

12278

No. _____

Supreme Court of Illinois

Central Military Tract R. R. Co.

vs.

Rockafellow.

71641  7

State of Illinois }
Bureau County } In Circuit Court of Said County
October Term AD 1855.

Be It Remembered that on the 14th day
of September AD 1855. Came into the office of the
Clerk of the Circuit Court, within and for Said County
Messrs Taylor and Stepp and filed in Said Clerks office
a preceipe for Summons, which is in the words and
figures following To wit.

Agasilans Rockafellow

vs

The Central Military tract
Rail Road Company

In Case

Damages \$100.00

The Clerk of Said Court
will please issue a Summons in the above entitled
Cause against the above defendants returnable on the
first day of the next Oct. Term of Said Court 1855;
as the law in such cases provides. Lay the damages
at \$100.00 the action Case.

Taylor & Stepp attys for Plff

And on the Same day to wit 14th day of September
AD 1855. Summons Issued in the above entitled Cause
in the words and figures following To wit.

State of Illinois Bureau County } ss. The People
of the State of Illinois. To the Sheriff of Said County
Greeting. We Command you that you summon
the Central Military tract Rail Road Company if

Filed Sept 14. 1855.
C. C. Fisher Clerk

They shall be found in your County personally to be
and appear before the Said Circuit Court of Said County
on the first day of the next term thereof, to be holden
at the Court house in the Town of Princeton, in Said
County, on the first Monday in the month of October
next, to answer unto Agasilans Rockafellow of a
plea of Case, To the damage of the Said plaintiff, as he
says in the Sum of One Hundred dollars, and have you
then and there this writ, with an enclosement thereon in
what manner you shall have executed the same.

Witness Edward Mc Fisher Clerk of our Said Circuit
Court, and the Seal thereof, at Princeton, this
14th day of September in the year of Our Lord
One thousand Eight Hundred and fifty five

Edward Mc Fisher Clerk
Served by Reading to Henry S Briggs Freight agent
for within named C. M. S. R. R. Co, at Arlington this 17th
day of Sept 1855.

Stephen G. Paddock
Shuff Bn Co Ills.

And afterwards to wit on the 21st day of September
A.D. 1855. came the Said Plaintiff By Taylor & Stepp his
attorneys and files his declaration herein in the words &
figures following to wit.

Agasilans Rockafellow	vs	Circuit Court of
		Bureau County
The Central Military Tract		of the October Term
Rail Road Company		A.D. 1855.

Filed Sept 17th 1855
E Mc Fisher clk

3 The State of Illinois Bureau County, to wit,
Agwilans Rockefeller, by Taylor & Stupp his attorneys
Complains of the Central Military tract Rail Road
Company, in a plea of the Case, for that whereas, the
Plaintiff before and at the time of the committing, by
the defendants, of the grievance hereinafter mentioned
To wit. On the first day of May A.D. 1855, at the County
aforesaid, was lawfully possessed of, and the Owner of
a certain work or of great value, To wit, of the value
of One Hundred dollars, which said Ore, was then and
there lawfully running at large, and the defendants
were then and there possessed of a certain Rail Road
which was then and there unin closed and Open to Stock
running at large, and the defendants were also then
and there possessed of a certain Steam Engine and Cars
attached thereto, running upon said Rail Road,
which said Steam Engine and Cars were then and there
under the Government and direction of certain then ser-
vants of the defendants, and whilst the said Engine
& Cars were then and there so running upon said Road
under the Government & direction of said Servants,
the said Ore of the plaintiff, so as aforesaid then and there
lawfully running at large, then and there lawfully came
and was upon said Rail Road, whereupon the defendants
by their said Servants, then and there so carelessly
negligently unskillfully and improperly, chove, Governed
and directed the said Engine and Cars, that by and
through the Carelessness, negligence, unskillfulness,

Filed Sept 21 1855
Edw Fisher clk

and improper conduct of the defendants by their said
^{the said Engine & Cars of the defendants.}
servants, then and there run and struck with great
force and violence upon and against the said Car of
the Plaintiff and thereby then and there wounded,
bruised, crushed and damaged said Car of the Plaintiff,
and the said Car of the Plaintiff thereby then and
there became and was wholly ~~worthless~~, and lost to the
Plaintiff, and the said Plaintiff thereby then and
there was also deprived of the use of the said Car, and
of his mate for a long space of time, to wit thence hitherto,
to wit at the County aforesaid to the damage of the
Plaintiff of One Hundred dollars, and therefore he
brings his Suit, &c. by Taylor & Stiff his attorneys,

Pleas before the Hon^{ble}. Mr. E. Hollister Judge
of the ninth Judicial Circuit of the Circuit Court of
the State of Illinois, at the October Term of said
Circuit Court for the County of Bureau, begun and
held at the Court House in Princeton within and for
said County, on Tuesday the Second day of October in the
Year of our Lord one thousand eight hundred
and fifty five.

Present Hon^{ble} Mr. E. Hollister Judge
Edward M. Fisher Clerk
Stephen G. Paddock Sheriff
W. H. L. Wallace States atty

Agesilans Rockafellow

vs

Case

The Central M. T. R. R. Co

Now Comes the Said defendant
by Kendall their attorney and files their plea in
abatement, to the Said Plaintiffs declaration filed
herein, which is in the word and figures following
to wit,

State of Illinois Bureau County }
Central military tract Rail Road Company }

Plaintiff } In Circuit Court of
vs } Said County of the

Agesilans Rockafellow } Oct 9. 1855.

And the Said defendant by their attorney
come and defend the wrong and injury when &c. and pray
judgment of the Said writ and declaration, because
they say that before the suing out of the writ on this
action, and before the Commencement of this Suit, to wit:
on the 13th day of June AD 1855, at the County of aforesaid
before Benjamin Park, Esquire one of the acting justices
of the peace in and for Said County (duly commissioned
and qualified to act as such justice of the Peace)
the Said plaintiff impleaded the Said defendant
in a plea of Trespass to the personal property of the
Plaintiff in which said action the plaintiff then and
there demanded for his damages a sum not ex-
ceeding or exceeding one hundred dollars, to wit the
sum of ninety nine dollars and ninety five cents, of
which said plea, and the said parties plaintiff and

defendant. The Said Justice of the peace then and there had jurisdiction, and afterwards, on the return day of the Summons duly issued in the Said action, and duly served on the defendants, to wit, on the 21st day of June A^d 1855, at the County aforesaid, the Said parties plaintiff and defendant, appeared to the Said action before the Said Justice of the peace, the Said action being then and there pending before the Said Justice of the peace, and on the Said 21st day of June 1855, at the County aforesaid, Such proceedings were had in the Said action before the Said Justice of the peace, that a judgment was then and there rendered in the Said action, by the Said Justice of the Peace in favor of the Said Plaintiff, and against the Said defendants for the sum of fifty dollars damages and Costs of the Said Suit, from which Said judgment the Said defendants afterwards to wit on the 4th day of July 1855, took an appeal to the Said Circuit Court of the County aforesaid, and the Said action is now still depending by the appeal aforesaid, and undetermined in the Said Circuit Court, to wit at this present term thereof, and the defendants aver that the whole Cause of the Plaintiffs action aforesaid, before the Said Justice, and which is now is pending and undetermined in the Said Circuit Court by the appeal aforesaid is the Same Identical Cause of action set forth in the plaintiffs declaration in this present Suit mentioned and none other or different and that the parties in

the Said former Suit and in this Suit are the same
identical parties and none other or different, as by the
record thereof now remaining in this Court appears,
and that the Said former Suit is still pending in the
Said Court last mentioned, and this they are ready to
verify. Wherefore they pray judgment of the Said
Court and declaration in this Suit, and that the same
may be quashed. Kendall for defendants
State of Illinois Bureau County ss.

Agosilans Rockafellone } In the Circuit Court of the
vs } Oct 1. 1855,

The Central Military tract

Rail Road Company } Milo Kendall being duly

Subscribed & sworn to before
me this 1st day of October
A.D. 1855.

Sworn on Oath Says that the
plea hereunto above annexed is true
O.D. Fisher At } in substance and in fact.

Milo Kendall

Agosilans Rockafellone

vs

case To wit on the 2 day of

The Central Military

Said Term

Tract Rail Road Company

Now Comes the plaintiff by Taylor
and Stepp his attorneys, and the defendants Come by
Kendall their attorney, and this Cause Comes up on the
plaintiffs demurer to Said defendants plea in
abatement filed herein, and after argument of
counsel, and the Court being fully advised in the
premises. It is considered that Said demures be sustained

On motion of the Said defendant, leave is given to
file his pleas by Friday afternoon

Agasilans Rockafellow

vs Care To wit on the 4th day
The Central M.I. RR Co of the Term

At one come the defendants by Wendall
their attorney and file their pleas in the words and
figures following to wit.

