No. 12583

Supreme Court of Illinois

Hunt

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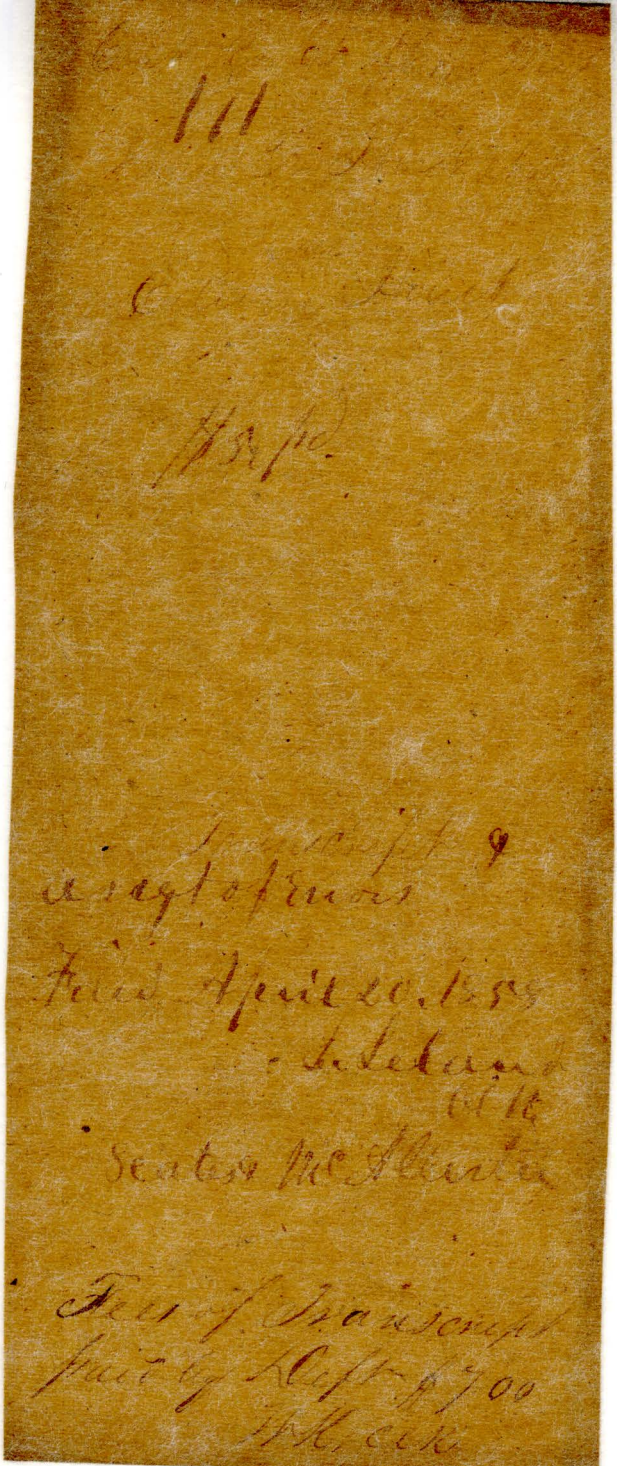
vs.

Hoyt, et al



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

Pleas before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State aforesaid, at a Special Term of the Cook County Court of Common Pleas begun and holden at the Court House in the City of Chicago in said County, in pursuance of an order of the Judge thereof and to public notice given in accordance with the Statute in such case made and provided, on the Second Monday being the Ninth day of November in the year of Our Lord One Thousand Eight Hundred and fifty Seven and of the Independence of the United States the Eighty Second.

Present the Honorable John M. Wilson, Judge
Carlos Haven Prosecuting Attorney
John L. Wilson Sheriff
Attest Walter Kimball Clerk.

Be it Remembered. That heretofore to wit, on the Twenty-seventh day of August A.D. One Thousand Eight Hundred and fifty seven. John L. Hoyt and Martha Ann Hoyt his wife by Martin & Perry their Attorneys filed in the office of the Clerk of said Cook County Court of Common Pleas their certain Precipe for Summons in the words and figures following, to wit.

[12583-1]

State of Illinois }
County of Cook } ss.
Cook County Court of Common Pleas
September Term A.D. 1857

John L. Hoyt and
Martha Ann Hoyt his wife }
vs
Edwin Hunt }

The Clerk of said Court will issue a Summons in the above cause directed to the Sheriff of Cook County in a plea of Trespass on the Case returnable at the September Term of said Court A.D. 1857. to the damage of the plaintiffs of One Thousand Dollars.

Marlin & Perry
Plaintiffs Attorneys.

To Walter Kimball, Esqr Clerk.
Chicago 26. August 1857.

And afterwards. to wit on the same day and year last aforesaid. there issued out of the office of the Clerk of said Court. a writ of Summons. which said writ. and the Sheriffs Return thereon endorsed are in the words and figures following to wit.

State of Illinois } S.S.
County of Cook }
The People of the State of Illinois.
To the Sheriff of said County — Greeting:
We command you that you Summon Edwin Hunt if he shall be found in your County personally to be and appear before the Cook County Court of Common Pleas of said County

on the first day of the next term thereof. to be holden at the Court House in the City of Chicago in said County on the second Monday of September next to answer unto John D. Hoyt and Martha Ann Hoyt his wife. in a plea of Trespass on the Case. to the damage of the said plaintiffs as they say in the sum of One Thousand Dollars.

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

Witness Walter Kimball Clerk of our said Court and the Seal thereof at the City of Chicago in said County this 27th day of August A.D. 1857

Walter Kimball Clerk

Seal

Endorsed

Served by reading to the within named Edwin Hunt this 28th day of August 1857

John L. Wilson Sheriff

By John A Dart Deputy.

And afterwards. to wit. on the same day and year last aforesaid the said plaintiffs. by their said attorneys filed in the office of the Clerk of said Court their Declaration in the words and figures following. to wit.

State of Illinois } Cook County Court
Cook County } Ss. of Common Pleas
John D. Hoyt and } September Term A.D. 1857
Martha Ann Hoyt his wife } Trespass on the Case.

vs

Edwin Hunt } John D. Hoyt and

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Martha Ann Hoyt his wife of said Cook County plaintiffs in this suit. by Martin & Perry their Attorneys. Complain of Edwin Hunt of said County, defendant. Who is summoned &c. in a plea of Trespass on the Case.

For that Whereas the said Martha Ann Hoyt, heretofore. to wit. on the first day of June AD. 1857. at Chicago. to wit. in said County of Cook, then and still being the wife of the said John D. Hoyt. was lawfully walking in and along a certain public & common highway. then and there in said Chicago situate. known as Lake Street. and in that part thereof near to and in front of a building on said Street then occupied in part as a store by Messrs Fisk & Ripley: And the said defendant was then and there. by his certain then servants. being and standing upon a staging suspended from and attached to the front side of said building so occupied by said Fisk & Ripley as aforesaid. hanging and putting up upon said building. certain sign boards: and in the prosecution of said business using a certain large iron hammer: nevertheless the said defendant. then and there. by his said servants. so carelessly and improperly used. managed and directed the said hammer. that by and through the carelessness. negligence and improper conduct of the said defendant. by his said servants in that behalf. the said iron hammer. then and there fell down a great distance. to wit. forty feet. from the said staging. and then and there struck with great force and violence upon the head of the said Martha Ann Hoyt. and thereby then and there cut a large gash in her head.

knocked her with great force and violence to and upon the pavement there, and by means of the premises aforesaid, the said Martha Ann Hoyt, was then and there greatly bruised, hurt and wounded, and greatly injured in her head and brain, and became sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time the said Martha Ann Hoyt suffered great pain, and has been otherwise greatly injured.

And whereas also the said Martha Ann Hoyt heretofore, to wit, on the first day of June A.D. 1857, at Chicago, to wit, in said County of Cook, then and still being the wife of the said John L. Hoyt, was lawfully walking, in and along a certain public and common highway then and there in said Chicago, to wit, in said County situate, known as Lake Street:

And the said defendant was then and there by his certain then servants, at work upon a certain staging, suspended from and attached to a certain building there upon said Street, placing and putting upon the front side of said building certain board signs, and in the prosecution of said work, the said defendant, by his said servants, then and there used a certain large iron hammer: Nevertheless the said defendant then and there, by his said servants, so carelessly and improperly used, managed and directed the said hammer that by and through the carelessness, negligence and improper conduct of the said defendant by his said servants in that behalf, the said iron

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hammer then and there fell down a great distance, to wit forty feet from the said Flagging, and then and there struck with great force and violence upon the head of the said Martha Ann Hoyt, and thereby then and there cut a large gash in her head, knocked her with great force and violence to and upon the pavement there, and by means of the premises aforesaid the said Martha Ann Hoyt, was then and there greatly bruised, hurt and wounded, and greatly injured in her head and brain, and became sick, sore, lame and disordered, and sore maimed and continued for a long space of time, to wit, hitherto, during all which time the said Martha Ann Hoyt suffered great pain, and has been otherwise greatly injured.

