No. 14815

Supreme Court of Illinois

C. & A. R. R. Co.

vs.

Howard

71641

14815

STATE OF ILLINOIS.

SUPREME COURT,

THIRD GRAND DIVISION.

No. 106

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

Chicago &
Alton R.R. Co.
vs
Howard

~~Stated~~ Pleas ~~Continued and~~ Burgan and held at the Court house in Bloomington before the Hon John M Scott Judge of the Circuit Court of the Eighth Judicial Circuit of the State of Illinois in a certain cause pending in the Circuit Court of McLean county in said State wherein George W Howard who sues as well for the people of the State of Illinois as for himself was Complainant the Chicago & Alton Rail Road Company was Defendant.

State of Illinois } ss
McLean County } Be it remembered that heretofore to wit on the Eighteenth day of August A.D. 1854 came George W Howard who sues as well for the People of the State of Illinois as for himself by Tipton & Benjamin his attorneys and filed in the office of the Clerk of the Circuit Court of said County his Bill of Complaint against The Chicago & Alton Rail Road Company which Bill of Complaint was in words and figures as follows to wit.

State of Illinois } ss.
McLean County } In the Circuit Court.

To the September Term 1854.

George W Howard by Tipton & Benjamin attorneys who sues as well for the People of the State of Illinois as for himself in their behalf complains of the Chicago and Alton

Rail Road Company (being Summoned &c)
of a plea that they the said defendants under
the people of the State of Illinois and to the
said George W Howard the sum of one thous
and dollars that the defendants owe to and
unjustly detain from them for that whereas
heretofore to wit the first day of July in the
year of our Lord One Thousand Eight Hun
dred and Sixty four were the owners of the
said Rail Road situated in part in said
County over which road at said time def-
endants propelled Engines and Cars and
plaintiffs over that the said Rail Road caused
a Public highway in said County and that
on the day and year aforesaid the said def
endants propelled an Engine across said
highway without blowing a Steam Whistle
or ringing a bell of thirty pound weight at
the distance of eighty rods from the place
where the said Rail Road crosses the said
public highway and while crossing the said
highway contrary to the Statute in such case
made and provided whereby an action hath
accured to the plaintiff to have and demand
of and from the said defendants a large
sum of money to wit fifty dollars paid
of the said sum above demanded. 2. and for
that whereas also the said defendants on to
wit. On the twenty fifth day of July A.D

1864. at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road. situated in part. in said County over which road at said time defendants propelled Engines and cars and plaintiff ~~over~~ over that the said Rail Road crosses a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said highway and while crossing the said highway contrary to the form of the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendants a large sum of money to wit fifty dollars & other parcel of the said sum first above demanded.

3d And for that whereas also the said defendants heretofore to wit on the twenty Sixth day of July A.D. 864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road. situated in part in said County over which Road at said time defendants propelled Engines and Cars & plaintiffs

~~over~~ over that the said Rail Road crosses a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said highway and contrary to the form of the Statute in such case made and provided whereby an action hath occured to the plaintiff to have and demand of and from the said defendants a large sum of money to wit fifty dollars other part of the said sum first above demanded.

4th and for that whereas also the said defendants on to wit on the 27th day of July A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines and Cars & plaintiffs saw that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said Public Highway & while crossing said highway contrary to the

Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendants a large sum of money to wit fifty Dollars other parcel of the said sum first above demanded

5th And for that whereas the said defendants on to wit the 25th day of July A.D. 1850 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which Road at said time defendants propelled Engines and Cars and Plaintiffs saw that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crossed the said public highway and while crossing the said highway contrary to the Statute in such case made & provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendant a large sum of money to wit fifty Dollars other parcel of the said sum first above demanded

6th And for that whereas also the said defendants heretofore to wit on the 29th day of July

A.D. 1864 at the County of McLean and State of Illinois were the owners of the said Chicago and Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines and Cars and plaintiffs avers that the said Rail Road crossed a public highway in said County and that on the day and year afore said the said defendants propelled an Engine across said highway without blowing a Steam whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said public highway contrary to the Statute in such case made and provided whereby an action hath accured to the plaintiff to have and demand of and from the said defendants a large sum of money to wit fifty dollars of the part of the said sum above demanded.

7th And for that whereas the said defendants on to wit the 3d day of July in the year A D 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which Road at said time defendants propelled Engines and Cars and plaintiffs avers that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid at the County and State aforesaid the said defendants

propelled an Engine accross said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where said Rail Road crossed the said public highway contrary to the form of the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand of & from the said defendants a large sum of money to wit fifty dollars other parcel of the said sum first above demanded.

8th For that Whereas the said defendants heretofore to wit on the first day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines & Cars and plaintiffs over that said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine accross said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crossed the said public highway and while crossing the said highway contrary to the form of the Statute in such case made and provided whereby an action hath accrued to the plaintiff

to have and demand of the said defendants a large sum of money to wit fifty Dollars other parcel of the said sum first above demanded.

9th For that Whereas the said defendants heretofore to wit on the second day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines and Cars and plaintiffs over that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said public highway and while crossing the said public highway contrary to the form of the Statute in such case made and provided whereby an action hath accured to the plaintiffs to have and demand of and from the said defendants a large sum of money to wit fifty dollars other parcel of the sum first above demanded.

10th And for that Whereas also the said defendants heretofore to wit on the third day of August A.D. 1864 at the County of McLean

and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which road at said time, defendants propelled Engines and Cars and plaintiff says that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crossed the said public highway contrary to the form of the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendants a large sum of money to wit fifty dollars other parcel of said sum first above demanded.

