

13306

No. _____

Supreme Court of Illinois

Tonica & Petersburg R.R.

vs.

John Unsicker

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Simon

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John Musieher

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Simon

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John Musieher

1859

13306

STATE OF ILLINOIS, } THIRD GRAND DIVISION.
SUPREME COURT. } APRIL TERM, A. D. 1859.

TONICA AND PETERSBURG RAILROAD COMPANY
vs.
JOHN ROBERTS.

TONICA AND PETERSBURG RAILROAD COMPANY
vs.
JOHN UNSICKER.

Brief for Appellees.

The record in both of these cases presents the same question.

It is urged that the amount of damages is excessive, and that the instructions given on the part of the appellees are incorrect, and that the court refused proper instructions for the appellant.

The plat in the record shows distinctly that the company's road passed through the farms of the appellees in such a manner as to almost ruin them. The evidence showed that the farm of Unsicker was only two and a half miles from the depot of the Peoria and Oquawka railroad, at Washington; that the market for both was at Peoria; and the jury were justified, from the circumstances, in concluding that it was no benefit to those two farms. It might be a great benefit to a farm to have one railroad near it, while it could be totally destroyed by having two or three running in different directions across it. By the third section of the act incorporating the appellant, all land taken for the right of way vests in the company in fee simple. The owner is deprived of it forever as soon as his damages are paid; and even if the road is never built, his land is gone from him forever. It will then belong to the company, without the privilege of using it in any manner by the appellee, unless the company see proper to allow him to do so. Such extensive privileges conferred by the legislature upon railroad companies over private property, is a stretch of power that ought not to be exercised; and if railroad companies will grasp at so much, they ought not to complain that they have to pay for it. Taking into consideration the manner in which the road runs through the farms of the appellees, and the amount of the land taken, the inconvenience of having the farms divided in that manner, show conclusively that the verdict is no more than reasonable. This is not like the ordinary manner of taking land for a common highway. In such a case the easement passes only, and the owner may use it in any way not inconsistent with the easement. Not so in this case. If the appellee even crosses the railroad except at a public or farm-crossing, he is a trespasser. *A. and S. R. R. Co. vs. Baugh*, 14 Illinois 211; 17 Ills. 541, 580; *Redfield on Railways*, 368; *Milwaukie and Mis. R. R. Co. vs. Eble*, 4 Chandler Rep. 72; *Peirce on American Railroad Law*, 320; *State vs. Evans*, 2 Scam. Rep. 209. It is not the benefit that will enure from the *location* that the jury are to inquire into: it is the benefit that will arise from the construction. In the language of Chief Justice Wilson, "The law does not contemplate so improbable a contingency as that the mere survey or location of a road, that may never be made, will enhance the value of land contiguous to it." 2 Scam. 209. And the whole case from 2 Scam. 209, lays down the law as it is, independently and fearlessly. It is well settled by the decisions of our own court, that the expense of additional fencing, the inconvenience of having a farm divided so as to make it inconvenient to pass, are proper subjects of damage in acquiring the right of way. *Alton and S. R. R. Co. vs. Carpenter*, 14 Ills. Rep. 190; *Evans vs. State*, 2 Scam. 208. Taking all these facts into consideration, the verdict is very

far from being to such extent excessive as to require this court to set it aside. Illinois and Wisconsin R. R. Co. vs. Van Horn, 18 Ills. Rep. 257.

But it is contended that the act of February 14, 1855, has altered the law in regard to this question; and such is assumed to be the case in the instruction refused by the court. If the law has not been altered, the instructions asked for the appellee are strictly correct. The act referred to has no reference to the *measure* of damages in obtaining the right of way. Certainly the legislature never designed to perpetrate so great fraud upon the land owner, as to refuse to allow him the expense of additional fencing, and throw open a railroad, and not even make the company liable to build the fences until six months after their road is running, and not even then if the company will run the risk of avoiding the stock that may stray upon the track. The first section of the act referred to simply requires the railroad corporation to fence their road, within six months after the same is open for use, with fences sufficient to keep cattle, &c., from getting on the road; and shall also make cattle guards at roads and farm crossings for the same purpose; and provides that so long as such fences, &c., are not made, the company shall be liable to damage done to cattle on the road; and when the fences are made and kept in repair, the company are not liable for injuries to cattle, &c., unless wilfully or negligently done; and the company is not required to fence its road at all except where it is necessary to keep cattle off the road.

By the second section, they are not required to fence their road, where the land owner has agreed to do so, nor where the expense of fencing is included in the assessment of damages; and in such case the company are not liable for damages to the cattle if he fails to make the fence.

The third section provides for a penalty against any one who shall attempt to drive stock, &c., across or along the road except at farm crossings. This act has not the remotest connection with, or reference to, the measure of damages for taking land for the right of way. It is an act to prevent injuries to stock, and regulate the liability of the companies of this state upon that subject. The land owner whose land has been taken has no right to join his fence to the fence built by the company, if the company does not choose to let him do so, nor has he any right to build farm crossings for his own use, unless by the permission of the company. This is fully laid down in A. and S. R. R. Co. vs. Baugh, 14 Ills. Rep. 211: and the statute referred to has not changed the law as laid down in that case.

B. S. PRETTYMAN and JAMES ROBERTS,

Attorneys for Appellees.

