No. 8599

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

---

vs.

Milly Meisenheimer

Know all men by these presents that the Ohio & Mississippi Railroad Company & Jad H. Casey are held & firmly bound unto Milly Meisenheimer of Clay County Illinois in the penal sum of Two Hundred Dollars. for the payment of which well & truly to be made we do hereby bind ourselves our heirs & administrators jointly severally & firmly 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 Milly Meisenheimer 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 Eighty five dollars: 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 W^m Thomas Their Atty in fact

H. Casey (Seal)

[8599-D]

27

O & M R R Co

vs

Milly McWilliams

Amended Appeal Bond

Filed Nov. 14 - 1861 -
N. Johnston Clk

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

BRIEF.

THE OHIO & MISSISSIPPI RAILROAD COMPANY,

vs.

MILLY MEISENHEIMER.

STATEMENT OF THE CASE.

Plaintiff below sued the Ohio and Mississippi Railroad Company, the appellant here, before a Justice of the Peace of Clay county, on the 3d of August, 1860, for alleged killing of a mare. Judgment was given for plaintiff in the sum of $85 and costs, from which the Railroad Company appealed to the Circuit Court of Clay.

At the October term, 1860, of that court, the cause was tried by a jury, and verdict rendered for the sum of $85. Motion was made by defendant below for a new trial. The court overruled the motion and entered judgment on the verdict. Defendant excepted to the overruling of the court, and prayed an appeal. The plaintiff sought to recover under the *fencing statute.*

The appellant relies for a reversal of the judgment, on the following points, to-wit:

1. The patent and fatal deficiency in the evidence adduced by the plaintiff below.

2. The manifest error in the 1st and 2d instructions for plaintiff, and the uncertainty and error of the 3d instruction for plaintiff.

3. The consequent error in refusing to grant a new trial.

The failure in proof is in reference to matters material to a recovery:—1. The title of the plaintiff to the property injured. 2. The ownership or possession by the defendant of the Ohio and Mississippi Railroad and trains, or that the injury complained of was committed by the defendant, or agents, or employees. 3. That the road had been in operation for six months preceding the time of the occurrence of the alleged injury. 4. That there was any law imposing an obligation to fence.

Actions must be in the name of the party having a legal interest affected, against the party who committed or caused the injury. The action for a tort must be in the name of the person whose legal right is affected, and who was legally interested in the property at the time the injury was committed. Actual ownership must be averred and proved. If no property or interest in the subject matter should be stated in a declaration, the omission would be fatal. Everything material to the action must be stated and proved.

And as some title to the property, real or personal, must be alleged and proved by the party setting up any right in respect thereto, so also if a party is charged with any liability in respect of such property, real or personal, his title must be alleged and proved. The first and most comprehensive rule is that the party must show title, both in himself and in the defendant, and that all that is essential to a recovery must be alleged and proved. The plaintiff can recover only *secundum allegata et probata*. These general principles are so familiar and well established that they require no amplification here.

See 1st Chitty Pl. 10th Ed. 1847, ch. 1 p. 1.
Ibid 59, 379.
Stephens Pl. 8th Ed. 1859, p. 302, 325.
Goulds Pl. ch. 4, sec. 7-—13.

This Court says, "The plaintiff should be held to reasonably strict proof of ownership."

Ill. Cent. R. R. vs. Finnigan 21st Ill. 646.

Also, "Plaintiff must make out his case substantially as stated in declaration. He is required to show that the defendant was in possession and owner of the railroad and locomotives and cars thereon, and that by their agents, employees and hands, and by their negligence, and unskillfulness, and wrongful act, they thereby caused the injury."

Ill. Cent. R. R. vs. Cox 21st Ill. p. 20.

In reference to matter to be proved see also Ohio & Mississippi Railroad Company vs. Brown, 23d Ill. p. 94; and 20 Ill. p. 390; and Moss vs. Johnson, 22d Ill. 633.

When a party seeks to recover under a liability imposed by statute he must bring himself within the provisions of the statute by averment and proof, and if there are exemptions in the statute the plaintiff must show that defendant is not within the exceptions. 20th Ill. 390; 23d Ill. 94; 1 Chitty 215, 222.

A reference to the record of testimony shows that it is impossible for this Court to learn from it that the mare was killed on the Ohio and Mississippi Railroad, or that she was killed on any road or by any train owned or possessed by the Ohio & Miss. R. R. Co.,

or by any agents and employees of the defendant. The proof does not connect the Ohio & Miss. R. R. Co., or the Ohio & Miss. Railroad, with the alleged injury.