11th And for that Whereas also the said defendants heretofore to wit on the fourth day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago & Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines and Cars & plaintiffs says that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants

propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said public highway and while crossing the said highway contrary to the form of the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendant a large sum of money to wit the sum of fifty dollars other parcel of said sum first above demanded

12th And for that whereas also the said defendants heretofore to wit on the fifth day of August in the year A.D. 1854 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road company situated in part in said County over which road at said time defendants propelled Engines and cars and plaintiffs over that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said public highway and while

crossing said highway contrary to the form of the Statute in such case made & provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendants a large sum of money to wit the sum of fifty dollars other parcel of the sum above demanded

13th And for that Whereas also the said defendants heretofore to wit on the Sixth day of August A.D 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County of McLean and State of Illinois over which road at said time defendants propelled Engines and Cars and plaintiff was then that the said Rail crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crossed the said public highway contrary to the form of the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendants a large sum of money to wit fifty dollars other

parcel of said sum first above demanded
14 And for that Whereas the said defendants heretofore to wit on the Seventh day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines and Cars and plaintiffs avers that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crosses the said public highway and while crossing said highway contrary to the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand of and from the said defendants a large sum of money to wit the sum of fifty dollars other parcel of said sum of money first demanded
15th And for that Whereas also the said defendants heretofore to wit on the Eighth day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the

Chicago and Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines and cars and plaintiffs over that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crossed the said public highway and while crossing the said highway contrary to the Statute = made and provided whereby an action hath accrued to the plaintiff to have of and from the said defendants a large sum of money to wit fifty dollars & other parcel of the said sum first above demanded.

15th And for that Whereas also the said defendants heretofore to wit on the ninth day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road to situated in part in said County over which road at said time defendants propelled Engines and cars and plaintiff over that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine

across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where the said Rail Road crossed the said public highway and while crossing said public highway contrary to the form of the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have and demand from the said defendants a large sum of money to wit fifty dollars other parcel of the said sum of money first above demanded.

17th And For that Whereas also the said defendants heretofore to wit on the tenth day of August A.D. 1869 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which road at said time said defendants propelled Engines & Cars and plaintiff says that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place where said Rail Road crossed the said public highway and while crossing the said highway contrary to the form of the Statute

in such case made and provided whereby
an action hath accrued to the plaintiff to have
of and from the said defendant a large sum
of money to wit the sum of fifty dollars other
parcel of said sum first above demanded
18. And for that Whereas also the said defend
ants heretofore to wit on the Eleventh day
of July A.D. 1864 at the County of McLean
and State of Illinois were the owners of the
Chicago and Alton Rail Road, situated in
part in said County over which road at said
time defendants propelled Engines and cars
and plaintiffs does that the said Rail Road
crossed a public highway in said County
and that on the day and year aforesaid the
said defendants propelled an Engine across
said highway to without blowing a Steam
Whistle or ringing a Bell of thirty pounds
weight at the distance of Eighty rods from
the place where said Rail Road crosses said
highway and while crossing said highway
contrary to the form of the Statute in such
case made and provided whereby an action
hath accrued to the plaintiff to have of
and from the said defendants a large sum
of money to wit fifty dollars other parcel
of said sum of money first above demand
ed.

15. 19. And for that Whereas also the said defendants

heretofore to wit on the twelfth day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road situated in part in said County over which road at said time defendants propelled Engines & cars and plaintiffs saw that the said Rail Road crossed a public highway in said County and that on the day and year aforesaid the said defendants propelled an Engine across said highway without blowing a Steam Whistle or ringing a Bell of thirty pounds weight at the distance of Eighty rods from the place when the said Rail Road crossed the said public highway contrary to the Statute in such case made and provided whereby an action hath accrued to the plaintiff to have of and from the said defendants a large sum of money to wit the sum of fifty dollars other parcel of said sum of money first above demanded:

And for that Whereas also the said defendants heretofore to wit on the thirteenth day of August A.D. 1864 at the County of McLean and State of Illinois were the owners of the Chicago and Alton Rail Road Company situated in part in said County over which road at said time defendants propelled Engines and cars and plaintiffs saw that

the said Rail Road crossed a public high
way in said County and that on the day
and year aforesaid the said defendants pro
pelled an Engine across said highway
without blowing a Steam Whistle or ringing
a Bell of thirty pounds weight at the distan
ce of Eighty rods from the place where the
said Rail Road crossed the said public
highway contrary to the form of the Statute
in such case made and provided whereby an
action hath accrued to the plaintiff to have
and demand of and from the said defend
ants a large sum of money to wit fifty dollars
other parcel of said sum first above deman
ded. Yet the Chicago and Alton Rail Road
Company although often requested have not
paid to the People of the State of Illinois
and to the said George W Haward who sues
as aforesaid or either of them the said
sum of One Thousand dollars first above
demanded or any part thereof but to pay
the same or either of them the said Chicago
and Alton Rail Road Company have who
lly refused and still do refuse to the damage
of the said George W Haward who sues as
aforesaid of — Dollars and therefore as
well for the People of the State of Illinois
as for himself the said George W Haward
brings this Suit: By

Tipton & Benjamin his atty

17-

State of Illinois }
McLean County }

same
vs
same

In Circuit Court of said County

To September term 1864

We do hereby enter ourselves security for costs in this cause and acknowledged ourselves bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the Officers of this Court in pursuance of the laws of this State

Dated Aug 18th 1864

Tipton and Benjamin

Whereupon afterwards to wit on the Eighteenth day day of August A.D. 1864 there issued out of the Office of the Clerk of the Circuit Court in and for the County of McLean & State of Illinois a writ of summons in words & figures as follows to wit:

State of Illinois } ss. The People of the State
McLean County } of Illinois.