To the Damage of the said Plaintiffs of One Thousand Dollars and therefore they bring their Suit &c.

Martin & Perry
Attys for Plffs

And afterwards, to wit, on the Fourteenth day of September, in the year last aforesaid, the said Defendant by Harvie Muller & Nissen his Attorneys filed in the office of the Clerk of said Court his Plea to said plaintiffs Declaration in the words and figures following, to wit

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State of Illinois }
County of Cook } ss.

In the Cook County Court of Common Pleas.
September Term A.D. 1857

Edwin Hunt
vs.
John D. Hoit &
Martha Ann Hoit } And the said defendant Edwin Hunt by Harvie Miller & Nissen his attorneys, comes and defends the wrong and injury when, and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiffs have above thereof complained against him, and of this he the said defendant puts himself upon the Country &c.

Harvie Miller & Nissen
Defts attys.

And afterwards, to wit, on the Tenth day of December in the year last aforesaid, said day being one of the days of the November Special Term of said Court, the following among other proceedings was had in said Court and entered of Record, to wit.

John D. Hoyt and
Martha Ann Hoyt
vs
Edwin Hunt } Trespass on Case

This day came the said plaintiffs by Martin & Perry their attorneys, and the said Defendant by Scates McAllister Jewett & Peabody his attorneys also comes, and upon issue

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being joined herein it is ordered that a jury come. Whereupon come the Jurors of a jury of good and lawful men to wit. Jacob Watts. P. D. Hall. Geo Ruckle. W. Weitenier. F. Colburn. J. L. McKee. D. C. Ledyard. S. A. Buell. E. M. Moore. Wm A. Woods. Joseph Bovill. and Christian Olson. who being well and truly elected tried and sworn. to try the issue joined aforesaid after hearing the evidence. arguments of Counsel and instructions of the Court, retire to consider of their verdict. under order of the Court to seal their verdict. when made up. and to meet the Court. on opening of Court. tomorrow morning at nine o'clock.

And afterwards. to wit on the Eleventh day of December, said day being also one of the days of said November Special Term the following among other proceedings was had in said Court and entered of Record to wit.

John D. Hoyt and
Martha Ann Hoyt
vs
Edwin Hunt
} Trespass on the Case.

This day again come the parties to this cause aforesaid. by their respective attorneys aforesaid. and the jury empanneled for the trial of this cause on yesterday also come, and submit their verdict, and say, we the jury find defendant guilty, and assess said plaintiffs damages to the sum of Five Hundred Dollars. And thereupon the said Defendant by his Counsel submits his motion for a new trial herein.

And afterwards. to wit. on the Nineteenth day of December in the year last aforesaid, said day being one of the days of the said November Special Term of said Court. the following among other proceedings was had in said Court and entered of Record. to wit.

John D. Hoyt and
Martha Ann Hoyt
vs
Edwin Hunt
} Trespass on Case.

And now at this day again come the parties to this cause. by their attorneys aforesaid. and after argument heard on defendants motion submitted heretofore. for a new trial herein. the Court being fully advised now overrules said motion.

Therefore it is considered that the said plaintiffs do have and recover of the said defendant. their damages of Five Hundred Dollars. in form aforesaid by the Jury here assessed. and also their costs and charges. by them about their suit in this behalf expended and have execution therefor.

And afterwards. to wit. on the Ninth day of January A.D. One thousand Eight Hundred and fifty Eight. as of the Nineteenth day of December A.D. Eighteen Hundred and fifty seven. the said Defendant by Seats & Voorhees his attorneys filed in the office of the Clerk of said Court his Motion for New Trial. which said Motion is as follows To wit.

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Of the September Term of the Court
County Court of Common Pleas 1857

E. Hunt
ads
John D. Hoyt & wife } Case.

The defendant moves the Court for a new trial in this case for the following reasons.

First. The verdict of the jury is against the evidence.
2nd. The verdict is against the law and evidence
3rd. The verdict is against the instructions of the Court. Scates & Voorhees for Defs

And afterwards. to wit. on the Ninth day of January A.D. Eighteen Hundred and fifty Eight said day being one of the days of the January Term of said Court. the following among other proceedings was had in said Court and entered of Record. to wit.

John D. Hoyt and
Martha Ann Hoyt
vs
Edwin Hunt } Case.

And now again on this day came again the said plaintiffs by Perry their attorney, and the defendant by Scates his attorney. and thereupon the defendant filed his reasons for a new trial. and also an affidavit.

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and thereupon moved the Court for an order to stay all further proceedings upon the execution issued in this behalf. and to set aside the Judgment entered in this Case. on the 19th day of December 1857. and the order of this Court overruling the defendants motion herein for a new trial. Whereupon argument being heard. and the premises being now here fully seen and considered by the Court. and it appearing to the satisfaction of the Court. that the hearing of the motion for a new trial in this case had been postponed until the present time by agreement of the Counsel of the parties. and that this motion was made and prosecuted in good faith.

It is therefore considered by the Court. that all further proceedings under the Execution issued in this Case. be stayed upon a service of a copy of this order upon the Sheriff.

It is further ordered that the reasons for a new trial. and the bill of exceptions be now filed nunc pro tunc as of the 19th day of December 1857. which is done accordingly.

The defendant thereupon prayed and appeal to the Supreme Court. which is allowed nunc pro tunc as of the 19th day of December 1857 upon the defendants entering into Bond in the penal sum of $ 800. conditioned according to law with David W. Hunter as his Surety. said Bond to be filed with the Clerk of this Court within ten days from this day.

[125834]

And afterwards. to wit. on the same day and year last aforesaid, as of the Nineteenth day of December A.D. Eighteen Hundred and fifty Seven. nunc pro tunc. the said defendant filed in the office of the Clerk of said Court his Bill of Exceptions in the words and figures following to wit.

State of Illinois }
Cook County } ss.

Cook County Court of Common Pleas
Nov. Spec. T. A.D. 1857

John L. Hoyt & Wife
vs
Edwin Hunt

This was an action of Trespass on the case to recover damages alleged to have been sustained by Mrs. Hoyt. in consequence of the negligence of defendants Servants. in carelessly letting a hammer fall from a staging upon the head of Mrs. Hoyt. Plea. general issue.

Be it Remembered. That on the trial of this Cause the plaintiffs, to maintain the issue on their part. called as witnesses the following.

David B. Fisk. Who being duly sworn, testified as follows. I engaged Messrs. Robins & Gaylord to paint some Signs for Fisk & Ripley. They informed me that Mr. Hunt put up Signs. and also told me the price he charged. I went to Mr. Hunt's Store to ask the price of putting up the Signs. Some one at the desk told me what the price would be. I agreed with Mr. Hunts foreman to put up the Signs. He said they had men

for that purpose and would send them up.
I waited awhile and the men not coming I went
again to see about it. and this time saw Mr. Hunt.
and they promised to send the men up at once.
The man came and put up the signs. and in
putting them up they broke a pane of glass.
I paid Mr Hunt for hanging the signs; and he
deducted from the bill the price of resetting the pane
of glass which his men broke. One of the signs
fell in putting it up I do not know how it came
to fall. I was not present when the accident
happened to Mrs Hoyt. but saw her soon after.
I went immediately for Mr. Hunt. who went with
me to see Mrs Hoyt. I saw the wounds she received
but did not see the hammer.

Roswell F. Farr being duly sworn testified as
follows. I am in the Employ of Messrs Fisk
& Ripley. and was in their Employ in June 1857.
I know of the injury to Mrs. Hoyt. and was an
Eyewitness to it. I was at the time passing
along Lake Street. on the side next to the Store of
Fisk & Ripley. and approaching the Store.
I saw Mrs. Hoyt cross the Street from the North
to the South side. When she reached the side walk
she was a few feet ahead of me. At that time
Mr. Hunts men were at work on a swing Stage
attached to the Store occupied by Fisk & Ripley.
putting up Signs for them. As Mrs. Hoyt was walk
ing along on the side walk. I saw a hammer
fall from the Staging. and saw it strike her
on the head. She fell partly down. I caught
her before she struck the side walk. She fell
down on one knee. We took her up Stairs into

Fisk & Ripleys store. Some men were on the staging putting a sign over the top of the second story window about 30 feet above the side walk. The stage and men could be seen from the side walk. There were no others at work on the building. Except the men putting up signs. The hammers had a handle, one end had a face and the other end was wedge shaped, and would weigh about 1 lb I should think. The staging was a swinging stage suspended by ropes.
The injury to Mrs Hoyt happened about half past two oclock in the afternoon. The men had been at work on the staging in the forenoon. Immediately after the injury I went for a Physician. The wound bled profusely. When I returned Mrs Hoyt was laying on a Sofa and in her senses. After this Mr. Hunt came into the store, and we went up into the third story. Where the staging was hanging from the outside to see the men. This was about one hour and a half after the accident. The men were not there. While there I had a conversation with Mr Hunt about the accident. Mr. Hunt said his workmen dropped a sign in the morning. on account of the wind in order to save themselves from falling. It was a very windy day. He said the men told him of their being obliged to drop a sign to save themselves; and that they were afraid to work there. I said that by reason of the previous accident the men ought to have been more careful. He said his workmen were as good and as careful as any workmen in the City, and that he was not going to have anything more to do with putting up signs. it was too dangerous

and there was too much risk in it.
I saw the sign that fell in the morning laying
in pieces in the side walk. The signs were about
three feet long. I do not know what part of the
hammer struck Mrs Hoyt.

