

12801

No. _____

Supreme Court of Illinois

Ill. Cent. R. R. Co.

vs.

Finnegan, et al.

71641  7

189-186

The M. Central
R.R. Company

vs

John Finnegan

1859

12801

189 - 1888

The Ill. Central
R. R. Company
is

Sam Feinman
et al
Transcript of Record

Filed Apr. 19, 1889.
L.eland Ch.

State of Illinois
La Salle County vs. Pleas. Proceedings
and Judgments held and taken in and
before the La Salle County Court in the
State of Illinois at the Court House in
Ottawa in the County of La Salle of December
Term thereof to wit. of the seventh day
of December A.D. 1857. and of the Inde-
pendence of the United States of America
the Eighty Second.

Present. Hon John C. Champlin Judge
Phil Lindley - Clerk
O. L. Waterman Sheriff

Or it remembered that heretofore
to wit. on the Twenty Third day of November
in the year of our Lord One Thousand, Eight
Hundred and Fifty Seven John Timmegan
and James Timmegan by Strain^d Bull
their attorneys filed in the Office of the
Clerk of said La Salle County Court their
specification which is in the words and
figures following to wit.

State of Illinois s.s. County Court for
 La Salle County said County
 December Term thereof A.D. 1857

John Timmegand and
 James Timmegand

vs.

The Illinois Central
 Rail Road Company

To appear on the case

Damages \$1000.

Clerk of said Court

Please issue
 as above and oblige, yours &c
 Strain & Bull
 Plffs Attys.

Afterwards to wit on the said 23rd day
 of November A.D. 1857 there issued out
 of the Office of the Clerk of said Court
 a summons directed to the Sheriff of La Salle
 County, in the words and figures following

The People of the State of Illinois
 To our Sheriff of our County of La Salle, Greeting
 We Command you that you Summon
 The Illinois Central Rail Road Company.
 If it shall be found in your County, personally
 to be and appear in our La Salle County Court,
 before our Judge thereof, on the first day of
 the next Term of said Court, to be held at the
 Court House in Ottawa, on the first Monday
 in December next at ten o'clock in the
 forenoon, then and there to answer unto
 John Timmegand & James Timmegand, in a

plea of trespass in the case to their damage
of One Thousand dollars,

and have you then there this writ
and the manner in which you shall
have executed the same.

Seal

In Witness whereof. We have
cause the Seal of our said Court
to be hereto affixed and attested
by Samuel W. Raymond our
Clerk thereof at Ottawa. 23rd
day of November 1857

Saml W. Raymond Clerk
E. L. Herrick Deputy.

And thereafter to wit on the 2nd day of
December AD 1857, said summons was
returned to and filed in the office of
the Clerk of said Court with the follow-
ing endorsement thereon, to wit:

"Executed the within writ by reading
"it & delivering a copy of the same
"to Roswell Keeler
"Nov 29, 1857. E. L. Waterman Sheriff
" By W. B. Chapman Deputy

On the 27th day of November AD 1857 the
said John Finnegan and James Finnegan
by Straim & Bull their attorneys filed in
the Office of the Clerk of said Court their
certain declaration in the above entitled
cause, which is in the words and
figures following to wit:

State of Illinois } County Court December
 La Salle County } Term thereof. AD. 1857

John Timmigan and James Timmigan complain of The Illinois Central Rail Road Company in a plea of trespass in the case, for that the said defendants heretofore to wit on the twentieth day of September AD, one thousand eight hundred and fifty five, to wit at the County aforesaid was an incorporated company, and was possessed of, and was then and there operating a certain Rail Road known as The Illinois Central Rail Road, which rail Road has been opened and operated for more than six months before the committing of the grievances hereinafter mentioned, and was then and there possessed of, and was then and there running certain trains of cars on said Rail Road, and by reason of the premises it then and there became and was the duty of said defendant to keep and maintain fences on the sides of its rail road, suitable and sufficient to prevent cattle horses, sheep and hogs from getting on said rail road except within the limits of cities towns and villages and at the crossings of public roads.

Yet the said defendants disregarding its duty in that behalf did not, nor would keep and maintain fences on the sides of its rail road, but negligently & carelessly omitted so to do, by reason whereof three cows, three heifers - two steers, and one colt of the plaintiffs of great value, to wit of the value of one thousand dollars, went upon

The said Rail Road of said defendants at a point not within the limits of any city town or village, nor at any public road or highway crossing in said County where said rail road was not fenced in the manner required by the Statute in such case made and provided, and the cars of said defendant then and there running upon the said Rail Road ran against the said cattle, and colt of the said plaintiffs and killed all of said cattle and said colt, whereby and by reason of which the said plaintiffs have sustained damage to the amount of one thousand dollars.

And also for that the said defendant heretofore to wit on the twentieth day of October in the year of our Lord one thousand eight hundred and fifty five, to wit at the county aforesaid was an incorporated company, and was possessed of and was then and there operating a certain Rail Road known as the Illinois Central Rail Road which rail road has been opened and operated for more than six months before the committing of the grievances hereinafter mentioned, and was then and there running certain trains of cars upon said rail road, and the said plaintiffs were then and there possessed of three cows, two steers, and one colt of great value to wit of the value of one thousand dollars, and the said defendants had not then and there on the sides of its rail road fences suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on the said rail road

in the manner required by the statute in such case made and provided, And the said cattle and colt of the plaintiffs in consequence of the want of such fence went on to the said rail road, at a point where said rail road was not fenced, on either side thereof, in the manner required by the statute in such case made and provided, and which point was not within the limits of any city, town or village, not at the crossing of any public road or highway, and the said cars of the said defendant were then and there being run on said Rail Road by the said defendant by its agents and servants and the said cars of the said defendant were then and there by the said agents and servants of the said defendant so negligently and carelessly governed, operated & driven that by and through the mere carelessness and negligence of the said agents and servants of the said defendant, were driven against the said cattle and the said colt of the said plaintiffs, and the said cattle and said colt of said plaintiffs were then and there thereby killed whereby the plaintiffs have sustained damages to the amount of ~~two~~^{over} thousand dollars.