To the Sheriff of said County Greeting

We command you to summon the Chicago and Alton Railroad Company if found in your County personally to appear before the Circuit Court of said County

of McLean on the first day of the next term thereof to be holden at the court house in Bloomington on the first Monday in the month of September next to answer unto George W Howard who sues as well for the People of the State of Illinois as for himself in a plea of debt. debt One Thousand Dollars and have you then and there this writ and make return in what manner you execute the same.

Witness Edward R Roe Clerk of said Circuit Court and the seal thereof hereto affixed at Bloomington this 18th day of August A.D. 1864

Edward R Roe Clerk

Stamped for 50c By C.H. Bridgett Dpty

Which said Writ was returned to the Office of the Circuit Clerk endorsed as follows to wit

Executed this Writ this 18th day of August 1864 by delivering a true copy of the same to Orville Vaughn Agent of said Chicago and Alton Rail Road Company at Bloomington Ills. the President of said Company not being a resident of this County

N Dixon Sheriff

By E B Mitchell Dpty

And afterwards to wit at the Regular September Term A.D. of the McLean Circuit Court A.D. begun and held in the City of Bloomington in said County on the first Monday in September 1864 the following proceedings were had to wit of Record to wit: Defendants by its attorney R.E. Williams on the Seventh day of September 1864 filed its demmur to the plaintiffs declaration which said demmur was in words and figures as follows to wit:

State of Illinois
McLean Circuit Court
September term 1864.

George W Howard. vs. Assumpsit
vs
The Chicago and Alton Rail Road Co

And now comes the said defendant and defends the wrong and injury when &c and says that the matters and things in the said declaration and each and every count thereof contained in manner and form as therein set forth are not sufficient in law to compel this defendant to plead thereto and of this the defendant prays the judgment of the Court. R E Williams
for Defendant

And their being then and there Present
Hon John M Scott presiding Judge.
Edward R Roe Clerk
Norval Dixon Sheriff
The following proceedings were had. as
appears of record in said cause.

Wednesday September 7th 1864

George N Howard who sues as well
for the People of the State of Illinois
as for himself
vs.
The Chicago & Alton Rail Road Company
} In Debt

This day comes
the parties hereto by their attorneys and the
said defendant having filed its demmur to
said Plaintiffs Declaration and the same com-
ing on now to be heard is argued by counsil
and the Court having heard said demmer and
not being fully advised what judgment
ought to be rendered doth take the same un-
advisement.

And afterwards Present as before the follow-
ing proceedings were had as appears of record
to wit:

Thursday September 15th 1864.

George W Howard who sues as well for the People of the State of Illinois as for himself

vs

The Chicago & Allon Rail Road Company

In Debt

This day comes again the parties hereto by their attorneys & the Court having heard the demmurer to Plaintiffs Declaration filed herein and being now fully advised in the premises doth order that the same be overruled.

Friday September 16th 1864

And afterwards Present as before the following proceedings were had as appear of Record to wit:

Friday September 16th 1864

George W Howard who sues as well for the People of the State of Illinois as for himself

vs.

Chicago and Allon Rail Road Company

In Debt

This day comes again the parties hereto by their attorneys and the said defendant abides by his Demmurer to Plaintiffs Declaration herein whereupon it is considered by the Court that said Plaintiff recover of and from the said Chicago and Allon Rail Road Company

the sum of One Thousand Dollars the amount of the Debt in the Declaration mentioned one half of said Debt to his own use and the residue to the use of the People of the State of Illinois and also his costs by him in this behalf expended and that he have execution therefor And now said Defendants by its attorney prays an appeal from the Judgment of this Court to the Supreme Court which is granted upon said defendants entering into Bond in the sum of Two Thousand Dollars and by agreement of parties said defendant is allowed thirty days to file said Bond and the Bond is to be approved by the Clerk of this Court.

Which said Bond so filed was in words and figures as follows to wit:

Know all men by these Presents.

That we the Chicago and Alton Rail Road Company Peyton R. Chandler and A. C. Badger of the County of Cook and State of Illinois are held and firmly Bound unto George W. Howard who sues as well for the People of the State of Illinois as for himself in the penal sum of Two Thousand dollars for the payment of which well and truly to be made we and each of us bind ourselves

our heirs executors and administrators jointly and severally and firmley by these presents Sealed with our seals and dated at Chicago this 23d day of September Anno Domino one thousand eight hundred and Sixty four

The Condition of the above Obligation is such that whereas the above bounded George W Howard who sues as well for the People of the State of Illinois as for himself did on the 10 day of September one thousand eight hundred and Sixty four one thousand eight hundred and sixty four at a term of the Circut Court holden within and for the County of McLean and State of Illinois obtained a Judgment against the above bounded Chicago and Alton Rail Road Company for the sum of One Thousand Dollars and cents and costs of suit from which judgment the said Chicago and Alton Rail Road Company has prayed for and obtained an appeal to the Supreme Court of said State.

Now if the said Chicago and Alton Rail Road Company shall duly prosecute said appeal, and shall moreover pay the amount of the judgment costs interest and damages rendered and be rendered against it the said Chicago and Alton Rail Road Company in case the said

Judgment shall be affirmed in the said Supreme Court then the above obligation to be null and void otherwise to remain in full force and virtue

The Chicago & Alton R.R. Co
By P. B. Blackstone Pres (seal)
Peyton R. Chandler (seal)
A C Badger (seal)

Taken and entered into before me and approved this 26th day of September A.D. 1854

E R Roe Clerk

State of Illinois } ss I Edward R Roe
McLean County } Clerk of the Circuit Court in and for said County do hereby certify that the foregoing is a true and complete copy of a transcript of the records and files of my office pertaining to a certain cause wherein George W Howard who sues as well for the People of the State of Illinois as for himself Complainant and the Chicago and Alton Rail Road Company defendants

