

No. **12215**

Supreme Court of Illinois

Galena & Chicago Union
R.R.Co.

vs.

Fay

G & C. W. R. R. Co vs E. P. Fay

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 W. C. W. R. R. Co.
 as
 Gary
 |
 And up to record
 |

United States of America
State of Illinois

Pleas before the Hon Isaac G. Wilson Judge of
the thirteenth Judicial Circuit for the State of Illinois
at a Term of the Kane County Circuit Court
begun and held at the Court House in Geneva
in said County on the 5th day of May in the year
of Our Lord One thousand eight hundred and fifty-four
Present. The Hon

Buckner S. Morris Trial Judge
by exchange with J. G. Allen & Co. Mo. Boyce States Attorney
Roach B. Spalding Sheriff
Attest L. Deaton
Clerk

And whereas heretofore to wit on the
23 day of April 1853 there was filed in said Court the
following precept which is in the words & figures following to wit

State of Illinois
Kane County

May Term ssd 1853 of the Kane
County Circuit Court

Albert R. Day
vs

The Galena & Chicago
Union Railroad Company

Loss Damages \$10,000.

The Clerk of said Court will
please issue a summons in the above entitled cause directed
to the Sheriff of Cook County & returnable at said Term of
of Court in case

Damages as above
Given April 22^d 1853

S. McLox
Atty for Def

2
State of Illinois
Kane County vs The People of the State of Illinois to
the Sheriff of Cook County - Chicago

We command you to summon the Galena & Chicago Union
Rail Road Company if they shall be found in your county
personally to be and appear before the circuit Court of said County
on the first day of the next term thereof to be holden at the Court
house in Geneva in said County on the second Monday of May
next to answer unto Robert B. Gay in a Plea of Case
to the damages of the said plaintiff as he says in the sum of
Ten Thousand Dollars and have you then and there this writ
with an endorsement thereon in what manner you have executed
the same

Witness Luther Dearborn Clerk of our said Court and
the Seal thereof at Geneva in said County this 23rd
day of April AD 1853.

Luther Dearborn

Clerk

And upon the back of said summons was
the Sheriff's endorsement in the words of figures following to wit
Served by making this writ and delivering copies
thereof to John B. Vermer President and William W. Lumber
Secretary of the Galena and Chicago Union Rail Road Company
at the Office of said Company at Chicago this 25th day of
April 1853.

Fees 2 services 1.00

21 copies 1.00

21 miles 1.00

1 mt 1.00

postage .08

\$2.08

Leysur P. Bradley Sheriff

By W. Hegon Deputy

And whereas afterwards to wit on the 28th
day of April AD 1853. the following case was filed in said Court
in said cause which is in the words and figures following "to wit"

State of Illinois ()
Stearns County vs

May Term AD 1853. of the same
County Circuit Court

Albert R. Gay

The Galena & Chicago
Union Rail Road Company

Albert R. Gay plaintiff in this
suit by S. Wiley his attorney com-
plains of the Galena and Chicago Union Rail Road Company
a corporation duly incorporated under a Statute of the State of
Illinois defendant in this suit which has been summoned
in an action of assumpsit on the case, For that whereas the said
defendant before and at the time of committing the grievances herein-
after mentioned were owners and proprietors of a certain Rail
Road and lease to run thereon for the carriage and conveyance
of passengers from Elgin in said Stearns County Illinois to Clinton
in said Stearns County for hire and reward to the said defendant
in that behalf to wit at said County. And the said defendant
being such owners and proprietors of the said Rail Road and lease
as aforesaid thereupon heretofore to wit on the first day of
August AD Eighteen hundred & fifty two to wit at the County
aforesaid the said plaintiff at the request of the said defendant
became & was a passenger in said Rail Road in one of said
lease to be safely & securely carried & conveyed thereby on a
certain journey to wit from Elgin aforesaid to Clinton aforesaid
for a certain fare & reward to the said defendant in that behalf
and the said defendant received the said plaintiff as such
passenger as aforesaid and thereupon it became and was
the duty of the said defendant to use due and proper care

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And diligence that the said plaintiff should be safely & securely
carried and conveyed on the said Rail Road on the said train
on the said journey from Elgin aforesaid to Clinton aforesaid yet
the said defendants not regarding their duty in that behalf did not
use due and proper care and diligence that the said plaintiff should
be safely and securely carried and conveyed on the said Rail Road
on the said train on the said journey from Elgin aforesaid to Clinton
aforesaid but wholly neglected and failed to do and suffered
and permitted the said Rail Road to be so out of order and repair
and the rail and track thereof to be so insufficiently secured
and fastened that by reason thereof afterwards and whilst the said
car was proceeding with great violence on said Rail Road on
said journey from Elgin aforesaid and before its arrival at
Clinton aforesaid it (said car) was thrown and run off said Rail
Road track and whilst off and proceeding with great velocity
as aforesaid the said car was so fearfully jerked along tossed
about and forced against the ties and other substances as to
be in great danger of being dashed and crushed to pieces and
the life and limb of the said plaintiff then and there became
in imminent peril and it was highly unsafe and dangerous
for the said plaintiff to remain and continue in said car and
to escape from the said peril. And his said unsafe position
and to preserve his life and limb he the said plaintiff
then and there was compelled to and did spring and leap
from said car to and upon the ground and in so doing came
in violent contact with the ground and by means of the
premises the said plaintiff bruised wounded and hurt the knee
of his left leg seriously sprained and fractured and he was
otherwise severely injured and by means thereof the said
plaintiff became and was sick sore & lame disordered and
confined to bed and so remained and continued for a long
space of time from thence hitherto and probably will
ever remain lame and crippled during all of which said time

the said plaintiff suffered and underwent great pain and was hindered and prevented from transacting & attending to his necessary & lawful business to wit that of a merchant selling goods & trading in Elgin aforesaid by him during all of that time & so performed and transacted and lost and was deprived of divers large gains profits and advantages which he might & otherwise would have derived and acquired And thereby also the said plaintiff was forced and obliged to and did then and there pay lay out & expend divers large sum of money amounting in all to the sum of One Thousand Dollars for medical surgical and other attendance and nursing and otherwise in and about the endeavoring to be cured of the said wounds bruises lacerations sprains fractures & injuries so received as aforesaid and for the sickness & so occasioned as aforesaid to wit at the county aforesaid.

And whereas also heretofore to wit on the day or day aforesaid to wit at the county aforesaid the said plaintiff at the request of the said defendant became and was a passenger by and in a certain other car of which the said defendants were proprietors to be safely and securely carried and conveyed thereby on a certain other Rail Road of which the said defendants were also proprietors on a certain journey to wit from Elgin aforesaid to Clinton aforesaid for certain reward to the said defendants in that behalf and thereupon it then and there became and was the duty of the said defendants to use due care that the said plaintiff should be safely & securely carried & conveyed by the said last mentioned car on the said last mentioned Rail Road on the said journey from Elgin aforesaid to Clinton aforesaid yet the said defendants not regarding their duty in this behalf did not use due care that the said plaintiff should be safely & securely carried and conveyed by the said last mentioned car on the said last mentioned Rail Road on the said journey from Elgin aforesaid to Clinton aforesaid but wholly neglected so

to do and suffered and allowed heedlessly negligently and
 recklessly the said last mentioned Rail Road track to be and
 remain in a state and condition hazardous for custom cars
 to run on & over the rails thereof in many places being loose and
 unfastened and permitted to fly up under the wheels of the cars
 and by reason thereof afterwards & whilst the said car (in which
 the said plaintiff was a passenger as last aforesaid) was and
 great rapidly proceeding with the said plaintiff as a passenger
 thereby on and along the said last mentioned Rail Road
 on the said journey from Elgin aforesaid and before the arrival
 thereof at Clinton aforesaid the said last mentioned car
 in consequence of the flying or springing up of the end of one of
 the iron rails of the said Rail Road track & negligently permitted
 to be loose and unfastened as aforesaid was forced and run
 off said last mentioned rail Road track and being there off
 and in rapid motion and being attached to and in front and
 in rear other cars was dashed bounded and struck along
 and about in a fearful manner and the life and limb
 of the said plaintiff became & was thereby greatly jeopardized
 and to save his life and limb from the great danger to which
 they were thereby exposed by remaining in said last named
 car as an act of reasonable precaution the said plaintiff
 was obliged to and did jump from and off of said car
 last mentioned car to and upon the ground and thereby
 was brought in violent contact with the ground by means
 whereof the knee of the left leg of the said plaintiff became
 and was terribly sprained & fractured and he was then &
 then otherwise greatly wounded & injured and also by means
 of the premises the said plaintiff became & was sick sore
 helpless lame and disordered and so remained and continued
 for a long space of time to wit (hitherto) (and will ever be lame
 and disabled) during all of which time the said plaintiff
 suffered and underwent great distress of mind & body &

was hindered and prevented from transacting & attending to his necessary and lawful business to wit that of a merchant from transacting selling goods & merchandize in Elyria aforesaid and affairs by him during all of that time to be performed and transacted & lost and was deprived of divers large gains profits and advantages which might & otherwise would have been derived and acquired from the same & thereby also the said plaintiff was compelled to and did then & there pay lay out & expend divers large sums of money amounting in all to the sum of One Thousand Dollars in and about rendering to be cured of the said last mentioned sprains fractures wounds and injuries so received as last aforesaid and the said last mentioned sickness soreness lameness and disorder so occasioned as last aforesaid to wit at said Kane County