And also for that the said defendants heretofore to wit on the eighth day of October in the year of our Lord one thousand eight hundred and fifty seven to wit at the County aforesaid was an incorporated company, and was possessed of and was then and there operating a certain rail road known as the Illinois Central

Rail Road which said Rail Road has
 been open and operated for more than
 six months before the committing the
 grievances hereinafter mentioned, and was
 then and there possessed of, and was
 then and there running certain trains
 of cars upon said rail road and said
 plaintiffs were then and there possessed
 of three cows, three steers three heifers
 and one colt, of great value to wit of
 the value of one thousand dollars, and
 it was the duty of said defendant, then
 and there to erect and maintain fences
 along the sides of its said road suffi-
 cient to keep horses, cattle hogs and
 sheep off the said rail road, except
 within the limits of cities towns and
 villages and at the crossings of public
 roads & highways, and the said cattle
 and the said colt of the said plaintiff
 in consequence of the want of such
 fences went out, and at the ^{time of} the ^{time of} the grievance
 hereinafter mentioned were on the said
 rail road at a point where said rail
 road was not fenced in the manner
 required by the statute in such case made
 & provided and which point was not
 within the limits of any city town or village,
 nor at the crossing of any public road
 or highway, and the said cars of the
 said defendant were then and there being
 run on said rail road by the said
 defendant by its agents and servants, and
 the said cars of the said defendant
 were then and there by the said servants
 & agents so negligently and carelessly
 governed operated and driven that by
 and through the mere carelessness and

8 negligence of the said agents and servants of the said defendant were driven against the said cattle and the said colt of the said plaintiff and the said cattle and the said colt were then and there thereby killed, whereby the plaintiff has sustained damage to the amount of one thousand dollars and therefore they sue &c by

Strain & Bull
Their Attorneys.

And afterwards, to wit, on the 10th day of December 1857 the said Defendant by Glover & Cook & Bough its attorneys filed in the office of the Clerk of the Court aforesaid a Demurrer to said Declaration in the words and figures following to wit:

John Finnigan and
James Finnigan

vs.

The Illinois Central
Railroad Company

La Salle County Court
December Term AD 1857

And the said defendant comes & defends the wrongs & injury when &c & says that the said several counts in the said declaration, and the matters & things contained therein, in manner & form as the same are before pleaded & set forth, are not sufficient in law, nor are either of said counts of said declaration sufficient in law for the said plaintiff to have & maintain his aforesaid action

9 Thereof against him the said defendant & that he is not bound by law to answer the same; & this he is ready to verify, wherefore he prays judgment &c.

And for special cause of demurres, the said defendant sheweth to the Court the following

1st It does not appear from the averments in the first count in said declaration that the grievances complained of were committed six months after the act requiring railroad corporations to fence their roads -

2^d There is no averment in said count that the grievances complained of were negligently or wilfully done.

3^d There is no averment in either count in said declaration that the cattle & colts of plaintiffs did not go upon the railroad of defendant at a point where said railroad runs through uninclosed lands lying at a greater distance than five miles from any settlement.

4th There is no averment in either the second or third counts in said declaration that the cattle and colts of said plaintiffs were damaged by the agents or engines of said defendant.

5th The second count in said declaration claims an amount of damages beyond the jurisdiction of this Court.

6th There is no averment in said second

10. Count of the duty of said defendant to fence its road.

^{the} In neither count in said declaration is there any averment of what did kill the cattle & colt of plaintiffs. —

Glover, Cook & Bough
Defts Attorneys.

And afterwards to wit on Thursday December Tenth Eighteen Hundred and Fifty Seven the same being one of the days of the December Term A.D. 1857 of said Court, certain proceedings in said cause were had and entered of record in said Court in the words and figures following to wit:

John Timmegan &
James Timmegan

vs.

The Illinois Central
Rail Road Company

Proprors on the Case

— This day come the plaintiffs by Strain & Bull their attorneys and on their motion leave is granted to file amended declaration ten days before the next term of this court, and cause continued at plaintiffs costs to be taxed.

And thereafter to wit on 19th day of February
A.D. 1858 The said plaintiffs by Strain
and Bull their attorneys filed in the
office of the Clerk of said Court, an
amended declaration in said cause
in the words and figures following
to wit:

State of Illinois } p. County Court March
La Salle County } Term thereof A.D. 1858

John Timmigan and
James Timmigan complain of the Illinois
Central Rail Road Company in a plea
of Trespass on the case, for that the said
defendant heretofore to wit on the twentieth
day of September, A.D. one thousand eight
hundred and fifty five to wit at the
county aforesaid was an incorporated
company, and was possessed of, and
was then and there operating a certain
rail road known as the "Illinois Central
Rail Road" which rail road has been
opened and operated for more than
six months before the committing of the
grievances hereinafter mentioned, and
was then and there possessed of, and
was then and there running certain
trains of cars on said rail road, and
by reason of the premises, it then and
there became and was the duty of
said defendant to keep and maintain
on the sides of its said rail road
fences suitable and sufficient to prevent
cattle, horses, sheep, and hogs from getting
on to said rail road except within the
limits of cities towns and villages

and at the crossing of public roads, and highways;

Yet the said defendant disregarding its duty in that behalf, did not, nor would keep and maintain fences on the sides of its rail road, of any kind, but negligently and carelessly omitted so to do, at the point of the committing the grievances hereinafter mentioned, and which said point was not within the limits of any city town or village nor at the crossing of any public road or highway by reason whereof three cows, three heifers, two steers, and one colt of the plaintiffs of great value to wit, of the value of one thousand dollars, went upon the said rail road of said defendant at the point aforesaid where the said rail road was not fenced as aforesaid, and which point was not within the limits of any city town or village as aforesaid nor at the crossing of any public road or highway as aforesaid in said county, and the cars of said defendant then and there running upon the said rail road ran against the said cattle and said colt of said plaintiffs at the point aforesaid and killed all of said cattle and said colt, whereby and by reason of which the said plaintiffs have sustained damages to the amount of one thousand dollars.

