

No. 13284

Supreme Court of Illinois

Galena & Chicago

Union R. R. Co.

vs.

Crawford

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1861. }

THE GALENA AND CHICAGO UNION RAILROAD CO.	}	
<i>Appellant,</i>	}	APPEAL FROM
VS.	}	WINNEBAGO CIRCUIT COURT.
CHARLES CRAWFORD,	}	
<i>Appellee.</i>	}	

ABSTRACT OF RECORD.

STATEMENT OF CASE.

This was an action on the case, brought by the appellee against the appellant, under the act of 1855, entitled "An act to regulate the duties and liabilities of Railroad Companies," for killing a mare, which the appellee claims got upon the railroad track over an insufficient cattle guard.

The mare was depastured on the public highway by Crawford, and, as is claimed by him, it strayed from the public highway on to the railroad track, over an insufficient cattle guard.

The suit was commenced at the February Term, A. D. 1861, and was tried at the same term, and resulted in a verdict for Crawford of one hun-

dred and sixty-seven dollars and fifty cents. The plaintiff, upon the motion for a new trial, remitted a portion of the judgment, and a judgment was finally entered for one hundred and fifty dollars.

Pages 3, 4, 5, 6, 7, 8, 9— **Plaintiff's Narr.**

It consists of Two Counts.

The first count alleges that the defendant, on the 14th day of June, 1856, was and still is, a Railroad Corporation, and was running cars from Chicago to Freeport; and that, according to an act entitled "An act to regulate the duties and liabilities of Railroad Companies, approved Feb. 14th, 1855," the defendant ought to have built and made, within six months from and after the opening of said railroad for use, and maintained, at all road crossings, existing or established, cattle guards, suitable and sufficient, &c. It then avers neglect of the Company to erect, build and maintain cattle guards at a Railroad crossing established and existing across the railroad in Winnebago, in the county of Winnebago; then alleges that "*a certain mare, of which the said plaintiff was then and there on the said 14th day of June, 1856, lawfully possessed in his own right, of great value, to wit: of the value of three hundred dollars, was then and there lawfully feeding and depasturing in the public highway or road in the said town of Winnebago aforesaid, and then and there went from out of the said highway or road on to and upon the said railroad of the said defendant, at and from the said public highway or road crossing, across, on or upon a cattle guard not suitable or sufficient to protect said railroad from cattle, horses, sheep or hogs; and that the said animal of the said plaintiff, so being upon the said railroad of the said defendant, on the 14th day of June aforesaid, was then and there run over and killed, &c. The count then concludes as follows:—*" And the said plaintiff further avers that the said mare did not *get on, to, or upon the said railroad* of the said defendant five miles from a settlement, nor was said animal killed, run against, over and upon, at any public highway or road crossing, nor within the limits of any town, city or village, nor did said animal *get on* to said railroad within the limits of any town, city or village, and that it was necessary such cattle guard should have been made and maintained to prevent cattle, horses, sheep and hogs from getting upon the track of said railroad, to the damage of said plaintiff of three hundred dollars.

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The second count is substantially like the first, and concludes as follows : — “And the said plaintiff further avers that the plaintiff’s said animal did not *get on, to, or upon the said defendant’s said railroad* five miles from a settlement, nor was said animal killed, run against, over and upon as aforesaid at any public highway or road crossing, nor within the limits of any town, city or village, nor did the said animal *get on, to, or upon said railroad* within the limits of any town, city or village, and it was necessary that such cattle guard should have been made to prevent cattle, horses, sheep and hogs from getting upon the said railroad and the track of the same, to the said plaintiff’s damage of three hundred dollars; and therefore he brings suit.”

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PLAINTIFF’S EVIDENCE.

John Elliott was introduced and sworn as a witness on behalf of plaintiff, and testified as follows :

Resides in the town of Winnebago, in Winnebago Co. ; resided there in A. D. 1856; lives sixty-five rods from the Galena & Chicago Union Railroad; don’t know when Railroad was built; think it was built in A. D. 1853; the cars commenced running to Freeport in A. D. 1854: the Railroad has been in use since 1854; was completed to Freeport in 1854.

20

Sometime in June, four years ago last Summer, I saw the mare; it was about one o’clock when I first saw her; I went away, and it was about half past four when I returned; the mare was well when I went away; she was not there when I came back; I saw the colt and followed it to the mare; I saw the mare—she had three broken legs; the colt got over the cattle guard, some way; I don’t know how; the colt was sucking; I saw the mare in a ditch down the embankment; the legs were broken—not off, but were hanging by flesh; I don’t know how colt got on the track. Two trains passed that day; one freight train east, one passenger train west; the freight train struck the mare; I judged the freight train struck the mare, from the way she laid.