And whereas also the said defendants before committing the grievances hereinafter next mentioned were the owners and proprietors of a certain other Rail Road and certain other cars to run thereon used and employed by them (defendants) for the carrying and conveyance of passengers at and for certain hire & reward to them in that behalf to wit at the said Kane County and the said defendants being such owners & proprietors of the said last mentioned Rail Road & cars as aforesaid the said plaintiff next to wit on the first day of August A.D. 1832 at said Kane County at the request of the said defendants became and was a passenger on the said last mentioned Rail Road in and by the said last named cars to be safely & securely carried & conveyed thereto on a certain journey to wit from Elyria aforesaid to Clinton aforesaid for certain hire and reward to the said defendant in that behalf and although the said plaintiff was then and there received by the said defendants as such passenger on the

said last mentioned Rail Road in and by the Last named
 Car as aforesaid got the said defendants not regarding their
 duty in that behalf carelessly negligently and recklessly suffered
 and permitted the said last mentioned Rail Road tracks to be
 and remain out of order and repair and in a dangerous condition
 for Cars to run on and over and so negligently, carelessly, unskillfully
 managed and conducted the said last mentioned Car
 that afterwards and whilst the said last named Car was
 proceeding with a rapidity very great and under the circumstances
 highly improper and perilous on the said last mentioned Rail
 Road tracks so out of order repair and dangerous as
 aforesaid with the said plaintiff as such passenger as aforesaid
 on the said journey from Elgin aforesaid to Clinton aforesaid
 and before the arrival of the said last named Car at Clinton
 aforesaid the said ^{said} named Car by & through the carelessness
 negligence, recklessness, unskillfulness & improper management
 and conduct of the said defendants and their servants thrown
 and run off of the said last named Rail Road tracks & whilst
 off and moving with rapidity as aforesaid the said last named
 Car was so violently & dangerously against the ties & timber
 of the said last named Rail Road and over uneven ground
 forced along and tossed and thumped about that it then
 and there became & was unfit unsafe and improper for &
 highly perilous to the life and limb of said plaintiff to be
 and stay in said last named Car and to extricate himself
 therefrom and save his life and limb the said plaintiff was
 obliged to and did then and there jump off and alight from
 the said last named Car to and upon the ground against which
 he came and was brought with great force by means whereof
 one of the legs of the said plaintiff became and was bruised
 & fractured and the knee thereof greatly sprained and
 the said plaintiff was otherwise greatly sprained
 and the said plaintiff was otherwise severely wounded

and injured in so much that the said plaintiff then & there
became and was sick, confined & was helpless & sore lame and
disordered and continued so for a long space of time & did
from then & thence during all of which time the said plaintiff
suffered and underwent great pain and was hindered and prevented
from carrying on transacting & attending to his lawful and
necessary business and affairs by him during that time to
be performed and transacted, thereby lost & was deprived of
great divers great gains & profits which had been accustomed
to arise and accrue and which otherwise would have continued
to arise and accrue to the said plaintiff from the carrying
on and transacting the same and also by means of the premises
last aforesaid the said plaintiff was obliged to and did
then & there pay lay out and expend divers large sums
of money amounting in all to One Thousand Dollars
in and about the carrying & endeavoring to cure
the said last named business bruises fractures & strains wounds
& injuries so received as last aforesaid and the said sickness
soreness lameness & disorder so occasioned as last aforesaid
to wit at said Kane County

And also for that whereas heretofore
to wit on the first day of August A.D. 1852 at the said Kane
County the said defendant being then and there owners and
proprietors of a certain other Rail Road and of certain other
cars then on for the carriage of passengers for certain hire
& rewards received into one of their said last named cars the
said plaintiff as a passenger to be conveyed thence on their
said last named Rail Road from Elgin in said County
to Clinton in said County for a certain fare & reward
to them in that behalf and that by reason thereof the said
defendants ought to have conveyed & carried or caused to
be conveyed the said plaintiff carefully and in safety &
security in & by the said last named car on the said last named

Rail Road from Elgin aforesaid yet the said defendants
 not regarding their duty conducting themselves so carelessly
 negligently & mischievously in that behalf that by & through the
 carelessness negligence mischievousness & default of themselves
 & their servants in regard to the State and Condition of the
 tracks of said last named road, and in conducting the said
 last named Car and for the want of due care and attention
 to their duty in that behalf afterwards and whilst the said
 last named Car was so conveying the said plaintiff from
 Elgin aforesaid and before the arrival thereof at Clinton aforesaid
 it became and was unfit and unsafe for the said plaintiff
 to remain therein and the said plaintiff's life and limb were
 then and there greatly imperiled and endangered and the
 said plaintiff was then and there compelled to remain in
 said last named Car in great & uncertain peril or grief therefrom
 and in order to get out of and free himself from such jeopardy
 & peril and preserve his life and limb the said plaintiff was
 obliged to and did jump and alight from the last named
 Car whilst the same was progressing at a very rapid rate
 and in so doing by means of the premises then & there came
 and was brought in violent contact to the ground and
 thereby the said plaintiff was greatly hurt, bruised and
 wounded the knee of the left leg was severely sprained
 & fractured and the said plaintiff was otherwise seriously
 injured and in consequence thereof he became & was soon
 lame disabled and disordered and so remained for a long
 space of time to wit from thence hitherto during all of which
 time the said plaintiff thereby suffered & underwent great
 distress of body & mind and inconvenience and was hin-
 dred and prevented from performing and transacting his
 necessary and lawful business & affairs by him during that
 time to be performed & transacted and thereby the said plaintiff
 was forced & obliged to and did pay and expend great sums

sums of money amounting in all to one thousand
dollars for nursing care medicine and surgical attention
and service and otherwise in & about the endeavoring to be
cured of the said last named lumbago & various wounds & sprains
fracture injuries so received as last aforesaid and of
the said last named sickness & various lameness & disorder
so occasioned as last aforesaid & in & about the said
by means of which the said several premises the said plaintiff
has sustained damages to the amount of ten thousand
dollars and therefore he brings suit &c

J. Miller

Pltff Atty

And whereas afterwards to wit on the 10th day
of May A.D. 1883 there was filed in said court the following
plea in said cause which are in the words of figures following
to wit

The Galena & Chicago
Union Rail Road Company
at &c
Albert R. Gary

Kane Circuit Court

and now comes the said defendant
by Collins & Williams their attorneys & defend themselves &
saying when &c and say that he is not guilty of the said
supposed grievances above complained of by the said
plaintiff of this it puts its self upon the country &c

Collins & Williams

Defrs Atty

And Whereas on the said 10 day of May
A.D. 1882 it being one of the days of the May Term of the
said Kane County Circuit Court A.D. 1883 the following among
other proceedings were had to wit

Albert R. Day

90

31

The Galena & Chicago
Union Rail Road Company

leave

This day comes the defendants by Williams their attorney and files an affidavit for a continuance. It is ordered by the court that this cause be continued at the defendants cost of term. It is therefore considered that the plaintiff have and recover from the defendants his costs of term and have execution therefor.

And whereas afterwards to wit on the 14th day of November AD 1883 the same being one of the days of the said court of the November Term AD 1884, the following among other proceedings were had to wit

Albert R. Day

4 31

The Galena & Chicago
Union Rail Road Company

leave

This day comes the parties to this suit by their attorneys and on motion of ^{defence} ~~Plaintiff~~ atty it is ordered that a jury come whereupon come a jury of good and lawful men to wit Eli Presb. Timothy Barker John S. Paul A Lemong Nelson Barrell J. Matteson John Gregg M. C. Matteson J. J. Nash Julius Alexander B Street Daniel Hunt who being severally elected chosen & sworn also come. After hearing a portion of the evidence it is agreed by the parties that the jury separate and meet the court to morrow morning at 9 O. Clock.

And afterwards to wit on the 15 day of November being one of the days of the aforesaid November Term of said Court the following among other proceedings were had to wit

Albert R. Day

vs

The Galena & Chicago
Union Rail Road Company

lease

This day again comes the parties
to this suit by their attorneys, ap-
peared And the also comes and after argument of ~~and~~ hearing
a portion of the Evidence it is agreed between the parties when
this afternoon the jury may separate and meet the Court at 8 o'clock
tomorrow morning

And whereas afterwards to wit on the 9
day of November AD 1853 the same being one of the days of the
aforesaid November Term of said Court the following among
other proceedings were had which are in the words of figures
following to wit

Albert R. Day

vs

The Galena & Chicago
Union Rail Road Company

lease

This day comes the parties to this
suit by their attorneys and the jury hear the
Empannelled also come and say they cannot agree and are
discharged from rendering a verdict herein

And whereas afterwards to wit on the 14
day of February AD 1854 the same being one of the days of the
said Term of said Court of the February Term AD 1854
the following among other proceedings were had which are
in the words of figures following to wit

Albert R. Day

vs

The Galena & Chicago
Union Rail Road Company

lease

This day comes the parties
to this suit by their attorneys and

by their agreement this cause is continued at the plaintiffs
cost of Term. It is therefore considered that the plaintiff recovers
of the plaintiff their costs of this Term and have execution therefor

And whereas afterwards writ on the 9th day
of May AD 1857 the same being one of the days of said court at
the May Term thereof AD 1857 the following among other proceedings
were had which are in the words of figures following to wit

Albert R. Gay

The Galena & Chicago
Union Rail Road Company

{ heard

for a continuance

This day comes the Plaintiff by
Hilcox his attorney and enters his motion

And whereas afterwards writ on the 12th day
of May AD 1857 the same being one of the days of the aforesaid May
Term of said court the following among other proceedings were had which
are in the words of figures following to wit

Albert R. Gay

The Galena & Chicago
Union Rail Road Company

{ heard

This day comes the parties to this
suit by their attorneys. And on motion
of the plaintiff it is ordered ^{by the court} that a jury come. Whereupon become
a jury of good and lawful men to wit Asst. Logan, J. D. Dunning
Thomas Fuller, Charles Simmons, C. H. Perkins, Richard Van Buren,
David Meester, William Lindsey, Harner Wilcox, William Tabor,
A. M. Nelson and Edm. Blair who being severally elected, tried
and sworn also come. And after hearing a portion of the evidence
it is agreed that the jury may separate and meet the court
to morrow morning

And afterwards to wit on the 13th day of May A.D. 1850 the same being one of the days of the aforesaid May Term the following among other proceedings were had, which are in the words of figures following to wit

Albert R. Bay

v

The Galena & Chicago
Union Rail Road Company

} Pass

This day comes the parties to this suit by their attorneys and the jury heretofore Empannelled herein also come and after hearing the ballance of the evidence testimony it is agreed by the parties that the jury may separate and meet the court on Monday next at 2 P.M.