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Tornia & Petersburg
R.R. Co.
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John Musick
same
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John Roberts
Appelluz
Brief

Filed April 27, 1853

A. Deland
Clerk

Gorica & Petersburg
R R Company Appts
vs
John Unsucker
Appel

In the Supreme
Court April Term 1859
3 Division

The Same
vs
John Roberts

Argument for appellants

It having been proposed by the defts
counsel to argue both of these cases
together such proposition is accepted
the cases being substantially alike and
the decision of the one would be decisive
of the other - In each case the law
road only runs thro' an eighty acre tract
In Unsuckers case he has recovered for five $\frac{9}{100}$
acres damages to the amount of \$800.00

In Roberts case the land taken is six $\frac{65}{100}$
acres and the damages are assessed to the amount
of \$1000.00! This land is but ordinary
farming land in the country and it requires
but the mere statement of the case to
show beyond all controversy that the
jury must have been governed in the
finding of their verdict by passion
prejudice or malice or were unduly
influenced by the plaintiff claimant
to give such verdicts. If such damages
are to be paid by Rail Road Companies
for lands in the country - No other road
can ever be built in the state all our

Magnificent Systems of Contemplated roads must be abandoned - It is not because the Claimant can get one two three or even four men so far behind the spirit of the age as to swear that a rail road is of no benefit to the lands along its line, and so prejudiced against internal improvements as to swear that the damages are a thousand dollars for six acres of land that the Claimant ought to recover that amount - The defendant introduced in each case two disinterested witnesses men of judgment that had viewed the premises & knew of what they testified but the jury placed not the least reliance upon such evidence & gave it no weight at all in the making up of their remarkable findings - For the reason alone that the damages are not only excessive but outrageous the verdicts in both cases ought to be set aside & a new trial awarded.

This proceeding was commenced & conducted under the Act of March 3, 1845 2 Purple Statutes 1031 And the only right that can be acquired by the R R Co is an easement a right to run & operate as well as to construct that road across the lands in controversy but a right subordinate to the freehold & which will revert in case of the work not being completed or even being discontinued.

In cases like this I maintain that the R R Co are bound to make necessary farm crossings convenient for the use

of the farm. And this by force of the Common Law & common reason. The Co. having without the consent of the owner obtained not the fee simple & absolute estate in the land but the right of way every sense of justice and I think of law would require them so to use their right as to do the least damage to the owner and this could not be done without providing suitable & convenient farm crossings.

The judge who tried the case tried it upon the hypothesis that the right to be acquired was a perfect estate in fee simple. That the owners of the land never could set foot upon the track of the Road without committing trespass. That no crossing was to be made for the benefit of the farm unless as a mere act of grace & favor that none could be made by the owner of the land and that the Company were bound to fence the Road & so charged the jury in effect & refused to charge otherwise on the motion of the Company's Attg.

In all which particulars I think the Court erred and am quite sure he did so far as the fencing is concerned. The duty of making suitable farm crossings is expressly recognized in the law of Feb 14, 1855 2 Pursh's Statutes 1077 and the obligation to fence is therein expressly enjoined so that the Court's theory was wrong & his instructions

also -

Thinking that the cases fully
sustain me in the views assigned
I hope the Court will reverse
both these judgments

A L Deverson
Atty for appt.

313 & 314

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P. & J. R. R. Co.

^{by}
Musick

^{do}
Roberts

Argument
for appts

Filed May 23, 1859
L. Leland
Clerk

STATE OF ILLINOIS, } THIRD GRAND DIVISION.
SUPREME COURT. } APRIL TERM, A. D. 1859.

THE TONICA AND PETERSBURG RAILROAD COMPANY, Appellant,
vs.
JOHN UNSICKER, Appellee.

This was a proceeding by the appellant made under our statute to obtain the right of way across the land of the appellee. The proceedings and judgment, as well as the errors relied upon for the reversal of this judgment, appear in the bill of exceptions filed in said cause, commencing on page ten of record, and is as follows:

10 STATE OF ILLINOIS, } TAZEWELL COUNTY CIRCUIT COURT,
Tazewell County, } ss. February Term, A. D. 1859.

TONICA AND PETERSBURG RAILROAD COMPANY
vs.
JOHN UNSICKER.

Be it remembered that, on the trial of this cause, the evidence offered on behalf of the appellant, Unsicker, was as follows:

11 Stellanger was first sworn, and testified that he resides near Unsicker; that he knows his farm through which the Tonica and Petersburg railroad runs; that the farm contains about seventy-two acres, worth about forty dollars per acre; that the usual market for Unsicker and his neighbors is Peoria, about eleven miles distant; that Unsicker's farm, the one in question, is about two or three miles from Washington; that in view of the quantity of land taken by the Tonica and Petersburg railroad, in running
12 their line of road through the farm of Unsicker, and the cost of making and maintaining the fences along the line of the road, and the cattle guards along the same, and their inconveniences to Unsicker by reason of the road running through his farm in the manner it does, witness estimated the damages sustained by Unsicker at nine hundred dollars. Witness further stated that the following plat, which was handed him, (which said plat is admitted to be correct by both parties to this suit,) represented, as
13 nearly as he could recollect, the manner in which the Tonica and Petersburg railroad runs through Unsicker's farm; and that he should think the quantity of land on said plat represented as taken up by the road, being 5.96-100 acres, as about the correct quantity. Witness further stated that he did not include, in his estimate of damages, the inconvenience to Unsicker in case the railroad company should refuse to let him erect cattle guards along the line of road through his farm. In that case damages would be incurred, how much witness did not say.

Witness was then cross-examined, and stated that the farm of Unsicker lies about four miles northeast of Morton; that he don't think the construction of the Tonica and Petersburg railroad would benefit Unsicker, or enhance the value of his land.

13 Samuel Mowberry, another witness for appellant, was next sworn, and testified that he knows the farm of Unsicker over which the Tonica and Petersburg railroad runs; had been on it recently; resided about six miles from it; thinks the plat shown first witness shows the manner in which the railroad crosses the farm of Unsicker correctly; that the farm of Unsicker is situated about eleven miles from Peoria, three miles from Washington, and seventeen miles from Pekin: Peoria being the usual market for the neighborhood. Witness further stated that the farm of Unsicker was worth thirty-five to forty dollars per acre; that the damages to Unsicker, by reason of the Tonica and Petersburg railroad running through his farm in the manner it does would be eight hundred and fifty dollars: this would be a low estimate. Included in this estimate of damages, witness stated, was the cost and expense of keeping up and building fences and cattle guards along the line of railroad through Unsicker's farm, but did not include the damage to Unsicker in case the railroad company should refuse to allow him to put up cattle guards along the line of road through his farm, and thus he be compelled to use gates. Witness stated 14 that he could not estimate the damages arising from such inconvenience: it would be additional damage, but he did not know how much.

There was no cross-examination of this witness.