And also for that the said defendant heretofore to wit on the twentieth day of October in the year of our Lord one thousand eight hundred and fifty five to wit at the county aforesaid was an incorporated company and was proposed

of and was then and there operating a certain rail road known as the "Illinois Central Rail Road" and which rail road has been opened and operated for more than six months before the committing of the grievances hereinafter mentioned and was then and there running certain trains of cars upon said rail road and said plaintiffs were then and there possessed of three cows, three heifers, two steers, and one colt of great value to wit of the value of one thousand dollars, and the said defendants had not then and there, on the sides of its rail road, fences suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on the said rail road, in the manner required by the statute in such case made and provided, at the point where the grievances hereinafter mentioned were committed and which point was not within any city town or village, nor at the crossing of any public road or highway, and the said cattle and said colt of said plaintiffs in consequence of the want of such fences went on to the said rail road, at the point aforesaid where the same was not fenced as aforesaid, and which point was not within the limits of any city town or village, nor at the crossing of any public road or highway, and the said cars of the said defendant were then and there being run on said rail road by the said defendant by its agents and servants and the said cars of the said defendant were then and there by the said agents of the said defendant, so carelessly and

14 negligently governed, operated and driven, that by and through the mere carelessness and negligence of the of the said agents and servants of the said defendant, they were driven against the said cattle and colt of said plaintiffs, and the said cattle and colt of said plaintiffs were then and there thereby killed, whereby the plaintiffs have sustained damage to the amount of one thousand dollars.

And also for that the said defendants heretofore to wit on the eighth day of October in the year of our Lord one thousand eight hundred and fifty seven, to wit at the county aforesaid was an incorporated company, and was possessed and was then and there the owner of, and was then and there operating a certain rail road known as the Illinois Central Rail Road" which said rail road has been open and operated for more than six months before the committing of the grievances hereinafter mentioned, and was then and there possessed of and was then and there running certain trains of cars upon said rail road, and the said plaintiffs were then and there possessed of three cows, three steers, three heifers and one colt, of great value, to wit of the value of one thousand dollars, and it was the duty of said defendant then and there to erect and maintain fences along the sides of its said rail road sufficient to keep horses, cattle, hogs and sheep off the said rail road except within the limits of cities towns and villages, and at the crossings of public

15 roads and highways, and the said defendant had not then and there fences along the sides of its said road at the point of the committing the grievances hereinafter mentioned sufficient to prevent horses, cattle, sheep and hogs from going upon said track of said rail road, which point was not within the limits of any city, town or village, or at the crossing of any public road or highway, and the said cattle and colt of said plaintiffs in consequence of the want of such fences went onto, and at the time of the committing the grievances hereinafter mentioned were on the said rail road at the point aforesaid where said rail road was not fenced as aforesaid in the manner required by the statute in such case made and provided, and which point was not within the limits of any city, town or village, nor at the crossing of any public road or highway, and the said cars of the said defendant were then and there being run on said rail road track, by the said defendants by its agents and servants, and the said cars of the said defendant were then and there by the said servants and agents so negligently and carelessly governed, controlled, operated and driven, that by and through the mere carelessness and negligence of the said agents and servants of the said defendant, were driven against the said cattle and colt of the said plaintiffs, and the said cattle and colt of the said plaintiffs were then and there thereby killed, whereby the plaintiffs have sustained damage to the amount of

16 one thousand dollars, and therefore
they sue us by
Strain & Bull
their Attorneys.

Afterwards to wit on the first day of
March 1858. The same being one of the days
of the March Term AD 1858 of said
Lancaster County Court certain other pro-
ceedings in said cause were had and
entered of record in said Court in the
words and figures following

John Timinegan &
James Timinegan

Shespare on the case.

The Illinois Central
Rail Road Company

This day came
The plaintiffs by Strain &
Bull their attorneys and on their motion it is
ordered that defendant plead herein by
to morrow morning.

And on motion of said plaintiffs attor-
neys it is ordered that an attachment
issue for Phillip Reilly a witness who has
been duly served with process, and does
not attend.

17 And afterwards to wit on said first day of March 1858 the said defendant by its said attorneys filed in the office of the clerk of the court aforesaid a demurrer to said plaintiffs amended declaration in the words and figures following to wit:

John Timmigan &
James Timmigan

The Illinois Central
Rail-Road Company

LaSalle County Court
March Term AD 1858

And the said defendant comes & says that the said plaintiffs ought not to have & maintain their action aforesaid against said defendant, because said defendant says that the several counts of the said declaration and the matters therein contained are not sufficient in law, nor are either of the counts in said declaration sufficient in law to maintain the action aforesaid, & that the said defendant is not bound by law to answer the same; wherefore the said defendant prays judgment, & that the said plaintiffs may be barred of their said action against said defendant.

And for special causes of demurrer to said counts in said declaration, & to each of them, the said defendant shows here to the court the following to wit:

1st In neither count in said declaration is there any averment that at the point on the railroad of said defendant, where

18 it is charged in the said declaration that the cattle & colt of said plaintiffs were killed, any fence was necessary to prevent horses, cattle, sheep & hogs from getting on the track of said railroad from the lands adjoining the same

2^d In neither count in said declaration is there any averment that the point on the railroad of said defendant, at which the cattle & colt of said plaintiffs are charged in said declaration to have been killed, was not one where said railroad runs through uninclosed lands lying at a greater distance than five miles from any settlement.

