Supreme Court of Illinois

Peter Carraher

vs.

Illinois Central R.R.Co.

71641

Hate of Ollinois Sos Theas before the Amorable arcing Court of the County of Alexander and Statex of Ollinis begun and held at the Court House in the City of Caire in said County and State, on Monday the Sixth, day of April of the April Jon of said Court at 1868. Present the How John Olney Judge of said Court Goresiding and holding the same, Cohe, 2, Harman Clerk Osel Jellorgan Sheriff & O. J. M. Cartney Fates Ally, Peter Earnaher The Illinois Central Rail Rail Rompany Se it Commendered that heretofor to. loit: on the 1st day of Avender as 1867 came the Clanitiff herein by D, I. Linegar his attorney and sendont of the clerks office of said court a writ of Summore against said Defendant which is in the words and figures as follows, to wet! Hati of Allinis & Margle of the Alexander County She People of the Offate of Cellinis Arit

To the Sheriff of said County; Feeting be command you that you summon The Ollinois Central Rail Road Comp any if it shall be found in your County to be and appear before the circuit Court of said County on the first day of the next term thereof to be holden at the Gurt House in the City of Caire in Said County of Abrauder on the 1st Monday of January next to auswer unto Otter Canaker in a plea of Case Damages Twe Hundred dollars And have you then and there this writ with an Endorsement thereon, in what manner you shall have executed the Same, Witness John & Harman derk of our said Court, and the Seal thereof, at the City of Cairo in Said County this It day of Chrember AD1867. Am 2 Harman Clerk Which said wit was by pain Theriff duly returned mito the clerks office of said Court enth the following Endorsement thereon to wit Sheffe Return State of Selinois 2 55. Abrauder County & Served the enthin wit by delivering a true copy of the sand cerit to James Showson Defendantythe President of the within Hamed. agent of the within named corporation not residing in my county 18847-2 Thereifs Theoft. "5" "Sel Gillingan Sheriff"

And afternario, to int: on the 27th day of December and, 1869, the Placetiff filed herein his De claration, which is in the words and figures, following, tout! State of Selivies 3 on the Circuit Court." Abrauder County 3 Do the January term ad 1868 In this action, Geter Caraher the plaintifferby D.I. Linegar his Attorney complains of the Celiaris Ecutral Rail Avad Company, defendant summoned oc in a plea of Orespass on the case, For that whereas on the 1th day of October in the year of our Ford One Thousand Eight hundred and Sixty seven at the County of Alexander and State of Celivis, the defendant Ivas, and still is a Kailroad Corpora-- tion, owning and possessed of, and having control of a certain ruilroad sunning through said county, to gether with the ground or land traversed by sain Road two hundred feet in width, and of the rutire length of said Kailroad through said county, and which sain Rail and had been open for use mon than six months before the Commencement of this sout, And the said plaintiff averathat it was the duty of said defendant to brechand Keep in repair fences on the sides of. said lailroad, suitable and sufficient to prevent; cattle horses, sheep and hoys from getting on said sailroad, except at the Crossing of public orade and higherry &

within the limits of towns, cities and Villages, and where the same run through unimproved Lando, at a greater distance than five miles from any settlement, through lands where proprietors had fenced and except where proprietive had agreed to fence, and to construct suitable cattle quards, at all sailwand assings of public highways to present cattle, horses sheep and hogs from gett ing on such railwad to, And the said plaintiff further averes that upon said ground or land owned and possessed by said defendant and at a point on said Rais road required by law to be fenced, and which said print was not ferced as the Law reg - sieres, there move is and before and on the same day and year aforesaid, there undo a certain hale or well of great depth, to wet i of the depth of ten feet which said hale or well had been day and used by said defendant, to ungs at the County of Alexander and State aforesaid, Set the said defendant well knowing the premises, while it was so the possesser and occupier of the said land, messuay and premises with the appartenences, and while there was such hole or well as aforesaid ito wit in the day and year aforesaid at to with the bount, and State afressie urrugfully and unjustly permitted said

hole or well to be and Continue, and the same was then and there so badly, insuff-iciently and deficionsty covered, that by means of the premises and for want of a proper and sufficient covering to said hole or well the said placetiff's mule which the ow'd plaintiff was then and then ording over the said lands or grounds be-- longing to said defendant, and which said lands or grounds, was not fences as was required by Law as aforesaid, in search of his said plaintiffs cattle, which said Callle had strayed, and was pusturing upon said lands, then and there necessarily and unavoidably slipped and fell into said hale or well, and thereby the Plaintiffs said mule of great value, to wit; of the value of two Hundred. and fifty dollars, was then and there Killed, By means whereof the said plaintiff has been greatly injured and damaged in his business, to cut; at the County of Alexander and State aforesaid to the damage of the daid Plaintiff of Hive Aundred dollars, and therefore he brings his suit &c "My D. J. Linegas" "his Chily And afterwards to cent, on the yell day of

And afternards to ceit; on the yell day of January 1868, the Defendant by Green & Gebert its altys files herein a Denner to Maintiff Dedaration, in and and figures as follows things

