

No. 13118

# Supreme Court of Illinois

Summer, Admr.

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vs.

Galena & Chicago Union  
R.R.Co.

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

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No. 17.

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Beaud  
Summer  
vs  
E. & N. RR  
Co

1860



# SUPREME COURT OF ILLINOIS,

*Third Division—April Term, 1859.*

GELENA AND CHICAGO UNION RAIL  
ROAD COMPANY, *Appellant*,  
vs.  
SUMNER et al., *Appellees*.

## APPELLANT'S POINTS AND AUTHORITIES.

The plaintiff below admits, and the evidence shows, that the Rail Road Company were not guilty of any negligence in operating or managing their trains at the time when either of the colts in question were killed.

139  
The evidence shows that when the first colt was killed, (in Lysander,) the Company's fence at the highway crossing was accidentally out of repair, and had been in that condition for several days. It also shows that the plaintiff's fence, between his enclosure and the highway, was down so that the colts passed from his field into the highway. The plaintiff was guilty of negligence in allowing the colts to run in the highway, and especially so when the fence between the highway and rail road was out of repair.

The R. R. Co. insists that so far as the plaintiff is concerned, he can take no advantage of the fact that the company allowed their fence to be out of repair at any other point or place than between his own land or inclosure and the railroad track immediately adjoining the same; and it refers to the act entitled "An act to regulate duties, &c., of rail road companies," (Purple's Stat., p. 1077.)

*Jackson vs. Rutland & Burlington R. R. Co.*, 25 Vermont, 156.

*Trow vs. Vermont Central R. R. Co.*, 24 Vermont, 487.

*Wolson vs. Northern R. R.*, 19 New Hampshire, 267.

*Marsh vs. N. Y. and E. R. R. Co.*, 14 Barbour, 364.

*Tonawanda R. R. Co., vs. Munger*, 5 Denio, 255, 264.

8 Foster 181

2 Gibbs 259 28 Vt 150

3 Wend 147 27 " 45

1 Foster 363 39 Maine 273

2 " 316 16 Barb 315

35 Maine 425

16 Mass 33

16 N.Y. 483

The Court erred in admitting proof of the town law of Winnebago, because from it the jury might suppose that such law authorized the plain-



tiff to permit his colts to graze in the highways, and trespass upon the rail road in that town.

The appellant cites the following authorities and the cases therein cited:

*Joliet and N. I. R. R. Co. vs. Jones*, 20 Ill., 221.

*G. and C. U. R. R. Co. vs. Jacobs*, *ibid*, 478.

*Chicago and R. I. R. R. Co. vs. Still*, 19 Ill., 508.

19 Penn. State Reports, 301.

The case of the Chicago and Miss. R. R. Co. vs. Patchin, (16 Ill., 198,) in connection with the case of Seely vs. Peters, (5 Gil., 138,) establish the doctrine that cattle being free to range, &c., does not relieve the owner from the exercise of diligence or excuse negligence.

The plaintiff (below) by allowing his colts to range off, as in this case, many miles from his plantation, and to be upon the rail road track at any time, and especially such a night as the one in question, was guilty of gross negligence, and such recklessness of the probable fatal consequences to the lives of the managers and passengers upon rail road trains, as deserves the severest reprehension from the courts for the public protection.

The law in relation to fencing rail roads, was never intended to excuse negligence on the part of the owners of cattle on the line of a road, and any such construction would render it mischievous and dangerous, instead of being a measure of safety to the public, as intended.

87-17-18

G. C. U. R. R. Co.

vs.

Summer stal

Appellants Points

& authorities

Filed April 21, 1839

L. Leland

Clerk



# In the Supreme Court.

APRIL TERM, 1858.

The Galena and Chicago Union Railroad Company,  
Appellant,  
VS.  
WILLIAM SUMNER,  
Appellee.

APPEAL FROM WINNEBAGO  
CIRCUIT COURT.

*Page of Record*

## ABSTRACT OF RECORD.

1 This was an action on the case, brought by the Appellee against the Appellant, claiming damages for three Colts belonging to the Appellee, alleged to have been killed by Appellant's Locomotive Engines and Cars, upon Appellant's Railroad, in the County of Winnebago, in the year 1856.

1 The suit was commenced in December, 1856, and was tried at the February term, 1858, and resulted in a verdict and judgment for the plaintiff, (appelle) for \$255.

3 The declaration contained two counts, charging the appellant, under the Act of Feb'y 14, 1855, with NEGLIGENCE in neglecting to erect and maintain sufficient fences and cattle guards.

7/8 The Appellant pleaded not guilty; and with that plea filed a written stipulation of the appellee, by his counsel, "that any defence might be made and proven under that plea, which would, or might be proper, had the same been specially pleaded."

9 Upon the rendition of the verdict, the appellant moved for a new trial, and also in arrest of judgment.

10 Motions overruled, and appellant excepted; and judgment upon the verdict.

10 All the evidence in the cause is preserved in the Bill of Exceptions, and is as follows: [The parties are designated "plff" and "deft," as in the Court below.]

11 On the part of the plaintiff, the following facts were proved:

That the plaintiff owned and occupied a farm in the town of Lysander, in this county, through which the defendants' railroad passed; that the defendants had fenced their road adjoining the plaintiff's land; and that on or about the..... day of September, A. D. 1856, a colt belonging to the plaintiff was killed upon the defendants' railroad track, opposite the plaintiff's land, by a construction train. The colt was proved to be worth fifty-five dollars.

It was proved that the colt was running in plaintiff's pasture, adjoining defendants' railroad, and adjoining the public highway, which crossed said railroad under the culvert, and that the plaintiff's bars between his pasture and the said highway were left down, and that the highway passage across the railroad was under a culvert of said railroad; that one or two of the stone steps of the culvert abutment had been knocked off by teams or otherwise, and that the fence of defendants' road joined to said culvert; that one or two of the boards of the fence so connecting with the culvert had been loosened, and had fallen down, and that it had been so for some days before the colt was killed; that the colt which was killed had escaped with three others belonging to the plaintiff, from said pasture into the highway, and from said highway onto the railroad track, over the fence so out of repair. That a son of the plaintiff, about twelve years of age, saw the three colts on the track, and drove them off, but did not see the one which was afterwards killed. The three which he drove from the track, passed into the highway over the defective fence at the culvert.

11 The plaintiff also proved, that on the night of the..... day of May, A. D. 1856, about eleven o'clock, nine colts were killed on the defendants'



12 railroad track, about one and a half miles west of Winnebago Station, in this County, by defendant's passenger train going east from Freeport to Chicago; that two of these last mentioned colts belonged to the plaintiff, and that the two were of the value of two hundred dollars.

These colts were running at large, and were killed between five and six miles east of the plaintiff's farm and residence, and in another town, viz., the town of Winnebago. There was a highway crossing over the railroad, about one mile west of the spot where the colts were killed; and also a farm crossing about half a mile west of the place of killing. Cattle guards were constructed at both crossings. The plaintiff proved that some other colts had once been seen to walk over the cattle guards, at the highway crossing, and to walk back over the same. He also proved that after the killing of these colts, an employee of the defendant, by order of the defendant's overseer of the road, hewed off the sides of the slats of this cattle guard, so as to widen the spaces between the slats; that the pit excavated beneath the slats was about three feet; that the timber used for the slats was four by four inches; and that the timbers were fastened and placed with an edge or corner upwards.

