

No. 14760

Supreme Court of Illinois

Bennett

vs.

O'Brien

51

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 72

J. W. Middleton & Co., Stationers, 196 Lake St.

1865

Bennett

72

Oliver

ABSTRACT OF RECORD.

STATE OF ILLINOIS, }
Third Grand Division, } ss. In Supreme Court,
To April Term, A. D. 1865.

CURTIS N. BENNETT, Appellant, }
vs. } Appeal from
MICHAEL O. BRIEN, Appellee. } Livingston County.

PAGE

- 1 Summons returnable first Monday in June, A. D. 1864.
- 2 Narr. in case, damages \$200.00 for loss of a mare by negligent driving by appellant, as bailee, on 23d January, 1864.
- 3 Demurrer of appellant to narr. special.
- 4 Plea. General issue.
- 5 Verdict, damages \$120 and costs in favor of plaintiff below.
Motion for new trial, (see page of Abstract for grounds of); motion overruled. Judgment on verdict.
- 6 Order of court overruling demurrer.
- 7 Bill of exceptions. Testimony of Leander Utley. Know the mare; think she was foundered; have seen Bennett (appellant) driving mare; he usually drives careful; do not know her value; very careful men sometimes founder their horses.
Stephen Hornberger testified: Mare was foundered; worst I ever saw; mare worth \$125.00; think sickness was caused by hard driving.
- 8 Richard Gibson testified: Think mare was foundered. Defendant said he drove her into a snow-drift, in January, 1864.
- 9 Frank Roach testified: Defendant acknowledged to

O'Brien, in my presence, that she got hurt in a snow bank; he did not say who was using her. O'Brien wanted a cow and a colt; cannot tell what he wanted them for.

PAGE

12 Ruben Macy testified: Know the mare; defendant drove her to my place about the last of January, 1864; I fed the mare that evening; defendant told me to feed her but little, which I did; saw nothing wrong with the mare; she ate her feed; it was about an hour and a half after I got home before I fed her; saw the mare next morning; she was all right then; feel sure that I fed her next morning; she ate her feed as usual.

13 Maria Macy testified: Know the parties; defendant drove the mare out to our house on the 23d day of January, 1864; got there a little before sunset; horses were not sweaty at all; noticed them; horses were not watered for an hour or more; live about 18 miles from defendant; rode home with him next day; mare appeared as usual; defendant drove quite slow; team walked most all the last half of the distance, eight or nine miles; roads were good; team was not sweaty at all when we got home; we were about five and a half hours on the road; distance 18 miles.

14 Allena Macy testified: Lived with my father on the 23d of January, 1864; defendant drove mare to our house in latter part of January; saw him drive up; horses were not sweaty; I noticed them; saw mare next morning; she appeared as usual.

14 David Lewis testified: Have been horse doctor for 16 years; served in the United States army as assistant veterinary surgeon; was called to see the mare by plaintiff sometime in latter part of January 1864; thought, and still think, she had inflammation of lungs; had every system of pneumonia, with the exception of hoofs.

15 C. N. Coe, testified: Was called to see mare by plaintiff; examined her closely; think she was not foundered; doctor my own and sometimes my neighbor's horses; talked with defendant in presence of plaintiff in relation to the bailment; 15 defendant said he took the horses to keep at the request of plaintiff, to feed for their work.

16 Instructions: 1st. If the jury believe from the evidence that the man in question did from inevitable casualty or by

PAGE causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of gross negligence and carelessness.

2d. If the jury believe from the evidence that the defendant used the same care, diligence and prudence in taking care of the mare in question that a prudent, careful man would take care of his own property under similar circumstances, they will find for defendant.

3d. If the jury believe from the evidence that the keeping of the mare in question by the defendant was an accommodation or an advantage to the plaintiff, and that the benefit was mutual, under which state of case the jury are to understand the law to be that no extraordinary diligence and care are requisite, and they will find for the defendant.

4th. When the loss of the mare is shown, the proof of negligence or want of care is thrown upon the plaintiff; it being a presumption of law that proper care and diligence were exercised on the part of the defendant.

17 5th. The jury must be satisfied that the evidence in describing the property in controversy, must correspond with the declaration to sustain the plaintiff.

6th. If the jury believe from the evidence that the defendant gave a consideration for the use of the mare, they will find for the defendant.

7th. If the jury believe from the evidence that the mare did not die from the effects of over driving and misuse on the part of the defendant, they will find for defendant.

17 All the instructions asked by defendant; court refused to give any and all; defendant then and there excepted.

18 Appeal Bond, approved per Judge.

ABSTRACT OF RECORD.

STATE OF ILLINOIS, }
Third Grand Division, } ss. In Supreme Court,
To April Term, A. D. 1865.

CURTIS N. BENNETT, Appellant, }
vs. } Appell from
MICHAEL O. BRIEN, Appellee. } Livingston County.

PAGE

- 1 Summons returnable first Monday in June, A. D. 1864.
- 3 Narr. in case, damages \$200.00 for loss of a mare by negligent driving by appellant, as bailee, on 23d January, 1864.
- 5 Demurrer of appellant to narr. special.
- 6 Plea. General issue.
- 7 Verdict, damages \$120 and costs in favor of plaintiff below.
Motion for new trial, (see page of Abstract for grounds of); motion overruled. Judgment on verdict.
- 8 Order of court overruling demurrer.
- 9 Bill of exceptions. Testimony of Leander Utley. Know the mare; think she was foundered; have seen Bennett (appellant) driving mare; he usually drives careful; do not know her value; very careful men sometimes founder their horses.
Stephen Hornberger testified: Mare was foundered; worst I ever saw; mare worth \$125.00; think sickness was caused by hard driving.
- 10 Richard Gibson testified: Think mare was foundered. Defendant said he drove her into a snow-drift, in January, 1864.
- 11 Frank Roach testified: Defendant acknowledged to

42
C W Bennett
vs
M O'Brien

Abstract

SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term A. D. 1865.