State of Illinois - In the Bureau Circuit Court
Bureau County } of the Oct 9. 1855.

Central Military tract
Rail Road Company

vs and the Said defen
Agasilans Rockafellow } dants by Wendall
} their attorney come and

defend the wrong and injury when &c. and
say that they are not guilty of the Said Supposed
grievance above laid to their Charge (or any part
thereof) in manner and form as the Said plaintiff
hath above thereof complained against them. and
of this the Said defendants put themselves upon
the Country &c. At Wendall for defendants
and the plaintiffs doth the like

By Taylor & Stipp

and for further plea in this behalf defendants say
action now &c. because they say that the said sup-
posed grievance & injury if committed at all wholly
arose through the fault, negligence and careles-
ness of the plaintiff and might have been
wholly avoided by the use of due and proper care
on the part of the said plaintiff, and this are
ready to verify wherefore they pray judgment

Hendall for defendants

and for further plea in this behalf defendants
say action now &c. because they say that the said
Oro of the plaintiff at the time when &c. was by and
through the fault, negligence and carelessness of
the plaintiff running at large in the vicinity
of and upon the defendants said Railroad, the said
plaintiff then and there knowing and suffering
the said Oro to be at large and upon said Railroad,
and in consequence of said carelessness, fault and
negligence of the plaintiff, the said Oro at the
time when &c. was injured and this the defendants
are ready to verify wherefore they pray judgment

Hendall for Defts

Agasilans Rockefeller

vs

Case

The Central Military Tract
Rail Road Company

To wit on the
6th day of the Term

Now Come the defendants by
Hendall their attorney and move the Court for

leave to file an additional plea herein. which motion
is sustained, and leave is given said defendants to file
an additional plea herein. in the words and figures
following To wit.

Central Military Tract

Rail Road Company

vs

Agasilans Rockefeller

Bureau Circuit Court

October Term 1855

And now on this 10th day

of said term & in term time the said defendants by
leave of the Court for this purpose first had and ob-
tained. for further plea in this behalf says acts
now. because they say that the plaintiffs or. for the
injury to which this suit was brought was an old
weak, poor infirm and debilitated or. of which
age weakness infirmity and debility of the or.
plaintiff long before and at the time of the injury
had knowledge. that plaintiff knowingly pur-
posely and negligently kept and pastured the
or. on the open unfenced prairie, and in the
immediate vicinity of and upon the defendant
said Rail Road. and the plaintiff knowingly
negligently and carelessly suffered and permitted
the or before and at the time of the injury to
wander and stray upon and about the defendant
Rail Road and on the lands of defendant, and
at the place of the injury, and on the lands
adjoining the said Rail Road, not belonging

to plaintiff. and the or to straying wandering
and going upon the said adjoining lands and
the land of defendant and on said Rail Road
by the sufferance permission negligence and care-
lessness of plaintiff. Come and was on the defendant's
railroad track at the time when & C and the defend-
ants by their agents and servants at the time when & C
were then and there running their locomotive
and train over and upon the said Rail Road
and the or by reason of the weakness, old age,
infirmity and debility aforesaid was unable then
and there to escape off the track of said Rail
Road in time to avoid the injury complained
of by plaintiff. while the said or. could and
would have so escaped the said injury but for
the weakness, old age infirmity & debility of the
said or. wherefore and by reason of the said care-
lessness and negligence of plaintiff suffering and
permitting the or to stray wander and come on said
Railroad, in manner aforesaid, the or was injured
and this the defendant is ready to verify wherefore
he prays judgment. Wendall for Def.

and the plaintiff comes by Taylor and Stipp
his attorneys and files his demurrer to the defend-
ants second and third pleas filed herein in the
words and figures following to wit

State of Illinois } In Circuit Court
Bureau County } October Term AD 1855
Agasilans Rockafellone

vs

Case

Central Military Tract
Rail Road Company

Now Comes the plaintiff by
Taylor and Stupp his attorneys and Says that the
Second and third pleas of the defendants by them
Secondly above pleaded and the matters and things
therein set forth in manner and form as the same
are above pleaded are not sufficient in law to
prevent the plaintiff from having or maintaining
his aforesaid action thereof against the said defen-
dants. and he the said Plaintiff is not bound
by law to reply to the same and this he is ready
to verify wherefore he prays judgment. and
plaintiff assigns for causes of Special demurrer to
2^d plea 1st that said plea amounts to general issue
Taylor & Stupp for Plff.

Agasilans Rockafellone

vs

Case

Central Military Tract
Rail Road Company

To wit on the 8th day of
said Term

Now Comes the said parties
by their attorneys aforesaid and by agreement of said
parties it is considered by the Court that this Cause
be continued to the next term of this Court.

Plea before the Hon^{ble} M^cCallister
Judge of the ninth Judicial Circuit of the Circuit
Court of the State of Illinois, at the January Term of
Said Circuit Court for the County of Bureau begun
and held at the Court House in Princeton within
and for Said County on Tuesday the fifteenth
day of January in the year of Our Lord One
thousand Eight Hundred and fifty six

Present Hon^{ble} M^cCallister Judge

Edward M^cFisher Clerk

Stephen G. Paddock Sheriff

W^m Wallace Dist Attorney

Agesilans Rockafellows

vs

Case To wit on the 22^d day

The Centra^l M. I. R. R. Co

of January A^d 1856

Now Come the Said Plaintiff

by Taylor and Stepp his attorneys and files his
demurrer to the Said defendants fourth plea filed
herein in the words and figures following
To wit,

State of Illinois } In Circuit Court.

Bureau County } January Term 1856

Agesilans Rockafellows

vs

The Cent M. I. R. R. Co

And The Said Plaintiff

by Taylor + Stepp his attorneys comes and says that

as to the 4th plea of the defendants by them fourthly
above pleaded. the said Plaintiff ought not to be
barred from having or maintaining his aforesaid action
thereof against the said defendants. Because he
says that the said fourth plea of the said defendants
and the matters and things therein set forth in
manner and form as the same are above pleaded
are not sufficient to bar or prevent the plaintiff
from having or maintaining his aforesaid action
thereof against the said defendants. and this he is
ready to verify wherefore he prays judgment &c.

Taylor & Stupp attys for
Plff

and plaintiff assigns for Special Cause of Demurrer
1st that said 4th plea amounts to general issue
2^d that said plea is double
3^d that said plea is uncertain

Taylor & Stupp for Plff.

Agencies Rockefeller

vs

Case

Cent M T R R Co

Jan'y 24 1886

Now comes the plaintiff by Taylor
and Stupp his attorneys, and the defendants come by
Hendall and Cook their attorneys, and after argument
of counsel and the Court being fully advised in the
premises. Said Demurrer is overruled as to said Third
plea, and sustained as to said Second and fourth pleas.

On motion of said Plaintiffs attorney leave is given
said plaintiff to file his replication to the defendants
third plea herein, and issue being joined on said
defendants first plea and the plaintiffs Replication
to said defendants third plea. The Court orders that
a jury be empaneled to try the said issues, and
there comes a jury of twelve good and lawful
men to wit. Bazel Young, Abram Carmichael,
Warren Rackley, S. W. Whiting, Charles Leeper, David
Chace, Harry C. Field, Wm Campbell, Charles S Boyd,
Aquila Triplet, James M Dexter, and Edwin S.
Humphrey, who are duly elected tried and sworn
well and truly to try the said issues, and by the
agreement of said parties said jury have leave to
separate and meet at the opening of the Court to
morrow morning.

Agesilaus Rockefeller

vs

Case

Central M. T. R. R. Co

January 25 1856.

Now comes Kendall in behalf of
the defendants and moves the Court to Suppress the 8th 9th
17th & 21st Interrogatories in the deposition of William
Fore, and the answers thereto. And the Court considers
that said motion be overruled as to the 8th & 9th
Interrogatories and Sustained as to the 17th and 21st
Interrogatories, and that said 17th and 21st Interrogatories
and the answers thereto be Suppressed. Said defend
ants -

also move the Court to Suppress the 20th Interrogatory
and answer thereto, which motion is overruled.
Whereupon Said Defendants by their attorney move the
Court to Suppress so much of Said Interrogatory and
answer thereto as relates to the Conversation of the plaintiff
with the Conductor, which motion is renewed,
and Said jury by leave of parties have leave to
separate to meet at opening of Court to morrow morning.