It is impossible also for this Court, or any one, to know to whom the mare in suit belonged. The only testimony bearing on the point is that of Sorey, who says: "I know plaintiff had a mare killed on the railroad sometime last July." But *non constat*, it may have been some other mare than the one in suit, and neither the jury nor any one else was warranted in determining that the mare in suit was identical with the mare killed in July, and that the plaintiff owned it.

The statute concerning fencing (Scates Statutes p. 953) among other provisions says, that every railroad then open for use, or any railroad to be built, shall, "*within six months after the lines of said railroad are opened*" for use, erect and maintain fences.

It was incumbent on the plaintiff to show that the railroad of the defendant had been open for use six months before the injury was sustained, before he could recover. There was no attempt to prove negligence.

Ohio & Miss. R. R. Co. vs. Brown, 23d Ill. 94.

II.

The 1st and 2d instructions for plaintiff are manifestly erroneous. They speak of a "duty" to erect and maintain sufficient cattle guards. It is doubtful if in any event railroads are *under obligation* to build fences or cattle guards. But at all events they are not under obligation to do it until open for use for "six months," nor in cities towns or villages, nor where it is unnecessary. The first two instructions are therefore contrary to law, and in effect they excluded from the mind of the jury important exemptions enjoyed by the defendant, and taught the jury that the defendant rested under a larger liability than the law imposes. The instructions indeed seem to appellant to be altogether too indefinite and loose, as well as erroneous, for an announcement of the law concerning the fencing of railroads.

The 3d instruction is uncertain. It seems to imply that the jury might judge for themselves whether the mare got in through a defective cattle guard or somewhere else, and find the defendant guilty in either case. Such could not be the law. The statute already referred to concerning fencing, and the decisions of this Court referred to, settle this question.

III.

There is no proof that there was any such statute as that under which plaintiff sought to recover. There was no common law obligation to fence the road: the duty was created by statute.

In drafting a declaration for a tort or offence created by statute, with a penalty, there must be an express reference to the statute in order that the defendant may see that the plaintiff grounds his case upon and intends to bring it within the statute, and then the statute must in some way be proved.

1 Chitty p. 215.

21 Del 646
23 A 94

IV.

The Court therefore committed grave error in refusing a new trial and entering judgment on the verdict, and the verdict should be reversed.

WILLIAM HOMES.

Attorney for Appellant.

Guardian Office print, Mt. Vernon.

31

O. and M. R. R. Co

vs

Milly Meisenheimer

Brief

Filed Nov. 12. 1861

A. Johnston Clk

IN THE SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.—MOUNT VERNON, *November*, 1861.

ABSTRACT OF THE RECORD.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY
vs.
MILLY MEISENHEIMER.
} APPEAL. from Clay

1 Proceedings before Justice of the Peace.
2 Appeal Bond.
3—4 Summons.
5 Trial, and Verdict for Eighty Dollars.
6 Motion for New Trial—Overruled—Appeal.
6—17 Bill of Exceptions—Testimony.

7 James H. Sorey said: I know the plaintiff, Mrs. Meisenheimer; she lives with me. The railroad over the farm where we live, about four miles east of Xenia, in this county. I know plaintiff had a mare killed on the railroad, some time last July; the mare was in my possession eighteen months; I saw her on the side of the track dead; her legs were broken, and a gash in her side; hair and blood and bones on the track; saw her the evening before she was killed. Fence, two or three hundred yards east of county road; good fence. Cattle-guard no guard at all; I told Eggleston, the section boss, to fix it; he said it was none of his business. A fence was necessary there to keep off stock; cattle-guards necessary there. The pit of the guard was only six or eight inches deep; there
8 were small rails nailed across, all loose at one end. The guard was not at all sufficient.
9 It was not within the limits of any town, city, or village. Nothing to prevent horses getting on the track there. It was nearer than five miles from a settlement. I think the place where the mare got on the track was west of the cattle-guard; cattle-guard not
9 sufficient to turn any kind of stock. Irwin built, or superintended the building, the cattle-guards. I saw the guard about sundown the night the mare was killed; I don't know but it may have been fixed in order that evening after I passed it. I don't think Eggleston repaired it; he gave me notice that my horses were in there between the fences; he had driven them out once or twice some ten days before the mare was killed. Had seen the cattle-guard almost daily for seven months.

