No. 8732

Supreme Court of Illinois

Illinois Central R.R.Co.

---

vs.

L.Cox,Admr.

71641 7

1

Pleas before the Circuit Court within and for the County of Union and State of Illinois on the thirteenth day of October in the year of our Lord one thousand eight hundred and fifty seven.

Be it remembered that heretofore, to wit, on the ~~[illegible]~~ second day of May in the year of our Lord one thousand eight hundred and fifty five Sabretha Cox Administratrix of Othneal Cox deceased filed in the Clerks office of the Court aforesaid the following Precipe to wit,

State of Illinois Union County ss — May Term 1855

Sabretha Cox Administratrix of Othniel Cox decd

vs

Illinois Central Rail Road Company

Case

Damages $3000. 00

The Clerk will issue duplicate Summons for Deft. returnable to May Term on the first day thereof in favor of plaintiff as in the Captions and against the defendant damages five thousand dollars and Subpoena

Green Bridges / Dougherty & Son for Plff

And afterwards to wit on the day and year last aforesaid Sabretha Cox Administratrix of Othneal Cox deceased sued out of the Clerks office of the Court aforesaid the following writ of Summons against the Illinois Central Rail Road Company, to wit,

State of Illinois } The people of the State of Illinois
County of Union } To the Sheriff of said County
Greeting

We command you that you Summon, The Illinois Central Rail Road Company if to be found in your County to be and appear before the Circuit Court of said County on the first day of the next term thereof to be holden at the Court House in Jonesboro on the Second Monday (~~the 1st Tues~~) in the month of May

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1855 (this Instant) to answer Tabitha Cox Administratrix of Othniel Cox deceased of a plea of Trespass on the Case to the damage of her the said Tabitha Cox Administratrix of Othniel Cox deceased five thousand dollars as she saith And have you then and there this writ and make return thereon in what manner you execute the same.

Witness Thomas Heileman Clerk and the seal (SS) of our said Circuit Court hereto affixed at Office in Jonesboro this 2nd day of May AD 1855

Thomas Heileman Clk

And afterwards, to wit, on the day and year last aforesaid the said writ was returned to the Court aforesaid by said Sheriff endorsed as follows, to wit,

Served the within by leaving a copy with John Cochran Station agent of the Illinois Central Rail Road Company on the 2nd day of May AD 1855.

Ser 50 Alex J Nemmo Shff

mileage 14 5 5

sets 10
65

And afterwards, to wit, on the fourth day of May in the year of our Lord one thousand eight hundred and fifty five the said Tabitha Cox Administratrix of Othniel Cox deceased filed in the Clerks Office aforesaid the following Declaration, to wit,

State of Illinois } } At the May Term of the Union County
Union County } } Circuit Court AD 1855.

Tabitha Cox Administratrix of all and singular the goods & chattels, rights and credits and and personal representative of Othniel Cox deceased by J Daugherty her Attorney Complains of the Illinois Central Rail Road Company in Custody &c of a plea of trespass on the Case, For that whereas heretofore to wit, on the ninth day of February in the year of our Lord one thousand eight hundred and fifty five

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and in the lifetime of the said Athnile Cox who is deceased at the County of Union and State of Illinois the said defendant, then and there being the owner of and in the possession of the Illinois Central Rail Road and the Locomotives and Cars therein, did then and their agents employes and hands and the by the negligence carelessness & unskillfulness and wrongful act of the same kill by running their said Cars and locomotives on against and over the body of the said Athnile Cox the intestate and husband of the said plaintiff thereby then and there by the said wrongful act Negligence carelessness & unskillfulness of the said defendant caused the death of the said Athnile Cox contrary to the form of the Statute in such case made and provided and to the damage of the Pl. pltff as such admnestrtrix of $5000. and therefore she sues &c. And the brings hereunto court the letters of admnestration granted to her as such admnestratrix which shows here to the Court that she is the Admx. of sd dec. Athnile Cox dec.

2nd And for that whereas also the said plaintiff as such admnestratrix aforesaid before and at the time of the committing of the grevances by the said defendant as hereinafter mentioned was the lawful wife of Athnile Cox & now is his admnestratrix and Louesa Matilda Cox Nancy Deane Cox Polly Jane Cox Martha Ann Cox James Lee Cox and William P Cox were his children and dependant on his labor for daily subsistance, and that the said Athnile Cox was of great pecuniary benefit to them, to wit, of the value of five thousand dollars, the said Athnile Cox being then and there lawfully engaged about his business, to wit, at the county of the Union and the State of Illinois and the said defendant being then possessed

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of a certain Rail Road ~~called and known as the~~ with the locomotives and Cars running thereon called and known as the Illinois Central Railroad, to wit, at the County of Union and State of Illinois aforesaid and then and there had the Care, direction and management of the same yet the said defendant not regarding their duty in that behalf whilst the said Athinile Cox so was engaged in and upon his lawful avocation, to wit, on the ninth day of February one thousand eight hundred and fifty five at the County of Union and State of Illinois aforesaid, he being then and there ~~and~~ a hand upon the Cars and Road of said defendants took little and such bad Care of their said Cars in the direction and management of the same, that the same by and through the carelessness misdirection and mismanagement of the said defendants by their servants in that behalf then and there greatly bruised injured and wounded the said Athinile Cox by and through the said neglect of the said defendant then and thereby causing instantly the death of the said Athinile Cox whereby and by means of the premises the said plaintiff lost the society, protection & pecuniary benefit resulting from the death of the said Athinile ~~Cox~~ to the s.d pltff and her children aforesaid contrary to the form of the statute in such Case made & provided & to her damage as such administratrix of as afs.d of $1000.00 And she brings here into Court her letters of administration upon d.e estate &c

3. And for that whereas also before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned the said defendant was the owner of the Illinois Central Rail Road and the locomotives and Cars thereon by the

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5

said Company used and employed in carrying wood on and along said Rail Road and being such owner of the said locomotive & cars, the said defendant on &c at &c. aforesaid ~~being~~ hired and employed the &c Athmile Cox the husband and intestate of this plaintiff and received him into and upon the cars of the said defendant as a hand or laborer to be kept and employed as such hand or laborer and as such hand the said defendant ought carefully to have carried and conveyed the said Athmile Cox. plaintiff avers that heretofore, to wit, on &c at &c aforesaid one Athmile Cox in his lifetime, to wit, on &c aforesaid was one of the laborers employed by said defendant on said Cars and was by the defendant taken upon said Cars and the plaintiff avers that the defendant then & there so negligently carelessly and by and through the wrongful act of the said defendant ran the said Cars on which the said Athmile Cox then and there was that the death of the said Athmile Cox was then and there occasioned by the negligence and wrongful act of the said defendant he then & there being instantly killed

This count is amended by being written on a piece of paper hereto attached

4 And for that whereas also afterwards, to wit, on &c. on &c the said defendant was the owner and in possession of and had the control and management of the Illinois Central Railroad and the cars and locomotives thereon and that then and there the said plaintiffs intestate Athmile Cox in the lifetime of the said Athmile Cox was of great pecuniary benefit and advantage to the said plaintiff and was then and there rightfully upon the said Cars of the said defendant on the said Illinois Central Rail Road in the employment of the said defendant and it was then and there the duty of the said defendant safely & carefully to carry and convey

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~~On and~~ said Cox on and along said Road and
6 employ & keep skillful agents on the said locomotives
yet the said defendant not being ignorant of the
premises has maliciously intending to injury the
said Othniel Cox in his lifetime did not keep and
employ skillful agents but then and there employed
unskillful agents, through the negligence and
default of the agents of the said defendant carelessly
& negligently ran the Cars and locomotives of said
Defts against each other & on and along the road
of said defendant and on the Cars of the said defend-
ant on said Road, Yet the said defendant not
regarding their duty in this behalf conducted themselves
so carelessly negligently and unskillfully in this behalf
that then and there, to wit, at the County of Ulinois in
the State of Illinois on the 9th day of February 1855
by and through the carelessness negligence ~~wrong~~-
wrongful act and default of the said defendant
and their servants and for want of due care and
attention to the duty of the defendant in this
behalf the said locomotive and Cars whilst the
same were carrying the said Othniel Cox, to wit,
on the day and year aforesaid at the County and
State aforesaid were run against each other and
against a pile of Cordwood by the unskillful agents
of Sd Defts. by them employed on the same by means
whereof the said Othniel Cox then being thereon was
then and there thrown off the said Cars, on ran over
by the said Cars and locomotive of the said defendant
and was then and there and thereby greatly cut mashed
bruised and divers bones of his body were then and
there broken insomuch that the said Othniel Cox
then and thereby instantly died of the wounds bruises
&c aforesaid contrary to the form of the statute in such
case made and provided whereby the said plaintiff

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as such administratrix lost the comfort and society of the said Athinie Cox and sustained pecuniary injuries resulting from such death to the amount of other $5000. and she brings hereunto court her letters of administration upon the estate of said Athinie Cox whereby it fully appears to the Court that she is administratrix of sd estate

5 And for that whereas also the said defendant was at & before the time of the committing of the several grievances hereinafter next mentioned possessed of and the owners of the Illinois Central Rail Road and the locomotives & cars running thereon and keep have and use the same for the transportation or carrying of Cord wood on and along the said line and also for the carrying and conveying of their laborers or hands on and along the same, And the said Athinie Cox intestate of the said plaintiff being then and there rightfully on one of the Cars of the said defendant, to wit, at the aforesd employed by said defendants as a hand on said locomotives & Cars, and whereas it then and there became and was the duty of said defendant to safely carry and convey the said Athinie Cox safely on and along said Road and to appoint and keep a competent and careful Conductor and careful and competent agents in and about the management and running of their said Cars & locomotives, yet the said defendant well knowing the premises but wrongfully wickedly and maliciously intending to injure the sd Athinie Cox in his lifetime did not appoint & keep a competent & skillful Conductor on said locomotive but on the contrary appointed a Conductor wholly incompetent unskillful & careless and kept & employed him on said locomotive & Cars on which said Athinie then and there rightfully was

by said defendant as a laborer and the said Plff
avers that through the carelessness unskillfulness in-
8 competancy negligence and wrongful act of the said
defendant by their said Conductor then and there
ran the car on which the said Athmile was
then and there standing and being on and against
a pile of Cordwood and then and there threw the
said Athmile Cox off said car & ran car the
same over on him whereby he the said Athmile
was wounded bruised and crushed his flesh and
bones and then & there instantly of said wounds
and bruises so wrongfully and negligently by the said
defendant caused as aforesaid died contrary to the
form of the statute in such case made and provided
By reason of the premises the said plaintiff as such ad-
ministratrix has been and is greatly injured and hath
sustained damage in the loss of the society of the said
Athmile Cox and as well as the pecuniary injuries
resulting to the wife & next of kin of said deceased to the
damage of the said plaintiff as such administra-
trix of five thousand dollars and therefore she
sues &c And the said plaintiff brings here into
Court her letters of administration upon the estate
of the said Athmile Cox deceased whereby it fully
appears here to the Court that the said plaintiff
hath the administration of the estate of said
deceased and full right to sue in this behalf
according to the provisions of the statute in such
case made and provided.