Agostaus Rockefeller

vs

Case Jan 26, 1856.

Cent Military Tract R.R Co

Now come the parties by
their attorneys aforesaid, and the jury empannelled
aforesaid, and Said jury upon their Oaths Say
We of the jury do find the Said Defendants guilty
in manner and form as charged in Said Declaration,
and assess the damages which the Said plaintiff
hath sustained at the Sum of Fifty Dollars.

Whereupon the Said Defendants by their Said attorneys
move the Court for a new trial herein, which motion
is overruled. It is therefore considered by the
Court that Said Plaintiff have and recover of the
Said Defendants the Said Sum of Fifty Dollars his
as aforesaid, Together with all his Costs and
Charges in and about his Suit in this behalf
expended, and that he have execution therefor
and the Said Defendants by Wendell their

attorney pray an appeal herein to the Supreme Court, which motion is allowed and said appeal taken on condition that said defendants file their appeal bond herein in the sum of one hundred dollars with Charles L. Welsey as security within thirty days from this date.

Copy of Bill of Exceptions

Agesilans Rockefeller	}	Bureau County
vs		Circuit Court
The Central Military and		January Term AD 1856
Rail Road Company		Action on the Case.

Be it remembered that on the trial of this cause the plaintiff offered in evidence the deposition of William Fore. The defendant objected to the 8th 9th & 21st Interrogatories in said deposition, and the answers thereto severally, and showed that each of said Interrogatories were objected to at the time of taking the deposition by defendants, and the objection notice in said deposition by officers taking the same. The Court overruled the said objection to the 8th & 9th Interrogatories, and permitted the same with the answers thereto, to be read in evidence, to which decision of the Court the defendant then and there excepted. The Court sustained the defendants objection to the 17th & 21st Interrogatories and excluded the same from the jury. Said deposition except the 17th & 21st Interrogatories and the answers thereto

was read in evidence. Defendant then moved
the Court to exclude from the jury the 20th Interroga-
tory and the answer thereto, and so much of the
answer to the 2^d Direct Interrogatory as relates the
conversations of the engineer and Conductor severally with
the plaintiff which motion the Court then over-
ruled, to which decision the defendants then and
there excepted. Said deposition read in evidence
is as follows

The deposition of William Foss, of the County
of Wabash, and State of Indiana, a witness produced,
sworn and examined before me W. M. Jearns, a
Notary Public in and for the Town of Princeton, in
the County of Bureau and State of Illinois, on
the 5th day of December A.D. 1855, at the office
of Taylor and Stupp in said County. Taken pursu-
ant to agreement of attorneys for Plaintiff and
defendant, to be read as evidence on the trial of a
certain suit at common law, now pending and
undetermined in the Circuit Court in, and for the
County of Bureau and State of Illinois, wherein
Agessians Rockafell is plaintiff and the Central
Military Tract Rail Road Company is defendant,
on the part and behalf of the said Plaintiff -
The said William Foss, being first duly sworn
according to law, deposeth and saith, in answer to
the several Interrogatories on the part of the

plaintiff viz -

Interrog 1st What is your name, age, residence and Occupation

Ans my name is William Fore, I am thirty one years of age, I reside in the County of Wabash, State of Indiana, my Occupation is that of a farming.

Interrog 2^d If you know anything about Agesilas Rockefeller having an ore killed on the Central Military Trust Railroad, State all you know about it.

Ans I know he had one killed, about the middle of April AD 1855. I suppose it was between 6 & 7 in the evening - the ore was killed by a freight train about a quarter of a mile from the depot at Astington - When I first saw the train it was about three or four hundred yards from where it first caught the ore. When it caught the ore on the cow catcher it shoved it along some seventy five yards - When Rockefeller & Bryng & I first came up to the bank the engineer was just in the act of knocking the ore in the head. he the Engineer looked up and said is this your ore. Yes Sir - Mr Rockefeller said. Then the engineer said you ought to have another one and go to hell - Then words passed between them which I do not recollect. They were pretty sharp ones. by this time the

Conductor come up and he told Mr Rockafellow
he should be paid for the Ore. By that time
they had the Ore knocked in the head and rolled
off the track. ^{The Conductor} hollered go ahead - and away they
went.

Interrog 3^d Was the Ore on the Railroad track when you first
saw the train coming.

Ans No, not when I first saw the train coming. I do
not suppose

Int 4th Did you see the Ore on the tracks before the
train struck him

Ans No Sir,

Int 5th Do you know whether the Ore was on the Rail-
road track at the time you first saw the Cars
or not.

Ans No Sir I do not.

Int 6th How far were you from the Rail Road track
at the time you first saw the Cars coming.

Ans It was about a quarter of a mile at the near-
est distance and it may be not that far.

Int 7 If the Ore had been on the track at the time
you first saw the Cars could you have seen
him, and if you could not why?

Ans I could not - It was rather too dark and raining.

How far could a person on the train have seen the Ore at the time you first saw the train coming?

I think you could have seen him a quarter of a mile and over.

Would a person on the train have had a better opportunity to see the Ore at the time you first saw the Cars, than you would from where you were and if so why?

Yes Sir, where the cattle crossed the track it was right at the mouth of a cut - and in lower ground than where I stood - and the fences being in the way. So I think on the Cars they had a better opportunity than I could.

Do you know whether the Ore ran along the Railroad any distance before the Cars struck him & if he did, how far - & how do you know it?

He did run along the rail Road before the Cars struck him - he ran seventy two steps. I knowed it by the tracks.

Was the track muddy or dry -

Muddy -

Interrog 12th Was the mud deep or Shallow & how deep was it.

Ans It was deep - from six to ten inches deep from the way he sunk in -

Interrog 13th Were you acquainted with the Conductor or Engineer on that Train & had you ever seen either of them before

Ans I was not - but I had seen them before -

Ans 14th Did they usually run the freight train on that road.

Ans The Conductor did. The Engineer ran the passenger & freight both.

Interrog 15th Did you hear any whistle from the train at or about the time of killing the Ore. if you did about how far was the train from the place where it first struck the Ore. at the time you first heard it.

Ans I heard a whistle before the time of killing the Ore - the train was about two hundred steps from the place where it first struck the Ore -

Interrog 16th What was the Ore worth at the time he was killed -

Ans He was worth about fifty five or sixty dollars

Interrog 8th How many oxen Green kept. Rockafellow left after the train killed the one you have mentioned -

Ans Five

Interrog 9th How many did he use in breaking prairie that Spring after the death of the one that was killed,

Ans Sometimes two yoke. & Sometimes three Yoke -

Interrog 20th Where did Rockafellow get another Steer to make the three yoke -

Ans He put in a same Steer - with the ~~add~~ ox. but he was not Old enough to be of much service he was three years old.

Interrog All Such interrogatories on the part of the plaintiffs as are leading or irrelevant, or otherwise Objectionable & the answers thereto - Defendants by their attorney objects to.

Cross. Examination

Interrog 1st What was the age of the ox which you speak of as being killed on the Railroad,

Ans It was about nine years Old.

Interrog 2^d When and where did you first know the ox.

Ans I first knew him when Mr Rockafellone first bought him. it was down in Green County Indiana in the year 1850.

Interrog 3rd Did you at that time know the age of the ox

Ans He was then four years old.

Interrog 4th To one do you know

Ans I know from what the man said he got him & I helped to drive him home

Interrog 5th Had the ox been worked & used considerable at that time when Rockafellone first bought him.

Ans Yes he had.

Interrog 6th Is it your judgment the ox was only 4 years old then.

Ans Yes Sir. it was my judgment. I knew it by the Rinkles on the horn.

Interrog 7th What was the Condition of the ox at the time it was killed.

Ans What I call in good working order

Interrog 8th Was his mate of the same age that died in the winter

Ans Yes sir.

Interrog 9th What was the occasion of the death of the mule to
that or that was killed on the Railroad.

Ans It fell into the Slough well at the time of the snow
storm.

Interrog 10th What use had Rockafellow put those ore in to
during the time that he owned them.

Ans While they were in Indiana they were put cutting
on the Canal & such work as was to be done on
the Canal.

Interrog 11th How long did he use them Canalling.

Ans Between two and three years.

Inter 12th Did you work for Rockafellow at Canalling.

Ans I did except the first year that he got the ore.

Inter 13th Did you come to this State with Rockafellow

Ans No Sir.

Inter 14th How long have you lived with Rockafellow
in this State -

Ans Since a year ago last fall.

Inter 15th At what time did Rockafellow move to Bureau County,

Ans Two years ago last September -

Interrog 16th Are you in any way related to Rockefeller, if so, state how.