Two of the plaintiff's witnesses—farmers by the name of Grippin—who occupied a farm adjoining the railroad, at the cattle guard, on the highway crossing, testified that they thought the frame-work of the cattle-guard was laid out for slats three by three inches, and that timber four by four inches was used, which accounted for the slats being so near together.

Said witnesses also testified that they saw colt's tracks between the highway crossing and the farm crossing, the morning after the colts were killed; that the tracks found near the highway crossing, appeared as if the colts had been feeding; and those found near where they were killed, showed that the colts had been running; where they were killed, the tracks were all in a huddle.

13 The plaintiff then offered in evidence a law adopted by a Town Meeting of the said town of Winnebago, in force at the time the colts were killed, which declared that colts of this description were allowed to run at large in said town at the time these colts were killed, and produced and proved the existence of such town law.

" The defendant, by its counsel, objected to the giving of the said town law in evidence. The Court overruled the objection, and allowed the same to be read in evidence to the Jury; to which decision and ruling of the Court, in overruling said objection, and allowing said law to be read in evidence, the defendant, by its counsel, then and there excepted.

" It was agreed between the parties that there was a town law of the town of Lysander, where the first mentioned colt was killed, restraining certain animals other than colts or horses, from running at large in the public highway, and that colts and horses were not so restrained in said town law of Lysander, and were not mentioned in said town law at all.

" This was all the evidence on the part of the plaintiff; and it was admitted on the part of the plaintiff, that there was no negligence on the part of the servants of the defendant, in the running or management of either of the trains, by which the colts in question were killed.

#### DEFENDANTS' EVIDENCE.

13 The defendant then introduced as a witness, Bruce Wilcox, who testified that he was the Conductor of the train, at the time the nine colts were killed, near Winnebago Station, in this County; that the night was very dark and rainy; that the train was running at its usual speed, which at that time was twenty miles per hour; that the time of arrival at Rockford was, as he now recollects it, eleven o'clock; that he felt



the shock at the time the engine struck the colts, but did not know what had been struck; that John B. Bowen was the engineer running the train, and that he was an able, prudent, careful engineer; that he had then been some time in defendant's employ as an engineer, and is still employed by defendant; he is now principal machinist at one of the defendant's shops.

14 The defendant then introduced as a witness, John B. Bowen, who testified that he was the engineer running the passenger train on the night when the colts were killed near Winnebago; that the night was very dark and rainy; that it was so dark that he could see nothing out of the front windows of the engine; that he did not see the colts, and did not know what had been struck by the engine until afterwards; although he felt the shock of the collision; that it occurred near a culvert about a mile and a half west of Winnebago Station; that he stopped at the Station to examine the engine and machinery, and found horses' hair and blood on the pilot (cow catcher); that he did not see the colts at all; that he was then running the train on time, at the usual speed, he thinks twenty miles per hour; the train was going from Freeport to Chicago; had been engaged by defendant, as engineer, for some years, and is still employed in defendant's service, as principal machinist.

14 The defendant then introduced as a witness Charles Elliott, who testified that he had charge of defendant's railroad track, from Freeport east to Winnebago Station.

It was his duty to see that the track, cattle guards and fences were in order. Witness had passed over the road a day or two before the colts were killed; the cattle guards and fences were in good order; the road had been all fenced on each side, some time before the colts were killed.

The cattle guard in question was similar to the other cattle guards on the defendant's road at highway crossings. The fences on the railroad from Freeport to Winnebago were in good repair.

The culvert at the road crossing in Lysander, was injured by one of the stones of the steps leading to the top of the abutment, being knocked off by teams passing it; and the fence which connected with it, was impaired by one or two of the boards being torn off. It remained so out of repair several days, when it was repaired by witness.

William Mindham had the overseeing of the track, cattle guards and fences, at the time the colts in question were killed.

15 William Mindham was then introduced as a witness, and testified that at the time the colts in question were killed, he was in the defendant's employ, and had the immediate supervision of the railroad track and fences from Winnebago Station to one and a half miles east of Pecatonica Station. The cattle guards and fences were in good repair at the time the colts were killed. Witness passed over the track the morning after the accident; saw no tracks at the highway crossing; followed up the track, and found tracks at the farm crossing east, (Swezey's); one of the slats of the cattle-guard on the east side of the farm-crossing was broken down, and witness saw an animal's track in the bottom of the pit under the broken slat; could not tell what animal's track it was; it had rained since the track was made. Both of the cattle-guards were in good order the night before the accident; and the fences were in good repair. Witness passed over the road where the colts were killed, on a hand car, before dark, on the same evening of the accident. Witness buried the nine colts; he found them all dead, and badly mangled, about six o'clock the next morning.

16 This was all the evidence in the case.

16 After retiring to consider of their verdict, the Jury returned, and by their verdict, found the defendant guilty, and assessed the plaintiff's damage to the sum of two hundred and fifty-five dollars.



16  
The defendant, by its Counsel, moved the Court for a new trial, and also in arrest of judgment; both of which motions the Court, after argument, overruled, and rendered judgment upon the verdict. To each of which decisions and rulings of the Court, in overruling the said motion for a new trial, and in overruling said motion in arrest of judgment, the said defendant, by its Counsel, then and there excepted, and prayed that this its Bill of Exceptions be signed and sealed by the Judge, which is done accordingly.

The Appellant assigns for Error  
That the Court Erred in permitting Town  
Law of ~~the~~ Winnebago to be read  
in Evidence.

That the Court Erred in overruling  
motions for new trial, and in arrest  
of judgment.

And, in rendering judgment for  
the Appellee.

J. L. Loop,  
Atty for Appellant



17 ~~26~~ 59

G. H. M. R. R. Co.

vs.

Wm Sumner

Abstract

Filed Apr 22 1838

De Seider

clerk

G. H. M. R. R. Co.

vs.

Brown

22 M.



# Letters of Administration.

STATE OF ILLINOIS, }  
County of Winnebago, } *Sci.*

*The People of the State of Illinois, to all to whom these Presents shall come—GREETING:*

Know Ye, THAT WHEREAS *William Sumner*  
late of the County of Winnebago and State of Illinois,  
died intestate, as it is said, on or about the *Eight* day of *May*  
A. D. 185*2* having at the time of *his* decease personal property in this State which may be lost, destroyed or  
diminished in value if speedy care be not taken of the same:

To the End, Therefore, that said property be collected and preserved for those who shall appear to have a legal right  
or interest therein, we do hereby appoint *Phraim Sumner*

of the County of Winnebago and State of Illinois,  
Administrator *ex*

of all and singular the goods and chattels, rights and credits which were of the said *William Sumner*  
*Sumner* at the time of *his* decease—with full power and authority to  
secure and collect said property and debts, wheresoever the same may be found in this State, and in general to do and per-  
form all other acts which now are or hereafter may be required of *him* by law

WITNESS WILLIAM HULIN, Clerk of the County Court in and for the said County of  
Winnebago, at his Office in Rockford, this *Sixteenth*  
day of *May*, A. D. 185*2* and the Probate  
Seal of said Court hereunto affixed.