"The Illinia Coutrue Demurer to Railroad Company lease
Ofter Caraher Thon And the said defendant Comes and defends So and says the said declaration is not Sufficient in Saw, Wherefore vo." Green & Gieberh" " for Deft And afterwards to cert; on the get day of January of the January Jerry of said Ourt 1868, the following proceedings were hat by laid Quest on this cause and Entered of Record to with' The Caraher Case Orderof Court Rail Road Company This cause corning on to be heard this day upon the Demuner to the Declaration and being argued by Coursel, the Court being fully advised in the premises and having duly considered the same is of opinion that said demurer ought to be, and the same is hereby nerruled." And afterwards to wit in the 10th day of January of the aforesain January derm of said Court. ad1868, the following proceedings were had ni this cause and Entered of learned to wit;

Peter Caraher J. Cason
The Illinois Central Cail Wood Company" To motion by Defendants Coursel, leave is January 18th 1868 to plead, And afterwards to wif; on the 17th day of January 1868 the Defendant filed its certain plea herein, which is in the words and figures following to wik! Gels. b. A. R. b. S ads Scass Teter Caraher 3 And the said defendant, comes and for plea days the daid plaintiff ought not to mintain his said action against the Said defendant, because it says, that before and at the time when voin said Reclaration mentioned, the said Plaintiff to viding his said mule, slipped and fell with said Hale or well, whereby to, as in said declaration alleged, the said Chaintifferos mideing his said mule over and upon the land of the said, defendant so carelessly, negligently and improperly that by reason thereof, and by and through the want of due care inriding the said mule, the said Plaintiff slipped and fell into the said Hale or well, whereby the said mule was then and there killed as is in said Declaration, which Killing of the said mule was caused by the carelessness and negligence

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Allea

of the said placetiff as aforesaid and which Killing is the supposed grievance in the Said to verify wherefore to Freen & Gelberk And on the Same day and Jear last aforesaid the Daf Plaintiff by his atty filed herein a Demurer to Defendants said Plea which is withe words and figures as follows to wit; Demerer Hate of Illinois 3 "In the Circuit Court"
Alexander County 3 Jan Jerm 1868, Ollea Alexanan

Peter Canaher

Benurer to Plans and the dain Deft comes and says the said plea of the said Deft above pleaded is not sufficient in Law". Linegar". atty. Peff" And afterwards to cert; on the same day and Jear lust aforesaid the following order and made & said Court in this cause and Entered of Record to earli "Teter Carraher Son Casi"
The delining Central
Rail Roan Company" Ordered that this cause stand continued until Court in Course."

And afterwards to with on the 7th day of April of the said April Form of said Court ab1868, at to, present to as first herein afresaid the following further profeedings were had by
the Definition, come again and its offly
said count in this cause and enterted
filed herein, its Pleas, in the unit and
of Record of to their; Peter Caraher Care Ollinio Central Rail Road, Hea And the said defendant ans & defendant I says it is not quiety of the Said supposed grievances in the said declaration mentioned, nor any mor si ther of them, nor any part there of and of this it puts himself apon the country for "creen & Giebert for" defendant" And in the cause of agreed year last afresaid the Placetiff filed herein his Demuner to Claimtiffs suid Plen, in words and figures as follows, State of Ollinis 350, In the Executy Court
Alexander County 3 of Alexander County
April Form 1868 Ater Carraher & Denuser Al, Cent R.R. Co and the out Plantiff comes and says And on the surve day and year lust afresuid to wit in the 7th day of April at 1668. the following proceedings were had by said Great on Changans and Entrateflacido tout;

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"The Ollinois Central"
"Pail Road Company This day came the parties by their respective attorneys, and on motion leave is given the Reference Hacitiff to file special Causes of Denurer to to Defendants Plen, Thereupon the mataninant files herein the following Demover to wit; That of Ollinis, I In the Circuit Court
Alexander County of Alexander County
Office Jerm 1868 Peter Cannher & Demines Demur Cely Cent, R. R. Co. Mea and the said Plaintiff Comes and surgs that the plea above pleaded is not sufficient in Law to," Special Course assigned, The said blew only amounts to the general issue," Whereufin this course come on to be heard upon the Demurer of Racitiff to Defendants Plea. Order and the Court after heaving arguments of Counsel bud being now fully arrised in the premises is of opinion that the Plaintiffs suid Denurer ought to be, and the same is herely sustained, and leave is quein the Defendant to file additional pleat (8+47-10)

Thereupon on the day and year last hereen aforesain the Effectant by its Alterneys filed herein its, further plea in this behalf which said Clears in the words and figures as follows to with Ollinio Central A R lev 3 Case" General Ceter Canaker Chue, And the said defendant, comes and defends to and says it is not quiety of the said supposed grierances in the Daid declarationed mentioned nor any nor either of them nor any part thereof and of this it puts itself upon the Country to Green T Gilbert. for Defendant And the said Huitiff doth the like "Do Lineyar ally for Seff

