

No. 8415

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

vs.

E. W. Brown

71641  7

Page

State of Illinois
Marion County

Heas and proceedings in the Circuit
Court in and for the County of Marion
and State of Illinois in a certain
cause heretofore pending in said
Court wherein Epherson W. Brown
is Plaintiff, and the Ohio and
Mississippi Rail Road Company,
Defendant.

Be it Remembered that on this 25th day of July
A.D. 1857 said Plaintiff by his Attorney filed his Dec-
laration against said Defendant in the words and
figures following, to wit:

Of the August term of the Marion
Circuit Court for the year 1857.

Epherson W. Brown

v. s.

Ohio & Mississippi Rail Road Company

Trespass on the case
Damages \$850.

Epherson W. Brown Plaintiff,
in this Suit by Silas L. Bryan Atty complains of the
Ohio & Mississippi Rail Road Company, defendants in
this suit, being summoned &c, of a plea of trespass on
the case. For that Whereas the said Defendants, here-
tofore to wit on the twenty first day of June eighteen
hundred and fifty seven at the County of Marion and
State of Illinois were the owners and proprietors of the
Ohio and Mississippi Rail Road which said Rail Road

or a part thereof to wit over and across said County of Marion had been open for use and had been and was operated and used by said Defendants for a long space of time previous to the day and year last aforesaid, to wit from the fourteenth day of February eighteen hundred and fifty five thence hitherto whereby and by reason whereof "the defendants became and were liable for all injuries done to stock Horses, Cattle, Sheep and Hogs upon said road in the event and upon condition that the said defendants failed, neglected or refused)" from and after the fourteenth day of August eighteen hundred and fifty five to erect and maintain fences on the sides of said Road or the part thereof so open for use as aforesaid, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on to said Rail Road within five miles of each and every settlement along said line of Road, except when the proprietors of adjacent lands had already erected said fences or agreed to do so, or at the crossing of Public roads and highways or within the limits of cities ^{towns} and villages or where it was not necessary to fence said road to prevent horses, cattle, sheep and hogs from entering upon the same, with openings or gates or bars at the farm crossings of such Rail Road for the use of the proprietors of the lands adjoining such Rail Road, and also to construct where the same had not already been done, and thereafter maintain at all Road crossings then existing or thereafter established, cattle guards, suitable and sufficient to

lines included
in parenthesis
as amendment
to Declaration.

prevent cattle, horses, sheep and hogs from getting on
 to such Rail Road. Yet the said defendants well
 knowing the premises but contriving and wrongfully
 and unjustly intending to injure and aggrieve the
 said plaintiff in this behalf to wit on the twenty first
 day of June eighteen hundred and fifty seven & thence
 hitherto wrongfully and unjustly neglected and refused
 to erect and maintain such fence as aforesaid whereby
 three mares, one mule and one colt the property of
 the said plaintiff of great value to wit of the value
 of eight hundred & fifty Dollars, lawfully feeding and
 depasturing in and upon the uninclosed lands and
 common adjacent to said Rail Road to wit in the 23^d
 day of June 1857 went erre and escaped from and out
 of said common for the want of such fence as aforesaid
 into and upon said Rail Road track of the said Defend-
 ants, That is to say within five miles of a settlement
 and at a point upon said Road where the said defend-
 ants were bound by law to erect and maintain such fence
 as aforesaid that is to say at a point where the owners
 of the adjacent lands had not enclosed the same or had
 not agreed to fence the same & where it became and was
 necessary to fence said adjoining lands to prevent
 horses, cattle, sheep and hogs from getting onto the
 track of said Rail Road from the adjoining lands
 and without the limits of any city, town or village
 and where there was no crossing of any public road
 or highway, and thereby then and there the said three
 mares, mule and colt of the said plaintiff were run

4

over and killed by a locomotive and train of cars of the said defendants passing along and over said Road, to wit, at the County of Marion aforesaid, whereof the said plaintiff says that he is injured and has sustained damage to the amount of eight hundred and fifty dollars & therefore he brings his suit &c.

Silas L. Bryan
Atty. for plt.

Whereupon the defendant files his general Denial in the Summons issued in the words and figures following to wit:

State of Illinois

Marion County

^{ss} The People of the State of Illinois,
To the Sheriff of Marion County Greeting.

We command you to summon The Ohio & Mississippi Rail Road Company if it be found in your County, to appear before the Circuit Court of Marion County, on the first day of the next term thereof, to be holden at the Court House in Salem on the second Monday in the month of August next to answer & person W. Brown of a Plea of Trespass on the case, to his damage Eight hundred and fifty dollars as he says, and hereof make due return to our said Court as the law directs.

Witness H. W. Egan Clerk of our said Court, and the Judicial Seal thereof at Salem this 25th day of July A.D. 1857.

H. W. Egan Clerk.

3

Upon the back of which Summons was the following
indorsement "I have this day served the within summons
by reading the same to S. W. Drake, Agent O & M. R. R. Co
at Salem, & give him copy of same, July 25th 1837.

W. J. Eastland Shff
By J. Shultz Deft."

Whereupon the defendant files his general Demurer
in the words & figures following to wit

And the said defend-
ant comes and defends when &c, and says the matters
and things in plffs declaration above pleaded manner
& form are not sufficient in law to have or maintain
his action, wherefore ~~def~~ prays judgment if the
same be sufficient.

Wayside
for deft.

And afterwards to wit, at the August term of the
Marion Circuit Court, to wit August 11th A.D. 1837
the following order was made, to wit

E. W. Brown

vs

Free pass on the case.