3^d In neither count in said declaration is there any averment that the point on the railroad of said defendant at which the cattle & colt of said plaintiffs are charged in said declaration to have been killed, is not one where the said railroad runs through lands where the proprietors of said lands had, at the time when said cattle & colt are charged as aforesaid to have been killed, already erected fences, or agreed with said defendant so to do.

4th In neither count in said declaration is there any averment that the said cattle & colt of said plaintiffs were killed through the wanton or wilful & gross negligence of the agents or servants of said defendant.

5th In neither count in said declaration is there any averment that the cattle & colts of said plaintiffs were killed through the gross & culpable negligence or wanton recklessness of the agents or servants of said defendant.

6th There is no statute by which such duty is imposed upon said defendant, as said plaintiffs in each count in said declaration claim to be incumbent upon said defendant.

7th Said defendant is under no obligation to fence said railroad in the manner & to the extent which said plaintiffs, in each count in said declaration, claim to be incumbent upon said defendant.

8th Each count in said declaration is in other respects informal, uncertain & insufficient.

9th At the time when the grievances in the first & second counts of said declaration complained of, are in said counts charged to have been committed, the six months provided for in the statute requiring railroad corporations to fence certain portions of their roads, had not expired.

Glover Cook & Wough
Defts Attorneys.

Afterwards to wit in The Second day of March 1858 the same one of the days of said March Term A.D. 1858 of said court further proceedings in said cause were had and entered of record in said court in the words and figures following to wit:

John Jimmegan &
James Jimmegan

vs.
Exposers on the Case,

The Illinois Central
Rail Road Company

This day came the plaintiffs by Strain & Bull their attorneys, and the defendant comes by D.L. Wough their attorney, and files a demurrer to the declaration of plaintiffs filed herein. whereupon after hearing the arguments of counsel, the said demurrer is sustained by the court, and on motion of said plaintiffs attorneys leave is given to amend the declaration and cause continued at plaintiffs costs to be taxed.

It is therefore considered by the court that said defendant have and recover of said plaintiffs their costs and charges by them at this time herein expended and that they have execution therefor.

And afterwards to wit on The Seventh day of June 1858, The same being one of the days of the June Term A.D. 1858 of said LaSalle County Court, certain further proceedings were had and entered of record in said court in said cause in the words and figures following to wit:

John Timmigan &
James Timmigan

The Illinois Central
Rail Road Company

Trespass on the case

This day came the
defendant by Wough
its attorney, and entered his motion to continue
for want of an amended declaration herein
whereupon this cause is continued at
plaintiffs' costs to be taxed and leave given
plaintiff to file amended declaration
herein ten days before the first day of
next term.

And thereafter to wit on the twenty
seventh day of August A.D. 1858 the said
plaintiffs by their said attorneys filed in
the office of the Clerk of said court an
amended declaration as amended in said
cause which is the words and figures
following to wit:

State of Illinois County Court, March
La Salle County 3d Term thereof A.D. 1858

John Timmigan and James
Timmigan complain of The Illinois Central
Rail Road Company in a plea of trespass
on the case, for that the said defendant
herebefore to wit on the twentieth day of
September A.D. one thousand, eight hundred
and fifty five, to wit at the county aforesaid
was an incorporated company, and was

possessed of, and was then and there
 operating a certain rail road known as
 the "Illinois Central Rail Road," which
 rail road has been opened and operated
 for more than six months before the
 committing of the grievances hereinafter
 mentioned, and was then and there poss-
 essed of, and was then and there running
 certain trains of cars on said rail road,
 and by reason of the premises it then and
 there became and was the duty of said
 defendant to keep and maintain on the
 sides of its said rail road fences suitable
 and sufficient to prevent cattle, horses
 sheep and hogs, from getting on to said
 rail road, except within the limits of
 cities, towns and villages and at the
 crossing of public roads and highways;
 Yet the said defendant disre-
 garding its duty in that behalf, did not,
 nor would keep and maintain fences, on
 the sides of its rail road, of any kind,
 but negligently and carelessly omitted so
 to do, at the point of the committing the
 grievances hereinafter mentioned, and
 which was a point where a fence was
 necessary on the sides of said Road to
 prevent horses, cattle, sheep and hogs
 from getting on the tracks of said road from
 the lands adjoining the same, and which
 said point was not within the limits
 of any city, town or village, nor where the
 owners of the land had agreed to fence the
 road, nor at the crossing of any public
 road or highway and was within a
 settlement of inclosed land, by reason

whereof three cows, three heifers two steers and one colt of the plaintiffs of great value to wit of the value of one thousand dollars went upon the said rail road of said defendant at the point aforesaid where the said rail road was not fenced as aforesaid, and which point was not within the limits of any city town or village as aforesaid, nor at the crossing of any public road or highway as aforesaid in said county, and the cars of said defendant then and there running upon the said rail road ran against the said cattle and said colt of said plaintiffs at the point aforesaid and killed all of said cattle and said colt, whereby and by reason of which the said plaintiffs have sustained damages to the amount of one thousand dollars

