No. 14776

Supreme Court of Illinois

Arnold

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vs.

Ludlam

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1476

STATE OF I[illegible]IS.

SUPREME COURT,

THIRD GRAND DIVISION

No. 70

J. W. [illegible] & Co., Stationers, 196 Lake St.

Arnold
&
Ludlam

Supreme Court of Illinois,

THIRD GRAND DIVISION.

OTTAWA APRIL TERM, A. D. 1865.

OBADIAH ARNOLD,
vs.
A. J. LUDLAM,

ERROR TO McLEAN.

POINTS AND AUTHORITIES.

I

This is an action to recover the penalty for driving cattle beyond their range; and is based upon section first, of chapter 35 of the revised statutes of Illinois, entitled "Drovers."

The evidence as contained in the Abstract of the record, shows as complete, and perfect a case as could well be made out, and one falling clearly within the letter, and spirit of the said section. See Purple's statutes, vol. 1, page 502. The section referred to, is in substance as follows:

"Whenever any drover, *or other person or persons*, engaged in driving horses or cattle &c., through *any part of the State of Illinois*, shall knowingly, or willingly suffer, or permit to be driven off from the premises of any citizen of said state, or from the range in which said stock usually run, &c., to any distance, exceeding five miles from such premises, or range, any horses, mules, neat cattle, &c., it shall be lawful for the owner of such stock to follow, and reclaim the same, wherever found; and for the taking and driving away, &c., the said owner shall be entitled to recover of, and from said drover, or other person or persons, guilty thereof for each head of horses, cattle, &c., twice the value thereof, &c."

The instruction of the plaintiff, as modified by the court, and the instructions given for the defendant, tend to reduce the whole matter to a question of construction, of the statute upon

which this action is founded; and the point attempted to be made by the defendant, is that the person so driving off stock, must be engaged in driving cattle *through the State of Illinois, from some point in one state, to a point in another state.*

It is evident, from the language of said statute, that the action for double value of stock so driven off, was given the owner of said stock, as a recompense for the damage, and inconvenience experienced by him; and it would be absurd to suppose that the Legislator in framing such statute, intended, that the measure of damage in such cases, should be the fact of whether the person so driving off stock, was a drover, *or other person*, and whether such person was engaged in driving cattle *clear through the state*, or only from one point to another in the state.

The evidence of the case, shows that plaintiff's cattle were driven off by a drover, *or other person*, who was for that time—at least, engaged in driving cattle *through a part of the State of Illinois*, and that such cattle were driven off to a distance of twenty-five miles from plaintiff's range. And so far as concerns the damage sustained by the plaintiff, it makes but little difference in which class the defendant is placed—or from what point, and to what point the said defendant was driving cattle.

The amendment of plaintiff's instruction, and the instructions given for the defendant, are unwarranted by the law. The instructions for defendant, took the case entirely from the jury, telling them in *fact*, if the defendant lived in the state, and was merely driving cattle through a part of the state, then the plaintiff could not recover. This cannot be the proper construction of the statute. The statute was constructed to remedy an evil, and grant a redress for a wrong. In a country like this, where stock run at large, and have a certain range, any person, knowingly driving them from their range, beyond the distance of five miles—in nine cases out of ten, causes the person to lose them, and in fact, often do so for that very purpose; and the Legislature in enacting the law, intended to provide a stringent remedy against such acts. And the facts in this case make a very aggravated violation of the statute.

Here the party not only drove the animals away, but marked and branded them, in his own marks and brands, thus depriving the owner of the only *indicia* of ownership he had—other than a mere recollection of the looks of the animal, which in animals young as these were, is soon obliterated from the memory of any one, and the animal would in fact, in a few months be entirely changed in appearance.

The whole facts of the case, show a very aggravated violation of both the letter and spirit of the statute—if my construction

of the statute is correct—and it seems absurd to argue that the mere fact of the party being a technical drover, or a person engaged in driving stock clear through the limits of the state, alone entered into the mind of the Legislature, in the passage of this statute.

The object plainly was, to provide a penalty against knowingly driving cattle more than five miles from their range—regardless of whether the party was driving cattle through the entire limits of the state or not. If this is what the law means, the instructions were wrong, and the case should be overruled. The whole case is upon the construction of the statute, and this arises upon the instructions of the court for defendant. The cause should be reversed, and a *venire de novo* awarded.

R. E. WILLIAMS,
Counsell for Plaintiff in Error.

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Obadiah Arnold

v

A J Lindlam

Brief & Argument for
Plaintiff in Error

Filed Apl. 15. 1865

L Leland Clk

R E Williams

STATE OF ILLINOIS.

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, A. D., 1865.

OBADIAH ARNOLD,
—vs—
A. J. LUDLAM.

} Error to McLean. Circuit Court.

ABSTRACT OF THE RECORD.

PAGE OF RECORD.

This was an action commenced before a Justice of the Peace to recover $99.00 as a penalty for driving cattle beyond their range, under the Statute. See Purple's Statutes, vol. 1, page 502.

1 Caption stating style of Court, term, &c.

1 Commencement of Abstract of Justice of the Peace to Circuit

2 Court on appeal. Continuation of Justice's Abstract.

3 End of Justice's Abstract.

Abstract shows a trial for driving cattle out of their range and a judgment for the Plaintiff below who is also Plaintiff in error for $24.00 debt and $5.52 costs.

3 Appeal Bond to appeal the case from the Justice to the Circuit Court.

4 Appeal Bond concluded.

4 & 5 Summons from the Circuit Court on the appeal.

5 Return of service on summons.

5 Caption of Record of Circuit Court.

6 Trial in Circuit Court and verdict for Defendant below.

6 Motion by Plaintiff for a new trial.

6 & 7 Motion for new trial overruled and judgment on the verdict.

7 Bill of exceptions commenced (which is here copied in full.)

STATE OF ILLINOIS, McLEAN CIRCUIT COURT:

SPECIAL JUNE TERM, 1864.

OBADIAH ARNOLD,
vs.
A. J. LUDLAM.

} ss.

