No. 8575

Supreme Court of Illinois

Ohio & Mississippi R R. Co.

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vs.

Brown

111

State of Illinois
Marion County } Pleas and Proceedings had in and for the County of Marion in the Circuit thereof in a certain Cause heretofore pending in said Court between Epperson W Brown Plaintiff and the Ohio and Mississippi Rail Road Company Defendant remanded by the Supreme Court at Mt Vernon Illinois at the November term A D 1859.

Be it Remembered that on the 23d day of Febuary A D 1860 there was filed in the office of the clerk of the Circuit Court of said Marion County the final order and judgment of the Supreme Court in said Cause which is in words & figures following to wit

"At a Supreme Court, of the State of Illinois begun and held at Mount Vernon, on Tuesday the fifteenth day of November in the year of our Lord One thousand Eight hundred and fifty Nine. To Wit, on Monday the twenty first day of November in the Year of our Lord one thousand Eight hundred and fifty Nine

Present. The Honorable. John D Caton. Chief Justice
" " Sidney Breese. Associate
" " D W Walker " "

[illegible]

"Ohio and Mississippi Rail
Road Company Plaintiffs in Error
vs.
Ephrahim W Brown
Defendant in Error

Error to
Marion

On this day came again the said parties, and the Court having deligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error. And being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is Manifest error. Therefore it is considered by the Court. that for that error and others in the record and proceedings aforesaid the Judgment in the Circuit Court in this behalf rendered, be reversed, annulled, set aside, and Wholly for nothing esteemed, And that this cause be remanded to the Circuit Court for such other and further proceedings as to Law and Justice shall appertain, The Whole with the Costs against the said defendant in error."

Opinion by
Walker J.

It is an elementary principal of universal application, that the allegata and probata must agree, any Material Variance between the allegation and proof fails to sustain the pleadings, although

mere surplusage is disregarded. The Defendant in error in this cause relied upon the liability imposed by the Statute for a failure to fence the track of the Road by Plaintiffs in Error, this duty is imposed alone by Statute, it not being a Common Law obligation, When Stock are killed by the Company, at a point on the Road, where they by the Statute are required to, but have failed to fence it, they are liable for the damage sustained by the owner, without reference to the negligence or care exercised by the Company, But a person relying upon a recovery, under the Statute, to entitle himself to its benefit must bring himself within its provisions by averments and proof. It has been held by this Court that the owner to recover under this Statute must by averment in his declaration, show that the Company were required to fence their track and have failed to comply with that duty, and must negative the various exceptions in the enacting clause, and that the Cattle were not injured at a point on the Road within these exceptions, Chicago Burlington & Quincy R.R. Co. vs Carter 20 Ills. 390.

The declaration in this case, was not objected to for the want of such averments, and they were traversed by the general issue, under that issue, to recover, the plaintiff was required to prove every

objected to for the want of such averment and they were traversed by the general issue under that issue, to recover the plaintiff was required to prove every material allegation, contained in his declaration to entitle him to Judgment. There was no evidence that the road had been in use for six months previous to the time when this Stock was injured, nor did it appear that they were not killed at a road crossing, within a town, City or village, or more than four miles from a settlement, these things should have been proved, as well as that the Road, was not fenced, together with any other averment of a Non Compliance with the provisions of the Statute, also the injury to the cattle, to Warrant a verdict in favor of the plaintiff, From ought that that appears in this record the horses may have been killed at any of the excepted places on the road, or the road may not have been open for use six Months before the injury was sustained, There was no count in the declaration, alleging that the injury was the result of gross Negligence nor could there have been a recovery on that grounds, in its absence, even if the proof had shown such negligence. We think that the Evidence Wholly fails to sustain the Verdict in this case, and that the

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Court below for that reason should have granted a New trial, The Judgment must therefore be reversed and the cause remanded

"Judgment Reversed"

State of Illinois

Supreme Court. First Grand Division

I. Noah Johnson, Clerk of the Supreme Court within and for the first Grand Division of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order, and of the Opinion of the Supreme Court of the State of Illinois, in the therein styled cause of Record in my office, In Testimony Whereof I have hereunto set my hand and affixed the Seal of the Supreme Court of the State of Illinois, at Mount Vernon in the year of our Lord, One Thousand eight hundred and Sixty

Seal

Noah Johnson Clk

Declaration in said Cause herein filed is in words & figures as follows Vizt

Of the August Term of the Marion Circuit Court for the year 1857

Epperson W Brown
vs
Ohio & Mississippi Rail Road Company

Trespass on the Case
Damages $ 850.