The O & M. R. R. Co. And now at this day came the
parties by their Attornies, and the plaintiff by Bryan
his attorney asks leave of the Court to amend his
declaration hereby striking out and inserting,
which leave the Court granted and ordered that the
plaintiff be at liberty to amend his declaration
accordingly.

6
And afterwards to wit, at the August Term of said Court, to wit, on the 30th day of August A.D. 1857, the following order was made, to wit:

E. W. Brown

v.s.

Trespass on Case.

Ohio and Mississippi
Rail Road Company

And now at this day came the said parties by their attorneys and have been asked by defendants attorney to withdraw their pleas filed herein. It is ordered by the Court that the Defendant have leave to withdraw said Pleas, and it is further ordered that this cause be continued until the first day of ^{the} next term of this Court.

And afterwards to wit on the 9th day of March A.D. 1858 said defendant filed his special demurrer to said Plaintiffs Declaration, in the words and figures following, to wit

Ohio & Mississippi Rail Road Co.

ats

Epperson. W. Brown

And the said defts by Haynie their Atty comes and defends the wrong & injury wherein, and says the matters and things in plffs Declaration mentioned Modo et forma &c, are not sufficient in law for said plff to have or maintain his aforesaid action against them & they are not bound to answer the decl of said plff - whereupon defts pray Judgment

40.

7

And defts assign the following special causes of
Remuner.

1st It is not averred or shown in plffs Decl, that at the point where plff cattle were killed it was necessary to erect a fence in order to prevent hogs or horses from getting on the track from adjoining lands.

2nd It is not shown that the proprietors of lands adjoining the points where the hogs or horses were killed had not erected the fence along the line of said road or agreed to do so. It is not enough to aver that they were killed at a point where the Company were "bound by law" to erect a fence. Whether the Company is bound by law is a question for the Court to determine from the facts appearing in the record - The pleader must state the facts, not his legal deductions.

3rd. The averment of the duty of Defts is too broad, all the exceptions in the same clause must be shown in the averments as to the duty to fence - and then the facts stated must show the Court that the defts are not within any exceptions - before it can appear to the Court that plff has a right to maintain his action.

The exceptions as to duty to build fence are
1st at the crossings of publick roads and highways,
2nd Within the limits of towns, cities & villages,
3rd Where the fence is not necessary to prevent hogs or horses from getting on from adjoining lands.

4th where the lands are more than 5 miles from a settlement.

5th where the owner of lands have erected or agreed to erect fences.

The declaration must show facts against defts

P manner & form as the said plff hath above in his declaration complained, and of this he puts himself on the country &c.

And the said Plff does likewise

L. L. Bryan for Plff.

Wayne for Deft

3rd

And for further plea by leave deft says action now because they say that the said defts are an incorporated Company, chartered by an act of the Legislature of the State of Illinois by an act thereof approved February 12th 1831, and now still in force and here to the Court shown & that after the approval of said act, said defts, did proceed to construct and complete said road across said state according to the terms of said charter. And defts aver that at and before the 14th day of February 1835, to wit on the 10th day of 2^d month the said deft had completed & in use a large portion of said road, and defts also avers that by the terms of their charter & the act incorporating them, nor by any law then binding (or subsequently) upon defts by being then or afterwards accepted, added to or incorporated into their charter by their consent, they were not bound to erect and maintain such fences as would prevent the horses of plff from erring and escaping into & on the rail road of defts, and there without the negligence of defts or their agents, being killed by the moving of defts trains, and this the said deft is ready to verify, wherefor they pray judgment &c.

Wayne for deft

3rd And for further plea by leave of defts says actio
 non, because they say that defts by deed of lease to one
 George W. Jenks heretofore to wit on the tenth day of August
 1835, did lease and let the said Ohio & Mississippi rail
 road with all its appertanances, engines, fixtures, rolling
 stock and machinery to the said Jenks, and did on the
 day, and date aforesaid, deliver the same into the full
 possession of said Jenks, to hold, use, manage and
 completely contrall, for and during the full term of
 fifteen years from said day free from all right or
 power of defts over the same unless surrendered by
 said Jenks to defts after giving 30 days notice of his
 desire so to do. and defts aver that from said 10th day
 of August 1835 thence hitherto the said Jenks has had
 the full and entire management and contrall of the
 same and still has, and has never surrendered the same
 or any part thereof to defts, and defts aver, and defts
 aver that the said grievances in the plffs declaration
 mentioned, if any such were committed were done
 after the said Lessee took possession of the said road & while
 he was operating the same, by the said Jenks his servants
 or agents, lawfully in the use & possession & operating
 said road, without this that the said defts or their agents
 or servants or any person by their authority or in their
 employ, committed any of the acts in plffs declaration
 complained of, and this defts are ready to verify,
 wherefor they pray Judge.

Wm. H. Haynis for Defts.

