No. 14812

Supreme Court of Illinois

C. & A. R. R. Co.

vs.

Utley

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STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 124

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

Supreme Court of Illinois

3rd Grand Division April Term A.D. 1885.

Leander Utley appellee

Ads

Chicago & Atlantic Rail Road Company } Appeal from Livingston Co

And the said appellee says there is no error, and asks that said judgment be affirmed.

J. M. Bane

Atty for appellee

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Leander Alley

Als

Chicago & Alton R R Co

Joinder in Error

Filed Apl 5. 1865

D Leland Clk

Jno Barrett Pltffs Atty

Supreme Court of Illinois.

THIRD GRAND DIVISION.

April Term, A. D. 1865.

The Chicago and Alton Railroad Company, *Apvellant*, vs. Leander Utley, *Appellee.*	Appeal from County Court of Livingson County.

APPELLANT'S POINTS AND AUTHORITIES.

I.

The amendment of the plaintiff's declaration by changing the time of the killing of the mare from "November 7th, 1863" to "November 7th, 1865" was one of substance and not of form.

Although in actions sounding in tort the precise time of committing the injury is in general not a material allegation, yet the declaration must allege and the proof must show that the wrong was done prior to the commencement of the action.

Gould on Pleading, Chap. 3, § 65.
Stephen on Pleading, p. 293.
1 Chitty on Pleading, p. 259.

And if time is laid which is intrinsically impossible or inconsistent with the facts to which it relates, it will be sufficient ground for demurrer, and would be good on motion in arrest of judgment.

Text Books ~~not~~ Sup.
Cheetham vs. Lewis, 3 Johns, 42.
Wanrig vs. Yates, 10, Johns 119.
Payne vs. Lansing, 2 Wend., 525.

The amendment being material the defendant was entitled to a continuance as a matter of course, without cause being shown by him.

Ohio and Mississippi R. R. Co. vs. Palm., 18 Ill., 22.
Brown vs. Smith, 24 Ill., 196.
Link vs. Architectural Iron Works, 24 Ill., 551.

II.

The second instruction given by the Court for the plaintiff, that the mere fact of the mare being killed on the track was evidence of negligence on the part of the defendant, should have been qualified by excepting the places where the Company is not bound by statute to fence. If the animal was killed in a town, city, or village, or at a public crossing, to recover the plaintiff must show gross and wilful negligence on the part of the defendant.

Galena and Chicago Union R. R. Co. vs. Sumner, 24 Ill., 631.
Chicago, Burlington and Quincy R. R. Co. vs. Carter, 20 Ill., 390.
Joliet and Northern Ind. R. R. Co. vs. Jones, 20 Ill., 221.
Ohio and Miss. R. R. Co. vs. Misenheimer, 27 Ill., 30.
do do vs. Jones, 27 Ill., 41.
do do vs. Taylor, 27 Ill., 207.
Illinois Central R. R. Co. vs. Williams, 27 Ill., 48.
Great Western R. R. Co. vs. Morthland, 30 Ill., 451.

III.

The third instruction of the plaintiff, that it was incumbent on the defendant to prove an entire absence of negligence on their part, is open to the same objection as that urged to the second instruction. If the defendant had erected and maintained good and sufficient cattle guards and fences the plaintiff must prove gross and wilful negligence on part of the defendant; the onus is on him. So if theanimal was killed at a place where the Company were not bound by law to fence.

Galena and Chicago Union R. R. Co. vs. Crawford, 25 Ill., 529.
Ill. Central R. R. Co. vs. Phelps, 29 Ill., 447.

IV.

The fifth instruction asked by the defendant is clearly law, and should have been given as requested. When the Company have

erected and maintained good and sufficient fences and cattle guards, the onus is on the plaintiff to show negligence or wilful conduct on the part of the Company before he can recover.

Galena and Chicago Union R. R. Co. vs. Crawford, 25 Ill., 529.

V.

The sixth instruction of the defendant should have been given by the Court. The statute requires the erection of good and sufficient fences and cattle guards. Where it has done this, and cattle break through the fences, the Company are not liable. Their duty having been complied with, if cattle are found upon their track they are there of their owners' own wrong. This Court has decided in cases arising before the statute that cattle found upon a railroad track are trespassers, and are there at their owners' risk.

Central Military R. R. Co. vs. Rockafellow, 17 Ill., 541.
Illinois Central R. R. Co. vs. Reedy, 17 Ill., 580.

The enactment of the statute of 1855, does not change the right of the railroad company to the exclusive use of its track. It merely imposes a duty upon the company, and alters the law of evidence in regard to negligence, when the company has omitted that duty. If the duty has been performed by the company, and an unruly or "breachy" animal, notwithstanding, gets upon the track, the company are responsible only for wilful neglect.

VI.

The fourth instruction of the defendant seems to us to be reasonable and proper. The company are bound to maintain a good and sufficient fence, and by this is meant, not a fence which will prevent unruly and vicious animals from getting upon the road, but such a fence as any reasonable person would construct to prevent cattle from getting upon his premises.

VII.

The proof does not show that the animal was not killed at a road crossing. It is in proof that the mare became frightened, got away from her driver, and was found with part of her harness

on on the following morning upon the track of the railroad company. There is no proof that she got upon the road through any defect in the fences or cattle-guards. The plaintiff must negative all the exceptions of the statute by proof, before he can recover.

Chicago, Burlington & Quincy R. R. Co., vs. Carter, 20 Ill., 390.
Galena & Chicago U. R. R. Co., vs. Sumner, 24 Ill., 631.
Joliet & Ind. R. R. Co. vs. Jones, 20 Ill., 221.
Ill. Cent. R. R. Co. vs. Williams, 27 Ill., 48.
Gt. Western R. R. Co. vs. Northland, 30 Ill., 451.

The Declaration does not allege

VIII.