CURTIS N. BENNETT, Appellant, } *Appeal from Liv-*
vs. } *ingston County*
MICHAEL O. BRIEN, Appellee. } *Court.*

BRIEF AND ARGUMENT FOR APPELLANT.

It appears from the record (abst. p. /) that this was an action on the case by appellee as plaintiff and appellant as defendant below, to recover the value of a certain black mare which appellant had in his possession as bailee, and claimed to have been lost by negligent driving by appellant on 23d January, 1864. The evidence shows this possession was a bailment for hire, beneficial to both parties, and the evidence shows that appellant received the mare at the special instance and request of appellee to keep and feed for her work (abst. p. 2). The evidence also shows (abst. p. 2) that the mare was driven by appellant to the residence of Reuben Macy on that day, and he saw nothing wrong with her either that night or the next morning. The witness, Maria Macy, (abst. p. 2) says she saw the mare on the night of the 23d and the next morning, and rode home with appellant; that he drove quite slow; "team walked most all the last half of the distance;" "roads were good;" "we were five and a half hours on the road;" "18 miles." Lewis testifies, (abst. p. 2) "Have been a horse doctor 16 years," &c.; "think she had pneumonia," &c. Under this state of case the court plainly erred in refusing to instruct the jury as asked in the first instruction of appellant, as this court has said that instruction was the law—Howard vs. Babcock, 21 Ill., 259—and in the same case this court has said the second instruction asked for by appellant was the law, and as they are plainly applicable to this case and supported by evidence, the court erred in refusing them.

We think the law is well settled that in bailment for hire, where the bailment is beneficial to both parties, the bailee is answerable only for want of ordinary care—3d John 170—and he is not bound to exercise any greater degree of care in taking care of the property than a careful, prudent man would of his own property placed under similar circumstances, no

extraordinary diligence and care are requisite—Howard vs. Babcock, 21 Ill., 259.

It is a well settled principle of evidence and one as broad as reason itself, which throws the burden of proof of negligence or want of due care upon the plaintiff—Harris vs. Packwood, 3 Tarm., R. 264. Marsh vs. Horn, Barn & Cress, 322. 7 Cowen, R. 500 N. 2 Kent Com., 587.

There is no evidence even tending to show negligence or want of ordinary care on the part of appellant and we therefore confidently assert that the court erred in refusing the first, second and third instructions of appellant, (abst. p. 3). They should have been given as the law in the case that the jury might have been guided thereby in the rendering of their verdict.

The fourth instruction should have been given. The plaintiff below declare in case and charges the defendant (below) with wrongfully, carelessly and negligently over driving and misusing his mare, from which said driving and misusing the said mare died.

A party is bound to prove all his material averments—Humphreys vs. Collier, 1 Deane, 52.

The death of the mare is not only not shown by the evidence, but that appellant negligently over-drove or misused her nowhere appears in the evidence, and without proof sustaining that averment the plaintiff below could not recover. Hence the fourth instruction asked by appellant should have been given, and on this point alone the court below should have granted a new trial.

5th. As to the fifth assignment of error, we think the point is well taken: the proof nowhere shows that appellant was guilty of gross negligence, or even want of ordinary care. The witness (abst. p. /) says "very careful men sometimes founder their horses," and the witness *Lewis* (abst. p. 2) says he does not think the mare was foundered, but thinks she had inflammation of the lungs, &c., and there is an entire absence of proof that the sickness of the mare was caused by the neglect of appellant in any degree.

6th. As to the sixth assignment of error, the motion for a new trial should have been sustained for the reasons given above and for the reasons as stated in the motion, to-wit: the refusal of the court to give the instructions asked by defendant below, as we think we have shown them to be the law.

As to the seventh assigned error, we think there can be no doubt but that there was sufficient error committed by the

court below to justify a reversal of the judgment upon the most casual examination by this court. As stated above the first instruction asked by appellant was most certainly the law, (abst. p. 2). The same may be said of the second instruction, (abst. p. 3), also the fourth (abst. p. 3) and seventh, (abst. p. 3). And we most confidently rely upon the eighth assigned error. We think the law is too well settled to admit of a doubt, that it is the duty of the court in all cases to give instructions to the jury on all questions of law which arise in a cause tried before it, and to have the law stated correctly to the jury on the facts as the party claims them to have been proven, where testimony has been given tending to sustain his views of the proof.

Commonwealth vs. Porter, 10 Met. 263.

10 " 14.

Whitney vs. Lynde, 16 Vt., 679.

And this case on the eighth assigned error presents a feature which we are not aware has ever been presented to this court for consideration. The bill of exceptions shows (abst. p. 3) that the Judge refused to give any instructions for appellant. As we understand the law, when instructions are asked by counsel and they are in conformity with the law, this court has said (State vs. Wilson, 2 Scam. R. 225) that "counsel have a right to require of the court to give an instruction as asked, when the same is in conformity with the law."

Again, in Galena & Chicago Union R. R. Co. vs. Jacobs, 20 Ill. R. 478, this court say: "It is the province of the court—their undisputed realm, in which to exert to the fullest extent this power—to impart instructions as to the *law* of the case on the *facts* as the jury may find them to exist, and for that purpose supply by its own suggestion any omission or want of observation of counsel."

