No. 8627

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

---

vs.

Levi H.Jones

Levi A Jones
to
The Ohio & Mississippi RR Co } Appellee / Appellant

And now comes the Appellee by Stephenson & Cooper his Attys & moves the Court to dismiss the Appeal herein and assigns the following reasons therefor towit

1st The Appeal Bond (Pages 25 & 26 of the record) is approved by the Clerk of the Circuit Court instead of the Court without consent of parties Purples Statutes Vol II page 838

2d The Appeal Bond (same pages record does not recite the judgment correctly reciting merely the judgment of One Hundred and Thirty five Dollars without naming the costs of suit &c

3d The conditions of said appeal Bond only binds the Appellant to prosecute his Appeal with effect & pay whatever judgment may be rendered by the Court on dismissal of said Appeal

Stephenson & Cooper
for Appellee

[8627-D]

Mo to Dismiss Appeal

Jones

vs

O & M R R Co

Chetwood & Cooper

for Appellee

Know all men by these presents, that we the Ohio & Mississippi Railroad Company & Zadock Casey are held & firmly bound unto Levi H Jones of Clay County State of Illinois in the penal sum of Three Hundred Dollars, for the payment of which well & truly to be made we bind ourselves our heirs & administrators jointly & severally by these presents. Witness our hands & seals this 13th day of November A. D. 1861

The condition of the above obligation is such that whereas the said Levi H Jones did at the October term A. D. 1860 of the Circuit Court of Clay County recover a judgment against the above bound Ohio & Mississippi Railroad Company for the sum of One Hundred & thirty four dollars & Costs Expended in said suit, from which judgment said Company took an appeal to the Supreme Court of this State:—

Now therefore if the said Company appellant shall pay the judgment, costs interest & damages in case the judgment shall be affirmed & shall duly prosecute said appeal, then this obligation to be void, otherwise to remain in full force & effect

The Ohio & Mississippi Railroad Company [Seal]
By Wm Thomas their Attorney in fact.
Z. Casey [Seal]

[Sec 27-3]

32

Otho R. Davis

vs

Levi H. Jones

Amended Appeal Bond

Filed Nov. 14 - 1861 -

S. Johnston Clk

IN THE SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.----------NOVEMBER TERM, 1861.

BRIEF.

The Ohio and Miss. Railroad Co.,
VS.
Levi H. Jones.

STATEMENT OF THE CASE.

LEVI H. JONES, the plaintiff below, filed a declaration in the Circuit Court of Clay County, at the October Term, 1860, wherein he alleged the injury of one gray horse, and the killing of a mare and colt, by the trains of the Ohio and Miss. Railroad Company.

The horse was injured in June, and the mare in August. There are four counts in the declaration. The first two are common law counts, for negligence. The last two are evidently intended by the plaintiff to be drawn under the statute concerning the fencing of railroads; but they are simply counts at common law, as will appear below.

The cause was tried at the October term, 1860, under the plea of general issue, and a verdict had for plaintiff and judgment entered, from which defendant appealed.

Apellant asks a reversal of the judgment below, for the following reasons :—

1. Fatal deficiency in the evidence essential to a recovery. 2. Error in the instructions of the Court. 3. Disobedience of instructions by the jury. 4. The uncertainty of the verdict. 5. Objectionable evidence. 6. Error in refusing a new trial.

POINTS.

1. The plaintiff was bound to make out by proof, such a case as he made for himself in his declaration. He could not make out one case in pleading, and recover upon another made by his proof. His averments and proof must correspond in all material matters. It was incumbent upon him, in a declaration for negligence, to prove ownership of the property injured, or legal possession in himself, and also, ownership or possession by the defendant of the Ohio and Miss. Railroad, and the trains alleged to be running upon it, and that the servants, or agents or employees charged with negligent running of the trains, were the servants of defendant. It was also incumbent on him to prove the negligence alleged, and to prove the injuries complained of. He is also bound, in charging a liability, under the fencing statute, to plead the statute intelligibly, and by special reference, and to negative all exceptions, and, in proof, to support his averments by satisfactory legal evidence, on all the material points. No recovery can be had unless the above requirements are complied with.

1. Chitty, p. 1, 59, 215, 222, 379 · Stephens. Pl. p. 302, 325; Gould's pl. chap. 4, sec. 7—13; Ill. Central Railroad vs Cox, 20th Ill.; 20; do vs. Finnigan, 24th Ill. 646; Moss vs. Johnson, 22d Ill. 633; Ohio & Miss Railroad vs. Brown, 23d Ill. 94.