C. I. R. R. Co. v. Brown 23 Ill. 95

Nor does the evidence show that the animal was not killed at a place where the road runs through uncultivated lands lying at a greater distance than five miles from any settlement. This was also necessary to entitle him to a recovery.

Same authorities as above.

IX.

The verdict of the jury is against the evidence in this case. The mare in question was being driven by a friend of the owner, on the night of November 7th, 1864, and becoming frightened ran away, taking the road to the owner's house. On the morning of the 8th, she was found, with part of her harness still on, dead upon the track, some distance from the place where she escaped from her driver. The evidence of Clary is, that the north cattle-guard, at the crossing above which the mare was found dead, was good; that he had never known cattle to cross it—that if they had done so he would have known it; that he examined the fences twice on the seventh of November; that they were good; and that he had heard Utley, the plaintiff, say that the mare in question "would jump any fence on the road;" and no witness for the plaintiff contradicted the testimony of Clary. They all swear that they never saw cattle go across the north cattle guard. There is no evidence to prove that the mare was not killed on the crossing, except the fact that she was not found there, but north of it; and no evidence, except by implication, that she was killed on defendant's railroad. There seems to us to be an entire absence of testimony sufficient to warrant the verdict of the jury

in this case, and on this ground alone, if for no other, the defendants were entitled to a new trial of the cause.

X.

The plaintiff having failed to negative, by proof, all the exceptions of the statute requiring the defendant to fence its road, the motion in arrest of judgment was proper, and should have been sustained by the Court.

A. W. CHURCH,
Attorney for the Appellant.

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In Supreme Court-

April Term 1865-

The Chicago and Alton
Rail Road Company.
Appellant-

vs

Lauder Illey
Appellee

Points and Authorities
of Appellant:

Filed April 10 1865-
J Selmser Clk

United States of America } ss.
State of Illinois }
Livingston County }

Please Bank at a regular term of the county court of Livingston County, State of Illinois, at a regular term of said court begun and held at the County Court House in Pontiac in said county, on Monday the sixth day of March, the same being the first Monday in March in the year of our Lord, one thousand eight hundred and sixty five,

Present. Hon. Jonathan Duff, Presiding Judge.
R. B. Harrington, Clerk.
Amos Hart, Sheriff.

Leander Ulley.

vs. } Case.

The Chicago & Alton Rail Road Company } Damages. $400.00

Be it remembered that on the 13th day of February A.D. 1865. there was issued out of the Office of the clerk of said a certain summons in the above entitled cause, which said summons is in the words & figures following to, wit,

"State of Illinois. } ss. The people of the State of Illinois
Livingston County } To the Sheriff of said county, greeting.

We command you that you summon the Chicago & Alton Rail Road Company, if to be found in your county to appear before the county court of Livingston County, on the first day of the next term thereof to be holden at the court house in Pontiac in said county on the first Monday in the month of March next to answer Leander Ulley in a plea of case to the damage of him the said plaintiff in the sum of $400,00 as he saith & hereof make due return to our said court as the law directs.

Witness R. B. Harrington. clerk of said court and the Judicial seal thereof, at Pontiac this 13th day of February A.D. 1865:

U.S. 10¢ stamp

R. B. Harrington Clerk. "

Returned as follows. to wit

" I have executed this writ on the Chicago & Alton Rail Road Company by reading the same to the within named company's agent. (Wm. Smith) at Pontiac this 16th day of February A.D 1865.

Amos Hart. Sheriff."

And on the 14th day of February A.D. 1865. there was filed in the office of the clerk of said court a declaration in said cause which said declaration was and is in the words and figures following. to wit

" State of Illinois } ss. In the county court of said county.
Livingston County }

March term. A.D 1865.

Leander Utley.

vs. } Case

The Chicago Alton Rail Road Company. } Damages $ & costs &c.

The plaintiff in this suit Leander Utley complains of the Chicago & Alton Rail Road company defendant. summoned &c. in a plea of trespass on the case. For that whereas on the 6th day of November. A.D. 1864 and for six months previous to that time. and then and from thenceforward have been and are the owners of and have in their control a rail road leading from Chicago to Alton in the state of Illinois. and passing through said county aforesaid and have and had the right to run upon the same, locomotives and trains. And said plaintiff avers. that during all that time. it was the duty of the said defendants to erect & keep in repair fences on the sides of said rail road. suitable and sufficient to prevent horses from getting on said rail road. except at the crossing of public roads

and highways within the limits of towns cities and villages and where the same run through unimproved lands at a greater distance than five miles from any settlement through lands where proprietors had fenced and except where proprietors had agreed to fence, and to construct suitable cattle guards at all rail road crossings of public highways, to prevent horses from getting on such rail road and said plaintiff avers, that said defendants more than six months after the said rail road was in use neglected to comply with the before mentioned requirements, as by the statute in such case made and provided, it was made their duty to do, at a certain rail road crossing of a public highway, in the said county of Livingston and state of Illinois, whereby by means of said rail road company neglecting to put up suitable cattle guards & fences one certain mare & horse the property of plaintiff of great value to wit: the value of four hundred dollars, on the night of the 7th of November A.D. 1865, at the county of Livingston and state of Illinois strayed and got upon the said rail road at the said place aforesaid said rail road crossing there & where being outside of the limits of any town city or village, and not being a place where any proprietor had agreed to put cattle guards or construct fences.

And the said plaintiff avers, that the said defendants by their servants on the night and at the time aforesaid, and at the place aforesaid so carelessly ~~and~~ negligently and improperly run conducted & directed the train and locomotive of said defendants on said rail road, that the said locomotive and train, struck with great force and violence the said horse or mare so then and there being on said rail road as aforesaid by, through, & by reason of the neglect of said defendants to

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erect and keep in repair the fences and cattle guards as aforesaid: and the same did then and there kill and destroy said horse or mare the property of said plaintiff as aforesaid to wit at the county aforesaid and state aforesaid, to the damage of the said plaintiff four hundred dollars: & therefore he brings this suit

J. M. Barrett.
Plffs atty.

And on the 8th day of March there was filed in the office of the clerk of said court a plea in said cause which said plea was in the words following to wit.