Ans Yes Sir, he is my uncle -

Int 17th Did you ever deal in cattle, buying or selling of them.

Ans No Sir not much.

Int 18th Do you claim to be a judge of the value or age of stock -

Ans I profess to be a little judge of Cattle but not as much as others.

Interrog 19th At the time of the conversation between Rockefeller and the engineer, did you hear Rockefeller threaten to shoot any of the Railroad hands or agents.

Ans At the time he and the Engineer were jawing there if my memory serves me right - the Engineer stood in motion to throw his axe - and Rockefeller said if I had my gun I would shoot you.

Int 20th Did you see the Ox at all from the time you first saw the train until the train stopped -

Ans No Sir,

Interrog 21st Did Rockefeller suffer the Ox in question to run at large on the prairie in the vicinity of this Rail Road.

Ans He did.

Int 22^d Did he suffer it to Run on the Railroad

Ans It did not go on only as it crossed, as I know
of the rail road was not fenced at the time.

Int 23^d Was there anything to hinder his Stock from
running on the Railroad when they pleased.

Ans There was not.

Interrog 24th How far is it from Stockpellers House to the
nearest point on the Railroad.

Ans It must be some six hundred yards or steps.
William Loo.

State of Illinois }
Bureau County }
Town of Princeton }
of Princeton in said County }
do hereby Certify, that

the above deposition of William Loo, was
sworn to, and signed by the deponent, before me
and in my presence, and was by me read over
in the hearing of said witness, and I Certify that
the said deposition was taken by me on the fifth
day of December A.D. 1855, at the office of G.W. Lipp
in the said Town of Princeton - on the fifth day
of December A.D. 1855, between the hours of Ten

O'clock in the morning and ten O'clock in the evening of said day. Given under my hand and seal notarial, this fifth day of December A.D. 1855.

J.S.

W. M. Fearing Notary Public

Plaintiff then called John Briney as a witness, who testified as follows: ^{where} ~~Some~~ about the middle of April 1855. I was going to the stable. Saw the locomotive coming. Saw it stop still. I did not hear a whistle. Went down there & found that they had run over Plffs Or. The Or had one horn off & was otherwise so badly bruised that he could not rise. The Or had gone along the track, from the point where he came on the road ahead of the Cars about 70 Yds. he came on to the track at a place where cattle and men were in the habit of crossing the R.R. track. It was on plaintiffs land. It was between two cuts through which the R.R. ran. The train was running eastward. When I first saw the Cars they were about 100 Yds from the place where the Or was killed. It was late in the afternoon, but I think before sun down. It was rainy & foggy. I was about $\frac{1}{4}$ th of a mile off. I could have seen a man standing on the top of the Cars when I first saw them, but did not see one on them. The place where the Or was killed was about 1/2 mile from Arlington east. The road runs on a straight course from Arlington. I saw the tracks of the Or where he had passed along on the

Centre of the Rail road track. I tracked him back from the place where he was killed to where he came on. It was muddy. I know the Or. drove him a good deal he was worth about \$60. he was a good work or. almost too fast for the other or. he was in as good working order as or. that work in the winter usually are. We had worked him during the winter and the day before he was killed. with this or Rockafellows had 3 Yoke of Cattle. The Cattle had been running on the prairie and were going home when the or was killed. the place where the or came on the road was where men and stock usually crossed. I think it is down grade. from east to west where or was killed.

Cross Examined - The Cattle were crossing. they all had crossed but this or. he went up the track. the Cattle were running at large. might have run on the rail road track if they liked. think the wind came from the east. People traveled on a track that run north from the place where the or came on to the ^{rail} road track. crossed the Rail Road at that place. I don't know any thing about a land out road. I did not mean that the Rail road track where the or was. was Rockafellows land. It was his before the Rail Road was built. Where the or was killed. The Rail Road occupied it one hundred feet wide. do not resumed. Jeff lived about 50 rods north from where the or was killed. The track that was

traveled was fenced on one side by Waights fence. Plaintiff then called Benjamin Parks, who testified as follows. I have never traveled across the Rail road at the place where the Ore was killed. There is a track that is traveled Somewhere there. I have never been enough along there to tell much about the travel. I saw a place Somewhere there, where there was tracks across the Rail Road of men and horses I think wagons, but am not positive. my son in law has been in the habit of Crossing repeatedly with his wagon & his sled Somewhere there, & must have crossed there. here the plaintiff rested his case.

The defendant to maintain the issue on its part called Ira Aldrich. the plaintiff objected to his being sworn on account of his want of religious belief said witness was then sworn and his Verdict examined by plaintiff & testified as follows. I dont believe in the existence of a god. particularly. Cant say whether I believe it or not. I have no belief one way or the other there may be a god, & there may not. never made up my mind on that subject. I dont believe there is a god who punishes for praying either in this world or any other. I dont believe anything about it. it may be & it may not I have no opinion about it. Examined by deft. I am certain that there is an obligation on my part to tell the truth when sworn. I am not certain that there is a

Supreme being who rewards and punish men. I am not satisfied that it is so & I am not certain that it is not so. I have no belief one way or the other Examined by the Court. I believe I should be responsible to the Civil Law, if I should testify falsely and further that I should be punished by losing the Esteem & respect of my fellow men. I don't know that I am bound in Conscience for I can't say what Conscience is unless it is judgment. I don't believe that there is a Supreme being who will reward & punish men. I do not believe that it is so, and do not say I disbelieve it. I have no belief about it. Examined by deft. I only say I am not certain one way or the other. I have no certainty that I may not be punished hereafter for perjury & no certainty that I may be. I feel obligated to tell the truth aside from the Sanctions of the Civil Law, & aside from what others may think of me. The Court thereupon refused to permit said witness to be sworn or to testify, to which decision of the Court the defendant then & there excepted. The defendant then called James Warragh who testified as follows. I have seen the Ox that was killed. have seen him work. The Ox looked pretty hard. he was a raw boned ox and might be fatter than he looked to be. my opinion is that he was an old ox. my father has dealt in Cattle a good deal. I have been with him and know something about Cattle. think that Ox worth

\$30 at least. I live $\frac{3}{4}$ of a mile from Plff. I saw the
or frequently from the time he came there. Rockafillows
Cattle run at large. We have a fence on one side
of the Rail Road at my fathers farm. There is no
fence north of the Rail road. Plffs Cattle could run
on to the Rail road. I dont know of any road crossing
the Rail road where the or came on to the track.
The Rail Road put in a crossing for plaintiff, about
80 rods east of where the or came on the road,
dont think there was there any traveled track crossing
the Rail Road where the or came on the track.

Cross. Etc. There was a traveled track crossing
the line of the railroad there running from the
plank road north across the Rail Road & past Ofs
house before the road was built. There was no
crossing put in across the Rail Road there after the
Rail Road was built. There was a place where
they could crop 80 rods further up East when it
was not very muddy. They there crossed under an
aqueduct. a bridge was made by public officers
not far from this cut. It was made before the
Rail Road was built. the track leads north
from the plank road. There used to be a
great deal of travel on that line before the
Rail Road was built. I am not in the habit
of using Oren on my farm. I use horses. I did
not not sell oren last Spring. There was quite
a demand for work oren last Spring to break Praines

don't know of Cattle being sold last Spring for over
\$100. a Head. The one killed was a good sized or,
large frame. I saw him a little while before he
was killed. did not take particular notice of him.
I never noticed him for the purpose of making up
an opinion of his age. I saw him after he was
killed. have seen all of Pluffs Cattle. when I saw
the one dead I knew what one it was. If the one
had been put in right good order for beef I
think he would weigh over 1000 lbs. I don't recollect
the one pluff worked with this one. I have seen
the one pluff is feeding for beef. have not seen
him for two or three months. I have never worked
the one that was killed. he looked like an old one.
There were two bridges built by the public
officers on what I understood to be the laid
out Township Road. between the rail Road and the
plank Road somewhere near the place where the
old traveled track spoken of used to run. they
were nearly on the same ground. The new road
was short. & the old traveled. track only differed
from it by making a few meanders on account
of the ground. they frequently run into each other.
my father has a fence on the north side of the
Rail road. and also one which runs north & south
which comes south to the Rail road. The cut
where the one came on the Rail Road. the laid out
Road which crossed the line of the Rail Road. and

the old traveled track both crossed the line of the
Rail Road at that cut. The R. R. Co made a
crossing for Rockafellow. but they did not make it
until after the ore was killed.