In Testimony Whereof I have hereunto set my hand and seal of Office this 2d day of December A.D. 1854

E R Roe Clerk
By C Roe Dpty



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The Chicago and Alton
Rail Road Company
Appellant
vs
George W. Howard qui tam &c
Appellee

In Supreme Court
April Term
A. D 1865

And now at this term comes said appellant The Chicago and Alton Rail Road Company by A W Church its attorney and saith that in the records and proceedings aforesaid and in the judgment rendered as aforesaid there is manifest Error in this to wit, That the matters and things in the declaration of the plaintiff in said record set forth are not sufficient in law for the plaintiff therein to have and maintain his action thereof against the said The Chicago and Alton Rail Road Company, and that the Court Erred in overruling the demurrer filed by the said The Chicago and Alton Rail Road Company to said declaration, And also in this that the court Erred in rendering judgment against the said The Chicago and Alton Rail Road Company and in favor of said plaintiff therein
Wherefore for the Errors aforesaid and other Error in the record & proceeding aforesaid this appellant prays that the judgment so rendered against it as aforesaid may be reversed annulled and wholly set at naught &c

A. W. Church
Attorney for Appellant

State of Illinois } In Supreme Court,
Third Grand Division } 2d April Term A.D. 1865:

George W. Howard, Guitau &c.
vs
The Chicago and Alton Rail Road Company } Joinder in Error:

And the said George W. Howard, Guitau &c, defendant in error, now comes and says, that there is no error, either in the record and proceedings aforesaid, or in giving judgment aforesaid, in manner and form as above assigned; and therefore he prays that the said judgment may be affirmed, and that his costs may be adjudged to him, &c:

By Lipton & Benjamin
Attys for Defts. in Error=

The Chicago & Alton
Railroad Company
Appellant
vs.
Geo. W. Howard guardian &c.
Appellee

Joinder in Error =

Filed Apl. 3d 1865
L. Leland
Clk

106-55

George W. Howard
- use of The People

vs.

Chicago & Alton R. R. Co

Filed March 29th 1855
L. Leland
Clerk

Record of Chicago & Alton
Rail Road $7.00 for this transcript
E. R. Roe Clerk

Price of Transcript 7.00

Supreme Court of Illinois.

THIRD GRAND DIVISION.

April Term, A. D. 1865.

The Chicago and Alton Rail Road Company, *Appellant*,	Appeal from
vs.	
Geo. W. Howard, *qui tam, &c.*, *Appellee.*	McLean County.

BRIEF STATEMENT OF CASE.

This was a *qui tam* action commenced by the appellee in the Circuit Court of McLean County. The appellee sued the appellant in an action of debt, to recover the penalty provided for by the act of November 5th, 1849, for omission to perform one of the duties prescribed by the act, viz: for failing at sundry times to ring the bell of its engines at the distance of eighty rods from public crossings.

The defendant in the Circuit Court filed a demurrer to the plaintiff's declaration, which demurrer the Court overruled. The defendant thereupon abiding by its demurrer, the Circuit Court rendered judgment against the defendant for the sum of One Thousand Dollars, from which judgment an appeal was granted to this Court.

ABSTRACT OF RECORD.

Record.

pp 1.—17. Plaintiff's declaration in twenty counts:

p. 23. Appeal prayed and granted—Sept. 16th, 1864.

pp. 23—25. Appeal bond filed and approved—Sept. 26th, 1864.

p. 25. Certificate of Clerk of Circuit Court.

ASSIGNMENT OF ERRORS.

1. The court erred in overruling the demurrer of the defendant to the plaintiff's declaration.

2. The court erred in rendering judgment against the defendant.

APPELLANT'S BRIEF AND POINTS.

The single question presented by the record in this case is whether the demurrer to the plaintiff's declaration was properly overruled by the court below.

The demurrer should have been sustained, because:

I.

The action was brought by the common informer, in his own name, and not by the District Attorney of the Eighth Judicial Circuit and in the name of the people.

The suit is a *qui tam* action, brought under the 37th section of the act of November 5, 1849, to provide for a general system of railroad incorporations. It is brought by the plaintiff in his own name, and by his own attorneys, to recover the penalties imposed by the statute for violations of its provisions. The statute provides that a penalty shall be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State.

Section 42 of the act provides that "all penalties imposed by this act may be sued for by the District Attorney, and in the name of the people of the State of Illinois."

We contend, in support of our first point,

1st. That the statute imposing the penalty having nowhere given the common informer the right to sue for the penalty, this action was improperly brought in his name.

When a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him generally to sue for the same, debt is sustainable, and he need not declare *qui tam*, unless where a penalty is given for a contempt; *but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for a recovery of the penalty.*

Chitty on Pleading, 12 Am. ed., vol. 1, p. 112.
Seward vs. Beach, 29 Barber, 239.
Colburn vs. Wright, 1 Metcalf, 232.
Barnard vs. Gostling, 2 East., 569.
Fleming vs. Bailey, 5 East., 313.

2d. Section 42 of the statute provides that all penalties imposed by this act *may* be sued for by the District Attorney and in the name of the people.

The true construction of the word *may*, here used, is *must*, and the action not having been brought by the District Attorney under the provisions of section 42, the demurrer of the defendant was well taken and should have been sustained.

The word "may" is to be construed as imperative, and not as permissive. It is a well settled principle of construction that the word "*may*" means *must* where the rights and interests of the public are concerned, or where the public or third persons have a claim *de jure* that the power shall be exercised.

Such is the rule laid down by the Supreme Court of the United States in

Minor *vs.* The Mechanics Bank of Alexandria, 1 Peters, 64;

and by the Supreme Court of the State of New York in

Malcom *vs.* Rogers, 5 Cowen, 188;

and by Chancellor Kent in

Newburgh Turnpike Co. *vs.* Miller, 5 Johns. Ch. R., 113;

and in Pennsylvania in Schaeffer *vs.* Jack, 14 Serg't & Rawle, 430.