Epperson W Brown plaintiff in this suit by Silas L Bryan atty complains of the Ohio & Mississippi Rail Road Company defendants in this suit being summoned of a plea of trespass on the case

For that whereas the said defendants heretofore, to wit on the twenty first day of June eighteen hundred and fifty seven at the County of Marion and State of Illinois were the owners and proprietors of the Ohio and Mississippi Rail Road which said Rail Road or a part thereof to wit, over and across said County of Marion had been open for use and had been and was operated and used by said defendants for a long space of time previous to the day and year last aforesaid, to wit, from the fourth day of February eighteen hundred and fifty five thence hitherto whereby and by reason whereof the defendants became and were liable for all injuries done to Stock, horses, cattle, sheep and hogs upon said Road in the event and upon condition that the said

[illegible]

defendants failed, neglected or refused from
and after the fourteenth day of August eighteen
hundred and fifty five to erect and maintain
fences on the sides of said Road or the part
thereof so open for use as aforesaid suitable
and sufficient to prevent cattle horses sheep
and hogs from getting on to said Rail Road
within five miles of each and every settlement
along said line of Road except where the pro-
prietors of adjacent lands had already erected
said fences or agreed to do so or at the crossing
of public Roads and highways or within the
limits of cities towns and villages or where it
was not necessary to fence said Road to pre-
vent horses, cattle sheep and hogs from
entering upon the same with openings or gates
or bars at the farm crossings of said Rail Road
for the use of the proprietors of the lands adjoining
such Rail Road and also to construct where
the same had not already been done and
thereafter maintain at all Road crossings
then existing or thereafter established cattle
guards suitable and sufficient to prevent
cattle horses sheep and hogs from getting
on to such Rail Road Yet the said defen-
dants well knowing the premises but contriving
and wrongfully and unjustly intending to
injure and aggrieve the said plaintiff in
this behalf to wit on the twenty first day of June

eighteen hundred and fifty seven thence hitherto wrongfully and unjustly neglected and refused to erect and maintain such fence aforesaid whereby three mares one mule and one colt the property of the said plaintiff of great value, to wit of the value of eight hundred & fifty dollars lawfully feeding and depas- -turing in and upon the uninclosed lands and common adjacent to said Rail Road to wit on the 20th day of June 1857 went strayed and escaped from and out of said common for the want of such fence as aforesaid into and upon said Rail Road back of the said defendants That is to say within five miles of a settlement and at a point upon said Road where the said defendants were bound by law to erect and maintain such fence as aforesaid That is to say at a point where the owners of the adjacent lands had not enclosed the same and had not agreed to fence the same and where it became and was necessary to fence said adjoining lands to prevent horses cattle sheep and hogs from getting into the track of said Rail Road from the adjoining lands and without the limits of any city town or village and where there was no crossing of any public Road or highway and thereby then and there the said three mares mule and colt of the said plaintiff were run over and killed by a

[illegible]

locomotive and train of cars of the said
defendants passing along and over said Road
to wit at the County of Marion aforesaid
wherefore the said plaintiff says that he is
injured and has sustained damage to the
amount of eight hundred and fifty dollars
& therefore he brings his suit &c

Silas L Bryan
Atty for Plff."

And afterwards at the May March Term of the Marion Circuit Court Judge O'Melveny presiding the following order was in said cause made Court

Friday March 30th 1860

Epperson & Brown
vs
The O & M R R Co } Case Remanded from Supreme Court

Ordered that this cause be continued &c."

And afterwards Court at the August Term A.D. 1860 the following order was made in said cause Court

"Monday August 27th 1860

Epperson & Brown
vs
O & M R R Co } Case Remanded from Supreme Court

This cause being this day called for trial came the parties by their attorneys and issue being joined let a Jury come and thereupon came the following Jury to wit Samuel Phillips Thornton Adams, Thomas Deeds, Richard Perdue Theophilus Sudlam, Solomon Smith Absalom Ennis Jesse Ballard

[0570-6]

Edward Mercer George B Pugh, Joshua Metcalf and Thomas Purcell twelve good and lawful men, who having been tried elected and sworn well and truly to try the issue joined herein. And having heard the evidence and arguments of counsel and the instructions of the Court retired to consider of their verdict, afterwards came into Court and returned the following verdict "We the jury find for the plaintiff and assess his damages at seven Hundred and thirty five Dollars $735 00/100 Thereupon the Defendant by its attorney moved for a new trial and in arrest of Judgment and the Court having heard argument thereon overruled said motion for new trial and arrest of Judgment. Thereupon the Defendant prayed an appeal, which is granted on Bond being filed by it within twenty days in the sum of fifteen hundred Dollars ($1500) to be approved as to form and security by the clerk of this Court the Bill of exceptions to be presented at Washington County Circuit Court and the Court thereupon considered and adjudged that said plaintiff

do have and recover of and from said Defendant said sum of seven Hundred and thirty five Dollars Damages together with his costs in this behalf expended and may have execution therefor &c."