John Lowman, another witness for appellant, was next sworn, and testified that he knew the farm of Unsicker; had been on it three weeks ago; that the Tonica and Petersburg railroad ran through it in the manner shown in the plat exhibited to the previous witnesses; that the land in question was worth thirty-five dollars per acre; that the damages to Unsicker by reason of constructing the Tonica and Petersburg railroad through his land as shown in the plat, would be from seven to eight hundred dollars. This included the building and maintaining fences and cattle guards along the line of road through the farm of appellant, but did not include the damage to appellant in case the railroad company should refuse to let him erect cattle guards, and thus compel him to use gates in 15 crossing the railroad track through his farm. In such case the damages would be increased, how much witness did not state. Witness further stated that the construction of the Tonica and Petersburg railroad through appellant's farm could not be of any benefit to him, nor enhance the value of his property, because his market was at Peoria, only eleven miles distant; that he was within two or three miles of a depot on the Peoria and Oquawka railroad at Washington, and did not need any greater railroad facilities.

This witness was not cross-examined.

John Oswald, another of appellant's witnesses, was sworn, and testified that he lived near the appellant; knew his land through which the Tonica and Petersburg railroad ran; that it ran through the farm in the manner shown by the plat exhibited to the other witnesses; that the farm was 16 worth thirty-five dollars per acre; did not think the railroad enhanced its value any; believed the damages to Unsicker, by reason of running the

road through his farm, to be at least nine hundred dollars. Witness further stated that Peoria was the usual market for Unsicker and his neighbors; that it was eleven miles distant; that they seldom or never sold their produce at Washington.

Witness was then cross-examined, and testified that he did not think railroads enhanced the value of land through which they were built.

17 David Sloan, another of appellant's witnesses, was next sworn, and testified that he knew the farm of Unsicker through which the Tonica and Petersburg railroad ran; that said road ran in the shape shown in plat exhibited to previous witnesses; that there was some curve to the road as it was constructed through Unsicker's farm; that the land was worth thirty-five to forty dollars per acre; that, in estimation of witness, Unsicker would sustain some nine hundred dollars, including fencing, and not including damages, by reason of the inconvenience of using gates in crossing the railroad track from one part of the farm to another in case the railroad company should refuse to let Unsicker erect cattle guards along the line of road through his farm; thinks the damages increased by the curve in the road through appellant's farm; don't think the appellant benefited in any way by the construction of the Tonica and Petersburg railroad, nor his land enhanced in value.

This witness was not cross-examined; and this was all the testimony of appellant in this cause.

18 Appellee then called William D. Evans, who was sworn, and testified that he had been selected by the Tonica and Petersburg railroad company as one of the commissioners to view the land and condemn the right of way through the farm of Unsicker; that there was a mistake in the return made to the justice of the peace; that the return stated that one dollar only had been assessed as damages to Unsicker by the commissioners, when in fact they had assessed the damages at one hundred dollars. Witness further stated that he had viewed the land of Unsicker along the line of the Tonica and Petersburg railroad, and then thought the damages to Unsicker, by reason of building the road through his land, would be one hundred dollars over and above the benefits of the same; and witness stated that his opinion was still the same.

19 Witness was then cross-examined, and testified that he lived at Delavan, twenty miles from the farm of Unsicker; that he had lived at his present home four or four years; that in estimating damages he had included the expense of building and maintaining fences and cattle guards along the line of road through appellant's farm, but thought the railroad company bound by law to build the same. The appellant, Mr. Bell, Rogers and Kellogg were with witness when he viewed the land of Unsicker.

Mr. Birkett, another of the commissioners, was not present on that occasion.

Thomas Birkett, another of appellee's witness, was next sworn, and testified that he had been across the land of Unsicker, but not on the line of

road, but he could see the line of road and the manner in which it ran through appellant's farm; thinks map, as shown other witnesses, correct; that the commissioners, of which witness is one, had assessed Unsicker's damages at one hundred dollars instead of one dollar, as appeared by the return to the justice of the peace; did not know how the mistake occurred. The damages assessed by commissioners were in view of the
20 railroad company building and maintaining the fences and cattle guards along the line of railroad through appellant's farm.

The witness was then cross-examined, and testified that, if Unsicker had to build and maintain fences along the line of road through his farm, the damages assessed by the commissioners would be increased to the extent of the cost of such building and maintaining; that on account of the railroad running in a curved line through appellant's farm, he suffered more damage than if the same ran straight through the farm. Witness further stated that he had not been over the land in company with the other commissioners, Bell and Evans; went on in advance of them. The land of Unsicker is situated about three or four miles from the town of Washington, where witness resides.

Bell, another of appellee's witnesses, was next sworn, and testified that he was one of the three commissioners selected by the Tonica and Pe-
21 tersburg railroad company to view the land of Unsicker and assess the damages for condemning the right of way over said land for the railroad; that he had been over the land in question, and the commissioners assessed the damages to Unsicker at one hundred dollars, which was the amount they designed to report in their return to the justice of the peace, but owing to a mistake somewhere the return showed the damage to be only one dollar. Witness further stated that the damages assessed to Unsicker were in view of the railroad company building and maintaining the fences along the line of the road through the farm of appellant; that he thought, at the time when the damages were assessed, that they were right, and was still of the same opinion; that the plat shown other witnesses correctly marks out the manner in which the road runs through the farm of Unsicker.

22 The witness was then cross-examined, and testified that the cost of fencing in the neighborhood where the farm of appellant was situated would be about one dollar and a quarter per rod; that he resided in Washington; that Evans, another of the commissioners, was in company with him when he went over the land of Unsicker to view the same, and assess the damages, but Brickett did not go over the land with them.

This was all the evidence in this cause on the part of either party.

The appellant then requested the court to give the jury the following instructions, viz:

23 The appellant asks the court, first, to instruct the jury, that the company

are not bound by law to fence their road only in cases where it is necessary to keep cattle or other stock off their road; nor do they have to fence the road when the cost of fencing is included in the assessment of damages; and the jury may, if they see proper, include the cost of the fencing in their assessment of damages.