"State of Illinois } ss. In the County Court. To March term
Livingston County } A.D. 1865

The Chicago & Alton Rail Road Co.
ads. } Case.
Leander Utley

And now comes the said defendant by Payson its atty. & defends &c. when &c and says that it is not guilty of said supposed grievances laid to its charge in manner & form as said plaintiff hath in his declaration complained against it & of this it puts itself upon the country, &c

Jno. L. E. Payson its atty.

and the plaintiff doth the like.

J. M. Barrett. plffs atty"

And be it further remembered that on the 6th day of March. A.D. 1865 the same being one of the days of the regular March term A.D. 1865: certain proceedings were had in said cause and entered on the records of said court. which said proceedings so entered were in the words & figures following to wit.

Leander Utley

431 vs

The Chicago & Alton Rail Road Company } Case

On this day comes the parties to this suit. the plaintiff by Barrett his atty. & defendant by Payson its atty. and plaintiff by his atty moves for leave to amend his narr. by inserting the figure "4" in date in stating cause of action in said narr. instead of the figure "5"; and, on consideration by the court said motion is allowed & leave given said plaintiff to amend upon payment of costs; said defendant by Payson its atty now moves the court for a continuance of said cause on the ground that the amendment of narr. by plaintiff is a material one. Upon consideration by the court the motion of defendant is over-ruled."

And be it further remembered that on the 8th day of March. A.D 1865 the same being one of the days of the regular March term A.D 1865. of said court. certain other proceedings were had in said cause and entered of record on the record of said court in the words & figures following to wit.

"Leander Utley

vs } Case

The Chicago & Alton Rail Road Company

This day comes the plaintiff by his attorney J.M. Barrett & also comes defendant by Payson its attorney. & the issue being joined herein, whereupon there called a jury of good and lawful men to try the issues joined in said cause, to wit. E.S. Babcock, D.S. Wolfkeil. Charles Hunter. A Viney. H. Wheeler Thaddeus Griffin W^m Franklin. M.L Payne W^m T. Miller. L. H. Hoyt D. B. Syler. J. Palmer, who were tried & sworn well and truly to try the issues joined herein. & having heard the evidence. & argument of counsel retired in charge of an officer of court to consider of their verdict. and

whereupon the said jury returning into court delivered the following verdict, "We the jurors find the Deft guilty and assess the damages at five hundred and twenty five dollars" and thereupon it was ordered by the court that said verdict of the jury be entered of record. and the said defendant by its attorney did then & there enter a motion for a new trial in said cause, and it appearing to the court that said motion should not be granted the motion was overruled. The said defendant by its attorney then moved in arrest of judgement, which motion was by the court overruled. It is therefore considered by the court that said plaintiff have & recover of defendant the sum of five hundred and twenty five dollars & costs of suit herein to be taxed. & that he have execution therefor. And thereupon the said defendant prays an appeal to the Supreme Court of the state of Illinois. which is granted. upon the filing of bond in the sum of five hundred dollars. within thirty days to be approved by the judge of said court. and it is further ordered that Bills of exception in said cause be filed in twenty days"

And be it further remembered that on the 23d day of March AD 1865. a certain bill of exceptions to the overruling of the defendants motion for a continuance of said cause heretofore made. was filed in the office of the clerk of said court. which said bill of exceptions was & is in the words & figures following to wit:

"State of Illinois } ss. In the County Court. To March term AD 1865
Livingston County }

Leander Utley

vs

The Chicago & Alton Rail Road Company } Bill of exceptions.

Be it remembered that at said term of said court on the first day of the docket of said court said plaintiff moved the court for leave to amend his declaration

filed in said cause which leave was granted by the court to said plaintiff: said plaintiff then and there amended his said declaration by substituting for the figure "5" in the clause in said declaration reading as follows, "For that whereas on the 6th day of November A.D. 1865 and for six months previous to that time &c", the figure "4" making said declaration in said clause read, For that whereas on the 6th day of November A.D 1864, & for six months previous to that time &c" & also under the leave of court so granted as aforesaid by inserting and substituting the figure "4" in the clause in said declaration, originally (as filed) reading " one certain mare or horse the property of plaintiff of great value to wit, the value of four hundred dollars on the night of the 7th of November A.D 1865 at the county of Livingston & state of Illinois strayed & got upon the said rail road at the said place aforesaid said rail road crossing them and there being outside of the limits of any town &c," for the figure "5" in said clause making said clause read as amended as to said date "on the night of the 7th of November A.D 1864 &c instead of "the 7th of November A.D 1865" as said clause in said declaration read as originally filed.

And upon said amendments being made as aforesaid, said defendant then & there moved the court for a continuance of said cause on the ground that said amendments were substantial amendments. The court then & there overruled said motion of defendants, to which decision of the court in overruling said motion, said defendant then & there excepted & inasmuch as all the matters aforesaid do not appear of record the counsel for defendant presents this bill of exceptions & prays that the same may be signed & sealed by the court & made part of the record in said cause & it is done accordingly

Jonathan Dixon (SEAL)

Judge of said court

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And be it further remembered that on the 23rd day of March A.D 1865; there was filed in the office of the clerk of said court a certain other bill of exceptions, which said bill is in the words and figures following to wit.

"State of Illinois } ss. March Term, County Court, A.D 1865
Livingston County }

Leander Utley.

vs.

The Chicago & Alton Rail Road Company } Bill of exceptions.

Be it remembered that on the trial of this cause at the March term A.D. 1865 of said county court said plaintiff to maintain the issue on his part gave in evidence to the jury by the following witnesses the following testimony.

