No. 8827

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

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vs.

Epperson Brown

ABSTRACT.

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

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

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

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

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

Plea General Issue.

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

Motion for new trial. Motion overruled.

Bill of exceptions tendered and signed &c.

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

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

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

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

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

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

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

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

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

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

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

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

Defendant excepted to all of said instructions.

The court instructed the jury for the defendant.

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

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

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

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

ERRORS ASSIGNED.

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

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

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

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Defendant excepted to all of said instructions.

The court instructed the jury for the defendant.

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

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

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