29 The court instructs the jury, that, after the assessment and payment of the damages to Unsicker by the railroad company, by way of damages in the consideration of land taken for the purposes of the road, it will not be bound to make the fences for Unsicker on either side of the road, or to make cattle guards for him to cross the road; nor will Unsicker have a right, without the consent of the company, to make cattle guards across the said road, if they believe, from the evidence, that Unsicker's land was already fenced and enclosed before the damages were assessed.

And the appellees, by their counsel, objected to each one; which objection was overruled by the court, and the instructions given to the jury. To the overruling of which objection, and the giving of the said instructions to the jury, the appellee, by their counsel, then and there excepted.

Appellee then requested the court to give the jury the following instructions:

The appellee asks the court to instruct the jury that the railroad company is bound to make and maintain the fences on each side of the road.

That in estimating the damages for the right of way, the jury ought not to allow the claimant for making and maintaining the fences along the line of road.

25 That the company are bound by law to make proper and suitable farm crossings where the road runs through a person's land; and in estimating damages, the jury have no right to allow the claimant any compensation for making them himself.

Which the court refused to give to the jury; and to the ruling and refusal of the court to give the said instructions, and each of them severally, to the jury, the appellee, by their counsel, then and there excepted.

The jury returned into court with the following verdict:

"We the jury find for the appellant, and assess the damages at eight hundred dollars, (\$800,) and appellant to make his own fences."

26 And thereupon, appellee, by their counsel, moved the court to set aside the verdict of the jury so rendered as aforesaid, and to grant a new trial in said cause; and assigned, as reasons for the said motion, that the verdict of the jury so rendered as aforesaid was contrary to law, and contrary to evidence; which motion was overruled by the court, and judgment rendered on said verdict. To which overruling and judgment the appellee, by their counsel, then and there excepted; and now prays that this their bill of exceptions be signed and sealed by the court; which is done.

JAMES HARRIOTT, [L. S.]

And the said Tonica and Petersburg railroad company assigns the following errors, to wit:

First. The court erred in giving the instructions asked by the appellee (Unsicker.)

Second. The court erred in refusing to give the instructions asked by the railroad company.

Third. The court erred in refusing to said company a new trial.

For which reasons, and for other errors appearing in the record and proceedings aforesaid, said railroad company pray that said judgment may be reversed, annulled, and altogether held for nothing.

A. L. DAVISON, Attorney for T. & P. R. R. Co.

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Pomona & Petersburg
Rail Road Company
vs C
John Linnick

Abstract

Filed April 27, 1889
L. Leland
Clerk

1
Pleas, at a Term of the Circuit Court,
Begun and held at the Court House,
within and for the County of Tazewell
and State of Illinois, at Pekin, on
the first Monday of the Month of
February in the Year of our Lord one
thousand eight hundred and fifty
eight, it being the 7th day of said
Month of February. Present the
Honourable James Harriott Judge
of the 21st Judicial Circuit of the
State of Illinois.

Be it remembered
that on the 30th day of November
AD 1858 an Appeal Bond was filed
in the County Court of Tazewell County
in the words and figures following
to wit:

Know all men by these presents that
we John Unsicker and John Winch
are held and firmly bound unto The
Tonica and Petersburg Rail Road Company
in the penal sum of One hundred and
fifty dollars lawful money of the United
States for the payment of which well
and truly to be made and performed
we bind ourselves, our heirs executors
and Administrators, jointly ~~and~~ severally

2

and firmly by these presents, Witness
our hands and seals this 30th day of
November 1858.

The consideration of
the above obligation is such that
whereas the above Rail Road Company
did on the 20th day of October 1858
apply to Elias Wenger a Justice of the
Peace of Tazewell County Illinois to
appoint Appraisers to assess the damages
done or to be done by reason of the
erection of the Tonica & Petersburg Rail
Road over the land of said John
Unsicker, and whereas said Appraisers
so summoned, and appointed by
said Justice, being Thomas Birkett
William D. Evans and James J. Bell
did on the 28th day of October 1858
assess the damage by reason of the
erection and location of said Rail
Road over the land of said John
Unsicker being the E $\frac{1}{2}$ of Lot 2 & 3. in
the North west quarter of Section 2 Town
25 N Range 3 W 3^d PM. at one dollar
and which said assessment was returned
to said Justice on the 23^d day of November
1858 - and Judgment entered thereon,
from which said assessment, said

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Unsicker has appealed to the County Court of Tazewell County Illinois.

Now if the said Unsicker shall prosecute his said appeal with effect and without delay, and pay whatsoever judgment may be rendered upon the trial or dismissal of said appeal, then this Bond to be void, otherwise to remain in full force.

Filed and approved by me this 30th November 1858
 John Unsicker
 John Minch
 John Gridley Clerk

And now afterwards to wit: on the 30th day of November AD 1858 a Supersedeas and Appeal Summons issued in the words and figures following to wit:

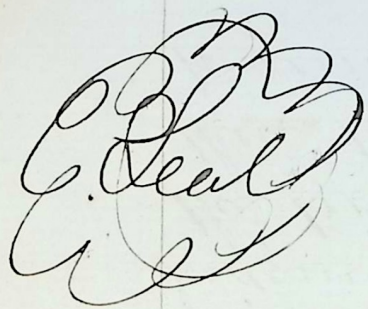
State of Illinois } The people of the
 Tazewell County } State of Illinois
 To Elias Wenger a Justice
 of the Peace of said County - Greeting:
 Whereas the Tonica and Petersburg Rail
 Road Company did apply to you to
 appoint appraisers to assess the
 damages done, or to be done, to the

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Land of John Unsicker by the location of said Rail Road over the Land of said Unsicker, and whereas said Commissioners have returned to you that they have assessed upon said Land over which said Rail Road is located, the sum of One dollar, from which said assessment an appeal has been taken to the County Court of Tazewell County and a Bond duly ~~filed~~ approved and Filed in the Office of the Clerk of said County Court.

Therefore we Command you and enjoin you the said Justice of the Peace to suspend all further proceedings on said judgment and cease from further molesting the said Unsicker on occasion thereof until the further order of said County Court.

