

No. 13002 1/2

Supreme Court of Illinois

Galena & Chicago Union
R.R.Co.

vs.

Sumner

In the Supreme Court.

APRIL TERM, 1858.

The Galena and Chicago Union Railroad Company,
Appellant,
VS.
WILLIAM SUMNER,
Appellee.

APPEAL FROM WINNEBAGO
CIRCUIT COURT.

Paper Read

ABSTRACT OF RECORD.

1 This was an action on the case, brought by the Appellee against the Appellant, claiming damages for three Colts belonging to the Appellee, alleged to have been killed by Appellant's Locomotive Engines and Cars, upon Appellant's Railroad, in the County of Winnebago, in the year 1856.

1 The suit was commenced in December, 1856, and was tried at the February term, 1858, and resulted in a verdict and judgment for the plaintiff, (appelle) for \$255.

3 The declaration contained two counts, charging the appellant, under the Act of Feb'y 14, 1855, with NEGLIGENCE in neglecting to erect and maintain sufficient fences and cattle guards.

7 8 The Appellant pleaded not guilty; and with that plea filed a written stipulation of the appellee, by his counsel, "that any defence might be made and proven under that plea, which would, or might be proper, had the same been specially pleaded."

9 Upon the rendition of the verdict, the appellant moved for a new trial, and also in arrest of judgment.

10 Motions overruled, and appellant excepted; and judgment upon the verdict.

10 All the evidence in the cause is preserved in the Bill of Exceptions, and is as follows: [The parties are designated "plff" and "deft," as in the Court below.]

11 On the part of the plaintiff, the following facts were proved:

That the plaintiff owned and occupied a farm in the town of Lysander, in this county, through which the defendants' railroad passed; that the defendants had fenced their road adjoining the plaintiff's land; and that on or about the..... day of September, A. D. 1856, a colt belonging to the plaintiff was killed upon the defendants' railroad track, opposite the plaintiff's land, by a construction train. The colt was proved to be worth fifty-five dollars.

It was proved that the colt was running in plaintiff's pasture, adjoining defendants' railroad, and adjoining the public highway, which crossed said railroad under the culvert, and that the plaintiff's bars between his pasture and the said highway were left down, and that the highway passage across the railroad was under a culvert of said railroad; that one or two of the stone steps of the culvert abutment had been knocked off by teams or otherwise, and that the fence of defendants' road joined to said culvert; that one or two of the boards of the fence so connecting with the culvert had been loosened, and had fallen down, and that it had been so for some days before the colt was killed; that the colt which was killed had escaped with three others belonging to the plaintiff, from said pasture into the highway, and from said highway onto the railroad track, over the fence so out of repair. That a son of the plaintiff, about twelve years of age, saw the three colts on the track, and drove them off, but did not see the one which was afterwards killed. The three which he drove from the track, passed into the highway over the defective fence at the culvert.

11 The plaintiff also proved, that on the night of the..... day of May, A. D. 1856, about eleven o'clock, nine colts were killed on the defendants'

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railroad track, about one and a half miles west of Winnebago Station, in this County, by defendant's passenger train going east from Freeport to Chicago; that two of these last mentioned colts belonged to the plaintiff, and that the two were of the value of two hundred dollars.

12 These colts were running at large, and were killed between five and six miles east of the plaintiff's farm and residence, and in another town, viz., the town of Winnebago. There was a highway crossing over the railroad, about one mile west of the spot where the colts were killed; and also a farm crossing about half a mile west of the place of killing. Cattle guards were constructed at both crossings. The plaintiff proved that some other colts had once been seen to walk over the cattle guards, at the highway crossing, and to walk back over the same. He also proved that after the killing of these colts, an employee of the defendant, by order of the defendant's overseer of the road, hewed off the sides of the slats of this cattle guard, so as to widen the spaces between the slats; that the pit excavated beneath the slats was about three feet; that the timber used for the slats was four by four inches; and that the timbers were fastened and placed with an edge or corner upwards.

Two of the plaintiff's witnesses—farmers by the name of Grippin—who occupied a farm adjoining the railroad, at the cattle guard, on the highway crossing, testified that they thought the frame-work of the cattle-guard was laid out for slats three by three inches, and that timber four by four inches was used, which accounted for the slats being so near together.

Said witnesses also testified that they saw colt's tracks between the highway crossing and the farm crossing, the morning after the colts were killed; that the tracks found near the highway crossing, appeared as if the colts had been feeding; and those found near where they were killed, showed that the colts had been running; where they were killed, the tracks were all in a huddle.

13 The plaintiff then offered in evidence a law adopted by a Town Meeting of the said town of Winnebago, in force at the time the colts were killed, which declared that colts of this description were allowed to run at large in said town at the time these colts were killed, and produced and proved the existence of such town law.

