

NEW JERSEY

COURT OF

ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES.

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REUBEN A. DRAKE,  
Plaintiff in Error,  
*vs.*  
DAVID H. MOUNT,  
Defendant in Error. } In Error to  
the Supreme  
Court.

P. L. VOORHEES,  
*Attorney of plaintiff.*

J. F. HAGEMAN,  
*Attorney of defendant.*

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TRENTON :

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Chancery Building, State street.

1867.



## COURT OF ERRORS AND APPEALS.

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### Writ of Error.

[Filed March 11, 1867.]

New Jersey, *ss.*—The state of New Jersey to  
[L. s.] our Justices of our Supreme Court of Judicature  
of the state of New Jersey, greeting :

Forasmuch as in the record and proceedings, and also in  
the giving of judgment of a plea which was in our court be-  
fore you, wherein David H. Mount is plaintiff, and Reuben  
A. Drake is defendant, of a plea of trespass, as it is said  
manifest error hath intervened to the great damage of the 10  
said Reuben A. Drake, as by his complaint we are informed ;  
we being willing that the error, if any there be, should in  
due manner be corrected, and full and speedy justice done  
to the parties aforesaid in this behalf, do command you, that  
if the judgment be thereupon given, then without delay you  
distinctly and openly send, under your seal, the record and  
proceedings aforesaid, with all things concerning the same,  
to our Court of Errors and Appeals in the last resort in all  
causes, as heretofore, on the second Tuesday in March, in-  
stant, wheresoever they shall be in the said state, together 20  
with this writ ; that the record and proceedings aforesaid  
being inspected, we may further cause to be done thereupon  
what of right and according to law ought to be done.

Witness the Honorable Abraham O. Zabriskie, Chancel-  
lor and president judge of our said court at Trenton, this  
sixth day of March, in the year of our Lord one thousand  
eight hundred and sixty-seven.

H. N. CONGAR, *Clerk.*

P. L. VOORHEES, *Att'y.*

The answer of the Justices of the Supreme Court within mentioned.

The record and proceedings within mentioned we certify and send to the Court of Errors and Appeals, in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY, *Ch. Just.* [L. s.]

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New Jersey Supreme Court.

As yet of the twelfth day of January, A. D. eighteen hundred and sixty-six.

10 Witness,                      MERCER BEASLEY, esq., *Ch. Just.*  
       CHAS. P. SMITH, *Clerk.*

Somerset county, *ss.*—Reuben A. Drake, the defendant in this suit, was summoned to answer unto David H. Mount, the plaintiff, in a plea of trespass on the case; and thereupon the said plaintiff, by J. F. Hageman, his attorney, complains of the said defendant—

For that whereas the said plaintiff heretofore, to wit, on the eighteenth day of August, A. D. eighteen hundred and sixty-five, at the township of Franklin, in the county of  
 20 Somerset aforesaid, and within the jurisdiction of this court, was lawfully possessed of a certain carriage, to wit, a freight wagon of great value, to wit, of the value of one hundred dollars, and of divers horses, to wit, two certain horses, of great value, to wit, of the value of three hundred dollars, each, then and there harnessed to said wagon, and drawing the same in and along a certain public and common highway, to wit, in Franklin aforesaid, in the county aforesaid; and whereas the said defendant was also then and there possessed of a certain other wagon and of a certain pair of  
 30 mules, drawing the same in and along the said common highway, and which said wagon and mules of the said defendant were then and there under the government and direction of a certain then servant of the said defendant, who

was then and there driving the same in and along the said common highway, to wit, at Franklin aforesaid—nevertheless the said defendant, then and there by his said servant, so carelessly and improperly drove, governed, and directed the said wagon and mules, that, by and through the carelessness, negligence, and improper conduct of the said defendant, by his servant in that behalf, the wagon of the said defendant, drawn by the said mules, then and there ran and struck with great violence against one of the said horses of the plaintiff, and against the said wagon of the plaintiff, and 10 the tongue or pole of the said wagon of the defendant, with great force and violence, was forced and driven at and against and into the said last mentioned horse of the plaintiff, whereby the tongue or pole of the said wagon of the plaintiff was then and there broken and destroyed, and the said last mentioned horse of the plaintiff was then and there so much wounded and hurt that the said horse of the plaintiff, of his said wounds and injuries afterwards, to wit, on the twenty-seventh day of August aforesaid, died, to wit, in the county aforesaid, whereby the said plaintiff not only lost and 20 was deprived of his said horse, but was forced and obliged to lay out and expend, and did actually lay out and expend a large sum of money, to wit, the sum of forty dollars, in and about the endeavoring to heal and cure the said horse of the said plaintiff of the aforesaid wounds and hurts, to wit, in the county aforesaid, to the damage of the said plaintiff five hundred dollars, and therefore he brings his suit.