Be it remembered that on the trial of this cause, the plaintiff called and had sworn to prove his part of the issue, the following witnesses, who testified as follows:

Ezra T. Kenyon testified that plaintiff is and has been for the last eight years a citizen of the State of Illinois, and all that time a resident of the County of McLean, and that early in the month of April 1863, witness met the defendant and a man named Paulding in a lane about a mile from plaintiff's house, driving a lot of young cattle—about 25 or 30 head—mostly yearlings—that plaintiff told witness

8 that he intended to take them down to Salt Creek to range; that

PAGE OF RECORD.

witness noticed among said cattle a bull yearling with a blue neck and singular color; that witness did not know at the time whose animal it was, but supposed it was defendant's. It was then worth about ten dollars. Witness saw the same animal a few days before the trial at plaintiff's place, with his cattle. It had been castrated and branded on the left hip with something that looked like the letter L, but it looked as if the branding-iron had slipped and the brand was not plain. He knows defendant's brand; it was the letter "L" He also knew the plaintiff's brand; it was the letter "A."

Homer C. Stone testified that he had sold the above mentioned animal to plaintiff for six dollars, in the Fall of 1862; that he had seen it a few days before the trial with the witness, Kenyon; knew it to be the same animal he had sold to plaintiff; was worth, about April, 1863, about $12.00.

Both of the above witnesses had seen, also at the same time, the
9 lost roan, the above animal, a speckled roan steer, in the possession of plaintiff, marked with an under cut out of each ear and a crop out of the right.

Harley McCarl also saw at the same time with the last two witnesses, the above two animals in the possession of plaintiff, and that said speckled roan steer; it was also branded with the letter "L" in the hip. He further testifies that he knew the speckled roan steer above spoken of; it had been calved his, and he had altered it and marked it as above, which was his mark, and that in the fall of 1862 he had sold and delivered it to plaintiff. This steer was worth about $15.00 in April, 1863; that plaintiff lived about a mile and a half from the town of Atlanta, and that his cattle in the Spring of 1863 ranged close to plaintiff's farm, on a section of open land, about two and a half miles from Atlanta, where plaintiff fed them; that he went with plaintiff, in May, 1863, to hunt plaintiff's cattle that were gone; that they went to Salt Creek, the place where defendant told witness Kenyon he was taking his cattle; that they found a herd of 70 or 80 young cattle there in charge of a herdsman, and among them they found the above two animals; the bull had been recently altered, and both had been recently branded and the brand was then plain; that the place was about 25 miles distant from plaintiff's place of residence and about 25 miles distant from plaintiff's cattle range; that for the
10 first five miles from plaintiff's cattle range, in the direction of Salt Creek, where they found these cattle, and in the direction that witness Kenyon saw defendant driving the cattle, there was a very thick settlement; that within the first three miles they had to go through the town of Atlanta, and that there was thick settlements nearly all the way to Salt Creek. He did not think on the whole route there was a place where the houses were more than a mile apart and most of the way the road went through lanes.

Thomas Bean testified that he lived on Salt Creek; that he was employed by defendant to herd his cattle there, that defendant's cat-

PAGE OF RECORD.

tle were brought there about the 10th of April, 1863, and that the above two animals were among them; there was in the herd about 120 head, mostly young cattle.

Plaintiff here rested.

Defendant then introduced Jacob Paulding, who testified that defendant lived on a farm near plaintiff's; thought the two farms cor-

11 nered, that he was with plaintiff driving cattle when they met the witness Kenyon in the lane; that he had been employed by defendant to buy him up a lot of young cattle, and was then helping him to collect them together to take down to a range on Salt Creek; that before starting (that morning they met Kenyon in the lane) from plaintiff's, he had pointed out the bull spoken of by the witness to defendant and defendant said he had not bought it, and witness told defendant that he, witness, had not bought it, that they did not know whose animal it was; it was a peculiar marked animal and he noticed it. Did not recollect of noticing the speckled roan steer; they were going to witness' place to gather up the cattle and brand them before taking them to Salt Creek to the range. They drove the bull along to his place which was about three and a half or four miles from plaintiff's place. They there branded the cattle and altered the bull. Witness told defendant that he thought it was then too late in the season to STRAY cattle and he thought the owner would be obliged to them for altering the bull, said if it was his he would be obliged to any one who would alter it. Defendant said he thought

12 they had better not brand it, but witness thought they had, so they branded them with defendant's brand—the letter "L" on the hip. Witness used the branding iron and defendant helped to hold the animals. Witness thought the bull at that time was not worth more than $6.00. Witness had heard plaintiff say that defendant had told him, plaintiff, in the Fall, when he brought his cattle back, to come and get his cattle if he had any there, and that plaintiff went and picked out the above two, and defendant had them driven to plaintiff's place.

Defendant then called on plaintiff to testify—that the defendant and plaintiff had met somewhere in the spring of 1863 before plaintiff went to Salt Creek to look for his cattle, and that plaintiff had then described to defendant his lost cattle, and that defendant told plaintiff he thought the cattle were in his herd on Salt Creek. Plaintiff was sworn at the request of defendant, and testified that he had met the defendant and described his cattle and that defendant then told him that he did not think that the cattle were in his herd.

The above was all the evidence in the case. And thereupon plain-

13 tiff presented to the Court in writing and asked that it might be given to the jury, the following instruction:

If the jury believe from the evidence that the defendant drove plaintiff's cattle or any of them out of the range of plaintiff and to a distance greater than five miles from the said range, said range being

PAGE OF RECORD. in the State of Illinois, then they should find for the plaintiff double the value of the cattle so driven off.

Which instruction the court refused to give—to which refusal the plaintiff then and there excepted. The court then modified said instruction by adding after the word DEFENDANT and before the word DROVE the following words, " being a Drover or engaged in driving cattle through any part of the State of Illinois," and then gave the instructions so modified to the jury, to which modification plaintiff then and there excepted.

The court then gave for the defendant the following instruction to the jury:

The jury are instructed for the defendant that moving of cattle by the owner from one feeding place or grazing place to another in the same neighborhood, does not constitute him a drover or person en-
14 gaged in driving cattle so as to subject him to the penalty of double of the value of the cattle driven off.

And in this case, if the jury believe the cattle in controversy were returned to the plaintiff he cannot recover their single value.

If the jury believe from the evidence that Ludlam did not know that the roan steer was in the drove when driven away, then he is not liable as to that animal.

In this action the defendant is not liable for the acts of his agent unless he knew what his agent was doing and approved of it.

To the giving of each of which the plaintiff then and there excepted.

After the coming in of the verdict the plaintiff moved the court to set aside the verdict and grant him a new trial on the ground that the court had erred in refusing to give plaintiff's instruction without modification and in modifying said instruction; and that the court
15 erred in giving defendants instructions and because the verdict was contrary to the law and evidence; which motion was overruled by the court; to which ruling of the court, plaintiff then and there excepted and prays that this his Bill of Exceptions be signed, sealed made part of the Record. Which is done by the court.

