long rains

I was familiar with the Country drained

8 3

by this Creek - It is about 5. or 6 miles long
and the Valley quite narrow.

The Ullings are not essential to the Culvert.
They may be carried away and the Culvert
remain. The Witness here verified the
drawings of the Culvert which were then
put in evidence, and a reduced Copy
of which is hereto appended. Marked

Being Cross Examined, said Witness
testified as follows

The Ulling Walls are
4 1/2 or 5 feet at the bottom, and about 3 feet
at top as appears by the plan on the drawing
in evidence. We did not expect the water in
times of freshets would all run off immediately
but that the strength of the Culvert and the height
& thickness of the embankment, and the weight
of Earth on top of the Culvert would hold
the water back until the Culvert could discharge
it.

William Havens, being Called by the Defendant
testified as follows:

I am an Engineer. was
in the immediate Supervision of building this
Culvert. We dug a pit five feet deep and
100 feet long - 30 feet wide, till we came
to a hard Compact gravel, to hard to pick
Timbers to Square 12 inches face, were

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laid across the whole width of the pit and filled in between with broken stones rammed in securely. The timbers were about 18 inches apart. On these timbers we placed 3 inch Oak plank. We attempted at first to drive Sheet piling. We then dug down four or five feet below the foundation a pit about two feet wide in that we put down plank, and fastened them to the timbers & plank above. We then put in heavy rubble stone and filled the hole with them rammed down. On this put the mason work.

The main wall of the Culvert was 5 1/2 feet at the bottom and 4 1/2 feet at the top (thickness) tapering at the back.

The wing walls where they joined the Culvert at the bottom were 4 1/2 feet thick, and decreased an inch to the foot as they went up, and became lighter as they ran back, tapering about 6 inches to every 10 feet of length which would make the wall about 3 feet thick at the back end. The stones used were heavier than usual. The Courses were from 14 inches to 2 feet. Some of them went through from face to back, in the main Culvert.

I had then been engaged, for 4 or 5 years in Rail Road and in heavy mason work in Boston.

I had aided in building Culverts in the Ogdensburg Road. I considered the Culvert & bank

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sufficient to hold the water until it could pass, and the embankment heavy enough to keep the Culvert. I consider that Culvert to have been built and put in with extraordinary skill and faithfulness.

William S. Pope - a witness called by the Defendant testified as follows; I am in the employ of the Defendant - I am Resident Engineer. Have been an Engineer in profession for 10 years. I have seen this Culvert. Have heard the testimony as to the mode of building - I think it was as firmly founded as could be got, and the Culvert was thoroughly built from the statement of the other Engineer - The Wing Walls are to hold up the Embankment from sliding down - and for nothing else. They have nothing to do with ^{the} solidity, permanency or Capacity of the Culvert. Mr. Norman is in charge of the tracks and Road bed from Belvidere to Oglethorpe. His business is to examine and report on the Condition of the road, &c under my Superintendence.

The Witness here introduced (by consent of the parties) Rain Tables kept by Prof. Porter of Beloit Wisconsin - The then from said tables testified as follows - The average fall of rain per year for 20. or 30 years is 36 inches.

In the Shower of 23rd May 1858 there fell at Beloit 6 miles from Racine, inches

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3.637

in six days including 23 May 9.725

In May 1857 15.46

14 days of that month rainy

In June 1857 in 9 days 5.52

In April 1857 6 days 2.35

Being Crops Examined by the Plaintiff
said Witness testified from said Tables.

"The Rain fall in June 1858 was inches 6.29

" " in May 1858 " " 10.294

" " on 3rd June 1858 " " 2.35

in August 1850 16.73

" about 21st August 1850 - - 8.21

" " May 31. 1857 - 4.50

Answer P Rogers being Called by Defendants
testified as follows. I Keep Observations
on papers from Smithsonian Institute one
mile East of Marengo.

Rain fall in May 1858 7.69

On the 4th & 5th - 13th - 17th - 20th23rd - 26th - 27th - 29th - 30th

In June 1858 - the Storm Commenced

at 1 A.M. of 3rd June & Continued to3 A.M. of 4th - therefore 3.98

J. W. Tollman - Called by Defendant testified as
follows. Reside near Winnebago Station

I Keep Register on the Smithsonian Institute
papers. In May 1858 therefore inches 6.86

on 3rd June 1858 4.20

Being Crops Examined by Plaintiffs Counsel
testified as follows

4.110

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The Storm Commenced in Morning of
the 3^d June 1858

from 3. to 7 A.M. there fell .79

" 5 P.M. to 7.45 P.M. " " 2.30

" 9 P.M. to 9.20 P.M. " " 1.58 4.17

Enoch Babcock, being Called as a Witness by
Defendants testified as follows.