And also for that the said defendant heretofore to wit on the twentieth day of October in the year of our Lord one thousand eight hundred and fifty five, to wit at the county aforesaid was an incorporated company and was possessed of and was then and there operating a certain rail road known as the "Illinois Central Rail Road" and which rail road has been opened and operated for more than six months before the committing of the grievances hereinafter mentioned, and was then and there running certain trains of cars upon said rail road, and said plaintiffs were then and there possessed of three cows three heifers two steers and one colt of great value, to wit of the value of one thousand dollars, and the said defendant

had not then and there, on the sides of
 its rail road, fences suitable and sufficient
 to prevent cattle horses sheep and hogs,
 from getting on the said rail road, in
 the manner required by the statute in
 such case made and provided, at the
 point, where the grievances hereinafter
 mentioned were committed and which
 was a point where a fence was necessary
 to prevent horses cattle sheep and hogs,
 from getting on the track of said rail
 road from the lands adjoining the same,
 and which point was not within any
 city town or village, nor at the crossing
 of any public road or highway, nor
 where the owners of the land had agreed
 to fence the road, and was within a
 settlement of enclosed land. The said cattle
 and said colt of said plaintiff in consequence
 of the want of such fences went into the
 said rail road, at the point aforesaid
 where the same was not fenced as aforesaid,
 and which point was not within the limits
 of any city town or village, nor at the
 crossing of any public road or highway
 and the said cars of the said defendant
 were then and there being run on said
 rail road by the said defendant by its
 agents and servants, and the said cars
 of said defendant were then and there
 by the said agents of the ^{said} defendant, so
 carelessly and negligently governed, operated
 and driven, that by and through the
 mere carelessness and negligence of the
 of the said agents and servants of the
 said defendant they were driven against
 the said cattle and colt of said
 plaintiff, and the said cattle and

colt of said plaintiffs were then and there, thereby, killed, whereby the plaintiffs have sustained damage to the amount of One thousand dollars.

And also for that the said defendants heretofore to wit on the eighth day of October in the year of our Lord one thousand eight hundred and fifty seven, to wit at the county aforesaid was an incorporated company, and was possessed, and was then and there the owner of, and was then and there operating a certain rail road known as the Illinois Central Rail Road which said rail road has been open and operated for more than six months before the committing of the grievances hereinafter mentioned, and was then and there possessed of, and was then and there running certain trains of cars upon said rail road, and the said plaintiffs were then and there possessed of three cows, three steers, three heifers, and one colt, of great value, to wit of the value of one thousand dollars, and it was the duty of said defendant then and there to erect and maintain fences along the sides of its said rail road sufficient to keep horses, cattle, hogs and sheep off the said rail road, except within the limits of cities towns, and villages, and at the crossings of public roads and highways, and the said defendant had not then and there fences along the sides of its said road at the point of the committing the grievances hereinafter mentioned, and which was a point where fences were necessary to prevent horses, cattle sheep

& hogs from going on said Rail Road track from the lands adjoining the same sufficient to prevent horses, cattle, sheep and hogs from going upon said track of said rail road, which point was not within the limits of any city, town or village, or at the crossing of any public road or highway, nor where the owners of the land had agreed to fence the road, and was within a settlement of inclosed land, and the said cattle and colt of said plaintiffs in consequence of the want of such fences went on to, and at the time of the committing the grievances hereinafter mentioned were on the said rail road at the point aforesaid where said rail road was not fenced as aforesaid in the manner required by the statute in such case made and provided, and which point was not within the limits of any city, town, or village, nor at the crossing of any public road or highway, and the said cars of the said defendant were then and there being run on said rail road track, by the said defendants, by its agents and servants, and the said cars of the said defendant were then and there by the said servants and agents so negligently and carelessly governed, controlled, operated and driven, that by and through the mere carelessness and negligence of the said agents and servants of the said defendants were driven against the said cattle and colt of the said plaintiffs, and the said cattle and colt of said plaintiffs were then and there thereby killed, whereby the plaintiffs have

sustained damage to the amount of
one thousand, and therefore they sue &c by
Strain & Bull
their Attorneys.

And afterwards to wit on the sixth day
of September A.D. 1858 said defendant by
its said attorneys filed in the office of
the Clerk of said court a plea in the
words and figures following to wit:

The Illinois Central
Rail-road Company
at,

John Sinnigan &
James Sinnigan

La Salle County Court
September Term A.D. 1858

And the said
defendant comes & defends &c. & says that it
is not guilty of the said supposed
grievances laid to its charge, in manner
& form as the said plaintiffs have
complained against him, & of this it puts
itself upon the country.

Glover & Bough
Defts Attys.

And the plaintiffs do the like by
Strain & Bull
their Attys

And afterwards to wit on the said sixth day of September 1858 the same being one of the days of the September Term A.D. 1858 of said Court further proceedings were had and entered of record in said Court in said cause in the words and figures following to wit:

John Timmerman &
James Timmerman

vs.

The Illinois Central
Rail Road Company

Transpass in the case

This day comes the defendant by Hough & Glover their attorneys and on their motion the deposition of Peter Hareity filed herein is suppressed - To which ruling of the Court in sustaining said motion the plaintiffs then and there accepted:

Thereafter to wit on the seventh day of September 1858, that being one of the days of said term of said Court certain other proceedings in said cause were had and entered of record in said Court in the words and figures following to wit:

John Timmegan &
James Timmegan

vs.

The Illinois Central
Rail Road Company

Insup in the case

This day came
The plaintiffs by
Strain & Bull their attorneys, and the defendants
by Glover Cook & Cough their attorneys -
whereupon came the following jurors of a
jury to wit, Benjamin J. Shortwell, Samuel
R. Lewis, Thomas Harris, Allen Fisher, C. H.
Sutphen, Richard H. Smitzer, Amasa Foster,
J. S. Lighthall, C. C. King, John H. Sewell,
Life H. Powers, and J. Frazer who were
duly elected tried and sworn to well and
truly try the issues herein according to
the evidence and after hearing the evidence
and arguments of counsel the jury
retire to consider of their verdict
and after due deliberation therein
had return into court the following
verdict to wit: "We the jury find the
issues herein for the plaintiffs and assess
their damages at one hundred and
twenty seven dollars and fifty cents."
Whereupon the defendants by their
said attorneys enter their motion for a
new trial herein.