An examination of the record shows that there is no proof of ownership of the horse—and none satisfactory that the horse was struck by the train; no proof that the injury was done on the road of the defendants, or that they used or operated or posseesed the road or trains either personally or by agents; no proof of negligence; no proof that the horse was not injured and the mare killed at a public crossing; no proof of definite or permanent injury to the horse, and proof in fact showing that the horse recovered; and there being no proof of loss of service or expense of cure; and no proof that the horse particularly described as a GRAY one, had any color at all.

In reference to the proof of negligence, the only witness who testifies as to what might be regarded as negligence, is Thomas Curry, who says the "engineer did not whistle," and that, in his opinion, the "speed of the train was not slackened." But this, by the decisions of this Court, is not such proof of negligence as entitles to recover.

——Galena and Chi. Union Railroad vs. Loomis, 13th Ill. 549; do. vs. Dill, 22 Ill. 264.

The evidence as to the damage to the horse was illegal and not conclusive. 1. Not a single witness could be brought to testify that the train struck the horse, though all saw him running. He ran into a bridge at full speed—a cause sufficient to explain the injuries received. Apperson testifies that he got pretty much over his injuries, and that when he first judged of his injuries, his estimate of pecuniary damages was based on his belief that he would not recover.

But the OPINION of Apperson as to the amount of damage was not evidence. He should have described the injuries to the jury and left them to estimate the damage.

——Giles vs O'Toole, 4 Barbour 262; Norman vs Wells, 17 Wend 161: Lincoln vs Sar. and Sch. Railroad Co, 23 Wend 425.

The testimony of Apperson, moreover, in reference to the amount of damage to the horse, did not furnish the jury with any criterion of damage, such that they could form a judgment in regard to it. The value of the horse before the injury, does not appear in the evidence at all, nor could the jury in any wise, judge of the comparative value of the horse, before the injury and afterward. He may never, at any time, have been worth more than $35. But whatever he was worth, in a sound condition should have been proved, and the difference between his value then, and his value when injured, was the true measure of damage. As this Court has said, "the criterion of damages is the value of the cattle as injured, and their value before the injury."

——Ill. Central Railroad company vs Finnigan, 21st Ill. 646.

2. The 1st and 2d instructions for plaintiff do not give the law correctly. The attention of the jury was not directed by them to the "SIX MONTHS" provision of the statute concerning fencing.

——Ohio and Miss Railroad vs Brown, 23d Ills. 94.

It was error also, to instruct, that if the jury believed, from the evidence, that the animals in suit were injured by trains of defendant, then the jury should find for plaintiff, the damages "AVERRED."

He could recover no more than he PROVED. If he PROVED none, he could recover none, however much he may have AVERRED.

3. The verdict was contrary to the 2d instruction for defendant as well as without evidence. That instruction required the jury to find for defendant, unless it appeared that the horse was struck by the train, as averred in the declaration. It was also regardless of the third instruction for defendant. Apperson's opinion, as to the injury of the horse, was that he was so much injured, he would not recover, and under that impression, he thought him damaged $30 or $35. But he says the horse about recovered. There was no other proof warranting any verdict for the horse—none showing loss of service for a single day, or any expense incurred for cure, or necessary hire of another horse. The jury, therefore, should have found nothing for the horse. But,

4. The verdict is uncertain; it does not appear whether the jury found for negligence, or under the statute, nor whether they found for plaintiff, as to all three of the animals, or only as two, or which of them.

If they found for the three, the verdict is erroneous and unjust,—because there is no legal and conclusive proof concerning the horse, and if they found only for the mare and colt, the verdict is excessive, for the undeniable weight of testimoney is, that the mare and colt were not worth more than $100.

[illegible]

3. The declaration is in fact, a common law declaration throughout. The counts designed to be drawn under the statute, or to ground the cause of action on the statute, are altogether defectively drawn. It nowhere appears in the counts that the defendant is under any obligation to fence: The facts mentioned as to there being no fence at certain places, are nowhere connected with any liability in the event of there being an unfenced road, nor is it anywhere stated that by reason of these facts the injuries alleged accrued. Any other facts, of a different nature, might as appropriately have been named.