And afterwards to wind; in the 21 thy of April. of the aforesaid April Ferm of said Court ad 1868, the following proceedings were had, and Entered of Record in said Cause m' this Gurt, to wit; "The Illinois Central Rail ?
"Ona Company Friding - & And now on this day again came the parties by their respective alterneys, and thereupon to try the issue joined between them came a Jury to wit; Stephen O Laughlin, Michael Mahoney, Martin Keating, Patrick In cheverty, Rufus Boroles, Il Hutchason, Dennis Mahoney, Valrick Madden, Odward Shannessey, B. Fr. Smith, Neury Procoward John Cahill, tudoe good and lanful menof the Country, who being first duly selected Empannelled and sworn according to law after having heard the evidence, arguments of Coursel, and seceived the instructions of the Court retired to deliberate upon their sendich; and afterwards on this same day returned here into open court. the following verdict. to wit; the the Jury find the Defendant Guitty and assess the plaintiffs damages at two Hun-- dred Dollars, " The Defendant thereupon by its altys, comes and mores the court for a new trial herein, Aux afterwards to with on the 29th day of April of the April Term of said Count ad 1868 the following further proceedings were had, by said

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Dingments,

Court, in this cause and Entered of Record to. Peter Canaher S Order of "Case" The Illinois Central & Cail And Company Judgmenh Vc This Cause this day again came on to be heard upon the motion of Defendants for a new trial and the court being one fully advised in the epremises is of opinion that said motion ought to be, and the same is hereby overruled, The Defendant by its Altorneys then moved the Court in arrest of Judgment, which motion in arrest of Judgment is also onerenled by the Court, It is therefore Considered by the Court that the said Slaintiff have, and secous of the said Defendant the said sum of Our Hundred Dollars for Shis damages so assessed as aforesaid, and also the further our of & - for his costs and Charges herein Expended, and that Execution may issue therefor, Upon motion of Defendant it is allowed therty days to file Bile of So ceptions herein, and the prayer for an appeal to the Safreme Court of this State, by Defendant, is allowed by its, filing Mind, conditioned according to Law, in the Sum of Three Hundred Dallars, with security to be approved by the clerk of this court, within therty days. And afterwards, to wit; on the 10th day of May ad 1868 the Defendant filed herein its affect Bould, in words and figures as follows to wit;

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appeal "Chrow all men by these presents that we

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The Alinois Central Rail Road Company as principal, and Chillian A. Green as security, are held and firmly bound unto Feter Carraher in the few al sum of Three Aundred dollars for the payment feolich fum well and truly to be made to the said Peter Carraher, He beild ourselves, our succession administrators and Executors, jointly severally and firmly by these presents, signed sealed and dated this centh day of May 1868, The Coudi Con of the above alligation is such! that whereas the said Peter Caraker, on the Quenty ninth day of April 1868, at the April Term of the Alexander County Circuit Court State of Minois 1868, in a certain cause then and there pending wherein said Peter. Caraher was plaintiff, and the said Allinio Central Rail Road Company was defendant, d'drecover a Judgment against said Illinois Central Rail Road Company for the sum of Two Hundred dollars, and costs of said suit; from which Judgment the said Illinio Central. Rail Road Company has prayed awappeal to the Supreme Court of the State of Illinois_ Now if the said Illinois Central Rail Road Company shall well and truly pay or cause to be paid, the said fudgment, costs mark interest and damages, in case said Judgen-- ent shall be affirmed, and shall also pros ecute said appeal to effect, then this obligation shall be mull and mid

otherwise to remain in full force and lue,
Ollivis Central Railroad Company Sent of William William Afreen attendanter Sine William Afreen Affroid by me this 13th day of May 1868 . Clerk And afterwards to wike on the 28th day of Tway 1868 the Defendant filed herein its Bill of Exceptions which is in the words and figures following to wit. Bill of (over) Exceptions,

that on the trial of the above entitled Cause the Plaintiff Deter Carraker, mus snorn as a netures and testified in his own behalf as fallows; -, I am the Plaintiff in this suit; I had , last two Cours and was no Rearch of them this was last October - I had been " hunting them several days before " round and about the Dame place, ,I was on the left of the Railroad , above the tressell work niding a mule and heard the loves on the other , side xx - Crossed over the Rail-roadabore the charly I mas going along on the right of the Rail soit as you go up a drove up a piece further, and the first thing I knew I found the mult and as he ded . he threw me off, and , by his second plunge he got his for " feet out of the well and got his head " feet in, and I got hold of the brille , Me went, down lousedirable mays in ", the well seeing I lould not do any good or get the mule out, of the well alone of

18847-15]

Ears and hired of men with their should and spades. I was to pay them to aughor and A10 if they got the mule out. When we got back to the mele the mule was dead. It may above the tressel nork -, It was about to feet from the Rail Road Frack, The right of may mus not fenced in at that hours, I would not have taken, \$200 for the mule, it was north \$200-, this was East October -The well was not three feet across the top, it was bounded up there was no curbing, or protection around the well there was no path leading to it, I did not see any path in a hundred Yords of the well; The timber was cut offthe growth around the neel was grassand lines, that runs and laps among the grass. In fact you louddut see the well - the grass and bries were all around it. This was Either 28 - or 27th of October Borne of the grass mas one foot I some of it his feet high - there was no water in the well-. And thereupon the Plaintiff introduced as a notues in his behalf. auchony Banks who was known and testified as fallows! I was one of the fire that he carried up to help get the mule out of the well. I caux where the mules' had feet slipped ento the well- the faddle was exemmed over his head I he was dead the mule