Dr Foster being duly sworn, testifies as follows.

I am a practising physician in the City
of Chicago. I was called to see Mrs Hoyt
about 3 o'clock P.M. on the 1st day of June A.D. 1857.
at the Store of Messrs Fisk & Ripley. I found her
laying on a Sofa, very faint from loss of blood.
She had a cut upon the head. The scalp was cut
through, and also the membrane underneath it
to the bone, and the bone was cut into or indented.
The instrument causing the injury seemed
to have glanced downward pelling the scalp
from the bone. so that the probe would pass nearly
down to the Eyebrow. I also saw a part of a tooth
Mrs Hoyt lost. She was confined to her room
nearly a month, during which time I visited
her twice a day. The scalp where the cut was
now adhered fast to the bone. She complained
much of headache and soreness about the cheek
and shoulder. She also complained of numb-
ness about the wound at one time. The right Eye
was almost closed for a time by swelling. The
muscle over the eye was not injured. The drooping
was occasioned by blood falling below the Eye.
The injury would trouble her for some time upon
the change of the weather or upon any extraor-
dinary exertion she should make. The wound
was a little over an inch long, and just below
the hair upon the right temple. She was confined

about Eighteen days before she sat up much.
and Confined to her room about a month.
A wound like this needs surgical dressing
and cannot be properly attended to by a nurse.
I think her symptoms justified the Complaints
she made.

Mrs Henry being duly sworn testified as follows.
I am a Sister of Mrs Hoyt.
I was with her during the curing of her wound
and have been with her from that time up to
now. I knew her well before the injury & knew
the state of her health. I dressed her wound
after Dr. Foster ceased his attendance. She was
confined to her room about four weeks. Her
general health was very good before this injury,
and she was able to do her own household
work. She is not as well now as formerly and
complains a great deal of her head. She has
had no other sickness since the accident.
After reading or sewing, or working about a
little while, She complains of pain in her head
and of numbness. The scalp has grown fast
to the bone so that she cannot move her right
Eyebrow freely. She had two double teeth and
part of another broken out by the accident.
They were the two teeth next the back tooth and
the one partly broken out was the one next forward
of the two entirely gone. She came home pale
and faint with blood on her dress. It was
three months before she could attend to her
usual duties.

Which was all the testimony offered
on the part of the plaintiffs.

The defendant to prove the issue on his part introduced as witnesses the following named persons.

George Hauslein being duly sworn testified as follows. I was employed by Mr. Hunt as Foreman of his job shop, connected with his store. Mr. Hunt is a hardware Merchant, and gives his personal attention to that business. I had the entire charge of the job shop, which is on the second floor and adjoining the hardware store. I hired the men who worked there with the assent and approbation of Mr. Hunt.

Mr. Fisk employed me to do the job and I sent the men there, and superintended the putting up of the signs. When the hammer fell from the Staging, I was on the opposite side of the Street looking to see that the sign was put up straight. at the time the hammer fell the men were holding up a Sign and Screwing into the building, which was made of Iron. They were not using the hammer at the time it fell. It fell between the Staging and the building. It struck on the Cornice over the door and then rebounded over to the sidewalk and struck the lady. So far as I remember it was a windy day, and the wind had some effect on the Staging to swing it and loose the fastening. I was told by Mr. Hunt not to put up any any more signs, but do not recollect whether it was before or after the accident.

John Cline being duly sworn testified as follows.

I worked for Mr. Hunt. I was employed by Geo. Hauslein with Mr. Hunts approbation.

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I was sent by Standeline to put up the signs on Fisk & Ripleys Store. Henry Brandon another man Employed in the Shop, was with me. We had been at work on the Staging nearly all day putting up signs. We had been to put up also this was the last one. At the time of the accident I was kneeling on one knee screwing up the sign and Brandon sat on the staging holding up the sign. I used the hammer to drive the screw in a little and then laid it down behind me upon the staging, and did not have the hammer in my hand. It fell without my knowing how it came to fall. The wind was blowing pretty hard and we were then at the corner of the building, just where the wind caught us over the top of the roof of the City Hotel, which was a much lower building than the one we were at work upon. The staging was about two feet wide and had no railings or boards upon the sides nothing to prevent the tools from sliding off.

The wind made the staging swing some and I tried to fasten it to some ornamental work on the iron columns, but the wind slipped off the fastenings. The ornaments were to weak to hold it. The columns were about a foot out from the building so that the staging rested against them, and left a space between it and the face of the building. The staging was suspended by ropes from the top of the building. Mr Fisk would not allow us to have the windows opened to stand in to fasten the staging to so as to hold it firm, and cautioned to pitch Brandon down for trying to do so. And so we fastened in the best way we could. I did not tell Mr. Hunt.

that day about an accident having happened there before. I do not know how the hammer got off the staging, but I saw it falling.

Henry Braudm being duly sworn testified as follows.

I worked on the staging with Cline the day the accident happened. I was holding up the sign while he screwed it to the building. I was on the left and Cline on the right side. We were both setting on the staging. Cline knocked a screw in and laid the hammer on the staging behind him. I saw it on the middle of the staging. dont know how it came to fall. It was very windy. I did not tell Mr Hunt that any accident happened in the morning.

Benjamin F. Robbins. being duly sworn testified as follows.

About the last of May I painted some signs for Fisk & Ripley and referred them to Mr. Hunt to get them put up. The staging used in putting up the signs by the men belonged to me. I lent it to a Geo. Hausbin who wanted it to put up the signs on Fisk & Ripleys building for Mr. Hunt. The staging was well constructed and a proper one to use in putting up signs. I have done jobs of the same kind, and know how they ought to be done and what is wanting. have used this staging and think it is all that is needed. for such purposes. The staging was 22 feet long 2 feet wide, and had no protections on the sides. Think it was a very windy day. I saw Mr. Hunt at his store, immediately after the accident

and before he had been down to the place where it happened. I told him his men had let a hammer fall, and killed or nearly killed a woman, and he replied that it was a careless piece of business or words to that Effect.

This was all the testimony in this case, Whereupon the Court at the suggestion of the said plaintiffs, instructed the Jury as follows.

"If the Jury believe from the evidence that at the time of the injury to Mrs Hoyt she was in the Exercise of due care, and that the injury to her was occasioned by the negligence of the defendants or his agents or Servants; or the want of such care and diligence for the safety and protection of the public as under the circumstances of the case would be sufficient and proper, the law is for the plaintiff."

"And in estimating the amount of damages if they find for the plaintiffs the Jury should take into consideration, the length of time Mrs. Hoyt was sick in consequence of the injury, the effect of the injury upon her, and the bodily suffering consequent thereon." To the giving of which the defts then and there excepted.

The Court at the instance of the defendant, instructed the Jury as follows.

First. Unless the Jury shall believe from the evidence that the defendants Servants were guilty of negligence in taking care of the hammer upon the Staging employed by them in putting up a sign, and by reason of such Carelessness, the hammer fell and hurt the

plaintiff Mrs. Hoyt. they will find for the defendant.
Second. It is not sufficient to make out their case for the plaintiffs to show that a hammer fell from the staging and hurt plaintiff Mrs. Hoyt. but they must show by the evidence. and the jury must believe that such injury was occasioned by the negligence of the defendant or his servants."

The Jury retired to consider of their verdict. and afterwards returned into Court the following verdict.

"We the Jury find the Defendant guilty and assess the plaintiffs damages at five hundred dollars!"

Thereupon the defendant moved the Court for a new trial upon the following reasons.

First. The verdict of the Jury is against the evidence
Second. The verdict is against the law and evidence.
Third The verdict is against the instructions of the Court.

Whereupon argument being heard and the premises fully seen and understood. it is considered by the Court that said motion be overruled. And the defendant then and there excepted.

And thereupon the Court entered judgment for the plaintiffs and against the defendant for the said sum of five hundred dollars. the damages aforesaid assessed.