J. Dougherty & Son

The amended "third" Count filed on the 26 day of
September 1855 in in the words following, to wit,
And for that whereas before the time of the committing
of the grievances hereinafter next mentioned the
defendants were possessed of a certain other Railroad

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known and designated as the Illinois Central Rail Road running through the County of Union and State of Illinois and of two certain other locomotives with other trains of Rail way Cars attached to each and which said trains were used to carry wood on said Rail road and in so doing were used and accustomed to meet and safely pass each other at the switch or section Number thirty on said Rail road by the direction and arrangement of the said defendants, to wit, at the County & State aforesaid And whereas also the said Othniel Coe the intestate of the said plaintiff at and before the time of the committing of the grievances hereinafter next mentioned was employed by the said defendants as a hand upon one of the said last mentioned locomotives and trains aforesaid, to wit, at the County and State aforesaid And whereas and by reason of the premises it was the duty of the defendants to employ and keep careful skillful agents and Conductors and by their agents and servants when it became necessary for the said last mentioned locomotives & trains to pass each other to have one of them switched off the main track at the switch and section aforesaid on the Railroad aforesaid so as to allow the other to pass with entire safety, to wit, at the County and State aforesaid, yet the said defendants by their agents and servants not regarding their duty as aforesaid and being then and there unskillful careless & negligent and contriving to injure and agrieve the plaintiff in this behalf by their agents and servants heretofore, to wit, on the 8th day of February in the year 1855 neglected to switch one of said last mentioned locomotives and trains sufficiently off the main track, to wit, at the County and State aforesaid whereby and through the negligence want of skill & wrongful act aforesaid of the said defendants their agents and servants whilst the said

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locomotives and trains so carrying wood as aforesaid on which the said Othniel Cox was proceeding as a hand as aforesaid in passing the said locomotive & train so negligently & unskillfully switched off as aforesaid ran into the said last mentioned locomotive & train to wit, on the 9th day of February 1855 at &c. afsd. whereby the said Othniel Cox the intestate and husband of the said plaintiff was thrown from and run over by said locomotive and train on which he had been so proceeding as a hand and greatly bruised ~~and~~ lacerated and wounded thereby then and there by the said neglect carless unskillful and wrongful act of the said defendant their agents and servants caused the death of the said Othniel Cox contrary to the form of the statute in such case made and provided to the damage of the sd pltff as such administratrix of $5000, and sd pltff brings here into Court her letters of administration upon said estate whereby it fully appears to the Court that she is such Administratrix &c.

10

And afterwards, to wit, on the fourteenth day of May in the year of our Lord one thousand eight hundred and fifty five the said Illinois Central Railroad Company filed in the clerk's office aforesaid the following Demurrer, to wit,

Illinois Central Railroad Company
vs
Sabetha Cox Administratrix
of Othniel Cox deceased
} Case.

Pleas of the May Term of the Union County Circuit Court in the year of our Lord one thousand eight hundred and fifty five.

And the said defendants by C. T. Simons their attorney come and defend the wrong and injury when &c and say that the said declaration and the

said first, second, third, fourth and fifth Counts of the said plaintiffs declaration nor any or either of them and the matters and things therein contained in manner and form as the same in the said first, second, third, fourth and fifth Counts are above stated and set forth are nor are either of them sufficient in law for the said plaintiff to have or maintain her aforesaid action thereof against the said defendants and he they said defendants are not bound by law to answer the same And this they are ready to verify, wherefore by reason of the insufficiency of the said first, second, third fourth and fifth Counts of the said declaration in this behalf the said defendants pray judgment and that the said plaintiff may be barred from having or maintaining her aforesaid action thereof against them &c—

And the said defendants according to the form of the statute in such case made and provided states and shows to the Court here the following causes of demurrer to the said declaration. First that neither the first, second third, fourth nor fifth Counts of said declaration refer to or aver the passage of an act of the legislature of the State of Illinois entitled an act passed and and approved on the day of AD 1854 nor are either of said Counts predicated thereon—

Third— Third that the first Count of said plaintiffs declaration does not aver any negligence, carelessness or unskillfulness on the part of the agents or servants of the said defendants, nor does it aver or show any damages resulting from the alledged wrongful acts of the said defendants by agents or servants as aforesaid—

Fourth— That the said second Count of said plaintiffs declaration contains no averment that she is the Administratrix of Othniel Cox deceased, nor that she sues as such, but sets up a different cause of action from that stated in the first Count.

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Fifth— That the said third Count of the said plaintiffs declaration contains no averment that damages were
12 sustained in consequence of the carelessness and negligents of the defendants— further that said Count is argumentative and otherwise informal & insufficient
Sixth— That the fourth Count of said plaintiffs declaration contains no averment that the said Athmile Cox was a passenger on the Cars of defendants, nor that he was a hand or servant thereon, nor that he was rightfully thereon— further that the said Count is argumentative and otherwise informal and insufficient—
Seventh— That neither the said fourth nor fifth Counts of said plaintiffs declaration contain any averment of damages sustained by plaintiff in this behalf.
Eighth— That the fifth Count of said plaintiffs declaration contains no averment that the locomotives and Cars of defendants were employed to carry passengers — no averment that the said Athmile Cox was such passenger or had any right on said locomotives and Cars— no averment that he was a hand or servant employed thereon or rightfully belonged thereon, neither does it contain any averment that there was carelessness negligence, unskillfulness or misconduct on the part of defendants and is in other respects uncertain informal and insufficient—

Cyrus G Simons Atty for defendants

And afterwards, to wit, on the nineteenth day of May in the year last aforesaid the following order was made and entered of record in the said cause by the said Court, to wit.

Tabitha Cox Admx of Athmile Cox dec^d
vs } Case
Ill C R R Company

This cause came on to be heard upon the demurrer of the defendant to the plaintiffs

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declaration, whereupon the plaintiff confesses the insufficiency of her declaration and asks leave to amend, thereupon leave is given the plaintiff to amend her declaration in this cause.

13

And afterwards, to wit, on the twenty fifth day of December in the year last aforesaid, the said Illinois Central Railroad Company filed in the Clerk's office aforesaid the following demurrer to the said plaintiffs amended declaration, to wit,

Illinois Central Railroad Company
vs.
Sabitha Cox Admx of Athniel Cox deceased } Case

Pleas of the December Special Term of the Union County Circuit Court in the year of our Lord one thousand eight hundred and fifty five,

And the said defendants by Jay and Simmons their Attorneys come and defend the wrong and injury when &c and say that the said plaintiffs declaration and the said first, second, third, fourth and fifth Counts thereof, nor any nor either of them, and the matter and things therein contained, in manner and form as the same are in the said first second, third fourth and fifth counts above stated and set forth are not nor are either of them sufficient in law to enable the said plaintiff to have or maintain her aforesaid action thereof against them the said defendants, and they are not bound by law to answer the same, and this they are ready to verify. Wherefore by reason of the insufficiency of the said first, second, third, fourth and fifth Counts of said declaration the said defendants pray judgment and that the said plaintiff may be barred from having or maintaining her aforesaid action thereof against them

1st And the said defendants according to the form of the statute in such case made and provided, states and shows

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to the Court here ~~to the Court~~ the following Causes of
Special Demurrer to the said declaration, that neither the
14 first, second, third fourth nor fifth Counts aver or show
that she sues as well for herself as for her children & the
Children of Athenie Cox deceased,

2nd That the first Count of said declaration does not aver
nor show any damage resulting from the injury complained of.

3 That the said third Count of said plaintiffs declaration
contains no averment that damages were sustained
in consequence of the carelessness of the servants of
defendants further that said Count is argumentative
and otherwise insufficient.

4th That neither the first, second, third fourth nor fifth
Counts of said declaration contain an averment that the
said Athenie Cox was a passenger on the Cars of defend-
ants nor that he was rightfully or legally thereon, nor
does the fourth Count aver that he was a servant of
defendants

5. That neither the fourth nor fifth Counts contain
any averment of damages sustained by plaintiff
in this behalf.

6. The fifth Count contains no averment that
the locomotive and Cars of defendants were employed
to carry passengers - No averment that he was a
passenger, the said Athenie Cox nor any averment
that he was a hand or servant thereon

Joy & Simons Defts Attorneys

And afterwards to wit on the Second day of January in the
year of our Lord one thousand eight hundred and
fifty Six. the following order was made in said Cause
and entered of record, to wit,

Sabetha Cox Admx of Athenie Cox decd
vs } Case.
Ill C R R Company

This cause came on to be heard

Upon the demurrer of the defendants to plaintiffs declaration which was argued by Counsel and taken under advisement until the next term of Court to which term this cause is continued.