When a party charges, or would maintain a liability which does not exist by common law, but is created by statute, he must plead the statute specifically, and he must prove it, too. It was therefore error in such a common law declaration for negligence to instruct under the fencing statute.

—1 Chitty Plead, 215; Terre Haute & Alton Railroad vs Augustus, 21st Ills. 186. 23rd Ill. C & M R R Co. v. Brown

4. The Court therefore erred in refusing a new trial and in denying the arrest of judgment. Upon a review of the record it appears that the demurrer, interposed by defendent at the outset, should have been sustained.

For the reasons assigned the judgment of the Circuit Court in this cause should be reversed.

WILLIAM HOMES,

Attorney for Appellant.

32

O & M. R. R. Co

vs

Levi H. Jones

Brief

Filed Nov. 12. 1861.

M. Johnston Clk

IN THE SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.—November, 1861.

ABSTRACT OF THE RECORD.

THE OHIO & MISSISSIPPI RAILROAD CO.
vs.
LEVI H. JONES.

Appeal from Clay

1—8 *Declaration, case,* for killing stock.

1st Count, for *negligence,* in injuring *one gray horse,* by striking him by the train, with averment that the road was *unfenced.*

3 2d Count, for *negligence,* in killing one *clay bank mare and colt,* with averment that the road was *unfenced.*

4 3d Count, designed to be drawn under the statute concerning fencing, averring the injury of one gray horse, by striking him with the train, with averments of *negligence.*

6 4th Count, designed to be drawn under the statute concerning fencing, averring the killing of mare and colt, with averments of *negligence.*

9 Summons.

10 Plea of general issue.

11 Demurrer.

12 Trial, judgment and appeal.

12—25 Bill of Exceptions.

14 Andrew Curry says that he knows about the animals in suit here. I was down at the track and saw some horses on the track. They ran ahead of the train and one of them fell or jumped into the bridge. There was no fence there on one side. There was a fence on one side. A fence is necessary there to keep cattle from getting on the track. It was a mile west of Flora. There is no town, city or village there. It is not five miles from a settlement. The other horses ran off the track when the train was coming. This one ran off the track and ran on again. I don't know that the train struck him. After the train passed, the horse got out of the bridge. He got out himself. I saw no wounds. He was hurt in the stifle and looked like he had been bruised. He couldn't use the leg that was injured. He stood in his tracks and did not move. I saw no external wounds, and no marks on the skin. The fence on the south of the road came to another one which came up close to the guard. The train and the horse ran side and side. The horse was within ten or fifteen feet of the track. I can't say whether he was in reach of the train, or whether the train hit him. I went up as the train passed and the horse was getting out. The train had been running six months before this happened.

15 Thomas Curry said: I know where this horse was injured—a mile west of Flora; fenced on one side only; prairie there; horses and cattle can get on the track; settlement there; not in a town, city or village. When I saw the horse he was one hundred yards west of the train. Can't say whether on the track or on the side. The horses were running ahead of the train. I don't know whether he was knocked into the bridge or run into it. The engineer didn't whistle. I don't think the speed of the train was slackened. They were running pretty fast and got among the horses and then whistled. I couldn't tell whether the horse was within reach of the train or not. The train passed while he was in the bridge. I don't know whether he was hit

16 by the train. I saw him the next morning. He was badly hurt in the right stifle; had no use of his leg. I saw the mare and colt which were killed in August. Road unfenced there, except on one side. Mare cut up badly; blood and hair on the track; she was pushed east by the train; a mouse-colored mare; colt bay. I did not know the mare particularly; she was a valuable mare. The road had been in operation six months. The horse was injured in June, in day time. The mare killed in night.

17 M. J. Apperson. I was called to appraise the injured horse. Appeared to be hurt in the stifle and shoulder. Couldn't get about much. One of his hips hurt on the side of the hip, about the joint, right on the side of the thick part of the hip. Looked as if he had been hit by something; can't say what. I thought when I looked at him he was injured so he would not get over it. I considered at the time he was injured worth $30 or $35. I saw the mare and colt after they were killed. There is no fence on the north side of the road. Mare and colt worth $140. Road had been in operation six months. It was where a fence was necessary; less than five miles from a settlement. The horse might have received his injuries in the hip by falling into a bridge. I saw nothing hit or strike him.

18 Robert Bryan said: I saw the mare and colt the next morning after they were killed. She was lying one hundred yards west of the crossing when I saw her. She and the colt were worth $140.