" The defendant, by its counsel, objected to the giving of the said town law in evidence. The Court overruled the objection, and allowed the same to be read in evidence to the Jury; to which decision and ruling of the Court, in overruling said objection, and allowing said law to be read in evidence, the defendant, by its counsel, then and there excepted.

" It was agreed between the parties that there was a town law of the town of Lysander, where the first mentioned colt was killed, restraining certain animals other than colts or horses, from running at large in the public highway, and that colts and horses were not so restrained in said town law of Lysander, and were not mentioned in said town law at all.

" This was all the evidence on the part of the plaintiff; and it was admitted on the part of the plaintiff, that there was no negligence on the part of the servants of the defendant, in the running or management of either of the trains, by which the colts in question were killed.

DEFENDANTS' EVIDENCE.

13 The defendant then introduced as a witness, Bruce Wilcox, who testified that he was the Conductor of the train, at the time the nine colts were killed, near Winnebago Station, in this County; that the night was very dark and rainy; that the train was running at its usual speed, which at that time was twenty miles per hour; that the time of arrival at Rockford was, as he now recollects it, eleven o'clock; that he felt

the shock at the time the engine struck the colts, but did not know what had been struck; that John B. Bowen was the engineer running the train, and that he was an able, prudent, careful engineer; that he had then been some time in defendant's employ as an engineer, and is still employed by defendant; he is now principal machinist at one of the defendant's shops.

14 The defendant then introduced as a witness, John B. Bowen, who testified that he was the engineer running the passenger train on the night when the colts were killed near Winnebago; that the night was very dark and rainy; that it was so dark that he could see nothing out of the front windows of the engine; that he did not see the colts, and did not know what had been struck by the engine until afterwards; although he felt the shock of the collision; that it occurred near a culvert about a mile and a half west of Winnebago Station; that he stopped at the Station to examine the engine and machinery, and found horses' hair and blood on the pilot (cow catcher); that he did not see the colts at all; that he was then running the train on time, at the usual speed, he thinks twenty miles per hour; the train was going from Freeport to Chicago; had been engaged by defendant, as engineer, for some years, and is still employed in defendant's service, as principal machinist.

14 The defendant then introduced as a witness Charles Elliott, who testified that he had charge of defendant's railroad track, from Freeport east to Winnebago Station.

It was his duty to see that the track, cattle guards and fences were in order. Witness had passed over the road a day or two before the colts were killed; the cattle guards and fences were in good order; the road had been all fenced on each side, some time before the colts were killed.

The cattle guard in question was similar to the other cattle guards on the defendant's road at highway crossings. The fences on the railroad from Freeport to Winnebago were in good repair.

The culvert at the road crossing in Lysander, was injured by one of the stones of the steps leading to the top of the abutment, being knocked off by teams passing it; and the fence which connected with it, was impaired by one or two of the boards being torn off. It remained so out of repair several days, when it was repaired by witness.

William Mindham had the overseeing of the track, cattle guards and fences, at the time the colts in question were killed.

15 William Mindham was then introduced as a witness, and testified that at the time the colts in question were killed, he was in the defendant's employ, and had the immediate supervision of the railroad track and fences from Winnebago Station to one and a half miles east of Pecatonica Station. The cattle guards and fences were in good repair at the time the colts were killed. Witness passed over the track the morning after the accident; saw no tracks at the highway crossing; followed up the track, and found tracks at the farm crossing east, (Swezey's); one of the slats of the cattle-guard on the east side of the farm-crossing was broken down, and witness saw an animal's track in the bottom of the pit under the broken slat; could not tell what animal's track it was; it had rained since the track was made. Both of the cattle-guards were in good order the night before the accident; and the fences were in good repair. Witness passed over the road where the colts were killed, on a hand car, before dark, on the same evening of the accident. Witness buried the nine colts; he found them all dead, and badly mangled, about six o'clock the next morning.

16 This was all the evidence in the case.

16 After retiring to consider of their verdict, the Jury returned, and by their verdict, found the defendant guilty, and assessed the plaintiff's damage to the sum of two hundred and fifty-five dollars.

16. The defendant, by its Counsel, moved the Court for a new trial, and also in arrest of judgment; both of which motions the Court, after argument, overruled, and rendered judgment upon the verdict. To each of which decisions and rulings of the Court, in overruling the said motion for a new trial, and in overruling said motion in arrest of judgment, the said defendant, by its Counsel, then and there excepted, and prayed that this its Bill of Exceptions be signed and sealed by the Judge, which is done accordingly.

The Appellant assigns for Error—
That the Court erred in permitting
Irish Law of Minutago to be
read in evidence.

That the Court erred in overruling
the motions for new trial, and
in arrest of judgment.

And, in rendering judgment for the
Appellee.

J. L. Loop,
Atty for Appellant.

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I. H. U. R. R. Co.

M.

Wm. Sumner

Abstract

Filed April 22. 1888
L. Leland
Clerk

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