And afterwards, to wit, on the twenty second day of April in the year of our Lord one thousand eight hundred and fifty six the following order was made and entered of Record in the said cause, to wit,

Sabitha Cox Admx of Otheniel Cox dec.d
vs
M & R R Company
} Case

This cause having been under advisement upon the demurrer of the defendant to plaintiffs declaration, on consideration whereof the demurrer is overruled as to the first Count and sustained as to the 2. 3. 4 & 5 Counts in plaintiffs declaration

~~upon the demurrer of the defendants to plaintiffs declaration, which was argued by Counsel and taken under advisement until the next term of Court, to which term this cause is continued.~~

15

And afterwards, to wit, on the twenty fourth day of April in the year of our Lord one thousand eight hundred and fifty six the Illinois Central Railroad Company filed in the Clerk's office aforesaid the following pleas, to wit,

Illinois Central Railroad Company

vs.

Sabitha Cox Admx of Athniel Cox dec'd et al.

} Case.

Pleas of the April Term of the Union County Circuit Court in the year of our Lord 1856.

And the said defendants by Cyrus G Simons their attorney come and defend the wrong and injury when &c. and say that they are not guilty of the said supposed grievances above thereof laid to their charge, nor any or either of them, nor any part thereof in manner and form as the said plaintiff hath above thereof complained against them and of this they put themselves upon the Country &c.

Cyrus G Simons, defendants Atty

And pltff doth the like.

J. Daugherty.

2d plea And for a further plea in this behalf the said defendants says actio non because they say that the locomotive Steam Engine in the declaration mentioned was driven upon and against and came in collision with the said Railroad Car on which the said Athniel Cox then was, in manner and form as in the declaration is alleged solely by and through the carelessness negligence unskillfulness and default of the servants of the said defendants in the declaration mentioned

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in that behalf and for want of due care and proper attention by them and not by or through any other negligence, unskillfullness, default or want of due care and attention and that the said Engines and Cars in the declaration in that behalf mentioned were respectively under the guardian government and direction of the servants of the said defendants in the said declaration mentioned and of no other person or persons, and that the said several servants were severally fit and competent persons to have the guardian government and direction of the said several Engines and Cars as aforesaid respectively as he the said Othniel Cox well knew. And the said carelessness negligence unskillfulness and default and want of due care and attention of the said servants of the defendants in the declaration in that behalf mentioned at the time when &c. and always were wholly unauthorized by the defendants and were wholly without the leave or license knowledge sanction or consent of the said defendants and this they are ready to verify — wherefore &c.

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3rd plea — And for a further plea in this behalf the said defendants say Actio non because they say that the said Locomotives Steam Engines and Cars in the said plaintiffs declaration mentioned was driven upon and against and come in collision with the said Cars locomotives Steam Engine upon which the said Othniel Cox then was in manner and form as in the said declaration is alleged solely by and through the carelessness, negligence, unskillfulness and default of the said servants of the defendants in the declaration mentioned in that behalf and for want of due care and attention by them, and not by or through any other negligence unskillfulness default or want of due care and attention, and the

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said Engines and Cars in the declaration in that behalf mentioned were respectively under the guidance, government and direction of the said several servants of the said defendants in the declaration mentioned and of no other person or persons, and that the said Othniel Case at the said time when &c was also a servant and in the employment of the said defendants in ~~this behalf~~ said declaration in this behalf mentioned upon their said Railroad. And that the said carelessness, negligence unskillfulness and default and want of due care and attention of the said servants of the said defendants in the declaration in that behalf mentioned at the said time when &c. and were wholly unauthorized by the said defendants and were entirely without the leave or license, knowledge sanction or consent of the said defendants in this behalf mentioned and this the said defendants are ready to verify, wherefore &c.

Cyrus G Simons Defts Attorney

Traverse & issue to the Country &c.

J. Dougherty for Plff

4th And for a further plea in this behalf the said defendants say actio non because they say that the locomotive Steam Engine in the said plaintiffs declaration mentioned was driven upon and against and came in collision with the said Railroad Car on which the said Othniel Case then was in manner and form as in the said declaration is alleged solely by and through the carelessness, negligence, unskillfulness and default of the servants of the said defendants in the said declaration mentioned in that behalf and for want of due care and proper attention by them and not by or through any other negligence unskillfulness default or want of due care and attention and that the said Engine and Cars in the said plaintiffs declaration mentioned in that behalf were resp-

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ectively under the guedance government and direction of the servants of the said defendants in the said declaration and of no other person or persons and that the said locomotive Steam Engine and Cars in said plaintiffs declaration mentioned on which the said Ethniel Cox then was, was in the service and under the control and management of William W Bennett and Shalem E Scott contractors and servants and in the employment and service of the said defendants in said declaration mentioned and of other servants and agents upon said Railroad of said defendants and the said Ethniel Cox was at the said time at sts. on sts. aforesaid the servant and in the service and employment of the said William W Bennett and Shalem E Scott on said Cars as aforesaid And that the said carelessness, negligence unskillfulness and default and want of due care and attentive of the said servants of the said defendants in the declaration in that behalf mentioned at the said time when sts and were wholly unauthorized by any or either of the said defendants, and was wholly without the leave or license knowledge sanction or consent of the said defendants in this behalf mentioned and that the said several servants and agents were severally fit and competent persons to have the guedance government and direction of the said several Engines and Cars as aforesaid respectively as the said Ethniel Cox well knew wer them the said defendants are ready to verify.

A. G. Simons Defts Attorney

And afterwards, to wit, on the twenty fifth day of April in the year of our Lord one thousand eight hundred and fifty six the following order was made and entered of record in the said Clerks office to wit,

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Sabetha Cox Admx of Athinda Cox dec^d
vs } Case
19 Ill C R R Company

On motion to the Court this cause is by agreement of parties ordered to be continued until the next term of this Court.

And afterwards to wit on the tenth day of October in the year last aforesaid the following order was made in said cause and appears of record in said Clerk's office, to wit,

Sabetha Cox Admx of Athinda Cox dec^d
vs } Case
Ill C R R Company

On motion to the Court this cause by consent of parties is continued until the next term of Court.

And afterwards, to wit, on the fifteenth day of May in the year of our Lord one thousand eight hundred and fifty seven - the said Sabetha Cox Administratrix of Athinda Cox deceased filed her demurrer to the said Illinois Central Railroad Company's 2. 3 & 4th pleas which is in the words and figures following, to wit,

Sabetha Cox Admr etc.
vs }
Illinois Central R R Co

And the said plaintiff by Daugherty & Son her Atto^s comes & as to the defts 2. 3. & 4th pleas filed herein the says precludi non because the says that the matters & things as above pleaded in each & any of said pleas are not sufficient in law for the said deft to bar or preclude the said plaintiff from having & maintaining her aforesaid action against the defendant, wherefore for want of a sufficient second, third or fourth plea in this behalf

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the prays judgt &c his damages &c.

J. Dougherty & Son for Pltff

20 And for Special cause of demurrer shows here to the Court the following causes of Special demurrer viz

1 The said second plea is argumentative, double and otherwise uncertain & defective.

2 The said 3. plea of the deft is double uncertain and presents an immeterial issue & is otherwise argumentative & defective.

3. Defts 4th plea above pleaded is argumentative uncertain and presents an immeterial issue amounting to the general issue only

J. Dougherty & Son for Pltff

And afterwards, to wit, on the sixteenth day of May in the year last aforesaid the following order was made in the said cause, to wit,

Sabetha Cox Admx of Othniel Cox dec^d
vs
Ill C R R Company
} Case

This cause came on to be heard upon the demurrer of plaintiff to defendants 2. 3 & 4th pleas on consideration whereof the demurrer is sustained as to the 2 & 4th pleas and overruled as to the 3rd plea.

And afterwards, to wit, on the day and year last aforesaid upon the issue and trial of said cause the following instructions were given and sent to the jury, to wit,

If the jury believe from the evidence that Bennett & Scott was but the employees agents of the defendant to hand in the wood of Company or have it hauled in and not contractors then they are but their servants & not contractors in the sense in which it is used in the instructions for Deft.

Given

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Tabitha Cox Administratrix of Othniel Cox deceased
vs
The Illinois Central Rail Road Company } Case

21

of the May Term of the Union County Circuit Court in the year of our Lord 1857.

First— The defendants ask the Court to instruct the jury as matter of law, that a Railroad Company or other Corporation are not responsible for injuries to their servants or agents occationed by the carelessness negligence or unskillfulness of fellow servants while acting in the same service without their knowledge or sanction, provided such company or Corporation have taken proper care to engage competant servants to perform the duty assigned them or if the person injured was acquainted with the character ~~with~~ of his fellow servants for capacity or skillfulness while engaged as such servant.

Given

2nd That in this case, if Othniel Cox was at the time of his injury in the employment of the Ill. C R R Co (provided the jury are satisfied from the evidence that he was in their employment) and in the discharge of his duty as such and further if the believe from the evidence that the injury complained of was occationed either by his own carelessness unskillfulness or negligence or that of his fellow servants in the same line of service they should find for the defendants provided they have exercised proper care in the selection of competent servants

Given

Third— That when Othniel Cox entered into the service of the Railroad Company (if the jury should believe from the evidence that he was in their service at all) he thereby virtually undertook to run all the ordinary risks incident to his

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employment including his own negligence or unskillfulness or the negligence or unskillfulness of his fellow servants in the same employment or necessarily connected therewith

22

Given

Fourth – That it is presumed in law that his wages were commensurate with the hazards to which he was exposed.

~~Fifth~~

Given

Fifth – The true principal is that when the servant of a company engages in their service he undertakes as between himself and his employer to run all the ordinary risks of the service which he undertakes; and this includes the risk of occational negligence or unskillfulness on the part of his fellow servants or employees engaged in the same ~~service~~ line of duty or incident thereto, provided such fellow servants are competent and skillful to discharge the duty assigned them.