The defendant then introduced—

18 E. B. Turner, who said: I know the value of the mare and colt involved in this suit. I wanted to trade for them, and I examined them closely. I considered the mare worth $65 and the colt $25. I have been in the habit of owning and buying and selling horses for fifteen years.

W. Brown said: I know this mare and colt. I know their value. I looked at
19 them often. They were worth about $95 for the two. I was called on to examine them before they were killed by one who wanted to buy them, and judged them worth that.

——— Tatman said: I know the mare and colt in question here. I have owned several horses in my life, and bought and sold them. I think I am a judge of the value of horses. I estimate the mare and colt about $100.

Aleck Decker says: I have seen this mare and colt. I am a dealer in horses and consider myself a judge of the value of horses. The two were worth between $90 and $100.

19 Instructions for plaintiff:

1st. "That if they believe from the evidence that the horses of plaintiff were injured or killed by the trains or engines of the defendants at a place upon said Railroad track not fenced, then the law is with the plaintiff, and the jury should find for him the amount of damages averred."

20 2d. "The law requires of said Railroad Company to fence their road, and if they fail so to fence it, they are liable for stock injured or killed by their trains or engines at a place not fenced as aforesaid; provided the injury was not done within the limits of a town, city or village, nor more than five miles from a settlement, nor at a public highway, nor at a place where a fence was not necessary to prevent stock from getting on the track of said road; and this qualification applies to both the foregoing instructions."

3d. "The jury are permitted to take into consideration all the circumstances proved in determining whether the iron-gray horse of plaintiff was struck or injured by the train or engine of the defendant."

Exceptions to the foregoing instructions.

21 Instructions for defendant:

2d instruction. "The Court instructs the jury that the declaration and the proof must correspond in material points; and unless it appears from the evidence that the iron-gray horse was struck and injured by the train of defendants, as alleged in the declaration, the jury will find for the defendants as to the said horse.

22 3d. "The court instructs the jury that in estimating the damages to the iron-gray horse, the jury must be governed by the evidence; and if it appear from the evidence that the opinion of Apperson on the morning after the alleged injury to said horse, that he was then injured to the amount of $30 or $35, was formed on the supposition that the horse would not recover from the injury, and it appears that the horse has nearly recovered, then the jury, in estimating the damages, will take these circumstances into consideration and give only such reasonable damages as are warranted by all the facts of the case."

4th. "The court instructs the jury that the measure of damages to be recovered for the injuries to the iron-gray horse is the difference between his value before the injury alleged and his value afterward; and if the jury believe from the evidence that the said horse is to-day as valuable as he was before the injury, then the defendant is not liable, and the plaintiff can not recover more than the jury shall believe from the evidence the plaintiff is reasonably entitled to receive for losing service of the horse and care and attention about his cure."

Exception to instructions.

24 Verdict, motion for new trial, &c.

25 Appeal bond.

26 Certificate of Clerk.

ERRORS ASSIGNED.

1. The verdict is without evidence. There is no proof of ownership of horse, mare or colt; no proof that the train struck the horse; no proof that it was done on the road of defendants, or by their train; no proof that the horse was not injured at a public crossing, and that the mare and colt were not killed at public crossing; no proof of negligence; no proof of definite or permanent injury to the horse, such that the jury could judge of the damage; no proof that the horse was a *gray* one.

2. The first and second instructions for plaintiff are erroneous. The attention of the jury was not directed by them to the "*six months*" provision of the statute, and therein the instructions did not give the law correctly. The first is erroneous also in instructing the jury to give the damages "*averred.*"

3. The verdict is contrary to instructions. The second, third and fourth instructions for defendant should have controlled the jury as to the horse.

4. The verdict is uncertain; it does not appear whether they found for negligence or under the statute; nor does it appear whether they found for plaintiff as to all three of the animals, or only as to two, or which of them.

5. The *opinion* of Apperson, as to the extent of damage to the horse, was not evidence. He should have described the injury and left the jury to determine the damage.

6. The declaration is in fact a common law declaration, averring negligence. All the instructions for plaintiff concerning liability under the statute were erroneous.

7. The Court erred in overruling the motion in arrest of judgment and for a new trial.

WM. HOMES,
Attorney for Appellant.

32 6

O & M. R. R. Co.

vs

Levi H. Jones

Abstract

Filed Nov. 9. 1861

S. Johnston Clk

IN THE SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.....NOVEMBER TERM, 1861.

