No. 14807

Supreme Court of Illinois

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

vs.

Cauffman

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 108

J. W. Middleton & Co., Stationers, 196 Lake St.

State of Illinois. In the Supreme Court.

THIRD GRAND DIVISION.

April Term, 1865.

APPEAL FROM BUREAU.

The Chicago, Burlington and Quincy Railroad Company, Appellant,

VS.

John M. Cauffman and Jeremiah Weirick, Appellees.

ABSTRACT BY APPELEES.

This suit was brought by the appelees against the appellant, in the count below to recover for three colts, killed by appellants engine on a crossing of its Rail Road in Bureau county, a trial was had before a jury at the August Term, 1861, and a verdict and judgement rendered for the appellees, from which appellant appealed to this court; and at the April Term 1862, of this court, the case was tried and the judgement reversed; on the ground that the court below erred in giving the law to the jury, in this, that its instructions to the jury, did not *negative the fact* that the negligence of the appellees in permitting their colts to be on the crossing in question, did in anywise contribute to the accident, *this was the only point decided in the case by this court*, as will be seen by the report of the case in 28 *Ill. Rep. P.* 513, the case was remanded to the court below, where the appellees obtained leave to amend their declaration.

Page 11. 7 14. 17. 7 21. Page

On the 31st July 1863, the appellees filed their amended declaration, in which it is believed the allegations conform to the law, as is laid down by this court, in this; It is alleged that the colts in question, on the 23d November, 1859, at said county, were lawfully being within the enclosure of appellees and on the same day without the knowledge or fault of appellees, escaped into an adjacent close then occupied by one Daniels, and without the fault, or knowledge of appellees, on the same day escaped from the enclosure of said Daniels into a public highway, and wandered along the highway without the knowledge or fault of appellees, on to the crossing where on the same day they were killed, &c.

The declaration contains two counts, in which will be found every material allegation, necessary to fix the liability of the appellant.

26, 33 34, To the declaration, the appellant pleaded the general issue, and at the March Term, 1864, the cause was again tried before a jury, and again a verdict and judgement rendered for the appellees.

ABSTRACT OF TESTIMONY BY APPELLEES.

41. HIRAM CAUFFMAN testifies, that he is a son and brother-in-law of appellees, was living with his father when colts were killed, had lived there four or five years, *appellees premises were two miles from the Rail Road crossing, when the colts where killed ; Jerome Daniels' farm lay between*

Page 42 *fathers (Cauffman's) farm, and said Rail Road crossing—colts had been running in stock field on fathers farm, two miles from crossing were they were killed, Daniels farm lay between colts and the crossing and was fenced*, the colts all run together; fathers farm, and Weiricks *are in same enclosure*, "*the colts were never on the highway in question, until the day they were killed*," they would have to go four miles around to get on the crossing in question ; the day they got out, they got over the

42, Page fence someway, went west to a pair of bars which let them into Daniels' field, and from Daniels' field got out into said highway, there was still a fence between Daniels' field and said highway, where they were killed; Daniel's had crops in his field, *father always looked after those colts, even-*

" *ings and mornings to see that they were at home*—saw colts at crossing after they were killed; I last saw the colts alive, a day or two before they were killed; might have seen them the same morning;

43. they were killed in Nov. 1859; there is a highway running east and west by fathers; it don't touch the rail road, colts were never known to range on the other highway which crossed the rail road, these colts when they run out always ranged east and north-east from fathers, which was the oppo-

" site direction from the rail road and the crossing ; I didn't know the colts were in Daniels' field that day, and *I dont think that father did*; they got out of the stock field into Daniels'.

44, Page 44 The colts going from fathers, would have to go four miles around, or two miles through Daniels, farm to get on the crossing; am positive I saw the colts on the farm the day before they were killed; we generally kept the colts up at night and in the morning turn them in the stock field; colts would go a quarter of a mile east of fathers farm to the creek for water along the road running by fathers farm. To get on the highway and crossing where the colts were killed, from the east end of this

45. road at the creek, the colts would have to travel about six miles, and on the west end about four miles. The road by fathers run between Daniels' farm and fathers. Dee owned land immediately

46. south of fathers, which lay between fathers and the rail road, which was fenced and in crops; Dansels has a section which lays south-west from fathers.

I know the crossing where colts were killed; rail road track was straight for half mile south-west

46. Page of said crossing; grade about two feet high at the crossing; *where the colts were killed, there was no*

" *obsticle for* 80 *rods on the rail road to prevent the colts from being seen for fifty feet on either side of the crossing. The engineer could have seen the colts for more than a half mile. 'I swear positive that a colt could have been seen from the train next to Daniels fence at the crossing.*

47 JEROME WILCOX.—Know the crossing in question; I own the land for 70 rods along the rail

road immediately south-west of crossing, was living there in Nov. 1859, saw the killing of the colts, at the time I was driving up with load of corn from the south, headed toward, and opposite said crossing, it was passenger train going east, first saw train near the crossing, at same time saw colts or part of them on south side of the rail road in the highway, as the train approached they went to west side of rail road *and stood in a huddle*, and when the the train got within seven or ten rods of
48. Page Ab cattle guards, *the whistle sounded, saw one of the colts turn a sort of summersault*, the colts were carried over the crossing, two were dead, and one yet alive, this was about noon. *It was from seven to ten rods from the crossing, when they sounded the whistle*, the cars were about one hundred rods from crossing when I first saw the cars, it was after I saw the cars that the colts crossed over the track, I was looking out to see how the colts were going to escape, for I had a great deal of stock killed at this crossing, and was looking and listening to see what would become of these colts; I was forty or forty-five rods south of, and facing the crossing; I could see anything that moved at the crossing; the fence didn't prevent my seeing the colts; I was on the load of corn; *the view of the crossing*
49. Page Ab *from the approaching locomotive, was as good as from my wagon, where I was*; the grade for 100 rods west of the crossing is higher than at the crossing; know the ground well, my house is twelve rods from the crossing; the highway on the south side of the crossing is about one foot lower than the grade of rail road; and on the west side from two to two and a half feet; *animals standing where I saw these colts standing 'huddled' up, could have been seen from a locomotive for ninety or a hundred*
49. Page Ab *rods easy enough*; there was no place I think where the colts *could have been concealed from the engineer's view; there was no place within fifty feet on either side of the track but that he could have seen them for ninety rods west of the crossing; the engineer must had fine view of colts when I first saw*
50. *them*; dont think my wagon made much noise; *my attention was attracted to the cars by the rumbling of the wheels, and not by the sound of the bell or whistle; the colts stood huddled up next to Daniels fence; if the bell or whistle had been sounded there is a probability I would have heard it* they might
Ab 50. have done so and I not heard it, but I think I would have as likely heard the sound of the bell or whistle, as the sound of the wheels; the colts *were three or four rods* from the rail road and they might have been easily seen by the engineer; *when the whistle was first sounded I saw the colts*
Ab *spring at the sound, they were then huddled up on the north side of the track next to Daniels' fence*; can't say whether the cars checked their speed; I think *they were running at a good jog*, for they
51. threw one colt up over the smoke pipe; my orchard was no obsticle in the way of the engineers seeing the colts. There was a small Quaking-asp on each side of the track; one four, the other two or two and a half inches in diameter, standing twenty or twenty-five feet from the crossing; *the colts all passed to the west side of the crossing; when I first saw the cars and stopped within*
Ab *3 or 4 rods of the crossing, till the cars came up and whistled, and then they sprang for the south-side; don't know that I ever saw the colts before.*