Witness John Gridley Clerk of said Court and the Seal thereof at Pekin in said County this 30th day of November A.D. 1858

 Seal

John Gridley Clerk
Per E. Rhodes, Dep't

State of Illinois
Tazewell County
of the People of the
State of Illinois, to the

5

Sheriff of Morgan County Greeting:

We command you that you Summon Tonica and Petersburg Rail Road Co. if it shall be found in your County personally to be and appear before the County Court of said Tazewell County on the ~~third~~ ~~Monday~~ ~~of January~~ ~~next~~ first day of the next term thereof, to be held at the Court House in Pekin in said County on the third Monday of January next, to prosecute an appeal from an assessment of Damages ~~on~~ the Land of John Unsicker lately appealed from before Elias Wenger J.P. And have you then and there this Writ with endorsement thereon, in what manner you shall have executed the same

 Seal

Witness, John Gridley, Clerk of our said County Court and the Seal thereof, at the City of Pekin this 14th day of December A.D. 1858

John Gridley Clerk County Court
Per E. Rhodes Deput

Which foregoing Supersedeas was by the Sheriff Returned, and ^{duly} Filed in

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said Clerk's Office on the 11th day of January A.D. 1859 with the following endorsement to wit

"Served by reading the same to Elias Wenger this 16th day of December A.D. 1858 - J.C. Reeves Sheriff T.C.

By J.B. Reeves Deputy

Also the foregoing Appeal Summons was on the 23^d day of Dec^r A.D. 1858 returned by the Sheriff, and duly filed in said Clerk's Office, with the following endorsement thereon, to wit: "Executed this Summons by reading the same to Richard Gates Pres. P. & T.R.R. Co Dec. 20th 1858"

J.S. Hicks Sheriff M.Co

~~Now afterwards to wit, on 7th day of February A.D. 1859 A Transcript of from the Justice of the Peace was filed in the following words and figures to wit.~~

State of Illinois
Fagerwell County J.P.

to James S. Bell or
to any other Citizen of the State and County
aforesaid, upon the Application of
John S. Marsh Director of the F.P.R.R.
Co. You are hereby directed to Summons

7.

~~H. D. Evans, Thos Birkett & James S. Ball~~
~~to appear forthwith before me the~~
~~undersigned, an acting Justice of~~
~~the Peace within and for said County,~~
~~then and there to be sworn as appraisers~~
~~and assessors of Damages done or to~~
~~be done to the Land of John Musick~~
~~by reason of the erection of the Tonic~~
~~& Petersburg R.R. over said Land~~
~~and that they proceed to make said~~
~~view and appraisal on the 24th~~
~~day of October 1858. And this you are~~
~~not to omit - and have you there~~
~~and there this summons. Given~~
~~under my hand and Seal, this~~
~~20th day of Oct 1858~~

Edias Wager J.P. (Seal)

State of Illinois
 Fitzgerald County for Oct the 24th 1858

The foregoing Summons
 read by me to the three persons therein
 named, who appeared before the said
 Justice of the Peace, and were sworn
 according to Law

Now afterwards to wit at a Term
 of the Circuit Court begun and
 held at Pekin within and for

the County of Tazewell and State of Illinois on the first Monday in the Month of February in the Year of our Lord one thousand eight hundred and fifty nine Present the Honorable James Harriott Judge, Hugh Fullerton States Attorney Thomas C. Reeves Sheriff & Merrill C. Young Clerk The following proceedings were had to wit:

Thursday February 17th A.D. 1859
 Tonica & Petersburg Rail Road
 Company
 vs
 John Unsicker

3 Appeal
 3 Appt

Now on this day came the Parties by their attorneys, whereupon came a Jury of twelve lawful Men, to wit:
 B. G. Ross, William Cagle,
 J. G. Bailey, P. McBride, S. Lincoln,
 S. Wood, Wm Larimore,
 Lewis Dingleline, - C. McGalliard,
 S. H. Case, John Clayton, and
 T. Deys, duly elected tried and sworn, who having heard

the Allegations and Proof of the parties, and Argument of Counsel thereon, for Verdict say, "Be the Jury find for the ~~Plaintiffs~~ ^{Defendant}, and assess his damages to the Sum of Eight hundred dollars, and he is to make his own Fence.

And thereupon the ~~Plaintiffs~~ entered their motion for a new trial which the Court overruled.

It is therefore ordered and adjudged by the Court that the defendant recover of said Plaintiffs the Damages found as aforesaid, and likewise the Costs and Charges by him about his defence expended.

Thereupon the Plaintiffs pray an Appeal, and it is ordered that their Bond be filed with John S. Marsh as security in the Sum of Twelve hundred Dollars — Bill of Exceptions to be filed during Vacation.

Now afterwards to wit on the 24th

day of February AD 1859 a Bill of exceptions was filed in the words and figures following to wit:

State of Illinois } Jazewell County
Jazewell County } Circuit Court
In February Term AD 1859
Tonica & Petersburg RR Co.