To all which decisions. rulings. opinions and judgments of the said Court in overruling said Motion for a new trial. and in rendering judgment for the said plaintiffs. the said defendant by his Counsel. then and there

excepted, and prays that this his Bill of Exceptions be signed sealed and allowed by this Court, which is accordingly done.

John M. Wilson (Seal)

And afterwards, to wit, on the Twelfth day of January in the year last aforesaid, the said defendant filed in the office of the Clerk of said Court his Appeal Bond, in the words and figures following, to wit.

Know all men by these presents, That we, Edwin Hunt, and David W. Hunter of the City of Chicago, in the County of Cook and State of Illinois, are held and firmly bound unto John D. Hoyt and Martha Hoyt in the penal Sum of Eight Hundred Dollars ($800.) to the payment of which sum we do hereby bind ourselves, our heirs Executors and administrators jointly and severally by these presents.
Sealed with our Seals and dated this Eleventh day of January A.D. 1858.

The Condition of the above Obligation is, that Whereas the said John D Hoyt and Martha Hoyt, did at the November Special Term of the Cook County Court of Common Pleas A.D. 1857, recover a judgment against the said Edwin Hunt, for the sum of Five Hundred Dollars and costs, from which said judgment, the said Edwin Hunt has taken his appeal to the Supreme Court of said State.
Now if the said Edwin Hunt shall prosecute his said appeal with Effect, or in case said appeal shall be dismissed or said judgment

shall be affirmed shall pay to the said John 2. Hoyt and Martha Hoyt the amount of said judgment together with the costs interest and damages that may be adjudged by said Court, that thereupon this obligation shall be void, otherwise it shall remain in full force and effect.

Edwin Hunt Seal
David W. Hunter Seal

State of Illinois }
County of Cook } ss.

I Walter Kimball Clerk of the Cook County Court of Common Pleas within and for said County. Do Hereby Certify that the above and foregoing is a full and true transcript of the papers on file in my office and the proceedings entered of record in said Court in the case wherein John 2 Hoyt and Martha Ann Hoyt are plaintiffs and Edwin Hunt is defendant.

In Testimony Whereof I hereunto subscribe my name and affix the Seal of said Court at Chicago in said County this 9th day of April A.D. 1858 Walter Kimball Clerk

[1258 3-12]

Supreme Court
Edwin Hunt } Of the April Term A.D. 1858
vs
John D Hoyt &
Martha Ann Hoyt

And now comes the said Edwin Hunt by Scates McAllister Jewett & Peabody his attorneys and says that in the Record & proceedings aforesaid there is manifest Error in this that the Evidence in the said cause was not sufficient to prove or show any cause of action against the said Hunt and the said judgment is given in favor of the said John D Hoyt & Martha Ann Hoyt whereas it should have been given for the said Hunt,

And also there is Error in giving the said instructions on the part of the said John D & Martha Ann Hoyt,

Also there is Error in overruling the motion for a new trial,

And the said Edwin Hunt prays that the judgment aforesaid for the Error aforesaid and for other Errors in the said record and proceedings being may be reversed annulled and altogether holden for nought and that he may be restored to all things which he hath lost by occasion of the said judgment &c

Scates McAllister Jewett & Peabody
Attys for Appellant.

STATE OF ILLINOIS—SUPREME COURT.

EDWIN HUNT, Appellant,
vs.
JOHN Q. HOYT and
MARTHA A. HOYT, Appellees.

Appeal from the Cook Com. Pleas

ABSTRACT OF RECORD.

Record
4. 5. 6

This was an action on the case, brought by Hoyt and his wife against Hunt, to the September term, 1857, of the Cook County Court of Common Pleas, for an alleged injury to the wife, by the falling of a hammer from a building in the city of Chicago, upon which the defendant's servants were putting up a sign, and striking Mrs. Hoyt upon the head, while walking along the street of said city.

The declaration contains two counts, and alleges that Martha Ann Hoyt, the wife, on the first day of June, was walking along Lake street, in said city, and in front of a building possessed by Fisk & Ripley; that the defendant's servants were engaged in putting up a sign upon said building, and for that purpose were using a certain iron hammer; that the said servants so carelessly, improperly used, managed and directed said hammer, that the same, by and through the carelessness, negligence and improper conduct of said servants, fell and struck the said Martha Ann Hoyt upon the head, &c.

The second count is substantially the same.

7 —

The defendant pleaded the general issue.

The bill of exceptions contains all the evidence given upon the trial, and so certifies. The case is as follows:

13 —

David B. Fisk, who being duly sworn, testified as follows: I engaged Messrs. Robins & Gaylord to paint some signs for Fisk & Ripley. They informed me that Mr. Hunt put up signs, and told me the price he charged. I went to Mr. Hunt's store to ask the price of putting up the signs. Some one at the desk told me what the price would be. I agreed with Mr. Hunt's foreman to put up the signs. He said they had men for that purpose, and would send them up. I waited awhile, and the men not coming, I went again to see about it, and this time saw Mr. Hunt, and they promised to send the men up at once. The men came and put up the signs, and in putting them up they broke a pane of glass. I paid Mr. Hunt for hanging the signs, and he deducted from the bill the price of resetting the pane of glass which his men broke. One of the signs fell in putting it up. I do not know how it came to fall. I was not present when the accident happened to Mrs. Hoyt, but saw her soon after. I immediately

[12583-12]

went for Mr. Hunt, who went with me to see Mrs. Hoyt. I saw the wounds she received, but did not see the hammer.

13 — Roswell F. Farr, being duly sworn, testified as follows: I am in the employ of Messrs. Fisk & Ripley, and was in their employ 1st June, 1857. I know of the injury to Mrs. Hoyt, and was an eye witness to it. I was, at the time, passing along Lake street, on the side next to the store of Fisk & Ripley, and approaching the store. I saw Mrs. Hoyt cross the street from the north to the south side. When she reached the side walk, she was a few feet ahead of me. At that, Mr. Hunt's men were at work on a swing stage, attached to the store occupied by Fisk & Ripley, putting up signs for them. As Mrs. Hoyt was walking on the side walk, I saw a hammer fall from the staging, and saw it strike her on the head. She fell partly down; I caught her before she struck the side walk. She fell down on one knee. We took her up stairs into Fisk & Ripley's store. Some

14 — men were on the staging, putting a sign over the top of the second story window, about 30 feet above the side walk. The stage and men could be seen from the side walk. There were no others at work on the building, except the men putting up signs. The hammer had a handle, one end had a face and the other end was wedge shaped, and would weigh about one lb., I should think. The staging was a swinging stage, suspended by ropes. The injury to Mrs. Hoyt happened about half past two o'clock in the afternoon. The men had been at work on the staging in the forenoon. Immediately after the injury I went for a physician. The wound bled profusely. When I returned, Mrs. Hoyt was lying on a sofa, and in her senses. After Mr. Hunt came into the store, and we went up into the third story, where the staging was hanging from the outside, to see the men. This was about one hour and a half after the accident. The men were not there. While there I had a conversation with Mr. Hunt about the accident. Mr. Hunt said his workmen dropped a sign in the morning on account of the wind, in order to save themselves from falling. It was a very windy day. He said the men told him of their being obliged to drop a sign to save thrmselves, and that they were afraid to work there. I said by reason of the previous accident, the men ought to have been more careful. He said his workmen were as good and as careful as any workmen in the city, and that he was not going to have anything more to do with putting up signs; it was too dangerous, and there was too much risk in it. I saw the sign that fell in the morning, laying in pieces on the side walk. The signs were about three feet long. I do not know what part of the hammer struck Mrs. Hoyt.

15 — Dr. Foster, being duly sworn, testified as follows: I am a practising physician in the city of Chicago. I was called to see Mrs. Hoyt about 3 o'clock P. M. on the 1st day of June, A. D. 1857, at the store of Messrs. Fisk & Ripley. I found her lying on a sofa, very faint from loss of blood. She had a cut upon the head; the scalp was cut through, and also the membrane underneath it, to the bone, and the bone was cut into, or indented. The instrument causing the injury seemed to have glanced downward, pulling the scalp from the bone, so that the probe would pass nearly down to the eyebrow. I also saw part a tooth Mrs. Hoyt lost. She was confined to her room nearly a month, during which time I visited her twice a day. The scalp, where the cut was, now adheres fast to the bone. She complained much of headache, and soreness about the cheek and shoulder. She complained of the numbness about the wound at one time.

The right eye was almost closed, for a time, by swelling. The muscle over the eye was not injured; the drooping was occasioned by blood falling below the eye. The injury would trouble for some time upon changes of the weather, or upon any extraordinary exertion she should make. The wound was a little over an inch long, and just below the hair upon the
16— right temple. She was confined about eighteen days before she sat up much, and confined to her room about a month. A wound like this needs surgical dressing, and cannot be properly attended to by a nurse. I think her symptoms justified the complaint she made.