I reside at Riley McHenry
Co. I keep Tables on System of Smithsonian
Institute - Roscoe is twenty five miles
North West of Riley. I find by inspection
of my tables that there fell of Rain in
May 1858 -

On the	Inches	
2 ^d May		.37
" " 3 ^d "		.52
" " 5 th		.28
" " 12 th		.50
" " 13 th		.45
" " 16 th		.52
" " 19 th		.16
" " 23 ^d		1.00
" " 24 th		.89
" " 25 th		.96
" " 27 th		.37
" " 28 th		.51
" " 29 th		.60
" " 30 th		.68

In all in Month of May 1858 inches 7.78
In Month of June on 2^d day of June - .35

On 3^d of June 235
Amos Norman being Called by Defendant
8 8 testified as follows:

I was Engaged as owner of Beloit branch in 1857 & 1858. I remember the high water of August 1857. One of the Wings of this Culvert was injured. There was a hole washed out below the end of the Culvert. I think the hole was near the Centre 6 or 8 feet deep. I was there and put in Stone on the upper side where the upper Wing settled from washing. The lower Wing on the lower side, settled some, by Earth washing out. In September I put in 6 car Loads of Stone. I filled the hole up with Stone. We had high water in February 1858 it did no harm. The next high water was in May 1858 about the 23^d ten days before that of 3^d June during this time the water kept up all the time. It did not go down so that we could see what the damages if any, were, until the Culvert went out. On the 11th May 1858 Mr Turner President of the road. Mr Mc Alpine the Superintendent and myself examined the Culvert. Its Condition was good. The Stone I had put in were in sight. I was there at 5 P.M. of 3^d June 1858. The water ^{was} high. Being Cross Examined by Plaintiffs Counsel

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the said Witness testified, as follows:
The Culvert was nearly full on the upper side - not near filled full at the lower end - The Defendant called no other Witnesses, and none being called by the Plaintiff in Reply the Testimony in the case was closed. And thereupon the Plaintiff by his Counsel asked of the Court the following Instructions which the Court gave to the jury - to the giving of which said Instructions the Defendants by their Counsel then & there excepted.

Instructions for Plaintiff

1 The Defendants in Constructing their Rail Road were obliged by Law to leave a sufficient opening through the embankment for the free passage of the water, so that the same should not accumulate unreasonably above the Road, and if they failed to do so and the embankment burst in consequence thereof they are liable to the Plaintiff for all the damage he sustained, if any, in consequence of such failure.

2 If the Defendant failed to provide a passage way of sufficient Capacity to convey the water freely through the Embankment, so as to prevent its unreasonable accumulation above the road, ^{it} would have been no excuse for them if the passage way they did provide was well constructed.

Given

Given

9 0
Given

3 If the Culvert which the Defendants provided for the passage of the Water through their Embankment, was not properly Constructed, and in Consequence of the bad, or insufficient Construction thereof the same gave way by the force of the Water, the Defendants are liable for all the Damages sustained by the Plaintiff, if any, in Consequence of such giving way of the Culvert.

Given

4. The Defendants were under obligations to keep the Culvert through their Embankment in repair: and if they neglected to keep the same in repair, and in Consequence thereof the Culvert gave way, the Defendants are liable for all the Damages which resulted to the Plaintiff, if any, from such giving way of the Culvert.

Given

5 The Defendants were bound to know the extent of Country drained by the Water Course in question, and to ascertain the floods to which it was subject and to provide a passage way under their Rail Road, reasonably sufficient for their free and safe passage.

Given

6 The Defendants were bound to provide a sufficient and safe passage under their Rail Road, not only for ordinary floods but for extraordinary floods also.

