No. 8764

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

vs.

Wm. Schiebe

71641 7

William Schiebe

vs.

The Ohio & Miss. R.R. Co.

Copy

of

Record

fee $10 $\frac{75}{100}$

[8764-1]

State of Illinois
County of St Clair } ss.

Be it remembered that in the St Clair County Circuit Court, within and for said County the following proceedings were had, to wit:

Be it remembered that on the fourth Day of March A.D. 1867 the following Declaration was filed, to wit:

State of Illinois } St Clair County
St Clair County } Circuit Court March Term 1867

William Schiebe pltff complains of the Ohio and Mississippi Rail Road Company Deft of a plea of Trespass on the Case. For that whereas before and after the time of committing the grievances hereinafter mentioned, to wit, on the third Day of October Eighteen hundred & sixty six, the Deft. was a body corporate, and was Owner and Proprietor of a Railroad extending from the City of East St Louis, through Lebanon in said State and County, to the City of Cincinnatti State of Ohio with Trains of Cars running thereon for the conveyance of goods & passengers. And that on the third day of October Eighteen hundred & sixty six as aforesaid, the pltff, at the City of East St Louis County & State aforesaid, became a passenger on the Deft's said Cars, to be carried thereon from East St Louis, to Lebanon as aforesaid, for a certain hire and reward, then and there paid by pltff to said Deft. for such passage. And the pltff avers that the Deft. then & there received

the pltff as such passenger, and it thereupon became the duty of the Deft. safely to carry said pltff from East St Louis to Lebanon as aforesaid, and that there its Train should be reasonably stopped and slackened in its Speed, to enable the pltff to alight without injury to his person. And the pltff avers that the Deft. did not use due care that the Train should be stopped and slackened in its speed, at Lebanon, so that the pltff should be permitted to leave said Cars, and be safely discharged therefrom, but neglected to do so, and after the arrival and Stoppage of said Train at Lebanon, and while the pltff with the consent and permission of the Deft. with all due care was alighting from said train, caused the same to be suddenly & violently moved backward, by means whereof the pltff, in the exercise of proper care was violently thrown to the ground, and his right arm torn, lacerated, fractured & broken in three different places, and the pltff otherwise injured &c at the County aforesaid

2d count

And whereas also heretofore, to wit on the third Day of October Eighteen hundred and sixty six at the County aforesaid, the said pltff at the special instance & request of the said Deft. was a passenger by a certain other train of cars of said Defts, to be safely & securely carried & conveyed thereby on a certain journey, to wit, from East St Louis aforesaid to Lebanon aforesaid, for certain hire & reward to said Defts. in that behalf, and thereupon, it then & there became the duty of said Deft, to use due and proper care, that said

pltff should be safely and securely carried and conveyed, by said last mentioned train on said journey as aforesaid, yet said Deft. not regarding his its Duty in this behalf, did not use due care that said pltff should be safely and securely carried and conveyed as aforesaid on said journey, but wholly neglected so to do; and by reason thereof afterwards, the pltff with all due care, alighting from said train, at the County aforesaid, was thrown violently to the ground, by the certain and forcible driving of said train backward, and his right arm crushed, fractured, & broken by the wheels of said train passing over his said right arm, and the said pltff thereby became & was sick, sore, and disordered, and so remained & continued for a long space of time, to wit, hitherto, during all which time said pltff suffered and underwent great pain, and by reason of said injuries, was forced to have his said arm amputated, whereby he was hindered and prevented from transacting & attending to his lawfull and necessary business, by him during all that time to be performed and transacted, and lost & was deprived of divers great gains, profits and advantages, which he might, and otherwise would, have derived and aquired from the same, and thereby also, the said pltff was forced & obliged to, and did then & there lay out, pay & expend divers other large sums of money, amounting to a considerable sum, in and about endeavoring to be cured of the said last mentioned bruises, fractures, & injuries so received as last aforesaid, at the County aforesaid.

[8764-3]

And whereas also, the said Deft. before the commission of the grievances hereinafter mentioned, was the Owner and proprietor of a certain other train of Cars by said Deft. used and employed for the carriage of passengers, at & for certain reward, to him in that behalf, to wit at the County aforesaid, and said Deft. being such Owner and proprietor of said last mentioned train, as aforesaid, the said pltff. heretofore, to wit on the third day of October Eighteen hundred & Sixty six, at the City of East St Louis, County aforesaid, at the special instance & request of said Deft, became, and was a passenger by the last mentioned train, to be safely and securely carried & conveyed thereby on a certain journey, to wit from said said City of East St Louis to Lebanon as aforesaid, for certain hire & reward, to said Deft. in that behalf; and although said pltff, was then & there received by said Deft. as such passenger by said last mentioned train, as aforesaid, to be carried & conveyed thereby, as aforesaid, yet the said Deft. not regarding its duty in that behalf, so carelessly, negligently, unskillfully, & improperly drove, managed & conducted said last mentioned train, that afterwards, and whilst said last mentioned train was proceeding with said pltff. as such passenger as aforesaid, on such journey aforesaid, to wit on the day & year last aforesaid, the said last mentioned train was conveyed to Lebanon about dark, and then stopped and that the said Deft. had caused one of its other trains of Cars to obstruct the main track, by stopping it at

5.

said Lebanon, and the said last mentioned train, whereon the pltff. was passenger as aforesaid was conducted on the side track without the knowledge of said pltff. where it remained for a space of time, to wit about ten minutes, and afterwards, through the carelessness, negligence & improper conduct of said Deft. was driven violently & suddenly back by means whereof, though said pltff. was endeavoring to alight from said train with all due care, said pltff. was thrown to the ground and one of his arms became, and was fractured, bruised, torn & broken, and said pltff was otherwise greatly injured, wounded and cut, insomuch that said pltff then & there became and was sick, sore, and disordered for a long space of time to wit, from thence, hitherto, during all which time said pltff. suffered & underwent great pain, & was hindered & prevented from carrying on, transacting & proceeding in his necessary & lawful affairs, by him, during that time to be performed, and thereby lost & was deprived of divers great gains, & profits, which had been accustomed to arise & accrue to said pltff. from the carrying on the same, and also by means of the premises last aforesaid, said pltff. was forced and obliged to, and did then & there pay, lay out & expend divers moneys, to wit a large amount in & about the curing & endeavoring to cure the said last mentioned fractures, bruises, cuts & wounds, to wit at the County aforesaid — To the damage of said pltff: Ten Thousand Dollars: And therefore he sues

Underwood & Davis

Attys for pltff

[8764-4]

Which Declaration is endorsed as follows, to wit:

William Schiebe
vs
The Ohio & Mississippi Rail Road Company } Case
Damages $10,000 00/100

Clerk will please issue summons as above & oblige Underwood & Davis Attys for pltff

So it remembered that on the fifteenth of March the following summons was filed, to wit:

State of Illinois
County of St Clair } Sct The People of the State of Illinois To the Sheriff of St Clair County, greeting We command you to summon The Ohio & Mississippi Rail Road Company if it can be found in your County, to be and appear in the St Clair Circuit Court, on the first day of the next term thereof, to be holden at the Court House in the City of Belleville, in said County, on the third Monday of March inst then and there to answer unto William Schiebe of a plea of Trespass on the Case to the plaintiffs damage as he says of the sum of — Ten Thousand 00/100 Dollars and not to fail under penalty of what the Law directs. And this Writ you shall have at our said Court, with your return endorsed thereon

U.S.R Stamp 50 cents cancelled

L.S.

Witness: Henry A. Reiches, Clerk of the Circuit Court, and the seal thereof hereunto affixed, at office this 4th day of March A.D one Thousand Eight Hundred and sixty seven

7.

Henry A. Kircher Clk
by Fred E Scheel Dy

This summons is endorsed as follows to wit:

William Scheibe
vs
The O & M. Rail Road Co } Sum
Returnable March Term 1867

Served by reading & delivering a true Copy of the within Writ to John G. Adams, Station Agent, (at East St Louis) of the within Company, the President not residing in my County March 7th 1867

Sheff fee — Chas Decker Sheff by D Hard Dy

Serv & Ret 60. - 15 mile 75 - copy 50 — $185. U & D atty

Be it remembered that on the twenty Eighth Day of March the following Plea of General issue was filed, to wit:

State of Illinois } St Clair Circuit Court
St Clair County } March Term AD 1867

William Scheibe pltff
vs
The Ohio & Mississippi Railroad Company } Case
Deft.

And the said defendant comes and defends the wrong and injury when &c and says that it is not guilty in manner and form as the said plaintiff hath above thereof complained against it and of this the said defendant puts itself upon the Country &c

N. P. Paxton Atty for Deft.

And pltff saith that he does the like

Underwood & Davis Attys for pltff

[8764-5]

Which plea is endorsed as follows, to wit:

William Schiebe
vs
O. & M. Railroad Co } General issue

State of Illinois
County of St Clair } ss. At a regular term of the Circuit Court within and for the County of St Clair and State of Illinois, begun and held at the Court House in the City of Belleville on Monday the Eighteenth day of March in the year of our Lord One Thousand Eight Hundred and Sixty seven, it being the third Monday of March in the year of our Lord One Thousand Eight hundred and sixty seven, according to the Act of the General Assembly, by the Honorable Joseph Gillespie judge of the twenty fourth judicial Circuit of the State of Illinois, of which the said County of St. Clair forms a part the following proceedings were had to wit:

William Schiebe
vs
The Ohio and Mississippi
Rail Road Company } Case

On the first Friday of the term the Court grants leave to plead until the second Saturday. And now on the third Thursday of the term it being the 4th day of April

9.