I examined cattle guard; saw foot marks on the slats, which were made of pine; the mare had walked over the cattle guard very near the public crossing; the cattle guard was at a county road, in the town of Winne-

bago, in this county; the cattle guard is in the country, and not in a town, city, or village. There was not over two inches space between slats; the horses' feet could not slip through; there was not a place to let a horses' leg through between the rails; the width of the cattle guard is four feet; I did not measure it; I guess it was four feet. I could see tracks of shoes on the slats; I examined the cattle guard that evening when the mare lay there; she was not far from cattle guard when struck; the mare was well at half past one p. m.; I saw her at six p. m., lying injured; the mare was a decent mare; horses were high; don't know her exact value; I am a farmer; use horses myself; the mare was worth, at that time, from \$140 to \$145; she was shot Sunday forenoon; this happened Saturday; she was not of any value after the injury; I saw she was well at one o'clock.

Cross Examined by defendant :

21 The mare was at Riley Hall's land when I saw her at one o'clock; she was on the north side of railroad — on commons; she was eighty rods from the railroad; the railroad was fenced on only one side; there was not a fence between her and railroad; she had to go to highway to get on railroad. *I found her fifteen yards from cattle guard; I cannot tell when she was struck; she was standing on track when struck; she was standing on centre of track when struck; I could see gravel thrown up and blood on the rails. I do not know but that the cars brought her from Winnebago, but think not. She was fifteen yards from crossing. There were foot marks of horses all the way from cattle guard to where she was struck; there were marks on the guard made by horse shoes. The slats were diamond shaped, with edge up; the guard was made of three inch square timber. Saw tracks on edge of two slats; saw but one track.*

22 The mare had not been on run; the tracks were of an animal walking; don't think she ran at all; *I had never seen the mare until that afternoon; I was ten yards from her when I saw her at one o'clock; I had never seen her before. Crawford (the plaintiff) lives on the state road one mile from the railroad. It was further, one mile and a half, where mare was killed. The road that intersects runs south to Bryan's. It is one mile and a quarter from the place where the Bryan road intersects*

state road to the railroad. I can't tell how far plaintiff lives from the railroad. Part of his land is south of the railroad; his house is north of the railroad. *There is improved land, but not quite up to where state road intersects. Between plaintiff's house and improved land, Charles Morgan lives. The railroad was all fenced at the time accident occurred. The cattle guard was at highway crossing. The mare got on the railroad out of the highway.*

I meant the cattle guard was very short; the slats were only about four feet long; the pit was about one foot deep. *I did not measure cattle guard or depth; grass and rubbish grew right through guard; I did not examine guard to see whether it was right; saw the guard every day; was crossing it daily, almost; I lived on south side of railroad; I lived sixty-five rods from cattle guard. The plaintiff lived west, on state road, one mile and a quarter.*

Direct Examination resumed :

I don't know just where mare was struck; I think fifteen yards from cattle guard; the railroad is straight there; from the west an object could be seen one hundred rods; cannot see far from the other way. There were other cattle guards that were insufficient; they have been removed because they were found to be insufficient.

23

Adams H. Davis was introduced, and sworn as a witness on the part of the plaintiff, and testified as follows :

I lived on the state road in June, 1856, in town of Winnebago, county of Winnebago, eighty rods from plaintiff. Have seen plaintiff drive the mare; I remember she was crushed with the cars in 1856; I saw her east of the crossing on the railroad track; *I saw her three or four rods east of crossing; saw her Monday morning; Ricker and plaintiff was present; three of her legs were broken, and her hind parts injured; it happened on the Galena Railroad; I saw where she was standing, and where she went down the bank; the cars must have been going east; an object could have been seen from a point one-half a mile or more. I did not see cattle guard; we measured the slats with a square; the average*

distance apart of the slats was one and one-half inches; some more and some a less distance apart; the cattle guard was not over five feet wide — length of slats. I saw horse tracks; there were two or three tracks on timbers; they were going east; I saw toe and heel corks. My opinion is that the tracks were made by the mare; we compared a shoe, which we took off the mare, with the tracks on the slats, and found they corresponded; the prints of nails were partially on two sticks; we took off only one shoe; I helped take it off.