And the said defendant, by Edward T. Green, his attorney, comes and defends the wrong and injury when, &c., and says 30 that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or of any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this he, the said defendant, puts himself upon the country, &c.

And the plaintiff does the like.

Therefore let a jury thereupon come before the Chief Justice, or some other Justice of the Supreme Court of the state of New Jersey, at a Circuit Court, to be held at Bridgewater, in and for the county of Somerset, on the eighteenth day of September, A. D. eighteen hundred and sixty-six, by 40

whom, &c., and the same day is given to the parties aforesaid, there, &c.

And now at this day, to wit, the eighth day of November, in the year last aforesaid, before the Supreme Court of the state of New Jersey, at Trenton, come the parties aforesaid, by their attorneys aforesaid, and the justice before whom, &c., sends here his record had before him, in these words, to wit: "Afterwards, on the day and at the place within contained, that is to say, on the eighteenth day of September, 10 in the year of our Lord one thousand eight hundred and sixty-six, at the Circuit Court held at Bridgewater, in and for the county of Somerset, before the Honorable Vanclave Dalruple, one of the justices of our Supreme Court holding said circuit, according to the form of the statute in such case made and provided, comes as well the within named plaintiff as the within named defendant, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned also come, who, to speak the truth of the matters within contained, being 20 chosen, tried, and sworn, say, upon their oath, that the said defendant is guilty of the grievances within laid to his charge, in manner and form as the said plaintiff hath within complained against him, and they assess the damages of the said plaintiff against the said defendant, on occasion thereof, over and above his costs and charges by him in his suit in this behalf expended, to three hundred and forty-one dollars, and for those costs and charges to six cents."

Therefore it is considered that the said David H. Mount do recover against the said Reuben A. Drake his damages 30 by the jurors aforesaid found to three hundred and forty-one dollars, and also forty-nine dollars and nineteen cents for his costs aforesaid by the court now here adjudged to the said plaintiff, and with his assent, which said damages, costs, and charges in the whole amount to three hundred and ninety dollars and nineteen cents. Judgment signed the eighth day of November, A. D. eighteen hundred and sixty-six (1866).

M. BEASLEY, *Ch. Just.*

I, Charles P. Smith, clerk of the Supreme Court of the state of New Jersey, do certify that the foregoing is a true

transcript of the record of judgment in the above cause, as the same remains in my office.

In testimony whereof, I hereto set my hand and the  
[L. s.] seal of said court, at Trenton, this eighth day of  
March, A. D. 1867.

CHAS. P. SMITH, *Clk.*

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### Bill of Exceptions.

This cause coming on this eighteenth day of September, eighteen hundred and sixty-six, before the Honorable Van-cleve Dalrimple, one of the justices of the Supreme Court 10 assigned to hold said court. A jury being empanelled and sworn, the plaintiff offered the following testimony in support of the issues joined on the pleadings in said cause.

*Aaron Kennedy*, being duly sworn, says—I was driving a pair of horses of Mr. Mount's to a large wagon loaded with corn—was coming from the storehouse or basin on east side of canal at Rocky-hill; the canal bridge was turned—I stopped—I was about in the middle of the road, road only eleven or twelve feet wide, never measured it—basin on right hand, no fence between—on my left was a high bank 20 and rocks; a pair of mules of Mr. Drake's started close to the turn-table—they came right towards me on the right—the mules were fast to a peach wagon, they had no driver, they came on a run, on a jump—saw Mr. Drake's son have hold of them, tried to have hold—saw him run after the wagon—he was on the near side of the mules, on the left side of the mule wagon; I sheered my horses off as far as I could get to the left, to avoid being run into—my horses could not move my wagon until the mules ran into me— could not say whether Drake's son had hold of the mules or 30 not; the pole of the mule wagon struck the off-side horse of my wagon in the flank, broke the pole, and knocked him down—horse taken home, and died a little over a week after—saw the horse every day after—Mr. Dilts, a farmer, attended him—wound six or seven inches deep—think this