And afterwards to wit on the 15 day of May A.D. 1850 the same being one of the days of the aforesaid May Term of said court the following among other proceedings were had which are in the words of figures following to wit

Albert R. Bay

v

The Galena & Chicago
Union Rail Road Company

} Pass

This day comes the parties to this suit by their attorneys and the jury heretofore Empannelled herein also come and after hearing a portion of the argument it is agreed between the parties that the jury heretofore Empannelled may separate and meet the Court tomorrow morning.

And whereas afterwards to wit on the 16th day of May A.D. 1850 the same being one of the days of the aforesaid May Term of said court the following among other proceedings were had which are in the words of figures following to wit

Albert R. Fay

v

Case

The Galena & Chicago

Union Rail Road Company

This day come the parties to this suit by their attorneys and the jury heretofore empannelled herein also come and after hearing the balance of the testimony before under charge of a sworn Officer of this Court to consider of their verdict and subsequently return into Court and for a Verdict say "We the jury find the issues joined in favor of the Plaintiff and award him damages at the sum of Two Thousand Two hundred Dollars and thereupon comes the defend and enters his motion for a new trial

And afterwards to wit on the 19th day of May 1882 the same being one of the days of the aforesaid May Term of said Court the following among other proceedings were had ~~and~~ which are in the words of figures following to wit

Albert R. Fay

v

Case

The Galena & Chicago

Union Rail Road Company

This day comes on to be heard the Defendants motion heretofore entered herein for a new trial the Court being fully advised Overrules the same. It is therefore considered by the Court that the Plaintiff have and recover from the defendant the sum of Two Thousand Two hundred dollars by the jury aforesaid assessed together with his costs in this behalf expended and his Execution therefor

And thereupon comes the defendant and prays an appeal to the Supreme Court of the State of Illinois which is granted upon condition that they give bond in the penal sum of Two Thousand Dollars with William N Brown John B Turner of James H Collins as security within ten days from this date and that

defendants have fifteen days to make and file Bill of Exceptions

And whereas afterwards writ on 23rd day
of May ¹⁸⁵⁴ the following Bond was filed in said court which is
in the words and figures following to wit

Know all men by these presents that the
Galena and Chicago union Rail Road Company as principal and
H. Collins as surety are held and firmly bound unto
Albert R. Bay in the penal sum of Four Thousand Dollars to be paid
to the said Albert R. Bay or to his certain attorney Executors Administrators
or assigns for which payment well and truly to be made our bind ourselves
successors heirs Executors & administrators and each severally of them
jointly & severally firmly by these presents. Sealed with the seal of the
said Galena and Chicago union Rail Road Company acting by
their President and secretary and with the seal of the said James
H. Collins this 24th day of May A.D. 1854

Whereas at the May Term of the same County
Circuit Court A.D. 1854 judgment was rendered by the said Court
in favor of the above named Albert R. Bay against the said
Galena and Chicago union Rail Road Company for the sum
of Twenty five hundred Dollars ^{Damages} besides cost of suit and whereas
the said Galena and Chicago union Rail Road Company
have prayed an appeal from said judgment to the Supreme
Court of the State of Illinois. Now therefore the condition
of this obligation is such that if the above bounden Galena and
Chicago union Rail Road Company shall duly prosecute
the said appeal and will pay or cause to be paid the said judgment
costs interest and damages in case the said judgment shall
be affirmed then the above obligation otherwise to be remain
in full force

In witness whereof the said Galena & Chicago
union Rail Road Company have attached

their corporate seal to this bond and have caused
 the same to be signed by their president & secretary
 and the said James H. Collins has hereunto set
 his hand and seal this day and year above
 written

H. M. Larrabee
 Secretary

John B. Turner President
 James H. Collins Secy

And whereas afterward to wit on the 12 day
 of June 1854 the following Bill of Exceptions was filed
 in said Court in said Cause which is in the word, and figures
 following to wit

State Circuit Court. State of Illinois

Galena & Chicago Union
 Rail Road Company

vs
 Albert R. Fay

Be it remembered that on the 12
 day of May in the year of our Lord
 One thousand Eight hundred and fifty four before the Honorable
 Buckner L. Morris Judge and a jury duly impeached being
 the issues in the above entitled cause came on in the State Circuit
 Court in said State of Illinois for trial & upon the trial
 of the issues in the said Cause and to sustain the issues his part
 the plaintiff introduced as witnesses

Samuel B. Jones

Who, being duly sworn said
 that he was on the cars when the plaintiff was hurt. I got on board
 of the cars at the depot at Egin upon the west side of the River, they
 (the complainant) and Mainwood got on board at the same time when
 it was in August 1853. H. H. Mygins was the conductor

of the train. We were all going to Clinton. Near Clinton the cars
ran off the track. The first I saw of Ray after the accident he
was lying on the bank. This was after the cars stopped. I was in
the baggage car when the cars ran off. Last I saw of Ray ^{in the cars} he was
in the hind end of the 2^d class passenger car. I left him there. I went
directly from the 2^d class car to the baggage car. I had just got into
the baggage car when the cars ran off. When I discovered first
that something was wrong I had not got to the hind end of the baggage
car. I came out on platform at the hind end of the baggage car
lying on there till dust cleared a little to give me a glimpse. I did not see Ray
when I came out of baggage car he was not in baggage car then
[the baggage car seemed to be jolting considerably]. I caught hold
of the side of the car in order to stand up. I thought there was
danger and I jumped from the cars. When I got out there was
a good deal of dust. I jumped because there seemed to be a good
deal of motion among the cars so that it was difficult for me to
keep my feet. I did not know what the trouble was. Whether they
would smash up or not. These facts induced me to jump. The
motion of the cars was that which it would make running over
ties. I have more particular reference to the motion of the baggage
car and the 2^d class passenger car. There was no one on either car
from when I went out cars had been off the track between 200
or 300 feet. When I jumped they ran but a little way after
jumped. Ray was not in baggage car when cars ran off.
I don't think a person could have passed from one car to another
without falling on account of the motion of the cars. When the
train stopped I was nearly opposite the hind end of the 2^d class
car. The 2^d class car was off the track & part of the 1st class
car. There were one first class car and 2^d class one baggage car
one freight car and locomotive & tender. This made the train.
My impression at the time of the accident was that the baggage
car was off the track at the time. I do not recollect of
hearing any signal to brace. I did not see any one jump.

besides myself. The cars were running so ^{that} when I jumped I came down on all fours. On the East side of the street there was a level spot where the cars stopped, on the West side there was a sand. It was a cut. There was a lieutenant & a 1st Lieutenant back of the place where the cars stopped. I think the cars were off the tracks before they passed the lieutenant. There was a rail fence about 200 feet back of where the cars were when they stopped. It was 1/3 of a bar. It was lying at the side of the tracks 10 or 12 feet long. I think there was a freight car before the baggage, there were others besides myself in the baggage car at the time of the accident. I think Leonard & Clark were in that ^{car} there was 2 or 3 persons there. Not more. After accident Myanwood & Gay was taken back to Elgin on a hump car. Gay left here was injured. I saw Gay after the accident at Mrs. Eatons in Elgin. Gay had two fits of sickness after the accident. The first time it was for ^{for} C. Mores before he got out and then he went on crutches. Gay was not lame before the accident. Has been lame ever since. The accident was in the afternoon. There was only about a mile of strap rail between Elgin & Clinton. The strap rail commenced East of the poplar creek bridge. We had run 1/4 to 1/2 a mile on strap rail before the accident. I did not notice any change of speed in coming on the flat rail. The outside wheels of the first class car ran off the ties. I noticed this after we stopped. The first class car tipped toward the sand by imperfection was at the time that the baggage car was off the track.