And afterwards to wit on the 13th day of
September 1858 the same being one of the days
of said September Term of said Court further
proceedings in said cause were had and
entered of record in said Court in the
words and figures following to wit:

John Timmegan &
James Timmegan

The Illinois Central
Rail Road Company

Treeburg on the case

This day again
come the parties herein by their said
attorneys and after hearing the arguments
of counsel upon the motion entered herein
for a new trial said motion is overruled
by the Court. To which ruling of the
court the defendant then and there accepted.

It is therefore considered by
the Court that said plaintiffs have and
recover of said defendants said sum
of One Hundred and Twenty Seven dollars
and fifty cents for their damage, and
also their costs and charges by them
herein expended and that they have
execution therefor.

Whereupon the defendants
pray an appeal, which is allowed
upon their entering into a bond in the
sum of Three Hundred dollars with
Joseph O. Glover as security, said bond to
be filed within forty days from the last
day of this term of this Court.

And afterwards went on the 15th day of September A.D. 1858 came the defendants by their said attorneys and filed their Bill of Exceptions, in the office of the Clerk of said Court, which is in the words and figures following to-wit:

James Sinnigan &
John Sinnigan County Court. September
Term A.D. 1858
The Illinois Central
Rail Road Company Tuesday Sept 7th 1858

Be it remembered that this day this cause came on to be tried, and the plaintiffs to maintain the issue on their part introduced, P. Reilly as a witness who testified as follows.

"I know the plaintiffs - they reside in Eden near the Illinois Central Rail Road. They are on Section No 1, T 32. R 1 - Road runs across their premises - Some stock which they claimed was killed on the road - one steer & some other cattle. This was not in any city, town or village - it was not at a crossing. The steer was worth \$10. There was a settlement in the vicinity of the place where the damage was done.

I saw the steer beside the track with three legs broken - not dead yet. Saw cattle tracks along the track - to the best of my opinion it was the last of September - a cow was killed next in October some time - was worth \$25. She was in Sinnigan's possession. She had a fore & hind leg broke - she was alive - she was ten rods away from the track. I did ^{not} examine the track. The cow

was on the east side of the track. There was a culvert there. The rail road track was 20 feet high from where the cow was. Her legs were broke below the knee.

There was no fence on the road at that time. The road had been in operation two years. Cattle could not be kept off without a fence.

Crop, Et- "I saw them before they were dead. - The steer was fat worth \$10. for beef. only had its legs broke. The cow was fat, worth about as much for beef as any thing. Saw persons at work upon the road last winter 3 years ago they were at work finishing some portion of the road, - can't swear that the cattle were killed in the night. I saw them in the morning. Think Keith & Snell were not then running a construction train. It was in Eden."

Direct resumed - "Saw the colt three legs broke by the road side a year ago worth \$90. near the place where the cattle were killed. Before he was hurt the road was only fenced on the west side about 40 rods from where the steer was killed north not in a city town or village or road crossing. A fence was necessary none of the stock got well."

Crop examined Jimmigans live together and sister keeps house for them - don't know which owned the cow. The colt was killed on the NW 1/4 of sec to 1. John Shew was in possession of that land. Cow & steer were not dead when I saw them.

Hugh Morgan called by plaintiffs testified as follows.

"I know plaintiffs. They reside near the mill. have seen a colt killed there in October last, its legs broke. I saw him dead three days after, 2 or 3 legs broken, about 40 rods from plaintiffs house. There was a fence on the west side of the Rail Road, but none on the east. I saw the cars pass & saw the colt in the ditch with his legs broke. I saw him in the track before with other horses.

The colt was worth from \$90. to \$100. It was later in the year than this. I was digging potatoes. John is a peddler, Road crosses about 20 rods from where the colt was." Cross Examined - "Both of the Jimmigans claimed the colt. I saw both side him, could not swear that he belonged to either of them.

Daniel Conway,

called by plaintiffs testified as follows. "I know plaintiffs, they live near the line of the Ill. Gen. Rail Road James Jimmigan came to get me to value 2 cattle near by the track. I valued them at \$20. each a cow & a steer. They were both dead. This was 1/2 a mile from plaintiffs residence on the west side of the Rail Road. This was in Sept last. There was no fence on the east side of the road. fence bad on the west side, next crossing was where Jimmigan lived.

I lived three miles from there. can't say that I ever saw the cattle before.

John Sha was there & Jimmigans, both cattle yellow. they were about three

33 years old, one steer, one heifer heavy with calf. I am well acquainted with prices of cattle. I valued a cow after that dark red, 3 years old, worth \$20. She was lying about 30 rods from where others were, fence was necessary to keep cattle off. The cow was dead, legs mashed up, don't know what did it, nothing but the cars about there to do it. No town village or city there, - crossing a mile away.
Crop Ex - "This stock was killed in La Salle co. I got at their value at six cents a pound."

Morgan Recalled, "Jinnegan's cattle were cows & one steer. The steer was red. Saw no other cattle about there."

The plaintiffs here rested. Deft called Geo W. Armstrong, who testified.

I have been dealing in cattle for 10 or 20 years back, - paid \$2. to $2\frac{3}{4}$. usual price $\$2\frac{1}{2}$ - cattle below a thousand were \$2. - those over were $2\frac{1}{2}$. 3 year old heifer worth from \$18 to 20. Steers \$22. to \$25.

Isaac Waddy, called by deft testified as follows.

I have been more or less acquainted with the work of the Illinois Central Rail Road, since the commencement of the work Keith & Snell had control of a construction train. They were contractors on the road and were running a train on their own account, - they controlled it as much as

they did their own buggy & horses, at the time the cattle were killed, running it past Todd's mill. a lot of fat cattle were killed at or near their work.

This was all the evidence. The defendant asked the Court to instruct the Jury as follows.