16

4th And for a further plea by leave &c. defts say
 action now because they say that by an act of the Legislature
 of the State of Ills. approved Feby. 12th 1851, and now still
 in force the said defts were chartered an incorporated Com-
 pany for the purpose and with the right and power to
 construct and operate a rail road across the State of
 Illinois, from Alton to a point at or near Vincennes
 Indiana, as will fully and at large appear by reference
 to the provisions of said charter now here to the Court
 shown. And defts aver that after the approval of said
 act they did proceed to lay out, construct and complete
 said road and equip the same as they might lawfully
 do by virtue of the charter aforesaid. And defts fur-
 ther aver that at & before the 14th day of Feby. 1855,
 they had expended a large amount of money & had
 completed and in use and operation a large part of said
 road. And defts aver that by the terms of their charter
 nor by any law in force before the day last aforesaid,
 they were not bound to erect and maintain fences along
 the line of their sd Road at any place or point to prevent
 the cattle of Plffs or others from escaping upon their
 road so constructed as aforesaid - Nor were they in any
 way liable for the value of Cattle killed on their said
 road without the fault of defts or their agents or servants.
 And defts further aver that neither by act or deed
 expressly or impliedly have they in any manner accept-
 ed as part of their charter the provisions of the act of
 14th Feby 1855, passed by the Legislature of Ills - nor
 have they since its approval or do they now consent

to be bound by its provisions in any manner, and defts further aver that the grievances in plffs declaration mentioned, if any such were committed, occurred without the fault or negligence of defts, their servants, or agents - whilst lawfully using & operating their road, chartered, constructed and operated as aforesaid in their ordinary course of business, and by the fault and negligence of Plffs turning their Cattle, horses &c at large upon the uninclosed lands adjacent to the track of said road & permitting them to escape upon the same at the place in Declaration mentioned. And this they are ready to verify, wherefore they pray judgment &c.

J. N. Starnie for defts.

Whereupon said plaintiff, on the 17th day of March A.D. 1858 filed his Demurrer to Defendants 2^d, 3rd & 4th Pleas, in the words and figures following, to wit:

Marion County Circuit Court,
March Term for the year 1858.

Efferson W. Brown

vs.

Ohio & N. R. R. Co.

Defenses on the case.

Demurrer to Pleas.

And the said Plaintiff as to the second, third, and fourth pleas of the said Defendants by them in their second, third and fourth pleas above pleaded, saith that the same, and the matters therein contained in manner and form as the same are above pleaded and set forth in said pleas, are not sufficient in law to bar or preclude him the said plaintiff from having or maintaining

his aforesaid action thereof against the said Defendants, and that he the said Plaintiff is not bound by law to answer the same. Wherefore, by reason of the insufficiency of the said pleas in this behalf, the said Plaintiff prays judgement and his damages by him sustained on occasion of the committing of the said grievances to be adjudged to him &c

Silas L. Bryan for Pltff.

And afterwards to wit at the March Term of the said Court, to wit March 19th A.D. 1838, the following order was made, to wit:

E. W. Brown

vs.

Trespass on the Case

Ohio and Mississippi

Rail Road Compy.

And now at this day came the said plaintiff by Bryan his attorney, and the defendants by Wayne their attorney, and this cause being called for trial, the defendants by Wayne their said attorney enter their motion, that they have leave to file a Bill of Discovery herein, and that this cause be continued until the next term of this Court, which motion the Court overrules. And Judge Wayne being sole counsel in this cause for the Defendants, and being suddenly taken sick, this cause is ordered by the Court, to be continued until the first day of the next Term of this Court and for that reason.

14

And afterwards, to wit at the March Term
of said Court, to wit on the 29th day of March
A.D. 1839, the following order was made, to wit
Efferson W. Brown

vs
Ohio and Mississippi
Rail Road Company

Trespass on the land.

This cause being now called
on for trial. And the defend-
ant having filed plea of the general issue and
special pleas herein Nos 1, 2, 3 and 4. And the said
plaintiff having filed Demurrer to the 2nd, 3rd and
4th pleas. And this cause coming on for hearing on
said Demurrer. And the Court having heard the
parties thereon by their attorneys and Counsel, and
being fully and sufficiently advised of and con-
cerning the premises, sustains said Demurrer to said
second, third and fourth pleas. To which the defend-
ants except, and the plaintiff stands by his Demurrer.
And plea of general issue being ample, this cause
is now here called for trial, issue being joined Let
a jury come. And thereupon came the following jury
to wit Fredill Meader, Jesse Gory, George Davidson,
John Dillon, A. P. Kell, Samuel Hartman, J. L. Perry-
man, Fleming Proise, George P. Hull, H. F. Kelchner,
Joseph Lynch and J. P. Huff, twelve good and
lawful men, who being tried elected and sworn well
and truly to try the issue joined, after hearing the
evidence, arguments of Counsel and instructions
of the Court, retired to consider of their verdict,

See Copy of Instru-
tions at foot of Bill
of Exceptions.

15-

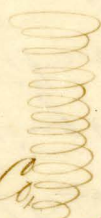
And afterwards brought into Court the following
 verdict. "We the jury find for the Plaintiff Seven
 hundred and thirty dollars. J. P. Huff Foreman".
 It is therefore ordered, and adjudged that said
 plaintiff do have and recover of said and from
 said Defendants said sum of (\$730) Seven Hundred
 and thirty dollars, together with his costs in this
 behalf expended and may have execution therefor.
 Whereupon the defendants by Daynie their attorney
 moves the Court for a new trial, which motion the
 Court overrules. And the defendants thereupon pray
 an appeal, which is granted on entering into Bond
 in \$1000 in thirty days, with Scham D. Daynie
 and William Hornes as security. Bill of exceptions
 to be signed in vacation, upon the same being first
 agreed upon by Counsel for plaintiff to wit
 Silas L. Bryan, as correct.

And afterwards to wit
 on the 27th day of August A.D. 1859 the defendant
 filed his Bill of Exceptions, which is in the words and
 figures following, to wit
 State of Illinois } Of the March Term of the
 County of Marion } Circuit Court of Marion 1859.