killed him—I went there next morning; Drake's son was behind his wagon when the mules started—I hollered to him once; the mules started a second time—the first time they started he caught them—I hollered, and he caught them—don't think it was over five or ten minutes before they started the second time; think it was about six o'clock in the afternoon, in August, 1865; I saw Drake's son hunting for peach baskets behind his wagon; should judge the distance between the two wagons, when mules started the  
 10 second time, was thirty-two paces about; horse hurt was a good sound horse—I took care of him—don't know his age—this took place Friday—Mr. Drake was at Mount's on Saturday.

And being cross-examined, says: I saw the mule team standing still—I heard the locomotive whistle—I was thirty-two paces from the railroad; I don't think teams could pass there if loaded; the interval of time between the two starts was about five minutes—they went about eight paces when he caught them the first start; he left the mules after he had  
 20 caught them—there was a blow of the engine just before they started the first time—he was behind the wagon busy with baskets—they moved off slowly; he got hold of them, backed them back—they went off on a slow walk—it was no running away; he could have tied to a post, a locomotive sign-post twenty feet from the railroad; I feared the mules would run into me when they first started; I hollered—I stood in the middle of road, and remained there; the blow of engine second time not very loud; think driver of mule team was along with his wagon at the second start, when  
 30 they had gone eight or ten feet—he was trying to catch his mules—don't think he caught them the second time; he was crowded by the mules towards the basin—he was on near side of his team; I sheered my horses to the left—if I had stood still there would have been harm to my horses; the mules were four or five feet from my horses when I sheered off; I have seen horses tied to the post spoken of—it is at the forks of the two roads.

*James Skillman*, being sworn, says—Recollect collision;

the position I occupied was between the turn-table and wagon track and railroad track—I was about twenty feet from the mule wagon—I was looking for empty peach baskets; I saw the mules as the cars came down the track; I said, young man, is there not danger of your mules starting—he said no; presently the mules made a few steps; the young man spoke to them, and stopped them; he was a little to the side of the wagon, nearly opposite the hind wheel, not more than three feet from hind wheel—had not hold of the reins; next thing, I think, the mules started again—he 10 spoke to them, they did not mind him; he saw they were about to get away, and ran; he was on near side of wagon, I was on the off side, his wagon between us—it was a top wagon; he stood with his back to the wagon, looked towards locomotive—judge he was about six feet from wagon, and behind it; I saw collision—I changed my position up on the wagon road where the mule wagon stood when it first started—then I observed Mr. Mount's team distinctly—mules were going at full speed when they struck; the other wagon did not move any; Mount's driver hoisted his team to the left, 20 and the fore wheels moved—his horses stood against the bank; I heard Mount's man say, take the pole out of my horse; I went to the place—blood had started down his leg—the wound was in flank, as big as your fist, nine or ten inches deep—the wagon tongue broken, cost of new one \$2.25; saw the horse every day, except the two Sundays, till he died, and saw him dead.

And being cross-examined, says: It was the off-side horse that was injured; the mules' heads were turned to go up hill before they ran away; the hill road is not the road Mount's 30 team was on; can't say at what point of time Mount's team was twisted one side; the mules started at first on a slow step; the lines were fastened to front bow of wagon; think they were not checked; both ran at the second starting, Drake's son right behind the wagon, talking about peaches; the position where the mule team stood was not the position where peach teams generally stood, others stopped up hill or across the canal; this team was in the habit of carrying thirty-five or forty baskets of peaches—sometimes they took

a good load of empty baskets back; other wagons have stopped at same spot of ground—rather an unusual position; the baskets were delivered by the railroad company where Drake's team stopped.