If the Jury believe from the evidence that Keith & Snell were at the time & place of the injury to said stock operating & controlling a Locomotive & cars upon said Illinois Central Railway track for their own use & benefit & over which the said Illinois Central Rail Road Company had no control, then the Jury must find for the defendant, unless they believe from the evidence that the injury to said stock was occasioned by some other means than the engine or train so operated by said Keith & Snell.

Which instruction the court refused to give to which decision of the court in refusing to give said instruction the defendant then & there excepted.

The Jury found a verdict for the plaintiff for the sum of \$127.50. The defendant moved the court for a new trial, which motion was overruled by the court, to which decision of the court in overruling said motion the defendant then & there excepted & prays that this its bill of exceptions may be signed, sealed & made a part of the record.

which is done

J. C. Champlin.

Judge La Salle Co Court Seal

And afterwards to wit on the 25th day of September A.D. 1858, said defendant filed an Appeal bond in the office of the Clerk of said Court, in the words and figures following to wit:

Know all men by these presents that we The Illinois Central Rail Road Company as principals, and Joseph O. Glover as surety are held & firmly bound unto John Finnegan & James Finnegan in the penal sum of Three hundred Dollars lawful money of the United States for the payment of which well & truly to be made the said Illinois Central Rail Road Company binds itself & the said J. O. Glover binds himself his heirs, Executors and administrators firmly by these presents. In witness whereof the said Railroad company has caused to be affixed hereto its corporate seal by the hand of E. Lane and the said Joseph O. Glover has affixed his hand & seal this 25th day of September A.D. 1858 -

The condition of the obligation is such that whereas the above named John Finnegan & James Finnegan did recover a judgment against the above bounden Illinois Central Rail Road Company in the La Salle County Court at the September Term thereof

A.D. 1858 for the sum of one hundred & twenty seven & 50/100 Dollars & the costs of suit, from which said judgment the said Rail road Company has prayed for & obtained an appeal to the Supreme Court of the State of Illinois. Now therefore if the said Illinois Central Rail road Company shall prosecute its said appeal with effect & pay or cause to be paid the said judgment costs, interest & damages in case the said judgment shall be affirmed, then this obligation to be void otherwise in full force & effect.

Seal

The Illinois Central Rail Road Company, by E. Lane Rest, Director

J. O. Glover Seal

State of Illinois ss.
La Salle County ss.

I, Philo Lindley Clerk of the County Court of said County and State do hereby certify the above and foregoing to be a true full and complete copy of the Record of the Proceedings, and of all the papers in said cause, as appear of record and on file in my office.

In Testimony whereof I have hereunto set my hand & affixed the seal of said Court at Ottawa this 19th day of March A.D. 1859

Philo Lindley CM
E. L. Greenick depy.

Refus 93 1/2 notis
Cady Kue

\$9.35

35
\$9.60 = Paid by R. C. Cook =

and now comes the appellee & says that
in the record proceedings aforesaid and
in the rendition of the judgment aforesaid
there is manifest error in this to wit

1st The court erred in refusing the instruction
asked by deft

2^d The court erred in overruling the motion
for a new trial

3^d The court erred in rendering the judgment
aforesaid in manner & form aforesaid

R. C. Crook

for appellant

And now comes the said Appellee
and says that there is not any such errors
in said record as is above alleged and
they pray that said judgment may be
affirmed.

Stearns + Bull

attys for appellee

State of Illinois
Supreme Court Third Grand
Division April Term 1839

The Illinois Central Rail Road
Company ~~Plffs~~ in error

^{vs}
James Finnigan et al ~~defts~~ in
error.

This case is submitted
on the part of the defendants in
error on the following written
argument.

The statement of the
case as it appears in the
abstract filed by the plaintiffs
in error except that in the
abstract of the testimony of the
witness Daniel Conway he is
made to say that the ~~defts~~ in
error live at a rail road crossing.
whereas the record shows that he
stated that they lived a mile
away from a rail road crossing.

No points or authorities have
been filed. but the counsel
for ~~Plffs~~ in error have stated
to us that the only two points
which upon are.

1st The refusal of the Court to
give the instruction asked for by
them. and

2nd The proof did not warrant

the jury in finding the verdict

The action is brought under
the Statute of Feb. 14th 1855 - page
959-4 D. B. Cook & Co's Edition.

By an ex-
amination of this Statute it will
be seen that so long as a rail road
reflects to fence its road, or to
keep the fence in repair. they shall
be liable for all damage which
shall be done by the agents or
engines of any such corporation
to any cattle, horses &c. thereon

Now although
the Rieth and Snell were contractors
on the road and running a construc-
tion train over that part of the
road, and had the entire control
of it, yet according to the
ruling of this Court in the case of
Hurd

at.
Wabash Navigation Company
XV Ill. p. 72. And in
Chicago St Paul and Fondulac
R. R. Co.

at.
Queen Mc Carthy XX Ill. 385.
They were the agents of the p^{ro}p^{er}
in error in the construction of
the road, and whether the engine
and train were the property of
the agents or of the Company

will according to the authority of the cases cited. They were, quo ad hoc the engines and train of the Company. And so the case is directly within the cases cited.

It will however be seen by an examination of the testimony in the cause that ~~the~~ it barley tends to show that the stock may have been killed by the engine of Smith & Snell. But it does clearly show that at least some of the stock was killed by the engines and cars of the Company.

And that the evidence does not show that the property was that of the plaintiffs below.

I reply that unless the verdict is entirely unsustained by the testimony of the witnesses it will not be disturbed.

In this case there is evidence tending to show and showing with reasonable certainty that the stock killed was the property of the plaintiffs below. And a verdict upon the ground stated would be with any precedent or authority whatever. So far as I am able to ascertain.