CHARLES EMERSON, Judge. L.S.

Clerk's certificate to the Record.

ERRORS ASSIGNED.

1st. The court erred in refusing to give plaintiff's instruction without modification.

2nd. The court erred in modifying plaintiff's instruction before giving the same.

3rd. The court erred in giving defendant's instructions.

4th. The court erred in overruling the motion for a new trial below.

R. E. WILLIAMS,
Counsel for Plaintiff in Error.

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Obadiah Arnold

&

A J Lindlauer

Error to McLean

Abstract of the Record

Filed April 3. 1865

S Strawn Clk

R. G. Williams

STATE OF ILLINOIS.

Supreme Court, Third Grand Division.

APRIL TERM, A. D., 1865.

OBADIAH ARNOLD,
vs.
A. J. LUDLAM. } **Error to McLean Circuit Court.**

POINTS AND AUTHORITIES FOR DEFT. IN ERROR.

This is an action brought originally before a Justice of the Peace, to recover a penalty under the act known as the "Drovers Act," (see Purple's Statutes, page 502.) It will be seen by reference to the bill of exceptions, contained in the abstract, page 11, that the evidence of the witness, Jacob Paulding, clearly establishes the fact that as to one of the animals the defendant did not know that it was in his herd, and that as to the other one, that it was a bull calf of no value, and that the owner would be obliged to them for altering it. That before this suit was commenced, that Plaintiff, at request of Defendant, went to Defendant's place, and picked out the two calves he claimed, and that the Defendant drove them home to Plaintiff's place.

So that it appears that the Plaintiff has received no injury from the Defendant, and that Defendant intended to do him no injury.

The Plaintiff had his cattle back at home before this suit was commenced, they having been returned to him by the Defendant in better condition than when ACCIDENTALLY taken away, and there was no wrong intended by the Defendant to the Plaintiff, or any person else.

The amount in controversy is in fact nominal, and this suit is clearly for no other purpose than to gratify the malicious and litigious disposition of the Plaintiff. The whole case was heard by the jury below and the verdict was properly rendered against the Plaintiff.

The question now is, did the Court err in refusing to grant a new trial?

The instruction offered by the Plaintiff and modified by the Court, was as it originally stood, incorrect, and was properly refused, and the modification made it conform to the language of the statute and no more, and therefore the modification must be correct. (See Purple's Statute, page 502.) The act applies only to "drovers, or other persons engaged in driving cattle, sheep or hogs, &c., through any part of this State," and the jury must believe from the evidence that the Defendant is such a person, or otherwise the act cannot apply to him, therefore, to make the Plaintiff's instruction correct, the modification of the same by the Court was indispensable and could not mislead the jury.

The Plaintiff, in his argument, complains that the instruction given for the defendant took the case entirely from the jury. Such is not the fact, the gentleman's argument misconstrues the instruction.

The instruction is, "that the moving of cattle by the owner from one feeding or grazing place to another, in the same neighborhood, does not constitute him a drover or person engaged in driving cattle, so as to subject him to the penalty of double the value of the cattle driven off."

In this case, the evidence clearly is, that the Defendant took his cattle from his farm to his grazing place, that the little blue bull was in the herd and he knew it, but that he did not know whose it was, that he did not know that the other animal was in the herd, that he returned with the herd to his farm, and that when he found out who the owner of the animals was, that he restored them to him. It cannot be reasonably said that this Statute was intended to inflict a penalty in such a case. Therefore the instruction is altogether proper and meets the real facts of the case.

As has been said, there never was any merits in this suit, no injustice had been done to the plaintiff, the right to recover rests altogether on the statute, there is no moral right about it. It would seem rather to be a moral wrong to enforce this penalty in such a case as this.

If the Court is satisfied that justice has been done, a new trial will not be granted, although the jury find against the weight of evidence nor for misdirection of the Court upon a point of law. (3 Scam. page 17, Smith vs. Shultz, 1 Scam. 491, Gillett vs. Sweat 1 Gilm. 475.

The Court will not grant a new trial when vindictive damages only are sought to be recovered, or merely nominal damages. (Johnson vs. Weedman, 4 Scam. 497.)

We insist then that the instructions given by the Court were properly given, and that the instruction refused was properly refused.

That the verdict of the jury is sustained by the evidence, and that if it is not to the entire satisfaction of the Court, still as it is the province of the jury to pass upon the evidence, the Court will not disturb the verdict.

That the suit is malicious and vindictive, and a new trial will not be granted to gratify the litigious disposition of the Plaintiff.

That on the whole case justice has been substantially done.

W. H. HANNA, Attorney for Defendant.

Obadiah Arnold

vs

A. J. Sudlam

Deeds Brief

STATE OF ILLINOIS.

Supreme Court, Third Grand Division.

APRIL TERM, A. D., 1865.

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So that it appears that the Plaintiff has received no injury from the Defendant, and that Defendant intended to do him no injury.

The Plaintiff had his cattle back at home before this suit was commenced, they having been returned to him by the Defendant in better condition than when ACCIDENTALLY taken away, and there was no wrong intended by the Defendant to the Plaintiff, or any person else.

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That the suit is malicious and vindictive, and a new trial will not be granted to gratify the litigious disposition of the Plaintiff.

That on the whole case justice has been substantially done.

W. H. HANNA, Attorney for Defendant.

Obadiah Arnold

vs

A. F. Lindsay

Defts Brief

Supreme Court of Illinois,

THIRD GRAND DIVISION.

OTTAWA APRIL TERM, A. D. 1865.

OBADIAH ARNOLD,
vs.
A. J. LUDLAM,

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The whole facts of the case, show a very aggravated violation of both the letter and spirit of the statute—if my construction

of the statute is correct—and it seems absurd to argue that the mere fact of the party being a technical drover, or a person engaged in driving stock clear through the limits of the state, alone entered into the mind of the Legislature, in the passage of this statute.

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R. E. WILLIAMS,
Counsell for Plaintiff in Error.

Obadiah Arnold
vs
A J Lovelace

Brief and Argument for
Plaintiff in Error.