He, Drake's son, was looking at locomotive when mules ran—he had been looking for his baskets just before; think there was said to be thirty or forty wagons there that day—it's twenty paces from where baskets are delivered to where wagons can get—think the place of Drake's team dangerous  
 10 —it's about ten feet from railroad—cars were approaching; there is a post and rail fence about thirty yards up the hill on the road to Brunswick—could have tied them to sign-post; there are two or three posts on the other side of canal; a team was tied at this time to chain of bridge on east side of canal, close to depot; Drake's team had been there about a quarter of an hour.

*Abraham Van Derveer* sworn, says—I live at Rocky-hill; I was standing on platform of depot—in front of me was Mr. Drake's wagon; as cars came in mules were uneasy, and  
 20 made a kind of start after cars came in; heard Drake's son holler to them—he was behind wagon—went to them, and they stopped; then he stood observing the passengers; mules started pretty lively—again he hollered; he got side of them by the breast of near side mule—the farther they went the faster they went; he got to the breast of the near side mule, don't think he got hold of the reins; they ran at first very close to the basin, then they bore off from the basin; if they had gone on the course they started they would have cleared Mr. Mount's wagon—value of horse  
 30 \$300; I heard Drake say next day his son was a careful boy before he went to Brunswick to college—since then he had got careless; Drake said he had sent for Doct. Dilts.

I tie to the iron that connects post to the bridge, ten or fifteen feet from where Drake's team was—not more than one team could be tied there; no wagon was tied there then—I was close by it; when the mules made the second start the locomotive stood right across the road—they started the first time when the cars were coming up; think there was a whistle—they were about moving when engine

whistled; I said at the time the mules should have been tied; the first time mules went two or three feet, he spoke to them—they stopped; locomotive remained in the same place between the starts; Mount's team stood within forty or fifty yards from the railroad.

*Augustus Van Zandt* sworn, says: I was at Rocky-hill—noticed Drake's team—gave his son caution; I stood talking to him—saw mules uneasy—told him he had better take care of them; think locomotive had passed depot—the cars were standing on the road; when mules ran, he caught the near 10 side mule by the head—think they had ran about twenty feet before he caught them by the head—held them up at first, thought he would stop them—they were not going so very fast—they went faster—he hung on—they ran pretty close to basin—they went pretty near straight ahead, did not change much either way—saw horse hurt, think he was worth \$300.

And being cross-examined, says: I never saw the mules do anything of the kind before—I had often seen them go down to the depot before; after he had got hold of them, and was 20 about checking them the whistle again blew; train was in view of the locomotive—it was a pretty loud whistle this second one; don't think the team bent much, they went close to basin, when half way Mount's team were nearest basin—they ran pretty straight; just before teams came together Mount's team turned left—his wagon was in the middle of the road; he (Mount's driver) could have moved his wagon if he had started when the mules started—the road was wide enough for two teams to pass; before the start, the distance between the teams was about forty yards; when 30 collision took place mules were in centre of road; saw the road measured where Mount's wagon stood—it was eighteen feet wide, I think; it was seven feet from north side of beaten track to basin; Mount's team could have stood safely nearer than seven feet—water four or five feet off from basin bank—bank of basin slopes—both mules ran.

*David H. Mount*, the plaintiff, sworn, says: I did not see

collision; Doct. Dilts attended horse—next day Drake said he had sent for Doct. Dilts; considerable said about the collision; he said his son was careful before going to college—that he was careless now—seemed anxious to know the value of the horse—the horse was worth \$300 at least—he mated another horse used for carting and carriage; I paid Doct. Dilts' bill, thirteen or fourteen dollars; I hired a special nurse—Doct. Dilts recommended it—nurse stayed all night with horse—have not settled with him yet—he has an  
 10 account at my mill—he claims \$25—think his services worth that; Mr. Drake sent me down a horse to use—he partly answered my purpose—I had him twenty-one days; there is no accommodation specially for tying by railroad track—across canal are posts, and there is a chain-post by canal bridge; the road my team was on is a very narrow road, on the edge of the water—about fourteen feet was the width it would be safe to drive upon where my team stood—wagon track near basin; if you measure from basin to the hill width greater, but not safe to drive out of the fourteen feet  
 20 width—a wagon could not have passed my wagon on the basin side.

And being cross-examined, says: Don't recollect of speaking to conductor or engineer of railroad next day about whistling the engine—my horses did not mind the whistle; the horse was valued, when I purchased him, at \$200—he was unbroke, very thin and young.