J. L. Culver, sworn — myself & husband were on Pontiac on the night of the 7th of Nov. last; about 9½ or 10 o'c we started for Maj Hoskins; we had Mr Utleys horse; the bridge over the river was broken & we had to ford it; the horse began to kick & finally ran away he ran back through town, South; Piff lives about 1¼ miles from town a little W. of South beyond the R.R; the road from here to Utleys crosses the R.R. about ½ a mile from town; the bridge at the crossing is elevated above the ground; there is a ditch under it; the bridge is not fenced or railed; the road leading to the crossing is the one Utley usually travels from town toward home.

N. Curry, sworn — Know the horse of Utleys driven by Culver on the night of the 7th of Nov. last; saw it dead on the R.R. at the 2d culvert this side of Cayuga; the was split open behind; had one leg taken off; Fence was poor when we found her, will not turn stock; Know the crossing spoken of by Mrs Culver; it is poor; there are no cattle guards there; there are holes there about 1½ or 2 ft deep, nothing to

prevent cattle from going up the track. found the mare dead think she was on the morning of the 8th of Nov. think she was killed by the cars. in Livingston County Illinois knew mare for 5 or 6 months. think she was not breachy. R.R. fences were poor at that time. I am certain that there are no cattle guards there. at the crossing spoken of: there are holes there about 1½ or 2 ft deep. probably 4 ft wide. they are not as deep as guards usually are.

E. Lockwood. sworn — Know the crossing spoken of. guards are not sufficient in my judgment to prevent stock from going on the track: had a steer jump over ahead of an engine over the south guard last June: guard is about 2½ ft deep: probably 5 ft wide: think the guards are not sufficient to prevent cattle from getting on track: there is no railing on bridge: have used the bridge considerably. it is good for ordinary purposes.

J. Garner. sworn — I found a piece of harness: belly band: trace & piece of shaft, between Stirrett house & Turners crib. they were nearer the crib. showed harness to Lockwood: the direct course each toward the road to Utley's.

Lockwood recalled. — have seen cattle go across the R.R. crossing more or less for the last 3 years: never saw a creature go across the guards North live about 100 yds from crossing. saw harness found by Garner: it was Utley's.

N. Buck. The Chicago & Alton R.R. has been in use more than six months prior to the 7th day of Nov. last. Pontiac limits extend N. 3/8 of a mile the crossing spoken of is outside of Pontiac limits: the town limits of Cayuga are 30 rods South of the Depot: I know that the 2d culvert spoken of is not in town limits.

N. Gove. sworn — Know the crossing spoken of there is a ditch there. my cattle have crossed the south guard last summer in June: it has

been improved somewhat since: think not materially changed
there are ditches open at both ends: don't know much about the
bridge: have crossed it frequently: there is no railing on it, always
regarded it as a safe bridge: don't think that stock would get
off this bridge: regard the bridge as a good and sufficient
one for the crossing of stock under ordinary circumstances:
never had an animal go across the North guard: have never ex-
amined the North guard closely. would not swear that the North guard
would not prevent cattle from going over.

D. Wonderger. sworn – mare was worth $225"/" : regard the bridge spoken of as
safe under under ordinary circumstances except at night. –

E. Simmons. sworn – mare was worth $225"/"

M. Lyon " mare was worth $235"/"

– Goggins guards have been in bad condition for 5 or 6 months. my knowl-
edge is derived from what I have seen as I have passed them

And said defendant to maintain the issue on his part gave
in evidence to the jury by the following witnesses the following evidence:

M. Clary- sworn – am section foreman of the Chicago & Alton R.R.: know
the crossing spoken of by it 7 ft. 9 in long. 12 ft wide & 3 ft. 6 in deep
the guards spoken of are like the rest of the R.R.'s: there has been
no alteration of the guards since 4 or 5 months before last Nov. the
bridge spoken of is 36 ft long & 15 ft wide have known bridge &
crossing spoken of for 5 or 6 years: have seen cattle passing over
it frequently: never knew any cattle to get off the bridge or over the
N. guard: if they had I should have known it. the sides of the
guard are perpendicular: saw mare at 2d culvert this side of
Lafayette: pass over the road twice a day: it is my duty to keep
fences in repair. passed over the road twice on the 7th of Nov. last
fences were good. I examined closely because it is my duty

there is an open prairie South of town & east of the R. R.; a fence joins R.R. fence 1/2 mile N. of road to Utley's on the east side of the R.R. saw the fence along R.R. South of crossing spoken of abt 3 or 4 o'c P.M. of the 7th of Nov. last. — D & Jeff had a conversation in regard to the mare in question: D asked him how his mare got upon the track as the fences were all up. Utley said, "Delany that mare would jump any fence on the road. this was on the 9th or 10th of Nov. last.

Cross Examined. — Did not see Utley leave Pontiac on the 9th of Nov. last. this talk was had as Utley was going for appraisers: Have been in R. R employ for six years. have been discharged some time ago, have known the managers of the road since road was made.: would be discharged if I left fences down guard spoken of has not been altered in about 9 months: Gove had a bull killed at the D. guard last June: don't remember saying that the crossing was bad. the fences were all up on the 7th of Nov. last along my line of the road: It was on the 9th or 10th of Nov. last that I had the talk with Utley. the fences were good when I left the road yesterday & for 2 days previous.

D. Bennett, sworn. Know the bridge spoken of. It is good for ordinary purposes & has been for a good while. have examined it: moved a house across it some three weeks ago: think it safe for stock to cross under ordinary circumstances.

N. Country man, sworn — Know the bridge spoken of. it is safe in my opinion for the crossing of stock under ordinary circumstances. have used the bridge frequently & have seen it often. last fall & winter.