E. W. Brown

v.s.

The Ohio & Miss. R.R. Co.



Be it Remembered that at the
 Court & term aforesaid before his honor Judge

H. K. S. O'Melveny, came the said parties & a jury being duly empannelled, the Plaintiff introduced his witnesses, as follows, to wit

Isaac Lydick being sworn testified & said, I saw the stock after it was killed. It was killed about three & a half miles from Salem. There were three brood mares, a mule & a sucking colt. Four head of them. the three mares & colt, were lying close to the rail road. The mule was off some distance. Some of them had a leg cut off. Neither of them were dead, The section hands hauled them off. I saw tracks on the road where they had run over half a mile. I saw the animals first. The mule was some 150 yards off, & had one leg cut off. I followed the tracks to see how far they had run. There was blood on the track when we found them. Three mares run over were a rod from the Tracks. The colt was right close. It was on the night of the 22^d June 1837. I heard the night train that night going west. The animals were running west, & train going west. The three mares & mule were worth \$175 each - the colt about \$30. They were number one mares, & number one mule.

Lydick cross examined.
It occurred in June 1837. I lived about fifteen rods from the railroad at that time. Was not up when the train passed. was in bed - had been asleep - heard the train pass that night. the animals were 150 or 200 yards from my house. - the rail road runs through my farm - it ^{is} not fenced. there were cattle guards

17

at that time, but not in my enclosure. It was East of me that it occurred. The tracks were running West about half or three quarters of a mile from me. I do not know whose horses they were. They would have brought in open market in our neighborhood \$175 each, the colt worth \$30 - this is Cash market value in market.

Re-Examined in chief

The act occurred on N.W. corner of Section 17. No fence on either side of the road.

Elifah Lewis, being sworn, testified, & said:

I saw the horses the evening before they were killed, about half a mile West of where they were killed.

I think Raintiff had them next morning. I went & saw the horses that were killed - think they were the same horses that I saw the evening before. Saw them about an hour by sun the evening before. The Raintiff stopped about half a mile from Mr Lydick's on the Vincennes road - stopped to camp. The horses roamed off half or three quarters of a mile from camp, & wandered in East direction. Don't know how they got to the railroad, but saw tracks for about half a mile where they had run on the road. I saw blood on the track. The colts nose was cut off. I did not examine. One leg was cut on the mule. One leg of the mare cut, & the legs of the other two cut. Think the mares worth \$175, or \$180 each. Did not examine. Colt was worth \$30 or \$40. No fence on either side of the railroad, where the tracks were seen on the railroad nor where the horses were killed.

Cross Examined

I sold one horse myself about that time - didn't see any others sold about that time. There were very few horses of that description. Never saw any sold but my own. Saw it quoted in the papers that the horses were high. Can't say what papers - I am speaking from recollection at that time. Don't know who had it put in the papers as to price - didn't see any sell except my own. Mino was a gelding.

The only way I can judge of the price of horses is by what I saw in the papers. I was living at that time on my father's farm about half a mile from where the horses were found. I was in the field the evening before the corn field runs near to the rail road - was about 300 yards from the rail road when I saw the mares the evening before about 50 yards from the state road when I saw the movers - three men, ~~about~~ 50 yards off, - it was one hour by sun. I saw the men next morning. They were all together the evening before the stock was killed. I was sitting on the fence when they passed - didn't see them stop that night, - they passed when I was at work. I don't know who owned the horses, - don't know whether Plaintiff or the other men owned them. The other men looked to be about as old as the Plaintiff. I can't say positively that the horses killed were the same I saw the evening before. I did not see them stop & camp. I did not see the horses any more that night - I did not see the horses wander off.

19

Re-Examined in chief.

I think Plaintiff was driving & managing the horses the evening before. I know the wagon standing North of Mr. Lydicks the next morning. It was the same I saw the evening before.

Re-cross. Ex. — I don't know whether Plaintiff was hired or not.

Matthew Rankin testified upon oath & said:

I did not see anything connected with the injury to the animals. I was called the next morning to appraise three large mares, one mule & colt. They were in bad condition. There were two mares on one side, & a mule & mare & colt on the other side. The sorrel mares were on the South side, not dead at the time. The mares were worth \$175 each & the mule the same. The colt was worth \$30 or \$40. They were fine large mares. I followed the track half a mile East of where I found them, on the road. I don't know when they got on the road. There was no fence on either side for nearly a mile. The horses were killed on land nearest Lydicks. I did not see Plaintiff the evening before, but saw his wagon. I did not see or know anything about the horses or mule the evening before.

Cross Examined. I do not know who owned the wagon I saw the evening before.

Ernie Mills, Examined. I know who owned

the land where the horses were killed, on the 22^d June 1837. It belonged to Wilson King of Pennsylvania. I was agent. Have since sold it - the deed passed thro' my hands. I had the agency of it for four years. I do not know of any contract with Defendant to fence the road. I made none.

Judge Haynie Examined. I know nothing about the case except professionally as Attorney for the Defendant. I never received any directions from Mr Whittaker.

Mr Shanafelt examined. I do not know about Mr Whittaker being Agent for the Company. He took papers for me to St Louis, about stock killed on the road. Whittaker has been making contracts for wood & ties. ~~He~~ ~~Ex~~ ~~am~~ ~~ined~~ ~~to~~

The company sent a note by Whittaker to me & I refused to take it. It purported to be from the Rail Road Company. - (Objected to.)