Mrs. Henry being duly sworn, testified as follows:

I am a sister of Mrs. Hoyts; I was with her during the curing of her wound, and have been with her from that time up to now. I knew her well before the injury and knew the state of her health. I dressed her wound after Doctor Foster ceased his attendance. She was confined to her room about four weeks. Her general health was very good before this injury, and she was able to do her own household work. She is not as not as well now as formerly, and complains a great deal of her head. She has had no other sickness since the accident. After reading or sewing, or working about a little while, she complains of pain in her head, and of numbness. The scalp has grown fast to the bone so that she cannot move her right eyebrow freely. She had two double teeth and part of another broken out by the accident. They were the two teeth next the back tooth and the one partly broken out was the one next forward of the two entirely gone. She came home pale and faint with blood on her dress. It was three months before she could attend to her usual duties.

Which was all the testimony offered on the part of the plaintiffs.

17— The defendant to prove the issue on his part, introduced as witnesses the following named persons:

George Hauslin being duly sworn, testified as follows:

I was employed by Mr. Hunt as foreman of his Job Shop connected with his store. Mr. Hunt is a hardware merchant, and gives his personal attention to that business. I had the entire charge of the job shop, which is on the second floor and adjoining the hardware store. I hired the men who worked there with the assent and approbation of Mr. Hunt Mr. Fisk employed me to do the job, and I sent the men there and superintended the putting up of the signs. When the hammer fell from the staging, I was on the opposite side of the street looking to see that the sign was put up straight. At the time hammer fell the men were holding up a sign and screwing into the building, which was made of iron. They were not using the hammer at the time it fell. It fell between the staging and the building. It struck on the cornice over the door, and then rebounded over the side walk and struck the lady. So far as I remember it was a windy day, and the wind had some effect upon the staging to swing it, and loose the fastenings. I was told by Mr. Hunt not to put up any more signs, but do not recollect whether it was before or after the accident.

John Cline, being duly sworn, testified as follows: I worked for Mr. Hunt; I was employed by Geo. Hanslein, with Mr. Hunt's approbation.
18— I was sent by Hanslein to put up the signs on Fisk & Ripley's store. Henry Brandon, another man employed in the shop, was with me. We had been at work on the staging nearly all day, putting up signs; we had seven to put up, and this was the last one. At the time of the accident, I was kneeling on one knee screwing up the sign, and Brandon sat on the

S125 3-16

3 Gray 349 as to teaching where there are
contractors as such contractors

staging holding up the sign. I used the hammer to drive the screw in a little, and then laid it down behind me on the staging, and did not have the hammer in my hand. It fell without my knowing how it came to fall. The wind was blowing pretty hard, and we were then at the corner of the building, just where the wind caught us over the top of the roof of the City Hotel, which was a much lower building than the one we were at work upon. The staging was about two feet wide, and had no railings or boards upon the sides—nothing to prevent the tools from sliding off. The wind made the staging swing some, and I tried to fasten it to some ornamental work on the iron columns, but the wind slipped off the fastenings. The ornaments were too weak to hold it. The columns were about a foot out from the building, so that the staging rested against them, and left a space between it and the face of the building. The staging was suspended by ropes from the top of the building. Mr. Fisk would not allow us to have the windows opened to stand in to fasten the staging to, so as to hold it firm, and threatened to pitch Brandon down for trying to do so, and so we fastened on the best way we could. I did not tell Mr. Hunt that day about an accident having happened there before. I do not know how the hammer got off the staging, but I saw it falling.

19—

Henry Brandon being duly sworn, testifies as follows: I worked on the staging with Cline the day the accident happened. I was holding up the sign while he screwed it to the building. I was on the left and Cline on the right side. We were both sitting on the staging. Cline knocked a screw in, and laid the hammer on the staging behind him. I saw it on the middle of the staging. Don't know how it came to fall. It was very windy. I did not tell Mr. Hunt that any accident happened in the morning.

Benjamin F. Robbins, being duly sworn, testified as follows: About the last of May I painted some signs for Fisk and Ripley, and referred them to Mr. Hunt to get them put up. The staging used in putting up the signs by the men, belonged to me. I lent it to a George Hanslein, who wanted it to put up the signs on Fisk & Ripley's building for Mr. Hunt. The staging was well constructed, and a proper one to use in putting up signs. I have done jobs of the same kind, and know how they ought to be done, and what is wanting. Have used this staging, and think it is all that is needed for such purpose. The staging was twenty-two feet long, two feet wide, and had no protections on the sides. Think it was a very windy day. I saw Mr. Hunt at his store immediately after the accident, and before he had been down to the place where it happened. I told him his men had let a hammer fall and killed, or nearly killed, a woman, and he replied that it was a careless piece of business, or words to that effect.

20—

This was all the testimony in this case, whereupon the Court at the suggestion of the said plaintiffs, instructed the jury as follows:

"If the jury believe from the evidence, that at the time of the injury to Mrs. Hoyt, she was in the exercise of due care, and that the injury to her was occasioned by the negligence of the defendant or his agents or servants or the want of such care and diligence for the safety and protection of the public as under the circumstances of the case would be sufficient and proper, the law is for the plaintiff.

"And in estimating the amount of damages if they find for the plaintiff, the jury should take into consideration the length of time Mrs. Hoyt was

Damage for loss of time was to the husband alone

sick in consequence of the injury—the effect of the injury upon her and the bodily suffering consequent thereon." To the giving of which, the defendant then and there excepted.

The Court at the instance of the defendants instructed the jury as follows:

21—

First. Unless the jury shall believe from the evidence that the defendants servants were guilty of negligence in taking care of the hammer upon the staging employed by them in putting up a sign, and by reason of such carelessness the hammer fell and hurt the plaintiff, Mrs. Hoyt, they will find for the defendant.

Second. It is not sufficient to make out their case for the plaintiffs to show that a hammer fell from the staging and hurt plaintiff, Mrs. Hoyt, but they must show by the evidence and the jury must believe that such injury was occasioned by the negligence of the defendant or his servants.

The jury retired to consider of their verdict, and afterwards returned into court the following verdict: "We, the jury, find the defendant guilty, and assess the plaintiffs' damages at five hundred dollars."

Thereupon the defendant moved the court for a new trial upon the following reasons:

First. The verdict of the jury is against the evidence.

Second. The verdict is against the law and evidence.

Third. The verdict is against the instructions of the court.

Whereupon, argument being heard and the premises fully seen and understood, it is considered by the court that said motion be overruled; and the defendant then and there exepted.

And thereupon the court entered judgment for the plaintiffs and against the defendant, for the said sum of five hundred dollars, the damages aforesaid assessed.

22—

To all which decisions, rulings, opinions and judgments of the said court, in overrullng said motion for a new trial, and in rendering judgment for the said plaintiffs, the said defendant, by his counsel, then and there excepted, and prays that this, his bill of exceptions, be signed, sealed and allowed by this honorable court, which is accordingly done.

APPELLANT'S POINTS.

I.

The plaintiffs below had the burthen of proving negligence in the use and management of the hammer by defendant's servants, and that the injury to Mrs. Hoyt was the consequence of such negligence.

1st. Because they have, by their declaration, averred such negligence, and the injury as the consequence.

The rules of pleading always furnish an easy test as to which party has the burthen of proof, and one of the most useful of these rules is, "that the point in issue is to be proved by the party who asserts the affirmative."

1 *Phil. Ev.* 194. *Cow. & Hill's Notes*, 368.
Gazzaman vs. the Ohio Ins. Co, *Wright R.* 202,

2nd. Because *negligence* is a necessary element to constitute the cause of action. If the defendant himself had let fall the hammer upon the person of Mrs. Hoyt, trespass would lie against him for the direct injury; but for an injury received from the acts or omissions of defendant's servants, case must be brought, and the action is always founded upon negligence in the course of their employment. And besides, the defendant's servants were, at the time, prosecuting a lawful act with lawful means, and if an injury resulted therefrom no action would lie. If they were engaged in an unlawful or mischievous act, the result would be otherwise.

Vandenburgh vs. Truax, 4 *Denio R.* 464.

3rd. This case belongs not to the class where the law implies negligence from the fact of the hammer falling. If the law implies negligence in this case, from the fact itself, then it must in every other case, by proving the injury, and some connection (no matter what) of the defendant with the agent by which the injury was occasioned. As, if a fire originates in A's house, communicates to B's and burns it, B shall have his action, for the law implies the negligence. Such is not the law.

Clark vs. Foot, 8 *Johns. R.* 421.
Wilson vs. Peverly, 2 *N. Hamp. R.* 548.

The doctrine of negligence being implied from the fact of the injury, is peculiar to actions against common carriers, and is founded upon the special duty which the carrier owes to the passenger.

Christie vs. Griggs, 2 *Camp. R.* 79.
Ware vs. Gay, 11 *Pick. R.* 112.

II.