My destret extended from bain to Cobden in Union County - On Cross Oxaccentation bituess said he did not Know any thing about the right of way below the Mounds as the timber is not - Cleaved off : " And this was all the Evidence offered by the Raintiff" And thereupon the Defendant introduced as a Statuess on its behalf Dennis Cody. who being duly severy, testified as fallows I am Roadmaster for Allenois Central Rail - road - Company - have been on this end of the road for Eight or nine years; It is my business to loak after the Condition of the road and, Company's right of may-I have had no decetions about the service right of may below the Mounds - O Know nothing about the right of may between the treetle, work and the Son bridges -The timber has been but off the right of May all above the mounded but not between the treelle mork & the Iron briggs - I have been along the between the battle work and the Iron bridge nearly every days for the Lixt two years past, Therewas no well where Carraher testified there. the drow bridge Except one blose at the shouty, The Company to my knowledge had any well day there Except one blose to the I havely, I did hear - the statement of Carraher. The well close to the thanky

is close to the trestle north, it is not. the well spaken of by Carraher -And there whow the Defendant introduces, as a Witness in its behalf Datois Jones who being duly morn testified as follows I have been Employed for Rex or leven Years as Hatchman on Illinois Central Rail road. I stay, in the Charly fust at the sud of the trestle nork -There is a well at the Charly, that I use theard Mr Carraher, o testimony, The well he spoke of, was not the well by the Sharly, no mule fell in it. It is my business to go along the road every day and I go along I every day, I Know there is no well on Company's right of may between the trestle nork and the From Andge, I went along where it was said the mule mas, and did not see the well there, And therespow the Defendant Introduced as a witness in , do Rehalf Anlashman who being duly error testified as fallons; I have been foreman for several yours on Allenois Central Railroad, between Mounds and Cairo - have passed along the sailroad, every day for two years between the crow Bridge and the treelle work & Know there was no luch well as was spake of by Deler Carraher,

go along the road and see that it is all right - and this, was all the endence offered by the Defendants The Defendant then moved the Court. from the sudante should the It apon the Endence afores aid to customet the Juny Shahe -: " llules you believe from the Endence that the Placetiff's mule michoul any neglegence on the part of the plaintiff unavoidably or accidentally fell into a well on land, belonging to, or in the possesion of the Defendant, and that Daid well was negligently left uncovered and Exposed by defendant or its agents I that in lowlequence of such negli gence by the defendants or its agents the succe. was killed, you should find the Deft, not guelly; Cho 2 of you believe from the Endence that none of the agents servents or Employees of the defendant had Knowledge of the Excetance of said well you should find the defend -aut not guilly" Und weless you believe from the endence that the Defendant either Dweed, or was in the was situated; you should find the Defendant not grilly"

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on the right of may, It is my business to

At The Court enstructs the Jung that before you law find the defendant quelly you must believe from the Oredence, that the plaintiff methorist any neglequel, on his had node his much wito a well, duy by the defendant on ground owned by the Defendant, and that the defendant. knowing such well to be dug left it sucoverello, If a well duy on ground owned by the defendant by third parties, without its Knowledged or loused and paid well remained unkovered without the Knowledge of the Defendant, the defend-and is not guilty "
So b. Mules there is Endence that the Rail Road Company either owned or was in the actual possession of the land on which the well was duythere is no presumption that the Rail

Road Company or its agents knew of the Existance of the well

The owner of an weeklossed mort. -out the Knowledge of the owner is not leable for a much which was rode on, to Ruch woodland without the knowledge of Ruch owner"

Muless you believe from the Endences that the defendant or some one of its agents, Knew the well in question was in Existance the defendant is. not guilty ? over the uneuclosed land of another, is not a matter of right; it is, at most an immunity" If you believe from the circlence that the Defendant mule fell into the well in lousequence of the awknownness of Defendants, mule, you should find defendants not quelly hereupon the Court gave to the Jung Said 1st Das & Third westweetons but refused to gere daid 4" 5" his y's 8" 9" 10" custometions to the Juny; to which the If then, I there excepted, and the Court at the unstance of the keff instructed the Juny as fallows to mit! The loud customets the Juny that if they believe from the Endence, that the Illewis Central Rail Road Company had a well upon their land, or apon they Lord Owelessly & regligently, left it unevered & Exposed in Ruch

manner, that the Dlantiff's mule unavoidably fell into vaid well that thereby last to the Rais Deffer thew rin that Execut the Rail Road Company is leable, and the Jury Should find the Plaintiffs damages, at euch amount as the Endence thour him extetled to." to the giving of which paid instruction. of Deff, Ift then there Excepted and thereupon the Dais Jung gave their render against the Deft - Whereupon the 2ft felled the fallowing mation for a new Teles Caraker & Mation for 25 John trial Illeriores Central 3 Rail Road Company of The said Defte by Green I Tellet its attorneys loves and mores the Court for a new trial in this Cause, for the following reasons to mit:-The verdeel is Contrary to the law, The verdeet is contrary to the Endences I he verdeet is Contrary to the law the Ordence, 300 The Court admitted surproper testimony 44 on the part of the peff to go to the Jung -The Court of Cluded from the Jury proper testimony offered by Deft-The Court refused proper westweeting, asked for on part of Deft'-[8947-21]

The lour gave infroper instructions to
the Jury on part of OffThe lourt gave instructions, to the Jury
which were not the law;
The Jury disregarded the instructions of
the Count" "Green & Tillet"

alty for Oft " But the Court overruled paid motion to which the Teft thew & there ex cepted, Whereupon the defendant filed the follow Jeler Carraher Sholion in arrest of of Judgment to mit;
Illinois Cidal Rail Road Co. 3 of Judgment," Said Deft by Green & Fillert its attys Comes and mores the Court to arrest the judgment herein, for the fallowing reasons to mit; Law to warrant the Court in rendening Judgment for Deff, whom the Paid Verdiet, Said Offis not entitled in law to a Judg-ment upon his declaration to aid verdiet. 3rd Off has made no luch lase as the Daid verdiel; "Treen & Tilbert" But the Court overruled paid motion in arrest of Judgment and gave Judg.