A.D. 1867 Comes the Plaintiff by Underwood and Davis his Attys and also the Defendant by H. P. Burton Esq his Atty & both parties being ready for trial, the Court orders a jury to be called, and twelve good and lawful men are chosen and sworn according to law. And after hearing the Evidence and arguments of Counsel the jury retire to consider upon their Verdict; and when they return into Court they publish the following verdict to wit: We the Jury find for the Plaintiff and assess his damages at Three Thousand and Five Hundred Dollars. Thereupon the Defendant by his Attorney moves the Court for a new Trial which motion is refused by the Court. It is therefore considered and adjudged by the Court that the said Plaintiff recover of the said Ohio and Mississippi Rail Road Company the said sum of Three thousand and Five hundred Dollars and also his proper costs to be taxed and that he have Execution therefore. And now comes the Defendants by his said Attorney and prays an Appeal to the Supreme Court, which is allowed, upon his filing his bill of Exceptions and a bond in the penal sum of Five Thousand Dollars, conditioned according to law, within (30) thirty days, with security to be approved by the Clerk of this Court.

[8764-6]

Be it remembered that on the 5th day of March the following Motion for New Trial was filed, to wit:

State of Illinois } St Clair Circuit Court
St Clair County } March Term 1867

William Schiebe
vs
The Ohio & Mississippi Railroad Company } Case

And the said Defendant moves the Court for a new trial because

1. The Verdict is contrary to Law
2. The Verdict is contrary to Evidence
3. The verdict is contrary to the Law and the Evidence
4. The Court refused to give proper Instructions asked by Defendant
5. The Court gave improper Instructions for the plaintiff
6th Because the Damages are excessive

A T Fenton Atty for Defe.

Be it remembered that on the Tenth Day of April the following Bill of Exceptions was filed to wit:

Be it remembered that at the March Term 1867 of the Circuit Court in & for the County of St Clair and State of Illinois on the trial of the Case of William Schiebe vs The Ohio & Mississippi Railroad Company in an Action of trespass on the Case, the plaintiff introduced the following Evidence viz:—

William Schiebe, testified:— I am the plaintiff in this Case — On the third day of October

11.

1866. I rode from East St Louis to Lebanon, St Clair County, Illinois on the Ohio & Mississippi Railroad. I am a Saddler by trade and have traveled on that Railroad a great deal — every two or three weeks for several years. It was at the time of the St Louis Fair that I speak of when I bought a ticket to go and return for which I paid one Dollar and twenty Cents — I went to St Louis on the morning of October third and had a return ticket which I gave to the Conductor. We started from East St Louis on the Cars at six o'clock in the Evening. At Caseyville the train stopped and took on and put off passengers × I cannot tele whether the Station was announced or not × They do not always call out the Station in all the Cars but in some of them — I was asleep some of the way between Caseyville and O'Fallon × The train stopped at O'Fallon and the Station was called in the Car I was in × Lebanon is the next Station after O'Fallon × When the train arrived at Lebanon there was a train of Freight Cars on the track by the platform and the train I was in came up slowly into the side track and some one said the train had stopped × The train had stopped × We sat there from five to ten Minutes and during that time the train remained still × It was very dark outside × Some one then said "The train is going to Summerfield" and I gathered up my baggage and went out of the

Car. onto the platform of the Car and just then the Locomotive gave a push backwards and I fell down by the Wheels and the Locomotive then went backwards and the Wheel went over my right arm and the doctor amputated it × The Locomotive came back with great force × I think a man this wife got out before me safely × It was forty or fifty yards from the Station where I was hurt × I cannot tell wether Lebanon was announced or not × I did not hear it × I did not see any thing of the Conductor or any Brakeman when I went to the door of the Car and no one told me not to get out × The persons that got out before me lived in Madison County and I did not know them × There were two Ladies in the Car with me × They are both here as witnesses × They did not get out till after I did × I cannot work hereafter at my trade because my right arm is gone × I was confined to my bed three weeks from the Injuries received × I was not well in that time but the Doctor did not attend me after that × I am forty Years old and have a wife & four Children

× Ex I had not been drinking the day I was injured × I drank one glass of beer in the morning before I left Lebanon and I did not drink any more that day × I met a friend at the Alton packet between five and six o'clock that Evening but I did not drink with him × I did not say to the Ladies that

were with me on the train from East St Louis to Lebanon that day, that I had met a friend that day whom I had not seen for several years and that I had been drinking pretty freely with him × I had one of their parasols in my hand at the time I was hurt × When I started out I gathered up my packages in a hurry and took the parasol with them by mistake × I had a little Keg of Fish and a heavy package of harness buckles and a Ladies parasol and some other things in my hands when I fell × The Ladies lived in Lebanon × I knew one of them before that time and the other I did not × As I came out of the Car it was very dark and the Locomotive Created a jar that threw me off × I did not know wether we were on the side track or not when I tried to get off × The train was on the side track when I was hurt but I did not know where we was at the time × Not one took hold of me or tried to prevent my getting off or told me not to get off ×

John Cramer testified ÷ I was on the train at the time plaintiff was injured × I rode in the same Car with him and sat within two or three seats of him × The train stopped seventy or Eighty Rods before it got to the platform at Lebanon × I did not hear any one give notice as to why they had stopped × I got up and went to the door as did about half a Dozen others to see why we had stopped ×

14. I did not see plaintiff fall × I cannot say that the Car came back or made any jar × The train went back a couple of feet as it stopped and then started slowly forward again × It jerked a little, but not more than ordinarily in stopping and starting a train × I was standing on my feet × No one fell down as I know × The plaintiff is a temperate man and was sober as far as I know × I did not talk to him that night × After he was hurt I went back and found him sitting on the ground × I went on to Summerfield on the same train ×

× Ex I was about the middle of the Car when the plaintiff was hurt × It was very dark × There were several standing between me and the door when pltff. fell ×

Anthony Roske, I am a Catholic Priest × I went on the train from Lebanon to Carlyle the night plaintiff was injured × I cannot say how the accident happened × I did not see the plaintiff that night × I got onto the passenger train at the platform. The Freight train stood on the main track while the passenger train came up and went into the side track × Then the freight train moved off towards St Louis & then the passenger train backed out of the side track and came up on the main track to the platform and I got on it and went to Carlyle × It was a very dark night ×

15.

Dr Purger – I attended plaintiff & saw him about a quarter of an hour after the accident & His right arm was crushed and I amputated it about an hour after the accident just above the elbow & I saw no other injury upon his person to speak of & I attended him regularly for three weeks & dressed his arm daily & After that he came to my Office to have his arm attended to & My charge is from two hundred to five hundred dollars in such Cases & Plaintiff was not intoxicated at the time we amputated his arm & We tested his exhalation and it was clear of any spirituous liquor.

James Wallace – I hauled plaintiff up to town in a bus that night after he was hurt & The freight train was standing on the main track when I came down to the Station & It usually comes in on the side track & I go to the depot to every passenger train and have done so every since January 1866 & The freight was a very long train & The side track is very long & I have seen two trains on it & I do not know whether there was room on the side track for the freight train or not &

[8764-7]

The Defendant introduced the following Evidence viz:

Maria Farell, testified, I was on the train at the time plaintiff was injured. I was not acquainted with him before that night. He was talking pretty loudly to Miss Macken and myself on the way from East St Louis to Lebanon and she told him to stop as he was attracting attention. He replied that she must excuse him as he had met a friend that day at the fair ground whom he had not seen before for several years and that he had been drinking pretty freely with him. He seemed to be quite intoxicated. When we got near Lebanon the train stopped two or three minutes and then started again and the plaintiff gathered up his parcels and started for the door & Miss Macken and I followed him. The train was moving slowly when he left his seat. When he got to the door of the Car the Conductor who was coming out of the opposite Car said to plaintiff "Man dont get off here" or some thing like that. I did not see him fall. Just as he got to the door Miss Macken said to him that this is not the Station. I think the train was moving backwards at the time. Miss Macken was between me and the door and I could not see out. I was standing up at the time. There was no jerking of the train at the time.

17.

Miss Ellen Macken, testified, I was with plaintiff on the train at the time he was injured × He was talking very loudly on the way from St Louis to Lebanon and I told him not to be so boisterous, and he replied that I must excuse him as he had been drinking pretty freely with a friend whom he had not seen before for twenty years × I had known him for two or three years × I think he was intoxicated × When the train got near Lebanon it stopped and after a minute or two it started again just as it started pltff. got up to go out and I followed him × The train was in motion when he started × The Station had not been called × When we got to the door I saw that we were not at the Station and told him to stop, that we were not at the Station, Mr Johnson the Conductor came out of the opposite car just as we got to the door & when the plaintiff started to get off Mr Johnson took hold of him and said "Man dont get off here, We are not at the Station" He pulled away from Mr Johnson and fell × I told him before Mr Johnson did that we were not at the Station.