Filed Apl 15. 1865
D Delano Clk

R E Williams

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the Circuit Court for the County of McLean 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 McLean County, before the Judge thereof, between

Obadiah Arnold

plaintiff, and

A. J. Sudlam

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Arnold as we are informed by his complaint and we being willing that error should be corrected, if any there be, 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 the 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 Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April 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.

Pinckney & Walker

Witness, The Hon. ~~JOHN D. CATON~~, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of January in the Year of Our Lord One Thousand Eight Hundred and Sixty five.

L. Delaunce

Clerk of the Supreme Court.

Obadiah Jackson

No. vs.

A. J. Ludlam

WRIT OF ERROR.

FILED Janu. 17. A. D. 1865.

L. Velance

Clerk.

Bloomington Ills January 12th 1865

A Leland Esqr

Clk Supreme court

Ottawa

Ills

Dear Sir

Inclosed I send you
Record and assignment of errors in the
case of Hezekiah Arnold vs H. F.
Sheldon Error to McLean, Abro
Ill. to Log Cabin pier.

Please forward to me process
directed to McLean County for the
Defendant, and I will have it served
and returned. I will forward the
Abstracts printed in due time

Very truly yours
R. E. Williams

STATE OF ILLINOIS, }
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Logan — County, GREETING:

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

Obadiah Arnold

plaintiff, and

A. J. Ludlam

defendant, it is said that manifest error hath intervened, to the injury of the said Arnold

as we are informed by his 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 Ottawa, before the Justices thereof, to correct the errors in the same in due form and manner, according to law: Therefore, ~~We~~ as we above ~~Command you~~ Sheriff of ~~the~~ said County, That by good and lawful men of your County, you give notice to the said

A. J. Ludlam

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April A. D. 1865, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Ludlam

notice, together with this writ.

Witness, The Hon. Pinkney H. Walker, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 25th day of January in the year of our Lord One Thousand Eight Hundred and Sixty-five.

L. Leland

Clerk of the Supreme Court.

70 Sheriff's Return 1865

Radcliffe Thrasher

vs.

No.

A. J. Ludlum

Alias SCIRE FACIAS.

Filed Feb 27 A. D. 1865

L. Holland Clerk.

State of Illinois }
Logan County } ss

Executed this writ by reading
to the within named A J Ludlum this
18th day of February A D 1865

Fees $2.00 paid by
Plaintiff atty

Wm L Stanley Sheriff Logan Co
By W W Hayden Deputy

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of McLean County, GREETING:

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

Obadiah Arnold

plaintiff, and

A. J. Ludlam

defendant, it is said that manifest error hath intervened, to the injury of the said Arnold

as we are informed by his 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 Ottawa, 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

A. J. Ludlam

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April A. D. 1865, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

A. J. Ludlam

notice, together with this writ.

Witness, The Hon. Pinkney H. Walker, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of January in the year of our Lord One Thousand Eight Hundred and Sixty-five.

L. Leland

Clerk of the Supreme Court.

Subpœna to Comm.

Radiah Arnold

vs.

No.

A. J. Lindlam

SCIRE FACIAS.

Filed Jany 25 A. D. 1865

L. Willard Clerk.

The within named A. J. Lindlam
not found in my County
plaintiff in error

Return 10 cents paid by
Henry A. Ewing
Sheriff
By Alex Cairns. Deputy

STATE OF ILLINOIS.

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, A. D., 1865.

OBADIAH ARNOLD,
—vs—
A. J. LUDLAM.

} Error to McLean.
} Circuit Court.

ABSTRACT OF THE RECORD.

PAGE OF RECORD.

This was an action commenced before a Justice of the Peace to recover $99.00 as a penalty for driving cattle beyond their range, under the Statute. See Purple's Statutes, vol. 1, page 502.

1 Caption stating style of Court, term, &c.

1 Commencement of Abstract of Justice of the Peace to Circuit

2 Court on appeal. Continuation of Justice's Abstract.

3 End of Justice's Abstract.

Abstract shows a trial for driving cattle out of their range and a judgment for the Plaintiff below who is also Plaintiff in error for $24.00 debt and $5.52 costs.

3 Appeal Bond to appeal the case from the Justice to the Circuit Court.

4 Appeal Bond concluded.

4 & 5 Summons from the Circuit Court on the appeal.

5 Return of service on summons.

5 Caption of Record of Circuit Court.

6 Trial in Circuit Court and verdict for Defendant below.

6 Motion by Plaintiff for a new trial.

6 & 7 Motion for new trial overruled and judgment on the verdict.

7 Bill of exceptions commenced (which is here copied in full.)

STATE OF ILLINOIS, McLEAN CIRCUIT COURT:

SPECIAL JUNE TERM, 1864.

OBADIAH ARNOLD,
vs.
A. J. LUDLAM.

} ss.

Be it remembered that on the trial of this cause, the plaintiff called and had sworn to prove his part of the issue, the following witnesses, who testified as follows:

Ezra T. Kenyon testified that plaintiff is and has been for the last eight years a citizen of the State of Illinois, and all that time a resident of the County of McLean, and that early in the month of April 1863, witness met the defendant and a man named Paulding in a lane about a mile from plaintiff's house, driving a lot of young cattle—about 25 or 30 head—mostly yearlings—that plaintiff told witness

8 that he intended to take them down to Salt Creek to range; that

PAGE OF RECORD.

witness noticed among said cattle a bull yearling with a blue neck and singular color; that witness did not know at the time whose animal it was, but supposed it was defendant's. It was then worth about ten dollars. Witness saw the same animal a few days before the trial at plaintiff's place, with his cattle. It had been castrated and branded on the left hip with something that looked like the letter L, but it looked as if the branding-iron had slipped and the brand was not plain. He knows defendant's brand; it was the letter "L" He also knew the plaintiff's brand; it was the letter "A."

Homer C. Stone testified that he had sold the above mentioned animal to plaintiff for six dollars, in the Fall of 1862; that he had seen it a few days before the trial with the witness, Kenyon; knew it to be the same animal he had sold to plaintiff; was worth, about April, 1863, about $12.00.

Both of the above witnesses had seen, also at the same time, the
9 lost roan, the above animal, a speckled roan steer, in the possession of plaintiff, marked with an under cut out of each ear and a crop out of the right.