Given

10th The defendants ask the Court to instruct the jury that if they believe from the evidence that Bennett & Scott were contractors of the Illinois Central R R Co and as such contractors had full charge of the train upon which said Ethereal Cox was employed and the said train engineer and conductor under their control – And if they further believe from the evidence that the said Ethereal Cox was the servant of Bennett & Scott and engaged as such at the time the injury complained of occured by such train and such injury was occationed through the negligence carelessness or unskillfulness of other servants of Bennett & Scott engaged upon such train at the same time they the jury will find the defendants not guilty

Given

[8732-82]

11th The defendants ask the Court to instruct the jury that if Bennett & Scott were Contractors of the Illinois Central R R Co they were not as such Contractors the agents or servants of said Company in such manner as to charge them the said Company with any injury that might occur to a servant to Bennett & Scott through the carelessness, negligence or unskillfulness of them the said Bennett and Scott or their agents or servants.

23

Given

12th That if Bennett & Scott were Contractors of the Illinois Central R. R. Co. and as such had full and entire charge of the locomotive and Cars & the control & direction of the officers & hands thereon upon which said Ethneal Cox was engaged at the time the injury occurred title the plaintiff is not entitled to recover in this action if the jury believe from the evidence that the injury occurred solely through carelessness negligence or unskillfulness of the servants or agents of Bennett & Scott engaged upon the same train or otherwise

Given

13th The Court instructs the jury that if Bennett & Scott were mere contractors of the Illinois Central R.R. Company and had under their charge and control the train of Cars upon which the said Ethneal Cox was engaged at the time the injury occurred which said train was seen and conducted by the officers in the employ of the Illinois Central R R Co but at the time of the occurance said train & officers were under the entire & exclusive control direction and government of the said Bennett & Scott then the said officers would for the time being become the servants of Bennett & Scott to this extent, that the Illinois C R R Co could not be made liable in this action if the testimony proves these facts.

Given

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And afterwards, to wit, on the day and year last aforesaid the jury empannelled and sworn to try the issue joined between the parties returned into Court the following Verdict. to wit.

24

We the jury find the defendants gitty and asses the damage to one thousand dollars.

And afterwards, to wit, on the day and year last aforesaid the following order was made in the said cause by said Court and entered of record, to wit,

Sabetha Cox Admx. of Athonie Cox dec^d
vs
Ill C R R Company } Case

On this day came the plaintiff by John Daugherty her attorney as also the defendants by C G Simons their attorney and issue being joined came a jury, to wit, Matthew Stokes, David Frees James Cockrum, James Corbett, Jasper McElhany W G Carter, B F Mangold David Vought Dell Davidson John, Ferrill Caleb Miller & Henry Seyerle twelve good and lawful men who being empannelled and sworn well and truly to try the issue joined between the parties upon their oaths say we the jury find the defendants guilty and assess the damage at one thousand dollars And thereupon the said defendants move for a new trial

And afterwards, to wit, on the eighteenth day of May in the year of our Lord one thousand eight hundred and fifty seven the following order and final judgment was by the said Court made in said cause and entered of record, to wit,

Sabetha Cox Admx of Athonie Cox dec^d
vs
The Ill. C. R. R. Company } Case

This cause came on to be heard upon the motion of the defendants to set

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aside the verdict rendered in this cause on Saturday last and was argued by Counsel on consideration 25 whereof it is ordered that the said motions be overruled Therefore it is considered by the Court that the said plaintiff recover of the said defendants the sum of one thousand dollars her damages aforesaid and also her costs and charges in this behalf expended Thereupon the said defendants by C G Simons their attorney pray an appeal to the Supreme Court which is allowed by defendants entering into bond in the sum of one thousand ~~dollars~~ and two hundred dollars with Lewis W Ashley or Joseph F Ashley security in thirty days from this day.

Note: Bill of exceptions may be ~~signed~~ filed in vacation

And afterwards, to wit, on the twenty first day of May in the year of our Lord one thousand eight hundred and fifty seven the Illinois Central Railroad Company filed in the Clerk's office aforesaid the following Appeal Bond, to wit,

Know all men by these presents that we the Illinois Central Railroad Company by C G Simons Joseph F Ashley & L W Ashley of the County of Union and State of Illinois are held and firmly bound unto Sabatha Cox Administratrix of Ethniel Cox deceased in the penal sum of two thousand and five hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly severally and firmly by these presents sealed with our seals and dated this twentieth day of May in the year of our Lord one thousand eight hundred and fifty seven.

The condition of the foregoing obligation is such that whereas the above named Sabatha Cox administratrix as aforesaid did at the May Term of the

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Union County Circuit Court in the year of our Lord
one thousand eight hundred and fifty seven, before
26 the Judge thereof and on the eighth day of said term
recover a judgment against the above bounden
Illinois Central Railroad Company for the sum of
one thousand dollars damages besides costs of suit
from which judgment the said Illinois Central
Railroad Company wishes to take an appeal to
the Supreme Court of the State aforesaid to review
said judgment Now if the said Illinois Central
Railroad Company shall well and truly and without
delay prosecute their said appeal with effect or in
case of failure therein shall well and truly pay or
cause to be paid whatsoever judgment may be
rendered by the said Court upon the trial or
dismissal of said appeal then this obligation
to be void otherwise to remain in full force and
effect.

Illinois Central Railroad Company
By E. G. Simmons their Atty in fact (Seal)
E G Simmons (Seal)
L. W. Ashley (Seal)
(Seal)

And afterwards, to wit, on the day and year first aforesaid, to wit, on the thirteenth day of October in the year of our Lord one thousand eight hundred and fifty seven the said Illinois Central Railroad Company filed in the Clerk's office of said Court the following Bill of exceptions, to wit,

Latitha Cox administratrix
of the estate of Arthinella Cox dec^d } Plaintiff
vs } Case
Illinois Central Rail Road Company } Defendants

In the Union Circuit Court
May Term 1857.

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Be it remembered that at the calling of the above entitled cause for trial a jury were impannelled to try the issues between the parties aforesaid whereupon the following evidence was adduced.

The plaintiff introduced Green Bridges who was duly sworn and deposed as follows:
I am acquainted with the plaintiff in this suit Jabetha Cox. I was present when Otheniella Cox was killed He was killed on the 9th day of February 1857. He was killed by a train of Cars running on the Illinois Central Railroad which were at the time he was killed engaged in hauling wood. The circumstances under which Cox lost his life were about these: In the morning before he was killed we all got on the train and went down the road from Anna after a load of wood, When the cars were loaded they were started Cox and myself were standing together on the Cars, for a time after which I moved my position to another place on the cars in front rather of where Cox was standing. Cox was standing up ~~when~~ against the wood with his face turned towards the rear of the train. The train was running rather fast and just as we came to a train on the side track I turned my head and saw the wood on the cars tumbling off. The wood struck the train on the side track which shoved it back against Coxes legs and tripped him up and threw off the cars the moment I saw him fall I hallowed as loud as I could to have them stop the train, but the train still went on. I saw a young man standing in front of me on the train I then motioned my hand to him. The young man immediately pushed open the door of the Caboose car and the Conductor came running out of the Caboose car and asked what was the matter I informed him and he wheeled

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right round and ran back and whistled and the train was stopped. By this time the train had ascended to the top of the rise When the train was stopped we ran back to where Cox was thrown off and there lay Cox dead. He was apparently as muddy as he could be and looked like if he had been rolled over in the mud for some little distance. His knees were laying up forter towards his head, one foot was nearly cut off. it hung only by a leader. He was so muddy that this was the only injury we perceived at that time. Mr Cox was very muddy indeed Mr Scott then left me and John B Jones to wash the body ready to be taken back on the train while they went to section ten Jones & me then washed off the mud off of Cox and when the train returned we put him on board and brought him home Coxs thigh was broken in two so that the bones stuck out there were cuts over each eye and a large gash on the back of his head so that we could see his skull bone Cox never moved after I went back I was well acquainted with him Plaintiff Counsel here asked witness whether Cox left any children and if so how many and their respective ages the defts counsel objected but the court overruled the objection and the defendants by their counsel ~~objected~~ excepted Witness then stated that Cox left four children or five he could not state definately He also left a widow the plaintiff in this suit one of the children was a small boy eight or nine or ten years old There were three girls one of whom was nearly grown the other about fourteen or fifteen years old and the third girl a deal smaller there were three girls and one boy Cox was the only man person about the house He was what might be called a poor man and was working at that time by days work for a living He labored for a living The locomotives and cars upon which Cox was at the

[8732-28]

time he was killed were called the Illinois Central Railroad Company, the name of the Engineer on the train at the time was Travis the Conductor was of the name Wright. I thought we were hauling wood for Bennett and he (Bennett) was hauling for the Company the wood which we hauled was used along the line of the Illinois Central Rail road the wood that knocked Cox off was knocked off the train by running against another train It looks like if Conductor and engineer had looked out they might have seen the Cars standing on the side track I always thought that it was the Conductors business to look out. The speed of the train was not slacked up as we came to the switch, I dont know what Travis character as an Engineer was, I Travis was drunk I dont know it I did not see him drink any thing nor do I know that he was in the habit of drinking I saw Travis once or twice afterwards. The wood was out over the edge of the Cars that struck the Cars on the switch.

Cross-examined

Bennett was a Contractor on the road to furnish wood. Bennett and Scott had the locomotive and Cars under their Control for that purpose. They sent the train when they pleased Cox was employed by Bennett as I supposed I thought we were all employed by Bennett. That was the first time that I was ever on that train and remained on it only two days I could not form any opinion as to the competency of the Conductor and engineer I had known Cox 5 or 6 years I dont know much about his habits of life. He drank too much liquor sometimes. I thought him to be a good hand to work – I dont know whether he spent much money for liquor or not, I have seen him

drinks Mr Cox was always industrious as far as I know I suppose Mrs Cox used almost as much industry in trying to ~~raise~~ make a living as did Mr Cox.

30

Re examined

Bennett was hauling wood for the Company as I understood it, was taking it to Stations along the road for the Company Cox was killed about 12 O'clock of the day time.