Here the plaintiff rested his case; whereupon the defendant offered the following testimony on his behalf.

*Herbert A. Drake* sworn, says: Am son of defendant; I had  
 30 charge of the mule, team had taken a load of peaches to depot; had unloaded along the railroad where peaches were usually unloaded; I stopped at an unusual place because the bridge over canal was turned so that I could not cross over; I went with team, intending to get my baskets; as soon as the whistle blew I said whoa! and caught mules by the head, had them under control, and supposed they would stop in a very short distance; something unaccountable to me started them again; I supposed wagon had run on them; I con-

tinued hold of them—they were small mules; I continued hold of them till they got to Mount's team; the teams came face to face, the tongues of the two wagons very near together; the mules had stopped, and wagon stopped a very short time; Mount's off-side horse opposite my near-side mule; then the horses sheered to the left, don't know whether pulled there or went themselves; as soon as the horses were pulled to the left, the near-side mule jumped, and the other started with him, and he brought the tongue of mule wagon against the flank of Mount's off-side horse, touched the flank just above 10 where wound was made, knocked off some hair only; mules made another plunge, and tongue penetrated the horse's flank, and then another plunge, and tongue went in deeper; all this time, from first stopping on third jump, I was doing all in my power, by jerking them, to get them back; after third bound, mules were under control—Mount's driver pulled the horses, I think, so that the flank of his horse was brought before the tongue; his team stood in the middle of the road—I had to stride a rock to get past with my team; I had used this team of mules several times, carted at least 20 a half dozen loads of peaches with them—they were gentle mules, they had always been gentle; two days before this I was driving mules to small wagon—a man was driving before me very slow—we had a little race—I was whipping them, and in my trying to pass him in running my whiffletrees came loose, and they took the wagon by the neck-yoke, and the mules ran about a quarter of a mile—stood there perfectly easy, were not much frightened—this was the only occasion they showed any signs they were not gentle—this did not show they were not gentle—any horses would do the 30 same under the like circumstances.

*Henry Silcox* sworn, says: I was conductor at that time on the train; Mr. Mount was president of the road, Mr. Whitlock was agent and superintendent; Mount employed the railroad hands, and discharged them—Mr. Mount had the general supervision of the road; I saw this occurrence, the commencement of it, saw mules start, saw young man catch the mules, saw them till they were two thirds the distance to Mount's team—Herbert had them under control—last I saw

he had the speed pretty well down; I suppose the blowing of the whistle started them—blowing whistle started them the first time—I don't recollect about the second whistle, whether it started them or not, and don't know; Mr. Mount, next morning after the accident, gave directions not to blow the whistle any more—it was not necessary to blow the whistle while train standing still—railroad used for freight, and at that season peach business much the largest.

And being cross-examined says: I told the engineer not  
 10 to blow whistle—Mount told me not to blow whistle while peach wagons were there more than necessary; he, Herbert, got the mules to go slower—whistle was blown after the passengers were out—that, I suppose, started the mules—always blow whistle when cars start; not so on Central road—they ring bell—whistle when crossing road and leaving stations.

In chief. I saw the mules about the depot often in the summer while the cars were there.

*John B. Voorhees* sworn, says: I was on the bank of the  
 20 basin when accident occurred; I did not see the mules until after they started—I did not hear but one whistle, and that was a loud one—I suppose it was that that frightened the mules, that's what drew my attention that way—I saw team going; had a broadside view of both teams, they were forty or fifty yards apart, nothing to obstruct my view; Mount's team stopped in the road; saw mules coming, saw driver have hold of mules, and kept hold of them—came together, and that seemed to stop all force; I concluded the race was over and nobody hurt, both teams quiet; heard some bol-  
 30 lowing whoa! and looked up, and saw the tongue against Mount's horse—Mr. Mount's team had been turned off a little, no doubt to shun mules, turned off to left; had no conversation with Mr. Mount about the whistle; I said to Mr. Mount, was it necessary to have so much noise about there, for that most of the teams were afraid; Mr. Mount remarked it was not necessary to make so much noise—there was no occasion of blowing so hard.

*By the court.*—Did not see what started the mules—my team not afraid of anything but loud whistle.