Whereupon said Defts by its Attys on the 1st day of September filed his reasons for new trial in words & figures following Dowit "E. Peterson Brown

vs

Ohio & Mississippi Rail Road Company } Case

And the said Defts moves the Court for a new trial upon the following grounds

1st The verdict of the Jury is contrary to law
2 The verdict of the Jury is contrary to the evidence
3 The verdict of the Jury is contrary to the law & the evidence
4 The Court erred in granting instructions to the Jury
5th The evidence did not show that any of said property was "killed" except the Colt.

Holmes & Smith
Attys for the Defts

[illegible]

And afterwards Court on the 26th day of September AD 1860 Defts filed its appeal Bond pursuant to order of Court which is in words & figures following Vizt:-

"
Know all men by these presents that
We The Ohio & Mississippi Rail Road
Company and R A Whitaker
of Marion County Ills and John
A Miller of Lawrence County Ills
are held and firmly bound unto
Epperson W Brown in the penal
sum of Fifteen Hundred Dollars
lawful money of the United States
for the payment of which well and
truly to be made we bind ourselves
our heirs Executors and Administrators
Jointly severally and firmly
by these presents Witness our hands
and seals this 24th day of September
A D 1866

The Condition of this obligation
is such that Whereas the above
named Epperson W Brown re-
covered a Judgment in the August
term 1866 of the Marion Circuit
Court in the County of Marion
and State of Illinois against
the said Ohio & Mississippi Rail
Road Company for the sum of
Fifteen Hundred and thirty five
Dollars from which the said Ohio
& Mississippi Rail Road Company

hair prayed an appeal to the
Supreme Court at Mt Vernon
Jefferson County Illinois
Now if the said Ohio & Mississippi
Rail Road company shall well
and truly pay or cause to be
paid the Judgment and all
costs and damages that may
be awarded in said case in
case the Judgment shall be
affirmed and shall duly prose-
cute this appeal then this obliga-
tion shall be void otherwise to
remain in full force and effect
Given under our hands and
seals this 24th day of September
1865

The Ohio & Mississippi Rail Road
Company (Seal)
R A Whitaker (Seal)

Approved by me
this Sept 26th 1865 John. M. Wible (Seal)
H W Eaton Clk
By J O Chance Dep."

And afterwards Court on the 9th day of Nov AD 1860 said Bill of Exceptions was filed in said Court which is in words & figures as follows Court

Esperson W Brown } Plaintiff
vs
Ohio & Mississippi Rail Road Company } Defendant

In the Marion Circuit court
Aug Term 1860
Action on the case

Be it remembered that upon the trial of the above cause the plaintiff introduced as a witness one A L Brown who after being duly sworn testified as follows
I am the Brother of the plaintiff — I and plaintiff were in this County about the 23rd day of June 1857 — On the night of the 22nd of June 1857 the plaintiff had five head of Stock killed and crippled — There was one Colt killed and three mares and a Mule crippled — We were travelling — moving and camped on the left side of the road coming this way about four Miles West of Salem Marion County Illinois — We turned the stock loose to graze when we camped — I saw the Stock on the Rail road track next morning

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None of them were dead except the colt
– the balance of them were crippled
I dont think they were worth any
thing at all after they were hurt
One of the Mares was cut in the neck
– another was lying with three legs
cut off – the Colt was dead – the
Mule was 200 yards from the track
with one leg cut off – None of them
were worth anything for work after
they were hurt – I did not go up
the Road any distance – There
was no cross Road or crossing
at the place when the Stock was
hurt – a road was west some
distance from when they were hurt
Plaintiff owned the property hurt
The three Mares were worth $175
or $200 each – the Colt was worth
$40 – the Mule was worth $175 or
$200 – The Mares were four or
five years old – 15 hands high
I did not see them after night
– When they were grazing when
I saw them last they were a short
distance from the Road on the
North side – Two of the Mares were
Sorrel and one of them a bay

One of the Mares laid North of the Road & two on the South — The Mule was standing on the North side