*William Hulin*  
Clerk of the County Court.

## YOUR OATH.

The following is a copy of the oath you have taken as Administrator *ex*

It is appended, that you may be enabled to refer to it at any time to get a clear idea of the duties you have sworn to  
perform.

It is seldom that a person sees the oath taken by him or her on being appointed to the administration of an estate, and  
no one can be expected to retain an accurate recollection of its tenor from hearing it once read:

I DO SOLEMNLY SWEAR, that I will well and truly administer all and singular  
the goods and chattels, rights, credits and effects of *William Sumner*  
Deceased, and pay all just claims and charges against his Estate, so far as his goods,  
chattels and effects shall extend, and the law charge me; and that I will do and perform all other acts required of me by  
law to the best of my knowledge and abilities.

## YOUR BOND.

The same remarks apply to your Bond, and a statement of the obligations it lays upon you and your Surety should be  
at all times at hand for you to refer to.

The condition and requirement of your Bond is, that you shall make or cause to be made a true and perfect inventory of  
all and singular the goods and chattels, rights and credits of the said deceased, which shall come to your hands, possession,



or knowledge, or to the hands of any person or persons for you, and the same so made shall exhibit, or cause to be exhibited in the County Court for the County of Winnebago, agreeably to law, and such goods and chattels, rights and credits, shall well and truly administer according to law, and all the rest of the said goods and chattels, rights and credits, which shall be found remaining upon your accounts, the same being first examined and allowed by the County Court, you shall deliver and pay unto such person or persons, respectively, as may be legally entitled thereto, and, further, shall make a just and true account of all your actings and doings therein, when thereunto required by the Court: and if it shall hereafter appear that any last will and testament was made by the deceased, and the same be proved in Court, and letters testamentary or of administration be obtained thereon, you shall in such case, on being required thereto, render and deliver up the letters of administration granted to you; and finally that you shall in general do and perform all other acts which may at any time be required of you by law.

## YOUR INVENTORY.

You will observe that the first duty specified in the Bond is the making of a **TRUE** and **PERFECT** Inventory.

What is the Inventory? It is a list of all the goods, chattels and estate of the person that has died. It must set forth every article of personal property that comes to your knowledge, and money on hand, if any. The Inventory will also give a list and description of whatever lands and lots, (if any,) are found or appear to belong to the Estate, and a full account of whatever claim or interest the deceased person had to or in real estate in any form, whether under deeds, articles, bonds or other writings. The Inventory will also give a list of all debts you find to be due to the Estate, and the names of the debtors, the amount, whether due by Note or Account, or in other form, and against each you will mark *Good*, or *Bad*, or *Doubtful*, as the case may.

The Inventory must be returned to the Court or to the Clerk's Office within three months from the date of your Letters of Administration.

Your Inventory can be headed as follows:

**STATE OF ILLINOIS,** } IN COUNTY COURT, \_\_\_\_\_ TERM, 185\_\_\_\_  
**County of Winnebago,** }

The following is a true and perfect Inventory of the Estate of \_\_\_\_\_ late of said County, deceased, so far as the same has come to the sight or knowledge of the undersigned, Administrator thereof.

(Then go on according to the above directions.)

Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 185\_\_\_\_

Admin.

## THE APPRAISEMENT BILL.

An Appraisement Bill must be made and returned to the Court or to the Clerk's Office within three months from the date of your Letters of Administration. A Warrant for the Appraisers, and a form for the Appraisement Bill is made out by the Clerk, and no extended directions on this head are required.

Please bear in mind that the Inventory is one thing and the Appraisement Bill is quite another thing. It is frequently supposed that the Appraisement is the Inventory, but you will see by the above directions and the form that the Appraisement is *not* the Inventory, and the Inventory is *not* the Appraisement. The Appraisement only sets forth the value of certain articles of personal property, and is signed by three appraisers. The Inventory contains a list of all the personal property, real estate, debts due, money on hand, (if any,)—as will be seen above—and is signed by the administrator.

Both the Inventory and Appraisement ought to be handed in to the Court or the Clerk as soon as possible.

## NOTICE TO CLAIMANTS.

The law requires the Administrator to give notice of a term when the Administrator will attend the Probate Court, to receive claims against the Estate. The notice is to be published in some newspaper, and also to be posted on the door of the Court House, and in five other of the most public places in the County. The Clerk furnishes blanks for these notices, and the Administrator should see that they are duly published and posted, as this is a vitally important part of the proceedings, and the Court will require proof of full compliance with the law.



## SALE OF PERSONAL PROPERTY.

Where there is personal property beyond what is selected by the widow, or set apart for her, or in case there is no widow, it is best to dispose of it as soon as possible, by public sale. Notice of the sale is to be published four full successive weeks previously, in the nearest newspaper, or by at least four advertisements set up in the most public places in the County. All sums over five dollars to be upon a credit of not less than six nor more than twelve months. Purchases under five dollars must be paid down at the sale if the advertisement so states the terms of the sale. The law requires that a bond with security shall be taken from the purchaser, but the invariable usage in this State seems to have been to take a good joint note, signed by the purchaser and another responsible person. The Administrator may appoint a clerk and crier of the sale, each of whom will be allowed by the Court not exceeding two dollars a day. The sale must be made between ten in the forenoon and five in the afternoon, whether it occupies one day or more. Immediately after the sale is finished, a sale bill certified by the crier and clerk of the sale must be returned to the Court or Clerk's office, describing particularly each article of property sold, to whom sold and at what price.

If there is a growing crop it must be inventoried, and it must be also appraised and sold, unless it is most advantageous to the Estate to mature the crops and sell them after harvest. In any event the crops must be inventoried and their proceeds accounted for.

### FORM OF NOTICE OF ADMINISTRATOR'S SALE.

NOTICE is hereby given that the undersigned, Administrator of the Estate of..... late of the Town of..... in the County of Winnebago, will on..... the ..... day of..... A. D. 185..., commencing at the hour of ten o'clock in the forenoon, at..... in said County, sell at public sale the personal property of said Estate, consisting of..... (here describe the articles.)

TERMS: Sums under five dollars, cash in hand. Over five dollars, a credit of six months, secured by joint note to the approval of the Administrator.

Dated this..... day of..... 185.....

..... Administrator.

### Form of Sale Bill to be returned to the Court.

A bill of the sales of the personal property of..... late of the Town of..... in the County of Winnebago, State of Illinois, deceased, which sales were made at public auction on the..... day of..... 185..... between the hours of ten in the forenoon and five in the afternoon, in pursuance of notice given according to law.

| Articles.                      | To whom sold.        | Price.  |
|--------------------------------|----------------------|---------|
| 1 Lumber Wagon, .....          | John Smith, .....    | \$75 00 |
| 1 Cow, (red,) .....            | James Jenkins, ..... | 20 00   |
| 1 Grindstone, .....            | Peter Payup, .....   | 3 80    |
| (And so on with all the rest.) |                      |         |
| Total amount of sales, .....   |                      | \$98 80 |

We the undersigned, clerk and crier of the aforesaid sale, do hereby certify that the foregoing sale bill is true and correct. Witness our hands this..... day of..... A. D. 185.....