And being cross-examined says: I stood on bank of the basin; I don't know that Drake is a director of the road; Mr. Mount said it was not necessary to blow so loud; it was after the halt when injury was done; I didn't see the horse down.

*In chief.* When the teams came together I thought it was all over, and went away; somebody hollered, and I saw the tongue on horse. 10

*Jacob R. Schenck* sworn, says: I was at Rocky-hill—did not see mules start; there were two whistles I believe; I remarked that Drake's team was frightened—young man had hold of the mules when the heads of the teams were very near together; I saw Herbert doing his best to hold the mules back—Herbert was pulling them hard, and they stopped.

And being cross-examined says: I was back of them; if the tongue had been level I think it would not have reached the horses—I could look over the mules, could see both mules 20  
—I was on front of passenger depot.

*Reuben A. Drake*, the defendant, being sworn says: I assisted in making the survey from which the map of the grounds was drawn—map offered in evidence—the distance was forty-seven yards from the hind part of my wagon to front of his; I was there the next day, an inquired about the accident—son went after doctor; the width of the road where Mount's team stood was twenty-one feet; I told Mount since Herbert had been to college had two accidents; the mules were gentle; my remark about son's carelessness based on 30  
what I heard at Rocky-hill.

Defendant here rests his case.

*Augustus Van Zandt*, being recalled by the plaintiff, says: It appeared to me they came together by collision—that there was no stop until they came together.

The plaintiff rested.

### Charge.

The court charged the jury in substance as follows:

This action is brought to recover damages, alleged by the plaintiff to have been sustained by him, by reason of a collision between his team and that of the defendant. His claim is that the defendant so negligently and carelessly managed his mule team that it ran away, and came in contact with the plaintiff's team of horses, standing upon the public highway, whereby one of them was killed. The damages claimed  
10 are the value of the horse and the expense of keeping and taking care of him from the time of the injury till he died.

Negligence is said to be the want of that degree of care which a prudent man, under the circumstances surrounding him, would observe in order to prevent accident and injury. Again: negligence has been said to consist in omitting to do something that a reasonable man would do, or the doing of something that a reasonable man would not do. If in either case an injury be done to another, though unintentionally, he may recover full compensation therefor. If a man is in  
20 the exercise of due and ordinary care he is not negligent. What is due and ordinary care must depend on the circumstances of each particular case. What would be due and ordinary care in driving a carriage along a public highway might not be so when crossing a railroad or approaching or standing at a railroad station in close proximity to a locomotive engine and train of cars. In other words, the care must be proportioned to the danger. This is the best idea that I can give you of what the law calls negligence or want of ordinary care.

30 The plaintiff, in order to entitle him to recover in this action, must show that the defendant was guilty, in the management of his mule team, of much negligence or want of care as I have described.

The burthen of proof is upon the plaintiff, and unless he has satisfied you by the evidence that the defendant was guilty of that which the law terms negligence or want of care in the management and use of his team your verdict must

be for the defendant. If the defendant was not negligent he must be pronounced not guilty in this action, no matter how great the plaintiff's loss. The circumstances on which the plaintiff relies in order to make out this part of his case are the disposition of the mules and their propensity to run away—the place where they were at the time the accident occurred—their proximity to a train of cars to which was attached a locomotive engine—their not being tied nor fastened to a hitching-post or anything else—that the person in charge of them at the time they started had hold neither of the 10 lines nor the bridles, nor any part of the harness—that he was at the rear of the wagon, some distance from his team, with his attention at the time attracted to the locomotive, and not to the team—that the team had already started once, and been stopped, and the attention of the driver called to the fact that it was likely to start again. On the other hand, the defendant alleges the mule team was gentle, and all the care taken against their running away which the circumstance required.