John Lydick for Pff testifyed — I saw the Stock after it was hurt on the Morning of the 23rd June 1857 about four Miles West of Salem in Marion County Illinois — There was five head in all — 3 Mares — a Sucking Colt & a Mule — one Mare had three legs cut off — another had a bad cut on the neck — the Colt had its nose cut off — None of the property was worth any thing after it was hurt The 3 Mares & the Mule were worth each $175 — the Colt was worth $35 & the Mule $175 — There was no fence where the property was hurt — No town — City or Village or public road crossing — It was down on Section 17 Town 2 North Range 4 East — No improvements adjoining when they were hurt — a fence was necessary to keep Stock off the road — the Mule had got off that Section & was a short distance from the Road — then

[8576-11]

was blood & hair on the tracks when
the Mule was hurt - and that the
section hands burried the Stock

Mathew Rankin for Pff
I was when the Stock was hurt and
I suppose they died as they looked
like it - I was on the road &
saw the Stock after they was hurt
It was done in June 1857 - The road
had been running over 6 months
& more than a year before the
accident happened - There was
one Colt & a Mule was hurt -
The Mares & Mule were worth $175
or $200 each - the Colt worth $35
I was an appraiser & appraised
the property as the property of the
Pff.
Cross Ex - I fix the value of hor
ses according to what I have
horses sold for at that time
- The section where the accident
happened was 17 town 2 Range
2

Neal Mills for Pff testifies
I know the Ohio & Mississippi
Rail Road in 1854 - It was com

pleted that year – It has run ever since – The cars was running in June 1857 & Since July 1855 until now – I Know the Section 17 town 2 North 2 East There was a fence on some portion on the South side of the road – at the time but none North – I dont Know any thing about any contract to fence the road then – There was no town City or village at the place when the injury was done – it was open prairie at that time – The accident was hardly four miles west of Salem – the country was settled all round it – a fence is necessary to Keep Stock off this land – there was no fence there – and if there had been any contract with the owners of the road to fence the land that he thought he would have Known it
Cross Examn
I dont Know about any Contract to fence said land – I was agent to sell the lands

[55767-21]

They belong to Col. Wilson King of Erie Pennsylvania - all my agency was merely to sell - I dont know of any contract with King to fence them I know nothing about it -

Sydick on Examined by Pff,

The trains ran regularly during the night at that time - The train ran first about Midnight - I heard the trains that night - I heard one blast of the whistle that night I could not tell when it was it blew the whistle

And this was all the Evidence that was given in the cause - either for plaintiff or defendants.

The following instructions were given by the Court for the pff, the same being asked for by said Plaintiff.

1 The Court is asked to instruct the Jury for the plaintiff that if they believe from the proof that Plaintiff has sustained his Case

action as stated in his declaration & that his stock was killed by the train & trains of the defendant when they were bound to fence the road as alleged in the declaration then the Jury should find for the Plaintiff and assess his damage according to the proof and give him damages according to the value of the property killed

2 That the plaintiff is not bound to prove by positive Evidence any of the facts in this case but that if he has shown by facts & circumstances that his stock was killed by the train of defendants then he is entitled to the same damages as if he had proved his case by positive Evidence

3 The plaintiff is not bound to show by direct & positive evidence that the Exceptions of the Statute do not apply to this case but if the Jury believe from the facts & circum

[8575-13]

Jones proves that the stock of plff was injured & killed by the defendants as alleged in the declaration of plff at a place not excepted by the statute the Should find for the plaintiff and assess his damages at the amount proved

For the giving of each and all of said instructions given for the plaintiff numbered 1. 2. & 3 as above defendant then & there at the time excepted & prays that said Exceptions might be made a part of this record in this case - which was accordingly granted

The defendant asked the following instructions - which were granted and given by the Court

1 The Court instructs the jury that if the plaintiff has not proved that the stock was killed by the cars running on the Ohio

& Mississippi Rail Road you should find for the defendant

2 That unless it has been proved that the stock was killed at a place where no other person had a gate with the defendants to erect fences they should find for the defendants —

To which charge counsel for defendant the Court added — "the law is for defendants but if from the evidence you believe that no such contract was made to fence by the owner of the land at that point then the law on that point would be for the plaintiff" —

To which modification or addition by the Court defendant then and there at the time objected & excepted & prayed that this exception be made a portion of the record in this cause which was accordingly by granted

L 0575-147

3 That all the Exceptions contained in the enacting clause of the Statute under which the plaintiff seeks to recover must be negatived & proved by the plaintiff as he has alleged the same in his declaration before he can recover and if this has not been proved you should find for defendant

Whereupon the Jury returned to consider their verdict & returned into Court the following as their verdict "We the Jury find for the plaintiff & assess his damages at Seven Hundred and thirty five Dollars"

Defendants thereupon moved the Court for a new trial assigning the following reasons