And this court go farther, in Stamp vs. Kelly, 22d Ill., 140, holding there on the question of the duty of the court to instruct the jury *without such instructions being asked by counsel*, that as courts are created and established for the administration of justice all legal and proper means should be employed for the attainment of that end, and that it is the duty of the court to instruct the jury as to the law in the case, whether asked to do so or not. The court say in that case: "One of the very objects in having a Judge is to instruct the jury on the law applicable to the case. Instead of its being error for the court on its own motion to instruct, where it seems to be required by the justice of the case, it is rather the

duty of the Judge to give such instructions.

A fortiori, then, when instructions are *asked*, which cannot be disputed as embodying the law, and are refused, and no instructions whatever given for the party asking them, there can be, we think, no doubt that the act is far from conforming with the duty imposed by the official obligation of the Judge and the requirements of the law.

We think the error committed so palpable, that it is not advisable or necessary to consume the time of the court by entering into a review of the cases in support of our view of the law on this point (as we are unable to find a single reported case supporting a contrary view), but content ourselves with citing a few cases among the many which sustain our position. *Whitney vs. Lynde*, 18 Vermont, 679. *Noble vs. McClintock*, 6 Watts & Serg., 58. *State vs. Wilson*, 2 Scam., 225. *Briggs vs. Georgia*, 12 Vermont, 66.

The first and second instructions, (abst. p. 243) this court has said are law—*Howard vs. Babcock*, 21 Ill., 259—and we think we have shown the others asked to be law, and applicable to the case as supported by evidence. This being true, and the refusal of the court below to give not only instructions asked, but any instructions, in direct opposition to all principles of law and duty, how this judgment can stand passes our comprehension. We therefore confidently ask a reversal of the judgment and a remandal.

STOUT & AMENT

and L. E. PAYSON,

Attorneys for Appellant.

C. A. Bennett

vs

M. O. Brew-

Brief & argument for
appellant

United States of America
State of Illinois ss
Livingston County,

Reas had at a regular term of the Livingston County Court at a term of said Court began and held at the County Court House of said Livingston County at Pontiac on Monday June 6th AD 1864 the same being the first Monday of June AD 1864 before the Hon Jonathan Bluff presiding Judge of said Court.

Present Hon Jonathan Bluff presiding Judge
" W. B. Hamington clerk
" J. E. Wye Sheriff
Court opened by public proclamation

Michael O'Brien
vs
Curtis N Bennett

Case
Be it remembered that on the 23 day of May AD 1864 there was issued out of the Office of the Clerk of said Court a certain summons in the above entitled cause which said summons is in the words and figures following to wit

State of Illinois ss
Livingston County

The People of the State of Illinois
to the Sheriff of said county greeting.
We command you to summon Curtis N Bennett

if to be found in ym County, to appear before
the County Court of Livingston County on the
first day of the next term thereof, to be holden at
at the Court House in Pontiac, in said county on the first
Monday in the month of June next to answer Michael
O'Brien in a plea of trespass on the case to the damage
of him the said Plaintiff in the sum of \$200.00 as
he saith on a herof make due return to our said
Court as the law directs.

Witness R. B. Hamington Clerk of the said
Court, and the Judicial Seal thereof at
Pontiac this 23rd day of May AD 1864

R. B. Hamington Clerk
Thayer Deputy

Upon said summons the following endorsements
are made in the words and figures following to wit:

"I have served the within writ by reading the same
to the within named defendant Curtis N. Bennett
this 24th day of May 1864. Job E. Hye Sheriff
per Albion Jones Deputy

Filed this first day of June 1864
R. B. Hamington Clerk
Thayer

And be it further remembered that on the 26th day
of May AD 1864 there was filed in the Office of the
Clerk of the said Court a Declaration in this cause
which Declaration is in the words and figures following
to wit:

Internal Revenue Stamp
50 cents

State of Illinois }
 Larngeton county }
 County Court, Larngeton County,
 June term, A.D. 1864.

Michael O. Brien plaintiff in this suit by
 A. E. Harding his attorney, complains of Curtis K. Bennett
 defendant, who has been summoned to answer unto the plaintiff
 in a plea of trespass on the case. For that whereas the said
 plaintiff before and at the time of the committing of the griev-
 ances hereinafter next mentioned was the owner & proprietor
 of certain personal property to wit, one black mare, about
 eight years old of great value, to wit, of the value of one hundred
 & fifty dollars, & which said goods and chattels had been and
 were before that time loaned for use to the said Curtis K.
 Bennett, and the same were in the possession of the said
 Curtis K. Bennett, under and by virtue of the said loaning
 to wit, at the county of Larngeton & state of aforesaid,

Yet the said defendant well knowing the premises and
 unjustly intending to injure the said plaintiff in his re-
 verendary interests in said personal property whilst the said
 plaintiff so was the owner & proprietor of the said goods and
 chattels and whilst the same were so loaned for use to and
 in the possession of the said Curtis K. Bennett as aforesaid
 to wit, on the 23^d day of January A.D. 1864, at the county &
 state aforesaid, wrongfully, carelessly & negligently overdrove
 and misused the said mare from which said driving
 & misusage the said mare died, at the county aforesaid, or
 about the 10th day of March, A.D. 1864. And thereby the
 said plaintiff saith he hath been damaged in the premises
 to the amount of Two hundred dollars & therefore he sues &
 And also for that whereas the said plaintiff before and

at the time of the committing of the grievances hereinafter
 next mentioned, was the owner and proprietor of certain per-
 sonal property to wit, one black mare about eight years old
 of great value to wit, of the value of one hundred and fifty
 dollars, and which said property had been and was before that
 time loaned for use to the said Lemuel A. Bennett for a period
 of time then to come and unspecified, & the same was in the pos-
 session of the said Lemuel A. Bennett under and by virtue of
 the said loaning at the county of Livingston & State of Illinois