J. T. Brunk testified, I got a Lantern and went back to the place where pltff. was injured and picked up his hat and the parasol and a small keg and some other little things × I saw the blood on the rail and ground, It was

about one thousand feet west of the West Switch and nearly two thousand feet from the platform to where he was injured. There was not room that night for the freight train on the side track and it had to remain on the main track and let the passenger train go on the side track in order to pass. The plaintiff was hurt on the main track before the passenger train had pulled up into the side track. It is a usual occurrance for passenger trains to take the side track to let freight trains pass.

David Tuesp, testified, I was Engineer on the train on which plaintiff was injured. As I came up to Lebanon I was signaled to stop and go into the side track to let the freight train pass that was on the main track as there was not room for the freight train on the side track. I came very near to a stop when pulled up to go into the side track. I was going at about three or four miles per hour and had got to within about one hundred yards of the switch when the alarm bell was sounded and I stopped the train in going about one hundred feet and some parties went back with a light and I went on into the side track. I did not know that any one was injured till afterwards. At the time the alarm bell was sounded I was moving slowly forward to go into the side track.

17.

× Ex

It is a usual thing for passenger trains to take the side track for freight trains to pass × I do it every day and have for more than a year on my run between Odin & St Louis at least once or twice × There are from twelve to fifteen stations between St Louis & Odin × I run from Odin to St Louis and back every Day ×

C. M. Johnson, testified I was Conductor on the train on which plaintiff was injured × As we came up to Lebanon we were signaled to take the side track × The Cars did not come to a full stop I think before it started along slowly to go into the side track × As I came out of the door of one car onto the platform of the car the plaintiff came out of the opposite car with some bundles in his hands, I said to him "do not get off here, we are not at the Station" but he walked right along & stepped down onto the steps of the Car and I reached over and took hold of his shoulder and said "dont get off here" but he was to heavy for me to hold in the position I was and he fell × I immediately pulled the Cord of the alarm bell and some of them went back to see if he was hurt & the train went on into the side track × There was no jerking of the train at the time he fell but it was moving forward slowly to go into the side track ×

× Ex

I tried to catch him as he fell but he was to heavy for me to hold × I dont know wether he heard me

[8764-11]

or not. He did not pay any attention to me but crowded by some others that were on the platform at the time he came out. The train was going forward at the time of the accident.

Mr Whittaker testified, I was a passenger on the train on which plaintiff was injured. When the crowd started to go out. I heard some one at the door of the car say that we have not got to the station yet. This was about the time plaintiff was hurt. The train was moving slowly forward at the time. I dont know who it was that said that we had not got to the station. I was about in the middle of the car. I went on the same train to Summerfield.

H. L. Purton testified, The Ohio & Mississippi Railroad Company, defendant in this suit has not owned or operated any Railroad in Illinois since 1862. and did not own and was not operating the railroad on which plaintiff was injured at the time of the accident.

This was all the evidence in the case.
The Court gave the following instructions to the jury on behalf of the plaintiff viz:—

I If the Jury believe from the Evidence that the injuries received by the plaintiff were occasioned through the carelessness or negligence of the Defendant, without any fault or negligence on his part, then they will find for

the plaintiff and assess his damages not exceeding the amount claimed in plaintiffs declaration x

II The Railroad Company, if improperly named, should have pleaded in abatement, and cannot take advantage of being sued in a wrong name upon the trial x to the giving of which instructions and to Each of them the Defendant at the time excepted which Exceptions were overruled by the Court and the instructions read to the Jury x

The Court gave the following instructions to the Jury on behalf of the Defendant, viz:

I If the Jury believe from the Evidence that the injury sustained by plaintiff was the result of his own negligence, then the Jury will find the Defendant not guilty x

II If the Jury believe from the Evidence that the negligence of the plaintiff contributed to the injury, and that the Defendant was not guilty of gross negligence, then the Jury will find the Defendant not guilty x

III If the Jury believe from the Evidence that the Defendant did not own or operate the Railroad on which the injury was sustained, at the time of the accident, then they will find the Defendant not guilty x

The Court was then asked by the Defendant to give the Jury the following instruction in connection with Defendants second instruction, viz: —

Gross negligence, in law, is such as would be deemed wilful or intentional"
which the Court refused to give, to which ruling of the Court in refusing to give said instruction to the Jury the Defendant at the time by its counsel excepted.

On the Jury returning a verdict against the Defendant and assessing the plaintiffs damages at thirty five hundred dollars, the Defendant filed motion for a new trial, and moved the Court for a new trial which motion was refused by the Court to which ruling of the Court in refusing to grant a new trial, and in overruling said motion the Defendant at the time by its Counsel excepted.

And the Defendant presents this its bill of Exceptions and asks that the same may be signed and sealed by the Court and made a part of the record in this Case which is done this 10th day of April AD 1867.

J Gillespie (seal)
Judge 24th Jud Cir Ills

State of Illinois }
St Clair County } I, Henry A. Kircher, Clerk of the Circuit Court in and for said County of St Clair & State of Illinois hereby certify that the foregoing is a true and correct copy of the Declaration, Summons, plea of general issue, motion for new trial, order of Court and bill of exceptions, in the case of William Schiebe against the Ohio and Mississippi Rail Road Company, as the same remain

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 Belleville Illinois this 16th day of April 1867

Henry A Kircher
Clk

Errors Assigned.

1 The court erred in overruling motion for new trial.

2 The court erred in giving defendants in Error first and second instruction.

3 The court erred in refusing plaintiffs in Error instruction, asked in connection with plaintiffs in Error second instruction.

4 The court erred in rendering the judgment aforesaid, in manner & form aforesaid

N. P. Buxton
Atty for pltff in Error

Joinder in error

J B Underwood Atty for Dfts in Error

[8714-13]

21

Record

O & M R R Co
Pltff in Error
vs
William Schiebe
Deft in Error

Error to O Nelair

Copy of record $10.75

Filed, June 4, 1867
N. Johnston Clk

Haley

~~Walker J.~~ This was an action in the case, brought by appellee, in the St. Clair Circuit Court, against appell=ants for negligence in operating their trains whereby he was injured. It appears that appellee became a passenger at Illinois Town for Lebanon, on a passenger train of appellants. That on arriving at Leb=anon, a freight train being too long for the side track, had stopped on the main track, and the passenger train having slacked up, moved ~~with~~ upon the side track to permit the freight train to pass. As the passenger train started, appellee attempted to get off, and in doing so fell, and one of his arms was crushed, and was afterwards amputated. He in=sists, that the injury was produced by the carelessness of the employees of the company, whilst they contend that it arose from his own want of care and prudence.

Appellee swears that after the train had stopped and was starting again, some one said the train was going to Summers=~~ville~~field; which was the next station; that he thereupon took his baggage and went off upon the platform, and just at that time the locomotive gave a push back towards

and I fell down by the wheels, and the locomotive then went backwards, and the wheel went over my right arm" and the Doc=tor amputated it. "The locomotive came back with great force." I think a man and his wife got out after me safely; It was forty or fifty yards from the station where I was hurt. I cannot tell whether Lebanon was announced or not, I did not hear it, I did not see anything of the conductor, or any brakeman when I went to the door of the car, and no one told me not to get out" He says the night was very dark, and in this he ~~was~~ is supported by other testimony.

Two witnesses inside the Conductor testified that the Conductor told him not to get off there: that it was not the station, They say they heard the warning. They were just behind him and had started to pass from the car, They say this occurred at the door of the car, and as the Conductor met appellee on the platform, in coming from the next car, Another passenger in the same car testifies that as the crowd started to go out, he heard some one at the door say, "We have not got to the Station yet", That it was about the time appellee was hurt, He says he does not know, who it was that gave the warning, That he was

[8704-15]

about the middle of the car.

The Conductor testified that as he came out of one car to the platform, Appellee was coming out of the opposite car with some bundles in his hands, that witness said to him, "do not get off here" we are not at the station" but appellee walked along and stepped down on the steps of the car and that he, (witness), took hold of his shoulder, and said, "Don't get off here" but appellee was too heavy for him to hold, in the position which witness then occupied, and he fell. There seems to be no other witness than appellee, who testified that there was a violent jerking of the train, at the time the accident occurred. Some of the witnesses gave it as their opinion, that appellee was under the influence of liquor at the time; but this he denied, and said he had only drunk one glass of beer that day, and that was in the morning.

If the testimony given by appellee was alone considered, the jury might have been warranted in the conclusion at which they arrived. But his testimony is overcome by the testimony of at least four witnesses as to the warning given, "that they had not reached the station" and three of them state positively, that he was directly by the

[8764-16]

conductor, not to pass from the cars at that place. These witnesses so far as we can see from this record, stand unimpeached and are entitled to credit. This evidence may no doubt be reconciled, Appellee may have been so fully possessed with the idea of getting from the cars, and thus avoid being taken to the next station, that he failed to give ordinary attention to what was said and done at the time. If his mind was greatly preoccupied with such an apprehension and he was not giving his attention to what others were doing, he might and probably would not hear the warning or directions given by the conductor. The others however seem to have been giving proper attention and state positively that the warning was given, and that they heard it distinctly.