1 The verdict of the Jury is contrary to law

2 The verdict is contrary to Evidence

3 The verdict is contrary to law & Evidence

4 The Court erred in the instructions granted to the Jury

5 The Evidence did not show that any of said property was killed except the Colt

Holman Patrick & Smith
attys for Dft

The Court overruling said Motion for a new trial the defendant then & there at the time Excepted & prays that the Exception might be made a part of the record in this cause which is accordingly done

Defendant then moved the Court in arrest of Judgment and the Court overruling said Motion defendant then and there at the time Excepted & prays that this Exception be made a portion of the record in this cause which is accordingly done

The Court thereupon rendered Judgment for the plaintiff upon the verdict of the Jury and the defendants thereupon tendered their bill of Exceptions & pray that the same may be signed & Sealed & made a part of the record in this cause which is accordingly

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done

H. K. S. Mulvany
Judge &c
(Seal)"

State of Illinois }
Marion County } I H W Eagan Clerk of the Circuit court of said County do certify the foregoing to be a correct copy of the Records & proceedings had in the above entitled cause in our said court as the same remains on file in my office

Given under my hand & official seal at Salem this 13th Nov 1860

H W Eagan Clk
By J O Chance Dept

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E. W. Brown
vs
O & M. R. R. Co.
E. W. Brown

Record

Filed Nov. 14. 1860
N. Johnston Clk

Fee for Recd $6.00
Paid $5.00

In the Supreme Court of the State of Illinois.

FIRST GRAND DIVISION, AT MOUNT VERNON.

NOVEMBER TERM, A. D., 1860.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY,
vs.
EPPERSON W. BROWN.

BRIEF.

STATEMENT OF THE CASE.

This was an action on the case for killing stock. The declaration was framed in accordance with the statute concerning fencing, and contained a negative of all the exceptions named in the first section of that statute. The declaration averred that five head of stock were *killed*—and also averred that it was not at any place or point where the statute holds the Railroad Company exempt from liability for killing stock. It also averred that the killing was on the Ohio and Mississippi Railroad, and by the cars running on that Road.

The cause was tried before a Jury, and a verdict was recovered with damages in the sum of $735. Motion was made in arrest of judgment and for a new trial. The Court overruled the motion and entered judgment on the verdict. Exceptions were taken, appeal prayed and allowed, and bond filed. The appellants rely for a reversal of the judgment on the correctness of the motion for a new trial, for the following reasons :

In order that the plaintiff may recover, every allegation essential to the issue must be proved in whatever form it be stated; and if he has failed to prove his material averments he cannot recover.

1 Greenleaf, sec. 51, 60, 63.

The *allegata* and *probata* must agree. Any material variance between the allegation and proof fails to sustain the pleadings.

23d Illinois, Brown vs. Ohio and Mississippi Railroad Company, p. 94.

A person relying upon a recovery under the statute to entitle himself to its benefits, must bring himself within its provisions by *averment* and *proof*. Ibid.

To recover under the general issue, under this declaration, the plaintiff is required to prove every material allegation contained in his declaration to entitle him to a judgment. Ibid.

The instructions numbered 2 and 3, for the plaintiff, do not lay down the law correctly as to the evidence required, and were calculated to mislead the Jury as to the obligation of the plaintiff to prove his case before he could recover.

1 Greenleaf, sec. 1, 2; 23 Illinois, Brown vs. Ohio & Mississippi Railroad Co.

The 2d instruction for the defendant below sheuld have been given without the modification introduced by the Court. It was the law as it stood, and required no amendment. The modification was erroneous, because, also, there was no evidence to warrant it, and it was calculated to suggest to the Jury that the negative testimony of Mills was proof of the fact sought to be established.

23d Illinois, Brown vs. Ohio and Mississippi Railroad Company, p. 94.
2 Gilman, 202; 14 Illinois, 155.
1 Scam., 53; 3 Gil., 381.
14 Illinois, 474.

WM. HOMES, *Attorney for Plaintiff.*

Russell & Wall, Printers, Guardian office, Mt. Vernon.

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The Ohio & Miss RR Co.

vs

Ephraim W. Brown

Brief

ABSTRACT.

Ohio & Mississippi Railroad Company, } **Plaintiff in Error.**
vs. **Error to Marion County.**
Epperson W. Brown. } **Defendant in Error.**

This was an action of trespass on the Case by Defendant in Error. Declaration contained one count. Damages eight hundred and fifty dollars, ($850;)

1st. Court avers that Defendant below owned the Ohio & Mississippi Railroad, on the 21st day of June 1857, that part of said Road ran over the County of Marion aforesaid, that said Road had been operated by said Defendants from 14th day of Feb. 1855.

That said Defendant were bound to fence said Road within five Miles of each and every settlement except as is provided by the Statutes.