..... Crier.

..... Clerk.

### Expiration of the Two Years.

As Creditors may file their claims at any time within two years from the date of the Letters of Administration, Estates cannot generally be closed up until the expiration of that time, and it is unsafe for the Administrator to make any payments (except funeral expenses and a few other preferred debts,) before the end of the two years. No claim should be paid by the Administrator to any person whatever, either before or after the two years, unless such claim has first been presented and allowed in Probate Court. If the Administrator should pay any claim or claims in full, and it afterwards turns out that the Estate can not meet all its indebtedness, the Administrator would suffer the loss of all he paid over and above the regular dividend declared by the Court. Of course there are Estates so perfectly solvent, or so nearly free of debt, (so far as any one can see or know,) that it may be safe to close them up before the end of two years, but the Administrator in so doing acts upon his own responsibility, (or rather the responsibility of himself and his surety on his bond,) and he and his security must meet whatever consequences may result. But whether the Estate is good or bad, or solvent or insolvent, the Administrator must not pay any bill whatever until it has been examined and allowed by the Court. When the two years are out, there should be an immediate settling up of the Estate, if it remains still unfinished. The Administrator should frequently attend the Court or the Clerk's Office to see if there is any thing requiring action or attention, and to examine claims that may have been filed.



State of Illinois, }  
County of Winnebago, }

I, William Hulin, clerk of the  
County Court for said County, do certify,  
that in said Court on the day of the  
date hereof letters of administration  
have been duly granted to Ephraim Sum-  
ner of said County, as Administrator  
of the Estate of William Sumner late  
of said County, deceased, and that the  
 foregoing is a true copy of said letters  
and of the record thereof in my office  
remaining, and that said Ephraim  
Sumner as such Administrator has  
duly taken and subscribed an oath  
as required by law, and given Bond  
with approved Surety in the penal  
sum of Three Thousand Dollars,  
all of which are duly filed in my  
office. Given under my hand  
and the Seal of said  
Court at Rockford, this  
Seventeenth day of May,  
A.D. 1858.

William Hulin  
Clerk.

Winnebago County Court.

Estate of

William Sumner

Deceased.

Letters of Administration

TO

Ephraim Sumner

Issued and Filed this

day of

May 17th

A. D. 1858

Recorded in Book

Page 129

Wm Hulin Clerk.

Filed May 18. 1858  
J. Selander  
Clerk



Sup. Court.

Apr. Term 1858.

Galena & Chicago

Union R.R. Co. Appellant,

vs.

J. M. Sumner, Appellee

}  
}  
}  
}

This cause,  
by agreement is submitted upon  
written arguments to be filed, unless  
the counsel are ready to  
argue the same orally  
when called for trial.

J. A. Cook,

Atty for Appellant.

Amos S. Miller  
Atty for Appellee.



17 ~~11~~  
Gt. N. R. R. Co.

74.  
Jm Sumner

Stipulations to  
submit on written  
arguments.

Filed April 23, 1858  
L. Leland  
clerk.



Supreme Court of Illinois,

THIRD DIVISION—APRIL TERM, 1860.

SUMNER, ADMINISTRATOR OF SUMNER, Appellee,  
*Ads.*  
 THE GALENA & CHICAGO UNION RAIL ROAD COMPANY, Appellants. }

**Statement of the Case with the Points and Authorities of Appellee.**

This suit was brought under the Special Statute of Illinois, entitled "An Act to regulate the Duties and Liabilities of Railroad Companies;" approved Feb. 14, 1855, Purple's Statutes, Page 1077—for damages caused by and in consequence of the neglect and failure of the Appellant, the Defendant in the Court below—an incorporated Company styled "the Galena & Chicago Union Rail Road Company,"—to erect and maintain suitable and sufficient fences and cattle guards on Appellant's Rail Road in the County of Winnebago, as required by said Act.

The Appellee, the Plaintiff below—declared against the Appellant for killing three of Appellee's colts on the track of Appellant's Railroad, two of which were killed in the town of Winnebago, in said County, on the 8th day of May, 1856; and the other one in the town of Lysander, in said County, on the 15th day of September, 1856; that said colts got upon said Rail Road track, from the public highway, the two killed in Winnebago, through defects in the Appellant's cattle guards, in said town of Winnebago, and the other colt through defects in the Appellant's Rail Road fence, in said town of Lysander. The Appellee alleged and proved that his colts were lawfully at large in the public highway, by producing town records in evidence, showing that by a vote of the electors at the annual town meetings, cattle and horses were there permitted to go at large in the year 1856—said vote of the electors at the annual town meeting being in accordance with the township organization law, then in force in said County of Winnebago. Purple's Statute, Page 1137.

The destruction of the colts by the Appellant and the cause of their destruction, together with the value of the colts being clearly and conclusively proved by the Appellee, as alleged in the declaration, he recovered a verdict of \$255 damages.

The main cause of error assigned by the Appellant is, that the Winnebago Circuit Court permitted the Appellee—the plaintiff below—to prove that his colts were <sup>carefully</sup> depasturing, and at large on the open prairies and public highways, from which they entered upon the Appellants Rail Road track.

The Appellant insists that although the Appellant's Rail Road fences and cattle guards were out of repair, and insufficient to prevent cattle, horses, &c., from getting on to the Rail Road, and that in consequence the Appellee's colts got upon the Rail Road and were killed, still the Appellee cannot take advantage of these facts unless it can also be shown that the defective fences and cattle guards were directly between the Appellee's land and the Appellant's Rail Road track.

The Appellant, therefore, substantially and on general principles, contends that Rail Road Companies in the State of Illinois, are not liable in damages for destroying cattle, horses, &c., getting on to the Rail Road through defective fences and cattle guards, unless these animals enter upon such Rail Road from the adjoining lands or enclosures of their owners,—thereby limiting the recovery for damages in such cases to persons lawfully in possession of such adjoining lands.

Such a construction of the law leaves the whole matter of damages in these cases to Rail Road Companies, and the owners of lands through which the Rail Roads pass, and virtually excludes all other persons and their property from the protection designed for them by the Rail Road Act of Feb'y 14, 1855, aforesaid.



That statute was specially enacted to regulate the Duties and Liabilities of Rail Road Companies, which the Common Law failed to do, for the sufficient protection of persons and property.

This beneficent statute had its origin in the new order of things arising from extensive Rail Road improvements in which Illinois excels most of the States of the Union. The introduction and use of steam as a motive power for traveling over the land, marked a new era and required new regulations. The Rail Road Act of 1855 was a public necessity. It was penal in its nature, and necessarily stringent in its requirements. It makes it the duty of Rail Road Companies to "erect and maintain fences and cattle guards suitable and sufficient to prevent Cattle, Horses, Sheep, and Hogs, from getting on to Rail Roads."