Proof Examined

I got on train at ^{Elgin} with Gay & Myanwood. Higgins said before we got on cars that the baggage car was full and we must or had better (don't know which) get into the baggage ^{car}. This was on platform of depot before we started. I think Gay was in the baggage car half of the time the rest of the time he was the 2nd class passenger car. I saw

They got into the baggage car just before the accident. They
pulled Garwood out of baggage car into 2^d class passenger
car. He had been fooling around some in the baggage car pulling
up skirts. I don't know that the baggage car was off of the
tracks. I said last fall upon the former trial that I was con-
fident I was at the time of the accident in the baggage car
I think I said last fall when on the stand that I was sure
that the car I was in ran off the track. The car I was in
had a good deal of motion, I can't tell what motion it was
I could not move in the car without taking hold of something
the whole of 1st class car was not off of the track. I think one
end of that car was tipped up when it stopped. The first class
car was the last one in the train. The 2^d class car was next
the baggage car next the freight car tender & locomotive before
that Diamond & Clark were in the baggage car. I think when
I went in previous to the accident. When cars stopped I was
about the middle of 2^d class car. They was about opposite
the middle of 1st class car lying on the ground. There was about
the length of a car between the place where I landed where
I jumped and the place where they landed. We had run from
1/2 to 3/4 a mile on the strap rail when the cars ran off. The
cars after they ran off were going slower and slower they
went about the 1/2 the length of a car after I jumped. My arms
pulled up their skirt before he left the baggage car. He had
stopped pulling up skirts at the time of the accident. We
stopped about the time we crossed poplar creek bridge.
I am as confident of this as I am of anything. It is a
mile from Elgin to poplar creek bridge all the way. And
it is a half a mile from the bridge to the place where the
strap rails commence.

Re Examined

I had just got into the baggage car.

car. at the time of the accident. - I had just left Bay in the 2^d class car. All the doors of the 2^d class baggage car were open. Bay was a little back of the center of the 2^d class car when I went into that car. I turned round and went out. The last I saw of Bay he was standing in the passage in the 2^d class car. Hammond had gone into the 1st class car. I think Bay was looking out of window when I left 2^d class car. I thought from the motion at the time of the accident that the baggage car was off the track.

Chief Examination Resumed

Bay's car had the motion as if it was off the track. I don't know whether there were two or three persons in the baggage car. Can't tell which. Bay followed Hammond out of baggage car. Hammond had the start of Bay. Bay went from the middle to the rear end of 2^d class car baggage car while I was in the car. I went right back into the baggage car, the last thing Bay did in the baggage car before leaving it was to fix his shirt he then followed Hammond.

Thomas Kerr

Very duly sworn said I am a physician and surgeon. Am acquainted with Bay. Resides in Elgin. I saw Bay an hour after the accident. found him lying on a sofa at Elgin. Examined his limb. there was partial fracture of the knee. I saw Bay again next morning in consultation with other. The injury was very painful. from the injury of the ligaments I thought it would be a difficult fracture to reduce. I think the fracture ^{would produce} permanent lameness. Have examined the limb to day. It cannot be straightened. I think the plaintiff will always be lame. I should think the dislocation would materially affect the knee and weaken the same.

Joseph Peff-

Being duly sworn I say

I am a physician & surgeon. I know the plaintiff and was his attending physician. Saw him the day of the accident & found that there was a partial dislocation of the knee. I visited the plaintiff between 12 & 13 weeks. Don't know whether he was confined to his bed afterwards as I went East about that time. I left him in his bed. He had been sitting up some. It was a painful injury. I thought at the time that there was a partial dislocation of the knee. After that there was inflammation of the knee. After the inflammation subsided the limb became smaller and shrank away somewhat above the knee. I do not think the plaintiff will ever get over the lameness entirely. The knee is not stiff but it cannot be straightened. It is weaker. There will be a permanent displacement of the knee. Before the accident I knew nothing but what Gay was a healthy young man. I do not know that any one was tending Gay after I left. I dislocated my own knee in 1844 & find no convenience from it still.

Joseph Examined

I hurt my limb by stepping on a round stone while running. I do not know that the injury has affected Gay's general health.

S. D. Wilder

Being duly sworn I say

That the plaintiff at the time of the accident was a merchant doing business at Elgin. I was living at Elgin and was a clerk for Gay at the time of the accident. Gay was confined to his bed for some six weeks. Afterward he went on crutches for six months. I think he could not have hired a man to take his place in the store for less than \$35.00 a month. Perhaps more. Gay was well to

go to New York in the fall of 1853 to fill up his stock
He has used a cane ever since he gave up his crutches

Cross Examined

The usual time of going to New York was in August or September. Jay had not been in the habit of going to New York for goods that I know of. The clerk who was with me in the Store had \$10.00 a month & boarded himself & traveled at his father's. Jay first came down to the Store upon crutches about the last of September.

Re Examined

Jay previously to the accident had a fair stock of goods. His Store in Elgin was a Large One

Edward Postlyn

Being duly Sworn Said

That he knew Jay at the time of the accident. Was with him after the accident. Was to see him every day for four weeks. He had crutches for three weeks. It was warm weather at the time. There were generally 2 or 3 persons about who were engaged more or less ⁱⁿ attending Jay for the first four weeks. About 4 weeks after he was hurt Jay wanted to get up. We got him into a Rocking Chair & he painted away. It was from 6 to 8 weeks before he rode out. I think he was on two crutches for ~~more~~ six months. Jay had not as large a stock of goods as some other merchants in Elgin. He had a fair stock of goods.

Cross Examined

Dr. Pefft was attending Jay when I took him out in a buggy.

Lewis M. Yarnwood

being duty from Smith

that he was on cars at the time of the accident
I was on first class passenger car coming out to the front
platform when I first seen anything out of the way, the first
that I noticed was that the front four wheels of the first class
car were off the track I left Ray in 2nd class passenger
car. Had time to come from 2nd class car to 1st class car look
around and come back. I thought cars were going good
speed I think they going 30 to 35 miles an hour at the
time of the accident. I was the length of a car behind the
train on the ground when the cars stopped I rode perhaps
100 feet after I first saw the cars off the trackman and
baggage man jumped off at the same time one from
the rear of the 2nd class car and one from the front of the first
class car I left Ray in the baggage car. He came into
the 2nd class car just as I was going out I saw him in front
of 2nd class car before I went into 1st class car. It was warm
weather and he had no vest. And the only pulling out I think
was simply pulling up each others shirts bosoms

Examination

Ray was not doing anything in that car when
I left I pulled Ray's shirt & soon went out I am quite
confident I never said to Higgins or Brewer that we
had been having a regular race in the baggage car
I think cars were going from 30 to 35 miles an hour
did not slack when we came upon "T" rail cars were
going fast. Capt. Higgins ^{urged me} said ~~to not~~ to get on board
Ray & Jones also urged me to get on cars. Higgins
said that we had better get into ^{the} baggage car. I thought
he said that the 1st class car was full. I pulled up Ray's
shirt bosom before I left the baggage car & soon

I know that Jay pulled up mine. I am sure that Jay did not chair me out of Bay State car. As sure as anything to which I have testified. I think I stopped in the 2^d Clap car. I walked through it and did not sit down.

L. B. Wells

Being duly sworn testify

I was on the cars at the time of the accident. The 1st Clap car was full. I went once into the 2^d Clap car. I noticed some passengers in the 2^d Clap car. I was standing in first Clap car in the passage way by my daughter at the time of the accident. The first sensation I noticed was a violent jumping & jerking of the cars. About 2/3 of the ties were above the ground. I got out of the cars after they stopped & saw where the cars had run while I was in the cars. There was an up & down & lateral motion of the cars. It was a violent motion in the 1st Clap car. The front door of the first Clap car was closed at the time. I did not hear anything that took place in the 2^d Clap car.

Question The Plaintiff Attorney then asked the witness the following question

What was the conduct of the passengers in the first Clap car if any indicating that there was or was not alarm among them? To which question the defendant objected and the being overruled by the court. The defendant then & there excepted.

Answer

There was a general rising of passengers & catching hold of seats and of one another. There was a rush toward the aisle bridges. This there was but little movement among them except what was produced by the motion of the cars. There was no prior passengers.

in the first class car than could be seated passengers
were thrown up and sideways I do not recollect of any being
thrown down. The motion brought me against the seat of the car
so as to tear my pantaloons & scratch my leg. There might
of been a violent jerking of the car ^{around} ~~round~~ ~~about~~ passengers.

The Plaintiff attorney then asked the witness
the following question

What explanations if any were made by papermen in the first class car indicating alarm.

So which question the defendant objected, the objection being overruled by the court the defendant then and there excepted.

Ans. There was a general screaming of the ladies asking what they could do I kept my place I got out of the rear end of our after they stopped. I saw Ray climbing up Bank at side of car. I was standing on the car when I saw him the Bank was from 3 to 3 feet high. Ray was a little back of front end of 1st ^{passenger} car when I first saw him after he jumped. He was groaning. After the cars stopped I examined the position of the cars. The 2^d car had swung off the track for some distance and then swung back again I examined the road back of the train a short distance ^{back} beyond the place where the cars stopped there was a slope to the west of the road. The ^{front} wheels of the car had run off the west end of the ties down the bank so that the wheels ploughed & plowed in to the ground. The cars tilted to the west side it did not tilt much the front wheels were off the end of the ties at one time. I do not recollect that I went back to the place where the rail was broken. I went back to the spot where the departure of the cars from the track of the road was the greatest. My impression is that the place where

The rail was broken was between the Culvert and Clinton I saw Day get on the train at Elgin. I recollect of Day Yarnwood and Jones getting on I think the speed before we ran off was greater than usual upon the flat rail. I could not swear of any change of speed in going from T road on to flat rail. I could not swear to any change my attention was not called to it. It is a down grade from Elgin to Clinton. I went 50 or 60 feet back of the train after they stopped. I have travelled on cars a good deal. I think train stopped sooner than usual. I thought the cars were a good while stopping.