That said defendants neglected to fence said Road and that the property of the Plaintiff to-wit: Three Mares one Mule and one Colt, valued at ($850) got on the said Road on the 23d day of June, 1857, and that said property was run over and killed by a Locomotive and train of cars belonging to said defendant.

Plea General Issue.

Trial by Jury—verdict for Plaintiff, $735 00.

Motion for new trial. Motion overruled.

Bill of exceptions tendered and signed &c.

Plaintiffs' testimony.—A. J. Brown testified that he and Plaintiff were in the County about the 23d day of June 1857. On the night of 22d Plaintiff had five head of stock killed and crippled—one Colt killed and three Mares and a Mule crippled. We were moving and camped on left side of Road four miles west of Salem—turned stock loose. I saw the stock on Railread track next morning.

None dead except Colt. Balance crippled—don't think they were worth anything at all after they were hurt. The Mule was two yards from track, one leg cut off.

No crossing at the place where done. Mares were worth One hundred and seventy-five or two hundred dollars each. Colt Forty dollars. Mule One hundred and seventy-five or Two hundred dollars. Did not see them after night, they were short distance from the road when I saw them last, on the north side of Road.

John Lydick for Plaintiff, testified.—I saw stock after it was hurt, about four miles west of Salem, five head: three Mares, one sucking Colt, one Mule. The Mares and Mule worth One hundred and seventy-five dollars each Colt, Thirty-five dollars. No fence where property was hurt. No town, city or village or public crossing.—— Done on section seventeen (17) town two (2) north range four (4) east. No improvement adjoining a fence was necessary.

Mathew Rankin for Plaintiff.—I saw the stock after they were hurt, and I suppose they died, it was done in June, 1855. The Road has been running over six months before the accident happened. The number of stock is correct. I was appraiser.

Cross Examination.—I fix the value of horses according to what they sold at then.

Urial Mills, for Plaintiff.—I knew the Ohio & Mississippi Railroad in 1854—then completed—the cars ran from July 1855 until now. I know the section referred to. There was a fence on south side of road. None north. I don't know anything about contract to fence the Road there. No town, city or village at the place where injury was done. It was not four miles from Salem, open prairie at that time, country was thickly settled there. A fence was necessary. If there had been any contract to fence, with the owners, I think I would have known it.

Cross examined.—I don't know any thing about any contract to fence said land, I was agent only to sell the lands. They belong to Col. Wilson King, Erie, Pennsylvania. My agency was only to sell. Don't know any thing about contract to fence.

Lydick re-examined by plaintiff.—Trains ran regularly during the night; trains ran west about midnight. I heard train whistle that night could not tell where it was.

Court instructed the jury for plaintiff. That if they believe from the proof that plaintiff has sustained his case as stated in his declaration, and that his stock was killed by the train or trains of the defendent where they were bound to fence the road as alleged in the declaration, then the jury should find for the plaintiff and assess his damages according to the proof and give him damages according to the value of the property killed.

2d. That the plaintiff is not bound to prove by positive evidence any of the facts in this case, but that if he has shown by facts and circumstances that his stock was killed by the train of defendant, that he is entitled to the same damages as if he had proved his case by positive evidence.

3d. The plaintiff is not bound to show by direct and positive evidence that the exceptions of the statute do not apply to the case, but if the jury believe from the facts and circumstances proved that the stock of plaintiff was injured or killed by the defendants as alleged in the declaration of plaintiff at a place not excepted by the statute, the jury should find for the plaintiff and assess his damages at the amount proved.

Defendant excepted to all of said instructions.

The court instructed the jury for the defendant.

1st. That if the plaintiff has not proved that the stock was killed by the cars running on the Ohio and Mississippi rail road, you should find for the defendant.

2d. That unless it has been proved that the stock was killed at a place where no other person had agreed with defendant to erect a fence, they should find for the defendants. To which second instructions the court added:—"The law is for defendants, but if from the evidence you believe that no such contract was made to fence by the owner of the land at that point, then the law on that point would be for the plaintiff." Defendants excepted to the above modification by the court.

3d. That all the exceptions contained in the enacting clause of the statute under which the plaintiff seeks to recover must be negative and proved by the plaintiff, as he has alleged the same in his declaration before he can recover, and if this has not been proved you should find for defendant.

Verdict, seven hundred and thirty-five dollars. Motion for new trial and arrest of judgment. Motion overruled and judgment for plaintiff, seven hundred and thirty-five dollars to all which defendant at the time excepted.

ERRORS ASSIGNED.