Appellee states that the conductor did not take hold of him, whilst the latter states that he did, and is fully supported in the statement by Ellen Mackey. We are wholly unable to comprehend, how so many witnesses could be mistaken as to what they saw and heard. On the other hand appellee may have been, and no doubt was, badly stunned by the fall, and would be less likely to recall the circumstances, than others not subjected to such a peril

Mem

[8264-12]

It is more than probable that the conductor took hold of him, whilst he was in the act of falling, and if so, it was natural for appellee, to have been entirely occupied with his situation and the apprehension of its results, under such circumstances it would be remarkable if his attention was attracted to the fact that the conductor had hold of him, or if noticed at the instant, that he could recall it to memory. The evidence, we think ~~largely~~ preponderates largely in favor of the occurrence as detailed by appellants witnesses.

This case proceeds upon the grounds of negligence on the part of appellants But when we consider the circumstances, we are unable to see that they have been derelict in any duty. Appellee says he did not hear the name of the station announced, and if was, we presume not done, as the train had not reached the station. He either failed for want of attention to hear the emphatic warning of the conductor, or he failed to regard it. Nor was there any negligence shown in running the train on the side track, to permit the freight train to pass on the main track. The evidence shows that such a

[3744-13]

course was not unusual, and in this instance it was necessary. And the weight of evidence is, that there was no violent jerking of the train; but if there had been, it was not negligence, as the train had not reached the platform where passengers are expected to get off. Appellee was attempting to pass from the train whilst in motion, and at an unusual place. If there was negligence, it was on the part of appellee

The judgment of the Court below is reversed and the cause remanded

"Judgment Reversed"

[8714-18]

Prime T. 1867

Ohio & Miss. R.R. Co

21 vs 6

William Scheiz

"

Opinion by

Walker Justice

OK

R & R

S. S.

102

Carlyle, Ills. June 1st 1867

Mr. H. P. Buxton
Attorney O.&M. R.W.
To Union Banner Dr

June 1st, 1867. } To printing Abstracts
O.&M.R.R. vs. Schieber $12.00

James M. Peterson
Pub. Union Banner
Carlyle Ill

[8764-28]

101

1867

O & M R R Co

vs

William Schiebe

J. H. Petersons
bill for
printing abstracts
$12.00

1867

WRIT OF ERROR.

STATE OF ILLINOIS } SS.
SUPREME COURT,

THE PEOPLE OF THE STATE OF ILLINOIS;

To the Clerk of the Circuit Court for the county of Saint Clair GREETING,

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Saint Clair county, before the Judge thereof, between

William Schibe

plaintiff, and The Ohio and Mississippi Railroad Company

defendant it is said manifest error hath intervened, to the injury of the aforesaid Defendant

as we are informed by the complaint, and we being willing that error, should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Count, the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Mount Vernon, in the county of jefferson, on the first Tuesday in June next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law:

P. H. Walker

Witness, the Hon. ~~WALTER B. SCATES~~ Chief Justice of our said court, and the seal thereof, at Mount Vernon this ~~thirteenth~~ day of April in the year of Our Lord One Thousand Eight Hundred and ~~Fifty.~~ Sixty Seven

Noah Johnston
Clerk Supreme Court.

[8764-9]

21

Supreme Court
1st Grand Division

The Ohio & Mississippi
Railroad Company
Pltff in Error

vs

William Schirbel
Deft in Error

Writ of Error
Issued and filed
April 30 1867
A Johnston Clk

Supreme Court of Illinois
First Grand Division - June Term 1867

The Ohio & Mississippi Railroad Co.
Plff in Error - Defendant below
vs Error to St Clair
March Term 1867
William Schiebe
Deft in Error - Plff. below

The clerk of the Supreme Court will please issue & file writ of error in above cause & issue scire facias directed to the Sheriff of St Clair Co. and forward same to me at Carlyle Illinois & oblige

Your friend
W. P. Buxton
Atty O & M R R Co

April 25/67

P.S. Inclosed I send you $5.00 advance clerk fees. Please ack receipt. When does the term commence under new law? 1st Monday in June?

B.

[B7611-23]

21

O & M. R.R

vs

W. Scherbe

Recipe

Filed April
30. 1867.
N. Johnston Clk

SUPREME COURT OF ILLINOIS,

FIRST GRAND DIVISION—JUNE TERM, 1867.

The Ohio & Mississippi Railroad Company, Plaintiff in Error, vs. William Schiebe, Defendant in Error.	Error to St. Clair.

ABSTRACT AND BRIEF;

By H. P. BUXTON, Attorney for Plaintiff in Error.

ABSTRACT.

THIS was an action on the case brought by Defendant in Error against Plaintiff in Error, in St. Clair Circuit Court, March Term, 1867.

The DECLARATION alleges that on the third day of October, 1866, Plaintiff in Error was a body corporate, and owner of a Railroad from East St. Louis to Cincinnati, through Lebanon, St. Clair County, Illinois, with trains running thereon, for the conveyance of passengers and freight; that on said day Defendant in Error became a passenger on said cars, to be carried from East St. Louis to Lebanon, for a certain fare and reward paid, and thereupon it became the duty of Plaintiff in Error safely to carry Defendant in Error from East St. Louis to Lebanon, and that then its train should be reasonably stopped, and slackened in its speed, to enable Plaintiff to alight without injury; that Plaintiff in Error did not use due care that the train should be stopped and slackened in its speed at Lebanon so that Defendant in Error should be permitted to leave said cars, and be safely discharged therefrom, but neglected so to do, and after the arrival and stoppage of said train at Lebanon, and while Defendant in Error, with the consent and permission of Plaintiff in Error, with all due care, was alighting from said train, caused the same to be suddenly and violently moved backward, by means whereof Defendant in Error was violently thrown to the ground, and his right arm broken, &c. [R. pp. 1 and 2.]

The SECOND COUNT alleges that on the third day of October, 1866, Defendant in Error was a passenger on a train of cars of Plaintiff in Error, to be safely carried from East St. Louis to Lebanon, aforesaid, for a certain fare paid, and thereupon it became the duty of Plaintiff in Error to use due care that Defendant in Error should be safely carried; yet Plaintiff in Error, not regarding its duty, did not use due care that Defendant in Error should be safely carried, but neglected so to

do, and by reason thereof, afterwards Defendant in Error, with due care, alighting from said train, was thrown violently to the ground, and the car wheels run over his right arm, and crushed it, &c. [R. pp. 2 and 3.]

The THIRD COUNT alleges that Plaintiff in Error owned a train of cars, and that Defendant in Error, October 3d, 1866, became a passenger thereon, to be carried from East St. Louis to Lebanon, for certain reward, and that Plaintiff in Error carelessly managed said train and same arrived at Lebanon about dark, and then stopped, and that Plaintiff in Error had caused one of its other trains of cars to obstruct the main track by stopping it at said Lebanon, and the said first mentioned train, whereon Defendant in Error was a passenger, was conducted onto a side track, without the knowledge of Defendant in Error, where it remained for about ten minutes, and afterwards, through the carelessness of Plaintiff in Error, was driven violently and suddenly back, by means whereof, though Defendant in Error was endeavoring to alight from said train, with due care, Defendant in Error was thrown to the ground, and his right arm cut off, &c. [R. pp. 4 and 5.]

SUMMONS AND SERVICE. [R. pp. 6 and 7.]

PLEA—GENERAL ISSUE—Not Guilty. [R. p. 7.]

JUDGMENT—$3500.00, and costs. [R. pp. 8 and 9.]

MOTION FOR NEW TRIAL FILED. [R. p. 10.]

ON THE TRIAL, Defendant introduced the following evidence, viz:

WILLIAM SCHIEBE testified: I am the Plaintiff in this case. On the third day of October, 1866, I rode from East St. Louis to Lebanon, St. Clair county, Illinois, on the Ohio & Mississippi Railroad. I am a saddler by trade, and have travelled on that Railroad a great deal—every two or three weeks for several years. It was at the time of the St. Louis Fair that I speak of, when I bought a ticket to go and return, for which I paid one dollar and twenty cents. I went to St. Louis on the morning of October third, and had a return ticket which I gave to the conductor. We started from East St. Louis on the cars at six o'clock in the evening. At Caseyville the train stopped and took on and put off passengers. I cannot tell whether the station was announced or not. They do not always call out the station in all the cars, but in some of them. I was asleep some of the way between Caseyville and O'Fallon. The train stopped at O'Fallon, and the station was called in the car I was in. Lebanon is the next station after O'Fallon. When the train arrived at Lebanon there was a train of freight cars on the track by the platform, and the train I was in came up slowly into the side-track, and some one said the train had stopped. The train had stopped. We sat there from five to ten minutes, and during that time the train remained still. It was very dark outside. Some one then said, "The train is going to Summerfield;" and I gathered up my baggage and went out of the car onto the platform of the car, and just then the locomotive gave a push backwards, and I fell down by the wheels and the locomotive then went backwards, and the wheel went over my right arm, and the doctor amputated it. The locomotive came back with great force. I think a man and his wife got out before me safely. It was forty or fifty yards from the station where I was hurt. I cannot tell whether Lebanon was announced or not. I did not hear it. I did not see anything of the conductor or any brakeman when I went to the door of the car, and no one told me not to get out. The persons that got out before me lived in Madison county, and I did not know them. There were two ladies in the car with me. They are both here as witnesses. They did not get out till after I did. I cannot work hereafter at my trade because my right arm is gone. I was confined to my bed three weeks from the injuries received. I was not well in that time, but the doctor did not attend me after that. I am forty years old, and have a wife and four children. [R. pp. 10, 11 and 12.]