And makes "Rail Road Corporations and their Agents liable for *all damages* which shall be done by the Agents or Engines of any such Corporation, to any Cattle, Horses," &c., that shall be injured in consequence of the neglect or omission of such Corporation to observe the requirements of the act aforesaid. This statute makes no distinction between the animals of those who own lands adjoining the Rail Road and others, neither is it a matter of any consequence *how* or *whence* animals enter upon the Rail Road Track, *provided* it be through the *neglect* of the Rail Road Companies, and not by the direct agency of the owner of such animals. Even negligence in the owner of animals, is no excuse for omissions of duty on the part of Rail Road Corporations.—Such, in substance, is the decision of the New York Court of Appeals in a ruling case under a special statute of that State, similar to our own,—3d Kernan's N. Y. Reports, p 42—in which the Duties and Liabilities of Rail Road Companies are fully and thoroughly discussed and clearly defined and established.

Some of the earlier decisions of that State—the same cited or relied on by the Appellant—seem to have been governed by the common law principles instead of special statutes. But these decisions have all been overruled in the case above referred to, and the principles of the common law have been declared inapplicable to Rail Road inclosures.

Other cases cited by the Appellant are from States having no special Rail Road Statutes, and those cited from the former decisions of this Court will be found entirely inapplicable to the case now under consideration.

The judgment in the Court below should be affirmed with costs.

#### A U T H O R I T I E S .

Purple's Statutes of Illinois, p. 1077.

Purple's Statutes of Illinois, p. 1037.

Seely *vs.* Peters, 5th Gilman, p. 138.

Corwin *vs.* The New York & Erie R. R. Co., 3d Kernan's  
(N. Y.) Reports, p. 42.



17 - 18

The Galena & Chicago  
Rail Road Company

By  
Tanner admr

Apples Point

Filed Apr-17, 1860

L. Loeland  
Clerk.



In the Supreme Court of the State of  
Illinois of the April  
Term A.D. 1858.

Galena & Chicago Union  
Rail Road Company }  
v. } Appeal  
William Sumner }

And the said  
Appellant, by J. L. Loop its Attorney,  
comes and says, that in the Record  
and proceedings in this cause there  
is manifest error, in this, to wit;

That the Court Erred in permitting  
the Town Law of the Town of  
Winnebago, in the County of  
Winnebago to be read in evidence  
by the Appellee on the trial of this  
Cause

That the Court Erred in overruling  
the motion of the Appellant for  
a new trial in said Cause.

That the Court Erred in overruling  
the motion of the Appellant in  
arrest of judgment.

That the Court Erred in



rendering Judgment in said  
Cause in favor of the Appellee.

And the said Appellant prays  
that the said Judgment & proceedings  
may be vacated, reversed, annulled,  
set aside and for naught held  
and Estopped.

J. L. Loop  
Atty for Appellant

And now Comes the said Appellee and  
says that there is no error in the record  
and proceedings of said Court.

Thos. Miller  
Atty for Appellee

Sup. Court.

Mrs. & Chicago  
Rail Road Co.  
vs.

William Summers

Judgment of Court.

J. L. Loop  
for Appellant



United States of America  
State of Illinois

Winnebago County } Pleas before the Hon Benj  
amin. R. Sheldon Judge of the fourteenth Judicial  
Circuit of the State of Illinois at a term of the Winne  
bago County Circuit Court began and held at the Court  
House in Rockford in the said county of Winnebago  
on the sixteenth day of February in the year of our  
Lord one thousand eight hundred and fifty seven

Present Hon Benj R. Sheldon Judge  
W.D. Meacham States Attorney  
Samuel A. Church Sheriff

Attest Morris B. Derrick Clerk

Winnebago Circuit Court  
February Term A.D. 1857

William Sumner

vs

The Galena & Chicago

Union Rail Road Company

} Transpass on the case

} Damages \$500

Winnebago County, ss.

The clerk will please issue  
summons in the above cause returnable to the next  
term of this court

Rockford December 27<sup>th</sup>/56

Miller & Miller

Brown & Ogden

Plffs Attorneys

To the Clerk of the Cir Court  
Winnebago }

Filed December 27, 1856

M B Derrick clk



State of Illinois }

Winnebago County } The people of the State of Illinois  
to the Sheriff of said County Greeting: We command You  
that you 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  
Winnebago County on the first day of the next term thereof  
to be holden at the Court House in the City of Rockford in said  
Winnebago County, on the third Monday of February A.D.  
1857 to answer unto William Sumner in a plea of ~~def~~  
-pass on the case to the damage of the said plaintiff, as  
he says in the sum of Five hundred Dollars. And  
have you then and there this writ with an endorsement  
thereon in what manner you shall have executed the  
same

"Seal"

Witness, Morris B Derrick Clerk of said Court,  
and the Seal thereof at his office in the City  
of Rockford, in said Winnebago County, this  
Seventy Seventh day of December A.D. 1856

Morris B Derrick Clerk

State of Illinois }

Winnebago County } 185

I duly served the within by leaving  
a copy with Yarwood agent of the Rockford Station of  
G & C. U. R. Road Dec 29<sup>th</sup> 1856 as I am therein commanded  
Saml. J. Church

Filed Dec 29-1856

M. B. Derrick

Sheriff

Winnebago Circuit Court  
February term A.D. 1857

William Sumner

vs.

Galena & Chicago Union  
Rail Road Company }

William Sumner Plaintiff



3  
in this suit, by Miller & Miller, and Brown & Ogden  
his Attorney complains of the Galena and Chicago -  
Union Rail-Road Company. Defendants being sum-  
moned of a plea of trespass on the case. For that -  
whereas the defendants heretofore to wit; on the Eighth  
day of May in the year of our Lord One thousand  
Eight hundred and fifty six at the county of Winne-  
bago aforesaid were and for a long time before that  
time had been and still are a Rail Road corporation  
by the name and style of the Galena & Chicago Union  
Rail Road Company" and being such corporation  
were the owners and managers of the Galena & Chicago  
Union Rail-Road Company at the time aforesaid,  
and were running and managing divers cars, Locom-  
otives & steam engines for the carriage & transportation of pass-  
engers, and freight from Chicago in the county of Cook  
to Peatonian in the county of Winnebago aforesaid on and  
upon the Rail Road aforesaid, and at the time last afo-  
said and from thence to the time of the commencement of  
this suit, according to the provisions of the Statute in  
such case made and provided, entitled an act to  
regulate the duties and liabilities of Rail-Road Com-  
panies approved February 14<sup>th</sup> 1855 the Defendant ought  
to have constructed and during all the time aforesaid  
so have maintained at all Road Crossings existing or  
established across said Rail-Road cattle guards suitable  
and sufficient to prevent Cattle horses Sheep and Hogs  
from getting onto and upon the said Rail Road of the said  
Defendants at the places where roads or highways cross  
said Rail-Roads and the said plaintiff avers that on  
the Eighth day of May A.D. 1856 the Defendants had  
neglected and still do neglect to construct and main-  
tain suitable and sufficient Cattle guards at a  
Road Crossing then established and existing across  
said Rail-Road of said Defendants said Road crossing  
being situated in the town of Winnebago in the  
county of Winnebago and State of Illinois, between