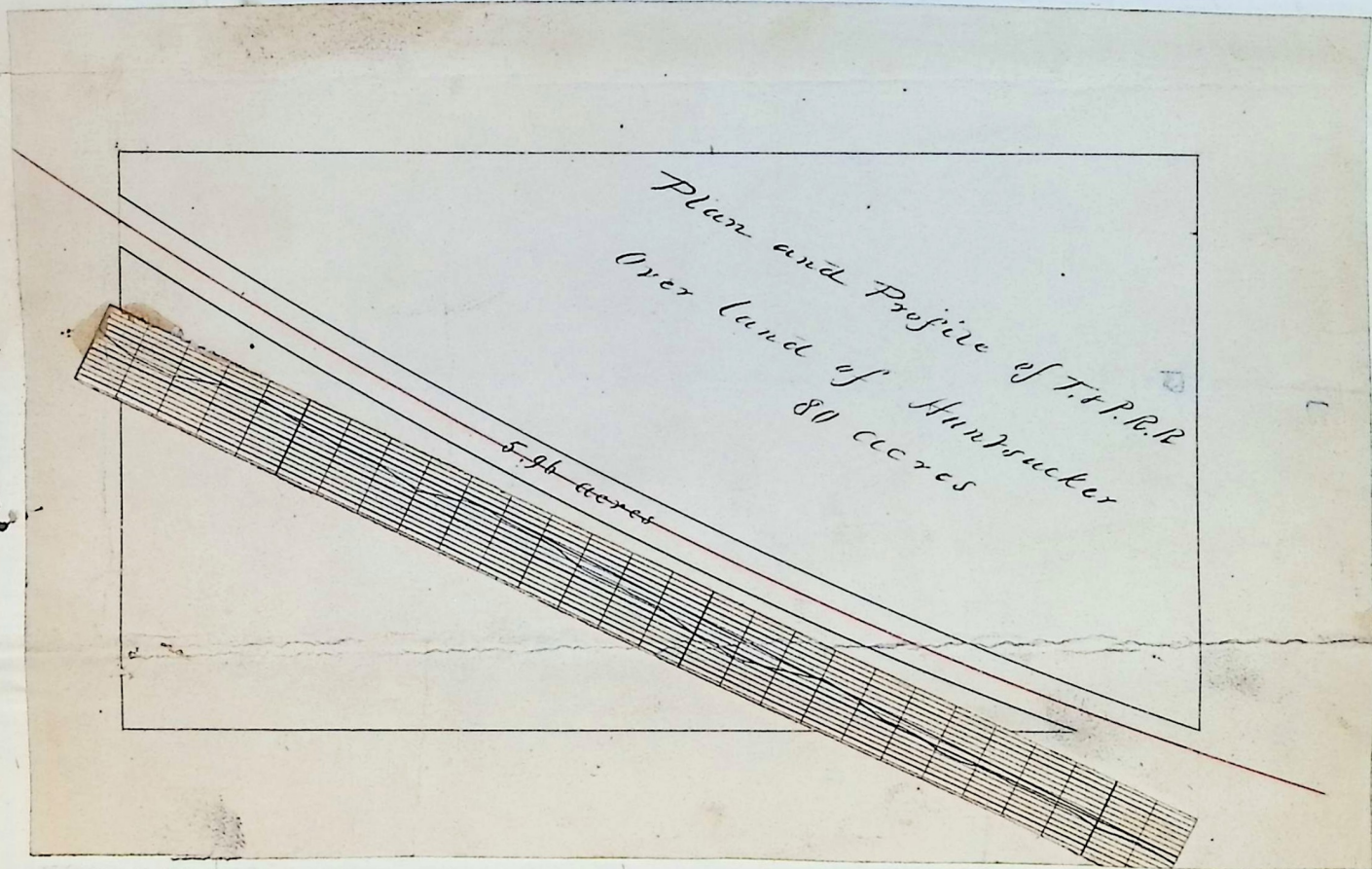
vs
John Unsicker.

Be it remembered that, on the trial of this Cause, the evidence offered on behalf of the Appellant Unsicker was as follows:

Stettenger, was first sworn, and testified that he resides near Unsicker; that he knows his Farm through which the Tonica & Petersburg Rail Road runs; that the Farm contains about twenty two Acres, worth about forty dollars per Acre; that the usual market for Unsicker and his Neighbours, is Peoria, about 11 Miles distant; that Unsicker's farm, the one in question, is about two or three miles from Washington; that in view of the quantity of Land taken by the Tonica & Petersburg Rail Road, in running their line of Road through

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the Farm of Unsicker, and the cost of making and maintaining the fences along the line of the Road and the Cattle Guards along the same, and their inconveniences to Unsicker by reason of the Road running through his Farm in the manner it does, Wittrup estimated the damages sustained by Unsicker at nine hundred dollars. Wittrup further stated that the following Plat, which was handed him,



(which said Plat is admitted to be correct by both parties to this suit,) represented, as nearly as he could recollect, the manner

in which the Tonica & Petersburg Rail Road runs through Unsicker's Farm; and that he should think the quantity of Land on said Plat represented as taken up by the Road, being Five and 96/100 Acres, as about the correct quantity. Witnup further stated that he did not include, in his estimate of damages, the inconvenience to Unsicker in case the Rail Road Company should refuse to let him erect cattle guards along the line of Road through his Farm. In that case damages would be incurred, how much Witnup did not say. Witnup was then cross-examined, and stated that the Farm of Unsicker lies about Four miles north east of Morton; that he don't think the construction of the Tonica & Petersburg Rail Road would benefit Unsicker, or enhance the value of his land. Samuel Morberry another Witnup for Appellant was next sworn, and testified that he knows the Farm of Unsicker over which the Tonica & Petersburg Rail Road runs, had been on it recently; resided about six miles from it; thinks the Plat shown first

witness, shows the manner in which
 the Rail Road crosses the Farm of
 Unsicker correctly; that the Farm of
 Unsicker is situated about eleven miles
 from Peoria, three miles from Wash-
 ington, and seventeen miles from
 Pekin, Peoria being the usual market
 for the neighborhood. Witness further
 stated that the Farm of Unsicker was
 worth thirty-five to forty dollars per acre;
 that the damages to Unsicker, by
 reason of the Tonica and Petersburg
 Rail Road running through ~~his farm~~
 his Farm in the manner it does, would
 be eight hundred and fifty dollars -
 this would be a low estimate.
 Included in this estimate of damages
 witness stated, was the cost and expense
 of keeping up and building ~~fences~~
 fences and cattle guards, along the
 line of Rail Road through Unsicker's
 Farm, but did not include the damage
 to Unsicker in case the Rail Road
 Company should refuse to allow him
 to put up cattle guards along the line
 of road through his Farm, & thus be
 compelled to use gates. Witness
 stated that he could not estimate

the damages arising from such inconvenience; it would be additional damage, but he did not know how much. - There was no cross-examination of this witness.