Direct resumed. Cant say that the track which
was traveled before the Rail road was built crossed
the line of the Rail road at the precise point where
the ore came on to the Rail Road track. The bridges
I understood to be on the laid out Township Road
this Township road as I understand it varies from
the old traveled track though sometimes one run
into the other & sometimes not. I dont recollect about
the Old Traveled track at the point where it crossed
the line of the Rail Road. The old traveled track
used to run through where our field is. before it was
broke up. after our field was fenced it crossed
the line line of the Railroad not far from the corner
of our field. Nelson Knapp. was then called by
dependant and testified as follows. I was on the
Locomotive when the jacks ore was killed. It was
about the middle of April last about 5 o'clock P.M.
about 1/2 mile east of Arlington. It was raining
hard. It was not dark. Should think it was about
sun down. It was a freight train going east. we had
stopped at Arlington. to wood & water. I dont recoll-
ect whether the window of the Locomotive was open
or not. we sometimes close it when it rains hard.
I saw some cattle cross the track. they all crossed

the track but this one he went down the track into a cut & there we hit him. The Engine was reversed, and everything done to save the Or. the Or might have been 40 rods off from the train when he ^{first} came upon the track. The other Cattle went across, and I thought he was going across, but he turned down on the track. he came up the bank & appeared to be going across. he had got through the 1st Cut. When I discovered the Or. we were going not faster than 5 or 6 miles an hour. I think it is down grade going east. but I dont know it seemed so to me. I did all I could to save the Or. reversed the Engine and put on steam. It was a heavy train, & the track was wet. I could not stop it. The engine was reversed & the train could not be stopped. I Cant recollect whether the breaks were whistled down or not, think they were. it was always customary to do it in such cases. nothing more could be done to stop the train. The Or was struck some 6 or 8 rods from where it was when I first saw it. the train had nearly stopped. I think if there had 2 or 3 rods more. we could have saved it. dont think we were going more than 1/2 a mile an hour when we hit him. he was then on the track between the rails. the Or was walking all the way did not run a step. I thought it was a poor Or. I thought if it had any life at all it could have got out of the way of that train. the Or was very poor. he staggered seemed to be very weak before he was hit.

If the whistle did blow it was for the purpose of closing down the breaks. Cross Examined -

Was on board of the Locomotive. was Engineer was in the employ of the Central Military Tract Rail Road Company. Cant tell whether the track was filled up even with the ties at that time. the ore got under the Ore Catcher. This was because the pilot was too short. If there had been a long pilot it would have thrown him off any how. When I first saw the cattle I had just got through the cut. Sometimes we whistle to scare cattle off the track but first we whistle the breaks down I cant tell whether we whistled to scare the cattle or not or whether I sounded the whistle or not. I did not see the cattle sooner on account of running in the cut. I tried to stop the train at once. I dont know whether the breaks were wound down or not. I cant tell how long it would take to stop a train on such a wet clayey track. the wheels of the locomotive did not hold any. I dont remember whether I looked down the track ahead of the engine coming through the cut. I dont remember that I swore before the justice that I was but 6 or 8 rods off when I first saw the ore dont recollect of saying before the justice. that it was cold & rainy & I did not have the windows open & therefore did not look ahead down the track. I tried to tell the truth before the justice. I do not say I did not so swear before the justice.

There was a full complement of men on the train but I dont know whether they did their duty or not. It was my business to keep look out ahead. before I got near the cattle they were all off but this one. they were crossing the track when I first saw them. Some had crossed. Some were crossing. & Some were not yet on the track. Cant say how far off. the Engine was one of the heaviest Engines on this road. It was a heavy train. dont recollect how many Cars. perhaps there might have been 30 & perhaps not so many. as soon as I saw the ox turn down the track I reversed the Engine. I cant tell what made the ox turn down the track I dont think it was because he was afraid of the train. dont think it would take a quarter of a mile to stop the train. dont know where the train was made up. dont know whether the Cars were loaded they usually were at that season of the year. dont think it safe to run so large a train that it could not be stopped in a quarter of a mile. Think I could have stopped this train in a quarter of a mile with a dry track & a proper train & all things in reasonable good order. A train can be stopped in going its own length with a train such as I ought to have to be safe. a dry track & every thing right think a train could be stopped in 30 rods perhaps. dont know exactly how far it was from the place where the ox came on to the track to where he was hit. The train was heavier than the engine could manage

It was a very heavy train. too heavy to be safe
The train was on the C M & S. R R. I understand
the C M & S R R. to run from Mendota to Galashung. It
was on that road the ore was killed. If any one
had asked me then in whose employ I was. I should
have answered in the employ of the C M & S R R Co.
Direct Resumed. A train cannot be handled
any way when the track is in that state. I do
not know that I was in the employ of the Central
Military Tract Rail Road Company. don't know whether
the road was owned by that Co. or by the Ch. Burlington
Trav. & Quincy R R Co. I have seen Cars marked in
that name on the road & I have run under the
same employment on the Peoria & Oguskee R. R.
I was employed by a man by the name of Frink. he
did not tell me for what Company. but I was to run
an Engine on this road. don't know in whose employ
Frink was. Cross Resumed. I understood the
C. M. & S. R R. to run from Mendota to Galashung.
It was on that road the ore was killed. if any
one had asked me then in whose employ I was. I
should have answered in the employ of the C M
& S R R Co. The defendant then called Sam-
uel Wuffelodt. who testified as follows. I was fire
man on the Engine when pliffs ore was killed. it was
some time in April last in the evening about sun
down. Can't tell how far we were from the ore
when we first saw him I think we were coming

out of the first cut from Arlington, when I first looked out I saw the cattle crossing the track. I think the engine whistled down breaks. but I could not say I dont remember. and I shut the fire door that is the rule. The engine was reversed. we were some little distance off from the ore cut tell how far. we were going very slow probably 4 or 5 miles an hour. It is hard for me to tell the speed. It was not my business. The ore walked right down the track. he did not run. I looked at him all the time on account of the danger. we had almost stopped when we hit the ore. we were not going faster than a man would walk. The track was wet and very slippery. the wheels were very slick would not stick. It was a heavy train. I think it was on a down grade we were running. but I am not certain. I never noticed particularly.

Cross Examined, Dont know how many brakes there were on the cars. all the cars had not brakes. There were two brakes could be worked in the very car on the inside. Dont tell whether the brakes on the other cars were on the top or on tracks. I was hired by Mr Frink to fire on this road. Dont know what company owned it whether the Central Military tract Co. or the Chicago & Burlington Railroad Co. I think the tender to the locomotive was marked C. M. & B. R. R. Dont know whether any of the brakemen were at their posts or not.

This was all the evidence

The Court at the request of the Plaintiff instructed the Jury as follows—

1st If the jury believe from the evidence, that the ore of the plaintiff, was killed by the Engine of the defendant, in consequence of the fault, negligence, or carelessness, of defendant servants in charge of said engine, then the jury will find for the the plaintiff, the damages which the plaintiff has proven he has sustained thereby. —

2nd If the jury believe from the evidence, that the ore in question was killed by reason that defendant engineer was not keeping a proper look out on the Railroad ahead of the Engine, then that is such negligence as would render the defendant liable in this action. —

3rd If the jury believe from the evidence that the ore in question was running at large and went upon the defendant Railroad at a point where the same was unfenced, then the ore was lawfully upon the Railroad, and if the jury believe from the evidence that while said ore was so upon the road he was killed by reason of any want of ordinary and reasonable care and diligence in the defendant servant, then they will find for the Plaintiff.

11
The degree of Care to which the defendants are bound is such Care as is ordinary and reasonable Care in the business of transporting freight by Steam on a railroad -

Given
A Said Instructions were given by the Court. & to the giving of each of said instructions the defendant then and there excepted,, The Court at the request of the defendant instructed the jury as follows

1st The defendant is not liable in this Case unless it is proven that the or was injured by the negligence or carelessness of the defendants or their servants.

2 And even if the or was injured by the negligence or carelessness of the servants of defendants yet if the want of ordinary Care on the part of the plaintiff contributed to produce the injury the law is for the defendant.

3 The Burden of proof in this Case is on the Plaintiff the defendant is not bound to prove that the Breckenmen were at their posts. the burden of proof is upon the plaintiff to prove their negligence.

Given
The defendants are not liable in this Case if the or was killed because the train was too large & heavy or by any other Cause than the negligence or Carelessness

Chinen
of the Servants of defendants in driving running governing & directing the train of Cars as it was made up -

Chinen
4 Unless the plaintiff has proven that the Rail Road in question at the time of the injury to the or. was the road of the Central Military Tract Rail Road Company and that the train of Cars belonged to said Company the law is for the defendant, and the burden of proof of that fact is upon the plaintiff -

Chinen
5 Unless the plaintiff has proven that the men running the train of Cars were in the employment of the Central Military Tract Rail Road Company at the time the or was injured, the law is for the defendant.