In our own State, this court has laid down the same rule of construction and a provision that all actions, local or transitory, against any county, *may* be commenced and prosecuted to final judgment in the county against which the action is brought, was held to mean that such actions *must* be brought in the Circuit Court of the county defendant.

Schuyler Co. *vs.* Mercer Co., 4 Gilman, 20.

In another case, the word "*may*," used in the 22d section of the statute under which this action is brought, was held to be imperative.

Section 22 provides that any number of persons *may* present a petition to the Legislature, stating the places from and to which they propose to construct their road, &c., and praying the Legislature to determine whether the construction of the proposed road will be of sufficient public use to justify the taking of private property for the construction of the same.

This court held that the word *may*, here used, means *must* or *shall*, and that the railroad company, before proceeding to condemn land under this statute, *must* present a petition to the Legislature as required by the statute.

Gillinwater *vs.* the Mississippi & Atlantic R. R. Co., 13 Ill., 1.

If the construction of the word for which we contend is correct, then all actions brought to recover penalties under the act of Nov. 5, 1849, must be brought by the District Attorney, in the name of the people and not by the common informer, and for this reason alone the demurrer of the defendant was well taken, and should have been sustained by the court.

NOTE.—In the case of

Higby *vs.* The People, 4 Scammon, 165,

the action was brought in the name of the people, the State having no interest in the recovery, the penalty going to the informer and the county. The court say, the statute *not authorizing the suit to be instituted in the name of the people*, it was improperly brought, and the court erred in not dismissing it.

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II.

The declaration is insufficient for want of certainty in the description of the place where the alleged violations by the defendant of the provisions of the statute occurred.

The words of each count of the delaration are: "That the "said railroad crossed *a public highway* in said county, and that "on the day and year aforesaid the defendants propelled an en- "gine across *said highway* without blowing a steam whistle or "ringing a bell of thirty pounds weight at the distance of eighty "rods from the place where the said railroad crosses the *said* "*public highway* and while crossing *said highway*, contrary to "the form," &c., &c.

The several road crossings where the alleged violations of the statute occurred, are not specified with sufficient certainty. The defendant's railroad crosses many public roads in McLean County, and the declaration should have notified the defendant which of these roads was crossed by the defendant in violation of the statute, otherwise defendant would be wholly at a loss to obtain evidence to rebut the charge. If it prepared itself to show that it did not violate the law at *one* crossing, under this declaration the proof might have shown a violation of the statute at any other road crossing in the county. To require the defendant to come into court prepared to show that it violated the statute at *none* of the road crossings in McLean County would be a monstrous hardship—a condition which it *could* not fulfil.

But the declaration should have been more particular in this respect, for another reason.

The defendant has the right to plead a judgment in this suit, in bar of any other suit brought to recover the penalty for the same offence. How could the defendant do this under the present record? The place should have been specifically and distinctly set forth in the declaration, that the defendant might be able to produce the record in any subsequent suit for the same offense, and plead it in bar to a second recovery. Having failed to render his declaration certain in this very material respect, it was fatally defective, and the defect may be taken advantage of either by demurrer, or by motion in arrest.

Gould's Pleading, Ch. 3 sec. 51;
Playter's Case, 5 Co., 34;
Phelps *vs.* Sill, 1 Day, (Conn.) 315;
City of New Orleans *vs.* Gordon, 12 La. Ann. Rep. 749;
Dixon *vs.* Freeman, Penn. (N. J.) 411;
Anonymous, Penn. (N. J.) 516;
Hill *vs.* Herbert, P enn. (N. J.) 924;
Wiatt *vs.* Essington, 2 Ld. Ray, 1410;
Bertie *vs.* Pickering, & *ux*, Burrows, 2456. Vol 4

This is a penal action, and the certainty required in indictments for crimes is applicable to the declaration in this suit.

A. W. CHURCH,
Attorney for the Appellant.

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The Chicago & Alton
Rail Road Co
vs
George W. Howard & Bros

Abstracts & Briefs

Filed April 4 1865
S Leland
Clerk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1865.

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APPELLEE'S ARGUMENT.

The appellant makes two points:

1st, That Geo. W. Howard, *qui tam* is not properly plaintiff.

2d, That the declaration is insufficient for want of certainty.

I

The appellant claims that under the 38th section of the act of Nov. 5th, 1849, to provide for a general system of railroad incorporations, the informer cannot maintain a *qui tam* action.

The statute *expressly* provides that one half of the penalty shall go to the informer, and the other half to the State. This is equivalent to an express provision giving one half of the penalty to any such person as will sue therefor. The terms "common informer" and "such person as will sue for the penalty" are synonomous. Blackstone uses them interchangeably:" But more usually these forfeitures created by statute are given at large to any *common informer*; or, in other words, to any *such person or persons as will sue for the same*. and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the King, to the poor, or to some public use, and the other part to the informer or prosecutor: and then the suit is called a *qui tam* action, because it is brought by a person 'qui tam pro domino rege &c., quam pro se ipso in hoc parte sequitur'. If the King therefore himself commences this suit, he shall have the whole forfeiture.," 3 Bl. Com. 161-2.

The Statue under which this action was brought *expressly gives to the informer* one half of the penalty. We contend that thereby he is enabled generally to sue *qui tam* in an action of debt.

"A person to whom a statute gives a certain penalty may maintain an action of debt for it, though the action is not in terms given him by the statute. * * Where part of a penalty is given to the King, and part to another person, such person may in an action for it state that he sues 'as well for the King as himself.'"