There can be no reason whatever why a rail road

1
Should not be held to a reason-
able, if not a strict accounta-
bility for all damages arising from a
failure to comply with the
plain, reasonable and easy re-
quirements of the law.

Strain & Bull
Attys for depts
in Error;

¹⁸⁹⁻¹⁵⁴⁸³
J.C.R.R. Company
vs
Livingston et al.

Argument on part of
Def'ts in error

Filed May 13. 1859
Leland
Clerk

Strain & Bull
Attys. for def'ts in
error

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

ILLINOIS CENTRAL RAIL
ROAD COMPANY,
vs
JOHN FINNIGAN & JAMES
FINNIGAN.

*Appeal from
La Salle County Court.*

This was an action in case for killing cattle brought by appellees, vs.
2 appellant, Nov. 27th, 1857.

4 Declaration filed November 27th, 1857

5 Demur to declaration filed December 10th, 1857.

10 Leave to file amended declaration, December 10th, 1858.

11 Amended declaration filed February 19th, 1858.

17 Demurrer to amended declaration filed March 1st, 1858.

20 Demurrer sustained.

21 Amended declaration filed August 21st, 1858.

1st. Count—That defendant was an incorporated company, operating a
22 Rail-Road for more than 6 months before the time when &c.—that it was
the duty of defendant to keep and maintain fences on sides of road suffi-
cient &c.—that defendant negligently and carelessly omitted so to do; that
the cattle of plaintiff for that reason were upon said road, and the cars
of said defendant then running on said road, then run upon said cattle
23 and killed them. Damages claimed, \$1000.

24 & 25 2d & 3d Counts in substance like the first, with this additional aver-
ment that the cars of defendant were there and then so negligently, care-
lessly governed and operated, that by the mere carelessness and negli-
gence of the agents and servants of defendant, the cars were driven
against the cattle of plaintiff and they were thereby killed.

23 Plea, General Issue.

20 Cause came on for trial September 7th, 1858, and the plaintiff called as
a witness P. Reiley, who testified:

I know the plaintiffs; they reside on section No. 1, Town 32, Range 1;
near Illinois Central Rail Road; Railroad runs across the premises; one
steer and some other cattle which plaintiff claimed were killed on the road.
This was not in any town, city or village, nor at any crossing; steer was
worth \$10; there was a settlement in the vicinity; I saw the steer beside
the track with three legs broken; it was not then dead; think it was
about the last of September; a cow was killed in October next; she was
worth \$25; she was in Finnigan's possession; she had a fore and hind
leg broke; she was alive and ten rods away from the track on the east
31 side of it. There was a culvert there and Railroad track was 20 feet high
above the place where the cow was; there was no fence on the road at

that time; the road had been in operation two years; cattle could not be kept off without a fence.

On cross-examination witness testified:—That steer was fat; worth \$10; only had his hind legs broke; cow was fat; worth as much for beef as anything; can't swear that cattle were killed in the night; I saw them in the morning.

Direct examination resumed.

I saw the colt with three legs broke by the road side a year ago; he was worth \$90; this was near where the cattle were killed; the railroad was only fenced on the west side; about 40 rods from where the steer was killed, north.

Cross-examined:—Finnigans live together; dont know which one owned the cow; colt was killed on north-west quarter of section No. 1; John Shea was in possession of it.

Hugh Morgan called by plaintiff testified as follows:—I saw a colt which was killed there in October last; its legs were broken; saw it dead two or three days afterward; this was about 40 rods from plaintiffs' house; I saw the cars pass and saw the colt on the track with other horses and saw him in the ditch with his legs broken after cars had passed; road crosses the track about 20 rods from where colt was killed.

Cross-examined:—Both of the Finnigans claimed the colt; saw both of them ride him.

Daniel Conway for plaintiff testified:—That James Finnigan came to get him to value two cattle near the track; valued them at \$20 each, a cow and a steer; they were both dead; this was half a mile from plaintiffs' residence on the west side of railroad in September last; no fence on the east and bad on the west side; Finnigan lived at next crossing; I
33 valued a dark red cow then; afterwards at \$20; she was lying about 50 rods from where the others had been; fence was necessary to keep cattle off; I valued the cattle at six cents a pound.

Plaintiffs rested.

George W. Armstrong called by defendant.

Testified that he had been dealing in cattle 9 or 10 years past; usually paid from \$2,00 to \$2,50 per hundred; under 1000 pounds about \$2,00; over, \$2,50; a three year old heifer is worth from eighteen to twenty dollars; a steer from twenty-two to twenty-five dollars.

Isaac Hardy called by defendant.

Testified, that he had been acquainted with the work of Illinois Central Railroad since the commencement of the same; Kieth & Snell were contractors on said Road at that time; they had entire control of a construction train, and were running it past that point, and a lot of fat cattle were killed near where they were at work.

This was all the evidence.

34 The defendant asked the Court to instruct the Jury as follows:

"If the Jury believe from the evidence that Kieth & Snell were at the time and place of the injury to said stock, operating and controlling a locomotive and cars upon said Illinois Central Railway tracks for their own use and benefit, and over which the Illinois Central Railroad Company had no control, then the Jury must find for the defendant, unless they believe from the evidence that the injury to said stock was occasioned by some other means than the engine or train so operated by said Kieth & Snell."

Which said instruction was refused and defendant excepted.

The Jury found for plaintiff \$127,50.

Defendant moved the Court for a new trial, which the Court overruled
and defendant excepted. Appeal taken and Bond filed.

ERRORS ASSIGNED.

1st. The Court erred in refusing the said instruction asked by defendants.

2d. The Court erred in overruling the motion for a new trial.

3d. The Court erred in rendering judgment aforesaid in manner and form aforesaid.

189-83
W. Lunt. W. R. Co

vs
John Finnegan et al

Abstract.

Filed April 19, 1859

L. Leland
Clerk