Chinen
6 If the Servants of the defendant injured the or of the plaintiff on purposely running the Cars against him intentionally the law is for the defendant.

Chinen
7 The Servants of the defendant were only bound to use ordinary care & skill to prevent an injury to said or, they were not bound to use extra ordinary care or skill.

Copy of Defendant Instructions Refused.

8

The defendant have a right to use their rail road, and run their cars thereon without obstruction and the plaintiff or had no right to be on said Rail road without any person to take charge of him and without the consent of the defendant, and if the plaintiff either voluntarily permitted said or to be on said rail Road track without right, or negligently suffered said or to stray upon the track by means of which the or was injured, the law is for the defendant.

9

The Plaintiff before he can recover in this cause must prove that the or was lawfully upon the rail Road track, and said plaintiff had not the right by law to allow his or to run at large upon the rail road track of the defendant without the knowledge or consent of defendant, and if he did so, it was at his own risk.

which instructions the Court refused to give, to which refusal of the Court to give each of said Instructions severally, the defendant then and there excepted. The jury found a verdict for the Plaintiff for the sum of fifty dollars. The defendant moved for a new trial, the Court overruled the motion. To which decision of the Court the defendant then and there excepted.

Filed Jan 26
1856. E. M. Miller
Clerk

And forasmuch as the several matters aforesaid do not appear of record, the defendant prays that this bill of Exceptions be signed sealed and made part of the record which is done

M. E. Heallister (Seal)

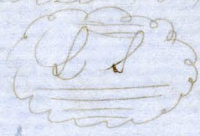
Copy of Appeal Bond

Know all men by these presents that we the Central Military Tract Railroad Company and Charles S. Keelsey, of the County of Bureau and State of Illinois are held and firmly bound unto Agostino Rockafellow, also of the same County and State in the penal sum of one hundred dollars current money of the United States for the payment of which well and truly to be made we bind ourselves and the assigns of said Railroad Company, and the heirs executors and administrators of said Charles S. Keelsey, jointly severally and firmly by these presents, witness our hands and seals this Thirtieth day of January AD 1856.

The Condition of this obligation is such that whereas the said Agostino Rockafellow did on the 26th day of January AD 1856 in the Circuit Court in and for the County and aforesaid recover a judgment against the above named Central Military Tract Railroad Company for the sum of Fifty dollars damages and costs of suit, from which said judgment of the

Filed February 14
1856. E. M. Fisher
Clerk

Said Circuit Court the said Central Military tract
Rail Road Company have prayed for and obtained
an appeal to the Supreme Court of said State.
Now if the said Central Military tract Rail road
Company shall duly prosecute their said appeal
with effect, and shall moreover pay the amount
of the judgment costs interest and damages rendered
and to be rendered against them, in case the said
Judgment shall be affirmed in the said Supreme
Court, then the above obligation to be void, other
wise to remain in full force and virtue



Central Military Tract Railroad Co
By Amos S. Hall Treasurer
Charles L. Hoessey (Seal)

Clerks fees

Copy of Record \$ 11.10
offt + seal \$ 11.45

State of Illinois

Bureau County Ill. 3 I Edward M Fisher Clerk

of the Circuit Court within
and for said County in the State aforesaid do hereby
certify that the foregoing is a true and complete
Transcript & copy of the Record and files in the
foregoing entitled Cause, as appear from the Record
and files now in my office.

In Testimony whereof I here to subscribe
my name and affix the Seal of said
Court at Princeton in said County this
7th day of May AD 1856

Edward M Fisher
Clerk

And now come the appellants of Glover & Cook
to step and say that in the record and proceed-
ings aforesaid and in the rendition of the judgment
aforesaid there is manifest error in this to wit

1st The court erred in refusing to permit Ira
Adrian to testify on the part of appellants

2^d The court erred in overruling the objection
of the defendant below to the 8th & 9th interrogatories
in the deposition of William Hox & orally
and in permitting said interrogatories and
the answers to the same severally to be read in
evidence

3^d The court erred in giving each of the instruc-
tions asked for by plaintiff below

4th The court erred in refusing to give the 8th & 9th in-
structions asked for by defendants severally

5th The court erred in overruling defendant's motion for a new trial

6th The court erred in rendering the Judgment
aforesaid in manner & form aforesaid
GIVEN & DONE
for appellants

And now comes the said appellee
by Supt MacLennan his attorney
and says that in the record
of the proceedings aforesaid &
in the rendition of the
judgment aforesaid there is
not any error to the prejudice
of the said appellants in
manner & form as the
said appellants have above
alleged & argued & this
he says may be seen by
the record &c.

Supt MacLennan
per d

Aquiline Rockafellus

The Cent. M. J. R. R. Co

Manuscript of

Record

Filed May 23 1856

Leland Clerk

Central M. & C. R. Co. Appellants } Supreme Court
 vs } of the State of Illinois
 Agasilans Rockafellow Appellee } 3^d Grand Division
 Appeal from Bureau Co } Term 1856.

Argument for Appellee

- 1 The first Error assigned is, that the Circuit Court Erred in refusing to permit the witness, Cha Aldrich to testify on the part of the Appellants. Therein is no error, for the Bill of Exceptions shows that the witness, Aldrich, had neither a belief in a God, or in a future state of rewards & punishments; while the law requires, in order to render him competent, that he should have both. See 1 Greenleaf's Evidence section 369, the rule is laid down as follows, "As to the nature & degree of religious faith required in a witness, the rule of law as at present understood seems to be this, that the person is competent to testify if he believes in the being of a God, and a future state of rewards & punishments; that is, that Divine punishment will be the certain consequence of perjury".
- 2 As to the argument that his want of belief is not properly shown by his own testimony; it is a sufficient answer to say, that ^{that} mode of showing his want of belief was not objected to in the Court below; and is not shown by the bill of exceptions so to have been. The old rule on this subject was, to prove the want of belief by the witness himself; but the modern rule is, to prove it by others who have heard his declarations. ^{See 1 Greenleaf's Evidence vol. 2 to sec. 370} The proof by either method is only the declaration of the witness; and when the method of proving the want of belief is not objected to in the Court below, it is too late in this Court
- 3 The case cited by the Appellants counsel, to wit, Ferry vs

the Commonwealth, 3^d Gratton 632, is not in point first, because in that case the witness stated, "that he believed in a God, but did not believe that men kind would be rewarded and punished in a future state of existence; but that offenses will meet their punishment here." See 3^d Gratton 633 near bottom of page. This witness was clearly competent under the rule as laid down in Greenleaf, before reverted to. The rule does not require that the witness should believe in a future state of existence; but that he should believe in a state of future rewards & punishment; and it is not material whether he believes that future state of rewards & punishments to be in this state of existence, that is in this world, or in another. It is not in point 2^d because, the judge delivering the opinion of the court in that case, expressly puts the decision on the ground that the Constitution & ~~statute~~ ^{statute of} Virginia had abrogated the rule of the common law, see 3^d Gratton page 641. The judge there states the law of Virginia to be that matters of religion "shall in no wise affect, diminish, or enlarge ~~their~~ civil Capacities."

3^d Our law is different. The only provision of which ~~any~~ at all bearing on the subject, is the 3^d section of the 13th Article of the new Constitution. Purples Real Estate Statute page 96. ~~no~~ And it is submitted that no clause of that provision is broad enough to abrogate the rule of the common law. In the case of Solomon vs the People Breese 29 & 30, the sup Court of Ills, lay down the rule to be "that all who believe in God and a future state, are on this account good Witnesses". But it is not likely that in that case the question was much considered. There is no doubt that the court intended, in that case, to lay down the common law rule. And it is submitted whether the report can be correct. But if that is the rule of

come in this state, still Aldrich would be incompetent, in not believing, in either a God or a future state - The case of Smith vs Bain & Shepley 167 cited by Juffs counsel is a decision under the statute of Maine, providing that all persons who believe in Supreme Being shall be competent witnesses &c.