Gove, recalled. for Jeff — Had a conversation with Delany last summer. he said the guards were bad. this was in June or July. I think he said the Co. ought to repair them. that they were insufficient, —

Mayall for pltff - sworn - That passed across the R.R. about 2 miles N. of Pontiac 5-days. N.R. fence was down, the posts & railing burned it was down yesterday & the day before & on Sunday: any animal could go through it

Which was all the evidence offered by either of the parties aforesaid.

The plaintiff then moved the court upon the evidence aforesaid to instruct the jury that.

1st. If the jury believe from the evidence that the mare strayed or got upon the rail road track through the insufficiency of the cattle guards or the fencing, they are instructed that the law is with the plaintiff & if killed while there the plaintiff is entitled to recover her value from the defendant.

2d. The jury are instructed that the mere fact of the mare being killed on the track is evidence of negligence on the part of the company.

3d. It is incumbent on the defendant to prove an absence of entire negligence on their part.

4th. The measure of damages is the value of the mare

To the giving of which said instructions of the plaintiff the defendant by its attorney then & there excepted.

The said defendant then moved the court upon the evidence aforesaid to instruct the jury. that.

1st The jury must believe from the evidence that the mare in question was killed on the road of the defendant & the jury are instructed that they cannot take this fact for granted & that it must be proved & if the plaintiff has not proved that the rail road on which the mare in question was killed, belonged to the defendant, they will find for the defendant.

2d Before the plaintiff can recover he must prove that the mare in question was not killed at a crossing of a public highway & if

12 the jury believe from the evidence that the plaintiff has not proved

that the mare was not killed at a rail road crossing of a public highway they will find for the defendant.

3d "Before the plaintiff can recover he must prove that the killing of the mare in question did not occur at a place on said road, where said road runs through uncultivated lands lying at a greater distance than five miles from any settlement, & if the plaintiff has not proved, that the killing did not occur at a place where the road runs through such uncultivated lands lying at a greater distance than five miles from any settlement, the jury will find for defendant.

4" The jury are instructed that a good & sufficient fence is such an one as will prevent ordinary stock from encroaching on an inclosure & that a good & sufficient cattle guard is such an one as will prevent ordinary stock from crossing it; in other words such fence & guard will be good & sufficient in law if they are such as a reasonable prudent man would rely on

5" If the jury believe from the evidence that defendant at the time of the killing charged had the road protected by good and sufficient fences & cattle guards to protect the place where the killing occurred then the plaintiff must prove a negligent or wilful act before he can recover

6" The jury are instructed as a matter of law that the defendant has a right to use its said road & run its cars thereon without obstruction & if the jury believe from the evidence that the defendant had its road protected by good & sufficient fences & guards to protect the place where the killing occurred, then the horse of plaintiff had no right or business upon the track above the crossing spoken of by witnesses & that if said horse was on there, he was there of his own wrong if without permission, & that plaintiff cannot recover for an injury there sustained, unless wilfully committed by Defts

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or by gross negligence.

7th Dft in making up their verdict in this case the jury should take into consideration all the facts in the case as proved. the fact (if proven) that the horse in question became unmanageable & ran away from and out of the control of the person in charge of it: the fact if proven, of its becoming detached from the wagon or carriage to which it was attached, the fact if proven that the trappings & harness were still upon it & if the jury believe from the ~~evidence~~ facts proven, that the horse actuated or incited by fear and alarm, under all the ~~circumstances~~ facts in evidence rushed over the fence or across the guards of the road of said deft: (the said fence & guard being at that time good & sufficient & so got upon the road of Deft & was there killed, then the law is that he was there of his own wrong & the jury will find for defendant unless they further believe from the evidence that the act was the result of negligence or wilfulness of Deft's.—

The 4th 5th & 6th of which instructions the court refused to give the jury. to which refusal of the court the defendant then & there excepted, & thereupon the said jury gave their verdict against the defendant. Whereupon the defendant moved the court for a new trial because the verdict was against the law & the evidence but the court overruled said motion to which ruling of the court defendant then & there excepted. The defendant then moved the court in arrest of judgment for the reason that the plaintiff was not entitled to recover because of substantial defects in the declaration in said cause and that said declaration was insufficient to support judgment. which motion the court then & there overruled to which ruling of the court the defendant then & there excepted. & the court thereupon gave judgment upon said verdict against said defendant. to which deft then & there excepted.

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

Jonathan Duff. (Seal)

Judge of said court.

And on the 23 d. day of March A.D. 1865. there was filed in the office of the clerk of said court a certain appeal bond. which said appeal bond is in the words & figures following to wit.

"Know all men by these presents that the Chicago & Alton Rail Road company. a body corporate under the laws of the state of Illinois is held and firmly bound unto Leander Utley in the penal sum of five hundred dollars for the payment of which well and truly to be made it binds itself & its successors firmly by these presents. In witness whereof the said Chicago & Alton Rail Road Company hath caused its corporate seal to be attached hereto & its President to subscribe the same this 17" day of March A.D. 1865.

The condition of the above obligation is such that whereas the said Leander Utley. plaintiff did on the 8" day of March A.D. 1865. in the county court of Livingston county in said State of Illinois at the March term thereof A.D. 1865 recover a judgment against the above bounden Company. defendants in an action of case for the sum of two hundred & twenty five. $225.00/100 & costs of suit from which judgment the said Chicago & Alton Rail Road Company. has taken an appeal to the Supreme Court of the state of Illinois Now if the said Chicago & Alton Rail Road company shall duly prosecute the appeal & shall pay said judgment costs interest & damages in case the said judgment shall be affirmed then the above obligation to be void. otherwise to remain in full force & virtue.

Sealed & delivered in presence of } The Chicago & Alton R. R. Co. (Seal)
T. M. Sarrabee. by T. B. Blackstone. Pres't

15

Which said bond is endorsed "Approved

Jonathan Duff.