Philip Crouse Witness for the plaintiff introduced and sworn deposed as follows.

I was a little acquainted with Cox, had known him 8 or 10 months Cox worked pretty much all the time I knew him on the line. His family were pretty much dependant upon his labor for a living I saw Travis the Engineer on the morning of the day Cox was killed. Travis asked me to go into a grocery with him and drink something I did so and Travis treated me and drank himself and soon afterwards left ~~himself~~ on the train, I thought Travis was a little tight that morning. I did not think that he could hardly walk straight

Cross-Examined

I dont know what time of day Cox was killed I dont know what Cox's habits of life were for drinking liquors, It was between 7 and 9 O'clock in the morning that I drank with Travis.

This was all the evidence introduced by the plaintiff

The defendant then introduced as a Witness William W Bennett who was duly sworn and deposed as follows.

I know the time when Cox was killed I was at time a contractor on the road my business was to furnish wood to the Company

[8732-23]

3) and build fence Mr Scott my partner and myself had charge of the train off of which I suppose Cox was thrown ~~off~~ & killed We had charge of the train and the men on the same had to obey our orders Mr Cox was in our employ at the time Mr Scott my partner and myself sent the train out that morning. I had known Davis since he came on the road in the Spring of 1854 or 1855 He had been here at least eight months before Cox was killed We looked upon him as one of the best engineers on the Road and that was his character He was skillful carefull and competent I regarded him as a very superior man in that business indeed, Wright I had known for 3 months He had been very successful with us and bore a good reputation as a conductor I did not see Wright after about 8 O'clock of that morning in the forenoon of that day Cox was sometimes very sober and at other times would get drunk but he was not an habitual drunkard His general habits of life were that of a sober man but would sometimes get on on a spree and spend all the money he had for he never had much My contract with the Company — as to furnishing wood was this; I was to furnish them at a certain price and the Company were to furnish me a train of Cars and locomotive an Engineer Conductor and fireman and the balance of the hands necessary Mr Scott and myself were to furnish ourselves They did furnish us a Conductor Engineer and fireman Cox was in our employ at the time of his death It was only a few days at a time that the train was furnished us when we would call in all the hands we needed.

Cross-Examined.

82 Bennett and Scott were always held responsible for the management of the train by the Superintendant and the officers ~~that~~ the Company furnished us to run the train was subject to our direction and control We could stop them at any time neither me nor Scott commanded the Conductor or Engineer to run the train against the other.

Defendants then introduced Ashley who was sworn and deposed as follows:

I have been acquainted with Travis ever since 1853 I always considered Travis a careful skillful and competent Engineer.

Defts then introduced John Buck who was sworn and deposed as follows:

I was acquainted with Travis, I think he was a careful competent Engineer.

This was all the evidence given in the case on the part of the defendants and the above and foregoing testimony was all the evidence adduced either by the plaintiff or the defendants upon the trial.

The plaintiffs counsel then asked the Court to instruct the jury:

If the jury believe from the evidence that Bennett & Scott was but the employees agents of the defendants to hand in the wood of Company or have it handed in and not contractors, then they are but their servants & not contractors in the sense in which it is used in the instructions for Deft.

Given

To which instruction the defendants by their counsel excepted.

The defendants counsel then asked the Court to instruct the jury:

[8732-31]

33 First— The defendants ask the Court to instruct the jury as matter of law that a railroad Company or other corporation are not responsible for injuries to their servants or agents occationed by the carelessness negligence or unskillfulness of fellow servants while acting in the same service without their knowledge or sanction provided such Company or corporation have taken proper care to engage competent servants to perform the duty assigned them or if the person injured was acquainted with the character of his fellow servants for capacity or skillfulness while engaged as such servant

Given

2nd That in this case if Athniel Cox was at the time of his injury in the employment of the Ill C R R C (provided the jury are satisfied from the evidence that he was in their employment) and in the discharge of his duty as such, and further if they believe from the evidence that the injury complained of was occationed either by his own carelessness unskillfulness or negligence or that of his fellow servants engaged in the same line of service they should find for the defendants provided they had exercised proper care in the selection of competent servants.

Given

Third— That when Athniel Cox entered into the service of the Rail road Company (if the jury should believe from the evidence that he was in their service at all) he thereby virtually undertook to run all the ordinary risks incident to his employment including his own negligence or unskillfulness or the negligence or unskillfulness of his fellow servants in the same employment or necessarily connected therewith—

Given

Fourth – That it is presumed in law that his wages were commensurate with the hazards to which he was exposed

Given

Fifth – The true principle is that when the servant of a Company engages in their service he undertakes as between himself and employer to run all the ordinary risks of the service which he undertakes and this includes the risk of occasional negligence or unskillfulness on the part of his fellow servants or employees engaged in the same line of duty or incidental thereto provided such fellow servants are competent and skillful to discharge the duty assigned them

Given

10th – The defendants ask the Court to instruct the jury that if they believe from the evidence that Bennett & Scott were Contractors of the Illinois Central R R Co. and as such Contractors had full charge of the train upon which said Atherval Cox was employed and the said train Engineer and Conductor under their Control, and if they further believe from the evidence that the said Atherval Cox was the servant of Bennett & Scott and engaged as such at the time the injury Complained of occured by such train and such injury was occationed through the negligence carelessness or unskillfulness of other servants of Bennett & Scott engaged upon such train at the same time they the jury will find the defendant not guilty.

Given

11th – The defendants ask the Court to instruct the jury that if Bennett & Scott were Contractors

85 of the Illinois Central RR Co they were not as such Contractors the agents or servants of said Company in such manner as to charge them the said Company with any injury that might occur to a servant of Bennett & Scott through the carelessness negligence or unskillfulness of them the said Bennett & Scott or their agents or servants

Given

12th That if Bennett & Scott were contractors of the Illinois Central RR Co and as such had ~~complete~~ full and entire charge of the locomotive and cars & the control & direction of the officers & hands thereon upon which said Othneal Cox was engaged at the time the injury occured still the plaintiff is not entitled to recover in this action if the jury believe from the evidence that the injury occured solely through carelessness negligence or unskillfulness of the servants or agents of Bennett & Scott upon the same ~~service~~ train or otherwise

Given

13th The Court instructs the jury that if Bennett & Scott were sub contractors of the Illinois Central RR Company and had under their charge and control the train of cars upon which the said Othneal Cox was engaged at the time the injury occured which said train was run and conducted by the officers in the employ of the Illinois Central RR Co but at the time of the occurance said train & officers were under the entire & exclusive control direction and government of the said Bennett & Scott then the said officers would for the time being become the

[8732-34]

36

servants of Bennett & Scott to this extent that the Illinois C R R Co could not be made liable in this action if the testimony proves these facts.

Given

To all and each of which instructions the said plaintiff by her counsel then at the time excepted

The jury found the issue for the plaintiff and assessed the damages at one thousand dollars the defendants by their counsel moved the Court for a new trial which motion the Court overruled and to which opinion the defendants by their counsel then and there excepted and now prays that this their bill of exceptions be signed sealed and made a part of the record which is accordingly done.

William R Parrish (Seal)
Judge Union Cir Court

State of Illinois }
County of Union } I Thomas Heileman Clerk of the Circuit Court within and for said county do hereby certify that the foregoing contains a true full and perfect transcript of the said cause as the same now is and remains on file and of record in my office –

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at office in Jonesboro this 30 day of October AD 1857.

Thomas Heileman Clk

[8732-35]

The Illinois Central Railroad Company Appellants
vs.
Sabitha Lex. Admx &c. of Ottinis Lex dec. Appellee

Appeal from Bureau Co.

Pleas of the Novem Term of Supreme Court in the year of Our Lord one thousand eight hundred and fifty seven

And the said appellants by Lyons & Simons their attorney come and now assign the following Causes of error in the record and proceedings aforesaid

First Second That the verdict of the jury was against the law

That the verdict of the jury was against the law and the evidence

Third That the Court erred in refusing to grant a new trial and in rendering judgment

Fourth That the Court erred in giving instructions asked for by defendant.

Fifth And that the Court also erred in sustaining the defendants demurrer to the Plaintiffs second and fourth Pleas

Lyons & Simons
Plaintiffs Attorney
Trustee in error
Johnson Douglas & the Statutes
for defts in
Error

No. 16

Illinois Central Railroad Company Appellants

vs.

Sabrina Cox Admx. of Ethniel Cox deceased Appellee

Filed 25. Nov. 1857.
N. Johnston Clk

Deposit $5.00 by
C. G. Simms Esq

Refilled Dec. 1. 1857.
N. Johnston Clk

Illinois Central Railroad Company Plaintiffs in error and Appellants, but Defendants in the Court below.

vs.

Sabitha Cox Administratrix of Ottniel Cox deceased. Defendant in error. Appellee but Plaintiff in the Court below

Appeal from Union County

Pleas of the November Term of the Supreme Court. In the year of our Lord one thousand eight hundred and fifty seven

Will the Clerk of Supreme Court Issue a Scire Facias for the defendant in the above styled Case directed to the Sheriff of Union County for service and returnable on the first day of the next Term of this Court

Lyman G. Simons
Atty for Plaintiffs in error

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16

In the Supreme Court
November Term A.D. 1857

The Illinois Central Rail-
road Company. Plffs
in error & Appellees

vs

Schuitten Ex Administratrix
of Ottemis, Ex deceased
Defts in error & appellee

Precipe

C. S. Lemons
Plffs. Attorney

Filed 25th November 1857.
N. Johnston Clk

Refiled Dec 1. 1857.
N. Johnston Clk

Ills Central R.R. Co appellants

vs

Mabitha Coy - appellees

Points & authorities relied on by appellee

1st Negligence in this case is a question of fact to be determined by the Jury 2d American R. Way Cases 381 258

2d The Engineer & Conductor being skillfull makes no defence 1 Blackstone 432, 13th Peters 181, Story on agency p. 452, 453,

3 That the ~~[illegible]~~ deceased was not the servant of the appellants within the principle of 4th Metcalf 49. 5th Porter Indiana Reports 345 14th Pick 71. 5 Bos & Pul 182, 5 Barnwell & Cresswell 547.