If, taking all the evidence into consideration, you are not 20 satisfied that there was that negligence or want of care by defendant which I have defined, you need go no further in your inquiries, but must find in favor of the defendant. If, on the contrary, the evidence satisfies you that there was, under the circumstances, negligence and want of care in the management of the defendant's team, and thereby the plaintiff's horse was injured, your next inquiry will be whether the plaintiff, on his part, was guilty of negligence or want of ordinary care which in any wise contributed to the injury. If he was, he cannot recover. The law says that although 30 the defendant was guilty of gross negligence, whereby the plaintiff was injured, yet, if the plaintiff was guilty of any negligence or want of care which contributed to the injury he cannot recover. No matter how gross the carelessness of the defendant, if the plaintiff was also careless, he has no lawful cause of action. The defendant contends that the plaintiff's team could, with reasonable effort and diligence, have been got out of the way between the time when the mule team became frightened and started and the time when the collision occurred. If the person in charge of the plain- 40

tiff's team could, by the exercise of reasonable care and skill, have avoided the injury, he was bound to do so. It was negligent for him to remain in the way of danger when by the exercise of ordinary care he could have shunned it. If you are satisfied that there was such negligence on the part of plaintiff's agent, you must find for the defendant. But in coming to your conclusion upon this part of the case, you are to look at all the facts and circumstances which surrounded the colored man at the time of the collision. Had

10 he time to move his team out of the way? You must consider the width of the road—the distance which the mules had to move from the place where they started to the place of the accident—that at the point of collision the canal basin was on one side, and a high bank upon the other, and that the driver did endeavor to turn his horses so as to avoid the running mules—if, as alleged by defendant, the horses were turned the wrong way, did that contribute to the injury, and was it, under the circumstances, such mismanagement and want of skill as amounted to negligence? If it was negli-

20 gence, and contributed to the injury, the defendant is entitled to your verdict. In considering this part of the case, you must take into account the fact, that most persons in charge of a team of valuable horses under such circumstances, with their own persons more or less endangered, would necessarily be under some agitation of mind, and make such allowance for the colored man on that account as you think right and proper. Had he time to consider and decide just what was best to do under the circumstances? If he failed to do anything which might reasonably have

30 been done to avoid injury, and that failure contributed to the injury, it was negligence on the part of plaintiff. The defendant alleges that he is not liable in this action, because the mules were frightened, and made to run away by the blowing of the whistle of the locomotive; that such blowing of the whistle then and there was louder than necessary and careless and negligent, and caused the injury; that the plaintiff is chargeable with that carelessness because he is president of the railroad company, and employs and discharges

40 control of the trains or locomotives other than such as may

be incident to his office of president of the road. He is not the superintendent. In order to charge the plaintiff with carelessness or negligence by reason of the blowing of the whistle, you must be satisfied that it was blown by his orders, and that the act was careless and negligent. If there is evidence in the case which satisfies you that the whistle was blown by plaintiff's orders, and that the doing so under the circumstances was careless and negligent, you must find for the defendant. You must bear in mind that railroad companies are under certain obligations to the public. 10

Among them is that of blowing a whistle or ringing a bell to give due warning of the approach of a train near to public highways, and as a signal that a train is about to leave a station, so that passengers and all interested may govern themselves accordingly. The signal must be loud enough to accomplish the object. It is said that the plaintiff the next day gave orders to the hands on the train or about the depot not to blow the whistle louder than necessary in future, or something of that sort. It is contended that this was an admission that the whistle was blown louder upon the day in 20 question than necessary. It may be so, or it may have been a caution to the hands to be as careful as possible, that in the future no such accident should happen. It was perhaps a natural remark for the plaintiff to make, even though the whistle had not been blown louder than reasonable and proper. However, of that you are the judges.

If you find that the defendant was guilty of carelessness and negligence, which resulted in the loss of plaintiff's horse, and that the plaintiff was not guilty of any negligence or carelessness which in any wise contributed to that 30 result, you will find in favor of the plaintiff such amount of damages as will compensate him for his actual loss.

Your verdict should be for the defendant, if you find that he was guilty of no negligence, or, being guilty of it, the plaintiff was also guilty of negligence which in any degree contributed to the injury complained of.

The evidence being commented upon by the counsel of the respective parties, and the court having charged the jury the counsel of the defendant requested the court to charge as follows :

1. If the injury to the plaintiff's horse resulted from an accident, which neither party could have avoided or prevented by the exercise of ordinary care, the plaintiff cannot recover.

2. If at the time the defendant's mules ran away, the defendant's servant was using ordinary care, the plaintiff cannot recover.