4  
Winnebago and Peatonasca Stations on said Rail-Road  
in the said county of Winnebago and that in consequence  
of such neglect to construct and maintain suitable  
and sufficient Cattle guards, at the Road crossing  
aforesaid two certain Colts of which the said plaintiff  
was then lawfully possessed, of great value to wit: of the value  
of three hundred dollars then lawfully going at large  
in the said town of Winnebago in the County aforesaid  
then & there went from and out of the said public high-  
way or road onto and upon the said Rail-Road of the said  
Defendants at the Road crossing above mentioned, and  
that the said colts of the said Plaintiff when so being  
upon the said Rail-Road of the said Defendants to wit:  
on the said Eighth day of May A.D. 1856 in the said  
town of Winnebago in the County aforesaid, without  
the negligence carelessness or improper conduct of the  
said plaintiff was then & there run against upon  
and over by the Locomotive Steam Engine & cars of the  
said Defendants, then & there under the care govern-  
ment and direction of a certain servant of the said  
Defendants, who was then & there directing, conduct-  
ing & Engineering the said Locomotive, Steam Engine  
and cars in and upon and along the said Rail  
Road of the said Defendants to wit: in the town  
of Winnebago in the County of Winnebago aforesaid,  
and the said colts of the said plaintiffs by being  
so run against upon & over by the said Locomotive Steam  
Engine & cars of the <sup>said</sup> Defendants as aforesaid was then  
& there killed and became of no use or value to the  
plaintiff, to said plaintiffs damages of three hundred  
dollars, and the plaintiff avers that said loss and dam-  
age was caused or was in consequence of the aforesaid  
neglect of the said Defendants to construct & maintain  
suitable & sufficient Cattle guards at the said road cross-  
ings hereinbefore mentioned situate in the town of  
Winnebago in the County of Winnebago aforesaid  
and of the running directing and driving their



2  
5  
Said cars Locomotive and Steam Engine, over and against and onto said plaintiff's said colts, and the said plaintiff further avers that at the annual Town Meeting of the said town of Winnebago, in the said County of Winnebago, held in said town on the first Tuesday of April A.D. 1856 by a vote of the electors of said town cattle & horses were permitted to go at large in said town of Winnebago, and were so permitted to go at large in said before: at the time of, and after the said colts of the plaintiff were killed, by being run against upon and over by the said Locomotive Steam Engine & cars of the said Defendants in the said town of Winnebago in the manner aforesaid and the said plaintiff further avers that the said Rail Road of the said Defendants was fenced on both sides thereof up to the lines of the Public Highway or road, crossing said Rail Road, at the road crossings above mentioned where the said Defendant neglected to construct & maintain in suitable and sufficient cattle guards, as aforesaid & the said close situated as herein before stated in the same town of Winnebago in the County of Winnebago aforesaid. And where as also the said plaintiff heretofore to wit: on the fifteenth day of September in the year of our Lord Eighteen hundred and fifty six was & from thence hitherto hath been and still is lawfully possessed & in the occupation of a certain close situated in the town of Tyndal in the County of Winnebago and State of Illinois & the said Defendants at the time aforesaid were and still are an incorporated company by the name & style of the Galena & Chicago Union Rail Road Company and then were and still are in possession of and in the use & occupation of a certain Rail Road styled the Galena & Chicago Union Rail Road passing over and across the plaintiff's said close on the day above mentioned and the said Defendants by reason of their said road passing over the said plaintiff's said close on the day above mentioned and according to the Statute in such case made and provided, Entitled "An Act to regulate the duties & liabilities of Rail Road Companies, Approved Feb'y. 14<sup>th</sup>

2<sup>nd</sup> Count



1855 ought to have erected & during all the time aforesaid to have kept and maintained a fence on both sides of their said Rail Road, against the said plaintiffs close, suitable and sufficient to prevent cattle horses, sheep & hogs from getting into and upon the said Rail Road of the said defendants, from the said close of the said plaintiff. Yet the said defendants well knowing the premises but continuing & to wit on the said fifteenth day of September A.D. 1856 neglected and from thence hitherto have neglected & still do neglect to erect & maintain a suitable & sufficient fence on each side of their said Rail-Road against the said plaintiffs close whereby and by reason of the said defendants neglecting to erect and maintain a suitable & sufficient fence on each side of their said Rail-Road against the said plaintiffs one other colt of which the said plaintiffs was then lawfully possessed of great value to wit of the value of Eighty dollars, Lawfully feeding and depasturing in said plaintiffs close on the said fifteenth day of September A.D. 1856 - aforesaid, went and escaped from and out of the same into and upon the said Rail Road of the said defendants and the said defendants were then & there possessed of a certain Locomotive or Steam Engine, the said defendants were then and there causing to be drawn or propelled on and along the track of the said Galena & Chicago Union Rail Road to wit opposite and against the said close of the said plaintiff in the said town of Gysander in the said county of Winnebago and the said defendants with the said Locomotive or Steam Engine & without the negligence carelessness or improper conduct of the said plaintiffs, did then & there to wit, on the said fifteenth day of September A.D. 1856 run against upon & over said one colt of the said plaintiff & with the wheels bars & beams thereof bruise & kill said colt to wit. opposite & against the said close of the said plaintiff in the said town of Gysander, in the county of Winnebago aforesaid, and the said colt of the said plaintiff then by then & there became and was rendered of no use or



7  
value to the said plaintiff to the damage of the said  
plaintiff of Eighty dollars and the plaintiff avers that  
said loss & damage was caused by or in consequence  
of the aforesaid neglect of the said Defendants to erect  
& maintain suitable & sufficient fence on the sides  
of the said Rail Road through and across the said  
close of the said plaintiff & of the running driving  
& driving their said Locomotive or Steam Engine over  
against and upon said plaintiffs said Colt. And  
the said plaintiff further avers that the said Colt of  
the said plaintiff did not get onto & upon the said  
Rail Road of the said defendants from the said close  
of the said plaintiff at the time said Colt of said plaintiff  
was killed as aforesaid at any crossing of any public  
highway over said Rail Road or within the limits of  
any town city or village, and other wrongs to the said  
plaintiffs then and there did to the damage of the said  
plaintiff of Five hundred Dollars and therefore he  
brings Suit &c

McIlwain & McIlwain &  
Brown & Ogden  
Plffs Attorneys

Filed for Record July 25<sup>th</sup> 1837

The Galena & Chicago  
Union Rail Road Company }  
vs  
William Sumner }

And the said defendants  
by Loop & Sathrop their attorneys come & defend the wrong  
& injury when &c and say that they are not guilty  
of the said several premises in the said plaintiffs de-  
claration against them alledged, or any or either of  
them, or any part thereof, and of this the said defen-  
dants put themselves upon the country &c