6 As to the care required of Coy - all that was required was that he should take reasonable care 2d American R. Way Cases 114. and it was the duty of the Conductor to give him timely warning see Laing vs Colder 2d American Way Cases 378

7 The onus lies upon the appellant see Rail way Cases page 381

R S Nelson for appellee

[8732-38]

Mrs C C Clark
"
Coy A Mill
Receipt of printed
Stamps

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, vs. TABITHA COX, Administratrix of OTHNEILE COX, deceased, *Appellee*.	Appeal from UNION COUNTY.	Pleas of the November Term of the Supreme Court of the State of Illinois, in the year of our Lord One Thousand Eight Hundred and Fifty-seven.

Page 1 of Record.

This action was instituted by the Appellee against the Appellant in the Union County Circuit Court, on the 2d day of May, A. D. 1855.

Pages 2 to 10.

The Declaration was in Case, and contained five counts, setting forth that the Appellant, being the owner of the Illinois Central Railroad, and the locomotives, engines, and cars running thereon, did, by and through its servants and employees, so carelessly misdirect and mismanage a locomotive and cars, running on said railroad, as to carelessly, negligently and unskillfully cause a collision, whereby one Othneile Cox, who was employed as a servant on said cars by defendant, was killed; to the damage of his Administratrix, the plaintiff in this suit, of $5000 00.

Pages 16 to 19.

To said Declaration the defendant pleaded *not guilty*, and for a further plea that the said collision of the said locomotive and cars in the plaintiff's declaration was caused solely by the carelessness, negligence, and unskillfulness of the defendant's servants, and from their want of due care and attention, and not by or through any other carelessness, unskillfulness, default, or want of due care and attention, that the said locomotive and car in the declaration mentioned were respectively under the guidance, government and direction of the said several servants of the defendant, and of no other person or persons; and that the said Othneile Cox, at the same time, when, &c., was also a servant and in the employment of the said defendant upon said railroad, and that the said carelessness, negligence, and unskillfulness, and want of due care and attention of said servants were unauthorized by defendant, and entirely without his leave, license, or knowledge.

Page 21.

Upon said pleas issue was taken; and the cause was tried at the May, A. D. 1857, Term, of said Court, before the Hon. Wm. K. Parrish, Judge of said Court, and a jury.

Page 28.

Upon said trial, the plaintiff introduced Green Bridges, who testified as follows: "I was present "when Othneile Cox was killed; he was killed on the 9th day of February, 1855. He was killed "by a train of cars running on the Illinois Central Railroad, which were, at the time he was killed, "engaged in hauling wood. The circumstances under which Cox lost his life were about these: In "the morning before he was killed, we all got on the train, and went down the road from Anna "after a load of wood. When the cars were loaded, they were started. Cox and myself were "standing together on the cars for a time, after which I moved my position to another place on the "cars, in front, rather, of where Cox was standing. Cox was standing up against the wood with "his face turned towards the rear of the train. The train was running rather fast, and just as we "came to a train on the side track, I turned my head and saw the wood on the cars tumbling off. "The wood struck the cars on the side track, which shoved it back against Cox's leg, and tripped "him up, and threw him off the cars. The moment I saw him fall, I hallowed as loud as I could to "have them stop the train, but the train still went on. I saw a young man standing in front of me "on the train; I then motioned my hand to him. The young man immediately pushed open the "door of the caboose car, and the conductor came running out of the caboose car, and asked what

Page 29. " was the matter. I informed him, and he wheeled right round and ran back and whistled, and " the train was stopped. When the train was stopped, we ran back to where Cox was thrown off, " and there lay Cox, dead. He was covered with mud, as if he had been rolled over in the mud " for some little distance; one of his feet was nearly cut off; his thigh was broken so that the " bones stuck out; there were cuts over each eye; and a large gash on the back of his head, so " that we could see his skull bone. Cox never moved after I went back. I was well acquainted " with him.." Plaintiff's counsel here asked witness "whether Cox left any children, and if so, how many, and their respective ages?" The defendant's counsel objected, but the Court over-ruled the objection, and the defendant, by counsel, excepted. Witness then stated "that Cox left four " or five children, as also a widow, the plaintiff in this suit. Of the children, one was a son, 8, 9 " or 10 years old; the others girls, one nearly grown, one 14 or 15 years old, and the other a size " smaller. Cox was the only man person about the house. He was a poor man—a day laborer.—

Page 30. " The locomotive and cars upon which Cox was at the time he was killed, were called the Illinois " Central Railroad Company's. The engineer's name was Travis; the conductor's, Wight.— " The wood hauled was used along the line of said Railroad. The wood that knocked Cox off, " was knocked off the train by running against another train. It looks as if the conductor and " engineer might have seen the car standing on the side track if they had looked out. Our speed " was not slacked up as we came to the switch. Do not know Travis's character as an engineer.— " If he was drunk I do not know it; did not see him drink; do not know that he was in the habit " of drinking. The wood was not over the edge of our cars."

Cross-examined.—" Bennett was a contractor on the road to furnish wood. Bennett and Scott " had the locomotive and cars under their control for that purpose. They sent the train where " they pleased. I thought that Cox was employed by Bennett; that we were all employed by " him. Can give no opinion as to competency of conductor or engineer. Had known Cox 5 or 6 " years; he was industrious, but sometimes drank too much liquor."

Page 31. Re-examined.—" Bennett was hauling wood for the company; taking it to stations along the " road for the company. Cox was killed about 12 o'clock of the day time."

Philip Cruse testified that he "had known Cox 8 or 10 months. Cox's family were pretty much " dependent upon his labor for a living. Witness drank with Travis between 7 and 9 o'clock on the " morning of the day that Cox was killed—thought that he was a little tight."

This was all the evidence introduced by the plaintiff.

The defendant then introduced Wm. W. Bennett, who testified as follows: "At the time that Cox " was killed, I was a contractor on the road. My business was to furnish wood to the company, and

Page 32. " build fence. Mr. Scott, my partner and myself, had charge of the train, off of which, I suppose " Cox was thrown and killed. We had charge of the train, and the men on the same had to obey " our orders. Mr. Cox was in our employ at the time. We sent the train out that morning. I " had known Travis at least eight months before Cox was killed. He was regarded as one of the " best engineers on the road; that was his character. He was skillful, careful and competent. I " regarded him as a very superior man in that business. I had known Wight for three months. " He had been very successful, and bore a good reputation as a conductor. Cox was generally a

"sober man, but would sometimes get drunk. My contract with the company, as to furnishing wood, "was this: It was to be furnished at a certain price, and the company were to furuish a train of "cars, locomotive, engineer, conductor and fireman, and the balance of the hands necessary. Mr. "Scott and myself were to furnish ourselves. They did furnish us a conductor, engineer and fire-"man. Cox was in our employ at the time of his death. It was only a few days at a time that "the train was furnished us, when we would call in all the hands needed."

Page 33. Cross-examined—"Bennett and Scott were always held responsible for the management of the "train by the superintendent, and the officers that the company furnished us were subject to our "direction and control. We could stop them at any time."

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Page 34. 1st. "The defendants ask the Court to instruct the jury as matter of law, that a railroad com-"pany or other corporation, are not responsible for injuries to their servants or agents, occa-"sioned by the carelessness, negligence or unskillfulness of fellow-servants, while acting in the "same service, without their knowledge or sanction, provided such company or corporation have "taken proper care to engage competent servants to perform the duty assigned them; or if the "person injured was acquainted with the character of his fellow-servants for capacity or skill-"fulness, while engaged as such servant.

2d. "That, in this case, if Othneile Cox was, at the time of his injury, in the employment of Ill. "C. R. R. Co., (provided the jury are satisfied from the evidence that he was in their employment,) "and in the discharge of his duty as such; and, further, if they believe from the evidence that the "injury complained of was occasioned either by his own carelessness, unskillfulness or negligence, "or that of his fellow-servants in the same line of service, they should find for the defendants, pro-"vided they have exercised proper care in the selection of competent servants.

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Page 35. 4th. "That it is presumed in law that his wages were commensurate with the hazard to which "he was exposed.

5th. "The true principle is, that when the servant of a company engages in their service, he "undertakes as between himself and his employer, to run all the ordinary risks of the service which "he undertakes; and this includes the risk of occasional negligence or unskillfulness on the part of "his fellow-servants or employees engaged in the same line of duty, or incident thereto; provided "such fellow-servants are competent and skillful to discharge the duty assigned them."

10th. "The defendants ask the Court to instruct the jury, that if they believe from the evidence "that Bennett and Scott were contractors of the Illinois Central R. R. Co., and as such contractors, "had full charge of the train upon which said Othneile Cox was employed, and the said train, en-"gineer and conductor under their control; and, if they further believe, from the evidence, that the "said Othneile Cox was the servant of Bennett and Scott, and engaged as such at the time the "injury complained of occurred by such train, and such injury was occasioned through the negli-"gence, carelessness or unskillfulness of other servants of Bennett and Scott engaged upon such "train at the same time, they, the jury, will find the defendants not guilty.

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12th. "That if Bennett and Scott were contractors of the Illinois Central R. R. Co., and as such, "had full and entire charge of the locomotive and cars, and the control and direction of the officers "and hands thereon, upon which said Othneile Cox was engaged at the time the injury occurred, "still the plaintiff is not entitled to recover in this action, if the jury believe from the evidence that "the injury occurred solely through carelessness, negligence or unskillfulness of the servants or "agents of Bennett and Scott, upon the same train or otherwise.