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The Defendants by their Counsel then prayed the Court for the following Instructions - of which the Court gave to the Jury the first, second, third, fifth & sixth - And the Court refused to give the fourth, Seventh and Eighth

To which ruling of the Court in refusing said "fourth, Seventh and Eighth" Instructions the said Defendants by their Counsel then and there excepted

Instructions prayed by Defendants

- 1 That the Defendant in the Construction of their Road were in the Exercise of a Lawful right, and were not responsible for Consequential damages arising from said Construction, provided due Skill and Caution were exercised by them to prevent injury to others - And that if the Jury believe from the evidence that the Defendants in this Case in the Construction of the road over the Water way in question, exercised as much Skill and Caution as a prudent man would exercise in the protection of his own property, if he owned both the road and the property charged to have been injured, And if the Jury further believe from the evidence that the Defendants as far as possible kept their Road over said Water Course in repair - then the Defendants are not liable in this action.

- 2 That as to such Counts of the Declaration

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Given

as Charges the injury to have resulted from insufficiency of the Culvert that the Defendants in the Construction of the same are held to the possession and use of competent Skill, prudence and Caution, as to ~~the~~ all matters of location, mode of building and Capacity. And if the Jury believe from the Evidence that the Culvert and Embankments were properly, Skillfully and prudently built, at the time, in relation to Location mode of Construction and Capacity, and so remained so far as Defendants could Control the same then the Defendants are not liable upon these Counts.

Given

3^d That if the Jury believe from the Evidence that the Defendants used due Care, Skill, and diligence in keeping the Culvert and Water way in repair, ^{there} that they are not liable upon the Counts for its being out of repair.

Repared

4th That if the Jury believe from the Evidence that the Culvert and Water way, at the time of the disaster, of the 3^d June, were out of repair. Yet if they also believe from the Evidence that such want of repair, was the necessary result of floods prior to that time, and that between such floods, and the time of the disaster, the Defendants were prevented by high water from ascertaining the injury and repairing the same.

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and also believe from the Evidence that the same was sufficiently, and Skillfully, constructed - then the Defendants are not liable.

Given
5th That the question presented in this Case is not whether the Culvert and Embankment, were sufficient to prevent flooding lands up Stream - but whether the same were sufficient to protect the property of the Plaintiff down the Stream - from dangers caused by the Erection & maintenance of the same

Given
6th That if the Jury believe from the Evidence that the Defendants in the Construction of this Road had exercised such Skill, Care and Caution to provide against damage to others, as prudent men would exercise in like Cases for the protection of their own property - then the Defendants are not liable for such damage as is claimed in the declaration as the result of insufficient Construction

Refused
7th That under the pleadings and Evidence in this Case - the Plaintiff is not entitled to recover damages on account of permanent injury to the real Estate (even if the Jury believe the Defendant guilty)

8th That the only damages which the Plaintiff

9 H
Refused

under the pleadings and Evidence, would be entitled to recover in respect to said Real Estate, and for the mere interference with his possession, and not for the damage done to the House and Lot.

The Case was then Submitted to the Jury, who retired to consider of their Verdict - and soon after returned into Court the following Verdict - "We the Jury find the Defendants Guilty and assess the Plaintiffs damages at Eleven Hundred Dollars"

And thereupon the Counsel for the Defendants move the Court for a New trial and in arrest of Judgment and file the following grounds.

Defendants in this Case by Joseph Marshall their Attorneys move for a new trial -

- 1st Because the Court erred in not allowing the motion made by Defendants to Strike from the files the Second Declaration on file in this Cause
- 2^d Because the Court permitted the Question to be asked of and answered by T. J. Remington "Whether the Culvert was of sufficient Capacity to pass the water in the Stream"
- 3^d Because the Court excluded the Testimony of John Van Stortwick upon the ground of Interest
- 4th Because the Court admitted Seeds of Palmer wife - and Tuttle wife without sufficient proof -

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9⁵ 5th Because the Verdict was Contrary to Evidence
and Should have been for the Defendant, no neg-
ligence being shown, but on the Contrary, proper
Skill, Care and diligence

6th Because the Instructions given on the part
of the Plaintiff were erroneous.

7th Because the Court refused to give the
fourth and last two Instructions asked by
the Defendants

8th Because the Court on Motion of the De-
fendant Should have ruled out and
Excluded from the Consideration of the
Jury all of the Evidence in respect to per-
manent injuries to the Real Estate, no sufficient
Evidence of title having been given

9th Because the Damages and Expenses
Loophole & Harbort
for Defts.

And thereupon by Consent of the parties in
Open Court, and Entered of Record It was
Ordered that the Defendants present their
points for new trial and authorities to the court
for Plaintiff by the first day of November
1889 - and that the points and authorities
on both sides be submitted to his Honor Isaac
G. Wilson at Chambers by the fifteenth of said
month of November, and that said motion for
new trial should be thereafter decided by his
Honor and Judgment to be Entered as of this date.