Yet the said defendant well knowing the premises, but con-
 triving & wrongfully intending to injure and deprive the said
 plaintiff of his interest in said property whilst the said plain-
 tiff was so the owner & proprietor of said property and whilst
 the same was loaned for use to, and in the possession of the
 said Lemuel A. Bennett, at the county aforesaid, on or about
 the 23rd day of January A.D. 1864, wrongfully carelessly and
 negligently drove & misused said mare from which said
 driving & misuseage the said mare died at the county aforesaid
 on or about the 10th day of March A.D. 1864, by reason of which
 said premises the said plaintiff was forced and obliged to pay
 and did necessarily pay lay out & expend diverse sums of
 money in the whole amounting to a large sum of money
 to wit, the sum of fifty dollars in and about the nursing &
 taking care of & doctoring & buying medicine & hiring stable
 room for said mare, By reason whereof said plaintiff hath
 sustained damages to the amount of Two Hundred dollars
 therefore he brings suit &c.

A. E. Harding
 plff's atty

#

5

And be it further remembered that on the 6th day of June, AD 1864 a certain demurrer was filed in said cause, in the office of the clerk of said court, which said demurrer, was and is in the words & figures following to wit:

" State of Illinois } ss. In the county courts thereof
Livingston County } To June Term, AD 1864,

And the said defendant by B. H. & Amick his attorneys comes & defends the wrong & injury where-
of, & says that the said declaration and the matters therein contained in manner & form as the same are therein stated & set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants and he the said defendant is not bound by law to answer the same and thus he is ready to verify wherefore he prays judgment. And the said defendant shows to the court the following special causes of demurrer to wit:

- 1st. In the first count said loaning is not stated to be at the special instance and request of the said defendants.
- 2d. In said first count the length of time for which said loaning was made is not stated or in other words whether the time of said loaning has yet expired.
- 3d. The defendant is ~~not~~ charged with injuring the reversionary interest of the plaintiff in one Black mare, when no reversionary interest is anywhere claimed in the said declaration.

In the second count,

- 1st. It is stated that the property was loaned for use, while it is contradicted by a contrary statement that it was loaned for keeping & feeding.
- 2d. It is also shown in said second count that the right

6

5

of action has not yet accrued by stating that the loaning
now for a period of time then to come and unexpired.

3d Damages are claimed for expending money in nursing
& taking care of and doctoring & buying medicine and
hiring stable room for said mare, without stating it to be
at the special instance and request of the said defendant.

And for that the said declaration is drawn in a neg-
ligent slovenly and untidical manner, and is in every
respect insufficient uncertain defective and informal. -

Stout & Amant

Attys for defendant.

And be it further remembered that on the 13th day of June
A.D. 1864 certain pleas in said cause were filed in the office
of the clerk of said court, which said plea was and is in
the words & figures following to wit..

" State of Illinois } ss. In County Court.

Laraway County }

vs James Ford A.D. 1864

And the said defendant by Stout
& Amant his attorneys comes & defends the wrong & injury
when &c. & says that he is not guilty of the said supposed
gouernance above laid to his charge or any or either of them
or any part thereof in manner & form as the said plaintiff
hath above thereof complained against him: and if this be
the said defendant puts himself upon the country &c.

Stout & Amant

Deft. Attorney.

And be it further remembered that on Tuesday June 14. A.D. 1864
certain same being one of the days of the regular June term A.D.
1864. of said court, certain proceedings were had in said

7

causes, which said proceedings were entered on the records of said court in the words & figures following to wit,

"Michael O'Brien,

Leah A. Bennett

} To ~~pass~~ pass on the case,

} On this day came the parties to this

cause by their respective attorneys, and the issue being joined, and for the trial thereof the plaintiff puts himself upon the country and the defendant doth the like, also whereupon came a jury of twelve good & lawful ^{men} as follows to wit, James Nelson J. D. C. Ladd, Nelson Buck, J. P. Sumner, J. Dingel, G. W. Vancoy, John Hood, D. E. Lawrence, Albert Lawrence, J. T. B. M' Collock, William Wood & D. Rider, who being duly tried & sworn to well and truly try the issue joined, and a true verdict render, according to the evidence, who after hearing the evidence adduced, and the argument of counsel retired on behalf of an officer of court to consider of their verdict; and now

again on this day came the jury in this cause and delivered in open court their verdict as follows, to wit, "That the jury find the defendant guilty and assess the Plaintiff's damages at the sum of one hundred and twenty dollars

Whereupon the defendant by his attorney moves the court for a new trial in this cause, And the court upon due consideration overruled the motion. It is therefore ordered by the court that the plaintiff Michael O'Brien have and recover of the said defendant, Leah A. Bennett the sum of one hundred & twenty dollars damages aforesaid as aforesaid together with the costs of suit in his behalf

8 expended, and that he have execution therefor,

The defendant enters exceptions to the rulings of the court and prays an appeal to the Supreme Court of the State of Illinois. By leave of the court the parties herein are given ten days to agree upon the evidence in this cause.

And it is further ordered by the court, that the defendant herein enter into Bond in the sum of five hundred dollars bond to be approved by the judge of said court.