9 James Monical said: I live near Mr. Sorey, and know the plaintiff. I know where
10 the county road crosses the railroad. I saw the mare east of this crossing the next morning after she was killed; it was two hundred yards from the crossing; she had been thrown to the right going east. The road was fenced both sides; the cattle-guard not in a good fix; the slats were down; I have seen horses go in by the cattle-guard; the pit a foot deep; slats loose at one end, many at both ends. I know the mare; worth ninety dollars; not killed in city, town, or village, nor more than five miles from a settlement. The railroad is fenced eastward three-fourths of a mile to the timber; public crossing at the timber; cattle-guard there. There were fresh tracks on the
11 road going eastward; saw some tracks going west also.

11 James Warner said: I was there the morning after it was supposed the mare was killed by the train; blood and bones on the track; mare had been moved east by the train; saw horse tracks moving east. I saw the cattle-guard that morning; I went in through it; pit very shallow; mare worth eighty dollars cash; a good and sufficient fence there.

11 Childers said: I was there. My testimony is about the same as that of other witnesses. The guard was in a bad fix; the mare was worth eighty dollars.

12 William Dudman said: I have not contracted with the Company to build and maintain a cattle-guard there. I contracted to build a fence there. I own on both sides east of the cattle-guard.

The defendant introduced

12 Eggleston, who said: I reside two hundred feet west of the cattle-guard, on the right of way of the Company. I saw the mare; she was killed in the night. I don't know how she got in when she was killed. The cattle-guard spoken of is like all the
13 other cattle-guards. [Witness here described mode of construction.] I nailed strips across two weeks before the mare was killed; I saw the mare there twice, and drove her out; the strips were loose then; I fastened them two weeks before; horses broke them in attempting to get through. I have seen animals go across the guard when the slats were in place; I have seen them leap clear over; the distance is seven or eight feet between the walls.

And this was all the testimony.

14 Instructions for plaintiff.

1. The Court instructs the jury that it is the duty of the defendants to erect and keep in good repair, at the crossings of public roads, cattle-guards sufficient to turn the ordinary stock of the country. Given.

2. That if they believe from the evidence that the mare of plaintiff was killed by the cars or engines of defendant, she having gotten on the track at or about the place where she was killed in consequence of a cattle-guard being insufficient to turn stock, they will find for the plaintiff the value of the mare. Given.

3. That they may look to the circumstances proved as to when the mare got on the track for the purpose of determining whether she got in over a cattle-guard or elsewhere. Given.

15 Exception to Instructions.

15—16 Defendant's Instructions.

17 Verdict of Jury, eighty-five dollars. Motion for New Trial—Overruled, and Judgment entered. Appeal.

18 Appeal Bond.

19 Certificate of Clerk.

ERRORS ASSIGNED.

1. The verdict is without proof. There is no proof that the mare was killed on the road of the Ohio and Mississippi Railroad Company, nor that defendant owned or possessed the road or trains. There is also no proof of the ownership of the mare in suit; Sovey's testimony does not supply the defect. There is also no proof that the road had been in operation six months. *There is no proof of negligence.*

2. The first instruction and the second for plaintiff do not give the law correctly.

3. The Court erred in overruling the motion for a new trial.

WILLIAM HOMES,

Attorney for Appellant.

[8599-7]

31 6

O & M. R. R. Co.

vs

M. Meisenheimer

Abstract

1658

Filed Nov. 9 - 1861 -

N. Johnston Clk

Louisville Ills
April 4th 1862

Noah Johnston Esq
Mt Vernon Ills

Sir

Enclosed please find $29.80 to pay costs in the case of Willey Misenhimer vs O & M R R Co for which please return to us the papers &c

Yours Truly &c
Stephenson & Cooper
per Lecrone

{8599-8}

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

BRIEF.

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vs.

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STATEMENT OF THE CASE.

Plaintiff below sued the Ohio and Mississippi Railroad Company, the appellant here, before a Justice of the Peace of Clay county, on the 3d of August, 1860, for alleged killing of a mare. Judgment was given for plaintiff in the sum of $85 and costs, from which the Railroad Company appealed to the Circuit Court of Clay.

At the October term, 1860, of that court, the cause was tried by a jury, and verdict rendered for the sum of $85. Motion was made by defendant below for a new trial. The court overruled the motion and entered judgment on the verdict. Defendant excepted to the overruling of the court, and prayed an appeal. The plaintiff sought to recover under the *fencing statute.*

The appellant relies for a reversal of the judgment, on the following points, to-wit:

1. The patent and fatal deficiency in the evidence adduced by the plaintiff below.

2. The manifest error in the 1st and 2d instructions for plaintiff, and the uncertainty and error of the 3d instruction for plaintiff.