9 6

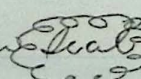
with the benefit of Excepting and perfecting
Appeal to Supreme Court (if the motion be
denied, as though the decision had been
made in time time - And thereupon
Afterwards on the 30th day of November AD
1859 in pursuance of said Order & agreement
his Honor filed in the Clerks Office of Boone
County Circuit Court, an Order refusing the
new trial above prayed to which Order &
ruling of the Court said Defendants by
their Counsel then & there excepted,

And thereupon on the same day and year
last aforesaid. Judgment is rendered by the
said Court upon said Verdict according
to said Order and agreement as takes Effect
as of September Term 1859. in favor of said
Plaintiff for the sum of Eleven Hundred Dollars
damages and Costs of suit by him expended

And thereupon Came the said Defendants
by their Counsel aforesaid and pray an
appeal from the said judgment to the Supreme
Court of the State of Illinois which is allowed
by the said Court upon the Defendants fil-
ing Bond with Security to be approved by said
Court in the sum of Twenty Two Hundred Dollars
Conditioned according to Law.

And it is also further Ordered by
the same agreement that said Bond be
filed, and the Bill of Exceptions submitted,

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to and approved by said Judge by the twenty
third day of December A.D. 1859. And afterwards
on the 23^d day of December A.D. 1859 -
the said Defendants filed in the clerks
Office of the said Circuit Court of Boone
their Bond in the sum of \$2200. with
Walter S. Newberry as security, approved
by said Judge ^{Amos now on file} 23^d day of December A.D.
1859 come the said Defendants and
present this their Bill of exceptions to the
said Judge, and forasmuch as the matters
& things therein set forth do not appear
of Record in said Cause, they pray the
said Judge to sign Seal and allow the
same of Record which is done

Isaac H. Wilson 

12.26.59

B 12.26-

Warranty Deed

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This indenture made this tenth day of January in the year of our Lord one thousand eight hundred and fifty three, Between Amos Tuttle & Abi A. Tuttle his wife of the Town of Roscoe County of Winnetago And State of Illinois of the first part, and Perry M. Welch of the Town, County and State aforesaid of the second part, Witnesseth, that the said party of the first part, for and in consideration of the sum of Two Hundred Dollars of lawful money to them in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed, and does hereby grant, bargain, sell, convey and confirm unto the said party of the second part, & to his heirs and assigns forever, all that tract or parcel of land situate and being in the Town of Roscoe, County of Winnetago And State of Illinois, And known And described as follows, to wit: Commencing at the North West corner of a lot decreed by the said party of the first part to John Jeffry And Mr. Richardson & now in the hands of Perry M. Welch being in the South West corner of Block A, in the Town of Roscoe County And State aforesaid, running thence north two Rods & Twenty One links to a post on the East side of main street in said town of Roscoe, thence East nine rods to a post, thence South five rods & seven links to the middle of the South Ninnekinick Creek,

thence westerly along the middle of said creek four rods
 And Seventeen links, thence north along the west
 line of the said lot Sealed to Jeffry and Richardson
 three rods And seventeen links to a post, thence west
 along the north line of said Jeffry & Richardson
 lot four rods & one half rod to the place of beginning -

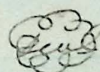
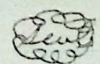
To gether with all And singular, the appurtenances
 thereto belonging, or in any wise appertaining: To have
 And to hold the above described premises unto the said
 party of the second part, And to his heirs And assigns,
 forever: And the said party of the first part, further
 And their heirs, executors And administrators, do cov-
 enant And agree to And with the said party of the
 second part, his heirs And assigns, that they are
 well seized of the premises above conveyed as
 of a good And indefeasible inheritance in the
 Law in Fee Simple, And that the said prem-
 ises are clear of all incumbrances whatsoever.

And the said party of the first part the afore-
 said premises unto the said party of the second
 part, And his heirs And assigns, against the
 claim or claims, of all And every person whomsoever,
 do And will warrant And forever defend by these presents.

In witness whereof, the said party of the
 first part have hereunto set their hands And seal on
 the day And year first above written.

Executed in presence of
 Mr. J. Smith

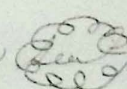
Amos Tuttle
 Eli A. Tuttle

State of Illinois, County of Mamebago ss.