52 *Cross Examined.*—Was a witness on former trial; don't remember that I gave the distance that I was away from crossing on the other trial: if I swore that I was seventy rods off I should think I was correct; don't remember that I swore I didn't see the cars till I heard the whistle; if I did swear so, it was probable the most correct, but don't think I could have avoided seeing the cars coming; my *recollection is now that I did see the cars before the whistle sounded*; dont think I swore before, that I didn't know whether it was a freight or passenger train; there were no apple trees on the south side of the rail road track; I have often rode over this part of the rail road on gravel trains,
Ab 53 at times too, when I see stock within 4 or 5 rods of the crossing; *when the colts had passed over the crossing, the cars were about* 60 *rods away; the colts passed the crossing* 3 *or* 4 *rods then huddled together and stopped with heads up, some headed one way and some another;* train of cars would be between me and colts when the colts were struck 2 or 3 of the colts passed over to the east side be-
Ab 54 fore the others were struck; *don't think there was any trees for* 70 *rods west of the crossing, except the two I have spoken of; I have ploughed that land.* The ground near the crossing has been ploughed and scraped out since this accident; I was driving my team north, and the cars were run-
Ab 56 ning north-east when the colts were killed; *I saw the colts grouped together, and the first that I heard the whistle, the colts sprang, and tried to get across the rail road; two or three got over safe;* don't know that colts could have got on to the crossing from Cauffman's on the north and south
57 highway; if this highway was not opened, the colts would have to travel four miles from Cauffman's to get on the crossing; and a zigzag route then; there was no pasture that way, only what would be in the highway.

D. C. Wilcox.—I was with Jerome (the last witness) gathering corn, when the colts were killed; I think a man on the rail road could see the colts from a locomotive for 100 rods west of the
Ab 59 crossing; there was no obsticles to hinder the view on the 50 feet each side of the rail road track, for 80 rods west of the crossing except the two Quaking-asps; these trees were 50 rods west from the crossing; near the crossing were two or three bushes, or sprouts on the north side; I don't think they would obstruct the view, they might be six feet high; dont remember if they had leaves on;
Ab 59 *I dont think my brothers orchard hindered the view; this orchard was five or six rods from the track; the fences along the* side of the rail road was wire fence, I could see the colts at the crossing wherever they were; the colts were not out of my sight, from the time they passed the crossing, until the
Ab 60 train intervened; the train was from seven to ten rods of the crossing, when I heard the first whistle; (after it whistled at the crossing west); I dont know why the colts couldn't be seen from the ap-
Ab 60 proaching train, the *nature of the ground was as good for the engineer to see, as for me where I was; I had an idea that the whistle started the colts; there was no perceptible time, between the sound of the whistle and the starting of the colts*; I had no trouble to hear the whistle; if it had whistled eighty

rods, I think I would have heard it; *heard no bell ring at any time, if it had rung eighty rods I think I would have heard it*; it might of rung and I not heard it: I watched the colts; *in my judgement the engineer could have seen the colts for* 100 *rods before reaching the crossing*; the colts stood up together; *I saw one colt go up towards smoke stack as high as the lamp.* The north and south road connecting the road by Cauffman's house with the road in question was not open; the colts Ab 61, *would have to go west from Cauffmans* 4 *miles to get on the crossing; east of Cauffman's they would have to go more than three miles; It was a passenger train that killed the colts; running a good jog faster than usual, and didn't abate the speed any as it approached the crossing;* I was about 80 rods from the cars when I saw them first; my brother might have been 25 rods ahead of me when I saw the train; *I* was from 60 to 80 rods south of the crossing at the time—discovered colts about the time I saw the train; when I first saw the colts some were standing around the track headed different ways; *all were on the* 50 *feet belonging to the rail road, and all passed over to the north side of the* Ab 61 *rail road, perhaps a rod or two, and came to a halt*; there was five of them, they went over one or two, or even they might have gone some four rods from the crossing; the colts remained in that position across the track until the train appoached within 7 to 10 rods; the colts where then four rods away, and the train obstructed my view of the colts except those that passed the crossing; *I did not* 63, *hear any bell, if it rang it must have been a very poor bell.*

Ab

64, JAMES M. FISHER,—I was 30 or 35 rods west of the crossing when when the colts were killed, unloading corn, facing the rail road, saw the colts in Jerome Daniels' field half mile from crossing, 8 or 9 o'clock in the morning of the day they were killed; next saw the colts at the rail road crossing: they were picking inside the 50 feet of the rail road track at crossing; they had been there 15 Ab 64, or 20 minutes before I saw the cars; *my attention was called to the cars by the rumbling of the car wheels; heard no bell at any time, and no whistle till the cars got within ten or fifteen rods of the crossing.* I had full view of the cars from the time I first saw the cars till they passed the crossing; if a bell had rung on the train, I think I would have heard it; I was pretty close to the cars; they run Ab 65, at a good speed, which did not slacken. I expected to hear the whistle: the cars were 125 or 150 rods from me when I first saw them; my attention was then called to the cars by the noise of the wheels; a whistle is easier heard than the wheels; when the cars first came in view some of the colts were on the south side of the crossing; they passed to north side, where they stood in a group, inside the 50 feet of the rail road; the colts sprang on the track when the cars whistled, two got Ab " over, three were killed; the colts were grouped on maybe ten foot square; the whistle was shrill, two or three toots; very short time from the sounding of the whistle until the collision; my attention was drawn to the colts, for I was satisfied they would get killed. Know the crossing ever since the rail road was built; I know of no low place west of the track, to prevent engineer from seeing the colts for 80 rods west of the crossing; I dont think Wilcox's orchard would interfere with the view

I was 3 or 4 rods from the highway, when the colts were killed; saw Daniels drive colts out of his
Ab 67. corn that morning a south west course, he drove them 8 or 10 rods; don't know how they got in highway.

EDWARD TRIPLETT.—Well acquainted with the ground west of the crossing before rail road was built, it was smooth cultivated ground; no trees there when road was made, it was made in 1854,
Ab 67. there were no trees up to 1859 on the rail road track for 80 rods west of the crossing; there was no obstruction on the rail road to prevent engineer from seeing stock on or near crossing for 80 rods west of crossing; I passed there very frequently; Wilcox's orchard wouldn't interfere with the view; *animals could have been seen for fifty feet on either side of crossing, for one hundred rods on the rail road west of the crossing*; *I* AM POSITIVE *I could see colts in every part of the fifty feet on*
Ab 68. *either side of the crossing, for* 80 *rods west of the crossing*; rail road is higher there than surface of the ground; *there were no trees along there as high as the locomotive.*

68. CHARLES KNOX.—Lived near the rail road crossing in '59; owned 80 acres adjoining Wilcox's on the west; the land is prairie where the rail road run: a few cotton wood came up along the rail road after it was built; the sprigs were not large, don't think they would obstruct the view for 80 rods west; I could easily see cattle on the crossing for 60 rods; *in* 1859 *the quaking asps were but little sticks; the orchard was no obstruction to the view of the engineer; if the animals were fifty feet east or west of the the crossing, for* 80 *rods west; an engineer coming up from the west on a train would have no difficulty in seeing the colts if they were anywhere within fifty feet of the track without difficulty; don't think a colt could hide from his view for fifty feet on either side of the crossing unless it would lay down.*

AMOS FISHER.—Lived in neighborhood in fall of '59, known the premises for 15 years; no
Ab 69. timber there when the rail road was built but Wilcox's apple trees; for 70 rods before reaching the crossing, the opportunity for seeing stock within 50 feet of the crossing are good; for that 80 rods as you approach the crossing; *a man could see a colt anywhere within* 50 *feet of the crossing if he would look*; *I don't think a colt could hide itself from his view unless it would lay down*; some quaking asps, don't think they would obstruct the view.

S. M. KNOX.—Have traveled frequently up to that crossing: for 80 rods west of the crossing,
Ab 70. an engineer might see stock on the 50 feet; *he might see* 100 *feet on either side of the crossing*; don't think there was any particular obstructions to his view; it is a straight line; there was a few cotton wood, all small.