Harley McCarl also saw at the same time with the last two witnesses, the above two animals in the possession of plaintiff, and that said speckled roan steer; it was also branded with the letter "L" in the hip. He further testifies that he knew the speckled roan steer above spoken of; it had been calved his, and he had altered it and marked it as above, which was his mark, and that in the fall of 1862 he had sold and delivered it to plaintiff. This steer was worth about $15.00 in April, 1863; that plaintiff lived about a mile and a half from the town of Atlanta, and that his cattle in the Spring of 1863 ranged close to plaintiff's farm, on a section of open land, about two and a half miles from Atlanta, where plaintiff fed them; that he went with plaintiff, in May, 1863, to hunt plaintiff's cattle that were gone; that they went to Salt Creek, the place where defendant told witness Kenyon he was taking his cattle; that they found a herd of 70 or 80 young cattle there in charge of a herdsman, and among them they found the above two animals; the bull had been recently altered, and both had been recently branded and the brand was then plain; that the place was about 25 miles distant from plaintiff's place of residence and about 25 miles distant from plaintiff's cattle range; that for the
10 first five miles from plaintiff's cattle range, in the direction of Salt Creek, where they found these cattle, and in the direction that witness Kenyon saw defendant driving the cattle, there was a very thick settlement; that within the first three miles they had to go through the town of Atlanta, and that there was thick settlements nearly all the way to Salt Creek. He did not think on the whole route there was a place where the houses were more than a mile apart and most of the way the road went through lanes.

Thomas Bean testified that he lived on Salt Creek; that he was employed by defendant to herd his cattle there, that defendant's cat-

PAGE OF RECORD.

tle were brought there about the 10th of April, 1863, and that the above two animals were among them; there was in the herd about 120 head, mostly young cattle.

Plaintiff here rested.

Defendant then introduced Jacob Paulding, who testified that defendant lived on a farm near plaintiff's; thought the two farms cor-
11 nered, that he was with plaintiff driving cattle when they met the witness Kenyon in the lane; that he had been employed by defendant to buy him up a lot of young cattle, and was then helping him to collect them together to take down to a range on Salt Creek; that before starting (that morning they met Kenyon in the lane) from plaintiff's, he had pointed out the bull spoken of by the witness to defendant and defendant said he had not bought it, and witness told defendant that he, witness, had not bought it, that they did not know whose animal it was; it was a peculiar marked animal and he noticed it. Did not recollect of noticing the speckled roan steer; they were going to witness' place to gather up the cattle and brand them before taking them to Salt Creek to the range. They drove the bull along to his place which was about three and a half or four miles from plaintiff's place. They there branded the cattle and altered the bull. Witness told defendant that he thought it was then too late in the season to STRAY cattle and he thought the owner would be obliged to them for altering the bull, said if it was his he would be obliged to any one who would alter it. Defendant said he thought
12 they had better not brand it, but witness thought they had, so they branded them with defendant's brand—the letter "L" on the hip. Witness used the branding iron and defendant helped to hold the animals. Witness thought the bull at that time was not worth more than $6.00. Witness had heard plaintiff say that defendant had told him, plaintiff, in the Fall, when he brought his cattle back, to come and get his cattle if he had any there, and that plaintiff went and picked out the above two, and defendant had them driven to plaintiff's place.

Defendant then called on plaintiff to testify—that the defendant and plaintiff had met somewhere in the spring of 1863 before plaintiff went to Salt Creek to look for his cattle, and that plaintiff had then described to defendant his lost cattle, and that defendant told plaintiff he thought the cattle were in his herd on Salt Creek. Plaintiff was sworn at the request of defendant, and testified that he had met the defendant and described his cattle and that defendant then told him that he did not think that the cattle were in his herd.

The above was all the evidence in the case. And thereupon plain-
13 tiff presented to the Court in writing and asked that it might be given to the jury, the following instruction:

If the jury believe from the evidence that the defendant drove plaintiff's cattle or any of them out of the range of plaintiff and to a distance greater than five miles from the said range, said range being

PAGE OF RECORD.

in the State of Illinois, then they should find for the plaintiff double the value of the cattle so driven off.

Which instruction the court refused to give—to which refusal the plaintiff then and there excepted. The court then modified said instruction by adding after the word DEFENDANT and before the word DROVE the following words, " being a Drover or engaged in driving cattle through any part of the State of Illinois," and then gave the instructions so modified to the jury, to which modification plaintiff then and there excepted.

The court then gave for the defendant the following instruction to the jury :

The jury are instructed for the defendant that moving of cattle by the owner from one feeding place or grazing place to another in the same neighborhood, does not constitute him a drover or person en-
14 gaged in driving cattle so as to subject him to the penalty of double of the value of the cattle driven off.

And in this case, if the jury believe the cattle in controversy were returned to the plaintiff he cannot recover their single value.

If the jury believe from the evidence that Ludlam did not know that the roan steer was in the drove when driven away, then he is not liable as to that animal.

In this action the defendant is not liable for the acts of his agent unless he knew what his agent was doing and approved of it.

To the giving of each of which the plaintiff then and there excepted.

After the coming in of the verdict the plaintiff moved the court to set aside the verdict and grant him a new trial on the ground that the court had erred in refusing to give plaintiff's instruction without modification and in modifying said instruction; and that the court
15 erred in giving defendants instructions and because the verdict was contrary to the law and evidence; which motion was overruled by the court; to which ruling of the court, plaintiff then and there excepted and prays that this his Bill of Exceptions be signed, sealed made part of the Record. Which is done by the court.

CHARLES EMERSON, Judge. L.S.

Clerk's certificate to the Record.

ERRORS ASSIGNED.

1st. The court erred in refusing to give plaintiff's instruction without modification.

2nd. The court erred in modifying plaintiff's instruction before giving the same.

3rd. The court erred in giving defendant's instructions.

4th. The court erred in overruling the motion for a new trial below.

R. E. WILLIAMS,
Counsel for Plaintiff in Error.

Obadiah Archbold

&

A J Sudlow

Error to Mc Lean

Abstract of the Record

Filed April 3. 1865

D Selmon Clk

R G Williams

State of Illinois

Supreme court 3d Grand division

Attorney April Term 1865

Richard Arnold } Error to McLean
vs
A J Sutton

No American Exchange Co } Appeal from McLean.
110 vs
David L Haggard.

In the above two cases it is agreed, that the defendant in Error and Appellee hereby joins in Error in both of said cases without further formality, and the clerk may enter upon the docket Error joined by W H Harris.

It is further agreed, that both cases are submitted on printed Arguments & be filed, and each party is to have a reasonable time to file the same, and no advantage is to be taken of any delay in filing said Arguments, on the part of either party.