What is the law? & What ought the law to be, are very different questions - See the rule in Grandeur before mentioned, & the authorities there referred to - See 18th Johnson Rep 98 - 4th N. H. Rep. 444. - See 5th Masons Report note to our bottom of pages 18 & 19 - It seems to me that the objection, that Aldrichs want of belief is proved by himself, comes with a bad grace from the party wishing to use his testimony - it is saying - he cannot be believed, as to his belief, for want of belief -

2 The Second Error assigned is, that the court Erred in permitting the plaintiff below to read in evidence the 8th & 9th interrogatories & the answers thereto in the deposition of William Fox -

The 8th Interrogatory & Answer are as follows
"8th Int.," How far could a person on the train "have seen the ox at the time you first saw the train coming?" Ans "I think you could have seen him a quarter of a mile & over"

This witness says in his answer to the 7th Interrogatory, that it was rather too dark & rising for him to see the ox - And the 8th interrogatory was designed to show whether a person on the train would have any better opportunity of seeing than he - And I can see no impropriety in it, or in the answer - At any rate it is manifest that it could not have prejudiced

the jels in error. But it would seem to be a reasonable thing for the jury to know, how far the ox could have been seen at the time of the injury, in order to ~~know~~ judge whether the servants of the company were guilty of negligence in not discovering the ox sooner than they did. And in what better way, could they be shown how dark & rainy it was, than by a witness, who was present at the time & place, & who saw the darkness & rain, telling them how far a particular object could be seen. In fact it is difficult to see how a witness could convey an idea of the degree of darkness in any other way.

The 9th Interrogatory & answer ^{are} ~~are~~ as follows, "Would a person on the ^{train} ~~cars~~ have had a better opportunity to see the ox "at the time you first saw the bars, than you "would from where you were, and if so why?"

"Ans "Yes Sir, when the cattle crossed the track "it was right at the mouth of the cut and in "lower ground than where I stood, and the "fences being in the way, so I think on the "bars they had a better opportunity than I could."

The object of the 9th interrogatory, was to show, that there were obstructions to sight between the witness & the ox, other than the darkness & rain. Suppose the Interrogatory had been "was there any thing else besides the rain & darkness to prevent your seeing the ox, and ~~was~~ if there was, was there any thing of that sort to prevent persons from the ^{loos} seeing). Would it not have been evading. Certainly it was a matter proper for the jury to know, whether there was anything to prevent persons ^{on the} ~~from~~ cars seeing the ox, if they had been looking out, as it was undoubtedly their duty to be

If the facts stated by the witness in the answer to the 9th Interrogatory, to wit, that "it was at the mouth of a boat, that the ground was lower than when witness stood, & that fences were in the way, were not true, ^{they} might have been shown not to be true by any witness then present, or by any other witness who had ever been at that place, so that it is difficult to see how the testimony could have prejudiced the ~~facts~~ Appellants - See Deposition of Fox -

The Bill of exceptions shows that the Appellants objected in the Court below to so much of the answer to the 2^d Interrogatory of the Deposition of Fox, as states the conversation between the servants of the Appellants & the Appella, at the time of the killing of the Ox, that their objection was overruled & that part of said answer read to the jury - And this was insisted on in the argument of Appellants counsel as error in the Court below - It is a sufficient answer to this to say, that that decision of the Court below is not assigned for error; But the ruling of the Court below was correct - the conversation was a part of the transaction at the time ~~it was~~ the ox was killed, it was a part of the Res Gestae. In 1 Phillips Ev. page 220, the rule is laid down in the following words "Hearsay is often admitted in evidence as constituting a part of the transaction which becomes the subject of inquiry, the meaning of which seems to be, that when it ~~is~~ necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence, for the purpose of showing its true character". In the case at ~~that~~ now under consideration, it was necessary to inquire into the nature of the act of killing the ox, whether it was negli-

, careless, or improper, therefore what the actor
said at the time was admissible in evidence, ~~also~~
~~contests~~ See also 1 Phillips on Evidence page 222
Besides the engineer & conductor over the agents
of the company, and the admission of the agent is the admission
of the Principal.

The 3^d Error assigned is that the
Court below Erred in giving each of the instructions on
the part of the below, the Appeller -

The Bill of Exceptions Shows that the ox
was killed in consequence of what would be
gross negligence. Fox testifies that when he first
saw the cars they were about $\frac{1}{4}$ of a mile
from the point where the ox was struck. The en-
gineer, ~~Stapp~~, swears that he saw the ox at
^{it might be} the distance of 40 Rods ahead of the train. He
also swears that the train was too heavy to be safe
, too heavy for the locomotive to manage, that the place
where the ox was killed was $\frac{1}{2}$ a mile east of Arling-
ton where they had stopped, for wood & water, that
it was muddy, & rainy, that the track was in bad order
slippery & muddy. Now if it is not gross negli-
gence, to start a train of cars on a wet, slippery track
, a train too heavy to be safe, one which the engine is
^{not strong enough to} ~~cannot~~ manage, one which the engineer swears could only
be stopped with a proper engine, all things right, & a
dry track, in a $\frac{1}{4}$ th of a mile, I am unable to see
what would be gross negligence. The Court is
respectfully asked to look into the evidence, the
testimony of Maugh Shows that the point where the
ox came on the track was when a laid out Town-
ship Road crossed the track, but no crossing had been
made by the rail Road at that point, that men, animals
& wagons were in the habit of crossing there is shown
by the Bill of exceptions - Certainly there is enough in

The Ill

in the testimony, to warrant the finding of the jury -
I understand the rule to be well settled by this Court,
that the verdict of a jury will not be disturbed, unless
the finding of the jury is manifestly contrary to the
evidence - such is not the case here, the Court
can well see in the Bill of exceptions, evidence from
which the jury might have inferred the verdict -
The next question under this assignment of error
is, are the instructions given by the Court on either
half of the p[er]f. below, wrong as applied to the evidence
in this cause - I understand this Court to lay down
the rule, in the case of Chicago & Mississippi R.R. Co. v. Patchin
16 Ills. ~~247~~¹⁹⁸, that Rail Road Companies are liable, if
stock is killed by their trains in consequence of ~~negligence~~
~~negligence on the part of their servants~~

what the Court terms Gross negligence, ~~as ap-
plied to~~ that is, as defined by the Court in that
Case, "the want of Common Care, Skill, or
diligence" see 16th Ills. page 20^{last paragraph} Now are
the instructions given by the Court below in
this Cause, inconsistent with that rule - I think
not. The 1st Instruction given is as follows.

"1 If the jury believe from the evidence, that the ox
of the plaintiff was killed by the engine of the defend-
ant in consequence of the fault, negligence, or
carelessness of Dpts. servants in charge of said en-
gine; then the jury will find for the p[er]f. the dam-
ages which the p[er]f. has proven he has sustained thereby

The 2^d Instruction is as follows

"2 If the jury believe from the evidence that the ox
in question was killed by reason that Dpt's engineer
was not keeping a proper look out on the rail
Road ahead of the engine, that is such negligence
as would render the Dpt. liable in this action"

The third 3^d & last instruction was as follows

"3 If the jury believe from the evidence that the ox in question was running at large & went upon Dpts Rail Road at a point where the fence was unfenced, then the ox was lawfully upon the rail Road; and then if the jury believe from the evidence that while said ox was so upon the ~~Rail~~ Road, he was killed by any want of ordinary or reasonable care and diligence in the dpts, servants, then they will find for the plaintiff; The degree of care to which the defendants are bound is ordinary, or reasonable care in the business of transporting freight by steam on a Rail Road -

Now in these instructions, the degree of negligence, for which this Court says in the case of Chi & Miss. R.R. Co. v. Paten, the dpts below, are responsible is clearly defined, to wit, the want of ordinary, or reasonable care skill, or diligence -

The 1st instruction is in substance, that if the ox was killed by the fault, negligence, or carelessness of dpts ~~servants~~, the dpts are responsible - the 2^d that if dpts servants did not keep a proper lookout ahead of the cars ~~dpts~~ that is such negligence as would render them responsible & in the third, the degree of negligence is clearly defined - Now, could the jury have been misled, by these instructions, ~~and~~ applied to the evidence in this case - The Counsel for the appellants, argue the case, as if what this Court calls gross negligence in the case of Chicago & Miss R.R. Co. v. Paten, was the ~~same~~ ~~of~~ want of slight diligence only - In Story on Bailments Section 17, ordinary, slight, & gross negligence, as applied to Bailments are thus defined, to wit, "~~Ordinary negligence is the~~" "Ordinary negligence may be defined to be the

want of ordinary diligence, and slight negligence the want of great diligence, and ~~this~~ gross negligence, the want of slight diligence—" gross negligence, thus defined, seems to be the sense in which the Counsel for the Appellants, understands the use of the word in the ~~case of~~ by this Court in the case before referred to;— But manifestly the Court does not mean to be thus understood— Is this Court mean to say to Rail Road Companies whose roads are unenclosed, You shall not be liable for damages which you ~~may~~ ^{have done} ~~do~~ to stock or children ~~are~~ which may happen to be upon the track of your Road, although you need not ~~to~~ ^{have done} down the injury, if you had used ordinary or common care—