County Judge Liv. Co. Ills "

State of Illinois } ss. I. R. S. Harrington clerk of the county court of
Livingston County } Livingston county state of Illinois do hereby certify
that the within is a true full and complete
transcript of the record of the above cause wherein Leander Utley was plaintiff
and the Chicago & Alton Rail Road Company defendants in an
action of case. (said cause being tried at the March term of said court
A.D. 1865.) as appears from the records of said court & the files in my
office. Witness my hand & seal of said court at Pontiac this 28th day
of March. A.D. 1866.

R. S. Harrington

clerk of said county.

The Chicago & Alton Rail Road Co appellant
vs
Leander Utley appellee
} April Term A.D. 1865

and now at this term of the court comes the appellant
the Chicago and Alton Rail Road Company by A. W. Church. its
attorney and says that in the records and proceedings
aforesaid and also in giving the judgment aforesaid
there is manifest error in this to wit:-

1st The court erred in giving the first instruction asked
by the plaintiff

2d The court erred in giving the second instruction asked by the
plaintiff

3d The Court erred in giving the third instruction asked by plaintiff

4th The court erred in refusing the fourth instruction
asked by the Defendant.

5th The Court erred in refusing the fifth instruction
asked by Defendant-

6th The Court erred in refusing the sixth instruction
asked by the Defendant.

7th The Court erred in overruling the motion of the
Defendant for a continuance of the case-

8th The Court erred in overruling the motion for
a new trial made by the Defendant.

9th The Court Erred in overruling the motion made by the Defendant in Arrest of Judgment.

10th The Court Erred in rendering Judgment in favor of the plaintiff against the Defendant.

And said the Chicago and Alton Rail Road Company prays that the judgment aforesaid for the Errors aforesaid and other Errors in the record and proceeding may be reversed annulled and altogether held for nothing and that this cause be remanded to the Court from which said proceedings were had for such other proceedings thereon as to this Court shall seem meet—

A. W Church

Attorney for the Appellant—

Record.

L. Bradley Atty.

B.

The Chicago & Alton R.R. Co.

Appeal from Livingston Co.

Filed Sept 3d 1858

T. Letcher Clk

124 141

Supreme Court of Illinois
Third Grand Division
April Term A.D. 1865—

The Chicago & Alton Rail Road Company
Appellant
vs
Leander Utley
Appellee

Appeal from the Livingston County Court

Points cited for Appellee

The insertion of the figure 5, instead of 4, in the allegation of the year in plaintiffs Narr, was a clerical mistake,. The Court had the right to suffer the Amendment to be made. See Brown's Ills Reports page 401. also page 35. and such permission afforded no just grounds for a Continuance.

Plaintiffs Narr, negatives all the material exceptions of the Statute requiring Rail Road Companies to fence their road. See, Scates Treat & Black Statute page 953.

J M Barrett
Atty for Appellee

12 ep 141

The Chicago & Alton RR Co
vs
Leander Utley

Written Argument for
Appellee.

Filed A/. 6. 1865

L Leland Clk

J M Bond Atty for Appellee

Supreme Court of Illinois.

THIRD GRAND DIVISION.

April Term, A. D., 1865.

The Chicago and Alton Rail Road Company, *Appellant*, *vs.* Leander Utley, *Appellee.*	Appeal from County Court of Livingston County.

BRIEF STATEMENT OF CASE.

The appellee brought an action of case in the County Court of Livingston County against the appellant to recover damages for the killing of his mare by the engine of the appellant. On the first call of the case in the Court below, the plaintiff moved to amend his declaration by changing the date of the killing in the same from "November 7th, 1865," to "November 7th, 1864," which amendments being allowed the defendant moved for a continuance of the cause, on the ground that the same were substantial. The Court overruling the defendant's motion, a trial was had, and verdict for the plaintiff, assessing the damages at two hundred and twenty-five dollars. A motion for a new trial having been overruled by the Court, defendant moved in arrest of judgment, because the declaration does not negative all the exceptions of the statute requiring rail road companies to fence their road, which motion being also overruled, defendant appeals.

ABSTRACT OF RECORD.

RECORD.

pp. 1—2. Summons and return of Sheriff.

p. 2. Declaration in single count as follows:

For that, whereas, on the 6th day of November, A. D. 1865, and for six months previous to that time, and then and from thence forward, have been and are the owners of, and have in their control, a railroad leading from Chicago to Alton, in the State of Illinois, and passing through the county aforesaid, and have and had the right to run upon the same locomotives and trains; and said plaintiff avers that during all that time it was the duty of the said defendants to erect and keep in repair fences on the sides of said railroad suitable and sufficient to prevent horses from getting on said railroad, except at the crossing of public roads and highways within the limits of towns, cities and villages; and where the same run through unimproved lands at a greater distance than five miles from any settlement, through lands where proprietors had fenced, and except where proprietors had agreed to fence, and to construct suitable cattle-guards at all railroad crossings of public highways, to prevent horses from getting on such railroads; and said plaintiff avers that said defendants, more than six months after the said railroad was in use, neglected to comply with the before mentioned requirements, as by the statute in such case made and provided, it was made their duty to do, at a certain railroad crossing of a public highway, in the said county of Livingston, and State of Illinois, whereat, by means of said railroad company neglecting to put up suitable cattle-guards and fences, one certain mare, or horse, the property of plaintiff, of great value, to wit: The value of Four Hundred Dollars—on the night of the 7th day of November, A. D. 1865, at the County of Livingston, and State of Illinois, strayed and got upon said railroad at the said place aforesaid, said railroad crossing, then and there being outside of the limits of any town, city, or village, and not being a place where any proprietor had agreed to put cattle-guards or construct fences. And the said plaintiff avers that the said defendant, by their servants, on the night and at the time aforesaid, and at the place aforesaid, so carelessly, negligently, and improperly run, conducted and directed the train and locomotive of said defendants on said railroad, that the said locomotive and train struck with great force and violence the said horse or mare so then and there being on said railroad as aforesaid, by, through, and by reason of the neglect of said defendants to erect and keep

in repair the fences and cattle-guards as aforesaid; and the same did then and there kill and destroy said horse or mare, the property of said plaintiff aforesaid, to wit: at the County aforesaid, and State aforesaid, to the damage of the said plaintiff Four Hundred Dollars, and, therefore, he brings this suit.