Loop & Sathrop  
Attys for Defs



8  
It is stipulated hereby that any defence may be made  
& proven under the above plea of the general issue in  
this cause which would or might be proper had the  
same been specially pleaded Dated Sept 29<sup>th</sup> 1857,

Miller & Brown

Attys for Plff

Refiled July 25<sup>th</sup> 1857

M B Denick clk

And afterwards to wit on the 2<sup>d</sup> day of February 1858  
it being one of the days of the February term of the Hennepin  
County Circuit Court the following entry was made as appears  
of the Court record

William Sumner

<sup>vs</sup>  
Galena & Chicago W  
R. R Co

} Versus in the case

} and now comes the plaintiff  
by Miller & Miller & Brown his attorneys & the defen-  
dantly Loops & Athrop its Attorney also comes &  
issue being joined it is ordered that a Jury come  
& thereupon come a Jury of Twelve good and lawfull  
men to wit. A. D. Curtis, Baltus Heagle, Benj F. Long, W<sup>m</sup>  
A Phelps, H. C. Greenleaf, S. D. Waldo, M. E. Gordon, Da-  
vid Lewis, John Spafford, William Thorn, Peter  
B. Johnson, George B. Cleveland & the hour of adj-  
ournment. having arrived the Jury are charged  
to meet the Court at the hour of nine o'clock to-  
morrow morning

And afterwards to wit on the 3<sup>d</sup> day of February 1858  
it being one of the days of the February term of the Hennepin  
County Circuit Court the following Entry was made as appears  
of the Court record



9 William Sumner  
 vs  
 Galena & Chicago  
 U. R. R. Co } Trespas in the case

And now comes the Jury hitherto  
 Empanelled tried & sworn and having heard the  
 Evidence & Argument of counsel they retire to consi-  
 der of their Verdict & therefore they return into Court  
 and render the following. We the Jury find the  
 defendant guilty and assess the Plaintiff dam-  
 ages at Two hundred & fifty five Dollars —  
 Thereupon the Defendant moved the Court for  
 a new trial herein

And afterwards to wit on the 4<sup>th</sup> day of February 1858  
 it being one of the days of the February term of the Winnebago  
 County Circuit Court the following entry was made as appears  
 of the Court record

William Sumner  
 vs  
 Galena & Chicago U.  
 R. R. Co } Trespas in the case

And now comes the defendant,  
 by Loops their Attorney & moves the court for a new trial  
 herein

William Sumner  
 vs  
 Galena & Chicago U.  
 R. R. Co }

And afterwards to wit on the 1<sup>st</sup> day of March 1858 it being  
 one of the days of the February term of the Winnebago  
 County Circuit Court the following entry was made as  
 appears of the Court record



William Sumner  
 vs  
 Galena & Chicago U  
 R. R. Co } The pass in the case

And now come the parties by  
 their attorneys & the motion for a new trial in this cause  
 having been made and the court having heard the  
 counsel upon said motion & being fully advised on  
 the premises denies and overrules the said motion. To  
 which decision the defendant excepts. It is therefore  
 ordered that the plaintiff have judgment upon the  
 verdict of the jury by them herein found as aforesaid.  
 It is therefore ordered & considered by the court that the  
 plaintiff have and recover of the defendant the sum  
 of Two hundred & fifty five dollars damages aforesaid  
 by the jury aforesaid found together with the costs and  
 charges herein expended in this cause and that he have  
 execution therefor: Whereupon the Defendant prays an  
 appeal in this cause which is allowed. Conditioned  
 that the Defendants with W<sup>m</sup> Lathrop as surety, file  
 his appeal bond properly conditioned in the sum  
 of \$500. with the clerk of this court within 30 days from  
 this date;

In the Winnebago County Circuit Court  
 Of the February term  
 A.D. 1858  
 William Sumner  
 vs  
 The Galena & Chicago  
 Union Rail Road Company }

Be it remembered that  
 on this third day of February A.D. 1858 being as yet  
 one of the days of the February term of said circuit  
 court this cause came on to be tried before the  
 Hon Benjamin R. Sheldon Judge, and a jury  
 on the part of the plaintiff the following facts  
 were proved that the plaintiff owned and



// occupied a farm in the town of Lyssander, in this county through which the defendants Rail Road passed that the defendants had fenced their road adjoining plaintiffs land and that on or about the day of September A.D. 1856, a Colt belonging to the plaintiff was killed upon the defendants Rail Road track, opposite the plaintiffs land, by a construction train. The Colt was proved to be worth Fifty five Dollars.

It was proven that the colt was running in plaintiffs pasture adjoining defendants Rail Road and adjoining the public Highway which crossed said Rail Road under the culvert, and that the plaintiffs bars, between his pasture and the said highway were left down and that the highway passage across the Rail Road was under a culvert of said Rail Road, and that one or two of the stone steps of the culvert abutment had been knocked off by teams or otherwise, and that the fence of defendants road joined to said culvert, and that one or two of the boards of the fence so connecting with the culvert had been loosened and had fallen down and that it had been so for some days before the colt was killed, and that the colt which was killed had escaped with three others belonging to the Plaintiff from said pasture into the highway and from said highway onto the Rail Road track over the fence so out of repair. That a son of the Plaintiff about twelve years of age saw the three colts on the track and drove them off, but did not see the one which was afterwards killed. The three which he drove from the track passed into the highway over the defective fence at the culvert.

The Plaintiff also proved that on the night of the day of May A.D. 1856 about eleven o'clock, nine colts were killed on the defendants Rail Road track, about one and a half miles west of this place Station in this county.



12  
by defendants passenger train going East from Freeport  
to Chicago. That two of these last mentioned colts  
belonged to the Plaintiff, and that the two were of the  
value of two hundred dollars.

These colts were running  
at large, and were killed between five and six miles  
East of the Plaintiffs farm and residence and in  
an other town viz the town of Winnebago. There  
was a highway crossing over the Rail Road about  
one mile west of the spot where the colts were  
killed, and also a farm crossing about half a  
mile west of the place of killing. Cattle guards were  
constructed at both crossings. The plaintiff proved  
that some other colts had <sup>once</sup> been seen to walk over the  
Cattle guards at the highway crossing, and to walk  
back over the same. He also proved that after the  
killing of these colts an employee of the defendant,  
by order of the defendants overseer of the road hewed off  
the sides of the slats of this Cattle guard so as to widen  
the spaces between the slats; that the pit excavated  
beneath the slats was about three feet and that the  
timber used for the slats was four by four inches,  
and that the timbers were fastened and placed with  
an edge or corner upwards. Two of the plaintiffs  
witnesses, farmers, named Grippin, who occupied  
a farm adjoining the Rail Road at the cattle guard  
on the highway crossing testified that they thought  
the framwork of the cattle guard was laid out  
for slats three by three inches, and that timber four  
by four inches was used. which accounted for the  
slats being so near together.

Said witness also testified  
that they also saw colt tracks between the highway  
crossing and the farm crossing, the morning after  
the colts were killed, that the tracks found near  
the highway crossing appeared as if the colts had  
been feeding, and those found near where they were



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Killed showed that the colts had been running; where they were killed the tracks were all in a huddle —

The plaintiff then offered in evidence a law adopted at a town meeting of the said town of Winnabago, in force at the time the colts were killed, which declared that colts of this description were allowed to run at large in said town at the time these colts were killed, and produced and proved the existence of such town law.