BRIEF.

The Ohio and Miss. Railroad Co.,
VS.
Levi H. Jones.

STATEMENT OF THE CASE.

LEVI H. JONES, the plaintiff below, filed a declaration in the Circuit Court of Clay County, at the October Term, 1860, wherein he alleged the injury of one gray horse, and the killing of a mare and colt, by the trains of the Ohio and Miss. Railroad Company.

The horse was injured in June, and the mare in August. There are four counts in the declaration. The first two are common law counts, for negligence. The last two are evidently intended by the plaintiff to be drawn under the statute concerning the fencing of railroads; but they are simply counts at common law, as will appear below.

The cause was tried at the October term, 1860, under the plea of general issue, and a verdict had for plaintiff and judgment entered, from which defendant appealed.

Apellant asks a reversal of the judgment below, for the following reasons:—

1. Fatal deficiency in the evidence essential to a recovery. 2. Error in the instructions of the Court. 3. Disobedience of instructions by the jury. 4. The uncertainty of the verdict. 5. Objectionable evidence. 6. Error in refusing a new trial.

POINTS.

1. The plaintiff was bound to make out by proof, such a case as he made for himself in his declaration. He could not make out one case in pleading, and recover upon another made by his proof. His averments and proof must correspond in all material matters. It was incumbent upon him, in a declaration for negligence, to prove ownership of the property injured, or legal possession in himself, and also, ownership or possession by the defendant of the Ohio and Miss. Railroad, and the trains alleged to be running upon it, and that the servants, or agents or employees charged with negligent running of the trains, were the servants of defendant. It was also incumbent on him to prove the negligence alleged, and to prove the injuries complained of. He is also bound, in charging a liability, under the fencing statute, to plead the statute intelligibly, and by special reference, and to negative all exceptions, and, in proof, to support his averments by satisfactory legal evidence, on all the material points. No recovery can be had unless the above requirements are complied with.

1. Chitty, p. 1, 59, 215, 222, 379 · Stephens. Pl. p. 302, 325; Gould's pl. chap. 4, sec. 7—13; Ill. Central Railroad vs Cox, 20th Ill.; 20; do vs. Finnigan, 24th Ill. 646; Moss vs. Johnson, 22d Ill. 633; Ohio & Miss Railroad vs. Brown, 23d Ill. 94.

An examination of the record shows that there is no proof of ownership of the horse—and none satisfactory that the horse was struck by the train; no proof that the injury was done on the road of the defendants, or that they used or operated or posseesed the road or trains either personally or by agents; no proof of negligence; no proof that the horse was not injured and the mare killed at a public crossing; no proof of definite or permanent injury to the horse, and proof in fact showing that the horse recovered; and there being no proof of loss of service or expense of cure; and no proof that the horse particularly described as a GRAY one, had any color at all.

[9429-7]

In reference to the proof of negligence, the only witness who testifies as to what might be regarded as negligence, is Thomas Curry, who says the "engineer did not whistle," and that, in his opinion, the "speed of the train was not slackened." But this, by the decisions of this Court, is not such proof of negligence as entitles to recover.

——Galena and Chi. Union Railroad vs. Loomis, 13th Ill. 549 ; do. vs. Dill, 22 Ill. 264.

The evidence as to the damage to the horse was illegal and not conclusive. 1. Not a single witness could be brought to testify that the train struck the horse, though all saw him running. He ran into a bridge at full speed—a cause sufficient to explain the injuries received. Apperson testifies that he got pretty much over his injuries, and that when he first judged of his injuries, his estimate of pecuniary damages was based on his belief that he would not recover.

But the OPINION of Apperson as to the amount of damage was not evidence. He should have described the injuries to the jury and left them to estimate the damage.

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The testimony of Apperson, moreover, in reference to the amount of damage to the horse, did not furnish the jury with any criterion of damage, such that they could form a judgment in regard to it. The value of the horse before the injury, does not appear in the evidence at all, nor could the jury in any wise, judge of the comparative value of the horse, before the injury and afterward. He may never, at any time, have been worth more than $35. But whatever he was worth, in a sound condition should have been proved, and the difference between his value then, and his value when injured, was the true measure of damage. As this Court has said, " the criterion of damages is the value of the cattle as injured, and their value before the injury."