13th. "The Court instruct the jury, that if Bennett and Scott were mere contractors of the Ill. Cent. "R. R. Company, and had under their charge and control the train of cars upon which said Othneile "Cox was engaged at the time the injury occurred, which said train was run and conducted by the "officers in the employ of the Illinois Central R. R. Co., but at the time of the occurrence said train "and officers were under the entire and exclusive control, direction and government of the said "Bennett and Scott, then the said officers would for the time being become the servants of Ben-

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Page 26. damages at one thousand dollars. The defendant, by counsel, entered a motion for a new trial, which was overruled by the Court, and defendant excepted. Thereupon, the Court rendered judgment in favor of plaintiff, and against defendant, for the sum of one thousand dollars and costs of suit. The defendant appealed to this Court, and now assigns the following causes of error:

1st. That the verdict was against the law and the evidence.

2d. That the verdict was against the instructions of the court.

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4th. The Court erred in the instruction to the jury given at the instance of the plaintiff (appellee.)

5th. That the Court erred in refusing to grant a new trial, and in rendering judgment.

C. G. SIMONS,
Attorney for Appellant.

The Ills Cent R R Co
a Appellant

Tabitha Cox Admtrx
Appellee

C. G. Simons
for appellt

A. Dougherty
for Appellee

The Illinois Central Rail road Company Plff in Error

vs

Thos. Cox Deft in Error

By the Statute upon which this action is predicated it is provided That when death is caused by the "wrongful act - neglect or default" and the same if death had not ensued would "have entitled the party injured to maintain an action" then the Company to which would have been liable to deceased had death not ensued - shall be liable to - Scates Statutes, 422

The question to be determined is. If Cox had not been killed by this Collision. Could he have maintained an action for his injury against the Ills C R R Company?

Now I lay down the following propositions one - or the other of which is necessarily true from the Evidence

18 Ills

First - That all parties (Cox included) upon and in charge of the train were the Servants of the Company Or

Secondly - That all the hands on the train (Cox included) were the Servants of Bennett & Scott, whose train & cars they managed,

By reference to the record P. 31, Bennett states what his Contract with the Company was - he was to furnish wood at a fixed price in addition to which the Company were to furnish him - Locomotive, Cars and hands, they subject to his (& Scotts) "Direction & Controll". Now here are two independent portions - Bennett & Scott agree to furnish wood for a Consideration agreed on. by the fixed price - Locomotive hands to furnished & to be subject to their Controll — The Company agree to give this & receive the wood -

[8732-44]

Now so long as the wood remained not "furnished" by Bennett & Scott to the Company (I.E before delivery) it belonged (not to the Company but) to Bennett & Scott, and they could sell it to any third person before delivery to ~~the~~ the Company - free of any Claim by the Company - Just as if A. agrees with B. to furnish the Latter a two horse team, wagon & driver & give him 2$ per Cord for wood - B agreeing to furnish wood for this Consideration. When the Company in the Case at bar - (or A. in the Case put for illustration has furnished - horses wagon & hand) has furnished locomotive Cars & hands then pro tanto they have performed their Contract - The whole hopes from their Control and pro tempore become the Servants of Bennett & Scott doing the Labor of Bennett & Scott - upon the wood of Bennett & Scott. Bennett & Scott - stand apart intermediate from - and independent of - the Company - Every man who agrees to furnish me a load of hay - a thousand Shingles - 500 feet of lumber or a Cord of wood is not my Servant, hence I argue that Bennett & Scott were principals, not agents or Servants & if they were principals those who were doing their business - for them. were their Servants, Therefore the Conclusion is clear if the premises are correctly stated that if there was any "wrongful act, neglect or default" on the part of those who were Bennett & Scotts Servants, acting for them - getting their wood ready to be delivered to the Company; then the defendants are not liable even if Bennett & Scott did intend the wood for delivery to the Company

For authorities in support of these positions view

1st Parsons on Cont Page 87.

15	Ills	550	Principal not liable to one servant for the carelessness of another servant, where both are engaged in the same business.
4	Mass	49	— same point.
24	Wright Co L & R	596	
6	Hill	592	Same point —
3	Exchq	1st	Mason & Webb — Same prin
1st	Pennsylv	86	21 Leg
4	Exch	256	Webb Mastrone & Gordon.
7	A & E	974	34. Eng. C. L. R. no such opinion
9	Mees & W	712	Same principle —

[8732-45A]

"The principle which defines the rule Respondeat Superior
"is this It "Grows out of, is measured by and begins and
"Ends with his Controll of the Servant"

"One is not liable for for a person who is only his
Servant by Construction Except so far as this Essential
Element of Controll and direction Exists between them

1st Person 88.

"Where the negligent party Exercises a distinct
independent Calling, his Employer is not liable"

1st Person Cont P 89. note (b)

"And if the negligence be committed in performance of
a Job a Piece of work undertaken in Consequence of a
Special Contract. the Contractor is Solely liable — Ibid

Allen vs Hayward 7. QB. 960

A party who is not the General master of a Servant
may make him his Servant in a particular transaction
By specially directing him thereto. 1st Person Cont P. 90 - note

In case of persons employed to do work on Contract
the Employer has no Control & is not liable

Ibid 90 - 91 - 92

It is the Contract with Bennett that put the hands all
out of the Companies Controll - under Bennetts & Scott
direction & Controll —

[8732-45]

I therefore insist that if the facts proven show that Bennett & Scott had the Controll & Direction of the locomotive, Cars and hands (as they swear they did) when this accident occurred then the Rail road Company are not liable

But if these hands with Cox are not to be regarded as the Servants of Bennett & Scott, by reason of their
(B & S) right to Controll & direct them & their Services or if it be held that Bennett & Scott & the hands under them were all the Servants of the Company then — being all Servants together; the Superior or master Could not have been made liable to one for injuries received by him by or on account of the negligence wrongful act or default of his Co Servant — and hence — the Master is not liable to the Administrator here

For authorities on this point See

Wharton 1st Person P 92 & following authorities —

The Illinois Central Railroad Company. Plaintiffs in error

vs.

Tabitha Levy, Administratrix of Otniel Levy, deceased Defendants

In the Supreme Court

November Term A.D. 1857

Appeal from Union

Points for Plff in error

First

The Plaintiffs in error are not responsible for injuries to their servants or agents, occasioned by the carelessness, negligence or unskilfulness of their fellow servants, while acting in the same service. Provided such agents or servants are, in their general character, fit and competent men to perform the duty assigned them, and provided further, such carelessness and negligence was without their express knowledge, sanction or consent. = See Homer vs. The Illinois Central Railroad Company, 15 Ill. Rep. 550 = Hutchinson Administratrix vs. The York Newcastle & Berwick Railway Co. - 6 English Railway cases 438. 9. 440. 1-2-3. = Wigmore Admx. vs. Jay Shil. 445. This case also reported in vol 5 of English Exchequer Rep. = Priestly vs. Fowler Shil. 446 See note. = Seymour vs. Maddox 5th English Law & Equity Rep. 265 = The Eastern Counties Railway Co. ats. of Skip - 24 English Law & Eq. Rep. = Farwell vs. The Boston & Worcester Railroad Co. 4 Mete. (Ashmun) Rep. 49. Found in 1 American Railway cases 339. = Hays vs. The Western Railway Co. 3 Cush. (Dewey) Rep. 270 = Also quoted in American Railway cases 564. = Brown vs. Maxwell. 6 Hill

58732-46

(N.Y.) Rep. 592. Keen vs. The Syracuse and Utica Railroad Co. 6 Barbour (N.Y.) Rep. 231. Same case affirmed on appeal 1 Selden 492 = Mooney vs The South Carolina Railroad Co. 1 McMullan 385. — Lockwood Carey & wife vs The Berkshire Railroad Co. and Oliver Skinner vs. The Housatonic Railroad company. 1 American Railroad Cases 442. The latter case also Reported in 1 Cushing Rep. 475. = Sherman vs. The Rochester and Syracuse Railroad company 15 Barbour's Rep. 574. = Albro vs. The Agawam Canal Co. 6 Cushing (Mass.) Rep. 75. If therefore it be held that Otheniel Gray was the servant of the company still plaintiff cannot recover

Second — It is not necessary to show on the part of the defence, that the persons injured were in the same employment with the servants whose conduct is complained of; or engaged in the same employment, or on the same cars, but if they incidentally be employed, and so as to become connected in the course of their employment, the Administratrix in this case could not recover = See Farwell vs the Boston and Worcester Railroad Co. 4th Metcalf's Reports 36. before cited.

Third — When an individual engages in the employment of another, which involves, also, the employment of others like himself, he thereby undertakes

as against his employer, he thereby can to run all the ordinary risks incidental to his employment, including the occasional negligence or unskilfulness of his fellow servants in the same line of duty, or incidentally connected therewith

Vide Hutchinson Admrx. vs. the York Newcastle and Berwick Railway Co. = before cited

Fourth — But in this case, the evidence clearly shows that Atkinson was not the servant of the company, but the servant of Bennett and Scott contractors upon the Railroad. And that the injury complained of was occasioned by and through the the carelessness and negligence of other servants of Bennett & Scott engaged upon the same train. There is not therefore, any principal of law which would enable the Plaintiff to recover.

Fifth — The Court erred in sustaining the Plaintiffs, (in the Court below) demurrer to the defendants Second and fourth pleas. Both of which, if true, = and it is submitted that the proofs in the case sustain them = contain a good defence to the action and the matters therein contained are not argumentative or informal = Vide Hutchinson Admrx. vs. the York, Newcastle & Berwick Railway Co. 6 English Railway Cases 434. 9. & 40-

Cyrus G. Simons
Plaintiffs Attorney

[8732-47]

16 –

In the Supreme Court
November Term A.D. 1857

The Illinois Central
Railroad Company
Appellants
vs.
Lobitha Cox Admx &
Otheniel Cox deceased
Appellee

Brief

C. S. Lemons
Atty for Plaintiff
$1500

Filed 1. Dec. 1857.
N. Dimmick Clk

From the foregoing points and authorities. I maintain that in no point of view can this Case be sustained The points in defendt must have been either the Servants of Bennett & Scott or of the Company In neither Case if the deceased had survived Could he have recovered from the Ills C R R Co.