I Mr. J. Smith a Justice of the peace in and for said County, do hereby certify that Amos Tuttle & Abi S. Tuttle his wife, personally known to me to be the persons whose names are subscribed to the foregoing deed as having executed the same, appeared before me this day in person, and acknowledged that they signed sealed and delivered the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

And the said Abi S. Tuttle personally known to me to be the wife of the said Amos Tuttle and as the person who subscribed said deed as such, having been by me made acquainted with the contents and meaning of said instrument of writing, and examined separate and apart from her husband, acknowledged that she had executed the same, and relinquished her dower, and all rights whatever, whether of dower or otherwise, in and to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and that she does not wish to retract. Given under my hand and seal at Rosebosc this twenty eighth day of March A.D. 1853.

Mr. J. Smith 
Justice of the Peace.

State of Illinois

County

Recorder's Office

Filed for Record on the — day of — A.D. 18—

At — O'clock — M. —

Recorded in Book _____ of seeds, page - and families
_____ - Records

Ms. Q. 95.

Monmouth deed.

This Indenture made this Twenty fourth day of September in the year of our Lord One thousand eight hundred and fifty one: Between Nathan P. Palmer and William L. Palmer of the Town of Roscoe, County of Winnebago and State of Illinois of the first part, and Perry M. Welch of the Town, County and State aforesaid of the second part, Witnesseth, that the said party of the first ^{part} for and in consideration of the sum of three hundred dollars lawfully money to them in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed, and does hereby grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that tract or parcel of land situate and being in the Town of Roscoe, County Winnebago, and State of Illinois and known and described as follows, to wit: Commencing at a stake fourteen rods & Eleven links South from the North west corner of Block Market (A) in the Town of Roscoe, thence East four & one half rods, thence South to the line of James Thompsons land, thence in a westerly direction on the line of said Thompsons land to the East line of Main Street in Roscoe, thence on the East line of said Street four rods and fourteen links more or less to the place of beginning. Also the privilege of taking the water from the South Winnebago Creek at a point where Second Street in Ros-

Coe Crosses, said Creek, with the privilege of conveying it by a race across the land lying between said point and the shop on the parcel of land above described, conveying to the party of the second part the entire use of all the water that may be running in said creek at the point on second street above named.

Together with all and singular, the appurtenances therunto belonging, or in anywise appertaining;

To have and to hold the above described premises unto the said party of the second part, and to his heirs and assigns forever: And the said party of the first part, for them and their heirs, Executors and Administrators, do Covenant and agree to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed as of a good and indefeasible inheritance in the Law, in fee simple, And that the said premises are clear of all incumbrances whatsoever.

And the said party of the first part the aforesaid premises unto the said party of the second part, and his heirs and assigns, against the claim or claims of all and every person whomsoever, And all liens and incumbrances, And the taxes and assessments aforesaid, do and will warrant and forever defend by these presents.

In witness whereof the said party of the first

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part have hereunto set their hands And seal
on the day And year first above written.

executed in Presence of
Mr J Smith

signed

Nathaniel Palmer

Hannah S. Palmer

And on the back of the foregoing
Deed, or Instrument in writing, is the following
Certificate of Proof of Acknowledgement, to-wit:-
State of Illinois, County of Winnebago S.S.

I Wm J Smith a Justice of the Peace, in and
for said County, do hereby Certify that Nathaniel
P. Palmer & Hannah S. Palmer, personally
known to me to be the person whose names are
subscribed to the foregoing Deed as having executed
the same, appeared before me this day in person,
And Acknowledged that they signed sealed and
delivered the same as their free And voluntary
Act And deed, for the uses And purposes therein
set forth. And the said Hannah Palmer
is personally known to me to be the wife of the
said Nathaniel P. Palmer, And as the person who
subscribed said Deed as such, having been by me
made acquainted with the contents And meaning
of said Instrument of writing, And & arrived separate
And apart from her husband, Acknowledged that
she had executed the same, And relinquished
her dower to the Lands And tenements therein
mentioned, voluntarily, fully, And without com-
pulsion of her said husband. Given under

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my hand and seal at Roseve, this twenty
fourth day of September A.D. 1851

Wm J Smith 
Justice of the Peace

On the back of the above deed, or instrument in
writing is the following indorsement, to wit =

State of Illinois,
Winnebago County.
Recorder's Office

Filed for Record on the 21 day of January A.D. 1852,
at ten O'clock A.M. Recorded in Book B of Deeds,
Page 87. And Examined.