1st. The verdict of the jury is contrary to law.
2d. The verdict is contrary to evidence.
3d. The court erred in the instructions granted to the jury.
4th. The verdict is contrary to law and evidence.
5th. The evidence did not show that any of said property was killed except the colt.

HAYNIE, PARRISH, HOLMES & SMITH, for Pl'ff in Error.

6. There is no evidence that there was no contract to fence.

7. There is no evidence that the injuries complained of were done on the Ohio & Miss. R.R.

O & M R R Co.

for Pl'ff in Err.

[8515-12]

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Ohio R.R. Co

vs

E. W. Brown

Filed Nov. 14. 1860.

N. Johnston Clk

In the Supreme Court of the State of Illinois.

FIRST GRAND DIVISION, AT MOUNT VERNON.

NOVEMBER TERM, A. D., 1860.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY,
vs.
EPPERSON W. BROWN.

BRIEF.

STATEMENT OF THE CASE.

This was an action on the case for killing stock. The declaration was framed in accordance with the statute concerning fencing, and contained a negative of all the exceptions named in the first section of that statute. The declaration averred that five head of stock were *killed*—and also averred that it was not at any place or point where the statute holds the Railroad Company exempt from liability for killing stock. It also averred that the killing was on the Ohio and Mississippi Railroad, and by the cars running on that Road.

The cause was tried before a Jury, and a verdict was recovered with damages in the sum of $735. Motion was made in arrest of judgment and for a new trial. The Court overruled the motion and entered judgment on the verdict. Exceptions were taken, appeal prayed and allowed, and bond filed. The appellants rely for a reversal of the judgment on the correctness of the motion for a new trial, for the following reasons :

In order that the plaintiff may recover, every allegation essential to the issue must be proved in whatever form it be stated; and if he has failed to prove his material averments he cannot recover.

1 Greenleaf, sec. 51, 60, 63.

The *allegata* and *probata* must agree. Any material variance between the allegation and proof fails to sustain the pleadings.

23d Illinois, Brown vs. Ohio and Mississippi Railroad Company, p. 94.

A person relying upon a recovery under the statute to entitle himself to its benefits, must bring himself within its provisions by *averment* and *proof*. Ibid.

To recover under the general issue, under this declaration, the plaintiff is required to prove every material allegation contained in his declaration to entitle him to a judgment. Ibid.

The instructions numbered 2 and 3, for the plaintiff, do not lay down the law correctly as to the evidence required, and were calculated to mislead the Jury as to the obligation of the plaintiff to prove his case before he could recover.

1 Greenleaf, sec. 1, 2; 23 Illinois, Brown vs. Ohio & Mississippi Railroad Co.

The 2d instruction for the defendant below should have been given without the modification introduced by the Court. It was the law as it stood, and required no amendment. The modification was erroneous, because, also, there was no evidence to warrant it, and it was calculated to suggest to the Jury that the negative testimony of Mills was proof of the fact sought to be established.

23d Illinois, Brown vs. Ohio and Mississippi Railroad Company, p. 94.
2 Gilman, 202; 14 Illinois, 155.
1 Scam., 53; 3 Gil., 381.
14 Illinois, 474.

WM. HOMES, *Attorney for Plaintiff.*

Russell & Wall, Printers, Guardian office, Mt. Vernon.

Ohio & Miss. R.R. Co.

vs.

Emerson A. Brown

Brief

ABSTRACT.

Ohio & Mississippi Railroad Company, } **Plaintiff in Error.**
vs. **Error to Marion County.**
Epperson W. Brown. } **Defendant in Error.**

This was an action of trespass on the Case by Defendant in Error. Declaration contained one count. Damages eight hundred and fifty dollars, ($850;)

1st. Court avers that Defendant below owned the Ohio & Mississippi Railroad, on the 21st day of June 1857, that part of said Road ran over the County of Marion aforesaid, that said Road had been operated by said Defendants from 14th day of Feb. 1855.

That said Defendant were bound to fence said Road within five Miles of each and every settlement except as is provided by the Statutes.

That said defendants neglected to fence said Road and that the property of the Plaintiff to-wit: Three Mares one Mule and one Colt, valued at ($850) got on the said Road on the 23d day of June, 1857, and that said property was run over and killed by a Locomotive and train of cars belonging to said defendant.

Plea General Issue.

Trial by Jury—verdict for Plaintiff, $735 00.

Motion for new trial. Motion overruled.

Bill of exceptions tendered and signed &c.

Plaintiffs' testimony.—A. J. Brown testified that he and Plaintiff were in the County about the 23d day of June 1857. On the night of 22d Plaintiff had five head of stock killed and crippled—one Colt killed and three Mares and a Mule crippled. We were moving and camped on left side of Road four miles west of Salem—turned stock loose. I saw the stock on Railread track next morning.