71. WARREN EASTMAN.—Lived north of Cauffman's; the colts when run out, ranged between me

and Cauffman's, and not near the rail road; I used to see them every day; they would have to go 4
Ab 70 miles around to get on the crossing; *I examined the rail road at the crossing after the killing, with a view to see what the chances of the engineer were to see the colts*; I think there was *nothing for* 80
Ab 71. *rods to obstruct his view; there was nothing for a quarter of a mile west of the crossing, to prevent the the colts being seen on the highway* from the rail road track, for 80 rods west of the crossing; the lands between Cauffman's and Wilcox's was enclosed and in crops; I will swear that the orchard
Ab 71. was no obstruction; I have traveled over the rail road and looked to see if the colts could have been seen off at the sides of the crossing; and *I think the engineer could easily have done so.*

It was stipulated by the parties that if the jury found for the plaintiffs, the verdict should be the same as on the former trial; and plaintiffs here read the former verdict, which finds for Cauffman 71. man $120, for Weirick $65.00.

DEFENDANTS TESTIMONY.

F. H. Cooly.—Was engineer on train that killed the colts, (exhibits release of defendants to
Ab 72. enable him to swear as a witness in the case) had run over the ground every day; have pulled leaves off of trees west of the crossing in question; it was hard to see the colts especially *if they were feeding*; the train was running east 15 or 20 miles per hour; when we crossed the other crossing I rang the bell, after that I saw a colt step on the track, I then shut off steam to get control of the
Ab 73. train, and blowed the whistle; *I dont recollect what I blowed it for, whether down breaks or what*; at the time I first saw colts I was 60 or 70 rods from crossing at that moment the colts passed out of my sight, I looked for colts but found none, this colt passed west of the track; *the track looked clear till I got within 7 or 8 rods of crossing*; *I then saw colts wheel and rush from that sink* close to the
Ab " fence, towards rail road, I then pulled the lever of engine, but found I couldn't save the colts; *previous to that I couldn't see the colts*; would take a distance of 20 rods to stop the train running as we were; *there was not anything within 50 feet to warn me that stock was there; the colts*
Ab 74. *when I saw them the second time they were beyond the 50 feet*; they were running as fast as I went; *there was a fireman aboard he rang the bell from the crossing west till we struck the colts*; I did not
Ab " let on the steam until I had struck the colts; the engine would not run far until she stopped; the colts had started to run when the whistle was blown; the orchard, fence, and trees, west of crossing hides stock considerable; *it is impossible to see them in some positions*; *the colts were about three*
Ab 75. *rods off when I saw them coming on crossing*; the right of way for some distance west of crossing is so obstructed with trees, as not to be able to see stock; 80 rods I could not have seen the stock; the trees were 8 or 10 inches in diameter, nearest tree is within ten rods of crossing; *the trees were very thick so that I couldn't tell whether there was a fence or not; it was so most of the way between the*
Ab 76. *crossings.*

If the colts stood 3 or 4 rods off the track I don't think I was bound to see after their safety;
Ab 77. *there was leaves on the trees; I think defendant ought to gain the case;* but I don't care who gains it; *I have been in the employment of defendant ever since colts were killed; I was allowed to review my testimony on the former trial; I might have had a reason to see my testimony to swear now as I did then.*

SAMUEL SWEETLAND.—Live in Hamilton, Ohio, was fireman on the train that killed the colts;
Ab 78. the first I saw was one of the colts passed off left side of the crossing; train was then 60 or 80 rods away; the trees and fence hid the view of the colts; I rang the bell from the crossing west to the one in question, about 160 rods; we were 50 rods from the colt when it passed off; *we shut off steam when we first saw the colt, and Cooly blew the whistle; then there was nothing to be seen till we got within 8 or 10 rods of the track;* when we saw the colts on the track: one or two got over safe, three got caught; colts were on the north side when I first saw them; the steam had been shut off for 60
Ab 79. rods; we couldn't save the colts after we saw them; *could not see any of the highway on account of the obstructions; could see nothing on highway till we got within 7 or 8 rods of crossing;* don't know that brakes were down; don't know whether we had any brakesman aboard; breakes were whistled down, and not whistled up till we passed the crossing.

I live in Hamilton, Ohio, have come here three times to testify in this case; the defendant paid me; they did not promise me if I would swear well they would pay me; I read my testimony
Ab 80. in the Bill of Exceptions (of former trial) *to see that I would swear now as I did then;* dont know that the breaks hugged the wheels.

81. A. C. PROUT.—Was on the train that killed the colts; rode on platform to a point half way between the crossings; the bell rang from the west crossing until I went into cars; and when I went in cars I heard whistle two toots, two different times; after I went in the cars I raised the window and saw the movement of the colts, from the time I heard the first whistle to the time I saw the colts; the cars had run 20 rods, perhaps; not much time elapsed from time I heard whistle till
Ab 83. colts were killed; first sound of whistle cars were about 60 rods from crossing, the second time within ten rods; *must have been bushes or fences to obstruct the view,* for I could not see any stock; the highway ran east and west; when I first saw the colts they were three rods west of the rail road; did not hear bell after I went in the cars; the defendant has paid my fees and fare to come here and testify; I live in Ottawa; leaves were generally off the tops the trees; one circumstance makes me remember that the bell rang was, there was a friend of mine on the train, with whom I had business, and I noted the date on my book; *another circumstance that makes me remember that the bell rang between the crossings was, there was a man tried to jump on the train a mile west of the crossing.*

Ab 85. GEORGE HOFFMAN.—Was track repairer on this road in 1859; there were some bushes on the road; would not swear that they would obstruct the view so that stock 50 feet from the crossing could not be seen for 80 rods on the rail road.

J. J. Taylor atty for appellee

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

vs.

John M. Caughman and Jeremiah Warnick appellees.

Abstract of Testimony by appellees

Filed April 5. 1865

Lt Leland Clk

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Supreme Court of Illinois,

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APRIL TERM, A. D. 1865.

The Chicago, Burlington & Quincy Railroad Co.
vs.
John M. Cauffman.

POINTS AND AUTHORITIES OF COUNSEL FOR APPELLANT.

BY

WALKER & DEXTER.

JAMESON & MORSE, PRINTERS, CHICAGO.

Filed April 5. 1865
S. Sloan Clk

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POINTS AND AUTHORITIES OF COUNSEL FOR APPELLANT.

This cause has been before this court once before, and is reported in the twenty-eighth volume of the Illinois Reports; and it seems to us that if the court and jury upon the second trial of the cause in the court below, had paid the slightest attention to the law of the case as then adjudged, there could have been no occasion to bring the matter again to the attention of your Honors. There are many reasons why the judgment of the court below cannot stand, and we shall urge them under three propositions:

I.

The verdict and judgment in the court below were manifestly against the evidence and law of the case, and the motion for a new trial in the court below ought not to have been overruled.

as the law requires, and the testi-
no doubt on this subject.

Willie Wilcox, a witness for the plaintiff, says he was forty or fifty rods from the crossing and the road, on a wagon, driving a team, with a load of corn, and did not hear the bell ring or the whistle sound till they got within seven to ten rods of the crossing; they might have rung the bell and sounded the whistle, and I not have heard it, my attention was so much taken up with the destiny of the colts.

D. C. Wilcox, plaintiff's witness says, at the time of the accident he was eighty rods from the crossing and the road, and heard no bell ring at any time. It might have rung and I not heard it—my attention was more on the colts than on the train.