3. If at the time of the injury the defendant's servant was using ordinary care, and the plaintiff's servant did not exercise ordinary care to prevent the injury, the plaintiff cannot recover.

4. If the injury resulted from the carelessness and negligence of the servants of both defendant and plaintiff, the plaintiff cannot recover.

5. If the negligence or carelessness of the plaintiff's servant in any way concurred in producing the injury, the plaintiff cannot recover.

6. The burthen of proof is upon the plaintiff, not only to show that the injury resulted from the negligence and carelessness of the defendant's servant, but to show that it did not in any degree result from want of ordinary care and diligence on the part of the plaintiff's servant.

Plaintiff must show that the injury did not arise—

1. From accident.
2. From ordinary care and diligence on his part.
- 30 3. From mutual carelessness and negligence of the parties.
4. That it was purely the result of the carelessness and negligence of the defendant.

Unless he has fully established all these propositions, he cannot recover.

That the plaintiff is responsible, so far as his claim in this case is concerned, for the carelessness (if any) of the employé on the road who blew the steam whistle which caused the defendant's mules to start, such employé being subject to removal by the plaintiff and under his control.

That if the cars occupied the public road, and stood upon it, the loud blowing of the whistle when they started was not required by law, but was, under the circumstances, unnecessary and dangerous; and if it caused the defendant's mules to run away, and thereby injured his, the plaintiff's horse, he cannot recover.

That the first time that the plaintiff the next day gave the orders not to blow the whistle so loud when it was unnecessary, is proof to be regarded by the jury as showing that the whistle was blown carelessly and dangerously upon the occasion of the collision.

The first, second, third, fourth, and fifth above propositions were charged as correct; the sixth was refused to be charged, except as already charged, and as to the others the court declined to charge otherwise than as already charged: to which refusals to charge and to the charge of the court the defendant prays a bill of exception, and that it be sealed, and it is sealed accordingly.

V. DALRIMPLE, [L. s.]

EDW. T. GREEN, 20

*Att'y of defendant.*

JNO. F. HAGEMAN,

*Att'y of plaintiff.*

## Assignment of Errors.

[Filed March 8, 1867.]

And the said Reuben A. Drake, by Peter L. Voorhees, his attorney, comes and says, that in the record and proceedings aforesaid and in signing the judgment aforesaid there is manifest error in this:

1. That by the record aforesaid it appears that the judgment aforesaid was given against the said Reuben A. Drake, whereas, by the law of the land, the said judgment should  
10 have been given for the said Reuben A. Drake.
2. That in the trial of said cause before the said jury the court admitted illegal evidence.
3. That in the trial of said cause before the said jury the court refused to admit legal evidence.
4. That the judge, at the trial of the said cause, misdirected the jury as to the law.
5. That the judgment of the said court is in other respects erroneous and contrary to law.

And the said Reuben A. Drake, by Peter L. Voorhees,  
20 his attorney prays, that the judgment aforesaid, for the causes aforesaid and for other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether for nothing holden, and that the said Reuben A. Drake may be restored in all things which he has lost by occasion of said judgment.

PETER L. VOORHEES,

*Attorney for and of counsel with plaintiff in error.*

### Joinder of Error.

[Filed April 10, 1867.]

And the said David H. Mount, by John F. Hageman, his attorney, comes and says, that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and he prays that the said court now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error; and that the judgment aforesaid given may in all things be affirmed, &c. But because the said court now here are not advised what 10 judgment to give of and upon the premises, a day is therefore given to the parties aforesaid here until the third Tuesday of June next, to have their judgment thereon, for that the said court here are not yet advised thereof, &c.

JNO. F. HAGEMAN,  
*Attorney of defendant.*

The first part of the book is devoted to a general  
 description of the country, and to a history of the  
 various tribes which inhabit it. The author has  
 collected a great number of interesting facts  
 and anecdotes, which he has arranged in a  
 clear and concise manner. The second part  
 of the book contains a description of the  
 manners and customs of the different  
 nations, and a list of the principal  
 towns and villages. The third part  
 of the book is a list of the  
 names of the different tribes, and  
 the names of the principal  
 towns and villages. The fourth  
 part of the book is a list of  
 the names of the different  
 tribes, and the names of the  
 principal towns and villages.

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