W H Harris for defts in error & appellants

R G Williams for pltf in error and appellee

Pleas continued and held at the Court House in Bloomington, in the Eighth Judicial District (Circuit) of the State of Illinois, before the Honorable, Charles Emerson, Judge of the Seventeenth Judicial District of the State of Illinois, acting as Judge in the Eighth district aforesaid, in the county of McLean and State of Illinois, in a certain cause wherein Obadiah Arnold was Plaintiff and A. J. Ludlam was Defendant.

State of Illinois,
McLean County } ss. Be it remembered that heretofore, to-wit, on the first day of February, A. D. 1864, there came to the office of the Clerk of the Circuit Court in and for said county, a transcript from the docket of John Kellogg, Esquire, a Justice of the Peace in and for said county, which transcript was in words and figures as follows, to-wit,

Transcript of Proceedings lately had before John Kellogg, Esquire, one of the Justices of the county of McLean and state of Illinois between Obadiah Arnold, Plaintiff, and A. J. Ludlam, was Defendant.

January 11th, 1864. In Justice Court before John Kellogg, Esquire; Plaintiff's demand

for damages, in defendants driving off Plaintiffs cattle in 1863.- $99.00.

Summons issued and put in the hands of George Church, Const. to serve, returnable Janry. 10th. 1864, at, 1 O'Clock P. M.

John Kellogg, J.P. (Ls)

Summons returned with the following indorsement. "Personally served the within by the within A. J. Ludlam excepting service this 13th day of Janry. 1864.

George Church, Const.

Janry. 10th. 1864. The parties met and went into trial After hearing all the evidence in the case, it is adjudged by the Court that the Plaintiff have judgement against the Defendants for Twenty four (24.00) & costs of said court.

I do therefore render judgement against A. J. Ludlam, the defendant for Twenty four dollars debt and Nine dollars and fifty two cents, costs.

John Kellogg, J.P. (Seal)

State of Illinois
McLean County } ss. I, John Kellogg, a Justice of the Peace in and for said county, do certify that the foregoing transcript is truly copied from files and books of my office.

In witness whereof I have hereunto set my hand this 30th day of Janu. 1864

John Kellogg, J.P.

And accompanying said Transcript was a Bon[illegible] words and figures as follows, to wit:

Know all men by these Presents, that we, A. J. Ludlam & James M. Summers, of the county of McLean and state of Illinois, are held and firmly bound unto Obadiah Arnold in the penal sum of Sixty-two dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly, severally and firmly, by these presents, witness our hands and seals, this Twenty-seventh day of Janu. A.D. 1864.

The Condition of the above obligation is such, that, Whereas, the said Obadiah Arnold did on the Sixteenth day of January, A.D. 1864, before John Kellogg, a Justice of the Peace for the said county of McLean, for the sum of Twenty-nine 49/100 dollars; from which judgement the said A. J. Ludlam has taken an appeal to the ___ Court of the county of McLean, aforesaid, and state of Illinois. Now if the said A. J. Ludlam shall prosecute his appeal with effect, and shall pay whatever

judgement may be rendered by the Court upon dismissal or trial of said appeal, Then the above obligation to be void, otherwise to remain in full force and effect.

Approved by me at my office this 27th day of Jany. 1864
John Kellogg
Justice of the Peace

A. J. Ludlam (Seal)
James McSummers (Seal)

Whereupon, there was issued out of the office of the Clerk of the Circuit court, aforesaid, a Summons in words and figures as follows, to-wit:

State of Illinois,
McLean County } ss. The People of the State of Illinois,
To the Sheriff of said county, Greeting:
We command you to Summon Obadiah Arnold, if found in your county, personally to appear before the Circuit Court of said county of McLean, on the first day of the next term thereof, to be holden at the Court House in Bloomington on the first Monday in the month of March next, to answer unto A. J. Ludlam, in an appeal by him taken from the judgement of John Kellogg Esq.
And have you then and there this writ and make return thereon, in what manner you

execute the same.

Witness, Edward R. Rue, Clerk of said
[Seal] Circuit Court, and the seal hereto ~~attached~~
affixed, at Bloomington, this 1st. day of
February, A.D. 1864.

Edward R. Rue Clerk
By L. Burr, Deputy.

Which said Summons was returned into the
Office of the Clerk of said Circuit court on the
9th day of February, A.D. 1864, indorsed as
follows, to-wit:

Executed this writ, February the 9th. 1864,
by reading the same to the within named
Obadiah Arnold. N. Dixon, Sheriff,
By E. B. Mitchell, Deputy

And thereupon, at the June special term
of the said Circuit Court, began and held
in and for said county on the fifth day of
June, A.D. 1864:

Present, Hon. Charles Emerson, Presiding Judge,
Edward R. Rue, Clerk,
Newell Dixon, Sheriff.

The following proceedings were had in this
cause, as appears of record, to-wit:

Friday, June 17th. 1864.

Obadiah Arnold }
vs. } On Appeal.
A. J. Ludlam }

This day come the parties hereto by their Attorneys, and the Defendant by his attorney moves the Court to dismiss this suit, which motion is overruled by the Court. And now this cause coming on for trial, thereupon comes a jury, twelve good and lawful men, to wit: Henry Newton, Benjamin Prothero, Samuel Scoggle, Michael Cutler, J. W. Bagnem, William H. Wyatt, D. S. Lewis, Isaac Mitchell, Aaron Harlan, Oliver Pease, Aaron Ritchell and Hazo Parsons, who were elected, tried and sworn to well and truly try the issue joined herein; and after hearing the evidence produced and the arguments of counsel, the Jurors aforesaid upon their oaths do say that they find the issue for the Defendants. Whereupon the Plaintiff by his attorney enters his motion for a new trial.

Whereupon, afterwards, to wit, on the 20th day of June A.D. 1864, Present as before, the following proceedings were had, as appears of record, to wit:

Obadiah Arnold, vs. }
A. J. Ludlam } On Appeal.

This day again come the parties hereto by their Attorneys, and the motion for a new trial herein before entered by said plaintiff now coming on to be heard before the Court, is argued by counsel, and the Court having heard said motion, and being fully advised in the premises, doth overrule said motion. It is therefore considered by the Court that Plaintiff take nothing by his suit, and that said said defendant recover of the said Obadiah Arnold his costs by him in this behalf expended, and that he have execution therefor.