Less of Examination

I think the train was in the neighborhood of a "moment" in stopping. I think the train ran off the track in the neighborhood of 200 feet. Cars must run slow to stop in 200 feet. I saw Yarnwood and Jones scuffling in the 3rd class car that was a very short time before the accident. When cars were first off the conductor went to the back of 1st class passenger car turned it and shut the door of the 1st class passenger car. Back of where the cars stopped there was a descent to the west it was 50 or 60 feet back of the rear end of the 1st class car. Day when the cars stopped was between the 1st end and the middle of the 1st class car. Day was from 90 to 100 feet from the place where the wheels went off the track the furthest - the west side of the track, some distance from the place where the cars stopped there was a descent at the side of the track. I went on with the train I went on in the baggage car. Only two cars were left behind when the train went on. The baggage car was not off of the track the second class car was not as long as the first. I made only a casual survey of the track the cars

while off run over a culvert

Re Examined

I do not recollect where Wiggins was when the cars run off. Wiggins came into our box it finally stopped and was there when the cars stopped.

It was admitted by the defendant's Counsel that the Defendant was a carrier of passengers and had a road running through the county of Kane from Edgemoor to Clinton in said county being the same ^{road} upon which the Plaintiff was riding.

The Plaintiff having stated his case the Defendant then introduced to sustain the issues on their part

John S. Brewer

who being duly sworn said:
I was on train at the time of the accident I was a passenger. Was in the baggage car a part of the time. I was in baggage car while train was at Edgemoor. I think the rate of speed upon the 'T' rail was from 16 to 20 miles an hour. We went slow when we got to the flat-rail. I saw the three young ^{men} together. Jay Yarwood and Jones were the three I did not ^{know} at the time. I do not know where Jay was on the cars when I last saw him the young men whom I saw were scuffling together. I think I saw scuffling in the 2^d class car. There was a signal given to brake when the cars run off. I jumped to the track when I heard the whistle. Capt Wiggins did the same. I saw Yarwood when he came into the first class passenger car.

The defendant's Counsel then asked the witness the following question

Question

Did Myanwood upon coming into the first-class passenger car state to you or to Captain Muggins in your presence. "Mr. Hubbard having a regular seat to which question the plaintiff by their counsel then asked objected, the objection being sustained by the court the defendant then and there excepted."

I have heard Ray state that he thought he jumped from the platform of the baggage car. This statement was made in November last. It was ^{either} at the Court House in Geneva in this county or at the Tavern in Geneva in the county that the statement was made. The 2^d class car and first tier of 1st class car were off. The baggage car went on when the car stopped they were in a cut. At the time of the accident I was engaged for the Michigan Central Rail Road Company. I do not think that there was any danger on the baggage. No car none of the passengers in either of the cars were injured except Myanwood & Ray. Cars ran off the track about twice the length of a car. I do not think there was any difficulty in a person of ordinary care jumping off without injury from the baggage car. I saw the place back of the car where they ran off. I did not measure the distance.

Chief Examiner

I had been employed by the Michigan Central Rail Road Company previous to time of accident for about 3 years in Selling Tickets & had commenced travelling over this Rail Road [for the first] in the forepart of July ^{preceding the accident} before that time I was in Racine I was on the front of the first class car at the time of accident I jumped off before the train

Stopped I thought it had better be on the ground, that I was safer then than on the cars on the platform when I jumped I fell upon my hands and feet I never had such upon a train but little then I jumped before yawbook when I spoke of a person with ordinary care jumping off of the car without injury I spoke of persons accustomed to jumping from cars of Rail Road, the place where this was broke was about 100 feet of the rear end of 1st class passenger car. It might have been more. A passenger car is about 50 feet long. I think the 2^d class car was the one thrown off by the rail. And that the breaking of a rail threw off the train. I should a man in the baggage car with that car, the tender & locomotive on the track could be in no danger. I do not think that a back car being off would throw off a car in front of it then was a brakeman on the rear of the 2^d class car he stood with his hands upon the brake. He jumped about the time I did and fell to the ground also. Two electric pins run through the cars into the trucks and holds the body of the car and the trucks together. It is not easy for the body of the car to be separated from the trucks. It is not a rare thing for the coupling between the cars to break I never hear of a person being thrown off in consequence of the car behind it being off the track. I think the track was ballasted up at this place. The back car being off and running over the ties would produce a jarring of the car in front of it. I did not say a violent jarring I have seen after a train when one of the cars was off the track and the car I was in not off. I could not tell by the motion of my car that the other car was off the track. I cannot bound unless it is off of the track. I think the locomotive of train broke the rail when the car jumped off. There was scuffling in the 2^d class car pulling & pushing.

around. Our arms engaged in it. They grabbed hold of each other & jerked each other around. I was walking through the car at the time I saw the scuffling. The persons scuffling came against the seats of the car. Before the car reached Elgin coming from the west I had been scuffling I went into baggage car after we left ^{Elgin} three persons were engaged in scuffling in that car. I saw Ray Jones and Yarnwood all scuffling in that car. I think Ray was not scuffling in 1st class car. I went through car to see who was going on beyond Chicago. I think cars were running at the time of accident at the usual rate. On T rails we usually ran from 16 to 20 miles an hour on strap rail from 10 to 12 miles an hour. My attention was called to the engineers shutting off steam when we came upon strap rail. When they shut off steam the bumper ~~the cars~~ ^{the bumper came together} as we came upon strap rail. I can't say when it was that I heard Ray say he jumped from the baggage car. Whether it was at the court house or at the tavern in this town. It was in this town I think I told him I jumped from the 1st class passenger car. I stated upon previous trial that I had no means of knowing the rate of speed except by guessing. I think I spoke at the former trial of the shutting of steam when we got to strap rail, but not of the cars bumping. I saw Yarnwood after he was hurt and went for hand car to take him to Elgin & when I came back first saw Ray. When Yarnwood jumped he nearly jumped on to me. We did not come down side by side. Shortly after the accident I was employed by the depot as have been in their employ ever since.

Re Examined

I jumped from the front

platform of the 1st class car. Yarwood jumped from the
same. I am now in the employ of the Rail Road Company
(Galena & Chicago N R R Co.)

Nelson Barrall

being duly sworn

I know the plaintiff Day. At the time this cause
was tried last fall I was present at the Court in this place
on Wednesday after the adjournment of court. Brown Day
and others were talking about jumping from car. Brown
asked Day when he jumped from. Day said from the
baggage car he said he went in there and fixed up. I
think Yarwood & Jones were present at the time of the
conversation.

Now Examined

The Plaintiff then asked the witness the
following question

Question Where did Yarwood say he jumped from
to which question the Defendant by its counsel objected
and the objection being overruled by the court the defendant
then and then excepted

Answer. I don't know when Yarwood said that
he jumped from. I don't know where Brown said he jumped from.
I came into the courtroom while the conversation
was going on. I heard what Day said. I was there but a moment
or less and went out. I was upon the jury at the time and my
attention was arrested by the conversation. Some of the people
were sitting and some standing. I did not take a seat. It
was at the last fall term the testimony was closed. I am
not certain ^{whether} the opening argument on the part of the plaintiff had been
made. I had previously stated on the trial that Day was in the
1st class car at the time of accident. And there was some dispute

as to the place from which he jumped, this made me notice what was said by Ray

As Examined

I am confident that I heard what I told others might have heard it if they had paid attention

John O. Demond

I was on the car at the time of the accident I was agent of the Stage Company at the time I saw the young men after they got on board the cars at Elgin. The cars were running not to exceed 15 miles per hour upon the flat rail. They usually run slower upon the flat rail than upon the Trail. The two young men were scuffling in the baggage car. The baggage man and my self were in the baggage car at the time of the accident. We remained there all the time. The motion in that car was more violent than usual. I could walk around the car without taking hold of anything. I did not consider myself in any danger. I do not think there was any danger. There was no bouncing in the baggage car. There was some pushing & pulling (the baggage man) was with me in the baggage car. It was a short time before the accident that Ray, Garrison, & Jones were scuffling in baggage car. They had all been scuffling together & pulling up shirts. Just before accident they fixed up & went out of baggage car. The cars were in a cut when they stopped. The first claf car was in a cut. Ray was about 1/3 of distance back of the front of 1st claf car. The 1st claf car is about 30 feet in length. 2^d claf car about 211 feet in length. The brakes of the baggage car were put down. I saw it done. I went on with the train to Clinton. I went on in the baggage car. The baggage car was not off the train. I had been running on this rail road for ten months previous to this accident. Had been in the habit of passing over the road twice every day. 30 feet back of the place where

The cars stopped. They were running from 2 to 6 miles an hour & could jump off of train going from 4 to 6 miles an hour without injuring myself

Comp Examined

I was near center of baggage car when the cars were off of the tracks. Henry Blair was in the baggage car with me I think Jones at the time of the accident was not in the baggage car, in the body of it I think he was not in that car. I don't think Day was there the back door of the baggage car was open [I could not have seen from the place where I was a person on the platform of baggage car] I saw no one come from the 2^d class car on to the front platform. I remained standing in the baggage car I did not take hold of anything. The motion of the car was mistle. The drawing to one side was not enough to be noticeable. I could see from the place where I was, I was in the baggage car that the 2^d class car was off of the tracks. I could see the trucks. The platform of the baggage car was extended about 2 feet beyond the body of car. It was 2 feet in width. Not so wide as the platform of the passenger car. I never heard of any instance where the front car was thrown off the track in consequence of a car behind it being off. I never knew a body of a car and the trucks coming apart by the car being thrown off the track. The coupling between the cars ^{Sometimes} break. Day was with Jones & Woodward in baggage car & was acting with them. I think Day was pulling up Woodward's shirt. I think I saw them all go into the 2^d class car. I did not see them come back. If they came back into the baggage car there was about an even chance that I might have seen them. Persons might have passed in & out of car & I not have seen them. The cars go faster on T rail than on flat rail. It is considered safer on the T rail. The motion of baggage car would make it more unsafe for a person to jump off.