It was lawful ~~this~~ for the
plfs. as to run at large, it was lawful for
dfts. to use their Rail Road unfenced -
dfts. could not sustain an action against
plf. because his ox came on the Rail Road,
the act of the ox going upon the Rail Road was
not then a trespass. ~~The Rail Road~~
~~Co. must be~~ of the Rail Road compa-
nies must of course be supposed to know the
situation of the country through which their roads
pass, & their servants do actually know it - they
then know that in using their Roads unfenced
that stock will frequently be upon their Rail
Road tracks. It would seem then that they
might reasonably be expected "to keep a proper
look out, a herd of their twins" and if they
do not, ought to be responsible for damages
consequent thereon. In Peers vs. The Houstonian
R. R. Co 2^d American R. R. Cases 114, the Court say
that there is no distinction between Rail Roads &

ordinary High ways in regard to the ^{degree} of care, which the law requires on the part of those which have the direction, or management of vehicles upon them - ~~They also say in an action for an injury to the property from the negligence of the driver~~ Suppose one of in the public High way be injured by a teamster, by being guilty of ordinary negligence, or in other words for want of Common ordinary care ~~in the~~ on the part of the Teamster, would he not be liable especially when the law permits cattle to run at large on the Highways, or on uninclosed ground, or in this State - In the case of Jackson vs the Rutland & Burlington Rail Road Co. 25th Vermont Rep (2^d Series) on page 162) the Court refer to the doctrine cited in 19th by Appellants Counsel from 19th Penn. State Rep & say that it is "expressly repudiated in the English cases & is most unquestionably unsound" They also say, "The rail Road cannot justify either recklessness, want of common care at the time, and after the cattle are discovered, or wilful injury." And let it be remembered that this is in Vermont where it is absolutely unlawful for Cattle to run at large - I cannot but conclude that this Court in the case in 16th Ill. 198 meant to lay down the Rule "that, if Cattle lawfully running at large come upon the track of an uninclosed Rail Road ~~in the~~ and are injured by the servants of the Co. by a want of common care, that then the Co. are responsible for the injury, if so there is no error in the instructions on the part of the jury below."

The 4th Error assigned is that the Court below erred in refusing

the 8th & 9th instructions asked by the App
Dfts Both of said instructions amount to
a denial of the right of the plf to permit
his ox to run, at large & were therefore not
law. And in the refusal to give them there
is no error -

the 5th assignment of Error is that the
Court below erred in refusing Dfts motion
for a new trial in this there was no error if
~~the~~ the verdict was in accordance with the
law, evidence, & instructions of the Court -

The 6th assignment of Error is that the
Court below erred in rendering the judgment.
Under this assignment, it is insisted that the
Court Erred, because no replication appears in
the record, to the Dfts third plea; but the record
states that there was such a replication, that
there was issue thereon, & that that issue
was tried. And Besides, if the chft. saw
proper to go to trial, without objections, ~~with~~
he thereby waives his right to assign the want
of such replication for error. And the
record shows that such was the fact -

~~All which is respectfully~~

~~submitted.~~

~~Geo. M. Stapp for~~
~~Appellee~~

It is insisted by the counsel for appellants, that
negligence in running a train too heavy for
the engine, & unsafe as proved by the engineer, can
not be proved under the declaration, & that the decla-
ration is not broad enough to cover such
negligence - To this I answer first this evidence
was not objected to in the Court below
& 2d that the words of the declaration are
that the servants of the company, "be collectively

"negligently, unskillfully, and improperly, ~~also~~
"drove, governed, & directed the said engine
" & Cars, that by & through the carelessness, negli-
"gence, unskillfulness, and improper conduct
"of the defendants by their said servants, the
"said Engine & Cars then and there &c."

Did they not improperly drive a train
too heavy to be safe - was it skillfull to start
from Abington, ~~is~~ with such a train
under the circumstances shown by the testimony
of ~~the~~

All which is respectfully
submitted

Jay Cox & Stupp for
the Appellee

No 72

Central Military
District R. R. Co
vs

Aggrieved Stockholder

Written Argument
for Appellees

Filed June 19, 1856

L. Leland

Clerk

The Leont N. Y. R. R. Co }
 vs } Appeal from
 Aquilano Rockafellow } Bureau

Ira M. Drich was improperly excluded
 as a witness -

3^d Watton 632 - 6th Shipley 157 -

This case presents the strange anomaly of
 the Court finding that the witness was en-
 tirely incompetent to give evidence from the
 evidence given by himself.

The evidence failed to make out a Case
 19 Pa State Rep. 301 - 16 Ill — 201 -
 5 Denio — 255 - 11 Barb S. B. R. 114 -
 14 " " — 368 -

V The 8th and 9th Instructions given asked by
 Deft were improperly refused -
 N. Y. & Erie R. R. vs Skinner 19 Pa S. R. 301 -
 and all the authorities above cited -

III The 3^d Instruction given for plffs is not Law

1st It was error to instruct that the ox was
 lawfully upon the Road -
 Chi & Miss R. R. vs Patchin 16 Ill 201 -

2^d It was error to charge that any want of
 reasonable care and diligence in defts ser-
 vants made defts liable -

Chi & Miss R. R. vs Patchin 16 Ill 201 -

3 It must at least have been the kind of negligence specified in the declaration -

4th It must have been gross negligence

There is no proof tending to show that ^{the train was} the train of the Cent Military Tract R.R. Co. - The Engineer & fireman swore that they did not know what Company employed them - whether the C.M.T.R.R. Co. or the Chi & Bur & Quincy Co. - and their evidence is all there is in the record on that question -

The Court erred in instructing that any failure to keep a look out was such negligence as would make the Company liable -

The Pltff can recover only the grounds stated in the declaration, & hence if the declaration states that the servants of the Deft negligently drove, conducted and managed the train", the pltff cannot recover if the negligence was in sending out too heavy a train

Angell on the Law of Carriers
Sec 592 -

Mayor & Humphries 1 Car & Payne R. 251 -

Reply to Argument of the Appellee -

In the argument of the Appellee there evidence of Aldrich is not correctly stated. Aldrich only stated that he had no certainty as to the existence of a load - his mind was not made up on that subject - He believed there was an obligation resting upon him to tell the truth aside from the sanctions of the civil law, and aside from what others would think of him -

Upon the question whether the evidence supports the verdict it does not seem to be contended that there was any negligence in the management of the train at that time - And the evidence shows that much more care was used than in the case reported in 16 Ill. - The Engine was reversed, the whistle sounded, and every means used that could be from the time the engine turned down the track - But it is insisted that the train was too heavy - To this I answer;

157 As against the stock of Appellee the Company ought not to be limited in the amount of freight they carry; the state of the track was the reason the train could not be stopped sooner. And it does ^{not} appear but what this arose after the train was made up -

But a complete answer to this point is, the declaration is expressly for the negligence of the servants of the Company having charge of the train - "This negligently drove, managed and governed the train" -

The train was made up by others -

It might as well be said that in an action against a stage proprietor for negligence of driver, a plaintiff could recover because the coach was insufficient, if there was no negligence of the driver -

The first Instruction given for the jury below says, that if the ox was killed by any fault, negligence or carelessness of deft's servants, the Company are liable. This directly conflicts with the case in 16 Ills -

The 2^d Instruction assumes to decide what is gross negligence, takes the case from the jury and decides it wrong; the want of a proper look-out might not be gross negligence -

The argument for appellee misstates the evidence of Waugh, he does not state that the point where the ox came on the track was where a laid out Township Road crosses the track. He says an old travelled track crossed the line of the R R somewhere in that vicinity. He does not pretend that it was at that point -

Blakes
of Counsel for Appellant -

7.2

The Central Military
Tract R.R. - 100

vs
Agassizans Rockefeller

Brief -

Filed June 21, 1856,
L. Leland
Clerk

Central Military Trach RR v Rockafellow

Book for Puffs - Case for killing on
 Demurrer to 3rd plea overruled & no replication
 Incompetency of witness for want of belief in a God
 3 Grant R 632 Witness believed in a God
 but not in future rewards & punishments
 or present

6 Shepl R 157 Same subject

2 Cow R 433. Same

16 Ills R 198 } An negligence

19 Pa Stat R 301 }

5 Denio R 255 }

11 Barb S R 114 }

14 Do " 368 }

Stupp will file written arguments

72
C. M. F. R. R. Co

Rockafello

Brief

~~72~~
The Central Military Tract
Rail Road Company
vs
Agerslaus Rockefeller

72

1856

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