John Lowman, another witness for Appellant, was next sworn, and testified, that he knew the Farm of Unsicker; had been on it three weeks ago; that the Tonica & Petersburg Rail Road run through it in the manner shown in the Plat exhibited to the previous witnesses; that the Land in question was worth thirty five dollars per Acre; that the damages to Unsicker, by reason of constructing the Tonica and Petersburg Rail Road through his land as shown in the Plat, would be from seven to eight hundred dollars, this included the building and maintaining Fences and Cattle Guards along the line of Road through the Farm of Appellant, but did not include the damage to Appellant in case the Rail Road Company should refuse to let him erect Cattle Guards, and thus compel him to use Gates in crossing the Rail Road Track

through his Farm, in such case the damages would be increased, how much, Witnup did not state. Witnup further stated that the construction of the Tonica and Petersburg Rail Road through Appellant's Farm could not be of any benefit to him, nor enhance the value of his property, because his market was at Peoria, only eleven miles distant, that he was within two or three miles of a depot on the Peoria & Oquawka Rail Road at Washington, and did not need any greater Rail Road facilities - This Witnup was not cross examined. -

John Oswald, another of Appellant's witnesses, was next sworn, and testified that he lived near the Appellant, knew his land through which the Tonica & Petersburg Rail Road, Run; that it run through the Farm in the manner shown by the Plat exhibited to the other witnesses; that the farm was worth thirty five dollars per acre; did not think the Rail.

Road enhanced its value and ^{supp} believed the damages to Unsicker by reason of running the Road through his Farm, to be at least nine hundred dollars. - Witup further stated that Peoria was the usual Market for Unsicker and his Neighbours; that it was eleven miles distant; that they seldom or never sold their Produce at Washington. - [Witup was then Cross Examined, and testified that he did not think Rail Roads enhanced the Value of Land through which they were built. -

David Sloan, another of Abbott's Witups was next Sworn, and testified that he knew the Farm of Unsicker through which the Peoria & Petersburg Rail Road run; that, that said Road run in the Shape shown in Plat exhibited to previous Witups, that there was some Curve to the Road as it was constructed through Unsicker's Farm; that the Land was worth thirty five

to forty dollars per Acre; that in estimation of Witnup, Unsicker would sustain some Nine hundred dollars, including Fencing, and not including Damages by reason of the inconvenience of using Gates in Crossing the Rail Road track from one part of the farm to another. in case the Rail Road Company should refuse to let Unsicker erect cattle Guards along the line of Road through his Farm; thinks the damages increased by the Curve in the Road through Appellants Farm; don't think the Appellant benefited in any way by the construction of Tonica or Petersburg Rail Road, nor his land enhanced in Value. This Witnup was not Cross examined, and this was all the testimony of Appellant in this Cause.

Appellee then Called William D. Evans, who was sworn, and testified that he had been Selected by the Tonica and Petersburg Rail Road Company as one of the Commissioners to view the land and condemn

the right of way through the farm of Unsicker that there was a mistake in the return made to the Justice of the Peace, that the return stated that one dollar only had been assessed as damages to Unsicker by the Commissioners when in fact they had assessed the damages at One hundred dollars. Witnup further stated that he had viewed the Land of Unsicker along the line of the Tonica & Petersburg Rail Road and then thought the damages to Unsicker by reason of building the Road through his land would be one hundred dollars over and above the benefits of the same. And Witnup stated that his opinion was still the same, Witnup was then Cross examined and testified that he lived at Delavan twenty miles from the Farm of Unsicker, that he had lived at his present home ^{four or five} years, that in estimating damages he had included the expense of building and maintaining Fences and Gate Guards along the line of Road through Appellants

farm, but through, but thought
 the Rail Road Company bound
 by law to build the same. The
 Appellant, Mr Bell Rogers and
 Kellogg were with Witnup when
 he viewed the land of Unsicker
 Mr Birkett another of the Commissioners
 was not present on that occasion.
 Thomas Birkett, another of Appellee's
 Witnups was next sworn and
 testified that he had been across
 the Land of Unsicker but not
 on the line of Road, but he could
 see the the line of Road and the
 manner in which it run through
 Appellant's Farm; thinks Map as
 shown other Witnups correct;
 that the Commissioners, of which
 Witnup was one, had assessed
 Unsicker's damages at one
 hundred dollars instead of
 one dollar, as appeared by the
 return to the Justice of the Peace,
 did not know how the mistake
 occurred. The damages assessed
 by Commissioners were in
 view of the Rail Road Company
 building and maintaining the

Fences and Cattle Guards along the line of Rail Road through Appellant's farm. The Witness was then Cross examined, and testified that, if Unsicker had to build and maintain Fences along the line of Road through his Farm, the damages ~~applied~~ by the Commissioners would be increased to the extent of the cost of such building and maintaining; that on account of the Rail Road running in a curved line through Appellant's Farm, he suffered more damages than if the same run straight through the Farm. Witness further stated that he had not been over the land in company with the other Commissioners, Bell & Evans; went on in Advance of them. The land of Unsicker is situated about three or four Miles from the Town of Washington, where Witness resides.

Bell, Another of Appellee's ^{ant} Witnesses, was next Sworn, and testified that he was one of the three Commissioners selected by the Louisa and Petersburg Rail

Road Company to view the land of Unsicker and assess the damages for condemning the right of way over said land for the Rail Road; that he had been over the Land in question, and the Commissioners assessed the damages to Unsicker at one hundred dollars, which was the amount they designed to report in their return to the Justice of the Peace, but owing to a mistake somewhere the return showed the damage to be only one dollar. Witnup further stated that the damages assessed to Unsicker were in view of the Rail Road Company building and maintaining the fences along the line of the road through the Farm of Appellant; that he thought, at the time when the damages were assessed, that they were right, and was still of the same opinion; that the Plat shown other witnesses correctly marks out the manner in which the road runs through the Farm of Unsicker. The Witnup was

then cross-examined, and testified that the cost of fencing in the neighbourhood where the farm of Appellant^{ee} was situated would be about one dollar and a quarter per Rod; that he resided in Washington; that Evans, another of the Commissioners, was in Company with him when he went over the land of Unsicker to view the same, and assess the damages, but Brickettth did not go over the land with them.

This was all the evidence in this Cause on the part of either party. The Appellant then requested the the Court to give the Jury the following instructions. viz:

~~The Appellant asks the Court to instruct the Jury that the Rail Road Company is bound to make and maintain the fences on each side of their Road.~~

~~That in estimating the damages for the right of Way the Jury ought not to allow the Claimant for making and maintaining the fences along the line of the Road.~~

~~That the Company are bound by law to make proper and suitable Turn Crossings where the Road~~

~~run through a person's land,~~
~~and in estimating damages,~~
 the jury have no right to allow
 the Claimant any compensation
 for making them himself.