p. 4. Defendant's plea and similiter.

p. 5. Motion by plaintiff to amend declaration by inserting figure "4" in date, in stating cause of action in same, in lieu of figure "5." Allowed.

p. 5. Motion of defendant for continuance, on ground that the amendment was material. Overruled.

pp. 5—6. Verdict of jury—Defendant guilty: damages $225.

p. 6. Motion for new trial. Overruled.

p. 6. Motion in arrest. Overruled.

p. 6. Judgment entered March 8th, 1865.

p. 6. Appeal granted, upon filing bond in sum of $500, within thirty days, and twenty days allowed within which to file Bill of Exceptions.

pp. 6—7. First Bill of Exceptions filed March 23, 1865, containing proceedings upon amendment of plaintiff's declaration and the overruling of defendant's motion for continuance.

p. 8. Second Bill of Exceptions containing all of the evidence in the case, the instructions given and refused by the Court, and the rulings of the Court.

TESTIMONY FOR THE PLAINTIFF.

Testimony of J. L. Culver.—Myself and husband were in Pontiac on the night of the 7th of November last; about half-past nine or ten o'clock we started for Major Haskin's; we had Mr. Utley's horse; the bridge over the river was broken and we had to ford it; the horse began to kick, and finally ran away; he ran back through town, north; plaintiff lives about one and a quarter miles from town, a little west of north, beyond the railroad; the road from here to Utley's crosses the railroad about half a mile

from town; the bridge at the crossing is elevated above the ground; there is a ditch under it; the bridge is not fenced or railed; the road leading to the crossing is the one Utley usually travels from town towards home.

pp. 8—9. *Testimony of N. Curry.*—Know the horse of Utley driven by Culver on the night of the 7th of November last; saw it dead on the railroad at the second culvert this side of Cayuga; she was split open behind, had one leg taken off; fence was poor where we found her; will not turn stock; know the crossing spoken of by Mrs. Culver; there are no cattle guards there; there are holes there about one and a half or two feet deep; nothing to prevent cattle from going up the track; found the mare dead; think it was on the morning of the 8th of November; think she was killed by the cars in Livingston County, Illinois; knew mare five or six months; think she was not breachy; railroad fences were poor at that time; I am certain that there are no cattle-guards there at the crossing spoken of; there are holes there one and a half or two feet deep—probably four feet wide; they are not as deep as guards usually are.

p. 9. *Testimony of E. Corkrell.*—Know the crossing spoken of; guards are not sufficient in my judgment to prevent stock from going on the track; had a steer jump over ahead of an engine over the south guard last June; guard is about two and a half feet deep, probably five feet wide; think the guards are not sufficient to prevent cattle from getting on track; there is no railing on bridge; have used the bridge considerable, it is good for ordinary purposes.

p. 9. *Testimony of J. Garner.*—I found a piece of harness, belly band, tugs and pieces of shaft between Sterrel's house and Turner's cribs, they were nearer the crib; showed harness to Corkrell; the street runs east towards the road to Utley's.

p 9. *Corkrell re-called.*—Have seen cattle go across the railroad crossing more or less for the last three years; never saw a creature go across the guard north; live about one hundred yards from the crossing; saw harness found by Garner; it was Utley's.

p. 9. *Testimony of N. Buck.*—The Chicago and Alton Railroad has been in use more than six months prior to the 7th day of November last. Pontiac limits extend North three eighths of a mile; the crossing spoken of is outside of Pontiac limits; the town limits of Cayuga are three rods south of the depot; I know that the second culvert spoken of is not in town limits.

pp. 9—10. *Testimony of H. Gore.*—Know the crossing spoken of; there is a ditch there; my cattle have crossed the south guard last summer, in June; it has improved somewhat since, think not materially changed; there are ditches open at both ends; don't know much about the bridge; have crossed it frequently; there is no railing on it; always regarded it as a safe bridge; regard the bridge as a good and sufficient one for the crossing of stock under ordinary circumstances; never had an animal go across the north guard; have never examined the north guard closely; would not swear that the north guard would not prevent cattle going over.

p. 10. *Testimony of S. Homberger.*—Mare was worth $225; regard the bridge spoken of as safe under ordinary circumstances, except at night.

p. 10. *Testimony of C. Simmons.*—Mare was worth $225.

p. 10. *Testimony of M. Lyons.*—Mare was worth $225.

Testimony of —— Gaggins.—Guards have been in bad condition for five or six months; my knowledge is derived from what I have seen as I have passed them.

TESTIMONY FOR THE DEFENDANT.

pp. 10–11. *Testimony of N. Clary.*—Am section foreman of the Chicago and Alton Railroad; know the crossing spoken of; it is seven feet nine inches long, twelve feet wide, and three feet six inches deep. The guards spoken of are like the rest of the railroads; there has been no alteration of the guards since four or five months before last November; the bridge spoken of is thirty-six feet long, and fifteen feet wide; have known bridge and crossing spoken of for five or six years; have seen cattle passing over it frequently;

never knew any cattle to get off the bridge or over the north guard; if they had I should have known it; the sides of the guard are perpendicular; saw mare at second culvert, this side of Cayuga; pass over the road twice a day; it is my duty to keep fences in repair; passed over the road twice on the seventh of November last; fences were good; I examined closely, because it is my duty; there is an open prairie North of town and East of the railroad. A fence joins railroad fence one half mile north of road to Utley's, on the East side of the railroad; saw the fence along the railroad, north of crossing spoken of at 3 or 4 o'clock, P. M., of the seventh of November last. I and plaintiff had a conversation in regard to the mare in question; I asked him how his mare got upon the track, as the fences were all up. Utley said, "Clary that mare would jump any fence on the road;" this was on the 9th or 10th of November last.