Re Examined

I made no effort to get out of car at the time of accident. A person could jump from one car to another while they were in motion. It might be difficult I think it would be more difficult to jump from one platform to another than to jump out onto the platform of car.

John Cox

Being duly sworn I depose

I saw the cars the day of the accident when they reached Wayne Station going East. I went back to the place where they were off. The 1st class passenger car and 2^d class passenger car were the ones left upon the track. The baggage car went on with train to Wayne Station. I think it was 100 to 120 feet from where they ran off the track to the hind end of 1st class passenger car when it stopped. I saw the marks where the train ran off but did not examine them particularly. There was no danger of the cars tipping except one little car not 4 feet broad. From where the cars first ran off to the accident was about 20 feet from the depot at Elgin to Clinton it is $3\frac{1}{4}$ miles the cars ran off $\frac{3}{4}$ mile from Clinton about $2\frac{1}{2}$ miles from Elgin the place where they ran off was on the strap rail about $\frac{3}{4}$ miles from track.

Loaf Examined

The ties extended beyond the rail at the accident there was marks upon the ties there a little beyond this I think the wheels ran off the ties. I examined the front in the tracks. The iron was broken. I suppose the wheels of the train broke the bar. I had been on the track sometime as track repairer in the employ of road. I am now in the employ of the company.

Henry Deland

Being duly sworn

That he was on train as baggage master. Was in the baggage car. Cars were going 10 to 20 miles an hour at the time they ran off perhaps more. There was no difficulty in remaining upon the baggage car & no danger upon the car. No persons were injured upon the cars except Garwood and Day I first saw Day ^{in baggage car} at Elgin. Day went out of the baggage car just before the accident. Day left the car last. He waited in the baggage car after Garwood went out until he fixed his clock. Day jumped from the front platform of 3rd class car. From rear platform of baggage car I heard the signal & went out immediately. There was no difficulty in getting in the cars. There was no one in baggage car at the time of the accident but Donald Campbell. I had been running upon the train defendants road for about 9 years before the time of accident 50 feet back of the place where the cars stopped. They were going 4 to 5 miles an hour. ^{When Day jumped cars (train) were going about 4 miles an hour.} I don't think there was any necessity of jumping from cars. I think a man could have jumped from the cars at the time Day jumped without injury if he was careful.

Cross Examined

I went out upon the platform of the baggage car at the time of the accident. The brake was at my right hand as I went out the cars were off on the west side. My Brother in Law I think was on the platform of the 3rd class car. I saw Day jump. I think my brother in law was on the other side from the one from which Day jumped. I do not recollect that any one besides myself was on the platform of the baggage car. I took hold of the brake I did not see Day come out of the car. The first that I saw of him he was jumping

from car. Day said let her up & jumped off. There was not very great motion at any time in buggies but the 2^d class car was not tilted to one side I think that it was the wheels of the 1st class passenger car that ran off the ties. The front wheels of the 2^d class car could not have run off the ties without the coupling and broken. The coupling of the cars were not long enough to let the front wheels of 2^d class car run off ties while the baggage car was upon the tracks. I did not see Jones jump. I have kept passengers from jumping when there was greater danger than ^{on} this day. I did not jump. My Brother in Law did not. A passenger man could have passed from one car to another while the cars were in motion off the tracks.

Re. Examination

The wheels of front end of 2^d class car could not have run off the ties the coupling between the cars were too short to allow it.

Re. Cross Examination

I was in the employ of the defendants at the time and am now.

Direct Examination resumed

I don't recollect whether the brake on the front of the 2^d class car was down or not.

Cross Examination resumed

A person can pass from one platform to another at anytime. When I am at the brake without my obstructing the passing.

Nordriess Swain

Being duly sworn said

I was at the rear end of the 2^d clasp car at the time of the accident. I turned up the brake then jumped off. I did not jump from this place.

Coop Examined

My brake was upon the east side. I jumped from that side. Brakes and I jumped together. I fell upon my side. I had been running upon the train some time before the accident. I was at the time of the accident and still in the employ of Seft.

Direct Answered

I did not hurt myself when I jumped. I thought I was safer upon the ground than upon the cars.

William A. Higgins

Being duly sworn said

That he was conductor of the train at the time of the accident. I am acquainted with Day. I saw him at Elgin the day of the accident. I can't remember what was said at the depot at Elgin. I think we were running on the flat rail at the time of the accident 16 miles an hour on the T rail we run faster. I was upon the platform of the 1st clasp passenger car while it was off. There had been a change in speed in going on to the flat rail. I stepped out of the 1st clasp car took hold of the brake handle & held it till the cars stopped. I did not go back into the car & shut the door after Yarwood jumped we run the length 1/2 the length of a car. Reversing the ^{Engine} ~~engine~~ and running the back is what is done to stop the train. I think the engine was reversed after we ran off. At the time

the train was 50 feet from the place where it stopped it could not have been going ^{more than} from 4 to 6 miles an hour I think a person could have jumped from the train without injury. There was no danger in the baggage car at the time May jumped. It was not off the track.

Cross Examined

Running at the speed we were when May jumped but few persons would have fell down in jumping. I always advise passengers not to jump when the train is off the baggage car could not have been jerked off the track by the 2^d class passenger car. There is always a risk to the door of car when passengers think themselves in danger. I did not consider that there was any danger at the time upon the car. I kept my post. Had been accustomed to run trains upon this road as conductor for some time previous to the accident. I never saw any serious accident upon a Rail Road. I could see the motion of the 2^d class car. I think the door of the 2^d class car the (rear door) was closed.

The plaintiff then asked the witness the following question:

Question "State what effect the ^{motion of the} 2^d class car when off the track would in your opinion produce upon the mind of the average of mankind in the car as to whether it would or would not produce alarm & to what extent if any.

To which question the defendant's counsel objected and the objection being overruled by the court the defendant then and there excepted.

Answer

I think it would excite and alarm the passengers.

The plaintiffs counsel then asked of the witness the following question

Question

State whether the rate of speed at which a train may be safely run does not depend upon the condition of the track? To which question the defendant's counsel objected, the objection being overruled by the court the defendant then & there excepted.

Answer

It does

The plaintiff's attorney then asked the witness the following question

Question

What was the condition of the track before you ran over it? To which question the defendant's counsel objected, the objection being overruled by the court the defendant then & there excepted.

Ans

I had not seen the track immediately previous to the passage of this train. A train should have papers over between the time I passed in the morning and the time of the accident. I do not know whether or not the track had been examined between the time when the train passed west and the time when my train passed east. I think likely that the ones were thrown off by a defect of the track. Don't know what threw them off. The rail was broken. I saw this after we stopped. The train ^{which went} west was heavier than my train. The rail west of Elgin was T rail, and it was a prime road and we some times run 30 miles an hour on it.

The plaintiff then resumed the testimony on his part and introduced

Augustus Higgins

who being duly sworn said

That he was conductor upon the train which went west over

defendants road in the afternoon of the day of the accident
prior to the accident. It was a freight train.

The plaintiff counsel then asked the witness
the following question

Question

State what if anything you observed out
of order in the track at the place where the accident occurred.
To which question the defendants counsel objected, the obj-
ection being overruled by the court the defendants then
then excepted.

Ans.

I do not know where the accident occurred.
I saw a rail loose a mile or a mile and a half west of High
Clinton. The rail was up some six inches. I did not give
notice to the track layers. I think it was the East end of the
rail the end towards Chicago that was loose.

The plaintiff counsel then asked the
witness the following question

Question

Was the road in this condition safe
to run over. To which questions the defendants by
his counsel objected, the objection being overruled by the
court the defendants then then excepted.

Answer

I do not think the road with the
rail loose was safe. I am in the employ of the Dept-

Cross Examined

My recollection is that it was the East
End of the rail ^{which} was loose.

Colton Knott

Being duly sworn said

that he is acquainted with the Rail Road track
I passed over it in the month of April previous to the
accident.

The Plaintiff counsel then asked the witness the

following question

Question

What was the condition of the Rail Road tracks in the month of April before the accident

To which question the the Defendants counsel objected and the objection being sustained by the court the Plaintiff then and then excepted

Patrick Coffey

Being duly sworn saith

That he was on the train in the first class passenger car train was going before we run off 20 miles an hour to the best of my knowledge there was a good deal of commotion in 1st class car when it was off the tracks

Cross Examined

I did not time the cars I think timed the cars once on the Michigan Central Rail Road I timed them by the mile posts. That was the only instance in which I ever timed the cars I have no extraordinary skill in ascertaining speed of trains I do not think my judgment is as good as the conductors I thought while on the cars we was going very fast

Direct Examined

John Clark

Being duly sworn saith

That he is acquainted with the railroad tracks, has been is now Superintendent of repairs upon the tracks. I am acquainted with the running of cars. A bar with the East End up as Augustus Higgins described would not be likely to throw off a train coming from the west. I never knew of such an instance. I should not think such a bar dangerous to a train going East. I was at the place of accident the day before it took place

It was a good strap rail track well gravelled. The strap rail was good iron & the spikes were good iron. The constant use of a rail will cause the spike to break & the breaking of a spike loosens the rail & exposes it to be broken. The best of spikes will break and wear out. The road was in good order in every respect as good as could be made with the material. It was a good article of iron.