J. M. Fisher says that he was thirty to thirty-five rods west of the crossing; heard no bell ring, and thinks if it had rung he should have heard it, and did not hear the whistle till within seven to ten rods of the crossing—my attention was attracted by the colts. Here, in substance is all the testimony produced by the plaintiff on this subject. These witnesses are thirty-five, another fifty, and the other eighty rods distant from the crossing and the railroad, with their attention closely fixed by the danger to the colts, and they did not hear the bell ring. This does not prove it did not ring, and it is not at all strange or incredible that they did not hear it; it is hardly to be expected that they would. Those witnesses do not, and could not swear that the bell did not ring, and the facts and circumstances detailed by them are not sufficient to raise a presumption that it did not. There is, then, in fact, no evidence in the testimony of these witnesses that the bell was not rung. The plaintiff below wholly failed to make even a *prima facie* case in

ry part of his case. Here is a total failure of evidence in a most material point, and without such proof it is idle to talk of supporting the judgment.

2d. *But the bell was rung as the law requires, and the testimony in the case leaves no doubt on this subject.*

Jerome Wilcox, a witness for the plaintiff, says he was forty or fifty rods from the crossing and the road, on a wagon, driving a team, with a load of corn, and did not hear the bell ring or the whistle sound till they got within seven to ten rods of the crossing; they might have rung the bell and sounded the whistle, and I not have heard it, my attention was so much taken up with the destiny of the colts.

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this regard. There was no case to be met, no testimony to be disproved, and no witnesses to be contradicted by the evidence of the defense. But that there might be no doubt upon the subject, the company did produce such affirmative and positive testimony as to place the matter beyond controversy.

FLOYD H. COOLEY testified that, when we crossed the west crossing, we rung the bell. There was a fireman aboard when the accident occurred, and he rung the bell from the crossing next west, until we struck the colts. I am required by the company to keep a record of my acts in ringing the bell and whistling, and I have examined to see if there was an omission to ring the bell at this crossing. There was no act omitted to be done by me to save the stock and passengers.

SAMUEL SWEETLAND testified, I rung the bell from the crossing west to the crossing where the colts were killed, about one hundred and sixty rods. I rung the bell myself through the whole distance. I remember it at this time, on account of the colts being killed.

A. C. PROUT, a passenger on the train, testifies that before we got to the crossing next west, I was riding on the platform and continued to ride there till we got half way between the two crossings when I went into the cars; and that the bell was ringing at the west crossing, and rung all the time till I went into the cars, and when I went in I heard the whistle toot two different times. The bell was ringing when I went into the car, but cannot say whether it rung after that or not. Here is direct, positive evidence by these witnesses, whose testimony is not impeached or sought to be impeached, that the bell was rung as the law requires for eighty rods or more before reaching the crossing. This testimony, as this court have held, is entitled to more weight than the mere negative testimony of witnesses who say that they did not hear it.

Chicago & R. I. R. Co. v. Still, 19 Ill., 499.

But in this case there does not seem to be a question as to the weight of testimony. No witness testifies that the bell was not rung, while, on the contrary, three witnesses testify positively that

this regard. There was no case to be met, no testimony to be disproved, and no witnesses to be contradicted by the evidence of the defense. But that there might be no doubt upon the subject, the company did produce such affirmative and positive testimony as to place the matter beyond controversy.

Floyd H. Cooley testified that, when we crossed the west crossing, we rung the bell. There was a fireman aboard when the accident occurred, and he rung the bell from the crossing next west, until we struck the colts. I am required by the company to keep a record of my acts in ringing the bell and whistling, and I have examined to see if there was an omission to ring the bell at this crossing. There was no act omitted to be done by me to save the stock and passengers.

Samuel Sweetland testified, I rung the bell from the crossing west to the crossing where the colts were killed, about one hundred and sixty rods. I rung the bell myself through the whole distance. I remember it at this time, on account of the colts being killed.

A. C. Prout, a passenger on the train, testifies that before we got to the crossing next west, I was riding on the platform and continued to ride there till we got half way between the two crossings when I went into the cars; and that the bell was ringing at the west crossing, and rung all the time till I went into the cars, and when I went in I heard the whistle toot two different times. The bell was ringing when I went into the car, but cannot say whether it rung after that or not. Here is direct, positive evidence by these witnesses, whose testimony is not impeached or sought to be impeached, that the bell was rung as the law requires for eighty rods or more before reaching the crossing. This testimony, as this court have held, is entitled to more weight than the mere negative testimony of witnesses who say that they did not hear it.

Chicago & R. I. R. Co. v. Still, 19 *Ill.*, 499.

But in this case there does not seem to be a question as to the weight of testimony. No witness testifies that the bell was not rung, while, on the contrary, three witnesses testify positively that

it was rung for more than eighty rods, one of them that he actually rung it himself, another that he both saw and heard it rung, and the third, who was a passenger, and in no manner connected with either party, that he heard it, and relates circumstances which go strongly to confirm the truth of his statements.

3d. The record shows that the defendants' servants in charge of the train, not only rung the bell as the law requires, but that they did all that could be done and used the utmost care and caution in the management of the train on the occasion. The testimony shows that the bell was kept ringing all the way between the two crossings, that when sixty or seventy rods from the crossing where the colts were killed, the engineer and fireman, when running at fifteen or twenty miles an hour, saw a colt come upon the track; they immediately shut off steam, blew the whistle and reversed the engine; the colts then passed off the road and out of their sight to the northward; that they ran along watching for the colts, and the track remained entirely clear, and neither the engineer, fireman or the passenger, Prout, all of whom were looking, could or did see anything more of the colts till they were from seven to ten rods from the crossing, when the colts "*wheeled and "rushed from the sink close to the railroad*" towards the crossing; the whistle blew twice for brakes and the engine was reversed, but it was too late, and when the engineer saw he could not save the colts, in order to save the train and passengers, he put on steam, with the purpose of striking the colts hard enough to throw them from the track, that being the proper course to take when he saw it was too late to save the stock. What more could have been done? Can this court, now looking over all the circumstances, suggest anything that might have been done for the safety of the stock, train and passengers, which those in charge of the train could have done, and yet omitted?

The defendant company were guilty of no negligence in this transaction. Nor is there in the record, evidence to convict it or which tends to convict it of negligence in any, the slightest particular.

The case of the *Galena and Chicago Union Railroad Company vs. Griffin* (31 *Ill.* 303), was like the present in all its essential features, and the language of the court in applying the law to that case, entirely disposes of the present one. The court say:

"It is insisted by appellant, *that appellee wholly failed, on the* trial below, to show negligence on the part of the company. It appears from the evidence, that the colt was killed on the depot grounds, where they are not required to fence their track. It ran upon the road, from behind a building so near the road that it could not be seen by the engineer in time to check the train. Before it could be seen, it was within a few feet of the engine. It also appears that the train was running at its usual speed.

"One or two of appellee's witnesses testify that they 'did not hear the ringing of the bell;' but the engineer and fireman both swear positively that it was ringing at the time the accident occurred. The fireman testifies that he rung the bell at the time, as he always did, at the road crossings, and had for at least eighty rods. This was all that the agents of the company could do to prevent the accident. Instead of the evidence showing negligence, it seems to establish the highest degree of care that could have been exercised, under the circumstances. We can perceive no omission of duty on their part. The finding of the jury was, we think, manifestly against the evidence, and the court below should have granted a new trial."

The circumstances of the two cases are so nearly alike that a description of one embraces that of the other. Change the names of the parties, and the language of the court, both in stating the case and in determining the law, will apply, I had almost said, equally well to either, and of course the decision in that case must determine the present one.

The killing of the colts, therefore, in the present case, was either purely accidental, without the fault of any one, in which case it will not be pretended that the defendant was liable, or is chargable to the carelessness and neglect of the appellee himself.