Said Juny against the left, to which the Off their their ex cepted, and in as much as the matters aforevaid do not appear of record, the source for the defendant presents this Ries of Exceptions through that the same may be signed the record by the lout to made a part of the record in said sauce and it is done accordingly—

John Olney

Judge Cell

State of Illinis 300 Alexander County 300 Court in and for said County and State do Chereby Certify that the above and fire ging is a true parfect and complete Transcrift of the Court of proceedings had by you said Court in aforementioned Course, as truly taken and Capiedly me from the Court of said Court, and the Original papers filed in said Cause all now remaining on file in my office In Jestimonywhere of Chave hereunte set my hand and affixed the Sent of Cain Ollinois this 29th day of May CADIS68

The 2 Harman

The 2 Said Court at office withe City of

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Emond assigned 1. the court exed in not carrying the demnerer to the special plea back to the declaration. Ind The court croed in not granting a new trial, 3rd The Court erred in not arresting the Judg ment. I The court ared in greening instruction AD. 2. It The Court ened in refusing custom ctions asked by defendant sin giving the instructions asked by filamtiff. Green Silvest allys for appellant. Joinden in Erron I. J. Linegar atty appalled

Ster Canahes At M. C. Adalo Drawings. 8847 Illmois Central PRG appellant Peter Carraher appellie Jul 3 me / 8 8 8 De fee ?

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1868.

HLINOIS CENTRAL RAILROAD COMPANY

vs

Appellant,

PETER CARAHER, Appellee.

Appellant,

Appellant,

Alexander.

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

June Term, A. D. 1868.

 $\left. \begin{array}{c} \text{ILLINOIS CENTRAL RAILROAD COMPANY} \\ vs & \text{Appellant,} \\ \text{PETER CARAHER, Appellee.} \end{array} \right\} \begin{array}{c} \text{Appeal} \\ \text{from} \\ \text{Alexander.} \end{array}$

Page 1 & 2 Writ in case and the return.

- The declaration alleges that it was the duty of appellant, (the defendant below,) to fence in the one hundred feet on each side of its railroad track, and it did not, and that it owned and possessed such three hundred feet of ground; that upon the ground so possessed, at a point where the law required a fence to be made, there was a well, and that defendat below knew of such well, and left it so defectively covered that plaintiff below, while riding his mule over said ground, rode into said well and mule was killed.
 - 6 Demurrer to declaration overruled.
 - 7 & 8 Special plea and demurrer sustained to plea.
 - General issue filed and issue joined.
- Trial, verdict, judgment for plaintiff below for \$200. Motion for new trial overruled. Motion in arrest overruled.

EVIDENCE FOR PLAINTIFF BELOW.

Peter Caraher, plaintiff below, swore he was riding his mule, hunting his cows, on right side of railroad track, going north, and rode into a well; it was about 50 feet from the railroad track; was not three feet across the top; did not see any path in a hundred yards of the well; the timber was cut off; the growth around the well was grass and briers: you could not see the well; the right of way was not fenced; the mule was worth \$200.

Anthony Banks swore he went to help Caraher get his mule

out of the well; mule was dead; well was not three feet across top; this well was between the trestle work and the iron bridge; it was inside, but at the outer edge of where they get dirt to build the track; nothing but grass and little briers were growing around the well; grass about a foot high.

Jim Selva swore he went to help Caraher get the mule out of the well; it was dead; the well was covered with grass; Mr. Caraher showed me the log over which the mule stumbled and fell in backwards.

Dennis Cody swore he was road-master of Illinois Central railroad; had been for eight years; was instructed to take charge of track and one hundred feet on each side; his district extended from Cairo to Cobden; he did not know anything about the right of way below the Mounds, as the timber is not cleared off.

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EVIDENCE FOR DEFENDANT.

Dennis Cody, witness for defendant below, testified as follows: I have been road-master for Illinois Central railroad for eight or nine years; it is my business to look after track and right of way; I have had no direction about right of way below the Mounds, between the trestle work and the iron bridge; the timber has not been cut off between the trestle work and iron bridge; I have been along between trestle work and iron bridge nearly every day for past two years; there was no well where Caraher testified there was one, between the trestle work and the iron bridge, except the one close at the shanty. The company never, to my knowledge, had a well dug there, except the one at the shanty, which is used by the watchman and is not the well spoken of by Caraher; I heard Caraher's testimony.

Patrick Powers, a witness for defendant, below, testified as follows, to-wit: I have been watchman for Illinois Central Railroad Company for six or seven years; I stay in the shanty, just at the end of the trestle work; I use the well at the shanty; I heard Caraher testify; the well he spoke of was not the well by the shanty; no mule fell in it; it is my business to go, and I do go, along the track every day; I know there is no well, on company's right of way, between the trestle work and the iron bridge.