The appellant insists that the gravamen of this action was not established by the evidence; that the evidence tends more strongly to show

that the falling of the hammer, which struck a part of the building, glanced obliquely and hit Mrs. Hoyt, was the result of a mere accident, than of negligence. Both the falling, hitting the top of cornice and glancing to the spot where she was walking, was a mere accident, for which no action will lie.

III.

The instruction given on the part of plaintiffs, directed the jury "in estimating the damages, to take into consideration the *length of time* Mrs. Hoyt was sick in consequence of the injury." Now that statement is broad enough, to direct the jury (and they would infer that to be its meaning) to allow a recovery in this action for the loss of her services; because they are told afterwards, to take into consideration "the *effect of the injury upon her*, and the *bodily suffering* consequent thereon." The bodily suffering consequent thereon, would include the degree and period of the suffering, which, with "the effect of the injury upon her," would necessarily include all for which she was entitled to recover Then when they are told to consider the *length of time* she was sick in consequence of the injury, the jury would naturally suppose the court meant loss of time, for which the husband has a right to bring his separate action.

1 *Sal. R.* 119. *Com. Dig. Plead.* 2 *A.*

171 70
Hunt
v
Hoyt et al
Abs. & Brief

171
Hunt
vs
Hoyt et al
Abstract & Brief

State of Illinois

Supreme Court
April T. A.D. 1858

Edwin Hunt, Plf. in Error

v

John L. Hoyt &
Martha A. Hoyt) Defts in Error—

And now the said defendants by Sanford B. Perry their attorney, come and say that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; And they pray that the said Court may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error: and that the judgment aforesaid, in form aforesaid given may in all things be affirmed &c—

Sanford B. Perry
Atty for Defts in Error

No. 171

Hunt &
Hoyt & wife

Joinder in Error

To be filed—
Filed April 27. 1858
L. Leland Clk.

Sanford B. Perry
Atty for Defts in Error

E. Hunt v J. L. Hoyt et al

A party will not be liable for doing a lawful act, in a lawful manner, although an injury may result therefrom to another — unless he be guilty of some carelessness or negligence

4 Com St 196 Ratcliffe v Mayor of Brooklyn

Thus a man may dig a cellar or vault upon his own land, without liability for an injury thereby occasioned to the building or vault of his neighbour

6 Bingh N. C. 1. Chadwick v Fower

9 Barn & Cress 725. Peyton v Mayor of London

1 Adol & Ellis 493 Dodd v Holme

3 Mees & Wels 220 Partridge v Scott et al

[12583-22]

It is the same, where he digs a pit, by which the well of an adjoining owner, is dried up.

12 Mees & Wels 346. Acton v Blundell

The doctrine of Respondeat superior or the liability of a Master for the acts of his Servant is well considered, in a review of the authorities in, Hilliard v Richardson 3 Gray Mass R 349.

And the doctrine of Bush v Steinman 1 Bos & Pull 404. is shown to be overruled, and no longer regarded as law

In Hancke v Hooper 32 Eng C L R 444, it was held, that, while A master was liable for the acts of his apprentice or Servant, for negligence or want of Skill; — it must be proved, and cannot be

[10583-23]

inferred from the act itself

This is the true position - and was so held in Crofts v Waterhouse 11 Eng C. L. R 10 5. -
Lyell v Seward 19 Eng C. L. R 298.
Gazzam v The Ohio Ins Co. Wright's R 205

And the same rule of evidence is laid down in,
2 Stark Ev 741.

So a party may set fire to his own grass-land, without being liable for the damages thereby occasioned by its spreading to his neighbours

8 John R 421, Clark v Foote
2 N. Hamp R 548. Wilson v Peverly

So he may build upon his own line, although his neighbours lights are thereby obstructed

13 Wend 261. Mahan v Brown
19 Wend 309. Parker & Fae v Foot

[12583-24]

The same principle protects a party who, in digging for a foundation of his own house, he injures his neighbour's building

4 Paige 169 La Salle v Holbrook
12 Mass 223. Thurston v Hancock et al

There is, however, a distinction to be noted; — and it is according to the Character sustained by the defendant

If the action be against a Carrier for loss of goods, proof of loss, affords presumptive evidence of negligence

2 Greenl Ev Lec 230 and the same is true of Innkeepers.

[1858-35]

But in the case at bar, I submit the plaintiff does not sustain the character or liability of Carrier, or keeper nor does he stand in the relation of undertaker or builder

I therefore submit:
First that the men engaged in putting up the sign, were employed by, and were the servants of Fisk & Ripley, and not of plaintiff

Second. If the plaintiff is to be regarded as the master of these workmen, then he would be liable only for a want of ordinary care, or for gross negligence.

Third That positive proof of negligence must be produced by defendants — and their proof of the accident and injury are not sufficient to show negligence, nor can it be inferred from the fact of the accident & injury

W. B. Scates of Counsel with Defs.

[12583-24]

171

E. Hunt v. J. L. Hoyt

Plff's Brief

Appeal

Brief

Filed May 4. 1855

S. Leland

Clk

State of Illinois
3d Division
Ottawa

Supreme Court
April T. A.D. 1858

Edwin Hunt, Plff. in Error

v

John D. Hoyt, et al Defts. in Error

Defendants Brief

1 That the Plff. in Error is liable for the damage done by his servants in the negligent or unskillful operation of the business intrusted to them, is a familiar rule of law.

Respondeat Superior -

Wilson v Peverly 2 N. Hamp. 548
S.C. 1 Am. Lead. Cases, 645

2 The question of negligence is one of fact, and cognizable by the jury alone

3 The question of negligence on the part of the Plff. servants was fully submitted to the jury, with proper limitations under the instructions given them, and this Court will not ~~over~~ review their

[12582-24]

verdict thereon, without the most substantial reasons -

Wickersham v The People	1 Scam.	129
Johnson v Moulton	1 "	533
Eldridge v Huntington	2 "	539
Webster v Vickers	2 "	297
Kinman v Thornton	2 "	355
Lowry v Orr	1 Gil.	83
Kincaid v Turner	2 "	621
Dawson v Robbins	5 "	74
Young v Silkwood	11 Ills.	36
Sullivan v Dollens	13 "	87.
Douglass v Tousey	2 Wend.	356
Bogert v Morse	1 Const.	377
1 Graham & Wat. on New Trials		380

4 The Defts. in error were obliged only to show -

(a) that Mrs. Boyt was in the exercise of ordinary care -

(b) that the persons from whose acts or omissions she received the injury, were the servants of the Plff. in error - and -

(c) that the injury was occasioned by the carelessness or negligence of those persons -

Under the instructions of the Court, the jury found these three facts in favor of the Defts in error -

From the facts proven in this case, the jury would have been justified in presuming negligence on the part of the Plffs. servants, as the injury could not have happened, if such precaution had been taken as the nature and situation of the work being done, would require -

The jury were clearly justified, upon the evidence, in finding actual negligence and want of proper care on the part of the plaintiffs servants -

It must be a very strong case indeed that would warrant the Court in granting a new trial, where there is no misdirection of law, and where the judge who tried the case and heard all the evidence, is not dissatisfied with the verdict.

Over

[illegible]

No. 171

Hunt v Hoyt et ux.

Defts. Brief

Sanford B. Perry
Defts. Atty.

Further Suggestions.

It is not denied in this case that Mrs. Hoyt was in the exercise of due care, or that the workmen on the staging were the Servants of the Plff. in Error, at the time of the injury

The instructions asked by both parties & given by the Court below were in substance the same, & submitted to the jury as a question of fact, that they must find negligence on part of Plff. Servants. and that the burthen of proving negligence was upon the defendants.