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Cross Examined by defendant :

I came in the Spring of 1856. I came to Rockford in the Fall of 1855. The railroad was in operation in the Winter of 1855. I have seen the mare, but could not say how old she was; she was not young. *The place where the mare was killed is three miles from plaintiff's;* she was thrown on the north side of railroad; I saw no tracks on highway before she came on railroad; I don't know what the weather was the day the mare was killed; I saw tracks after the mare crossed the guard, and before she got to the place where she was killed; the mare was not killed in any town, city, or village, or at any road crossing.

S. J. Ricker was introduced and sworn as a witness on the part of the plaintiff, and testified as follows :

I saw the mare on Monday morning; I don't remember seeing her previously; she was gray; I had seen plaintiff driving her; I suppose I saw her on Monday; Davis, plaintiff, and others were there; *she was three rods east of the cattle guard; I don't know where she was struck;* I saw two foot prints; saw horse shoe compared with those prints; they corresponded.

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I measured between the slats; the slats were $1\frac{1}{2}$ inches; some exactly that — some over, some under; I cannot say how wide cattle guard was, but it was not, I think, over five feet; the pit was about length of square, two feet deep; there were one or two tracks near the north rail; the train going east must have struck mare; they commenced cutting slats

that (Monday) morning that we measured; they hewed the slats in the presence of me, Davis and others.

Cross Examined by defendant :

This was four or five years ago; was a difference between fore and hind shoes; I cannot tell difference; *the shoe had five nails in it; it had heel and toe corks; any other medium sized shoe would have done to test the holes; this was a medium shoe; the plaintiff lived three miles from cattle guard; plaintiff allowed the mare to run at large in the Summer time.*

Samuel Moat was introduced and sworn as a witness on part of plaintiff, and testified as follows :

23 Resided, in June, 1856, in town of Winnebago, in this county; I live fifty rods from railroad; I know the plaintiff— am some acquainted with him; live three miles from plaintiff. I saw the mare about nine or ten o'clock that morning—the first time I ever saw her; she was nine or ten rods from Mr. Hall's stone house; she was grazing; she was pretty much white; I saw her next, half-past seven same day; she was lying down embankment, in a gutter; she had three broken legs, and was also jammed up somewhat in her hind parts; there was no one present when I saw her; my boys told me, and I went to see her, and found colt there. *I did not examine track.* I saw the mare next, on Sunday morning; she was lying in gutter. *I could not tell what killed her.* It was fifteen or twenty yards from cattle guards; the cars were going east; she laid with her head north; if cars were going other way, she would not have lain as she did; saw track on south side of railroad; saw where grass had been eaten on south side of railroad; she was first struck fifteen or seventeen yards from crossing; the crossing was at a public road; I saw the mare about noon on Sunday; plaintiff and Blackburn and others were there; I examined cattle guard on Sunday; the slats of the cattle guard were, as I put my hand down between them, the width of my hand apart; I put my hand through, where steps of horses walked off; the timber of the slats was pine; *I saw marks of horses on slats;* the marks were those of the shoes of horses; saw marks of toe corks and heel corks; they were more visible on south side than on north side;

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marks were on two slats ; saw tracks where she had walked on south side — fresh tracks ; I did not see shoes of mare taken off after she was dead ; I saw five of Stephenson's cattle walk over same cattle guard from the track ; the spaces had been widened between slats when oxen jumped over ; the railroad men have made the spaces wider since ; I have seen sheep jump over the cattle guard ; a rope was put around the colt's neck, and it was pulled over ; the cattle guard was a little over four feet wide ; the road was used two years before mare was killed ; the road was fenced ; it had been fenced a year at that time ; I stood still and hopped over the cattle road several times.

Cross Examined by defendant :

28 I was coming to Rockford the morning I saw the mare ; I live one mile and a half south of the state road ; I knew then where plaintiff lived ; could not tell how long plaintiff had lived there ; did not pass plaintiff's house in coming to Rockford. I live on road that crosses railroad fifty rods from crossing ; I saw the mare near the road that crosses state road : she was on south side of railroad and seventy rods from it ; she was east of highway that crosses on Hall's land ; she was on vacant ground ; she was one and three-fourths of a mile from plaintiff's house ; she was a half mile south of where we turn to go to Rockford ; it is, I think, about one mile from State road to the railroad ; the mare was fifty rods from railroad ; she was north of railroad and east of cross road ; she was *one and a half miles from home* ; there was no fence between her and public road ; it was fifty rods from public and seventy rods from railroad ; did not know who she belonged to at that time ; I never saw her before ; never measured length of slats ; have seen sheep jump over ; saw two foot prints on slats — one was where she stepped with one right foot, and the other the left — could not tell whether the right or left ; it was fore foot ; the one on the south side was the plainest to be seen.