Q. of Examiner

A. I had been over the road the day before the accident - I did not walk over it but rode over in cars. The place of accident is the near the end of a curve. I was at the place the next day after the accident - I could see by the tracks where the cars had been. A rail that was up loose would be more liable to break broken than one which was down. It was the intention of the company to have the track repaired over by the track repairers previous to the passage of every train. I consider that a good safe road for the speed we were accustomed to run.

Q. of Examiner

A. It was a safe road for 15 miles an hour that was the time of running by the time table.

William H. Higgins recalled

A rail loose as my brother described would not be likely to throw a train on a straight track. The train going east. This was a good road for a strap rail road. I should think a speed of 20 miles an hour safe for such a track. The road bed was as good as it ever saw. The rails were pine rails at place of accident. Pine rails had

been put down in place of Chesnut

Gravel Examined

By the road bed I mean the surface that the superstructure was laid on. The road was gravelled up in the middle of the top of the ties. The ties are always exposed at the surface. The road is built so as to have the road higher in the centre with a descent to the sides so that the water might run off. I did not examine the road particularly at this place our rate of speed was 15 to 16 miles an hour. The rate of speed was not so great for that part of the road. I used to consider the road safe for a speed of 30 miles an hour from Elgin to Clinton. It was the best part of our road. Previous to this time or soon after a rail ran up through a car in this vicinity. I did not consider that an unsafe road for a high rate of speed. I did not consider that there was any danger in running over the road at 20 miles per hour. Soon after the time of the accident they relaid the road with T rail. I think the road at that time had been extended from Elgin to Rockford. It was made with T rails. A portion of the strap rail had been used previous to being put down on Dependents road. In May day or in May that winter the rails are most likely to get loose. The arrangement of the company was that some one should pass over the track previous to the passage of every train. This kind of rail is liable to get out of order.

John Boy recalled

It is $\frac{1}{4}$ of a mile from Clinton to the place of accident. A rail with the east end up would not be likely to throw off a train going east. I had been over the road twice that day to examine it.

of the accident The road was in good condition well tamped. The center of the road had been heaped up with gravel. At the time the gravel was about level with the top of ties in the road between the rails. The Iron of the rail was ^{was arranged} ~~was~~ a lot of iron ^{I repaired the track and to cut the iron}. The breaking of the bars was caused, I think by the wheels of the cars. It was the west end of the rails which was broken at the time of the accident. The other end was tight. I was over the track between 11:12 o'clock the day of the accident to see if anything was some out of order. I found all in good order the accident was in the afternoon.

Leo J. Examined

I saw nothing out of order at this point. One train passed over without having the track examined. I was right have passed but am not certain. I repaired the place where accident occurred. I was there an hour after the accident. That one spot was repaired that night. I went over the ~~the~~ track the next morning. I do not recollect of finding any slackhead the next morning in going over the track. I found no other rail loose between Clinton and the T rail soon after the accident the Sept. took the flat rail & laid down T rail where the accident occurred. The T rail west of Elyria was hauled over the flat rail.

John J. Diamond recalled

The track to the best of my knowledge was in good repair order. I had been over it before that day and been over it twice a day for several months previous. I had been going over track for ten months the track always carried us safe, ^{over} ~~before~~ I never examined the road. I merely passed over it in the cars.

This was all the testimony offered in the cause either on the part of the plaintiff or of the defendant

The Defendant then asked the court to give the jury the following instructions from One to No. thirteen inclusive in the words of figures following to wit as

Defendants Instructions

1st Given
That if the jury shall believe from the evidence that the injury to the plaintiff in this suit happened to him by mere accident without fault on the part of the defendant then the Plaintiff cannot recover

2nd Given
If the Jury shall believe from the evidence that the defendant exercised due care and diligence & skill in the preservation and repair of their tracks & in managing & operating their road at the time of the accident & that the accident could not have been prevented by the use of such care diligence and skill then the Plaintiff cannot recover in this action

3rd Refused
That the Defendant as a common carrier of passengers is not an insurer of their personal safety against all accidents but is liable only for the want of such care diligence & skill as is characteristic cautious persons if the defendant exercised such care & diligence in the transportation of the plaintiff then the Plaintiff cannot recover in this action

4th
If the jury shall believe from the evidence that the injury to the Plaintiff was the result

5th If the jury believe from the evidence of an accident which could not be avoided by the exercise of due care & skill in the preparation & management of the means of conveyance on the part of the defendant the Plaintiff cannot recover

Refused
5th If the jury believe from the evidence that the Plaintiff while on his passage from Edgemoor to Clinton was guilty of carelessness & unnecessarily exposing himself to damage & danger by wrestling or scuffling on the cars or by imprudently & unnecessarily passing from one car to another while the cars were in motion & that such carelessness or imprudence contributed in any way to produce the injury then the Plaintiff cannot recover

Refused
6th If the jury believe from the evidence that the Plaintiff while on defendant's cars imprudently & carelessly exposed himself to danger by shuffling or playing & that the injury to him was the result of such carelessness or imprudence or that such carelessness or imprudence in any way contributed to produce the injury then the Plaintiff cannot recover even though the jury may believe that the defendant has also been guilty of negligence

Refused
7th If the jury shall believe from the evidence that the Plaintiff was guilty of any want of reasonable care while a passenger upon the defendant's cars and that such his want of care concurred with the negligence of the defendant in producing the injury then the Plaintiff cannot recover

8th That the Plaintiff before he can

Refused

recover in this action must show not only that the injury to him was the result of the carelessness or negligence of the Defendants but also that he himself was without fault in producing said injury

9.

Refused

What the Plaintiff cannot recover unless the jury shall believe that he exercised proper care & Circumspection while on his baggage from Elgin to Clinton & that the Defendants are guilty of negligence from which the injury resulted & the burden of Proof is upon the Plaintiff to show not only ^{that} the Defendants are negligent but that he himself was not guilty of negligence

10th

Given

If the jury shall believe from the Evidence that the Plaintiff leaped from the cars of the Defendants under a rash and undue apprehension of danger when in reality there was no danger & that the injury was the result of such leaping then the Plaintiff cannot recover

11th

Refused

If the Jury believe from the Evidence that the Plaintiff leaped from the cars of the Defendant under circumstances that would not have justified such an act on the part of a prudent careful man & that the injury was the result of such leaping then the Plaintiff cannot recover

12

If the jury believe from the Evidence that the Plaintiff leaped from the Defendants ~~cars~~ baggage car while said car and the locomotive tender were all upon the track & while the cars were moving slowly then we find from

Refused in this language
but is given in below
checked by the court

which the Jury may presume that the Plaintiff was guilty of impudence and culpability in leaping from said Car

13th

If the jury shall believe from the Evidence that the Plaintiff ^{with out reasonable cause} leaped from the cars of the defendant when he was in no peril & leaped culpably & recklessly and that his culpable and reckless manner of jumping ^{caused} contributed to produce the injury then the Plaintiff cannot recover

14th

If the Jury shall believe from the Evidence that the Plaintiff leaped from the cars of the defendant while it was moving slowly in a place where there was no danger of the car being upset or injured under a rash & undue apprehension of danger when in reality he was in no danger & that the injury was caused by such leaping they must find for the Defendant even though the Plaintiff at the time really thought himself in danger & leaped to the ground to save himself from harm

15.

The clerk will copy this 15th Instruction as amended but put the words of the court in ~~traces~~ as above indicated in traces as above so as to designate the amendments

If the Jury believe from the Evidence that previous to taking passengers on the Defendants cars at the Depot in Elgin the Plaintiff was directed by the conductor to take his place in the baggage car because there was not room for him in the first class passenger car & that the Plaintiff did go into said baggage car at the time of starting and whilst on the way from Elgin to Clinton he left said car without any

Refused as asked but is given with amendments in period

Given

Refused as asked but is given as amended by the court

reasonable cause & acted carefully, carefully & [carefully] from one car to another & that the injury to the Plaintiff happened in consequence, [of his leaving the car] so assigned him another reasonable cause & that from the car, whereby he was injured, then the Plaintiff cannot recover

16th

That the Plaintiff must prove his cause of action as stated in his declaration and if the Jury shall not believe that the car in which the plaintiff was riding in his passage from Elgin to Clinton & immediately previous to the plaintiff leaping from the car was thrown off the track by the defendants negligence of the defendants & was proceeding over the ties & was so high above so that the Plaintiffs life or limb were in great danger & that the said Plaintiff left & limbs were over then & were greatly jeopardized & endangered by remaining in the car then the Plaintiff cannot recover

Refused but given out as a substitute

17

If the Jury believe from the evidence that the injury to the Plaintiff complained of in this action was the result of the negligence or want of care of both the plaintiff and the defendant the Jury should find for the defendant

Refused

18

If the Jury believe from the evidence that they did not hear whatever noise there might have been in the passenger car when the same ran off the track then the Jury should disregard the evidence of such noise as influencing the conduct of Say [otherwise than showing the reasonableness of his fear of danger]

Given as amended & not otherwise

19

The Plffs as passenger upon Swifts Rail Road must be presumed to have taken upon himself the risk necessarily incident to the mode

Refused

of Travel which he adopted and if without fault of the defendant or by a concurrence of the fault negligence or want of care of both Plaintiff and defendant. the Plaintiff was injured the Jury should find for defendant

The Court gave number One Two four 10. 14. And refused to give the Third Fifth sixth Eighth 9. 11. 12. 17. 19. instructions as asked for. The Court also refused to give No 7. as asked for but gave No 21. in its stead which is in the words and figures following

If the jury believe from the Evidence that the Plaintiff was guilty of a want of reasonable care at the time the accident happened or without reasonable care or apprehension of danger rashly leaped from the car by which he was injured he ought not to recover although the Defendants negligence contributed to the injury in such case.