Mr Schaeffer, examined (objected to) -

Whittaker told Plff. over a year ago that the company would give Plff. Roger Bacons note for \$650⁰⁰ payable six months after date for the stock killed. Plaintiff talked of taking it, but the note was not forwarded.

Cross examined. The proposition to give the note was made after suit was commenced. The

21
8

offer was made to settle the matter. Plaintiff agreed to take the note, but it ^{did} not come. This suit is for the same matter that the proposal to give a note related to. do not know anything about Whittaker being agent, only that he settled with me for my cow last fall by giving me a note from the Company. The proposition to settle this matter was made by Whittaker before last March Court. The Court permitted witness to go on & state in full what the proposition was. Objected to by Defendant.

This was all the evidence in the case. The Defendant introduced no witnesses. — Whereupon the jury, after instructions from the Court, having retired, returned a verdict in manner & form as follows to wit:

That the jury find for the Plaintiff & assess the damages at \$730.⁰⁰/₁₀₀.

Whereupon the defendant by counsel moved said Court to grant a new trial, for these reasons,

1. The verdict of the jury is contrary to the instructions of the Court, & so contrary to law.
2. The verdict is without evidence.
3. The verdict is against evidence.

(Which motion with the reasons therefor were overruled by said Court, to all which the Defendant then & there at the time excepted.

Signed on Saturday the 27th day of August A.D. 1839.

H. K. S. O'Melveny Esq
Judge &c &c

The court instructed the jury in the words
22 and figures following, to wit:

The court is asked to instruct the jury for the plaintiff that if the plaintiff has shown that he was the owner of the property in controversy, and that the property was killed by the train of defendants and that, ^{Railroad} their Road was not fenced at the place where the property was killed and that under the statute defendants were bound to fence their Rail Road, at the place of the killing then the plaintiff is entitled to a verdict for the value of the property as proved. Given

That the Plaintiff is not bound to prove his ownership in the property by positive testimony, if he has shown by facts and circumstances to the jury that he was the owner of the property, then he is entitled to recover, the other facts being proven. Given.

That the possession of the property by the plaintiff, if the jury believe from the evidence that the property was in his possession is prima facie evidence of ownership and if the jury believe from the testimony that before and at the time of the loss of the property it was in the possession of the plaintiff it is sufficient to establish such and ownership as if undisputed entitles the plaintiff owner for the purposes of this case. Given.

The Court instructs you for the defendant.

23

That you are to weigh all the testimony in this case and give to each witness such weight as they may believe him entitled to - And unless you can find, from the weight of evidence, and the preponderance of proof that the plaintiff Brown was the owner of the property at the time it was injured, the verdict should be for the defendant. Given.

And if there are other persons who from the evidence before you must have known who owned the property - and the plaintiff has failed to produce said witnesses knowing the same or their depositions in this case, this is a circumstance the jury may consider against the Plaintiff and if without this circumstance the evidence is equal then this failure of plaintiff is a circumstance you may consider in the case in coming to your conclusions - Given.

If from the evidence it is as probable that the property in question was some others as the plaintiff, then the verdict should be for defendants. Given.

State of Illinois
Marion County
I, J. H. W. Egan Clerk of the
Circuit Court of said County
do hereby certify the foregoing to be a true, full
and complete transcript of the ^{whole of} Record and
proceedings had in our said Court in the above
entitled cause and that the Bill of Exceptions

24

Letter attached is a true & perfect copy of the
original all of which remains on file in my
office



Given under my hand & official
Seal at Salem this Sept 18th 1839
N W Eagan Clerk
J D O'Connell Capt

C W Brown

as
C W R. Co

Recd

Recd

And now at this day Comes the Said.
Ohio & Mississippi Railroad Company Pliffs
in Error, and Say there is manifest Error
appearing in the records and proceedings
of the Court below in the foregoing Cause
and for assigning the same, the Said Pliffs
doth Set down and Show the following Errors
to wit

Error

1st The Court Erred in refusing to grant
a new trial Because

1st The Verdict of the Jury is against Evidence

2nd The verdict was against the Fact -

3rd The Verdict was against Law & Evidence
and regardless of the instructions given

Error

2nd The Court Erred in rendering Judgment
for Pliff below & deft here

Error

3rd The Court Erred in refusing to render judgment
for deft below & Pliff here

Error,

4th The Court Erred in giving instructions
which should have been refused -

5th The Court Erred in refusing instructions
which should have been given

6th The Court Erred by admitting testimony for Pliff
below which should have been excluded

7th The Court Erred by rejecting Evidence for
deft below which should have been admitted

Wherefore Pliff in Error for all these Causes

doth pray that the said Judgment of the Court
below in this Cause be set aside Annulled
reversed, made void and for nothing be
Estimated.

Homer Haynie & Parish
Attys for Plff in Error

The Clk. of the Sup. Court 1st Band Division will
make the writ of Error a supersedeas in the
Plffs in Error amounting a bond in the penal sum
of eight hundred and fifty dollars with Levi
Edmonds of Clinch Co. Ky. surety. Sept. 29. 1859
Admors Messrs Messrs

Record 28

Nov Term Sep ct 1859

The Ohio & Mississippi R R Co
Plff in Error

vs
Epperson W Brown
Def in Error

Error to Marion

Filed Oct 18. 1859.

Rock Johnston Clk

Paid by Judge Haynie \$5.00

Homer Haynie & Parish
Attys for Plff in Error

State of Illinois,
SUPREME COURT,
First Grand Division.