Pres. & Coll. Physicians v. *Salmon.* 1 Ld. Raym, 680. From the sixth exception taken in that case, it seems that the action was brought *tam quam.* Id. 683.

Where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident. See *Ewer* v. *Jones*, 2 Ld Raym. 934, 937. This is in accordance with the maxim *ubi jus ibi remedium.*

But the appellant quotes the following passage from Chitty. "Where a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him *generally* to sue for the same, debt is sustainable; and he need not declare *qui tam* unless where a penalty is given for a contempt, but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty." 1 Ch. Pl. 112. We have endeavored to show that the express giving of part of a penalty to an informer does enable him *generally* to sue *qui tam.*

The last clauase of the above passage is emphasized and mainly relied upon by the appellant. This clause is based upon *Fleming* v. *Bailey*, 5 East, 313, which is also cited by appellant. In that case the 35th section of the statute enacted "that any pecuniary penalty imposed by this act exceeding the sum of 20*l.*, may be sued for and recovered by any person who will sue for the same in any *court of record at Wesminister*, &c., and any pecuniary penalty imposed by this act and *not exceeding* the sum of 20*l.* &c., *shall and may* be recovered before any justice of the peace," &c. The 36th section enacted "that all pecuniary penalties imposed by this act, shall, *when recovered*, either by action in any court, or *in a summary way* before any justices, be applied, one moiety to the plaintiff in any such action, or *the informer before any justice*, the other moiety to the king." The statute contemplated that a penalty *not exceeding* 20*l.* should be recovered in a summary way before a justice, and only when recovered in such summary way was the informer entitled to a moiety thereof. Where the penalty exceeded 20*l.*, a moiety was to go to any such person as would sue for the penalty, or, in other words, to the common informer *without limitation*; but when the penalty did not exceed 20*l.*, a moiety was to go to "the informer before any justice." In the latter case it was not given to any informer, but only to the informer before a justice. Such person alone was entitled to the moiety of a penalty not exceeding 20*l.* The informer sued for a penalty *not exceeding* 20*l. in a court of record*, and it was properly held that he could not sustain the action. The moiety of a penalty not

exceeding 20*l.* *was not given to him* by the statute, and therefore he was not entitled to sue. The whole or part of a penalty must be expressly given to a common informer in order to enable him to sue for it in his own name. This, we contend, was all that was decided in *Fleming* v. *Bailey*, and all that was meant by Chitty in the above quotation. This view is confirmed, we think, by the following passage from Chitty: "In debt on a statute at the suit of a party grieved, or by an informer, where the whole of the penalty is *given to him*, the commencement is the same as in debt on a contract; but where a part of the penalty is *given to the informer*, and the king, or the poor of the parish, &c., the commencement and other parts of the declaration usually state that the plaintiff sues *qui tam*, &c., though this is not necessary unless there has been a contempt of the king." 1 Ch. Pl (11 Am. Ed.) 371-2.

The report of *Barnard* v. *Gostling*, 2 East, 569, cited by appellant, does not show whether or not the statute gave the penalty to a common informer. If it did not, of course the informer could not sue for the penalty.

In *Colburn* v. *Sweet*, 1 Met, 2 32, the penalty was given conditionally to engineers. The suit was brought by the "clerk of the chief engineer." The penalty *not being given to him*, it was held that he could not maintain the action. But the court say: "Whether an action would lie it the name of the engineers, we give no opinion. It seems to be held, that when a penalty is given wholly to one or more persons, an action will lie for it in the name of those persons, although no express authority to sue for it is contained in the statute. *Pres and Coll, Physicians* v. *Salmon*, 1 Ld. Raym, 682. To the application of this rule, however, to these statutes, there are some objections, which are, that the penalty is not given absolutely to the engineers, but in a certain contingency, that of an engineer's testifying, it is to go to the poor." 1 Met. 234-5. Here the rule seems to be recognized that when the whole or part of a penalty is *given to an informer*, he is thereby enabled generally to sue. We add "part" of a penalty because in the case in 1 Ld. Raym, as we have already noted, the action was brought *tam quam*.

We have not seen *Seward* v. *Beach*, 29 Barb 239, X but from the Digest it appears that part of the penalty was given to the "complainant" instead of the "informer." By the term "complainant" may have been meant a party aggrieved. Even if the case fully supports the appellant's position it was probably decided upon a misapprehension of the cases already examined in East and Metcalf.

But we insist that this Court has already settled the point in controversy. In *Higby* v. *The People*, 4 Scam. 165, the

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penalty was to go one-half to the informer and the other half to the county, and neither informer nor county was expressly enabled to sue in the sense insisted upon by the appellant. Suit was instituted in the name of the people, but inasmuch as no part of the penalty was *given* to the people—as they had no interest in the recovery—as nothing had been forfeited to them—it was held that the statute did not authorize suit to be instituted in the name of the people, and that it was improperly brought. The Court add: "The action should have been brought in the name of the informer, or in that of the county; most properly in the name of the informer, for the use of himself and the county." Id. 166.

The case of *Galena & Chicago Union R. R. Co.*, v. *Appleby*, 28 Ill. 283, was upon the statute in question, and is directly in point. One of the errors assigned was, that Appleby had no right to prosecute the action "*qui tam* in his own name and in behalf of the State of Illinois." (Id. 285—6.) Among the authorities cited by the plaintiff in error was the case in 29 Barb. 241, already alluded to. (Id. 287.) The counsel for Appleby relied upon the case in 4 Scam, 165. (Id. 288.) The judgment for Appleby was affirmed.