X Ex.—I had not been drinking the day I was injured. I drank one glass of beer in the morning before I left Lebanon, and I did not drink any more that day. I met a friend at the Alton Packet, between five and six o'clock, that evening, but I did not drink with him. I did not say to the ladies that were with me on the train from East St. Louis to Lebanon that day, that I had met a friend that day whom I had not seen for several years, and that I had been drinking pretty freely with him. I had one of their parasols in my hand at the time I was hurt. When I started out I gathered up my packages in a hurry, and took the parasol with them by mistake. I had a little

keg of fish and a heavy package of harness buckles and a lady's parasol and some other things, in my hands when I fell. The ladies lived in Lebanon. I knew one of them before that time and the other I did not. As I came out of the car it was very dark, and the locomotive created a jar that threw me off. I did not know whether we were on the side-track or not when I tried to get off. The train was on the side-track when I was hurt, but I did not know where we was at the time. No one took hold of me or tried to prevent my getting off, or told me not to get off. [R. pp 12 and 13.]

JOHN CRAMER testified:—I was on the train at the time plaintiff was injured. I rode in the same car with him, and sat within two or three seats of him. The train stopped seventy or eighty rods before it got to the platform at Lebanon. I did not hear any one give notice as to why they had stopped. I got up and went to the door, as did about half a dozen others, to see why we had stopped. I did not see plaintiff fall. I cannot say that the cars came back or made any jar. The train went back a couple of feet, as it stopped, and then started slowly forward again. It jerked a little, but not more than ordinarily, in stopping and starting a train. I was standing on my feet. No one fell down, as I know. The plaintiff is a temperate man, and was sober as far as I know. I did not talk to him that night. After he was hurt I went back and found him sitting on the ground. I went on to Summerfield on the same train. [R. pp. 13 and 14.]

X Ex.—I was about the middle of the car when the plaintiff was hurt. It was very dark. There were several standing between me and the door when plaintiff fell. [R. p. 14.]

ANTHONY ROSKE.—I am a Catholic priest. I went on the train from Lebanon to Carlyle the night plaintiff was injured. I cannot say how the accident happened. I did not see the plaintiff that night. I got onto the passenger train at the platform. The freight train stood on the main track while the passenger train came up, and went into the side-track. Then the freight train moved off towards St. Louis, and then the passenger train backed out of the side-track, and came up on the main track to the platform, and I got on it and went to Carlyle. It was a very dark night. [R. p. 14.]

Dr. BURGER.—I attended plaintiff. Saw him about a quarter of an hour after the accident. His right was crushed, and I amputated it about an hour after the accident, just above the elbow. I saw no other injury upon his person, to speak of. I attended him regularly for three weeks and dressed his arm daily. After that, he came to my office to have his arm attended to. My charge is from two hundred to five hundred dollars in such cases. Plaintiff was not intoxicated at the time we amputated his arm. We tested his exhalation, and it was clear of any spirituous liquor. [R. p. 15.]

JAMES WALLACE.—I hauled plaintiff up to town in a 'bus that night, after he was hurt. The freight train was standing on the main track when I came down to the station. It usually comes in on the side-track. I go to the depot to every passenger train, and have done so every since January, 1866. The freight was a very long train. The side-track is very long. I have seen two trains on it. I do not know whether there was room on the side-track for the freight train or not. [R. p. 15.]

The defendant introduced the following evidence, viz:

MARIA FARRELL testified:—I was on the train at the time plaintiff was injured. I was not acquainted with him before that night. He was talking pretty loudly to Miss Macken and myself on the way from East St. Louis to Lebanon, and she told him to stop, as he was attracting attention. He replied that she must excuse him as he had met a friend that day at the Fair Ground whom he had not seen before for several years, and that he had been drinking pretty freely with him. He seemed to be quite intoxicated. When we got near Lebanon, the train stopped two or three minutes, and then started again. The plaintiff gathered up his parcels and started for the door, and Miss Macken and I followed him. The train was moving slowly when he left his seat. When he got to the door of the car, the conductor, who was coming out of the opposite car, said to plaintiff, "Man, don't get off here," or something like that. I did not see him fall. Just as he got to the door, Miss Macken said to him that this is not the station. I think the train was moving backwards at the time. Miss Macken was between me and the door, and I could not see out. I was standing up at the time. There was no jerking of the train at the time. [R. p. 16.]

MISS ELLEN MACKEN testified:—I was with plaintiff on the train at the time he was injured. He was talking very loudly on the way from St. Louis to Lebanon, and I told him not to be so boisterous; and he replied that I must excuse him as he had been drinking pretty freely with a friend whom he had not seen before for twenty years. I had known him for two or three years. I think he was intoxicated. When the train got near Lebanon it stopped, and after a minute or two it started again; just as it started plaintiff got up to go out, and I followed him. The train was in motion when he started. The station had not been called. When we got to the door I saw that we were not at the station, and told him to stop, that we were not at the station. Mr. Johnson, the conductor, came out of the opposite car just as we got to the door, and when the plaintiff started to get off, Mr. Johnson took hold of him, and said, "Man, don't get off here—we are not at the station." He pulled away from Mr. Johnson and fell. I told him before Mr. Johnson did that we were not at the station. [R. p. 17.]

J. T. BRUNK testified:—I got a lantern and went back to the place where plaintiff was hurt, and picked up his hat and the parasol and a small keg and some other little things. I saw the blood on the rail and ground. It was about one thousand feet west of the west switch, and nearly two thousand feet from the platform to where he was injured. There was not room that night for the freight-train on the side-track, and it had to remain on the main track and let the passenger train go on the side-track in order to pass. The plaintiff was hurt on the main track before the passenger train had pulled up into the side-track. It is a usual occurrence for passenger trains to take the side track to let freight trains pass. [R. p. 18.]

DAVID GUESS testified:—I was engineer on the train on which plaintiff was injured. As I came up to Lebanon, I was signalled to stop and go into the side-track to let the freight train pass that was on the main track, as there was not room for the freight train on the side-track. I came very near to a stop, and then pulled up to go into the side-track. I was going at about three or four miles per hour, and had got to within about 100 yards of the switch when the alarm bell was sounded, and I stopped the train in going about one hundred feet, and some parties went back with a light and I went on into the side-track. I did not know that any one was injured till afterwards. At the time the alarm bell was sounded I was going slowly forward to go into the side-track. [R. p. 18.]

X Ex.—It is a usual thing for passenger trains to take the side-track for freight trains to pass. I do it every day, and have for more than a year, on my run between Odin and St. Louis, at least once or twice. There are from twelve to fifteen stations between St. Louis and Odin. I run from Odin to St. Louis and back every day. [R. p. 19.]

C. M. JOHNSON testified:—I was conductor on the train on which plaintiff was injured. As we came up to Lebanon we were signalled to take the side-track. The cars did not come to a full stop, I think, before it started along slowly to go into the side-track. As I came out of the car onto the platform of the car the plaintiff came out of the opposite car with some bundles in his hands; I said, "Do not get off here; we are not at the station;" but he walked right along, and stepped down onto the steps of the car, and I reached over and took hold of his shoulder, and said, "Don't get off here," but he was too heavy for me to hold in the position I was and he fell. I immediately pulled the cord of the alarm bell and some of them went back to see if he was hurt and the train went on into the side-track. There was no jerking of the train at the time he fell, but it was moving slowly forward to go into the side-track.—[R. p. 19.]

X Ex.—I tried to catch him as he fell, but he was too heavy for me to hold. I don't know whether he heard me or not. He did not pay any attention to me but crowded by some others that were on the platform at the time he came out. The train was going forward at the time of the accident. [R. pp. 19 & 20.]

Mr. WHITTAKER testified:—I was a passenger on the train on which plaintiff was injured. When the crowd started to go out, I heard some one at the door of the car say that we have not got to the station yet. This was about the time plaintiff was hurt. The train was moving slowly forward at the time. I don't know who it was that said that we had not got to the station. I was about in the middle of the car. I went on the same train to Summerfield. [R. p. 20.]

H. P. BUXTON testified:—The Ohio & Mississippi Railroad

Company, defendant in this suit, has not owned or operated any Railroad in Illinois since 1862, and did not own, and was not operating the Railroad on which plaintiff was injured at the time of the accident. [R. p. 20.]

This was all the evidence in the case.

The Court gave the following instructions to the jury on behalf of the plaintiff, viz:

I. If the jury believe, from the evidence, that the injuries received by the plaintiff were occasioned through the carelessness or negligence of the defendant, without any fault or negligence on his part, then they will find for the plaintiff, and assess his damages not exceeding the amount claimed in plaintiff's declaration. [R. pp. 20 and 21.]