We are, therefore, next to inquire whether the plaintiff below has shown his allegation to be true, that the colts were present on the crossing without his fault or neglect. That they were on the crossing at the usual time of the passenger train passing, is certain, and that the appellee did not *prevent* their being there at that time, is also certain; and since it was in his power to have prevented it, and did not, it follows, with much certainty, I think, that they were there by his *permission* or *sufferance*. The only inquiry is, was this permission or sufferance of the appellee careless or negligent? They ought not to have been on the crossing at the time they were. They were, by being there, not only in danger themselves, but they very greatly endangered the train and passengers. The appellee was their owner and keeper, and it was his imperative duty to see to it that the colts were not, at any time, where they ought not to be, and he must be held responsible for the discharge of this duty. It was in his *power* to have discharged it in this instance. It required but a very low degree of care and attention to have looked after the colts, and seen to it that they were at home, or in charge of some person to look after them. This duty, quite within his power, and not inconvenient of performance, he wholly omitted, and in truth made no effort to discharge. He seems to be content with admitting the fact of neglect, and offering a very poor excuse in justification: it is that while he permitted them to run at large, and go where they pleased, without a keeper, they had not, during the summer, been accustomed to range towards the crossing, but in an opposite direction. Upon so slight and, I had almost said, trifling a pretext, he was willing to endanger, not only his colts, but the lives of hundreds of passengers, it may be, and the safety of the train. Can it be said, under such circumstances, that the colts were upon the crossing without the fault of the appellee? On the contrary, do not the facts present a case of gross, and most inexcusable negligence.

It will not do to answer to this, as is done, that it was the fault of Daniels, who drove the colts towards the crossing. It was the business of the appellee to see to it that his colts were at home, and

not trespassing on Daniels' premises, and to attend to them himself, and not permit Daniels to drive the colts towards or on to the crossing. There certainly was nothing to prevent him attending to this ordinary and very reasonable duty, such as every man owes to himself and his property, to say nothing about the public rights.

This is very clear from the record, *he and his son were at home all that day, doing nothing.*

It appears from the testimony of the plaintiff's own son, that the colts were allowed, during the summer, to run at large upon the range,—that at all times, and at the time of the accident, they were suffered to go, without restraint, into the highway, and about eighty rods from the house, or more, to get water,—that they did not know that the colts were at home the night before, and were not certain that they were there the day before, and took no pains to ascertain—that they did not know at any time, where they were the day they were killed, and made no effort to learn, notwithstanding the appellee and his son were at home all day, sitting in the house, and doing nothing; that, without any attention to their whereabouts, the colts, on the day they were killed, were allowed and permitted by the appellee, to be trespassing on Daniels' farm, who, finding them there, drove them off towards the crossing; that by this short and quick route, the colts were suffered to go to and upon the crossing, and came in collision with the defendant's passenger train, running upon its usual time, and at its usual speed; can it be said that the appellee, with his son, could sit idly in his house all day, and permit his colts to wander at will on to the crossing, or by suffering them to trespass upon his neighbor, to be driven away to this highway crossing, where they had no right to be, at the time of a passing train, and thus come in collision with that train, and be guilty of no fault or carelessness? And is it upon such an exhibition of reasonable and proper care that the appellee expects, in this court of justice, to sustain a verdict and judgment, so improperly rendered? A more gross and inexcusable case of negligence and carelessness could hardly be conceived.; it was,

therefore, by and because of this gross carelessness of the appellee, and by no fault of the appellant, that these colts were killed.

The case of the *Galena and Chicago Union Railroad Company vs. Griffin*, above referred to, is quite decisive of the present controversy, but there are many others to the same effect.

In this very case, when it was here before, the court stated, and the appellee should have been advised, that no such case as this record presents can be maintained. Caton, Ch. J., in delivering the opinion, says: "The defendant certainly had a right to the use of its track at the road crossing as well as other places, and the plaintiff had no right to have his horses stand upon the track, or to jump across it, or pass over it in the way of, or so as to come in collision with an approaching train, if those in charge rung the bell, or sounded the whistle, as the law requires. It is due to the traveling public, and the safety of human life requires, that the owners of stock should not allow it to stand or lie upon a road crossing, on a railroad track," and if an owner of stock does permit it, no sane man can say that his own carelessness did not contribute to the loss; "on the contrary, the law would hold him responsible for any damage which might accrue to the train, or persons upon it, resulting from such reckless or criminal carelessness."

28 *Ill.* 517.

The case of the *Illinois C. R. R. Co. vs. Phillips* is also much like the present, and there the court held expressly, that "*a person is guilty of negligence*, who permits his animals to go upon a railroad track, where the company is not bound, by law, to fence," and the court say, in giving the opinion: "Again, if it could be conceded that the company were guilty of negligence, the defendant in error was also blamable in permitting his animals to run on the track at a place the company were not required to fence. *Chicago and Mississippi R. R. Co. vs. Patchin*, 16 *Ill.* 198, where it is laid down as a rule, that, where a railroad company are not bound to fence, they are only liable for gross neglect, or wanton injury to

stock. Here there seems to be no pretense that the injury was wanton, or that the servants of the road were guilty of gross neglect. The engineer testifies, that, after the stock was discovered, no person on earth could have prevented the injury, owing to their nearness to the engine, and its momentum at the time. This case seems to have been much freer from neglect than the *Chicago and Mississippi R. R. Co. vs. Patchin*, and yet the court there held there was no right of recovery."

In the case of the *Aurora Branch R. R. Co. vs. Grimes* (13 *Ill.* 58), the court say:

"When a party seeks to recover damages for loss which has been caused by negligence or misconduct, he *must show that his own negligence or misconduct* has not concurred with that of the other party in producing the injury. *And the burden of proof is upon the plaintiff to show, not only* negligence on the part of the defendant, but, *also, that he exercised proper care and circumspection; or, in other words, that he was not guilty of negligence.*"

"The plaintiff is bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it, or that by the exercise of ordinary care he could not have avoided it."

In the *Galena and Chicago Union Railroad Company vs. Jacobs* (20 *Ill.* 488), the language of the court in the above case is quoted and approved, as correctly stating the rule on this subject, and the court observe that the rulings of other courts, British and American, do not essentially differ from these, and that "all of them proceed upon the ground, not only that the defendant was guilty of negligence, *but that the plaintiff exercised ordinary care, and throwing the onus in each aspect upon the plaintiff.*"

Under such rules of law, how can this judgment be sustained? Instead of the record showing a case of the exercise of reasonable and ordinary care on the part of the appellee, it convicts him of most gross carelessness, and inexcusable, and almost criminal heed-

lessness. Instead of exhibiting a case of *wilful and wanton* injury to the stock, as the law, under the circumstances of the case requires, to authorize a recovery, as held in *Ill. C. R. R. Co. vs. Phelps*, it is clear beyond all manner of doubt, that the appellant was guilty of no carelessness, and that every precaution was taken, on the part of those in charge of the train, to avoid the consequences resulting from the appellee's negligence in allowing his stock to be upon the track at the crossing.

II.

The court erred in permitting the plaintiff, on the trial of the cause, to give in evidence to the jury incompetent testimony.

It appears from the record that the plaintiff below, after the company had closed its testimony, was allowed to recall

D. C. Wilcox and Jerome Wilcox, to prove that the defendant, in running its trains over that part of its road at other times, and on other occasions, was not in the habit, usually, of ringing its bell, and said witnesses did testify on the trial, "that the defendant, both before and after the accident, had been in the habit, frequently, of running its trains over that part of its road, between these crossings, without ringing the bell; but that after Wells was killed, at a crossing east of Princeton, that, for a while, they kept up a pretty constant ringing and whistling."