Whereupon, afterwards, to-wit, on the 21st day of June, A.D. 1864, the Plaintiff by his Attorney filed his Bill of Exceptions, in words and figures as follows, to-wit:

State of Illinois, McLean Circuit Court:
Special June Term, 1864

Obadiah Arnold }
vs. }
A. J. Adam } Be it remembered that on the trial of this cause, the plaintiff called and had sworn to prove his part of the issue, the following witness, who testified as follows:

Ezra J. Kenyon - testified that Plaintiff is and has been for the last eight years a citizen of the State of Illinois; and all that

time a resident of the county of McLean; and that early in the month of April, 1863, witness met the defendant and a man named Sanding, in a lane, about a mile from Plaintiff's house, driving a lot of young cattle - about 25 or 30 head, mostly yearlings that plaintiff told witness that he intended to take them down to Salt-creek, to range; that witness noticed among said cattle a bull yearling, with a blue neck, and singular color; that witness did not know at the time whose animal it was, but supposed it was defendant's - it was then worth about ten dollars. Witness saw the same animal a few days before the trial at plaintiff's place with his cattle; it had been castrated, and branded on the left hip, with something that looked like the letter L. but it looked as if the branding iron had slipped, and the brand was not plain. He knows defendant's brand - it was the letter L. - he also knew Plaintiff's brand; it was the letter A.

C. Stone - testified that he had sold the animal to plaintiff for six dollars, in the fall of 1862; that he had seen it a few days before the trial, with the witness, Kenyon; knew it to be the same animal he had sold to plaintiff; was worth

about April, 1863, about $12,00

Both of the above witnesses had seen also at the same time, they lost ~~roan~~ Sand, the above animal, a speckled roan Steer, in the posession of plaintiff, (marked with an ~~---~~ out of each ear, and a crop out of the right.

Harley McCord also saw at the same time with the last two witnesses the above two animals in the posession of Plaintiff; and ~~that~~ said speckled roan Steer; it was also branded with the letter L. on the hip. The further testified ~~that~~ he knew the speckled roan Steer above spoken of; it had been calved his, and he had altered it, and marked it as above, which was his mark; and that in the fall of 1862 he had sold and delivered it to plaintiff. This Steer was worth about $15,00 in April 1863; ~~that~~ plaintiff lives about a mile and a half from the town of Atlanta; and that his cattle in the Spring of 1863 ranged close by plaintiffs farm, on a section of open land, about ~~two~~ and a half miles from Atlanta, where plaintiff lives; that he went with plaintiff in May 1863 to hunt plaintiffs cattle that were gone; ~~that~~ they went to Salt-creek, the place where defendant had told witness, Kenyon, he was taking his cattle; that they found a herd of 70 or 80 young cattle there in charge of a

9

herdsmen; and among them they found the above two animals; that the bull had been recently altered, and both had been recently branded, and the brand was then plain; that the place was about 25 miles distant from plaintiff's place of residence, and about 25 miles distant from plaintiff's cattle range; that for the first five miles from plaintiff's cattle-range, in the direction of Salt-creek, where they found these cattle; and in the direction that the witness, Keegan, saw said defendant driving the cattle, there was a very thick settlement; that within the first three miles they had to go through the town of Atlanta and that there was thick settlement nearly all the way to Salt-creek: he did not think there was on the whole route a place where the houses were more than a mile apart, and most of the way the road went through lanes.

Thomas Beard, testifies that he lived on Salt-creek; that he was employed by defendant to herd his cattle there; that defendant's cattle were brought there about the 10th of April, 1869; and that the above two animals were among them; there was in the herd about 120 head, mostly young cattle.

Plaintiff here rested

Dependant then introduced -
Jacob Paulding - who testified that dependant lived on a farm near plaintiffs. Thought the two farms connected; that he was with plaintiffs driving cattle when they met the wi[illegible]kenyon, in the lane; that he had been employed by dependant to buy him up a lot of young cattle, and was then helping him to collect them together, to take down to a range on Salt creek; that before starting that morning they met Kenyon in the lane, from plaintiffs, he had pointed out the bull spoken of by the witness to dependant, and dependant said he had not bought it; and witness told dependant that he, witness, had not bought it, that they did not know whose animal it was: it was a peculiarly marked animal, and he noticed it. - Did not recollect of noticing the special roan steer; they were going to witness place to gather up the cattle, and brand them before taking them to Salt-creek to the range; they drove this bull along to his place, which was about 3½ or four miles from plaintiffs place. They there branded the cattle and altered the bull. Witness told dependant he thought it was then too late in the season to stray cattle, and

he thought the owner would be obliged to them for altering the bull - said if it was his, he would be obliged to any one who would alter it. Dependant said he thought they had better not brand it, but witness thought they had. so they branded them with dependant's brand - the letter D. on the hip. Witness held the branding iron and dependant helped to hold the animals. Witness thought the ~~animal~~ bull at that time was not worth more than $6. Witness had heard plaintiff say that dependant told him, plaintiff, in the fall, when he brought his cattle back, to come and get his cattle, if he had any there; and that plaintiff went and picked out the above two, and dependant had them driven to plaintiff's place.

Dependant then called on plaintiff to testify: - that the Dependant and Plaintiff had met somewhere in the Spring of 1863, before plaintiff went to Salt-creek to look for his cattle, and that plaintiff had then described to dependant his lost cattle; and dependant told plaintiff he thought the cattle were in his herd on Salt-creek. Plaintiff was sworn at the request of Dependant, and testified that he had met the dependant, and described his cattle, and that

defendant — then told him that he did not think that the cattle were in his herd.

The above was all the evidence in the case.

And thereupon Plaintiff presented to the Court in writing, and asked that it might be given to the jury, the following instruction:

If the jury believe from the evidence that the defendant drove the plaintiff's cattle or any of them, out of the range of plaintiff, and to a distance greater than five miles from the said range, said range being in the State of Illinois, then they should find for the plaintiff double the value of the cattle so driven off.—

Which instruction the Court refused to give, to which refusal the plaintiff then and there excepted. The Court then modified said instruction by adding, after the word defendant, and before the word drove, the following words: "being a Drover, or engaged in driving cattle through any part of the State of Illinois" — and then gave the instruction, so modified, to the jury — to which modification, plaintiff then and there excepted.