——Ill. Central Railroad company vs Finnigan, 21st Ill. 646.

2. The 1st and 2d instructions for plaintiff do not give the law correctly. The attention of the jury was not directed by them to the " SIX MONTHS" provision of the statute concerning fencing.

——Ohio and Miss Railroad vs Brown, 23d Ills. 94.

It was error also, to instruct, that if the jury believed, from the evidence, that the animals in suit were injured by trains of defendant, then the jury should find for plaintiff, the damages "AVERRED."

He could recover no more than he PROVED. If he PROVED none, he could recover none, however much he may have AVERRED.

3. The verdict was contrary to the 2d instruction for defendant as well as without evidence. That instruction required the jury to find for defendant, unless it appeared that the horse was struck by the train, as averred in the declaration. It was also regardless of the third instruction for defendant. Apperson's opinion, as to the injury of the horse, was that he was so much injured, he would not recover, and under that impression, he thought him damaged $30 or $35. But he says the horse about recovered. There was no other proof warranting any verdict for the horse—none showing loss of service for a single day, or any expense incurred for cure, or necessary hire of another horse. The jury, therefore, should have found nothing for the horse. But,

4. The verdict is uncertain ; it does not appear whether the jury found for negligence, or under the statute, nor whether they found for plaintiff, as to all three of the animals, or only as two, or which of them.

If they found for the three, the verdict is erroneous and unjust,—because there is no legal and conclusive proof concerning the horse, and if they found only for the mare and colt, the verdict is excessive, for the undeniable weight of testimoney is, that the mare and colt were not worth more than $100.

Lee37-12

3. The declaration is in fact, a common law declaration throughout. The counts designed to be drawn under the statute, or to ground the cause of action on the statute, are altogether defectively drawn. It nowhere appears in the counts that the defendant is under any obligation to fence: The facts mentioned as to there being no fence at certain places, are nowhere connected with any liability in the event of there being an unfenced road, nor is it anywhere stated that by reason of these facts the injuries alleged accrued. Any other facts, of a different nature. might as appropriately have been named.

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4. The Court therefore erred in refusing a new trial and in denying the arrest of judgment. Upon a review of the record it appears that the demurrer, interposed by defendent at the outset, should have been sustained.

For the reasons assigned the judgment of the Circuit Court in this cause should be reversed.

WILLIAM HOMES,

Attorney for Appellant.

[illegible]

32

O. & M. R. R. Co

vs

Levi H. Jones

Brief

Filed Nov. 12. 1861.

S. Johnston Clk

IN THE SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.—November, 1861.

ABSTRACT OF THE RECORD.

THE OHIO & MISSISSIPPI RAILROAD CO.
vs.
LEVI H. JONES.

Appeal from Clay

1—8 *Declaration, case,* for killing stock.

1st Count, for *negligence,* in injuring *one gray horse,* by striking him by the train, with averment that the road was *unfenced.*

3 2d Count, for *negligence,* in killing one *clay bank mare and colt,* with averment that the road was *unfenced.*

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9 Summons.

10 Plea of general issue.

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12 Trial, judgment and appeal.

12—25 Bill of Exceptions.

14 Andrew Curry says that he knows about the animals in suit here. I was down at the track and saw some horses on the track. They ran ahead of the train and one of them fell or jumped into the bridge. There was no fence there on one side. There was a fence on one side. A fence is necessary there to keep cattle from getting on the track. It was a mile west of Flora. There is no town, city or village there. It is not five miles from a settlement. The other horses ran off the track when the train was coming. This one ran off the track and ran on again. I don't know that the train struck him. After the train passed, the horse got out of the bridge. He got out himself. I saw no wounds. He was hurt in the stifle and looked like he had been bruised. He couldn't use the leg that was injured. He stood in his tracks and did not move. I saw no external wounds, and no marks on the skin. The fence on the south of the road came to another one which came up close to the guard. The train and the horse ran side and side. The horse was within ten or fifteen feet of the track. I can't say whether he was in reach of the train, or whether the train hit him. I went up as the train passed and the horse was getting out. The train had been running six months before this happened.

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18 Robert Bryan said: I saw the mare and colt the next morning after they were killed. She was lying one hundred yards west of the crossing when I saw her. She and the colt were worth $140.

The defendant then introduced—

18 E. B. Turner, who said: I know the value of the mare and colt involved in this suit. I wanted to trade for them, and I examined them closely. I considered the mare worth $65 and the colt $25. I have been in the habit of owning and buying and selling horses for fifteen years.