This testimony was objected to, and the opinion of the court, admitting the same, was excepted to at the time (see record, page 85). This ruling of the court was clearly wrong. The inquiry was as to the truth of an alleged fact, to wit: was the bell rung, or the whistle sounded, on this occasion, by the defendant's servants then in charge of the train? This, like any other fact, must be proved by those who have knowledge upon the subject, and can testify of

what they know. The statute required of the company, that its bell be rung, or whistle blown for this crossing, and the presumption is that the requirements of the law were complied with. This presumption can only be overcome by the plaintiff's establishing by competent testimony that the fact was otherwise. *What other agents of the company, in charge of other of its trains, and on other occasions, may have frequently done, or frequently omitted to do,* can have no logical tendency to prove what those particular servants of the company, on the occasion in question, did or omitted to do. It is implied, both in the questions and answers, that the company did sometimes, and perhaps generally, ring the bell, but whether it did or did not, to allow testimony to be given to the jury, that it, on other occasions, and that, *too, after* the occurrence of the accident in question, frequently omitted to ring the bell, was certainly erroneous. A reference to the authorities will show that we are correct.

In *Robinson vs. Fitchburg and W. R. R. Co.*, where evidence was offered that the same engineer, on other occasions, had been guilty of similar acts of carelessness, a much stronger case than the present one, the competency of such testimony was considered, and held to be inadmissable, and the court say:

"Evidence of specified acts of negligence and carelessness on the part of the engineer, in running the train on other occasions than the one in question, was clearly incompetent. It would not only lead to collateral inquiries, but it had no legal or logical tendency to prove the point in issue. Because a man was careless or negligent of his duty in one or two instances, it does not follow that he was so at another time, and under different circumstances." No offer was made to prove the general character of the engineer for skill; such testimony would have been less objectionable, though perhaps not competent.

7 Gray, 95.
Collins vs. Inhabitants, &c., 6 *Cush.* 396.
Ill. C. R. R. Co. vs. White, 18 *Ill.* 166.

Dean vs. Blackwell, 18 *Ill.* 336.
Standish vs. Washburne, 21 *Pick.* 237.
1 *Greenl. E. Sec.* 52–448.

It may be said, as a ground for the admission of this testimony, that the engineer and fireman had sworn that they always rung the bell or sounded the whistle at this crossing. Such testimony, if received, was doubtless incompetent, and would have been excluded, if objected to, though it was not; but, the fact that one party, without objection, has given to the jury incompetent testimony, is no authority to the other, against objection, to give other incompetent evidence. One party's fault gives no license to the other party to commit a wrong.

McBride vs. Cicotte, 4 *Mich.* 478.

The only object of such testimony would be to impeach the witness for the defense. The testimony was not to show that these same witnesses had, on other occasions, neglected to ring the bell, or sound the whistle, but simply that the defendant, by its other agents, in no manner connected with these, it may be, had, on other occasions, with other engines, omitted to ring the bell. Such testimony would neither tend to impeach the witnesses for the defense, nor to prove the fact alleged by the plaintiff, that on the occasion in question, the servants of the defendant neglected to ring the bell, or sound the whistle, and its admission to the jury, by the court, was, therefore, an error.

III.

The court erred in instructing the jury on behalf of the plaintiff, on the trial of the cause below.

There are objections to the plaintiff's first instruction, but as the second one is obnoxious to the same objection, amongst others, we may omit any notice of the first, and proceed to an examination of the second, which is as follows:

2d Instruction. Though the jury may believe that the defendant directing the train in question, did ring the engine bell continuously for eighty rods before the train reached the crossing in question, yet this act alone will not excuse the defendant from liability, if it appears to the jury from the evidence, that the said servants could have avoided the killing of the colts by the precaution of sounding a whistle, or slacking the speed of the train, not endangering the safety of the train and passengers by so doing; if the jury further believe from the evidence, that said colts were present at said crossing without the fault or neglect of their owners, and could have been seen by said servants in time to have been saved by the exercise of ordinary care in managing said train.

As we have seen, this court have already decided that the appellant had a right to the use of its railroad, to run its trains thereon without obstruction. And the appellee had no right to allow his colts to be standing upon the track of the road at the crossing, or to be jumping or passing over the same, in the way of, or so as to come in collision with an approaching train, if the bell was rung as the law requires, and if allowed, it would be recklessness and criminal carelessness.

Such is undoubtedly the law, and it is certainly the law of this case, in this and in all other courts; for neither this nor any other court can sit in review of the opinions of this court.

Marsh v. Beer, 4 *Rawle*, 288.
Ex parte Sibbald, 12 *Peters*, 588.
Wash. Bridge Co. v. Stewart, 3 *How.*, 425.

This court decided in *Chicago and Mississippi R. R. Co. v. Patchin* (16 *Ill.* 198), and more recently *Ill. C. R. R. Co. v. Phelps*, above referred to, that where the company is not bound to fence, it is only liable *for gross negligence*, or a *wanton or wilful injury to stock*, and such is the law as settled in other States.

Now, the case and this second instruction itself, show that the colts in question were killed upon a crossing where the company could not and were not bound to fence.

But by this second instruction the jury are told that although the defendant's servants did ring the bell continuously for eighty rods before reaching the crossing, this will not *excuse it from liability* if it appears that the defendant's servants could have avoided the killing either.

1—By the precaution of sounding the whistle, or

2—By slackening the speed, (not thereby endangering the safety of the train and passengers,) or

3—By the exercise of ordinary care in managing the train (if the colts could have been seen in time to have saved them), provided the colts were present at said crossing without the fault or negligence of the owner.

This instruction is full of errors.

In the first part of it, it is assumed, and the court by implication instructs the jury, that the defendant is liable from the mere fact of killing, and that it must excuse itself from such liability. Such is not the law, as we have seen. The instruction assumes that the colts were killed upon the crossing, and that the defendant did ring the bell as the law requires. There was, therefore, upon the plaintiff's own showing, no case made against the defendant, and there was no liability for it to excuse itself from, and could not be until the defendant was convicted of *wilful* or *wanton* injury to the stock, and the court ought to have so instructed the jury.

Again: the jury are told that if they still believe that the servants of the defendants could have avoided killing the colts, by sounding the whistle, or by slackening the speed of the train, or by the exercise of ordinary care, and failed to do so; the ringing of the bell as the law requires, will not excuse the defendant, and

it is liable. The law is otherwise. The colts being *on* the crossing at a time when they had no right to be there, the law says, the defendant's servants discharged their duty, when they rang the bell for eighty rods before reaching the crossing, and they were not bound to take other precautions. Having done this, before the company can be made liable, it must be shown that the killing of the colts was a wanton and wilful act of carelessness or negligence.

Ill. C. R. R. Co. v. Phelps, 29 *Ill.* 447.
The Great W. R. R. Co. v. Thompson, 17 *Ill.* 131.
Ill. C. R. R. Co. v. Ready, 17 *Ill.* 580.
Chicago & Miss. R. R. Co. v. Patchen, 16 *Ill.* 198.

This was the rule and measure of the defendant's liability, and the jury should have been so advised. But instead of this, by this instruction, a rule and measure of liability was given to them for which we find no warrant in the law, and one by which they must have been very greatly misled.

There is still another objection to this instruction. It is this: The instruction is based upon nothing in the case. There are no facts to show that the blowing of the whistle would have been of any use. In fact the whistle was sounded four times within the distance of eighty rods, and all the use made of the whistle that could be, to avoid danger. Then, again, they did attempt to stop the speed of the train when the colts were seen bounding upon the track, but it was too late, and it became necessary to give the train all the speed they could to save the lives of the passengers. Every effort was made to watch the track and see that the colts did not return, and nothing, as the witnesses swear, and as the case shows, was omitted on the part of those in charge of the train. This instruction, therefore, had no place in the case, and was designed to, and doubtless did, confuse and mislead the jury.

Galena & Ch. U. R. R. Co. v. Jacobs, 20 *Ill.* 478.
Hosley v. Brooks, 20 *Ill.*, 115.

There was also error in the third instruction given to the jury, on the trial of the cause by the court, on behalf of the appellee.