} SS

The People of the State of Illinois,
To the Sheriff of Marion County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Marion county, before the Judge thereof between

Epperson W Brown plaintiff and The Ohio and Mississippi Rail road Company

defendants it is said that manifest error hath intervened to the injury of said Ohio and Mississippi Rail road Company as we are informed by their complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Epperson W. Brown

that he be and appear before the justices of our ~~said~~ Supreme Court; at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Epperson W Brown notice together with this writ.

WITNESS, the Hon. John D Catton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this eighteenth day of October in the year of our Lord one thousand eight hundred and fifty nine

Asah Johnston

Clerk of the Supreme Court.

SUPREME COURT.
First Grand Division.

Ohio & Mississippi Rail
road Company

Plaintiffs in Error,

VS.

Esperance W. Brown

Defendant in Error.

SCIRE FACIAS.

Return Defdts
not found in my

FILED.

Court of Dec. 7 - 1889

Wm. H. Smith

The writ of error which has been issued and
filed in this cause, is made a Superedeas-
and as such, is to be obeyed by all concerned.
Noah Johnston Clerk

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND
DIVISION—NOVEMBER TERM, 1859.

OHIO & MISSISSIPPI R. R. Co. vs. E. W. BROWN.

The def't in error, Brown on 25th day of July, 1857, filed his case in Clerk's office of Circuit Court of Marion County vs the pl'ffs in error. Containing one count in usual form, averring that def'ts on 21st June, 1857, were the proprietors of the O. & M. R. R. which had been open for use from 14 February, 1855, whereby def'ts below were liable for injuries to stocks, in case they failed to erect fences &c., Except at places excepted in the statutes that def'ts below knowing the same, neglected and refused to erect such fences whereby 3 mares, one mule and one colt the property of the plaintiff below of value of 850 dollars lawfully feeding &c., went from the adjoining land, unto and upon said rail road at a point where the owners of lands had not fenced and where they had not agreed to fence the same and where it became necessary to fence the same &c; and without the limits of a town, city or village and where there was no crossing of a public road or highway and thereby then and there said animals were run over and killed by def'ts Locomotive.

Damages claimed \$850—

Plea 1st general issue.

2d. Showing def'ts to be a private corporation, not bound by the terms of the charter to fence their road, nor by the terms of any law added to or incorporated in their charter by their consent, and thereby prevent cattle, &c., without their negligence being killed.

3d Special Plea. That def'ts by deed of lease to one George W. Jinks on 10th of August 1855. Leased the O. & M. R. R. with all its appertences &c., and then delivered the same to him for the term of 15 years, according to terms stated in the plea, that from said 10th of August 1855, thence hitherto he had possession thereof, that if any cattle &c., were killed it was by Jinks and his servants, and not by def'ts and their servants.

4th plea. Set up their charter of O & M R R Co., on 12th February 1851—that under said charter def'ts below did build and equip said road and before the 14th day of Feb'y, 1855, had expended a large amount of money and had in use part of said road—and they aver that by their charter nor by any law in force before 14th day of July, 1855, they were not bound to erect fences nor were they liable for cattle killed on their road without their negligence or fault and def'ts do aver that neither by act or deed expressly or impliedly, accepted or part of their charter the act of 14th Feb'y, 1855, and that the grievances in pl'ffs declaration mentioned occurred without their fault whilst operating their road &c., and by neglect of pl'ffs below.

Demurrer to 2nd 3d and 4th pleas sustained. Issue jury and verdict on gen'l issue alone, def't standing by his 2nd 3d and 4th pleas, verdict for pl'ff for \$730. Motion for new trial overruled and excepted to. Appeal prayed &c.

BILL OF EXCEPTIONS.

EVIDENCE.—Isaac Lydick proved the killing of the mares mule and colt and value by def'ts train on 22d June, 1857, and road not fence—did not prove who owned the property or that it was killed at a place not within a town, city or village or at a public crossing.

E. Lewi's proof of killing and value and no fence—Thinks the plaintiff had horses next morning—saw the horses that were killed—same ones I saw evening before. Was in corn field 50 y'ds from state road, saw the movers, 3 men, saw the men the next morning they were all together the evening before the stock were killed. I don't know who owned the horses, don't know whether pl'ff or the other man owned them, who were above the age of pl'ff can't say the horses killed were the same I saw that night.

Re-examined.—I think pl'ff was driving and managing the horses the evening before; don't know whether he was a hired hand or not. Does not show that the place where they were killed was not within a city, town or village or at a public crossing.

M Ranking—I was called to appraise the mares, colts and mules, five animals, no fence; the horses were killed on land nearest Lydick's, but he no where shows that on that land at the point where killed there was not a town city or village or a public crossing.

U Mills—Knows the land where horses killed; belonged to Wilson King of Pennsylvania; I was agent, have sold it; do not know of any contract to fence it.—witness does not show that there was not a town city or village on the land or a public crossing where the animals were killed.

Haynie Snow—Know nothing of this case except professionally as def'ts attorney.

Saml Shanefelt—Don't know Whitaker, being agent, he took papers for me to St Louis for stock killed, and he made contracts for wood and ties; Company sent a note by Whitaker to me I refused to accept it; it purported to be from the railroad company. This evidence was objected to.

Shoffer—Whittaker told me more than a year ago that the comp'y would give pl'ff Page & Bacon's note for \$650 for this stock; he talked of taking it but the note was not sent. Crose Ex.—The proposition to give the note was after suit began; this offer was made to settle the matter; pl'ff agreed to take the

Page of
Record. 21 note, but it did not come; dont know any thing about Whitaker being the ag't of the comp'y. Testimony objected to, but court allowed witness to go on. This was all the proof offered—verdict for pl'ff for \$730.