But notwithstanding the decision in 28 Ill., 283, on the very statute in controversy, the appellant further insists that the penalty can be recovered only in the name of the people by the district attorney. In support of this position, section 42 of the statute is relied upon. "All penalties imposed by this act *may* be sued for by the district attorney, and in the name of the people of the State of Illinois; and if such penalty be for a sum not exceeding one hundred dollars, then such suit *may* be brought before a justice of the peace." We may observe in passing that it will hardly be contended that the second "may," in the above section is imperative. This Court has laid down the rule that "the word 'may' means 'must,' or 'shall,' *only* in cases where the public interests and rights are concerned, and when the public, or third persons, have a claim *de jure* that the power should be exercised." *Gillinywater*, v. *Mississippi & Atlantic R. R. Co.*, 13 Ill. 1, 3; *Schuyler Co.*, v. *Mercer Co.*, 4 Gilm, 20. The rule is a sound one, the only question being as to its application. In both of those cases public interests and rights were concerned. But in all the other cases cited by appellant, with perhaps the exception of the Pennsylvania case, which we have not seen, the rule was held not to apply. Section 10, of chapter 9, Rev. Stat. 65, provides that if the forthcoming bond in attachment be forfeited, "the sheriff *may* assign such bond to the plaintiff in attachment." In *Young* v. *Camp-*

bell, 5 Gilm. 80, suit was brought in the name of the sheriff; the defendand insisted that the word "may," meant "shall" or "must," but the Court held otherwise. We can adopt the argument of this Court in that case, and apply it to the present case. Neither the interest of the public, nor any of the parties requires that construction. It is a matter of no moment to the defendant whether the suit be brought in the name of the informer *qai tam*, or of the people. The defendant could make the same defense in either case, and with equal facility. Id. 83.

The Supreme Court of the United States in *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 64, cited by appellant, held that "the ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions." The object of section 42 is to allow a *civil* suit in the name of the people in the Circuit Court, and when the penalty does not exceed one hundred dollars, before a justice of the peace. This is a more summary and less cumbersome method of proceeding on the part of the people for the whole of the penalty, than the common law mode of prosecution by indictment, especially when the penalty does not exceed one hundred dollars. The object of this section certainly would not be defeated by allowing the informer to sue *qui tam*. Under this section the people *may* proceed by civil suit for the whole of the penalty wherever they could prosecute for the same at common law by indictment. If the informer sues *qui tam* first, he is entitled to half of the penalty, and if the people sue first under this section, they are entitled to the whole, just as at common law they would be entitled to the whole by prosecuting first. It is a well settled principle that when a penalty is given partly to the public, and partly to a common informer, the State may prosecute for the *whole*, unless an informer has commenced an action *qui tam* for the penalty. *State* v. *Bishop*, 7 Conn. 181; *Commonwealth* v. *Howard*, 13 Mass. 221. In the Massachusetts case the Commonwealth prosecuted and the judgment awarded part of the penalty to the informer. For this cause it was reversed, and a judgment ordered to be entered, instead of it, that the Commonwealth recover the whole penalty to its own use. So it seems that the appellee's remedy for recovering one-half of the penalty is only by suit *qui tam*, and that section 42 affords the informer no remedy.

II

The appellant claims that the declaration does not specify the road crossing where the violations of the statute occurred with sufficient certainty.

The uncertainty in *Playter's* case, 5 Co. 34, cited by appellant, would now be held to be cured after a general demurrer. See 2 Will. Saund. 74 note (1).

In *Wiatt* v. *Essington*, 2 Ld. Raym. 1410, and in *Bertie* v. *Pickering*, 4 Burr. 2455, the action was trespass for taking goods, and the only description in the declaration was "divers goods and chattles of the plaintiff," which was clearly insufficient; although the law does not now require so much precision, and certainty in the description of the goods, as formerly, for if they are described according to common acceptation, it is sufficient. See 2 Will. Saund. 74, note (1).

We have not had access to the other cases cited by appellant. He closes his argument by saying that "this is a penal action, and the certainty required in indictments for crimes is applicable to the declaration in this suit." Testing the declaration by even such a rule, and we still claim that it is sufficient. In an indictment for selling spiritous liquors the kind need not be specified. *Zarresseller* v. *The People*, 17 Ill. 101; *Commonwealth* v. *Odlin*, 23 Pick. 275. So the indictment is not defective for want of the name of the purchaser, or an allegation that he was unknown. And as a question of pleading, certainty to a common intent does not require it. *Cannady* v. *The People*, 17 Ill. 158, 160; *The People* v. *Adams*, 17 Wend. 475.

In *Gebbart* v. *Adams*, 23 Ill. 397, the action was for cutting timber, and this Court laid down the rule which, we think, governs this case: "It is a correct rule in declaring upon a statute, to describe the cause of action, whatever it may be, in the words of the statute." Id. 400

The declaration in this case follows literally the one in *Galena & Chicago Union R. R. Co.*, v. *Appleby*, 28 Ill., as given on page 284, with the single exception that Appleby in bringing an action *qui tam* in his own name, employed the State's Attorney. If the informer is entitled to bring an action *qui tam* in his own name, it seems to us immaterial whether he employs the State's Attorney or any other attorney to bring and conduct his suit. The informer might not wish to employ the State's Attorney, especially if he were the regular attorney of the defendant, as was the fact in this case, although it may not appear from the record that his name was signed to the demurrer, and stricken therefrom after he had argued it on behalf of the defendant before the court below. We may add in conclusion that the declaration in 28 Ill. 284, has been adopted as a precedent by Puterbaugh in his Treatise on Illinois Pleadings and Practice Page 219.

TIPTON & BENJAMIN,

Counsel for Appellee.

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The Chicago & Alton R.R. Co
Geo. M. Dawson & others &c,

Appellees Argument

Filed Apl. 3d 1865.
L. Leland
Clk.