William Cashman, witness for defendant below, testified

as follows: I have been foreman on the Illinois Central Railroad for several years, between the Mound and Cairo; have passed along the railroad every day for two years, between the iron bridge and the trestle work; I know there was no such well as was spoken of by Peter Caraher, on the right of way.

And this was all the evidence in the case.

INSTRUCTIONS GIVEN.

The court without being requested gave the following instructions, to wit:

- No. 1. "Unless you believe from the evidence that the plaintiff's mule, without any negligence on the part of the plaintiff, unavoidably or accidentally fell into a well on land belonging to or in possession of the defendant, and that said well was negligently left uncovered and exposed by defendant or its agent, and that in consequence of such negligence by the defendant or its agents the mule was killed, you should find the defendant not guilty."
 - No. 2. "If you believe from the evidence that none of the agents, servants, or employees, of the defendant had knowledge of the existence of said well, you should find the derendand not guilty."

And the court, on request of defendant below, gave the following instruction to wit:

No. 3. "And unless you believe from the evidence that the defendant either owned or was in actual possession of the land on which the well was situated, you should find the defendant not guilty."

INSTRICTIONS REFUSED.

- And the court being requested by defendant below, to give the following instructions, refused the same, to wit:
 - No. 4. The court instructs the jury that before you can find the defendant guilty, you must believe from the evidence that the plaintiff without any negligence on his part, rode his mule into a well dug by the defendant on the ground owned by the defendant, and that the defendant, knowing such well to be dug, left it uncovered."
 - No. 5. "If a well was dug on the ground owned by defendant by third parties, without its knowledge or consent, and

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said well remained uncovered without the knowledge of the

defendant, the defendant is not guilty."

No. 6. "Unless there is evidence that the Railroad company either owned or was in the actual possession of the land on which the well was dug, there is no presumption that the Railroad company or its agents knew of the existence of the well."

- No. 7. "The owner of an unenclosed woodland, in which a well was dug without the knowledge of the owner, is not liable for a mule which was rode on to such woodland without the knowledge of such owner."
- No 8. "Unless you believe, from the evidence, that the defendant, or some one of its agents, knew the well in question was in existence, the defendant is not guilty."
- No. 9. "Browzing and grazing on, and riding over the unenclosed land of another, is not a matter of right; it is at most an immunity." To which refusal defendant excepted.

No. 10. No error is claimed to be in this instruction.

At the request of the plaintiff below the court then gave

the following instructions, to wit:

The court instructs the jury, that if they believe from the evidence that the Illinois Central Railroad Company had a well upon their land, or upon land in possession of defendant, and that they have carelessly and negligently left it uncovered and exposed in such manner that the plaintiff's mule unavoidably fell into said well and was thereby lost to the said plaintiff, then, and in that event, the railroad company is liable, and the jury should find the plaintiff's damages at such amount as the evidence shows him entitled to."

To the giving of which instruction defendant excepted. Verdict. Motion for new trial—overruled. Motion in arrest—overruled. Judgment. Defendant below prayed an appeal, and has assigned the following errors, to-wit:

ERRORS.

- 1. The court erred in not carrying the demurrer to the special plea back to the declaration.
 - 2. The court erred in not granting a new trial.
 - 3. The court erred in not arresting the judgment.
 - 4. The court erred in giving instruction No. 2.
- 5. The court erred in refusing instructions asked by defendant and in giving the instructions asked by plaintiff.

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IN THE SUPREME COURT,

FIRST DIVISION.

JUNE TERM, A. D., 1868.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant, vs.
PETER CARAHER, Appellee.

BRIEF.

Plaintiff below sued appellant in an action on the case. The material allegations in the declaration are that defendant knowingly permitted a well to remain uncovered on its right of way, and that into this well, plaintiff rode his mule.

The evidence shows the mule was rode into an uncovered well about 50 feet from the railroad track. But there is no evidence showing that the well was on land owned by defendant or in its possession. The evidence of Dennis Cody, road master of defendant, shows he had charge of the right of way above the Mounds, but not below the Mounds, where the well was.

The evidence of Cody, Powers and Cashman, shows the Railroad Company did not dig the well and knew nothing of its existence. They were the agents of the Company. There is no evidence even tending to show that the Railroad or any of its agents knew anything of the existence of the well.

In Patcheris case, 16 Ills, p 202. this Court say: "The owner of an unenclosed woodland, in which he had dug an ore pit, was not therefore liable for an ox, which had wandered into the woodland and fallen into the pit;" and cite Knight vs Abert, 6 Fa. State Rep. 472. And although this utterance of the Court might be regarded as mere dictum, it received the endorsement of this Court, in an opinion of another judge, delivered fourteen years after the decision of the Patchin case.

In 39th Ill, page 194, this Court say: "If an individual turns his cattle in the highway, and they fall into a pit on another person's uninclosed land, it would hardly be contended that the owner of the land would be liable for damages.

Regarding this opinion as the law, we confidently claim that the verdict of the jury was against the law.

The 5th and 7th instructions refused, as copied into the record, are deficient in a material part of the original instructions, and there may be no error in refusing them, as they appear in a mutilated form.