Motion fo new trial—1st. The verdict was against the law. 2u. The ver-
dict was without evidence. 3d. The verdict was against evidence. Motion
overruled and then excepted to.

22 INSTRUCTIONS FOR PL'FF—That if the pl'ff has shown that he was the owner
of the property in controversy, and that the property was killed by the train
of def't, and that their railroad track was not fenced at the place where the
property was killed, and that under the statute the def'ts were bound to fence
their railroad at the place of killing, then the pl'ffs are entitled to recover a
verdict for the value of the property as proved. (given) That the pl'ff is
not bound to prove his ownership in the property by positive testimony if he
he has shown by facts and circumstances to the jury that he was the owner of
the property, then he entitled to recover, the other facts being proven (given)

ERRORS ASSIGNED.

1st—Tht court erred in refusing a new trial. 1st—The verdict was against
evidence. 2d—The verdict was against law. 3d--The verdict was against law
and evidence and instructions.

2d. The court erred in rendering judgment for pl'ff below. 3d. The court
erred in refusing to render judgment for def't below. 4. The court gave
wrong instructions. 6. The court allowed improper testimony to go to the
jury for pl'ff. 7. The court refused to allow proper evidence for def't to go.

POINTS BY PL'FF IN ERROR.

1st. The proof does not show that the property killed to belong to pl'ff in
court below, but leaves as likely to be the property of any other of the 3 men.

2d. The proof fails to show that the horses were not killed at a public cross-
ing, and not within a city or town or village.

3d. The proof no where shows that the railroad was or had been in opera-
tion for six months before the horses were killed.

4. The declaration of Whittaker and his propositions were improperly ad-
mitted.

HAYNIE & PARISH, for Plff.

See Rev Stat

*See Statute 185-5 as
to fencing*

O. W. W. Co }
by }
E. W. Brown }

It is agreed that this case
be submitted on points of law by
agreed for decision on its merits
the 20th Nov 1859

I Meanie for
p. 11 in law

Edw. J. W. Wain
for defts in law

28

Mail Road

1/2

Proctor

March 21.
1858.

N. Huntington
Ch

No 28-22-

Nov-Dec 1859-

O & M. Railroad

vs

E. M. Brown

Ernest Martin-

Rebecca & Hermann

8415

St Louis Oct. 10. 1879
To Mr Johnstone Esq
Dear Sir

By some unaccount-
able delay the bond, with
security, approved by Judge
Brown did not reach me
until Saturday eve. I
enclose it at once. Judge
Haynie Sproule is at Mt.
Vernon, & so will you
mention the matter to
him, as he is in the case.

Very Respectfully
Yrs. Wm. L. Conrad
Atty. Genl

damages, ~~and~~ ~~damages~~ Costs,
 & whereas said Company has prayed for & ob-
 tained a Writ of Error & a Supersedeas to
 issue from the Supreme Court of said State
 or the Office of the Clerk of the same,

And if the said Company shall duly prove
said writ of Error with effect & shall
moreover pay the amount after judgment, costs, int
erst & damages rendered & to be rendered against
said Company, in case said judgment shall be affirmed
in the Supreme Court, then the above obligation shall
be void, otherwise to remain in full force & effect

The Ohio & Mississippi Railroad Co. Supt
By William H. Jones, Atty in fact

109
Wm. J. A. Miller.

Levi^{his} Edmund^{son}

28

Brown

ps.

Ohio & Mississippi R.R.

Band.

Filed Oct 18, 1859.

Book " Johnston M

State of Illinois }
Jefferson County }

Epperson M Brown }
Plffs vs } In the Motion Circuit
The Ohio & Mississippi } Court
Rail Road Company }
Defendants }

Indorsement for plffs March Term
AD 1859. for 730th & costs & Mt of Error
by Defendants. Below

The Ohio & Mississippi
Railroad Company plffs in Error }
vs } Error Waiver
Epperson M Brown defts in Error }

Issue in the above case as argued by
for

Howes, Haynes & Pank
for plffs in Error

Ohio & Mississippi
 Railroad Company
 Pays in 2000

as

Expenses of Brown
 dependent in 2000

Receipts

Filed 18th October 1859.

Attest Solomon M
 " "

State of Illinois,
SUPREME COURT,
First Grand Division.

} ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Mason Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Mason county, before the Judge thereof between

Epperson W. Brown

plaintiff and The

Ohio and Mississippi Railroad Company

defendants it is said manifest

error hath intervened to the injury of the aforesaid Ohio and Mississippi Railroad Company

as we are informed by This complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that

if judgment thereof be given, you distinctly and openly without delay

send to our Justices of our Supreme Court the record and proceedings

of the plaint aforesaid, with all things touching the same, under your seal,

so that we may have the same before our Justices aforesaid at

Mount Vernon, in the County of Jefferson, on the 1st Sunday after

2^d Monday of November next, that the record and

proceedings, being inspected, we may cause to be done therein, to correct

the error, what of right ought to be done according to law.

WITNESS, the Hon. John D. Catron Chief

Justice of the Supreme Court and the seal

thereof, at MOUNT VERNON, this eighteenth

day of October in the year of

our Lord one thousand eight hundred

and fifty years.

Noah Johnston

Clerk of the Supreme Court.

SUPREME COURT.

First Grand Division.

*Chris. Mississippi
Railroad Company*

Plaintiff in Error,

VS.