And be it further remembered that heretofore to wit on Thursday June 9th AD 1864 the same being one of the days of the regular June term AD 1864 of said court, certain other proceedings were in said cause & entered on the records of said court, which said proceedings as entered as aforesaid, are entered in the mode following to wit:

" Michael O'Brien

"

Bartholomew N. Bennett

I appeared in case.

On this day comes the plaintiff by A. E. Harding his attorney and also comes the defendant by Booth and Amick his attorneys and this cause coming on to be heard on the Demurrer to Plaintiff's Narr. filed at a former day of this term, and the court being sufficiently advised therein, ordered, that the said demurrer be and is hereby overruled, -

And be it further remembered that on the 23rd day of November AD 1864 a certain bill of exceptions in said cause was filed in the office of the clerk of said court which said bill of exceptions so filed as aforesaid is in the words and figures following to wit,

8

9 State of Illinois } In the County Court
Springston County } To June Term AD 1864,
Michael O'Brien,

v

} Being exceptions,
James M. Bennett }

Be it remembered that on the trial
of this cause at the June Term AD 1864, of the said county
court, the said plaintiff to maintain the issues on his
part gave in evidence to the jury.

Gander Wiley, first witness,

Know the brown mare, I think she was foundered, I think
it was caused by feeding when too hot or very tired. It is
sometimes caused by drinking water. I have seen Mr. Bonner
driving the mare, he usually drives careful, when I saw him
driving her he was driving the usual gait for driving.

Mare was brought to Hornberger's stable after she was
sick, some might call her black, but I call her brown.
I never noticed her much, cannot tell her value.

Cross Examination. Sometimes horses are foundered and no one can
hardly tell how it happened: very careful men sometimes
founder their horses, I have foundered them myself, she
is a brown mare. I said some might call her a black or
dark brown. I call her a brown mare, I am a pretty
good judge of horses, I deal in them considerably.

Stephen Hornberger, second witness,

The mare was kept in my stable, knew her about one month
before sick. Defendant used her before she was sick, she
was the worst foundered mare I ever saw. Plaintiff
time in taking care of the mare was worth seventy five

10 cents per day. The use of stable worth five or six dollars for the whole time. mare worth one hundred and twenty five dollars. mare was taken sick about the last of January. don't recollect of Bennett saying anything of snow bank. I think it was by hard driving mare was sick about fourteen days. I rode the mare on purpose to test her mind. I thought it was good I would have given one hundred and twenty five dollars for fifty of them. I was buying horses for the government I was speculating for Uncle Sam. Plaintiff's time worth seventy five cents per day. mare was five or six years old, was a dark brown.

Richard Gibrow. third witness,

I doctored mare, my account was five dollars. He paid me at one time two dollars and fifty cents. at another time one dollar and fifty cents & at another time one dollar. The medicine cost about three dollars. I said she was foundered the worst I ever saw. Defendant said it was not foundered. he said he drove her into a snow drift and hurt her in January the mare was a brown mare, most a black. I have doctored horses for thirty years
Prof. Examination.

I said she was a brown or rather blackish brown, she was not black. Horses may be foundered with ordinary care

W. L. Fox, fourth witness,

Heard defendant's conversation at the stable about the mare, she was a brown mare. He did not pay a great deal of attention to the conversation. He said Bennett say he would pay him if she died, there was some talk about killing her.

11. Bennett said don't tell her. if she dies I will pay you
heres Examination.

Bennett say wheather they were talking about what Bennett
owed plaintiff or not. - heard that Bennett was owing plaintiff
for mare, this was in the winter.

Justice Doran. fifth witness.

I first saw defendant about the fourth of May. 1864. defendant
said he had the horses for their keep. went up to defendants
with mr. chas O'Bovin. heard Bennett say he always intended
to pay for mare and would pay for her only for your talk to
me down town. Bennett said he mares did not work enough
to pay for their keep. and that they did not do as much
work as the other horses. O'Bovin said she did as enough
to pay for their keep. That is all I know about it.
heres examination.

Went up to Bennett with O'Bovin on business, went to
look at a wagon. I said I heard Bennett say I always
intended to pay you for the mare & would only for your
talk to me down town.

Leander Utley. recalled.

Bennett lives north of my house about a mile and a
quarter, a little east of my place in Longston county.

Frank Roach. sixth witness

Defendant acknowledged to O'Bovin in my presence
that she got hurt in a snow bank. he did not say who
was using her. O'Bovin wanted a cow and a colt
cannot tell what he wanted them for. Defendant said
he would give him the colt. Plaintiff said he would not
take the colt. Has come to settle with defendant.

12. Plaintiff wanted a cow and colt, Defendant would not give them, but said he would give colt.

crop examination

This conversation occurred here in town, parties did not come to any settlement. Bennett refused to give the cow.

And that the said defendant to maintain the said issue on his part gave in evidence to the jury that re.

Defendant's witnesses. Ruben Macy, first witness.

Know the mare in question, defendant drove the mare out to my place about the last of January 1864. I was not at home when defendant came to my house. I got home sometime between dusk and dark. I fed the mare that evening, fed her some frost bitten corn, defendant told me to feed her but little which I did, saw nothing wrong with the mare that night. She appeared all right as usual, she ate her feed. It was about an hour and a half after I got home before I fed her, saw the mare next morning she was all right then, don't know for certain whether defendant or myself fed her that morning. I think I fed her. I feel pretty sure I fed her she ate her feed as usual, did not observe any thing wrong with her. After breakfast defendant rode her out with the cattle in company with one; it was about seven and a half. did not return with defendant to the house, the mare appeared as usual. I was acquainted with the mare. A year or more ago mare was mind broken, don't remember when I first noticed it. Don't remember seeing her after that, she was a brown mare, she appeared

13

to be a mare worth from \$100 to \$125, but for my own use I would not give half that. Her being mud broken would detract from her apparent value at least \$25.00

Mariah Macy second witness.