This was two and a half miles from Winnebago station. There were two public crossings between that and Winnebago station. The last cattle guards were different ; the slats were longer and wider ; there was not so much pit under it, nor was it so long ; the slats were taken out

and changed ; don't know when ; the slats were from four to four and a half feet long. Would not believe that they were eight feet long, if measured and sworn to as being of that length ; I can't say when new ones were put in ; cattle guards were changed same Summer (1856.) they are not over eight feet now ; don't know where plaintiff came from when he moved there.

29 **S. P. Crawford** was introduced and sworn as a witness on the part of the plaintiff and testified as follows :

Am a son of plaintiff ; saw plaintiff's mare the morning after ; I know the crossing. The railroad went to Freeport in the Winter of '53-'4 ; I examined cattle guards ; the width between slats one and a half inches ; saw prints of shoes ; length of slats, four to four and a half feet ; mare was worth \$150.

Cross Examined by defendant :

I knew the mare over a year ; she did not run loose while here in Rockford ; never knew her to try cattle guards before ; she worked on Loomis' farm near Rockford ; her age was ten years ; plaintiff bought her of Wilder ; she was more valuable after plaintiff bought her of Wilder.

DEFENDANT'S EVIDENCE.

Robert Crisp was then introduced and sworn as a witness on the part of the defendant and testified as follows :

Am in the employ of Railroad Company ; my business is to look after track between Cherry Valley and Winnebago ; have been seven years employed here ; am acquainted with cattle guards ; know track stringers ; they are eight feet, between Rockford and Winnebago ; both rested on same bed-timbers ; the distance might have been seven feet ;

might have been eight feet; have known none less than eight feet, except there will be one occasionally two inches shorter; know the mare; did not see her after she was killed; don't know whether she was breachy or not; she was killed on Saturday; examined cattle guard to see if tracks were upon it.

36 **Cross Examined by plaintiff:**

Don't know the exact length of slats; think guard was seven feet wide.

This was all the evidence in the case.

— ... —

PLAINTIFF'S INSTRUCTIONS.

20 At the request of plaintiff's counsel,

The Court instructed the jury as follows :

If the jury believe, from the evidence, that the plaintiff's mare was killed upon the defendant's railroad track, and not upon the crossing of a public highway, nor within the limits of a town, city, or village, and within five miles of a settlement, and that the said railroad had been open for use for six months previous to the time of said injury of said animal; and that the said mare was injured, and rendered of no value, by the engines and servants of the defendants, as charged in the said plaintiff's declaration, and that the said mare got unto and upon the said defendant's said railroad track through the insufficiency of the defendant's said cattle guard, without any neglect on the part of the plaintiff, then the jury will find for the plaintiff such amount of damage as was proved to have been done to said animal.

To the giving of which instruction, the defendant, by its counsel, objected, which objection was overruled by the Court, and the defendant then and there excepted.

DEFENDANT'S INSTRUCTIONS.

31 The defendant's counsel asked the Court to give the following instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9.

1. The jury are instructed, that if they believe from the evidence, that the negligence of the plaintiff contributed to the loss of the mare in question, the plaintiff cannot recover.

2. That the killing of the mare, mentioned in plaintiff's declaration, is not of itself proof of gross negligence or malice; and that if the plaintiff charges, and claims to recover, for the negligence on the part of the servants of the defendant, that he must prove such negligence as charged in the declaration, or he cannot recover in this action.

3. That while, by the laws of this State, cattle have the right to run at large on uninclosed lands, and the owners of such cattle are not liable in trespass for their so running at large; yet if cattle, when so allowed to run at large by their owners, are killed or injured, by getting upon a railroad, the Railroad Company is not liable without proof that the death, or injury, was occasioned by the negligence of the Company, or its servants, or that it was wilfully done.

32 4. That a case of negligence on the part of a Railroad Company is not made out by showing simply the killing of live stock, but it must also be clearly shown that the death was occasioned by the negligence of the Company, which negligence consists in doing some act careless or negligent on its part, or failing to do some act required by law, or the omission of which implies carelessness on the part of the Company.

[Refused.]