The above instructions were
 refused by the Court. And the
 Appellee by their counsel object to
 each one.

The Appellant asks the Court, first,
 to instruct the jury, that the Company
 are not bound by law to fence their
 Road only in cases where it is necessary
 to keep cattle or other stock off their road;
 Nor do they have to fence the Road when
 the cost of fencing is included in
 the assessment of damages; And the
 jury may, if they see proper, include
 the cost of the fencing in their apportionment
 of damages.

The Court instructs the jury, that, after
 the assessment and payment of the
 damages to Unsicker by the R. Road
 Company by way of damages in the
 consideration of land taken for the
 purposes of the Road, it will not
 be bound to make the fences for
 Unsicker on either side of the

~~With~~ Road, or to make Cattle Guards for him to Cross the road; nor will Unsicker have a right, without the Consent of the Company, to make Cattle Guards across the said road. If they believe, from the evidence, that Unsicker's Land was already fenced and enclosed before the damages were assessed.

And the Appellee, by their Counsel, objected to each one, which objections was overruled by the Court, and the instructions given to the jury, to the overruling of which objection, and the giving of the said instructions to the jury, the Appellee, by their Counsel, then and there excepted.

Appellee then requested the Court to give the jury the following instructions: ~~right to~~ The Appellee asks the Court to instruct the jury that the R. R. Co. is bound to make and maintain the fences on each side of their Road.

That in estimating the damages for the right of way, the jury ought not to allow the Claimant for making and maintaining the fences along the line of Road;

that the Company are bound by Law to make proper and suitable Farm Crossings, where the Road runs through a persons land, and in estimating damages, the Jury have no right to allow the Claimant any Compensation for making them himself. —

Which the Court refused to give to the Jury; and to the ruling and refusal of the Court to give the said instructions, and each of them severally, to the Jury, the Appellee, by their Counsel, then and there excepted.

The Jury returned into Court with the following Verdict: "We the Jury find for the Appellant, and assess the Damages at Eight Hundred Dollars (\$800.) and Appellant to make his own Fences."

And thereupon, Appellee, by their Counsel, moved the Court to set aside the Verdict of the Jury so rendered as aforesaid, and to grant a new trial in said Cause; and assigned as reasons for the said Motion, that the Verdict of the Jury so rendered as

aforesaid. was contrary to Law, and
 contrary to evidence; which motion
 was overruled by the Court, and
 Judgment rendered on said Verdict,
 to which overruling and Judgment
 the Appeller, by their Counsel, then
 and there excepted; and now
 prays that this their Bill of Exceptions
 be signed and sealed by the Court;
 which is done -

James Harriott. Seal

Afterwards to wit on the 5th day of
 March A.D. 1859 The Tonica and Petersburg
 Rail Road Company filed their Appeal
 Bond in the words and figures as
 follows to wit

State of Illinois }
 Tazewell County } ss

Know all men by
 these presents that we the Tonica and
 Petersburg Rail Road Company
 as principal & John S. Marsh of the County and
 State aforesaid as security are held
 and firmly bound unto John Unsicker
 of the same County and State in
 the penal sum of Twelve hundred

27.

dollars (\$1200.) good and lawful
Money of the United States, the payment
of which well and truly to be made
we bind ourselves, our heirs, executors
and Administrators and assigns
by these presents signed with our
hands, ^{and sealed with} the Corporate Seal of said Company
and the private seal of said John Marsh
this first day of March A.D. 1859 -
The Condition of the above obligation
is such that whereas, at the February
Term of the Tazewell County Circuit
Court, and on the 17th day of said
Month of February the said John
Unsicker recovered a judgment
against the Tonica and Petersburg
Rail Road Company for the sum
of Eight Hundred Dollars (\$800.) and
costs of suit on a suit in said Court
pending, And whereas said Tonica
and Petersburg Rail Road Company
has prayed an appeal from
said judgment of said Court to
the Supreme Court of the State of Illinois
which said prayer of said Company
has been granted by the Court
conditioned that the said Tonica
and Petersburg Rail Road Company

file their bond in the sum of twelve hundred dollars with John S. Marsh as surety, within thirty days from the rendition of the judgment aforesaid

Now if the said Jonica and Petersburg Rail Road Company shall well and truly prosecute their said suit to effect and without delay, and abide the judgment of the said Supreme Court and pay all costs adjudged by the said Supreme Court against said Company in said suit, then this obligation to be void, otherwise to remain in full force in the Law.

Seal

John S. Marsh Seal
The Jonica and Petersburg
Rail Road Co
By Richard Yates, President
James Borden Secretary

State of Illinois }
Tazewell County } ss

I Merrill C. Young
clerk of the Circuit Court within
and for said County do certify that
the foregoing twenty eight pages

contain a true, perfect and complete copy of the Record of the Proceedings had in the Cause therein Named as the same appears of Record in my office

In witness whereof I have hereunto set my hand, and affixed the Seal of said Court at Pekin this 9th day of April A.D. 1859

Memie G. Young Clerk

Recd.



Supreme Court April Term 1859

And now comes the said Tonia & Petersburg Rail Road Company & says that in the record & proceedings aforesaid & in the giving of the judgment aforesaid there is manifest error to its injury And it appears for Error

First The Court erred in giving the instructions asked by Musickes

2nd The Court erred in refusing the instructions asked by the Tonia & Petersburg R.R. Co.

3rd The Court erred in refusing a new trial & For which & for other

reasons appearing in the record & proceedings
aforesaid & in the giving of judgment
aforesaid the said Tonic & Peterburg
R R Co prays that said judgment may
be reversed annulled & altogether held for
nothing

A. L. Dawson
for app't.

And now comes the said Appelle and
says that in the record and proceedings aforesaid
there is no error and prays that said judgment
may be affirmed

B. P. Rogers &
James Roberts for
Appelle

313-48

Tonica & P. R. R. Co
by appt

John Unsicker
Appellee

Record & Apt of Enorm

Filed April 26. 1859
L. Leland
Clerk

A L Davison Atty