Knew the parties, defendant drove mare out to our house on the 23rd day of January 1864. She got there a little before sunset, defendant stopped at the house and talked about five minutes and then went down to her barn and put horses out. Horses did not appear fatigued neither of them were sweaty at all. I noticed them because they were splattered with mud. Horses were not watered for an hour or more. Defendant watered them. Knew when he did it, he took pails from the house to water them with. Defendant is my son in law, we live about eighteen miles from defendant's house. I rode home with him the next day, mare appeared as usual, she danced considerably at the start. Defendant noticed her to be slightly lame when she struck into a trot; I told him (defendant) that I could not see it, mare was very ambitious for the first few miles, defendant had to hold very hard, she finally settled down and was willing to walk. Defendant drove quite slow, team walked most all the last half of the distance which was about eight or nine miles. The roads were very good and smooth but a little sloppy, got home about dusk, the team did not appear to be fatigued, they were not sweaty at all, we were about five and a half hours on the road the distance about eighteen miles.

Allen Macy third witness

14. Know the parties, am acquainted with the mare in question
 lived at that time the 23rd January, 1864 with my father
 Ruben Macy, defendant drove out to our house
 sometime in the latter part of January 1864 I saw him
 drive up and I went to the door noticed horses, noticed
 that they were quite muddy and wet, did not notice
 anything ailing mare, did not appear to be fatigued
 horses were not sweaty. I remember because I noticed
 that they were all spattered with mud. defendant put
 horses in barn, was at barn but a short time, did not
 water horses for an hour or more, he took buckets from the
 house to water them in. I saw the mare the next morn-
 ing, did not notice anything different about her, she
 appeared as usual, her color was brown, don't know
 but some would call her black. I should call her brown
 it is about eighteen miles from where defendant lives to
 our house, he, defendant, arrived at our house a little
 before sundown.

David Lewis fourth witness,

I have seen the parties. I am not particularly acquaint-
 ed with them, I know them when I see them. I am a
 blacksmith follow the business now; have been a horse
 doctor by profession and practice for some sixteen years
 served in the army of the United States as assistant vet-
 erinary surgeon, never saw the mare in question before she
 was sick, was called by plaintiff to see her while she
 was sick, said mare was at that time in Hornbergers
 stable, it was sometime in the latter part of January 1864
 I am acquainted with the different diseases of horses

44

- 15 Examined the mare and found her very sick. I thought at the time & think still that she had the inflammation of the lungs, she had every symptom of pneumonia with the exception of her hoofs. I found her hoofs loose & feverish, But this I thought was caused by lying in a cold wet stable. I think the mare was not properly cared for.

O. H. Coe, fifth witness

I am acquainted with the parties. I was called by the plaintiff to see the mare in question on the morning she was taken sick. I examined her quite closely. I think it was not a founder, never saw anything like it before in my life. She appeared to be stiff and lame at both ends, she appeared to be lame about the kidneys & in the right hind leg. I never saw a foundered horse that was stiffer behind than before as she was, think it was not a founder. I am not a professional horse doctor. I doctor my own horses and sometimes my neighbors horses, she was a brown or brown black, am not prepared to say what her value was. I know that plaintiff offered the span for two hundred dollars and the bay was worth twenty dollars to me. I have dealt in horses considerably keep several of them. I had a conversation with defendant in the presence of plaintiff in relation to the bailment. Defendant said he took her to keep at the request of the plaintiff to feed for their work, heard considerable talk in relation to the contract of keeping. I asked defendant in presence of plaintiff in relation to the matter of keeping; he answered me that plaintiff was owner for him, and

16

would defendant be concent to let him (plaintiff) bring his horses there to be kept and they might make to pay for their keeping. This was in defendant's barn-yard, - Which was all the evidence offered by either of the said parties. The said defendant then moved the court upon the evidence aforesaid to instruct the jury that

1st "If the jury believe from the evidence that the mare in question died from inevitable casualty or by causes or under circumstances over which the defendant had no control, & could not prevent, then they will find for the Defendant unless they further believe that the defendant was guilty of gross negligence and carelessness.

Secondly.

If the jury believe from the evidence that the defendant used the same care, diligence and prudence in taking care of the mare in question that a prudent careful man would take care of his own property placed under similar circumstances, they will find for the defendant.

Third.

If the jury believe from the evidence that the keeping of the mare in question by the defendant was an accommodation or an advantage to the plaintiff, and that the benefit was mutual, under which state of case the jury are to understand the law to be that no extraordinary diligence and care are required & they will find for the defendant.

Fourth

When the loss of the mare is shown the proof of diligence negligence or want of care is thrown upon the plaintiff. It being a presumption of law that proper care and diligence were exercised on the part of the defendant.

17

Fifth

The jury must be satisfied that the evidence in describing the property in controversy must correspond with the declaration to sustain the plaintiff.

Sixth

If the jury believe from the evidence that the defendant gave a consideration for the use of the mare then they will find for the defendant.

Seventh.

If the jury believe from the evidence that the mare did not die from the effects of overdriving and misusage on the part of the defendant they will find for the defendant.