II. The Railroad Company, if improperly named, should have pleaded in abatement, and cannot take advantage of being sued in a wrong name upon the trial.

To the giving of which instructions, and to each of them, the defendant, at the time, excepted; which exceptions were overruled by the Court, and the instructions read to the jury. [R.p.21.]

The Court gave the following instructions to the jury on behalf of the defendant, viz:

I. If the jury believe, from the evidence, that the injury sustained by the plaintiff was the result of his own negligence, then the jury will find the defendant not guilty. [R. p. 21.]

II. If the jury believe, from the evidence, that the negligence of the plaintiff contributed to the injury, and that the defendant was not guilty of gross negligence, then the jury will find the defendant not guilty. [R. p. 21.]

III. If the jury believe, from the evidence, that the defendant did not own or operate the railroad on which the injury was sustained, at the time of the accident, then they will find the defendant not guilty. [R. p. 21.]

The Court was then asked by the defendant to give the jury the following instructions, in connection with defendant's second instruction, viz: [R. p. 21.]

"Gross negligence, in law, is such as would be deemed willful or intentional." Which the Court refused to give, to which ruling of the Court, in refusing to give said instruction to the jury, defendant, at the time, by its counsel, excepted. [R. p. 22.]

On the jury returning a verdict against the defendant, and assessing the plaintiff's damages at thirty-five hundred dollars, the defendant filed motion for a new trial, and moved the Court for a new trial, which motion was refused by the Court, to which ruling of the Court in refusing to grant a new trial, and in overruling said motion, the defendant, at the time, by its counsel, excepted. [R. p. 22.]

ERRORS ASSIGNED.

I. The Court erred in overruling motion for new trial.

II. The Court erred in giving Defendant's in Error first and second instruction.

III. The Court erred in refusing Plaintiff's in Error instruction, asked in connection with Plaintiff's in Error second instruction.

IV. The Court erred in rendering the judgment aforesaid, in the manner and form aforesaid.

H. P. BUXTON,
Att'y for Pl'ff in Error.

PLAINTIFF'S BRIEF.

The judgment in this case should be reversed:

I. Because the second instruction given for Defendant in Error was improperly given. There was no evidence in the case tending to show that the party sued was improperly named, and therefore, there was nothing in the case on which such an instruction could be based. The fact that the plaintiff in Errror did not own or operate the road at the time, is only showing that if so, it could not be guilty, and is, therefore, proper evidence, under the general issue.

II. Because the instruction refused by the Court, asked by the Plaintiff in Error, that "gross negligence in law is such as would be deemed willful or intentional," is the correct principle, and applicable to the case.

III. Because the whole facts in the case go to show, beyond

a doubt, that the injuries complained of, were the result of the negligence of the Defendant in Error, and that there was no negligence of any one else that, in any degree, contributed to the injury.

Gold U R R Co vs Yarwood 15 Ill R 468

Same vs Hay, 16 Ill R 567

The fact that the passenger train was required to take the side-track to let the freight train pass, is of daily occurrence, and in no way endangers a careful, prudent and sober man; besides, the Defendant in Error was repeatedly warned by the conductor and others that they had not arrived at the station; and he threw himself from the train against the advice of his friends and the efforts of the conductor to prevent it. If the Railroad Company are responsible in this case, there can be no circumstances under which a man could be injured on a train of cars for which they would not be liable; for this case shows not only that there was no negligence on the part of the men operating the train, but that they used much more than ordinary care for the safety of the Defendant in Error.

H. P. BUXTON,
Att'y for Pl'ff in Error.

21

O & M. R. R. Co.

vs

Mr Schiebe

Filed June 4th 1867

Noah Johnston Cl

SUPREME COURT.

OHIO & MISSISSIPPI RAIL ROAD COMPANY, Appellant,
vs.
WILLIAM SCHIEBE, Appellee.

APPELLEE'S BRIEF.

The evidence shows that appellee bought a ticket at the office of the defendant in East St. Louis, for which appellant was to carry him to the town of Lebanon. The train arrived with appellee, near Lebanon, after dark—the night being a "very dark" one. About one hundred yards from the switch, the train stopped, (as appears by weight of evidence,) the engineer seeing a freight train on the main track, at the station, which proved to be too long to go on the switch. There was no brakesman in front of the car in which appellee was riding, at that time. A number of passengers, ladies and gentlemen, appellee included, thinking they had arrived at Lebanon, advanced at once to the front of the car—three or four got off—and appellee while in the act of getting off, was met by the conductor, who was coming from the other car, and told by him not to get off, they had not yet reached the station; and while he was in the act of stepping off, the conductor took hold of him, but he being a heavy man, it had but little effect, and he fell as he jumped off, with his arm upon the rail, and the wheel of the car passed over it, in consequence of which the arm had to be amputated. There was some little evidence that he admitted on the train that he was somewhat intoxicated, but the weight of evidence, including that of the doctor who tested his breath, shows that he had not been drinking any intoxicating liquors that day.

1. "By the law, the company were bound to the *utmost* diligence and care, and are liable for *slight* negligence." Gal. & Chic. R. R. Co. vs. Yarwood, 15 Ills. 472.

"Common carriers of passengers are responsible for the slightest negligence resulting in injury to them, or in other words, are required in the *preparation* and *management* of their means of conveyance, to exercise the highest degree of diligence and skill, which a reasonable man would use under such circumstances. Pierce's Am. R. R. Law 470.

"It has been considered bound to warn passengers of particular passages unusually dangerous, and requiring of them superior circumspection." N. J. R. R. Co. vs. Kennard, 21 Penn. 203. Pierce's Am. R. R. Law 475.

2. The carrying of passengers being *founded on contract*, the carrier is bound to greater care than when running upon its own road, and coming in collision with persons or stock, crossing its own track.

In this case we claim—

1st. That the freight train should have been on the

switch. It it no answer to this objection to say that the train was made too long for that purpose.

2d. That it was the imperative duty of the company, when stopping so near a station, to have locked the doors of the cars, or to have had a brakesman stationed at the end of each car to warn passengers of the danger of getting off at the peril of their lives; and the failure to do one of these things would render the company liable for negligence, especially on a night as dark as this one.

It was proved that the brakemen do not always call the stations, in all the cars.

Appellee testified that he did not hear the conductor speak to him, or notice any person interfering with his getting off.

Care and diligence, unusually strict, should be required of the carrier in this part of the country, because many of the passengers are very ignorant, and very many of them do not understand the English language.

JOSEPH B. UNDERWOOD & S. P. DAVIS,
Appellee's Attorneys.

Ohio & Mississippi
R. R. Company
vs 21
William Schiebe

Deft. Brief

Filed June 5th 1867
Noah Johnston Cl

SUPREME COURT OF ILLINOIS,

FIRST GRAND DIVISION—JUNE TERM, 1867.

The Ohio & Mississippi Railroad Company, Plaintiff in Error, vs. William Schiebe, Defendant in Error.	Error to St. Clair.

ABSTRACT AND BRIEF;

By H. P. BUXTON, Attorney for Plaintiff in Error.

ABSTRACT.

THIS was an action on the case brought by Defendant in Error against Plaintiff in Error, in St. Clair Circuit Court, March Term, 1867.

The DECLARATION alleges that on the third day of October, 1866, Plaintiff in Error was a body corporate, and owner of a Railroad from East St. Louis to Cincinnati, through Lebanon, St. Clair County, Illinois, with trains running thereon, for the conveyance of passengers and freight; that on said day Defendant in Error became a passenger on said cars, to be carried from East St. Louis to Lebanon, for a certain fare and reward paid, and thereupon it became the duty of Plaintiff in Error safely to carry Defendant in Error from East St. Louis to Lebanon, and that then its train should be reasonably stopped, and slackened in its speed, to enable Plaintiff to alight without injury; that Plaintiff in Error did not use due care that the train should be stopped and slackened in its speed at Lebanon so that Defendant in Error should be permitted to leave said cars, and be safely discharged therefrom, but neglected so to do, and after the arrival and stoppage of said train at Lebanon, and while Defendant in Error, with the consent and permission of Plaintiff in Error, with all due care, was alighting from said train, caused the same to be suddenly and violently moved backward, by means whereof Defendant in Error was violently thrown to the ground, and his right arm broken, &c. [R. pp. 1 and 2.]

The SECOND COUNT alleges that on the third day of October, 1866, Defendant in Error was a passenger on a train of cars of Plaintiff in Error, to be safely carried from East St. Louis to Lebanon, aforesaid, for a certain fare paid, and thereupon it became the duty of Plaintiff in Error to use due care that Defendant in Error should be safely carried; yet Plaintiff in Error, not regarding its duty, did not use due care that Defendant in Error should be safely carried, but neglected so to

do, and by reason thereof, afterwards Defendant in Error, with due care, alighting from said train, was thrown violently to the ground, and the car wheels run over his right arm, and crushed it, &c. [R. pp. 2 and 3.]