The Defendant by its counsel objected to the giving of the <sup>said</sup> town law in evidence, the Court overruled the objection and allowed the same to be read in evidence to the jury; to which decision and ruling of the Court in overruling said objection and allowing said law to be read in evidence the defendant by its counsel then and there excepted.

It was agreed between the parties that there was a town law of the town of Lysander, where the first mentioned Colt was killed, restraining certain animals other than colts or horses from running at large in the public highway; and that colts and horses were not so restrained in said town law of Lysander and were not mentioned in said town law at all.

This was all the evidence on the part of the Plaintiff; and it was admitted on the part of the Plaintiff that there was no negligence on the part of the servants of the defendants in the running or management of either of the trains, by which the colts in question were killed.

The defendant then introduced as a witness Bruce Hilcox. Who testified that he was the Conductor of the train at the time the nine colts were killed near Winnabago station in this county. That the night was very dark and raining. That the train



14 was running at its usual speed, which was at that time 20 miles per hour, that the time of arrival at Rockford was, as he now recollects it, Eleven o'clock. That he felt the shock at the time the engine struck the colts, but did not know what had been struck. That John B. Brown was the engineer, running the train and that he was an able prudent careful engineer, that he had <sup>been</sup> sometime in Defendants employ as Engineer, and is still employed by defendant. He is now principal machinist at one of the defendants shops.

The defendant then introduced as a witness John B. Brown who testified that he was the Engineer running the passenger train on the night when the colts were killed near Winnebago, that the night was very dark and rainy. That it was so dark that he could see nothing out of the front windows of the engine. That he did not see the colts; and did not know what had been struck by the engine until afterwards, although he felt the shock of the collision, that it occurred near a culvert about a mile and a half west of Winnebago Station. That he stopped at the station to examine the engine & machinery, and found horses hair and blood on the Pilot, (cow catcher) that he did not see the colts at all, that he was then running the train on time, at the usual speed, he thinks 20 miles per hour. The train was going from Freeport to Chicago. Had been engaged by defendants as engineer for some years, and is still employed in defendants service as principal machinist.

The defendant then introduced as a witness Charles Elliott, who testified that he had charge of the defendants R.R. track from Freeport, east, to Winnebago Station.

It was his duty, to see that the track, cattle guards & fences were in order.



15  
Hitnefs had passed over the road a day or two before the colts were killed. The cattle guards & fences were in good order. The road had all been fenced on each side sometime before the colts were killed. The cattle guard in question was similar to the other cattle guards on the Defts road at highway crossings. The fences on the Rail Road from Freeport to Winnebago were in good repair. The Culvert at the road crossing in Lysander was injured by one of the stones of the steps leading to the top of the abutment being knocked off by teams passing it, and the fence which connected with it was impaired by one or two of the boards being torn off. It remained so out of Repair several days, when it was repaired by Hitnefs. William Mindham had the overseeing of the track, cattle guards & fences at the time the colts in question were killed.

William Mindham was then introduced as a Hitnefs, and testified, that at the time the colts in question were killed he was in the defendants employ, and had the immediate supervision of the Rail Road track and fences from Winnebago Station to  $1\frac{1}{2}$  miles East of Pecatonica Station. The cattle guards & fences were in good repair at the time the colts were killed. Hitnefs passed over the track the morning after the accident. Saw no tracks at the highway crossing; followed up the track & found ~~and~~ tracks at the farm crossing East (Severys). One of the slats of the cattle guard on the east side of the farm crossing was broken down, and Hitnefs saw an animals track in the bottom of the pit under the broken slat. Could not tell what animals track it was. It has rained since the track was made.

Both of the cattle guards were in good order the night before the accident; and the fences



16  
were in good repair. Witness passed over the road  
where the colts were killed on a hand car before dawn  
on the same evening of the accident.  
Witness buried the same colts. He found them all dead  
& badly mangled, about 6 o'clock the next morning.  
This was all the evidence in the case.

After retiring to consider of their verdict, the jury  
returned and by their verdict found the defendant  
guilty, and assessed the Plaintiff damages to the  
sum of \$255.

The defendants by its counsel moved  
the court for a new trial, and also in arrest of  
judgment, both of which motions the court after  
argument overruled, and rendered judgment upon  
the verdict. So each of which decisions and rul-  
ings of the court in overruling the said motion in  
arrest of judgment the said defendant by its counsel  
then and there excepted - and prayed that this,  
its bill of exceptions be signed and sealed by the  
Judge which is done accordingly.

By R. S. Sheldon, Seal

"Filed" Feb 13 1838.

At Attorney Def. Clerk

Know all men by these presents that the Galena &  
Chicago Union Rail Road Company as principal and William  
Sathrop as security are held and firmly bound unto William  
Sumner in the penal sum of five hundred dollars to the pay-  
ment of which well truly to be made the said Galena & Chicago  
Union Rail Road Company binds itself and the said William  
Sathrop binds himself his heirs executors and administrators joint-  
ly & severally, firmly by these presents: Signed by the President  
of the said Galena & Chicago Union Rail Road Company &  
sealed with the corporate seal thereof and sealed with the seal  
of the said William Sathrop this fifteenth day of March A.D.  
1838. The condition of the above bound is such that whereas



14  
on the second day of March A D 1838 at the February term of  
the Circuit Court in & for the County of Mennebag in the State of  
Illinois by the Consideration and judgment of the said Circuit Court  
a judgment was rendered against the said Galena & Chicago  
Union Rail Road Company in favor of the said William Sumner  
in said Cause for the sum of two hundred & fifty five dollars damages  
besides Costs: Now if the said Galena & Chicago Union Rail Road  
Company shall well and truly pay or cause to be paid the said judg-  
ment and all Costs interest & damages in Case the said Judgment  
shall be affirmed and that the said party to wit: the Galena &  
Chicago Union Rail Road Company shall duly and without delay  
prosecute the said Appeal then this obligation shall be void other-  
wise to remain in full force and effect

S. C.

John B Sumner Just  
Wm Sathrop sear

Attest W. M. Sarabee

Secretary:

"Filed Mar 23 1838."

(At Fennoyes) Depledge"

State of Illinois

Mennebag County Clerks Office for J. Morris B. Derrick Clerk  
of the Circuit Court in & for said County do hereby certify the fore-  
going to be a true Copy of correct & complete Copy of the records &  
papers on file in my Office in the foregoing entitled Cause & that  
they are correct Copies of such original records & files duly compared  
therewith by me.

Witness my hand & the seal of said Court at  
Rockford this 15<sup>th</sup> day of April 1838.

M B Derrick Clerk  
By W Fennoyes Dep Clerk

Fees \$3.00



~~#1~~ 17.

William Sumner

Salina & C. W. R. R. Co.  
Winnebago

Transcript &  
certificates  
for

Supreme Court

Filed April 22, 1858  
L. Leland  
clerk