"In the third instruction of the plaintiff, the court tells the jury, that if they believe *the testimony* of Cooley and Sweetland, *to the effect* that there was such a growth of trees and bushes on the sides of said road track, west of the place of collision, as materially obstructed the view of objects within a space of fifty feet west of the crossing in question, if any such was given, is wilfully false, they would be warranted in holding the entire testimony of said witnesses successfully impeached, and in disregarding anything testified to by them, unless corroborated by other witnessess, it not being the law that the only mode of impeaching a witness, is by swearing other witnessess as to his reputation and character."

This instruction is bad, for the reason that it is not based upon any evidence in the case, is unjust and unfair to the defendant and the witnesses named therein, and was designed and calculated to mislead the jury.

The whole instruction is based upon an assumed impeachment and the corrupt character of the witnesses named in the instructions, Cooley and Sweetland, when the record shows that they were not impeached; that no effort was made to impeach them; no witnesses were called after they were sworn to contradict them, by statements elsewhere made, by attacking their general character, or to disprove or rebut the statements made by them, in the subject matter named in the instruction, to-wit: the character of the bushes by the side of the road; and we do not hesitate to say that there is not one word of testimony in the record to show, or which in any manner tends to show, that these witnesses wilfully stated what was false, or that they did in fact state what was false. All the witnesses who speak upon the subject agree in stating that there were trees in the orchard, and bushes by the side of the road, and the only difference is that the three witnesses for the defense, who were on the train and had the best opportunity of knowing, state that the bushes were larger and thicker than some of the witnesses for the plaintiff.

Then, again, the matter of these bushes was but a circumstance, an *immaterial circumstance*, in this case. That they were there is not alleged or proven to have been the fault of the company, and is in no manner connected with its alleged negligence, to-wit: a failure to continuously ring the bell, &c. If the witnesses, therefore, had been mistaken, or indeed wilfully stated what was not true in reference to these bushes, the jury would have had no right to disregard and throw out their entire testimony. It is essential that the matter of which they speak should be material to authorize such action. The court, however, in their instruction, have told the jury that if they believe that the witnesses named have designedly sworn falsely in reference to this little immaterial circumstance, their whole testimony, except so far as it is supported by other evidence, may be thrown out. We submit that such is not the law.

From what we have said, we think it will be seen that the court below erred in not granting a new trial—in receiving incompetent testimony, and in instructing the jury on behalf of the appellee; and that the judgment should be reversed and set aside.

WALKER & DEXTER,

Counsel for Appellant.

State of Illinois. In the Supreme Court.

April Term, 1865.

The Chicago, Burlington and Quincy Railroad Company, Appellant,

VS.

John M. Cauffman, et. al., Appellees.

SUGGESTIONS BY APPELLEES.

On the part of the appellees, little need be said of the testimony, bearing upon the question of the alleged negligence of the servants of the appellant; in the killing of the colts in question; for whatever laches may be attributed to the appellees, we claim that by a very decided preponderance of testimony, both with respect to numbers, respectability, and disinterestedness of witnesses, that the fact has been most satisfactorily established, that the killing of the colts resulted from the want of proper care, and caution on the part of the servants of the appellant who directed the train in question.

Three witnesses—Jerome, and D. C. Wilcox, and James M. Fisher, all witnessed the casuality, from different stand points, and all agree in every detail, and circumstance relating to the transaction; each was warned of the approach of the train *by the rumbling of the car wheels, and not by the sound of bell or whistle*; each saw the colts at the same time, and saw them pass over to the west side of the rail road and halt, and stood grouped together within two or three rods of the track, till the train came up; each swears that the engineer could as easily have seen the colts from his position on the train, for a distance of 80 rods from the crossing, as the witnesses, from the position occupied by them respectively; each heard no whistle until the train had reached within 8 or 10 rods of the crossing; each perceived no slacking up in the speed of the train; each saw the colts spring for the south side of the *rail road at the very instant that the whistle sounded*, 8 *or* 10 *rods from the crossing, each heard no bell at any time; each thought if a bell rung, that from his position, he would have heard it*; each thought that the whistle started the colts; each swears there was no obsticle along the rail road for 80 or a 100 rods west of the crossing, that would have prevented the colts from being seen by the engineer; each thought of the danger of the colts, and watched both train and colts to see what the result would be.

Against this testimony, Cooly and Sweetland (the engineer and fireman) on the train, swear

that a bell was rung from the crossing west, to the crossing in question, that a whistle was sounded 60 rods before reaching the crossing; that the trees along the track, orchard, fences, &c., prevented them from seeing the colts, until they got within 8 or 10 rods of the crossing; when they first saw the colts on the run for the crossing, and that they couldn't then save them, the engineer(Cooly) swearing that the timber was so thick along the track near the crossing, *that he couldn't see the fence on the sides of the rail road track; some of the trees being 8 or 10 inches in diameter, the leaves being on, &c.*

These statements of Cooly and Sweetland, with regard to the obstructions to prevent their seeing the colts,are most effectually impeached and contradicted by the whole neighborhood. *Edward Triplett, Charles Knox, Amos Fisher, S. M. Knox, Warren Eastman, Jerome Wilcox,(who owns the land) D. C. Wilcox, James M. Fisher, and Hiram Cauffman were well acquainted* with the premises in question, some of them long before the rail road was built, swear that the colts could not have concealed themselves,from the eye of the engineer,for the distance of 80 or 100 rods on the train,without laying down; that the rail road west of the crossing was built in 1854, through a cultivated prairie field, where there was no timber, and that there was no timber there when the colts were killed, save a few cotton wood sprouts, which did not obstruct the view on the rail road; and yet this court will be asked to credit a witness against all this testimony, who, as we believe to cover his criminal neglect of duty, swears into being a forest,so dense as to obstruct a view of the fence on the side of the track; the trees germinating from the seed, and attaining a diameter of 8 or 10 inches from 1854, to 1859; certainly no such a magicial growth of vegitation has equaled this, since Jonah's gourd vine.

Whatever this court may think of the testimony, bearing upon the alleged negligence, of appelant's servants, *twenty-four men on their oaths have declared that the accident was the result of their neglect of duty*; and the Circuit Court has twice refused to disturb the verdict of these men, on the ground that such verdicts were contrary to the evidence. This court has said that the question of negligence is purely a question for the Jury to determine from all the circumstances, it will surely then not disturb the verdict in this case,on the *ground that it is contrary to the evidence*, and especially will it not do so, after repeatedly holding, that it will not disturb a verdict, when there is testimony in the case tending to support it, "unless the *verdict strikes the mind, at first blush, as palpably and flagrantly contrary to the evidence.*"

It may be urged by counsel that even if the whistle had sounded for 80 rods before reaching the crossing, that the result might not have been different. We say that the testimony of the two Wilcox's, and of James M. Fisher, show that the colts sprang from their "*huddled*" position, at the very first blast of the whistle, when the cars were only 8 or 10 rods from the crossing; they be-

lieved that the whistle started them, suppose the whistle had sounded 30 or even 15 or 20 rods from the crossing; who in his senses can believe that the colts would not all have started,and escaped to the south side of the crossing before the train could have caught them!

In the case of the C. B. & Q. R. R., vs Reid 24 Ill. P. 144, (which was a case just like this one, where a mare was killed on a road crossing) the court say, "it is due to the public that all, either persons or *stock at or near a road crossing*, should be warned of the approach of a train by the bell or whistle," and they further say, "had the train been run with proper care, and the whistle sounded, or the bell rung for a reasonable distance, upon the approach to this crossing *it may be, and indeed the probability is that this accident would not have happened.*" We humbly ask the court to say the same thing again in this case.