3. The consequent error in refusing to grant a new trial.

The failure in proof is in reference to matters material to a recovery:—1. The title of the plaintiff to the property injured. 2. The ownership or possession by the defendant of the Ohio and Mississippi Railroad and trains, or that the injury complained of was committed by the defendant, or agents, or employees. 3. That the road had been in operation for six months preceding the time of the occurrence of the alleged injury. 4. That there was any law imposing an obligation to fence.

Actions must be in the name of the party having a legal interest affected, against the party who committed or caused the injury. The action for a tort must be in the name of the person whose legal right is affected, and who was legally interested in the property at the time the injury was committed. Actual ownership must be averred and proved. If no property or interest in the subject matter should be stated in a declaration, the omission would be fatal. Everything material to the action must be stated and proved.

And as some title to the property, real or personal, must be alleged and proved by the party setting up any right in respect thereto, so also if a party is charged with any liability in respect of such property, real or personal, his title must be alleged and proved. The first and most comprehensive rule is that the party must show title, both in himself and in the defendant, and that all that is essential to a recovery must be alleged and proved. The plaintiff can recover only *secundum allegata et probata*. These general principles are so familiar and well established that they require no amplification here.

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It is impossible also for this Court, or any one, to know to whom the mare in suit belonged. The only testimony bearing on the point is that of Sorey, who says: "I know plaintiff had a mare killed on the railroad sometime last July." But *non constat*, it may have been some other mare than the one in suit, and neither the jury nor any one else was warranted in determining that the mare in suit was identical with the mare killed in July, and that the plaintiff owned it.

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1 Chitty p. 215.
21 Md. 646
23 " 94

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The Court therefore committed grave error in refusing a new trial and entering judgment on the verdict, and the verdict should be reversed.

WILLIAM HOMES.

Attorney for Appellant.

Guardian Office print, Mt. Vernon.

[3547-12]

31

O & M R R Co

vs

Milly Meisenheimer

Brief

8599

Filed Nov. 12. 1861
N. Johnston Clk

IN THE SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.—MOUNT VERNON, *November*, 1861.

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[8599-15]

The defendant introduced

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And this was all the testimony.

14 Instructions for plaintiff.

1. The Court instructs the jury that it is the duty of the defendants to erect and keep in good repair, at the crossings of public roads, cattle-guards sufficient to turn the ordinary stock of the country. Given.

2. That if they believe from the evidence that the mare of plaintiff was killed by the cars or engines of defendant, she having gotten on the track at or about the place where she was killed in consequence of a cattle-guard being insufficient to turn stock, they will find for the plaintiff the value of the mare. Given.

3. That they may look to the circumstances proved as to when the mare got on the track for the purpose of determining whether she got in over a cattle-guard or elsewhere. Given.

15 Exception to Instructions.

15—16 Defendant's Instructions.

17 Verdict of Jury, eighty-five dollars. Motion for New Trial—Overruled, and Judgment entered. Appeal.

18 Appeal Bond.

19 Certificate of Clerk.

ERRORS ASSIGNED.

1. The verdict is without proof. There is no proof that the mare was killed on the road of the Ohio and Mississippi Railroad Company, nor that defendant owned or possessed the road or trains. There is also no proof of the ownership of the mare in suit; Sovey's testimony does not supply the defect. There is also no proof that the road had been in operation six months. *There is no proof of negligence*

2. The first instruction and the second for plaintiff do not give the law correctly.

3. The Court erred in overruling the motion for a new trial.

WILLIAM HOMES,

Attorney for Appellant.

[8599-14]

8599

31

O & M. R. R. Co

vs

M. Meisenheimer

Abstract

Filed Nov. 9. 1866

N. Johnston Cl

31 - 5

O & M. R. R. Co

vs

~~[illegible]~~

Milley Meisenheimer

1861

8579

Costs a - 287 -

Costs Nov - 29 - 77 -

Cert fiand & copy of Bar
& opinion & Receipt for
money sent 7 Sept 62

Appeal Bond to
be amended by
Neil

6

Louisville Ills
Feb 18th 1862

Noah Johnson Esq
Mt Vernon Ills

Sir

We wish to know what disposition was made of the following cases

Levi H. Jones vs O & M R R. Co

Mills Misenheimer vs O & M R R Co

Day & Matlack vs Barbee & Rayburn

If Judgt has been reversed in the above cases please return the papers to us as soon you can conveniently - if they were not reversed please let us hear from you & much oblige Yours Truly & C

Stephenson & Cooper
per A. W. Searone

[8595-2]