It is submitted that there is no error in the second clause of the instruction given at the request of the defendant, for the "length of time Mrs Hoyt was sick in consequence of the injury" is a material element in her claim for Damages - "The effect of the injury upon her" is another material element in her claim, which is the permanent ~~wound~~ injury to her head - the scar upon her forehead, the adhesion of the scalp &c - and the "bodily suffering" from such an injury is also a material element - It is submitted that each of these three elements are proper and distinct items for the jury to consider, and could not mislead a jury - They were

[19582-29]

I submit clearly proper, and if the Plff had at the trial apprehended it to be important to guard against any misapprehension of the jury on this point, it was his duty to ask an instruction to that effect. That the instruction did not go far enough to suit the Plff is no fault of the defts, and no error since the instruction in itself is proper -

And in point of fact it was distinctly stated and agreed to the jury that no damages were to be given for any loss sustained by the husband by reason of his wifes sickness. -

The only question it would seem that can be raised on this record is this - Does the evidence show any negligence on the part of Plffs servants - or was the injury the result of a mere accident, one that proper care and diligence could not have prevented -

The evidence shows that the Plffs servants were at work on a staging suspended over the principal thoroughfare in Chicago - a side walk thronged with people constantly -

That the staging was a plank or board 2 feet wide & 20 ft. long -

That it had no railing or board on the sides, nothing to prevent the

tools from sliding off the Staging -

That the day was very windy and that the wind caused the Staging to swing back and forth from the building -

That there was no way to fasten the Staging to the building to prevent it from thus swinging

That in the forenoon of the same day the workmen were obliged to let a sign fall to the sidewalk, breaking it and a pane of glass, in order to save themselves from falling off the Staging

That this fact, involving a knowledge of the condition of the weather, of the Staging and of the danger of being and working on the Staging was told to the Plff., as he admitted, on the same day, and before the injury to Mr. Hoyt -

It is proved by two of the workmen that they did not inform Mr. Hunt of these facts, but Geo. Hauslin, the foreman, probably did - Some one did or Mr. Hunt would not have known it

That Mr. Hunt, himself, with a full knowledge of the facts, when told of the injury replied "it was a cursed piece of business" -

It is submitted that the above epitome of the evidence shows a most reckless disregard of the rights & personal safety of persons on

[1258-30]

the sidewalk underneath the staging. — that the staging itself without any protection on its sides was totally unfit for use in such an exposed situation even in a calm day, a fortiori in a windy day. that the plff was guilty of negligence in using such a staging in such a position, and particularly after knowledge that his men came near falling off themselves a few hours before the accident.

If such a state of facts do not warrant a verdict finding actual negligence under the stringent instructions given at Plffs request, it would seem almost impossible to obtain a verdict that would not be set aside.

I rely confidently upon the long list of cases cited from the decisions of this Court, that the Court will not disturb a verdict where there is any evidence to sustain it, even though sitting as jurors they would have decided differently = and in this case I fail to see how any other than the verdict given could be sustained upon such a state of facts.

Sanford B Perry
atty for
Defts in Error.

No. 171

Edwin Hunt. Plff in Error

v

John D. Hoyt et ux. Defts in Error

Brief & Suggestions

of

Defts in Error

Filed May 8. 1848

S. Leland

Clk

Sanford F. Perry

Defts. Attys

STATE OF ILLINOIS—SUPREME COURT.

EDWIN HUNT, Appellant,
vs.
JOHN Q. HOYT and
MARTHA A. HOYT, Appellees.

Appeal from the Cook Com. Pleas

ABSTRACT OF RECORD.

4. 5. 6.

This was an action on the case, brought by Hoyt and his wife against Hunt, to the September term, 1857, of the Cook County Court of Common Pleas, for an alleged injury to the wife, by the falling of a hammer from a building in the city of Chicago, upon which the defendant's servants were putting up a sign, and striking Mrs. Hoyt upon the head, while walking along the street of said city.

The declaration contains two counts, and alleges that Martha Ann Hoyt, the wife, on the first day of June, was walking along Lake street, in said city, and in front of a building possessed by Fisk & Ripley; that the defendant's servants were engaged in putting up a sign upon said building, and for that purpose were using a certain iron hammer; that the said servants so carelessly, improperly used, managed and directed said hammer, that the same, by and through the carelessness, negligence and improper conduct of said servants, fell and struck the said Martha Ann Hoyt upon the head, &c.

The second count is substantially the same.

7

The defendant pleaded the general issue.

The bill of exceptions contains all the evidence given upon the trial, and so certifies. The case is as follows:

David B. Fisk, who being duly sworn, testified as follows: I engaged Messrs. Robins & Gaylord to paint some signs for Fisk & Ripley. They informed me that Mr. Hunt put up signs, and told me the price he charged. I went to Mr. Hunt's store to ask the price of putting up the signs. Some one at the desk told me what the price would be. I agreed with Mr. Hunt's foreman to put up the signs. He said they had men for that purpose, and would send them up. I waited awhile, and the men not coming, I went again to see about it, and this time saw Mr. Hunt, and they promised to send the men up at once. The men came and put up the signs, and in putting them up they broke a pane of glass. I paid Mr. Hunt for hanging the signs, and he deducted from the bill the price of resetting the pane of glass which his men broke. One of the signs fell in putting it up. I do not know how it came to fall. I was not present when the accident happened to Mrs. Hoyt, but saw her soon after. I immediately

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went for Mr. Hunt, who went with me to see Mrs. Hoyt. I saw the wounds she received, but did not see the hammer.

13 — Roswell F. Farr, being duly sworn, testified as follows: I am in the employ of Messrs. Fisk & Ripley, and was in their employ 1st June, 1857. I know of the injury to Mrs. Hoyt, and was an eye witness to it. I was, at the time, passing along Lake street, on the side next to the store of Fisk & Ripley, and approaching the store. I saw Mrs. Hoyt cross the street from the north to the south side. When she reached the side walk, she was a few feet ahead of me. At that, Mr. Hunt's men were at work on a swing stage, attached to the store occupied by Fisk & Ripley, putting up signs for them. As Mrs. Hoyt was walking on the side walk, I saw a hammer fall from the staging, and saw it strike her on the head. She fell partly down; I caught her before she struck the side walk. She fell down on one knee. We took her up stairs into Fisk & Ripley's store. Some
14 — men were on the staging, putting a sign over the top of the second story window, about 30 feet above the side walk. The stage and men could be seen from the side walk. There were no others at work on the building, except the men putting up signs. The hammer had a handle, one end had a face and the other end was wedge shaped, and would weigh about one lb., I should think. The staging was a swinging stage, suspended by ropes. The injury to Mrs. Hoyt happened about half past two o'clock in the afternoon. The men had been at work on the staging in the forenoon. Immediately after the injury I went for a physician. The wound bled profusely. When I returned, Mrs. Hoyt was lying on a sofa, and in her senses. After Mr. Hunt came into the store, and we went up into the third story where the staging was hanging from the outside, to see the men. This was about one hour and a half after the accident. The men were not there. While there I had a conversation with Mr. Hunt about the accident. Mr. Hunt said his workmen dropped a sign in the morning on account of the wind, in order to save themselves from falling. It was a very windy day. He said the men told him of their being obliged to drop a sign to save thrmselves, and that they were afraid to work there. I said by reason of the previous accident, the men ought to have been more careful. He said his workmen were as good and as careful as any workmen in the city, and that he was not going to have anything more to do with putting up signs; it was too dangerous, and there was too much risk in it. I saw the sign that fell in the morning, laying in pieces on the side walk. The signs were about three feet long. I do not know what part of the hammer struck Mrs. Hoyt.

15 — Dr. Foster, being duly sworn, testified as follows: I am a practising physician in the city of Chicago. I was called to see Mrs. Hoyt about 3 o'clock P. M. on the 1st day of June, A. D. 1857, at the store of Messrs. Fisk & Ripley. I found her lying on a sofa, very faint from loss of blood. She had a cut upon the head; the scalp was cut through, and also the membrane underneath it, to the bone, and the bone was cut into, or indented. The instrument causing the injury seemed to have glanced downward, pulling the scalp from the bone, so that the probe would pass nearly down to the eyebrow. I also saw part a tooth Mrs. Hoyt lost. She was confined to her room nearly a month, during which time I visited her twice a day. The scalp, where the cut was, now adheres fast to the bone. She complained much of headache, and soreness about the cheek and shoulder. She complained of the numbness about the wound at one time.

The right eye was almost closed, for a time, by swelling. The muscle over the eye was not injured; the drooping was occasioned by blood falling below the eye. The injury would trouble for some time upon changes of the weather, or upon any extraordinary exertion she should make. The wound was a little over an inch long, and just below the hair upon the
16— right temple. She was confined about eighteen days before she sat up much, and confined to her room about a month. A wound like this needs surgical dressing, and cannot be properly attended to by a nurse. I think her symptoms justified the complaint she made.

Mrs. Henry being duly sworn, testified as follows:

I am a sister of Mrs. Hoyts; I was with her during the curing of her wound, and have been with her from that time up to now. I knew her well before the injury and knew the state of her health. I dressed her wound after Doctor Foster ceased his attendance. She was confined to her room about four weeks. Her general health was very good before this injury, and she was able to do her own household work. She is not as not as well now as formerly, and complains a great deal of her head. She has had no other sickness since the accident. After reading or sewing, or working about a little while, she complains of pain in her head, and of numbness. The scalp has grown fast to the bone so that she cannot move her right eyebrow freely. She had two double teeth and part of another broken out by the accident. They were the two teeth next the back tooth and the one partly broken out was the one next forward of the two entirely gone. She came home pale and faint with blood on her dress. It was three months before she could attend to her usual duties.

Which was all the testimony offered on the part of the plaintiffs.