Supreme Court of Illinois,

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29 Barbour 241, 242

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But notwithstanding the decision in 28 Ill., 283, on the very statute in controversy, the appellant further insists that the penalty can be recovered only in the name of the people by the district attorney. In support of this position, section 42 of the statute is relied upon. "All penalties imposed by this act *may* be sued for by the district attorney, and in the name of the people of the State of Illinois; and if such penalty be for a sum not exceeding one hundred dollars, then such suit *may* be brought before a justice of the peace." We may observe in passing that it will hardly be contended that the second "may," in the above section is imperative. This Court has laid down the rule that "the word 'may' means 'must,' or 'shall,' *only* in cases where the public interests and rights are concerned, and when the public, or third persons, have a claim *de jure* that the power should be exercised." *Gillinywater*, v. *Mississippi & Atlantic R. R. Co.*, 13 Ill. 1, 3; *Schuyler Co.*, v. *Mercer Co.*, 4 Gilm, 20. The rule is a sound one, the only question being as to its application. In both of those cases public interests and rights were concerned. But in all the other cases cited by appellant, with perhaps the exception of the Pennsylvania case, which we have not seen, the rule was held not to apply. Section 10, of chapter 9, Rev. Stat. 65, provides that if the forthcoming bond in attachment be forfeited, "the sheriff *may* assign such bond to the plaintiff in attachment." In *Young* v. *Camp-*

bell, 5 Gilm. 80, suit was brought in the name of the sheriff; the defendand insisted that the word "may," meant "shall" or "must," but the Court held otherwise. We can adopt the argument of this Court in that case, and apply it to the present case. Neither the interest of the public, nor any of the parties requires that construction. It is a matter of no moment to the defendant whether the suit be brought in the name of the informer *qui tam*, or of the people. The defendant could make the same defense in either case, and with equal facility. Id. 83.

The Supreme Court of the United States in *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 64, cited by appellant, held that "the ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions." The object of section 42 is to allow a *civil* suit in the name of the people in the Circuit Court, and when the penalty does not exceed one hundred dollars, before a justice of the peace. This is a more summary and less cumbersome method of proceeding on the part of the people for the whole of the penalty, than the common law mode of prosecution by indictment, especially when the penalty does not exceed one hundred dollars. The object of this section certainly would not be defeated by allowing the informer to sue *qui tam*. Under this section the people *may* proceed by civil suit for the whole of the penalty wherever they could prosecute for the same at common law by indictment. If the informer sues *qui tam* first, he is entitled to half of the penalty, and if the people sue first under this section, they are entitled to the whole, just as at common law they would be entitled to the whole by prosecuting first. It is a well settled principle that when a penalty is given partly to the public, and partly to a common informer, the State may prosecute for the *whole*, unless an informer has commenced an action *qui tam* for the penalty. *State* v. *Bishop*, 7 Conn. 181; *Commonwealth* v. *Howard*, 13 Mass. 221. In the Massachusetts case the Commonwealth prosecuted and the judgment awarded part of the penalty to the informer. For this cause it was reversed, and a judgment ordered to be entered, instead of it, that the Commonwealth recover the whole penalty to its own use. So it seems that the appellee's remedy for recovering one-half of the penalty is only by suit *qui tam*, and that section 42 affords the informer no remedy.

II

The appellant claims that the declaration does not specify the road crossing where the violations of the statute occurred with sufficient certainty.

The uncertainty in *Playter's* case, 5 Co. 34, cited by appellant, would now be held to be cured after a general demurrer. See 2 Will. Saund. 74 note (1).

In *Wiatt* v: *Essington*, 2 Ld. Raym, 1410, and in *Bertie* v. *Pickering*, 4 Burr. 2455, the action was trespass for taking goods, and the only description in the declaration was "divers goods and chattles of the plaintiff," which was clearly insufficient; although the law does not now require so much precision, and certainty in the description of the goods, as formerly, for if they are described according to common acceptation, it is sufficient. See 2 Will. Saund. 74, note (1).

We have not had access to the other cases cited by appellant. He closes his argument by saying that "this is a penal action, and the certainty required in indictments for crimes is applicable to the declaration in this suit." Testing the declaration by even such a rule, and we still claim that it is sufficient. In an indictment for selling spiritous liquors the kind need not be specified. *Zarresseller* v. *The People*, 17 Ill. 101; *Commonwealth* v. *Odlin*, 23 Pick. 275. So the indictment is not defective for want of the name of the purchaser, or an allegation that he was unknown. And as a question of pleading, certainty to a common intent does not require it. *Cannady* v. *The People*, 17 Ill. 158, 160; *The People* v. *Adams*, 17 Wend. 475.

In *Gebbart* v. *Adams*, 23 Ill. 397, the action was for cutting timber, and this Court laid down the rule which, we think, governs this case: "It is a correct rule in declaring upon a statute, to describe the cause of action, whatever it may be, in the words of the statute." Id. 400

The declaration in this case follows literally the one in *Galena & Chicago Union R. R. Co.*, v. *Appleby*, 28 Ill., as given on page 284, with the single exception that Appleby in bringing an action *qui tam* in his own name, employed the State's Attorney. If the informer is entitled to bring an action *qui tam* in his own name, it seems to us immaterial whether he employs the State's Attorney or any other attorney to bring and conduct his suit. The informer might not wish to employ the State's Attorney, especially if he were the regular attorney of the defendant, as was the fact in this case, although it may not appear from the record that his name was signed to the demurrer, and stricken therefrom after he had argued it on behalf of the defendant before the court below. We may add in conclusion that the declaration in 28 Ill. 284, has been adopted as a precedent by Puterbaugh in his Treatise on Illinois Pleadings and Practice Page 219.

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The Chicago & Alton R.R. Co.
vs
Geo. W. Dorman et al

Appellees Arguments

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L. Leland Clk.