W. Brown said: I know this mare and colt. I know their value. I looked at
19 them often. They were worth about $95 for the two. I was called on to examine them before they were killed by one who wanted to buy them, and judged them worth that.

——— Tatman said: I know the mare and colt in question here. I have owned several horses in my life, and bought and sold them. I think I am a judge of the value of horses. I estimate the mare and colt about $100.

Aleck Decker says: I have seen this mare and colt. I am a dealer in horses and consider myself a judge of the value of horses. The two were worth between $90 and $100.

19 Instructions for plaintiff:

1st. "That if they believe from the evidence that the horses of plaintiff were injured or killed by the trains or engines of the defendants at a place upon said Railroad track not fenced, then the law is with the plaintiff, and the jury should find for him the amount of damages averred."

20 2d. "The law requires of said Railroad Company to fence their road, and if they fail so to fence it, they are liable for stock injured or killed by their trains or engines at a place not fenced as aforesaid; provided the injury was not done within the limits of a town, city or village, nor more than five miles from a settlement, nor at a public highway, nor at a place where a fence was not necessary to prevent stock from getting on the track of said road; and this qualification applies to both the foregoing instructions."

3d. "The jury are permitted to take into consideration all the circumstances proved in determining whether the iron-gray horse of plaintiff was struck or injured by the train or engine of the defendant."

Exceptions to the foregoing instructions.

21 Instructions for defendant:

2d instruction. "The Court instructs the jury that the declaration and the proof must correspond in material points; and unless it appears from the evidence that the iron-gray horse was struck and injured by the train of defendants, as alleged in the declaration, the jury will find for the defendants as to the said horse.

22 3d. "The court instructs the jury that in estimating the damages to the iron-gray horse, the jury must be governed by the evidence; and if it appear from the evidence that the opinion of Apperson on the morning after the alleged injury to said horse, that he was then injured to the amount of $30 or $35, was formed on the supposition that the horse would not recover from the injury, and it appears that the horse has nearly recovered, then the jury, in estimating the damages, will take these circumstances into consideration and give only such reasonable damages as are warranted by all the facts of the case."

4th. "The court instructs the jury that the measure of damages to be recovered for the injuries to the iron-gray horse is the difference between his value before the injury alleged and his value afterward; and if the jury believe from the evidence that the said horse is to-day as valuable as he was before the injury, then the defendant is not liable, and the plaintiff can not recover more than the jury shall believe from the evidence the plaintiff is reasonably entitled to receive for losing service of the horse and care and attention about his cure."

Exception to instructions.

24 Verdict, motion for new trial, &c.

25 Appeal bond.

26 Certificate of Clerk.

ERRORS ASSIGNED.

1. The verdict is without evidence. There is no proof of ownership of horse, mare or colt; no proof that the train struck the horse; no proof that it was done on the road of defendants, or by their train; no proof that the horse was not injured at a public crossing, and that the mare and colt were not killed at public crossing; no proof of negligence; no proof of definite or permanent injury to the horse, such that the jury could judge of the damage; no proof that the horse was a *gray* one.

2. The first and second instructions for plaintiff are erroneous. The attention of the jury was not directed by them to the "*six months*" provision of the statute, and therein the instructions did not give the law correctly. The first is erroneous also in instructing the jury to give the damages "*averred*."

3. The verdict is contrary to instructions. The second, third and fourth instructions for defendant should have controlled the jury as to the horse.

4. The verdict is uncertain; it does not appear whether they found for negligence or under the statute; nor does it appear whether they found for plaintiff as to all three of the animals, or only as to two, or which of them.

5. The *opinion* of Apperson, as to the extent of damage to the horse, was not evidence. He should have described the injury and left the jury to determine the damage.

6. The declaration is in fact a common law declaration, averring negligence. All the instructions for plaintiff concerning liability under the statute were erroneous.

7. The Court erred in overruling the motion in arrest of judgment and for a new trial.

WM. HOMES,
Attorney for Appellant.

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O & M. R. R. Co.

vs

Lewis A. Jones

Abstract

Filed Aug 9 - 1861 -

N. Johnston Clk

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O & M R R Co

8627

Lewis Jones

Cert bill on 458 –

Costs Due $40.92

[illegible]

1861

affidavit bond to be amended by [illegible]

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