But the Court Erred in allowing testimony that the deceased left a wife & Children bills Page 28 - Record This Question not involved in this Case

Mac Stat Law P. 422

I N Haynie
for Plff

Argument & Brief

Illinois Central Rail
road Compy
vs
Tobitha Cox admr

Appeal from Union

Illayne
for Appelts

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant.* vs. TABITHA COX, Administratrix of OTHNEILE COX, deceased, *Appellee.*	Appeal from UNION COUNTY.	Pleas of the November Term of the Supreme Court of the State of Illinois, in the year of our Lord One Thousand Eight Hundred and Fifty-seven.

Page 1 of Record.

This action was instituted by the Appellee against the Appellant in the Union County Circuit Court, on the 2d day of May, A. D. 1855.

Pages 2 to 10.

The Declaration was in Case, and contained five counts, setting forth that the Appellant, being the owner of the Illinois Central Railroad, and the locomotives, engines, and cars running thereon, did, by and through its servants and employees, so carelessly misdirect and mismanage a locomotive and cars, running on said railroad, as to carelessly, negligently and unskillfully cause a collision, whereby one Othneile Cox, who was employed as a servant on said cars by defendant, was killed; to the damage of his Administratrix, the plaintiff in this suit, of $5000 00.

Pages 16 to 19.

To said Declaration the defendant pleaded *not guilty*, and for a further plea that the said collision of the said locomotive and cars in the plaintiff's declaration was caused solely by the carelessness, negligence, and unskillfulness of the defendant's servants, and from their want of due care and attention, and not by or through any other carelessness, unskillfulness, default, or want of due care and attention, that the said locomotive and car in the declaration mentioned were respectively under the guidance, government and direction of the said several servants of the defendant, and of no other person or persons; and that the said Othneile Cox, at the same time, when, &c., was also a servant and in the employment of the said defendant upon said railroad, and that the said carelessness, negligence, and unskillfulness, and want of due care and attention of said servants were unauthorized by defendant, and entirely without his leave, license, or knowledge.

Page 21.

Upon said pleas issue was taken; and the cause was tried at the May, A. D. 1857, Term, of said Court, before the Hon. Wm. K. Parrish, Judge of said Court, and a jury.

Page 28.

Upon said trial, the plaintiff introduced Green Bridges, who testified as follows: "I was present "when Othneile Cox was killed; he was killed on the 9th day of February, 1855. He was killed "by a train of cars running on the Illinois Central Railroad, which were, at the time he was killed, "engaged in hauling wood. The circumstances under which Cox lost his life were about these: In "the morning before he was killed, we all got on the train, and went down the road from Anna "after a load of wood. When the cars were loaded, they were started. Cox and myself were "standing together on the cars for a time, after which I moved my position to another place on the "cars, in front, rather, of where Cox was standing. Cox was standing up against the wood with "his face turned towards the rear of the train. The train was running rather fast, and just as we "came to a train on the side track, I turned my head and saw the wood on the cars tumbling off. "The wood struck the cars on the side track, which shoved it back against Cox's leg, and tripped "him up, and threw him off the cars. The moment I saw him fall, I hallowed as loud as I could to "have them stop the train, but the train still went on. I saw a young man standing in front of me "on the train; I then motioned my hand to him. The young man immediately pushed open the "door of the caboose car, and the conductor came running out of the caboose car, and asked what

Kogue
Stat. 422
West Wisconsin
18 Ill. 356
Per Cox the Servant of the Co. was Servant and also Servant and the Co. Servant of Servant
15 Ill 550
if Servant of Co. the Co. not liable
4 Metcalf - 49
Main point
2. In case Plaintiff is injured by Cox the Servant
Parsons
86

(8732-49)

Nelson

Cox the servant of Bennet & Empire & con-
ductor servants of the Company — (Who
loaded the car with wood? Bennet & his
servants. It was loaded so unskillfully by
the ends sticking out that they ~~jostled~~ stuck
against another car where the wood was
which falling on Cox threw him off &
killed him. This clearly, is the negligence
of Bennet & servants of whom Cox was
one and not of the Company)

Nelson says Cox was a mere passenger on the
St Rain — (Not so — He was one who aided
to cause the accident by unskillfully loading the wood on
the car — 5 Porter Ala. Rep 340 in point
Story on Ag. 563-4-5 — Strong stable
Keeper — 570 note —

Page 29. " was the matter. I informed him, and he wheeled right round and ran back and whistled, and " the train was stopped. When the train was stopped, we ran back to where Cox was thrown off, " and there lay Cox, dead. He was covered with mud, as if he had been rolled over in the mud " for some little distance; one of his feet was nearly cut off; his thigh was broken so that the " bones stuck out; there were cuts over each eye; and a large gash on the back of his head, so " that we could see his skull bone. Cox never moved after I went back. I was well acquainted " with him.." Plaintiff's counsel here asked witness " whether Cox left any children, and if so, how many, and their respective ages ?" The defendant's counsel objected, but the Court over-ruled the objection, and the defendant, by counsel, excepted. Witness then stated " that Cox left four " or five children, as also a widow, the plaintiff in this suit. Of the children, one was a son, 8, 9 " or 10 years old; the others girls, one nearly grown, one 14 or 15 years old, and the other a size " smaller. Cox was the only man person about the house. He was a poor man—a day laborer.—

Page 30. " The locomotive and cars upon which Cox was at the time he was killed, were called the Illinois " Central Railroad Company's. The engineer's name was Travis; the conductor's, Wight.— " The wood hauled was used along the line of said Railroad. The wood that knocked Cox off, " was knocked off the train by running against another train. It looks as if the conductor and " engineer might have seen the car standing on the side track if they had looked out. Our speed " was not slacked up as we came to the switch. Do not know Travis's character as an engineer.— " If he was drunk I do not know it; did not see him drink; do not know that he was in the habit " of drinking. The wood was not over the edge of our cars."

Cross-examined.—" Bennett was a contractor on the road to furnish wood. Bennett and Scott " had the locomotive and cars under their control for that purpose. They sent the train where " they pleased. I thought that Cox was employed by Bennett; that we were all employed by " him. Can give no opinion as to competency of conductor or engineer. Had known Cox 5 or 6 " years; he was industrious, but sometimes drank too much liquor."

Page 31. Re-examined.—" Bennett was hauling wood for the company; taking it to stations along the " road for the company. Cox was killed about 12 o'clock of the day time."

Philip Cruse testified that he " had known Cox 8 or 10 months. Cox's family were pretty much " dependent upon his labor for a living. Witness drank with Travis between 7 and 9 o'clock on the " morning of the day that Cox was killed—thought that he was a little tight."

This was all the evidence introduced by the plaintiff.

The defendant then introduced Wm. W. Bennett, who testified as follows: "At the time that Cox " was killed, I was a contractor on the road. My business was to furnish wood to the company, and

Page 32. " build fence. Mr. Scott, my partner and myself, had charge of the train, off of which, I suppose " Cox was thrown and killed. We had charge of the train, and the men on the same had to obey " our orders. Mr. Cox was in our employ at the time. We sent the train out that morning. I " had known Travis at least eight months before Cox was killed. He was regarded as one of the " best engineers on the road; that was his character. He was skillful, careful and competent. I " regarded him as a very superior man in that business. I had known Wight for three months. " He had been very successful, and bore a good reputation as a conductor. Cox was generally a

"sober man, but would sometimes get drunk. My contract with the company, as to furnishing wood, "was this: It was to be furnished at a certain price, and the company were to furnish a train of "cars, locomotive, engineer, conductor and fireman, and the balance of the hands necessary. Mr. "Scott and myself were to furnish ourselves. They did furnish us a conductor, engineer and fire-"man. Cox was in our employ at the time of his death. It was only a few days at a time that "the train was furnished us, when we would call in all the hands needed."

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2d. "That, in this case, if Othneile Cox was, at the time of his injury, in the employment of Ill. "C. R. R. Co., (provided the jury are satisfied from the evidence that he was in their employment,) "and in the discharge of his duty as such; and, further, if they believe from the evidence that the "injury complained of was occasioned either by his own carelessness, unskillfulness or negligence, "or that of his fellow-servants in the same line of service, they should find for the defendants, pro-"vided they have exercised proper care in the selection of competent servants.

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10th. "The defendants ask the Court to instruct the jury, that if they believe from the evidence "that Bennett and Scott were contractors of the Illinois Central R. R. Co., and as such contractors, "had full charge of the train upon which said Othneile Cox was employed, and the said train, en-"gineer and conductor under their control; and, if they further believe, from the evidence, that the "said Othneile Cox was the servant of Bennett and Scott, and engaged as such at the time the "injury complained of occurred by such train, and such injury was occasioned through the negli-"gence, carelessness or unskillfulness of other servants of Bennett and Scott engaged upon such "train at the same time, they, the jury, will find the defendants not guilty.

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12th. "That if Bennett and Scott were contractors of the Illinois Central R. R. Co., and as such, "had full and entire charge of the locomotive and cars, and the control and direction of the officers "and hands thereon, upon which said Othneile Cox was engaged at the time the injury occurred, "still the plaintiff is not entitled to recover in this action, if the jury believe from the evidence that "the injury occurred solely through carelessness, negligence or unskillfulness of the servants or "agents of Bennett and Scott, upon the same train or otherwise.

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To all and each of which instructions the said plaintiff, by his counsel, then and there excepted.

Page 25. Whereupon, the cause was submitted. The jury found the defendant guilty, and assessed the
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C. G. SIMONS,
Attorney for Appellant.

[8734-53]

In the Supreme Court
November Term A.D. 1857

The Illinois Central
Railroad Company

vs.

Sabitha Ley Administratrix
of Otheniel Ley deceased.

Abstract

C. B. Simons
Plaintiffs Attorney

Argued
PAM

Filed Nov. 1857.
N. Johnston Clk

Refiled Dec. 1. 1857.
N. Johnston Clk

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Ill. C. Rail Road

vs

Cox - Admrs of Cox -

B732