17— The defendant to prove the issue on his part, introduced as witnesses the following named persons:

George Hauslin being duly sworn, testified as follows:

I was employed by Mr. Hunt as foreman of his Job Shop connected with his store. Mr. Hunt is a hardware merchant, and gives his personal attention to that business. I had the entire charge of the job shop, which is on the second floor and adjoining the hardware store. I hired the men who worked there with the assent and approbation of Mr. Hunt Mr. Fisk employed me to do the job, and I sent the men there and superintended the putting up of the signs. When the hammer fell from the staging, I was on the opposite side of the street looking to see that the sign was put up straight. At the time hammer fell the men were holding up a sign and screwing into the building, which was made of iron. They were not using the hammer at the time it fell. It fell between the staging and the building. It struck on the cornice over the door, and then rebounded over the side walk and struck the lady. So far as I remember it was a windy day, and the wind had some effect upon the staging to swing it, and loose the fastenings. I was told by Mr. Hunt not to put up any more signs, but do not recollect whether it was before or after the accident.

John Cline, being duly sworn, testified as follows: I worked for Mr. Hunt; I was employed by Geo. Hanslein, with Mr. Hunt's approbation.
18— I was sent by Hanslein to put up the signs on Fisk & Ripley's store. Henry Brandon, another man employed in the shop, was with me. We had been at work on the staging nearly all day, putting up signs; we had seven to put up, and this was the last one. At the time of the accident, I was kneeling on one knee screwing up the sign, and Brandon sat on the

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staging holding up the sign. I used the hammer to drive the screw in a little, and then laid it down behind me on the staging, and did not have the hammer in my hand. It fell without my knowing how it came to fall. The wind was blowing pretty hard, and we were then at the corner of the building, just where the wind caught us over the top of the roof of the City Hotel, which was a much lower building than the one we were at work upon. The staging was about two feet wide, and had no railings or boards upon the sides—nothing to prevent the tools from sldiing off. The wind made the staging swing some, and I tried to fasten it to some ornamental work on the iron columns, but the wind slipped off the fastenings. The ornaments were too weak to hold it. The columns were about a foot out from the building, so that the staging rested against them, and left a space between it and the face of the building. The staging was suspended by ropes from the top of the building. Mr. Fisk would not allow us to have the windows opened to stand in to fasten the staging to, so as to hold it firm, and threatened to pitch Brandon down for trying to do so, and so we fastened on the best way we could. I did not tell Mr. Hunt that day about an accident having happened there before. I do not know how the hammer got off the staging, but I saw it falling.

19—

Henry Brandon being duly sworn, testifies as follows : I worked on the staging with Cline the day the accident happened. I was holding up the sign while he screwed it to the building. I was on the left and Cline on the right side. We were both sitting on the staging. Cline knocked a screw in, and laid the hammer on the staging behind him. I saw it on the middle of the staging. Don't know how it came to fall. It was very windy. I did not tell Mr. Hunt that any accident happened in the morning.

Benjamin F. Robbins, being duly sworn, testified as follows: About the last of May I painted some signs for Fisk and Ripley, and referred them to Mr. Hunt to get them put up. The staging used in putting up the signs by the men, belonged to me. I lent it to a George Hanslein, who wanted it to put up the signs on Fisk & Ripley's building for Mr. Hunt. The staging was well constructed, and a proper one to use in putting up signs. I have done jobs of the same kind, and know how they ought to be done, and what is wanting. Have used this staging, and think it is all that is needed for such purpose. The staging was twenty-two feet long, two feet wide, and had no protections on the sides. Think it was a very windy day. I saw Mr. Hunt at his store immediately after the accident,

20—

and before he had been down to the place where it happened. I told him his men had let a hammer fall and killed, or nearly killed, a woman, and he replied that it was a careless piece of business, or words to that effect.

This was all the testimony in this case, whereupon the Court at the suggestion of the said plaintiffs, instructed the jury as follows:

"If the jury believe from the evidence, that at the time of the injury to Mrs. Hoyt, she was in the exercise of due care, and that the injury to her was occasioned by the negligence of the defendant or his agents or servants or the want of such care and diligence for the safety and protection of the public as under the circumstances of the case would be sufficient and proper, the law is for the plaintiff.

"And in estimating the amount of damages if they find for the plaintiff, the jury should take into consideration the length of time Mrs. Hoyt was

sick in consequence of the injury—the effect of the injury upon her and the bodily suffering consequent thereon." To the giving of which, the defendant then and there excepted.

The Court at the instance of the defendants instructed the jury as follows:

First. Unless the jury shall believe from the evidence that the defenddants servants were guilty of negligence in taking care of the hammer upon the staging employed by them in putting up a sign, and by reason of such carelessness the hammer fell and hurt the plaintiff, Mrs. Hoyt, they will find for the defendant.

21—

Second. It is not sufficient to make out their case for the plaintiffs to show that a hammer fell from the staging and hurt plaintiff, Mrs. Hoyt, but they must show by the evidence and the jury must believe that such injury was occasioned by the negligence of the defendant or his servants.

The jury retired to consider of their verdict, and afterwards returned into court the following verdict: "We, the jury, find the defendant guilty, and assess the plaintiffs' damages at five hundred dollars."

Thereupon the defendant moved the court for a new trial upon the following reasons:

First. The verdict of the jury is against the evidence.

Second. The verdict is against the law and evidence.

Third. The verdict is against the instructions of the court.

Whereupon, argument being heard and the premises fully seen and understood, it is considered by the court that said motion be overruled; and the defendant then and there exepted.

And thereupon the court entered judgment for the plaintiffs and against the defendant, for the said sum of five hundred dollars, the damages aforesaid assessed.

22.

To all which decisions, rulings, opinions and judgments of the said court, in overrullng said motion for a new trial, and in rendering judgment for the said plaintiffs, the said defendant, by his counsel, then and there excepted, and prays that this, his bill of exceptions, be signed, sealed and allowed by this honorable court, which is accordingly done.

APPELLANT'S POINTS.

I.

The plaintiffs below had the burthen of proving negligence in the use and management of the hammer by defendant's servants, and that the injury to Mrs. Hoyt was the consequence of such negligence.

1st. Because they have, by their declaration, averred such negligence, and the injury as the consequence.

The rules of pleading always furnish an easy test as to which party has the burthen of proof, and one of the most useful of these rules is, "that the point in issue is to be proved by the party who asserts the affirmative."

1 *Phil. Ev.* 194. *Cow. & Hill's Notes*, 368.
Gazzaman vs. the Ohio Ins. Co, *Wright R.* 202,

2nd. Because *negligence* is a necessary element to constitute the cause of action. If the defendant himself had let fall the hammer upon the person of Mrs. Hoyt, trespass would lie against him for the direct injury; but for an injury received from the acts or omissions of defendant's servants, case must be brought, and the action is always founded upon negligence in the course of their employment. And besides, the defendant's servants were, at the time, prosecuting a lawful act with lawful means, and if an injury resulted therefrom no action would lie. If they were engaged in an unlawful or mischievous act, the result would be otherwise.

Vandenburgh vs. Truax, 4 *Denio R.* 464.

3rd. This case belongs not to the class where the law implies negligence from the fact of the hammer falling. If the law implies negligence in this case, from the fact itself, then it must in every other case, by proving the injury, and some connection (no matter what) of the defendant with the agent by which the injury was occasioned. As, if a fire originates in A's house, communicates to B's and burns it, B shall have his action, for the law implies the negligence. Such is not the law.

Clark vs. Foot, 8 *Johns. R.* 421.

Wilson vs. Peverly, 2 *N. Hamp. R.* 548.

The doctrine of negligence being implied from the fact of the injury, is peculiar to actions against common carriers, and is founded upon the special duty which the carrier owes to the passenger.

Christie vs. Griggs, 2 *Camp. R.* 79.

Ware vs. Gay, 11 *Pick. R.* 112.

II.

The appellant insists that the gravamen of this action was not established by the evidence; that the evidence tends more strongly to show

that the falling of the hammer, which struck a part of the building, glanced obliquely and hit Mrs. Hoyt, was the result of a mere accident, than of negligence. Both the falling, hitting the top of cornice and glancing to the spot where she was walking, was a mere accident, for which no action will lie.

III.

The instruction given on the part of plaintiffs, directed the jury "in estimating the damages, to take into consideration the *length of time* Mrs. Hoyt was sick in consequence of the injury." Now that statement is broad enough, to direct the jury (and they would infer that to be its meaning) to allow a recovery in this action for the loss of her services; because they are told afterwards, to take into consideration "the *effect of the injury upon her*, and the *bodily suffering* consequent thereon." The bodily suffering consequent thereon, would include the degree and period of the suffering, which, with "the effect of the injury upon her," would necessarily include all for which she was entitled to recover Then when they are told to consider the *length of time* she was sick in consequence of the injury, the jury would naturally suppose the court meant loss of time, for which the husband has a right to bring his separate action.

1 *Salk. R.* 119. *Com. Dig. Plead.* 2 *A.*

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v.

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Abst & Briefs