5. That it is, in contemplation of law, negligence on the part of the plaintiff to allow his mare to run at large where it was liable to get upon defendant's railroad, and if the jury believe, from the evidence, that the plaintiff was guilty of such negligence at the time the mare was killed, the jury should find for the defendant.

[Refused.]

33

6. That a party cannot recover for an injury brought about by his own carelessness and negligence ; therefore if the jury in this case believe that the plaintiff was the owner of a mare, as alleged in this declaration, and that he turned said mare out in the highway, and that he there kept and depastured her, and that said mare went from said highway, over the cattle guards of the defendant, at a road crossing, unto the railroad track of the defendant, and that said defendant was bound to erect and maintain good and sufficient cattle guards to prevent cattle, horses, &c., from going over the railroad, and that said cattle guards were insufficient, and that in consequence of said cattle guards being insufficient said mare got on said railroad track and was run over by the cars of said defendant, who was exercising ordinary care and was guilty of no negligence, then in that case the plaintiff cannot recover; the law being that, although the law imposes upon a Railroad Company the absolute duty of erecting and maintaining good and sufficient fences and cattle guards, to keep horses and cattle off from a railroad track, yet there is a duty also upon the proprietors along the road ; and they have no right to fold their arms and voluntarily permit their cattle to stray upon the railroad track, even though the cattle guards and fences which the Company are bound to maintain be insufficient.

[Refused.]

34

7. That Railroad Companies, in this State, are not liable for injuries to cattle which have strayed upon the highway, or which have been voluntarily turned into the highway by the owner, and which came upon the track through the want of the fence, or cattle guard, which the Company is bound by law to maintain. Public highways cannot be regarded as commons, and no man has a right to depasture his cattle upon the public highway ; therefore cattle are unlawfully upon the highway unless they are being driven along, or, while being driven along, they escape from the person having them in charge who makes fresh pursuit ; and if the jury in this case believe that the plaintiff voluntarily turned the mare in question into the public highway to be depastured, and that the mare strayed on the railroad track and was killed, without any fault on the part of the defendant or its servants, then the jury must find for the defendant.

[Refused.]

35

8. That if the jury believe, from the evidence, that the cattle guard in question was insufficient, and they also believe, from such evidence, that the plaintiff was advised of such fact, it was negligence on his part to allow the mare to depasture on the highway; and if the jury find that the plaintiff allowed the mare in question so to depasture in the highway, and also believe that she came upon the railroad from the highway, and not from the plaintiffs' close adjoining the defendant's road, on account of the insufficiency of the defendant's fence, then the jury shall find the defendant not guilty.

[Refused.]

9. That the presumptions of law are in favor of defendants; and that the plaintiff cannot recover in this suit unless upon proof of gross negligence of the servants of the defendants.

Those instructions numbered 1, 2, 3, 4, the Court gave, and refused to give those numbered 5, 6, 7, 8, 9, to which decision and ruling

The defendant then and there excepted.

The Jury found a verdict for the plaintiff for one hundred and sixty-seven dollars and fifty cents.

ASSIGNMENT OF ERRORS.

SUPREME COURT OF ILLINOIS, }
THIRD GRAND DIVISION. }

GALENA AND CHICAGO UNION RAILROAD COMPANY	} APRIL TERM, 1861.
<i>Appellant,</i>	
vs.	
CHARLES CRAWFORD, <i>Appellee.</i>	

And now comes the said appellant, the Galena & Chicago Union Rail-

road Company, by Elliott Anthony, its attorney, and says: that in the records and proceedings aforesaid, and also in the rendition of this judgment aforesaid, there is manifest error in this, to-wit:

1. The declaration aforesaid, and the matters therein contained, are not sufficient in law, for the said Charles Crawford to have or maintain the aforesaid action thereof against the said appellant.

2. The judgment was given for the appellee, Charles Crawford; whereas, by law, it should have been given for the said Galena & Chicago Union Railroad Company.

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

4. The Court erred in giving the instructions for the plaintiff.

5. The Court erred in refusing to give the fifth, sixth, seventh, eighth and ninth instructions asked for on the part of the said Galena & Chicago Union Railroad Company.

6. The Court erred in overruling the motion for arrest of judgment.

And the said Galena & Chicago Union Railroad Company prays that the judgment aforesaid, for the errors aforesaid, and for other errors apparent in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing; and that the said appellant may be restored to all things which it has lost by occasion of the said judgment.

ELLIOTT ANTHONY,

Attorney for Appellant.

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Abstract

Filed Apr 16, 1861

A. Deland
Clerk

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