The 4th and 6th instructions refused embodied the law, and it was error to refuse them.

But the instruction given for plaintiff was not the law, and presumes a state of facts which did not exist. There was no presumption that the Railroad Company knew of the existence of the well; there was no proof of knowledge of its existence; hence there could be no negligence or carelessness in leaving it uncovered. This instruction supposes there was evidence tending to show that the mule unavoidably fell into the well; while the proof is that the mule was rode into the well, by his owner, who was riding him away from any road or path.

GREEN & GILBERT, For Appellant.

Ills. Cent. R. R. E. Caraher Brief of appellants Filed 200 1800 Moureauly

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1868.

 $\begin{array}{c} \text{ILLINOIS CENTRAL RAILROAD COMPANY} \\ vs & \text{Appellant,} \\ \text{PETER CARAHER, Appellee.} \end{array} \right\} \begin{array}{c} \text{Appeal} \\ \text{from} \\ \text{Alexander.} \end{array}$

38847-29

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

June Term, A. D. 1868.

 $\begin{array}{c} \text{ILLINOIS CENTRAL RAILROAD COMPANY} \\ vs & \text{Appellant,} \\ \text{PETER CARAHER, Appellee.} \end{array} \right\} \begin{array}{c} \text{Appeal} \\ \text{from} \\ \text{Alexander.} \end{array}$

Page 1 & 2 Writ in case and the return.

The declaration alleges that it was the duty of appellant, (the defendant below,) to fence in the one hundred feet on each side of its railroad track, and it did not, and that it owned and possessed such three hundred feet of ground; that upon the ground so possessed, at a point where the law required a fence to be made, there was a well, and that defendat below knew of such well, and left it so defectively covered that plaintiff below, while riding his mule over said ground, rode into said well and mule was killed.

- Demurrer to declaration overruled.
- ^{7 & 8} Special plea and demurrer sustained to plea.
 - General issue filed and issue joined.
- Trial, verdict, judgment for plaintiff below for \$200. Motion for new trial overruled. Motion in arrest overruled.

EVIDENCE FOR PLAINTIFF BELOW.

hunting his cows, on right side of railroad track, going north, and rode into a well; it was about 50 feet from the railroad track; was not three feet across the top; did not see any path in a hundred yards of the well; the timber was cut off; the growth around the well was grass and briers: you could not see the well; the right of way was not fenced; the mule was worth \$200.

Anthony Banks swore he went to help Caraher get his mule

out of the well; mule was dead; well was not three feet across top; this well was between the trestle work and the iron bridge; it was inside, but at the outer edge of where they get dirt to build the track; nothing but grass and little briers were growing around the well; grass about a foot high.

Jim Selva swore he went to help Caraher get the mule out of the well; it was dead; the well was covered with grass; Mr. Caraher showed me the log over which the mule stumbled and fell in backwards.

Dennis Cody swore he was road-master of Illinois Central railroad; had been for eight years; was instructed to take charge of track and one hundred feet on each side; his district extended from Cairo to Cobden; he did not know anything about the right of way below the Mounds, as the timber is not cleared off.

EVIDENCE FOR DEFENDANT.

Dennis Cody, witness for defendant below, testified as follows: I have been road-master for Illinois Central railroad for eight or nine years; it is my business to look after track and right of way; I have had no direction about right of way below the Mounds, between the trestle work and the iron bridge; the timber has not been cut off between the trestle work and iron bridge; I have been along between trestle work and iron bridge nearly every day for past two years; there was no well where Caraher testified there was one, between the trestle work and the iron bridge, except the one close at the shanty. The company never, to my knowledge, had a well dug there, except the one at the shanty, which is used by the watchman and is not the well spoken of by Caraher; I heard Caraher's testimony.

Patrick Powers, a witness for defendant, below, testified as follows, to-wit: I have been watchman for Illinois Central Railroad Company for six or seven years; I stay in the shanty, just at the end of the trestle work; I use the well at the shanty; I heard Caraher testify; the well he spoke of was not the well by the shanty; no mule fell in it; it is my business to go, and I do go, along the track every day; I know there is no well, on company's right of way, between the trestle work and the iron bridge.

William Cashman, witness for defendant below, testified

18 & 19

as follows: I have been foreman on the Illinois Central Railroad for several years, between the Mound and Cairo; have passed along the railroad every day for two years, between the iron bridge and the trestle work; I know there was no such well as was spoken of by Peter Caraher, on the right of way.

And this was all the evidence in the case.

INSTRUCTIONS GIVEN.

The court without being requested gave the following instructions, to wit:

- No. 1. "Unless you believe from the evidence that the plaintiff's mule, without any negligence on the part of the plaintiff, unavoidably or accidentally fell into a well on land belonging to or in possession of the defendant, and that said well was negligently left uncovered and exposed by defendant or its agent, and that in consequence of such negligence by the defendant or its agents the mule was killed, you should find the defendant not guilty."
 - No. 2. "If you believe from the evidence that none of the agents, servants, or employees, of the defendant had knowledge of the existence of said well, you should find the derendand not guilty."

And the court, on request of defendant below, gave the following instruction to wit:

No. 3. "And unless you believe from the evidence that the defendant either owned or was in actual possession of the land on which the well was situated, you should find the defendant not guilty."