The Court then gave for the defendant the following instructions to the jury:

The Jury are instructed for the defendant — that moving of cattle by the owner from one

feeding place, or grazing place, to another in the same neighborhood, does not constitute him a drover or person engaged in driving cattle, so as to subject him to the penalty of double of the value of the cattle driven off. And in this case, if the jury believe the cattle in controversy were returned to the plaintiff, he cannot recover their single value.

If the jury believe from the evidence that Linsam did not know that the roan steer was in the drove when driven away, then he is not liable as to that animal.

In this action, the defendant is not liable for the acts of his agent, unless he knew what his agent was doing, and approved of it.—

To the giving of each of which, plaintiff then and there excepted.

After the coming in of the verdict, the plaintiff moved the Court to set aside the verdict and grant him a new trial, on the ground that the Court had erred in refusing to give plaintiff's instruction as modified, and in modifying said instruction; and that the Court erred in giving defendant's instructions; and because the verdict was contrary to the law and the evidence, which motion was overruled by

the Court; to which ruling of the Court plaintiff then and there excepted; and prays that this, his Bill of Exceptions, be signed, sealed, and made part of the record - which is done by the Court

Charles Emerson, Judge, (Seal)

State of Illinois,
McLean County } ss. I, Edward R. Roe, Clerk of the Circuit Court in and for said county, do hereby certify that the foregoing is a true and complete Transcript of the records and files of my office pertaining to a certain case, wherein Theodore Arnold was Plaintiff and A. J. Lindsay was Defendant.

In testimony whereof I have hereto affixed my hand and the seal of said Court, this twenty-third day of December, A. D. 1865

E. R. Roe Clerk



Obediah Arnold

vs.

A. J. Ludlam.

Transcript from
McLean Circuit Court.

Received of Plaintiff in
error $4.00 for this Transcript
E. R. Breck

Paid $4.00.

State of Illinois
Supreme Court
3rd Grand Division
Ottowa April Term 1865

Error to McLean
Circuit Court

The plaintiff in Error assigns the following errors upon the record

1st The Court erred in refusing to give plaintiffs instruction without modification

2nd The Court erred in modifying plaintiffs instruction before giving the same

3rd The Court erred in giving defendants instructions

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

For these errors and others that will be apparent on inspection of the record, the Judgment should be reversed and the cause remanded

R E. Williams
Counsell for Plff in Error

No. 133

Obediah Ann

vs.

J. Sudlam

Error to M. Lean

Record and assignment of Errors

Filed Jany. 17. 1865.
L. Leland
Clk.

K & Williams

STATE OF ILLINOIS.

Supreme Court, Third Grand Division.

APRIL TERM, A. D., 1865.

OBADIAH ARNOLD, }
vs. } **Error to McLean Circuit Court.**
A. J. LUDLAM. }

POINTS AND AUTHORITIES FOR DEFT. IN ERROR.

This is an action brought originally before a Justice of the Peace, to recover a penalty under the act known as the "Drovers Act," (see Purple's Statutes, page 502.) It will be seen by reference to the bill of exceptions, contained in the abstract, page 11, that the evidence of the witness, Jacob Paulding, clearly establishes the fact that as to one of the animals the defendant did not know that it was in his herd, and that as to the other one, that it was a bull calf of no value, and that the owner would be obliged to them for altering it. That before this suit was commenced, that Plaintiff, at request of Defendant, went to Defendant's place, and picked out the two calves he claimed, and that the Defendant drove them home to Plaintiff's place.

So that it appears that the Plaintiff has received no injury from the Defendant, and that Defendant intended to do him no injury.

The Plaintiff had his cattle back at home before this suit was commenced, they having been returned to him by the Defendant in better condition than when ACCIDENTALLY taken away, and there was no wrong intended by the Defendant to the Plaintiff, or any person else.

The amount in controversy is in fact nominal, and this suit is clearly for no other purpose than to gratify the malicious and litigious disposition of the Plaintiff. The whole case was heard by the jury below and the verdict was properly rendered against the Plaintiff.

The question now is, did the Court err in refusing to grant a new trial?

The instruction offered by the Plaintiff and modified by the Court, was as it originally stood, incorrect, and was properly refused, and the modification made it conform to the language of the statute and no more, and therefore the modification must be correct. (See Purple's Statute, page 502.) The act applies only to "drovers, or other persons engaged in driving cattle, sheep or hogs, &c., through any part of this State," and the jury must believe from the evidence that the Defendant is such a person, or otherwise the act cannot apply to him, therefore, to make the Plaintiff's instruction correct, the modification of the same by the Court was indispensable and could not mislead the jury.

The Plaintiff, in his argument, complains that the instruction given for the defendant took the case entirely from the jury. Such is not the fact, the gentleman's argument misconstrues the instruction.

The instruction is, "that the moving of cattle by the owner from one feeding or grazing place to another, in the same neighborhood, does not constitute him a drover or person engaged in driving cattle, so as to subject him to the penalty of double the value of the cattle driven off."

In this case, the evidence clearly is, that the Defendant took his cattle from his farm to his grazing place, that the little blue bull was in the herd and he knew it, but that he did not know whose it was, that he did not know that the other animal was in the herd, that he returned with the herd to his farm, and that when he found out who the owner of the animals was, that he restored them to him. It cannot be reasonably said that this Statute was intended to inflict a penalty in such a case. Therefore the instruction is altogether proper and meets the real facts of the case.

As has been said, there never was any merits in this suit, no injustice had been done to the plaintiff, the right to recover rests altogether on the statute, there is no moral right about it. It would seem rather to be a moral wrong to enforce this penalty in such a case as this.

If the Court is satisfied that justice has been done, a new trial will not be granted, although the jury find against the weight of evidence nor for misdirection of the Court upon a point of law. (3 Scam. page 17, Smith vs. Shultz, 1 Scam. 491, Gillett vs. Sweat 1 Gilm. 475.

The Court will not grant a new trial when vindictive damages only are sought to be recovered, or merely nominal damages. (Johnson vs. Weedman, 4 Scam. 497.)

We insist then that the instructions given by the Court were properly given, and that the instruction refused was properly refused.

That the verdict of the jury is sustained by the evidence, and that if it is not to the entire satisfaction of the Court, still as it is the province of the jury to pass upon the evidence, the Court will not disturb the verdict.

That the suit is malicious and vindictive, and a new trial will not be granted to gratify the litigious disposition of the Plaintiff.

That on the whole case justice has been substantially done.

W. H. HANNA, Attorney for Defendant.

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Ithadiah Arnold

vs

A. J. Sudlam

Dept Brief