Epperson W Brown

Defendant in Error.

WRIT OF ERROR.

*Leave - make a
Supplemental
and FILED - October
18th 1859.*

Wash Johnston Clerk

"This Court of error is made a Supremacy, and
is to be given accordingly!"
Wash Johnston Clerk

St Louis Oct. 4. 1859

Wash Johnston - Clerk.

Supreme Court Rooms

W. W. W. W.

Dear Sir -

Copy of the Opinion recd - put in
time - Enclosed please find \$5.

In the Pats case, I wish you would send
word or notice to the Attorneys, Bowman &
Harrod, & to — Hayward, of the filing
of the record &c. &c. B. & H. address is Vin
Census. — Hayward is at Albany. ^{Also} Probably they
will take notice of it.

In a day or two I will forward to you a Bond - a
Supersedeas Bond - in accordance with an order
of Judge Bruce; to be filed with the record of
the case of Brown vs. O. & M. R. & Co.

Judge B. writes me has forwarded to you the
record with assignment of errors, & an order
for Supersedeas to issue &c. When the Bond reaches

you, you will discover some blunders. I do
not remember Christian name of Brown. Please
supply it. So do I remember the amount of
the judgment &c. Will you please supply it,
as the record will enable you to do.

I will forward the fee ^{\$3-} with the Bond.

Very truly Yrs

Wm. Haines

Atty. Genl.

Wm. Haines Esq.

St. Louis

Sept 89

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND
DIVISION—NOVEMBER TERM, 1859.

OHIO & MISSISSIPPI R. R. Co. vs. E. W. BROWN.

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Damages claimed \$850—

Plea 1st general issue.

2d. Showing def'ts to be a private corporation, not bound by the terms of the charter to fence their road, nor by the terms of any law added to or incorporated in their charter by their consent, and thereby prevent cattle, &c., without their negligence being killed.

3d Special Plea. That def'ts by deed of lease to one George W. Jinks on 10th of August 1855. Leased the O. & M. R. R. with all its appertanances &c., and then delivered the same to him for the term of 15 years, according to terms stated in the plea, that from said 10th of August 1855, thence hitherto he had possession thereof, that if any cattle &c., were killed it was by Jinks and his servants, and not by def'ts and their servants.

4th plea. Set up their charter of O & MR R Co., on 12th February 1851—that under said charter def'ts below did build and equip said road and before the 14th day of Feb'y, 1855, had expended a large amount of money and had in use part of said road—and they aver that by their charter nor by any law in force before 14th day of July, 1855, they were not bound to erect fences nor were they liable for cattle killed on their road without their negligence or fault and def'ts do aver that neither by act or deed expressly or impliedly, accepted or part of their charter the act of 14th Feb'y, 1855, and that the grievances in pl'ffs declaration mentioned occurred without their fault whilst operating their road &c., and by neglect of pl'ffs below.

Demurrer to 2nd 3d and 4th pleas sustained. Issue jury and verdict on gen'l issue alone, def't standing by his 2nd 3d and 4th pleas, verdict for pl'ff for \$750. Motion for new trial overruled and excepted to. Appeal prayed &c.

BILL OF EXCEPTIONS.

EVIDENCE.—Isaac Lydick proved the killing of the mares mule and colt and value by def'ts train on 22d June, 1857, and road not fence—did not prove who owned the property or that it was killed at a place not within a town, city or village or at a public crossing.

E. Lewi's proof of killing and value and no fence—Thinks the plaintiff had horses next morning—saw the horses that were killed—same ones I saw evening before. Was in corn field 50 y'ds from state road, saw the movers, 3 men, saw the men the next morning they were all together the evening before the stock were killed. I don't know who owned the horses, don't know whether pl'ff or the other man owned them, who were above the age of pl'ff can't say the horses killed were the same I saw that night.

Re-examined.—I think pl'ff was driving and managing the horses the evening before; don't know whether he was a hired hand or not. Does not show that the place where they were killed was not within a city, town or village or at a public crossing.

M Ranking—I was called to appraise the mares, colts and mules, five animals, no fence; the horses were killed on land nearest Lydick's, but he no where shows that on that land at the point where killed there was not a town city or village or a public crossing.

U Mills—Knows the land where horses killed; belonged to Wilson King of Pennsylvania; I was agent, have sold it; do not know of any contract to fence it.—witness does not show that there was not a town city or village on the land or a public crossing where the animals were killed.

Haynie Snow—Know nothing of this case except professionally as def'ts attorney.

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21 This was all the proof offered—verdict for pl'ff for \$730.

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of the property in controversy, and that the property was killed by the train
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property was killed, and that under the statute the def'ts were bound to fence
their railroad at the place of killing, then the pl'ffs are entitled to recover a
verdict for the value of the property as proved. (given) That the pl'ff is
not bound to prove his ownership in the property by positive testimony if he
he has shown by facts and circumstances to the jury that he was the owner of
the property, then he entitled to recover. the other facts being proven (given)

ERRORS ASSIGNED.

1st—Tht court erred in refusing a new trial. 1st—The verdict was against
evidence. 2d—The verdict was against law. 3d--The verdict was against law
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2d. The court erred in rendering judgment for pl'ff below. 3d. The court
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3d. The proof no where shows that the railroad was or had been in opera-
tion for six months before the horses were killed.

4. The declaration of Whittaker and his propositions were improperly ad-
mitted.

HAYNIE & PARISH, for Plff.

*See Statute of 1851
as to fencing*