The THIRD COUNT alleges that Plaintiff in Error owned a train of cars, and that Defendant in Error, October 3d, 1866, became a passenger thereon, to be carried from East St. Louis to Lebanon, for certain reward, and that Plaintiff in Error carelessly managed, said train and same arrived at Lebanon about dark, and then stopped, and that Plaintiff in Error had caused one of its other trains of cars to obstruct the main track by stopping it at said Lebanon, and the said first mentioned train, whereon Defendant in Error was a passenger, was conducted onto a side track, without the knowledge of Defendant in Error, where it remained for about ten minutes, and afterwards, through the carelessness of Plaintiff in Error, was driven violently and suddenly back, by means whereof, though Defendant in Error was endeavoring to alight from said train, with due care, Defendant in Error was thrown to the ground, and his right arm cut off, &c. [R. pp. 4 and 5.]

SUMMONS AND SERVICE. [R. pp. 6 and 7.]

PLEA—GENERAL ISSUE—Not Guilty. [R. p. 7.]

JUDGMENT—$3500.00, and costs. [R. pp. 8 and 9.]

MOTION FOR NEW TRIAL FILED. [R. p. 10.]

ON THE TRIAL, Defendant introduced the following evidence, viz:

WILLIAM SCHIEBE testified: I am the Plaintiff in this case. On the third day of October, 1866, I rode from East St. Louis to Lebanon, St. Clair county, Illinois, on the Ohio & Mississippi Railroad. I am a saddler by trade, and have travelled on that Railroad a great deal—every two or three weeks for several years. It was at the time of the St. Louis Fair that I speak of, when I bought a ticket to go and return, for which I paid one dollar and twenty cents. I went to St. Louis on the morning of October third, and had a return ticket which I gave to the conductor. We started from East St. Louis on the cars at six o'clock in the evening. At Caseyville the train stopped and took on and put off passengers. I cannot tell whether the station was announced or not. They do not always call out the station in all the cars, but in some of them. I was asleep some of the way between Caseyville and O'Fallon. The train stopped at O'Fallon, and the station was called in the car I was in. Lebanon is the next station after O'Fallon. When the train arrived at Lebanon there was a train of freight cars on the track by the platform, and the train I was in came up slowly into the side-track, and some one said the train had stopped. The train had stopped. We sat there from five to ten minutes, and during that time the train remained still. It was very dark outside. Some one then said, "The train is going to Summerfield;" and I gathered up my baggage and went out of the car onto the platform of the car, and just then the locomotive gave a push backwards, and I fell down by the wheels and the locomotive then went backwards, and the wheel went over my right arm, and the doctor amputated it. The locomotive came back with great force. I think a man and his wife got out before me safely. It was forty or fifty yards from the station where I was hurt. I cannot tell whether Lebanon was announced or not. I did not hear it. I did not see anything of the conductor or any brakeman when I went to the door of the car, and no one told me not to get out. The persons that got out before me lived in Madison county, and I did not know them. There were two ladies in the car with me. They are both here as witnesses. They did not get out till after I did. I cannot work hereafter at my trade because my right arm is gone. I was confined to my bed three weeks from the injuries received. I was not well in that time, but the doctor did not attend me after that. I am forty years old, and have a wife and four children. [R. pp. 10, 11 and 12.]

X Ex.—I had not been drinking the day I was injured. I drank one glass of beer in the morning before I left Lebanon, and I did not drink any more that day. I met a friend at the Alton Packet, between five and six o'clock, that evening, but I did not drink with him. I did not say to the ladies that were with me on the train from East St. Louis to Lebanon that day, that I had met a friend that day whom I had not seen for several years, and that I had been drinking pretty freely with him. I had one of their parasols in my hand at the time I was hurt. When I started out I gathered up my packages in a hurry, and took the parasol with them by mistake. I had a little

keg of fish and a heavy package of harness buckles and a lady's parasol and some other things, in my hands when I fell. The ladies lived in Lebanon. I knew one of them before that time and the other I did not. As I came out of the car it was very dark, and the locomotive created a jar that threw me off. I did not know whether we were on the side-track or not when I tried to get off. The train was on the side-track when I was hurt, but I did not know where we was at the time. No one took hold of me or tried to prevent my getting off, or told me not to get off. [R. pp 12 and 13.]

JOHN CRAMER testified:—I was on the train at the time plaintiff was injured. I rode in the same car with him, and sat within two or three seats of him. The train stopped seventy or eighty rods before it got to the platform at Lebanon. I did not hear any one give notice as to why they had stopped. I got up and went to the door, as did about half a dozen others, to see why we had stopped. I did not see plaintiff fall. I cannot say that the cars came back or made any jar. The train went back a couple of feet, as it stopped, and then started slowly forward again. It jerked a little, but not more than ordinarily, in stopping and starting a train. I was standing on my feet. No one fell down, as I know. The plaintiff is a temperate man, and was sober as far as I know. I did not talk to him that night. After he was hurt I went back and found him sitting on the ground. I went on to Summerfield on the same train. [R. pp. 13 and 14.]

X Ex.—I was about the middle of the car when the plaintiff was hurt. It was very dark. There were several standing between me and the door when plaintiff fell. [R. p. 14.]

ANTHONY ROSKE.—I am a Catholic priest. I went on the train from Lebanon to Carlyle the night plaintiff was injured. I cannot say how the accident happened. I did not see the plaintiff that night. I got onto the passenger train at the platform. The freight train stood on the main track while the passenger train came up, and went into the side-track. Then the freight train moved off towards St. Louis, and then the passenger train backed out of the side-track, and came up on the main track to the platform, and I got on it and went to Carlyle. It was a very dark night. [R. p. 14.]

Dr. BURGER.—I attended plaintiff. Saw him about a quarter of an hour after the accident. His right was crushed, and I amputated it about an hour after the accident, just above the elbow. I saw no other injury upon his person, to speak of. I attended him regularly for three weeks and dressed his arm daily. After that, he came to my office to have his arm attended to. My charge is from two hundred to five hundred dollars in such cases. Plaintiff was not intoxicated at the time we amputated his arm. We tested his exhalation, and it was clear of any spirituous liquor. [R. p. 15.]

JAMES WALLACE.—I hauled plaintiff up to town in a 'bus that night, after he was hurt. The freight train was standing on the main track when I came down to the station. It usually comes in on the side-track. I go to the depot to every passenger train, and have done so every since January, 1866. The freight was a very long train. The side-track is very long. I have seen two trains on it. I do not know whether there was room on the side-track for the freight train or not. [R. p. 15.]

The defendant introduced the following evidence, viz:

MARIA FARRELL testified:—I was on the train at the time plaintiff was injured. I was not acquainted with him before that night. He was talking pretty loudly to Miss Macken and myself on the way from East St. Louis to Lebanon, and she told him to stop, as he was attracting attention. He replied that she must excuse him as he had met a friend that day at the Fair Ground whom he had not seen before for several years, and that he had been drinking pretty freely with him. He seemed to be quite intoxicated. When we got near Lebanon, the train stopped two or three minutes, and then started again. The plaintiff gathered up his parcels and started for the door, and Miss Macken and I followed him. The train was moving slowly when he left his seat. When he got to the door of the car, the conductor, who was coming out of the opposite car, said to plaintiff, "Man, don't get off here," or something like that. I did not see him fall. Just as he got to the door, Miss Macken said to him that this is not the station. I think the train was moving backwards at the time. Miss Macken was between me and the door, and I could not see out. I was standing up at the time. There was no jerking of the train at the time. [R. p. 16.]

MISS ELLEN MACKEN testified:—I was with plaintiff on the train at the time he was injured. He was talking very loudly on the way from St. Louis to Lebanon, and I told him not to be so boisterous; and he replied that I must excuse him as he had been drinking pretty freely with a friend whom he had not seen before for twenty years. I had known him for two or three years. I think he was intoxicated. When the train got near Lebanon it stopped, and after a minute or two it started again; just as it started plaintiff got up to go out, and I followed him. The train was in motion when he started. The station had not been called. When we got to the door I saw that we were not at the station, and told him to stop, that we were not at the station. Mr. Johnson, the conductor, came out of the opposite car just as we got to the door, and when the plaintiff started to get off, Mr. Johnson took hold of him, and said, "Man, don't get off here—we are not at the station." He pulled away from Mr. Johnson and fell. I told him before Mr. Johnson did that we were not at the station. [R. p. 17.]

J. T. BRUNK testified:—I got a lantern and went back to the place where plaintiff was hurt, and picked up his hat and the parasol and a small keg and some other little things. I saw the blood on the rail and ground. It was about one thousand feet west of the west switch, and nearly two thousand feet from the platform to where he was injured. There was not room that night for the freight-train on the side-track, and it had to remain on the main track and let the passenger train go on the side-track in order to pass. The plaintiff was hurt on the main track before the passenger train had pulled up into the side-track. It is a usual occurrence for passenger trains to take the side track to let freight trains pass. [R. p. 18.]

DAVID GUESS testified:—I was engineer on the train on which plaintiff was injured. As I came up to Lebanon, I was signalled to stop and go into the side-track to let the freight train pass that was on the main track, as there was not room for the freight train on the side-track. I came very near to a stop, and then pulled up to go into the side-track. I was going at about three or four miles per hour, and had got to within about 100 yards of the switch when the alarm bell was sounded, and I stopped the train in going about one hundred feet, and some parties went back with a light and I went on into the side-track. I did not know that any one was injured till afterwards. At the time the alarm bell was sounded I was going slowly forward to go into the side-track. [R. p. 18.]