Which instructions the court refused to give the jury. To which the defendant then and there excepted. And thereupon the said jury gave their verdict against the defendant. Whereupon the counsel entered a motion for a new trial on account of the instructions of the said defendant not having been given and the verdict being contrary to the evidence, but the court overruled the said motion and gave judgment upon the said verdict of the said jury against the defendant to which the said defendant then and there excepted.

And inasmuch as the matters aforesaid do not appear of record the counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court, and made part of the record in said cause, and it is done accordingly.

Jonathan Duff
Judge Co. Court Liv. Co. Sec.

And be it further remembered that on the 29th day of July AD 1864 there was filed a certain appeal bond

in said cause, in the office of the clerk of said court
which said bond is in the words & figures following to wit:

"Appeal Bond.

Know all men by these presents, that we Curtis N. Bennett & C. B. Babcock of the county of Livingston in the state of Illinois are held and firmly bound unto Michael O'Brien in the penal sum of five hundred dollars, lawful money of the United States for the payment of which well & 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 twenty ninth day of July A.D. 1864

The condition of the above obligation is such that whereas the said Michael O'Brien did on the fourteenth day of June A.D. 1864 before the county court of the county of Livingston recover a judgment against the above bounden Curtis N. Bennett for the sum of one hundred and twenty dollars from which judgment the said Curtis N. Bennett has taken an appeal to the Supreme court of the state of Illinois. Now if the said Curtis N. Bennett shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal then the above obligation to be void, otherwise to remain in full force and effect.

Approved by me as my officer, C. N. Bennett (S)
this 29th day of July A.D. 1864 } C. B. Babcock (S)

(Endorsed) Bond approved, Jonathan Duff
co. Judge "

State of Illinois
Livingston County

ss

J. R. B. Harrington clerk
of the county court in and for said county
and State do hereby certify that the within is a
true full complete and perfect transcript of
the record of the within entitled cause as
appears by the Record of said court in my Office
Witness my hand and Official seal
at Pontiac this fifth day of January
AD 1865



J. R. B. Harrington clerk

State of Illinois } p. In Supreme Court.
Third Grand Division } To April Term, A.D. 1865.

Curtis N. Bennett, appellant }
Michael O.'Brien, appellee } Appeal from Livingston
County Court,
Assignment of errors.

And now comes the said Curtis N. Bennett, appellant, and says that in the record and proceedings aforesaid there is manifest error in this to wit:

1. The court erred in refusing to instruct the jury that: "If the jury believe from the evidence that the mare in question died from inevitable casualty or by cause or under circumstances over which the defendant had no control & could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of gross negligence and carelessness." (1st Instruction of Dept.)
2. The court erred in refusing to instruct the jury, that "If the jury believe from the evidence that the defendant used the same care diligence and prudence in taking care of the mare in question, that a prudent careful man would take care of his own property placed under similar circumstances, they will find for the defendant." (2d Instr.)
- 3d. The court erred in refusing to instruct the jury that "When the loss of the mare is shown the proof of negligence or want of care is thrown upon the plaintiff, it being a presumption of law, that proper care and diligence were exercised on the part of the defendant." (3d Instr.)

4" The court erred in refusing to instruct the jury that
If the jury believe from the evidence that the man did
not die from the effects of overdriving and misusage on
the part of the defendants they will find for the defendants.
(7" Inst. for Def't.)

5" The said verdict of the jury is manifestly against the
evidence in the case.

6" The court erred in overruling said motion for a new
trial.

7" The court erred in refusing to give all the instruc-
tions as asked by the defendants.

8" The court erred in refusing to give any instruc-
tions (as to the law in the case) for the defendants.
By reason whereof the appellants praye that said
judgments may be reversed, &c.

By. Trout & Amey
Ed. L. E. Payson atty
for Appellants.

72

Comtes. A. Bennett

"

Michael O. Boivin.

appeal from Longdon Co.
court

Transcript of records

Filed Jan. 21. 1865.
L. Seland
Clk.

SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term A. D. 1865.

CURTIS N. BENNETT, Appellant, } *Appeal from Liv-*
 vs. *ington County*
 MICHAEL O. BRIEN, Appellee. } *Court.*

BRIEF AND ARGUMENT FOR APPELLANT.

It appears from the record (abst. p. /) that this was an action on the case by appellee as plaintiff and appellant as defendant below, to recover the value of a certain black mare which appellant had in his possession as bailee, and claimed to have been lost by negligent driving by appellant on 23d January, 1864. The evidence shows this possession was a bailment for hire, beneficial to both parties, and the evidence shows that appellant received the mare at the special instance and request of appellee to keep and feed for her work (abst. p. 2). The evidence also shows (abst. p. 2) that the mare was driven by appellant to the residence of Reuben Macy on that day, and he saw nothing wrong with her either that night or the next morning. The witness, Maria Macy, (abst. p. 2) says she saw the mare on the night of the 23d and the next morning, and rode home with appellant; that he drove quite slow; "team walked most all the last half of the distance;" "roads were good;" "we were five and a half hours on the road;" "18 miles." Lewis testifies, (abst. p. 2) "Have been a horse doctor 16 years," &c.; "think she had pneumonia," &c. Under this state of case the court plainly erred in refusing to instruct the jury as asked in the first instruction of appellant, as this court has said that instruction was the law—Howard vs. Babcock, 21 Ill., 259—and in the same case this court has said the second instruction asked for by appellant was the law, and as they are plainly applicable to this case and supported by evidence, the court erred in refusing them.