Cross-Examined: Did not see Utley leave Pontiac on the 9th of November last; this talk was had as Utley was going for appraisers; have been in railroad employ for six years; have been discharged some time ago; have known the managers of the road since road was made; would be discharged if I left fences down; guard spoken of has not been altered in about nine months; Gore had a bull killed at the south guard last June; do not remember saying that the crossing was bad; the fences were all up on the 7th of November last along my line of the road; it was on the 9th or 10th of November last that I had the talk with Utley; the fences were good when I left the road yesterday, and for two days previous.

p. 11. *Testimony of S. Bennett.*—Know the bridge spoken of; it is good for ordinary purposes, and has been for a good while; have examined it; moved a house across it some three weeks ago; think it safe for stock to cross under ordinary circumstances.

p. 11. *Testimony of N. Countryman.*—Know the bridge spoken of; it is safe in my opinion for the crossing of stock under ordinary circumstances; have used the bridge frequently, and have seen it often last fall and winter.

p. 11. *H. Gore recalled for plaintiff*: Had a conversation with Clary

last summer; he said the guards were bad; this was in June or July; I think he said the Company ought to repair them; that they were insufficient.

p. 12. *Testimony of John Mayall, for plaintiff.*—I passed across the railroad about two miles north of Pontiac to-day; railroad fence was down, the posts and railing burned; it was down yesterday and the day before, and on Sunday; any animal could go through it.

PLAINTIFF'S INSTRUCTIONS.

I.

p. 12. If the jury believe from the evidence that the mare strayed or got upon the railroad track through the insufficiency of the cattle guards or the fencing, they are instructed that the law is with the plaintiff, and, if killed while there, the plaintiff is entitled to recover her value from the defendant.

II.

p. 12. The jury are instructed that the mere fact of the mare being killed on the track is evidence of negligence on the part of the Company.

III.

p. 12. It is incumbent on the defendant to prove an absence of entire negligence on their part.

IV.

p. 12. The measure of the damages is the value of the mare.

DEFENDANT'S INSTRUCTIONS.

I.

p. 12. The jury must believe from the evidence that the mare in question was killed on the road of the defendant, and the jury are instructed that they cannot take this fact for granted, and that it must be proved, and if the plaintiff has not proved that the rail-

road on which the mare in question was killed belonged to the defendant they will find for the defendant.

II.

p. 13. Before the plaintiff can recover he must prove that the mare in question was not killed at a crossing of a public highway, and if the jury believe from the evidence that the plaintiff has not proved that the mare was not killed at a railroad crossing of a public highway, they will find for the defendant.

III.

p. 13. Before the plaintiff can recover he must prove that the killing of the mare in question did not occur at a place on said road where said road runs through uncultivated lands lying at a greater distance than five miles from any settlement, and if the plaintiff has not proved that the killing did not occur at a place where the road runs through such uncultivated lands, lying at a greater distance than five miles from any settlement, the jury will find for defendant.

IV.

p. 13. The jury are instructed that a good and sufficient fence is such an one as will prevent ordinary stock from encroaching on an inclosure, and that a good and sufficient cattle guard is such an one as will prevent ordinary stock from crossing it; in other words, such fence and guard will be good and sufficient in law if they are such as a reasonable and prudent man would rely on.

Refused by the Court.

V.

p. 13. If the jury believe from the evidence that the defendant, at the time of the killing charged, had its road protected by good and sufficient fences and cattle guards to protect the place where the killing occurred, then the plaintiff must prove a negligent or willful act before he can recover.

Refused by the Court.

VI.

pp. 13–14. The jury are instructed as a matter of law that the defendant has a right to use its railroad and run its cars thereon without obstruction, and if the jury believe from the evidence that the defendant had the road protected by good and sufficient fences and guards to protect the place where the killing occurred, then the horse of plaintiff had no right or business upon the track above the crossing spoken of by witnesses, and, that, if said horse was so there, he was there of his own wrong, if without permission, and that plaintiff cannot recover for an injury there sustained unless wilfully committed by defendant, or by gross negligence.

Refused by the Court.

VII.

p. 14. In making up their verdict in this case the jury should take into consideration all the facts in the case as proved; the fact (if proved) that the horse in question became unmanageable and ran away from and out of the control of the person in charge of it; the fact (if proved) of its becoming detached from the wagon or carriage to which it was attached; the fact (if proved) that the trappings and harness were still upon it, and if the jury believe from the facts proved that the horse actuated or incited by fear and alarm, under all the facts in evidence, rushed over the fence or across the guards of the road of said defendant (the said fence and guard being at that time good and sufficient) and so got upon the road of defendant and was there killed, then the law is that he was there of his own wrong, and the jury will find for the defendant, unless they further believe from the evidence that the act was the result of negligence or willfulness of defendant.

p. 14. Motion for new trial overruled.

p. 14. Motion in arrest of judgment overruled.

p. 15. Appeal bond.

p. 16. Certificate of Clerk.

ASSIGNMENT OF ERRORS.

1st. The Court erred in overruling defendant's motion for a continuance.

2d. The Court erred in giving the instructions asked by the plaintiff.

3d. The Court erred in refusing the 4th, 5th and 6th instructions asked by the defendant.

4th. The Court erred in overruling the motion of the defendant for a new trial.

5th. The Court erred in overruling the motion in arrest of judgment made by the defendant.

6th. The Court erred in rendering judgment against the defendant.

A. W. CHURCH,
Attorney for Appellant.

124 141

The Chicago & Alton
R. R. Co.
vs
Leander Utley

Abstract

Filed April 4 1865
L. Leland
Clerk