No. 95

H. Spafford, Recorder. Seal.

Know all men by these presents that the Galena and Chicago Union Rail Road Company and Walter L. Newberry of Chicago, Cook County, Illinois are held and firmly bound unto Perry M. Welch of Winnetook County Illinois in the sum of two thousand two hundred dollars, lawful money of the United States of America to be paid to the said Perry M. Welch, his Executors, Administrators or assigns, for which payment well and truly to be made, we bind ourselves, our Successors and assigns, Executors and Administrators jointly and severally firmly by these presents.

Sealed with our the Corporate Seal of said Galena and Chicago Union Rail Road Company, and with the Seal of said Walter L. Newberry. Dated this Seventeenth day of December One Thousand Eight Hundred and Fifty Nine.

The condition of the above obligation is such, that whereas the said Perry M. Welch did on the twenty third day of September at the September Term of the Boone County Circuit Court obtain a judgment against the said Galena and Chicago Union Rail Road Company for the sum of eleven hundred dollars damages, and costs from which judgment the said Galena and Chicago Union Rail Road Company have payed an appeal to the Supreme Court - now therefore - if the said Galena and Chicago Union Rail Road

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Company shall duly and diligently prosecute the
said appeal with effect, and shall pay whatever
judgment, damages interest and costs, which
shall be given, adjudged or awarded in case the
said judgment is affirmed, by the Supreme Court,
then the above obligation to be void

~~W. S. Newberry~~ Pres,

~~W. S. Newberry~~

Otherwise to remain in full force and effect.

W. S. Newberry

Pres.

W. S. Newberry *E. P. B.*

Letter

W. M. Sarabee

Secretary

Approved this 20th day of December

A. D. 1859 - Isaac C. Wilson

Filed Dec. 22. 1859.

J. H. Whitney, clerk.

\$ 0.50

\$ 14.66

Total costs of Transcript \$29.75

Perry W. Welch }
 as }
 The Galena & Chicago }
 Union Rail Road Company }
 108 }
 Case - Change of Venue from Winnebago County
 Nov 30, 1858 -
 Costs in Winnebago Circuit Court - Clerks Fees
 Dec 10. Ap 25. Duns 40 fil p 30. M.C. Nov 20 ORO do. 20 1.35
 M & Dec 20. Ord do 20 B 30 C do 20 Ct 22 35 1.25
 Shff Winnebago Dev. Duns 1.15
 Peff C Min. Co. 3.75

Sfc. Apr 15. fil p 5. Duns 20. Ch. Nov 20. Ord do 20 B C 30 Apr 20 1.30
 Cert 18 35 Tr of Rec 1.00 1.35
 Defts Costs Min Co 2.65

Defts costs }
 Costs in Boone Circuit Court }
 Mich Term 59 Fil 5 prep 25 Dec 10 Appt Atty 15 Ord C 20 m t e c 30 1.00
 Wit Offh 10 10
 Peffs Wit Eliz Pangburn 1 day \$1⁰⁰ 16 m t r 80 1.80
 Mich T. 1859 Defts C Apr 15 m t Cert 20 Ord m t e c 20 Ord C 20 75
 Ord de f c 20 m t e c 30 Copy 20 90
 1.545

Peff Costs }
 Sept Term 59 Dec 10 3 pre & 2 subp fil 90 2 d. d. 90 s. i. p 20 - \$2.10
 Ord July 20. Cal t day Ju 15 - 12 Nov. Si. O. Co. 50. July 20 \$1.20
 9 m t A 45. Rec t Ent Nov 20. Ord Ju 20. Ent do 20. Dec do 10 Ord 4 20 \$1.40
 Ex doo fil 50. Ent Dunt t Sat 25 Ord C 20 m t e c 30 1.30
 Copy 20 11 m t offt fil 110 1.30
 7.30

Jury fee \$3.00 Ricket do 1.25 4.25

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Has Shiff (Knap) 80- Jensen 90	\$1.70	
Shiff Minnibago (Miller) 2 Subpos 1.50 + 2.00	3.30	5.20
Peffer Nitropas Asa. A. Abbott 5 ds Memo	\$5.80	
Geo. L. Smith 4 ds Memo	4.80	
Francis Griswold 3. ds Memo	3.80	
Ebenezer Brown 4 ds Memo	4.80	
Nathaniel Palmer 4 ds Memo	4.80	
W. M. Neacock 4 - Memo	4.80	
John A. Leaman 3. ds	3.00	
Jennie M. LeRoy 4 ds 14 ^{ms}	4.70	
T. S. L. Remington 4 ds. 14 ^{ms}	4.70	41.20