We think the law is well settled that in bailment for hire, where the bailment is beneficial to both parties, the bailee is answerable only for want of ordinary care—3d John 170—and he is not bound to exercise any greater degree of care in taking care of the property than a careful, prudent man would of his own property placed under similar circumstances, no

extraordinary diligence and care are requisite—Howard vs. Babcock, 21 Ill., 259.

It is a well settled principle of evidence and one as broad as reason itself, which throws the burden of proof of negligence or want of due care upon the plaintiff—Harris vs. Packwood, 3 Tarm., R. 264. Marsh vs. Horn, Barn & Cress, 322. 7 Cowen, R. 500 N. 2 Kent Com., 587.

There is no evidence even tending to show negligence or want of ordinary care on the part of appellant and we therefore confidently assert that the court erred in refusing the first, second and third instructions of appellant, (abst. p. 3). They should have been given as the law in the case that the jury might have been guided thereby in the rendering of their verdict.

The fourth instruction should have been given. The plaintiff below declare in case and charges the defendant (below) with wrongfully, carelessly and negligently over driving and misusing his mare, from which said driving and misusing the said mare died.

A party is bound to prove all his material averments—Humphreys vs. Collier, 1 Deane, 52.

The death of the mare is not only not shown by the evidence, but that appellant negligently over-drove or misused her nowhere appears in the evidence, and without proof sustaining that averment the plaintiff below could not recover. Hence the fourth instruction asked by appellant should have been given, and on this point alone the court below should have granted a new trial.

5th. As to the fifth assignment of error, we think the point is well taken: the proof nowhere shows that appellant was guilty of gross negligence, or even want of ordinary care. The witness (abst. p. /) says "very careful men sometimes founder their horses," and the witness Lewis (abst. p. 2) says he does not think the mare was foundered, but thinks she had inflammation of the lungs, &c., and there is an entire absence of proof that the sickness of the mare was caused by the neglect of appellant in any degree.

6th. As to the sixth assignment of error, the motion for a new trial should have been sustained for the reasons given above and for the reasons as stated in the motion, to-wit: the refusal of the court to give the instructions asked by defendant below, as we think we have shown them to be the law.

As to the seventh assigned error, we think there can be no doubt but that there was sufficient error committed by the

court below to justify a reversal of the judgment upon the most casual examination by this court. As stated above the first instruction asked by appellant was most certainly the law, (abst. p. 2). The same may be said of the second instruction, (abst. p. 3), also the fourth (abst. p. 3) and seventh, (abst. p. 3). And we most confidently rely upon the eighth assigned error. We think the law is too well settled to admit of a doubt, that it is the duty of the court in all cases to give instructions to the jury on all questions of law which arise in a cause tried before it, and to have the law stated correctly to the jury on the facts as the party claims them to have been proven, where testimony has been given tending to sustain his views of the proof.

Commonwealth vs. Porter, 10 Met. 263.

10 " 14.

Whitney vs. Lynde, 16 Vt., 679.

And this case on the eighth assigned error presents a feature which we are not aware has ever been presented to this court for consideration. The bill of exceptions shows (abst. p. 3) that the Judge refused to give any instructions for appellant. As we understand the law, when instructions are asked by counsel and they are in conformity with the law, this court has said (State vs. Wilson, 2 Scam. R. 225) that "counsel have a right to require of the court to give an instruction as asked, when the same is in conformity with the law."

Again, in Galena & Chicago Union R. R. Co. vs. Jacobs, 20 Ill. R. 478, this court say: "It is the province of the court—their undisputed realm, in which to exert to the fullest extent this power—to impart instructions as to the law of the case on the facts as the jury may find them to exist, and for that purpose supply by its own suggestion any omission or want of observation of counsel."

And this court go farther, in Stamp vs. Kelly, 22d Ill., 140, holding there on the question of the duty of the court to instruct the jury *without such instructions being asked by counsel*, that as courts are created and established for the administration of justice all legal and proper means should be employed for the attainment of that end, and that it is the duty of the court to instruct the jury as to the law in the case, whether asked to do so or not. The court say in that case: "One of the very objects in having a Judge is to instruct the jury on the law applicable to the case. Instead of its being error for the court on its own motion to instruct, where it seems to be required by the justice of the case, it is rather the

duty of the Judge to give such instructions.

A fortiori, then, when instructions are asked, which cannot be disputed as embodying the law, and are refused, and no instructions whatever given for the party asking them, there can be, we think, no doubt that the act is far from conforming with the duty imposed by the official obligation of the Judge and the requirements of the law.

We think the error committed so palpable, that it is not advisable or necessary to consume the time of the court by entering into a review of the cases in support of our view of the law on this point (as we are unable to find a single reported case supporting a contrary view), but content ourselves with citing a few cases among the many which sustain our position. *Whitney vs. Lynde*, 18 Vermont, 679. *Noble vs. McClintock*, 6 Watts & Serg., 58. *State vs. Wilson*, 2 Scam., 225. *Briggs vs. Georgia*, 12 Vermont, 66.

The first and second instructions, (abst. p. 243) this court has said are law—*Howard vs. Babcock*, 21 Ill., 259—and we think we have shown the others asked to be law, and applicable to the case as supported by evidence. This being true, and the refusal of the court below to give not only instructions asked, but any instructions, in direct opposition to all principles of law and duty, how this judgment can stand passes our comprehension. We therefore confidently ask a reversal of the judgment and a remandal.

STOUT & AMENT

and L. E. PAYSON,

Attorneys for Appellant.

119
C. N. Bennett
M. O'Brien

Brief & argument
for Appellant

WILLIAM S. BROWN

NEW YORK

1884