We think the witness Cooly, unwittingly made a statement (found on page 77 of the Record) which solves the whole question, as to the principle and motive which governed his conduct in the management of the train, at the time of the casuality, which is this: "*If the colts stood 3 or 4 rods off the track, I do not think I was bound to see after their safety,*" doubtless it was the practice of this *his principle*, which occasioned the casuality on this occasion, but we are sure that he is mistaken in the law.

It is urged by appellants that the negligence of appellees, in permitting their colts to be on the highway and crossing, conduced to the accident and therefore it is not liable, even though its servants have been guilty of negligence too.

On this point we desire to call the attention of the court to the proof, that the farm of appellees was situated at a distance of two miles from the highway and crossing in question; that Daniels and Dee's farms [fenced and in crops] lay between farm of appellees, and the highway and crossing, [which were south of appellees] that the colts in question, when they run out, ranged north-east of appellees—the opposite direction from the crossing and highway in question, that the colts would have to travel four miles west, [along lanes at every point of the compass at that] or six miles east of appellants farm, to get on the crossing; that when they were killed they had been running in appellants stock field; that appellee [Cauffman] looked after them every morning and evening, keeping them up at nights; that they were seen on his farm the day before they were killed, and no testimony that they didn't leave his enclosure the morning they were killed; that they got out of their stock field "*some way*" [as the witness expresses it] went west to a pair of bars, through which they entered the enclosure of Daniels', and from Daniels farm [which is fenced against the highway]they got out into highway by same means undiscovered in the testimony; that appellees did not know

they had escaped, and that the colts had never been on said highway but on this one occasion, when they were killed ; this is substantially the proof on the question of negligence by appellees.

We concede the law to be, that unless the proof shows that the appellees exercised ordinary care, in the premises, that they cannot recover; what then is ordinary care ? We say in the language of Lord Ellenborough in the case of *Butterfield vs Forrester*, it is "*that degree of care which may be reasonably expected from a person in the plaintiffs situation.*" This definition has been very generally accepted by the courts of this country as will be seen by the authorities referred to in our brief. What then should reasonably be expected from a person, in the situation of the appellees ; with refference to the hazard to colts, occasioned by the crossing in question ; situated as it was, distant from his farm, four miles of circuitous travel by the west, and six miles by the east ; the *only open routes* from his farm, by which his colts could reach the danger, and two miles distant through neighboring farms, obstructed by fences, and impassable to stock at least to all human appearances ; his colts accustomed always to run out in safety, ranging in the opposite direction from the crossing ; seen in his stock field the day before they were killed, (it not appearing that they did not leave it the day they were killed) himself habitually looking after them morning and evening, and not knowing they were out when they were killed ; we venture the assertion, that not one farmer in a thousand would apprehend the slightest danger to the colts, in the situation in which he was placed, and therefore would not have taken any precautions against the perils of the crossing in question, more than was taken by the appellees ; it is the sheerest nonsense to say that we will reasonably expect a man to do that, which from his situation, and surroundings, we know that he will not do, it would indeed *be exceedingly unreasonable* to expect the appellees to provide against a danger, which to all human appearances seemed so remote, and which few in his situation would provide against.

Learned counsel will cite cases perhaps from England, and some of the States, where negligence has been attributed to the owners of stock in case of its being at large on the highways, these decisions are made where the English common law on the subject of the running at large of stock prevails, where every man is bound at his peril, to keep his stock upon his own lands, these decisions can have no application to this case, for here, we have a *common law of Illinois*, recognized in the case of *Seely vs Peters*, by which it is made lawful for our colts to run at large, not on rail road crossings with our consent, to be sure, but if by any fortuitous circumstance, our colts without our fault, and against our will, wandered upon a road crossing, we insist that even there, *we have some rights which even a Rail Road company are bound to respect.*

We believe that no error will be found in any of the ruleings of the Circuit Court, the three

instructions given for the apeellees we think are faultless, and everything asked by appellants was given by the Circuit Court

The objection that the court allowed the witness, Wilcox, to testify on the subject of the ringing of the bell at the crossing in question, at other times, we think is not tenable, because the reason of the ruling of the court is not stated in the Bill of Exceptions. It will be found on page 76 of the record, that the appellant itself opened the door of enquiry into this subject in chief, it was certainly legitimate for appellees to go into the enquiry of a subject which they themselves introduced, at least it can't lay in their mouths to complain if the court permits the enquiry to be pursued by the other party.

We have prepared a copious abstract of the testimony in this case, and also a *brief* of our points and authorities, which we file herewith, and to which we respectfully ask the attention of the court.

J. I. TAYLOR,
Attor'y for Appellees.

Over (for Brief)

State of Illinois. In the Supreme Court.

April Term, 1865.

APPEAL FROM BUREAU.

The Chicago, Burlington and Quincy Railroad Company, Appellant,

vs.

John M. Cauffman, et. al., Appellees.

POINTS AND AUTHORITIES RELIED ON BY APPELLEES

The appellant was required by law to have a bell and whistle on the engine, and to have rung or sounded one of these continuously for 80 rods before reaching the crossing,and in case of neglect is liable for the damages which accrued from such neglect.—*Scates, Stat. P.* 948, *Sec.* 38, 24, *Ill. P.* 145.

Even if the servants of appellant complied with the statute by ringing the bell for 80 rods before reaching the crossing; such compliance alone,will not absolve the defendant from liability; said servants were bound by law to have sounded the whistle, or checked the speed of the train, if by so doing the collision would have been avoided.—*Bradly vs The Boston & Marine R. R.* 1. *Amer. Railway, cases, P.* 459, *Parker vs Adams* 12, *Metcalff, P.* 455, 4, *C. & P.* 106, 5, *C. & P.* 375, *ib.* 407.

Where the negligence of defendant *is the proximate cause of the injury, and the plaintiffs negligence the remote cause the defendant will be liable.—Kerwhacker vs C. C. & C. R. R. co.* 3, *Ohio,* 172.

The question involved is one of negligence, depending upon the surrounding circumstances, *and which must be left alone for the Jury to determine.—G. & C. U. R. R. co. vs Dill,* 12. *Ill. (Text) P.* 271.

The liability of the appellant in this case, depends upon the circumstances attending the killing of the colts, and "*the court in such cases will rarely, if ever disturb the verdict if there be any evidence in the bill of exceptions tending to support the verdict.—Young vs Silkwood,* 11, *Ill. P.* 36.

Where evidence is *contradictory, or in conclusive,* the court will never disturb the verdict.—*Evans vs Fisher,* 5, *Gil.* 72, *P.* 569.

The Jury alone, are to determine as to the weight of the testimony, and the court will never in such case disturb their verdict "*unless it strikes the mind at first blush, as palpably and flagrantly contrary to the law and the evidence.*',—5, *Gil. Rep.* 72, 1, *Scam.* 17, *ib.* 97.

The plaintiff was only bound to exercise ordinary care.—*Parker vs Adams,* 12, *Metcalf, P.* 415, *Beers vs H. R. R. co.* 2, *Amer. Railway cases , P.* 114.

Is it not the law, *that any degree of want* of care on the part of the plaintiff, concuring with the neglect of the defendant, will preclude a recovery by the plaintiff.—2, *Amer. Railway cases (Text) P.* 119.

Ordinary care means that degree of care which may reasonably be expected from a person in the plaintiffs situation.—2, *Amer. Railway cases (Text) P.* 121, 12, *Metcalf, P.* 415, 2, *Pick.* 621, 7, *ib.* 188, 12, *ib.* 177, 21, *ib,* 146, 1 *chip.* 128.

The common law of England, with reference to the running at large of stock, is not in force in Illinois ; it is lawful here for stock to run at large.—*Seely vs Peters,* 5, *Gil. P.* 130.

J. J. Taylor. atto for appellees

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

vs

John M. Caughman and
Jeremiah Weirick appellees.

Arguments & Brief of appellees.

Filed April 5. 1865
L. Leland Clk