The above Peffer with Certified, as ^{made by} by the Cash

Peffer with not Certified by Cash Saml. Rathbun 5. ds Memo	5.80	
Clerks Fees M & E Bal & Minnibago 30. Copy 25		50
fil Pl's Mot. 20. Ord. Pl. just 20. Out Pl. 5. Ent. just 20. Ord. mens. 20		90
Mot. St. Dec. fil 20. Ord. not dec. 20. Ent. Ex. by Left 20. Mot. 4 th 20. Ord. dec. 20		1.00
Ent. mens. 20. time Ent. 20. Ord. fil. 20. Jan. just 20. Ord. dec. 20		1.00
Judges of T. 20. Ord. hear. App. 20. M & E 30. Copy 20. Doc. fil. 15. C. & H. 35		1.40
Ent. Sub. 20. 4. Q. 20. 4. mit. Offt. H. 20		.85
M & E Minnibago 30. Copy 20. Doc. 15		65
		1.00
		0.80

Lefts Nitropas

R. J. Crisp 2 days 18. ms.	\$2.90	
E. P. Babcock 4. - 18 -	4.90	
O. P. Rogers 5 ds 14 ms	5.70	
J. M. Johnson 4 ds 22. ms	5.10	18.60

110 State of Illinois {
Boone County { J. Daniel H. Whitney, Clerk
of the Circuit Court in and for the said County
of Boone, And State aforesaid, do hereby certify
that the foregoing is a true copy of the Records in
the aforesaid Entitled Cause, "My Mr. Petitioner
The Galena & Chicago Union Rail Road Company,
And of all the Original papers filed therein;
And which said Papers are lettered and
designated in the same manner as alluded
to in the progress of the proceedings of said Cause
And set forth in the foregoing transcript; And
all of which are hereby transmitted to the Clerk
of the Supreme Court of the Third Grand Di-
vision of the said State of Illinois, at the City
of Ottawa.

Witness, Daniel H. Whitney, Clerk of
the said Boone County Circuit Court, And the
Seal thereof at Redwine in said County this
fourth day of April A.D. 1860.

Daniel H. Whitney, Clerk.

State of Illinois
Supreme Court.

Third Grand Division

April Term 1860.

Galena & Chicago Union Rail

Road Company
vs
appellant
Perry M. Welch.
appellee

appeal from
Boone County.

Afterwards to wit on the 17th day of April 1860. at this same term of the court, comes the said Galena & Chicago Union Rail Road Company, by C. Anthony its attorney & says, that in the record & proceedings aforesaid & also in the rendition of the judgment aforesaid there is manifest error in this to wit—

1. The court erred in not allowing the motion made by defendants to strike from the files the bench declaration on file in this cause.
2. Because the court permitted the question to be asked & answered by the defendant witness J. S. Remington whether the culvert was of sufficient capacity to pass the water for the stream.
3. Because the court excluded the testimony of John Van Antwerp on the ground of interest.
4. Because the court admitted deeds of Palmer & wife and Tuttle & wife without sufficient proof.
5. Because the verdict was contrary to evidence and should have been for the defendant; no negligence being shown but on the contrary proper skill, care & diligence.
6. Because the instructions given on the part of the plaintiff were erroneous.
7. Because the court refused to give the fourth & last two instructions asked by the defendants.
8. Because the court on motion of the defendant should have ruled out & excluded from the consideration of the jury all of the evidence in respect to permanent injuries to the real estate, no sufficient evidence of title having been given.
9. Because the damages are excessive.
10. Because the court erred in refusing to grant a new trial.
11. Because there was a variance between the evidence & the declaration. ^{the said judgment should have been annulled} And the said Galena & Chicago Union Rail Road Company prays that the judgment aforesaid, for the sums aforesaid & for other errors apparent in the record & proceedings aforesaid may be reversed, annulled & altogether held for nothing & that it may be restored to all things which it hath lost by occasion of the said judgment.

C. Anthony
Attorney for Appellant

Filed April 17, 1860
L. L. Lynch
Clerk