INSTRICTIONS REFUSED.

- And the court being requested by defendant below, to give the following instructions, refused the same, to wit:
 - No. 4. The court instructs the jury that before you can find the defendant guilty, you must believe from the evidence that the plaintiff without any negligence on his part, rode his mule into a well dug by the defendant on the ground owned by the defendant, and that the defendant, knowing such well to be dug, left it uncovered."
 - No. 5. "If a well was dug on the ground owned by defendant by third parties, without its knowledge or consent, and

said well remained uncovered without the knowledge of the

defendant, the defendant is not guilty."

No. 6. "Unless there is evidence that the Railroad company either owned or was in the actual possession of the land on which the well was dug, there is no presumption that the Railroad company or its agents knew of the existence of the well."

- No. 7. "The owner of an unenclosed woodland, in which a well was dug without the knowledge of the owner, is not liable for a mule which was rode on to such woodland without the knowledge of such owner."
- No 8. "Unless you believe, from the evidence, that the defendant, or some one of its agents, knew the well in question was in existence, the defendant is not guilty."
- No. 9. "Browzing and grazing on, and riding over the unenclosed land of another, is not a matter of right; it is at most an immunity." To which refusal defendant excepted.

No. 10, No error is claimed to be in this instruction.

At the request of the plaintiff below the court then gave

the following instructions, to wit:

The court instructs the jury, that if they believe from the evidence that the Illinois Central Railroad Company had a well upon their land, or upon land in possession of defendant, and that they have carelessly and negligently left it uncovered and exposed in such manner that the plaintiff's mule unavoidably fell into said well and was thereby lost to the said plaintiff, then, and in that event, the railroad company is liable, and the jury should find the plaintiff's damages at such amount as the evidence shows him entitled to."

To the giving of which instruction defendant excepted. Verdict. Motion for new trial—overruled. Motion in arrest—overruled. Judgment. Defendant below prayed an appeal, and has assigned the following errors, to-wit:

ERRORS.

- 1. The court erred in not carrying the demurrer to the special plea back to the declaration.
 - 2. The court erred in not granting a new trial.
 - 3. The court erred in not arresting the judgment.4. The court erred in giving instruction No. 2.
- 5. The court erred in refusing instructions asked by defendant and in giving the instructions asked by plaintiff.

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Abstract.

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In the Supreme Court of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D. 1868.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant, Appeal from PETER CARRAHER, Appellee.

Appellee's Brief.

I.

The laws of this State do not require the owners of cattle to keep them in an inclosure. Seely vs. Peter's 5, Gilm., 130; Misner vs. Lighthall, 609; II., 13-

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П.

The long continued custom of the people of this State to allow cattle to run and graze at large upon the uninclosed lands of the State or individuals, has grown into a right, and is as sacred as any other common law right.

The leaving of the open well upon uninclosed lands is a nuisance and gross negligence on the part of the defendant below.

III

So far as any question arises on the evidence it is a matter addressed to the sound discretion of the July.

IV.

The instructions refused the defendant below were either abstract principles of law or covered by other instructions, and were properly refused.

V

The right of way of the defendant below, was not fenced as required by law, at the place where the well was located.

We think the judgment of the Court below should be affirmed.

D. T. LINEGAR, Att'y for Appellee.

204 Znik XX / CELWD DIVISION Carraher appales Brief fierd 102 of 1818. Photosis with beautiful of the state with the colored T. LEWIS BAR, Salve for Artestle. Lingar appalies expents

In the Supreme Court of Allinois First Grand Division June Ferry 4.2, 1868 Ma betrat K. K. Co. Appellant 3 Appeal from barraher, Appelle, 3 Alexander Appelled Argument. The point to which I despre to call qual of the Survey in leaving the well without curb or cover, It is not contended, that the owner of uninelosed lands can not make such use of his lands as he may desire: provided, that his use does not amount to a nuisance, or an infringement upon the rights of others. of others. The common law of Allinois arises from the recognized Common law of England up to the fourth year of The Reight of James the first; and from the habits and customs of our own people, whereof the memory of man runs not to the contrary, Tohen a constom in This State becomes thus established, it is the

common law of the State and fireof England, that Stands in conflict Imaintain that the long estate lished custom in Allinois, to allow cattle to our at large upon the "range" has grown into a common law right and that the owner of uninclosed lands must use them in such mans ner as not to infringe this right so long as the lands semain uninclosed. He can not by snaves and traps to injure the cattle that may go upon his uninclosed lands, If cattle may go upon minelosed lands to grage with out becoming trespossers, The owner of any Such cattle may go upon any such lands in Search of them also without becoming a bres passer It was, in my opinion, gross night gence on the part of the defendant below, to leave the well mentioned in The declaration, in the manner it was Shown to be, by the evidence and it is hable for whatever injury that may have account to the plains tiff by means of that negligence,

re case of Valahiro 16 Ills P. 202 is not a case in point, The Rail road Company in that quette, of negligence, but simply engaged in the legitimate Their road, I do not deem it sung to make any argument on The affect of the evidence tions being satisfied that there is no cause of reversal, if the law of the case is with the plaintiff, D. J. Lingar ally for appelled

He Court PEK Carraher Angueuch appelles find 10th July 1808 Lucgan atty appealo