None dead except Colt. Balance crippled—don't think they were worth anything at all after they were hurt. The Mule was two yards from track, one leg cut off.

No crossing at the place where done. Mares were worth One hundred and seventy-five or two hundred dollars each. Colt Forty dollars. Mule One hundred and seventy-five or Two hundred dollars. Did not see them after night, they were short distance from the road when I saw them last, on the north side of Road.

John Lydick for Plaintiff, testified.—I saw stock after it was hurt, about four miles west of Salem, five head: three Mares, one sucking Colt, one Mule. The Mares and Mule worth One hundred and seventy-five dollars each Colt, Thirty-five dollars. No fence where property was hurt. No town, city or village or public crossing.—— Done on section seventeen (17) town two (2) north range four (4) east. No improvement adjoining a fence was necessary.

Mathew Rankin for Plaintiff.—I saw the stock after they were hurt, and I suppose they died, it was done in June, 1855. The Road has been running over six months before the accident happened. The number of stock is correct. I was appraiser.

Cross Examination.—I fix the value of horses according to what they sold at then.

Urial Mills, for Plaintiff.—I knew the Ohio & Mississippi Railroad in 1854—then completed—the cars ran from July 1855 until now. I know the section referred to. There was a fence on south side of road. None north. I don't know anything about contract to fence the Road there. No town, city or village at the place where injury was done. It was not four miles from Salem, open prairie at that time, country was thickly settled there. A fence was necessary. If there had been any contract to fence, with the owners, I think I would have known it.

Cross examined.—I don't know any thing about any contract to fence said land, I was agent only to sell the lands. They belong to Col. Wilson King, Erie, Pennsylvania. My agency was only to sell. Don't know any thing about contract to fence.

Lydick re-examined by plaintiff.—Trains ran regularly during the night; trains ran west about midnight. I heard train whistle that night could not tell where it was.

Court instructed the jury for plaintiff. That if they believe from the proof that plaintiff has sustained his case as stated in his declaration, and that his stock was killed by the train or trains of the defendent where they were bound to fence the road as alleged in the declaration, then the jury should find for the plaintiff and assess his damages according to the proof and give him damages according to the value of the property killed.

2d. That the plaintiff is not bound to prove by positive evidence any of the facts in this case, but that if he has shown by facts and circumstances that his stock was killed by the train of defendant, that he is entitled to the same damages as if he had proved his case by positive evidence.

3d. The plaintiff is not bound to show by direct and positive evidence that the exceptions of the statute do not apply to the case, but if the jury believe from the facts and circumstances proved that the stock of plaintiff was injured or killed by the defendants as alleged in the declaration of plaintiff at a place not excepted by the statute, the jury should find for the plaintiff and assess his damages at the amount proved.

Defendant excepted to all of said instructions.

The court instructed the jury for the defendant.

1st. That if the plaintiff has not proved that the stock was killed by the cars running on the Ohio and Mississippi rail road, you should find for the defendant.

2d. That unless it has been proved that the stock was killed at a place where no other person had agreed with defendant to erect a fence, they should find for the defendants. To which second instructions the court added :—"The law is for defendants, but if from the evidence you believe that no such contract was made to fence by the owner of the land at that point, then the law on that point would be for the plaintiff." Defendants excepted to the above modification by the court.

3d. That all the exceptions contained in the enacting clause of the statute under which the plaintiff seeks to recover must be negative and proved by the plaintiff, as he has alleged the same in his declaration before he can recover, and if this has not been proved you should find for defendant.

Verdict, seven hundred and thirty-five dollars. Motion for new trial and arrest of judgment. Motion overruled and judgment for plaintiff, seven hundred and thirty-five dollars to all which defendant at the time excepted.

ERRORS ASSIGNED.

1st. The verdict of the jury is contrary to law.

2d. The verdict is contrary to evidence.

3d. The court erred in the instructions granted to the jury.

4th. The verdict is contrary to law and evidence.

5th. The evidence did not show that any of said property was killed except the colt.

HAYNIE, PARRISH, HOLMES & SMITH, for Pl'ff in Error.

6. There is no evidence that there was no contract to fence

7. There is no evidence that the injuries complained of were done on the Ohio & Miss. R.R.

H. P. H. & S.

For Pltff &c.

89

O. & M. R. R. Co

vs

E. W. Brown

$575

Filed Nov. 14. 1860.

R. Johnston Clk

Coffeen

No 39

Nov. Term 1860

O. & M. R. R. Co.

vs

Brown

Error to Marion

Affirmed

8575