X Ex.—It is a usual thing for passenger trains to take the side-track for freight trains to pass. I do it every day, and have for more than a year, on my run between Odin and St. Louis, at least once or twice. There are from twelve to fifteen stations between St. Louis and Odin. I run from Odin to St. Louis and back every day. [R. p. 19.]

C. M. JOHNSON testified:—I was conductor on the train on which plaintiff was injured. As we came up to Lebanon we were signalled to take the side-track. The cars did not come to a full stop, I think, before it started along slowly to go into the side-track. As I came out of the car onto the platform of the car the plaintiff came out of the opposite car with some bundles in his hands; I said, "Do not get off here; we are not at the station;" but he walked right along, and stepped down onto the steps of the car, and I reached over and took hold of his shoulder, and said, "Don't get off here," but he was too heavy for me to hold in the position I was and he fell. I immediately pulled the cord of the alarm bell and some of them went back to see if he was hurt and the train went on into the side-track. There was no jerking of the train at the time he fell, but it was moving slowly forward to go into the side-track.—[R. p. 19.]

X Ex.—I tried to catch him as he fell, but he was too heavy for me to hold. I don't know whether he heard me or not. He did not pay any attention to me but crowded by some others that were on the platform at the time he came out. The train was going forward at the time of the accident. [R. pp. 19 & 20.]

Mr. WHITTAKER testified:—I was a passenger on the train on which plaintiff was injured. When the crowd started to go out, I heard some one at the door of the car say that we have not got to the station yet. This was about the time plaintiff was hurt. The train was moving slowly forward at the time. I don't know who it was that said that we had not got to the station. I was about in the middle of the car. I went on the same train to Summerfield. [R. p. 20.]

H. P. BUXTON testified:—The Ohio & Mississippi Railroad

Company, defendant in this suit, has not owned or operate any Railroad in Illinois since 1862, and did not own, and was not operating the Railroad on which plaintiff was injured at the time of the accident. [R. p. 20.]

This was all the evidence in the case.

The Court gave the following instructions to the jury on behalf of the plaintiff, viz:

I. If the jury believe, from the evidence, that the injuries received by the plaintiff were occasioned through the carelessness or negligence of the defendant, without any fault or negligence on his part, then they will find for the plaintiff, and assess his damages not exceeding the amount claimed in plaintiff's declaration. [R. pp. 20 and 21.]

II. The Railroad Company, if improperly named, should have pleaded in abatement, and cannot take advantage of being sued in a wrong name upon the trial.

To the giving of which instructions, and to each of them, the defendant, at the time, excepted; which exceptions were overruled by the Court, and the instructions read to the jury. [R. p. 21.]

The Court gave the following instructions to the jury on behalf of the defendant, viz:

I. If the jury believe, from the evidence, that the injury sustained by the plaintiff was the result of his own negligence, then the jury will find the defendant not guilty. [R. p. 21.]

II. If the jury believe, from the evidence, that the negligence of the plaintiff contributed to the injury, and that the defendant was not guilty of gross negligence, then the jury will find the defendant not guilty. [R. p. 21.]

III. If the jury believe, from the evidence, that the defendant did not own or operate the railroad on which the injury was sustained, at the time of the accident, then they will find the defendant not guilty. [R. p. 21.]

The Court was then asked by the defendant to give the jury the following instructions, in connection with defendant's second instruction, viz: [R. p. 21.]

"Gross negligence, in law, is such as would be deemed willful or intentional." Which the Court refused to give, to which ruling of the Court, in refusing to give said instruction to the jury, defendant, at the time, by its counsel, excepted. [R. p. 22.]

On the jury returning a verdict against the defendant, and assessing the plaintiff's damages at thirty-five hundred dollars, the defendant filed motion for a new trial, and moved the Court for a new trial, which motion was refused by the Court, to which ruling of the Court in refusing to grant a new trial, and in overruling said motion, the defendant, at the time, by its counsel, excepted. [R. p. 22.]

ERRORS ASSIGNED.

I. The Court erred in overruling motion for new trial.

II. The Court erred in giving Defendant's in Error first and second instruction.

III. The Court erred in refusing Plaintiff's in Error instruction, asked in connection with Plaintiff's in Error second instruction.

IV. The Court erred in rendering the judgment aforesaid, in the manner and form aforesaid.

H. P. BUXTON,
Att'y for Pl'ff in Error.

PLAINTIFF'S BRIEF.

The judgment in this case should be reversed:

I. Because the second instruction given for Defendant in Error was improperly given. There was no evidence in the case tending to show that the party sued was improperly named, and therefore, there was nothing in the case on which such an instruction could be based. The fact that the plaintiff in Errror did not own or operate the road at the time, is only showing that if so, it could not be guilty, and is, therefore, proper evidence, under the general issue.

II. Because the instruction refused by the Court, asked by the Plaintiff in Error, that "gross negligence in law is such as would be deemed willful or intentional," is the correct principle, and applicable to the case.

III. Because the whole facts in the case go to show, beyond

a doubt, that the injuries complained of, were the result of the negligence of the Defendant in Error, and that there was no negligence of any one else that, in any degree, contributed to the injury.

G & C. R R Co vs Yarwood 15 Ill R 468
Same vs Fay 16 Ill 567

The fact that the passenger train was required to take the side-track to let the freight train pass, is of daily occurrence, and in no way endangers a careful, prudent and sober man; besides, the Defendant in Error was repeatedly warned by the conductor and others that they had not arrived at the station; and he threw himself from the train against the advice of his friends and the efforts of the conductor to prevent it. If the Railroad Company are responsible in this case, there can be no circumstances under which a man could be injured on a train of cars for which they would not be liable; for this case shows not only that there was no negligence on the part of the men operating the train, but that they used much more than ordinary care for the safety of the Defendant in Error.

H. P. BUXTON,
Att'y for Pl'ff in Error.

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O & M. R. R. Co

vs

Wm Schieber

Filed June 4th 1867

Cook Johnston Clk

SUPREME COURT.

OHIO & MISSISSIPPI RAIL ROAD COMPANY, Appellant,
vs.
WILLIAM SCHIEBE, Appellee.

APPELLEE'S BRIEF.

The evidence shows that appellee bought a ticket at the office of the defendant in East St. Louis, for which appellant was to carry him to the town of Lebanon. The train arrived with appellee, near Lebanon, after dark—the night being a "very dark" one. About one hundred yards from the switch, the train stopped, (as appears by weight of evidence,) the engineer seeing a freight train on the main track, at the station, which proved to be too long to go on the switch. There was no brakesman in front of the car in which appellee was riding, at that time. A number of passengers, ladies and gentlemen, appellee included, thinking they had arrived at Lebanon, advanced at once to the front of the car—three or four got off—and appellee while in the act of getting off, was met by the conductor, who was coming from the other car, and told by him not to get off, they had not yet reached the station; and while he was in the act of stepping off, the conductor took hold of him, but he being a heavy man, it had but little effect, and he fell as he jumped off, with his arm upon the rail, and the wheel of the car passed over it, in consequence of which the arm had to be amputated. There was some little evidence that he admitted on the train that he was somewhat intoxicated, but the weight of evidence, including that of the doctor who tested his breath, shows that he had not been drinking any intoxicating liquors that day.

1. "By the law, the company were bound to the *utmost* diligence and care, and are liable for *slight* negligence." Gal. & Chic. R. R. Co. vs. Yarwood, 15 Ills. 472.

"Common carriers of passengers are responsible for the slightest negligence resulting in injury to them, or in other words, are required in the *preparation* and *management* of their means of conveyance, to exercise the highest degree of diligence and skill, which a reasonable man would use under such circumstances. Pierce's Am. R. R. Law 470.

"It has been considered bound to warn passengers of particular passages unusually dangerous, and requiring of them superior circumspection." N. J. R. R. Co. vs. Kennard, 21 Penn. 203. Pierce's Am. R. R. Law 475.

2. The carrying of passengers being *founded on contract*, the carrier is bound to greater care than when running upon its own road, and coming in collision with persons or stock, crossing its own track.

In this case we claim—

1st. That the freight train should have been on the

switch. It it no answer to this objection to say that the train was made too long for that purpose.

2d. That it was the imperative duty of the company, when stopping so near a station, to have locked the doors of the cars, or to have had a brakesman stationed at the end of each car to warn passengers of the danger of getting off at the peril of their lives; and the failure to do one of these things would render the company liable for negligence, especially on a night as dark as this one.

It was proved that the brakemen do not always call the stations, in all the cars.

Appellee testified that he did not hear the conductor speak to him, or notice any person interfering with his getting off.

Care and diligence, unusually strict, should be required of the carrier in this part of the country, because many of the passengers are very ignorant, and very many of them do not understand the English language.

JOSEPH B. UNDERWOOD & S. P. DAVIS,
Appellee's Attorneys.

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Ohio & Mississippi
R. R. company
vs
William Scheibe
Deft. Brief

Filed June 5th 1867
Noah Johnston Cl