The Court also refused to give No 13. as asked for but gave it by inserting these words in a line from the thereof after the word Plaintiffomit "Without reasonable cause rashly" and by striking out the words "Contributed to produce" & inserting in lieu thereof the word "Caused" and will then read as follows

13th

If the Jury shall believe from the Evidence that the Plaintiff "Without reasonable cause" rashly leaped from the car of the defendant when he was in no peril or leaped carelessly or recklessly & that his careless reckless manner of jumping caused the injury then the Plaintiff cannot recover

Given instead of
No 7. refused by
the Court

The Court refused to give the 15th as asked for but after amending by adding the words in Brackets he gave the same" The Court refused to give No 16 but gave the following in its stead to wit"

No 21
Sustained But the Court states that the Plaintiff must prove his case as stated" Some one of the Courts in his declaration to the satisfaction of jury before the Jury ought to find in his favor

The Court refused to give No 18 as asked for but gave it by adding the words in Brackets at the foot thereof & underscored

The Defts Excepted to the Several Opinions of the Court in refusing to give their several instructions as asked for by them and also Excepted Severally to the giving of those as amended by the Court

The Plaintiff asked the following Instructions to wit"

1st
Refused A Common Carrier of passengers by Rail Road is bound by Law to have and provide a Rail way properly and staunchly constructed with suitable materials - and in good travelling order and repair safe and fit for use. and to have & provide road worthy Carriages or cars suitably equipped and controlled and managed by Competent Careful and Skillful persons

2nd A Common Carrier of passengers by Rail Road is bound by Law to make a most thorough and careful Examination of his means of conveyance

Refused

such as his rail way cars and equipments persons to each journey and to draw his cars at a safe and proper rate of speed which rate depends much upon the condition of the rail way.

3rd

Refused

Such Common Carrier so far as human care foresight and skill can possibly go is bound for the safe conveyance of his passengers - and in the performance of the duties enumerated in the instructions numbered One & two [1 & 2] he is bound to use the utmost possible care diligence and skill and if there be any even the slightest negligence inattention or unskillfulness on his or his servants part in the discharge of said duties, then for any injury occasioned to his passengers thereby he is answerable.

4th

Given

If the jury believe from the evidence that the cars of the defendants while conveying the Plaintiff as a passenger from Elgin to Clinton were run or thrown off the track that fact is *prima facie* evidence of a neglect or disregard of their duties as common carriers and in such case it devolves upon them to prove that ~~the neglect~~ there was no neglect or disregard of their duty but that the running off resulted from a cause which no human care foresight or skill could prevent.

5th

If the jury believe from the evidence that the Railroad track was out of order and repair and that the cars in consequence thereof were thrown off the track and that while thus off and in violent motion the Plaintiff had reasonable grounds to apprehend danger to his life or limb if he continued in the

Car and that to escape from the supposed danger he jumped off the car and thereby received the injury he complains of then the defendants are liable though it may ^{now} appear that if he had remained in the car he would have been safe. The law in such case proceeds upon the principle that when danger comes suddenly upon a passenger he may not be sufficiently self-possessed to know in what way to act and then the carrier is answerable for the injury resulting therefrom.

6th If the jury believe from the evidence that the motion of the cars while off the track - the excitement among the passengers - the place as to danger when the cars were off - and all the circumstances connected with the accident by their running off would have produced in the mind of any man of ordinary firmness & prudence such fear of injury as to ~~induce him~~ induce him to leap from the cars for safety ^{then} the plaintiff in law was justified in jumping from the cars in such a case and that fact is no bar to his recovery.

7. What if the jury should find for the plaintiff in assessing his damages they can take into consideration the pain & suffering occasioned by the injury to the plaintiff his loss of time loss in business if any expense has been put to in consequence of the injury and the present and probable future condition of his leg.

8. On the question whether there was such apparent danger as would have caused fear in

Given as usual
in pencil

in the minds of the average of mankind similarly situated - The Jury are not bound by the opinion expressed by witnesses - The Jury are also to judge from the circumstances proved and their own personal knowledge of Human Nature and should adopt so much of the opinion of a witness as suits the approbation & judgment of the Jury more

Given

9th The Prudence & due care required of the Common Carrier by law is of the highest order the utmost possible skill care diligence and watchfulness for the safety of the passengers and in this sense the words due care &c. as mentioned in the defendants instructions is intended. The Prudence required of the passengers is simply such as ordinary men usually exercise in like circumstances and if the Jury believe from the evidence that by reason of the omission or neglect of the defendants or any one of their servants the cars were thrown off the track while under way and Plaintiff was thereby put in danger and to save himself leaped from the car and thus received the injury the defendants cannot excuse themselves from responsibility by reason of any act of the Plaintiff unless they show 1st that such act helped to produce the injury and 2nd that such act was so imprudent, rash or heedless that the exercise of such prudence as the average of mankind possesses, would have prevented the Plaintiff from doing the act.

The Court refused to give No 1, 2 & three as asked for but gave No 4, 5, 6, 7, 8, & 9, as asked - then gave No 11 as a substitute for No 1, 2, & 3

The Defts having admitted to be common carriers for hire, they are from at the time bound to use the utmost care foresight and diligence in providing of safe, sufficient and suitable conveyance in order to prevent those injuries which human care diligence and foresight could guard against and if the Plaintiff injury happened by reason of a defect in the road of the Deft which might have been discovered and prevented by a careful and thorough investigation thereof immediately thereof after the Western train had passed & before the train coming East with the Plff ran over the same track going East then such accident must or ought to be ascribed to the negligence of the Defts or their servants

But if the Jury believe the accident did arise from a hidden defect of the road which no human care skill foresight or careful prior examination of the road at the point where the accident happened could not be discovered and which could not be guarded against by the exercise of a sound judgment & vigilant foresight then the Defendants are not liable on the other hand if the injury was the result of the slightest neglect of the Defts or their servants then they are liable therefor unless you further believe from the evidence that the Plaintiffs act of jumping from the car was rash and without reasonable grounds of fear of injury by remaining in the car any longer

is the giving of these several instructions asked for by the Plff the Deft also excepted.
The Jury thereupon retired.

A consider of their verdict and afterwards come into Court and rendered the following verdict

The Jury find the Defendants Guilty and assess the Plaintiffs Damages at \$9500.

The Defendants Counsel then moved the Court for a new trial in this cause and filed in this Court the following motion:

Where Day comes the Defendants by its Attorneys & moves the Court for a new trial herein

Which motion was

overruled by the Court to which decision of the Court in overruling said motion for a new trial the said Defendants by its Counsel then & there excepted & moved the Court to sign & seal this Bill of Exceptions which is done

R. S. Morris Esq.
Judge of C. C. of Ill.

State of Illinois
Kane County

I Luther Dearborn Clerk of the
Kane County Circuit Court in the State
of Illinois do hereby certify that the above and foregoing is a full
perfect and complete Transcript of the records of said Court in
the foregoing Entitled Cause and a true copy of the Process
Summons Return Verdict and Bill of Exceptions in said cause
as appears from the files of said Court & also the Bond in
said Cause

In Witness Whereof I have hereunto set my hand
and Seal of said Court at General in said
County this fourth day of June A.D. 1855

Luther Dearborn
Clerk

Supreme Court. State of Illinois

June Term A.D. 1855.

And now the Galena & Chicago Union Rail Road Company
comes by Peck & Hammon & Pleas their Attorneys -
and assigns for error in the foregoing Record -

- 1st The court erred in overruling their objections to
the questions asked the Witness Wells - and permitting
said Witness to answer.
- 2nd The circuit court erred in sustaining the objection to question
asked the Witness Brewer.
- 3rd The circuit court erred in overruling the objections ^{of appellants} to the
questions asked the Witness ^{Wm. H.} Higgins.
- 4th The court erred in overruling the objections of these appel-
lants to the questions asked the Witness Augustus
Higgins.
- 5th The court erred in giving ^{the jury} the instructions of
the said Plaintiff ^{May} - each and all of them -
^{and each of the substituted instructions given by the court -}
- 6th The said Court erred in refusing to give the
jury ^{each of} the instructions asked by these defendants -
and numbered 3- 5- 6- 7- 8- 9- 11- 12- 13- 15- 16- 17- 18- & 19.
- 7th The said Court erred in qualifying the instructions ^{& each of them}
of these appellants asked to be given to the jury -
and in giving the same as qualified. Nos. No-
13, 15- 18.
- 8th The said court erred in giving each of the
Instructions numbered 20- & 21. as substitutes
for No- 1 & 6- & as asked by the appellants.

9th The said Court erred in overruling the appel-
lants motion for a new trial -

E. Peck, Hammon & Burges

Attorneys for Appellants.

Galena & Chicago
Union Rail Road Company
as appellants

Albert R. Fay
appellee

Record - 5

Errors apixed
34
306.00

Filed June 11th 1885.
L. Leland Clk.

\$5.00. me —

68
G. & C. W. R. R. Co.
vs
Albert R. Fay.

1225

1855