No. 12973

Supreme Court of Illinois

Chicago & Rock Island R. R. Co

vs.

Reid

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 178.

Lohr
RR
vs
Reed

C & R. & R. R.

" Reed

It is stipulated by appellants counsel that the bill of exceptions in many in this cause, it is agreed that the order of remand may be set aside the case submitted for opinion upon written argument to be filed, and that appellant may file a certified copy of the bill of exceptions which shall stand as a portion of the original record

B. G. Cook for appellant
C. S. Lee and for appellee

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Chicago & Rock Island Rail Road Co

vs

Reid

Filed May 14. 1860
L. Leland
Clk.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

188. THE CHICAGO & R. I. R. R. CO. *vs.* MATTHEW M. REED. } *Appeal from Bureau.*

ARGUMENT FOR APPELLANT.

THE first instruction asked for the defendant should have been given.

First, because the suit was brought against the defendants expressly for damages done by defendant in the running of the cars and not for negligence in not having sufficient fences and cattle guards; see the entry on the Justice's docket, in which the suit is called trespass on personal property; see also the transcript which says, "Parties appear by counsel; plaintiff claims damages of defendants for an injury done to plaintiff's mare by the said defendants in the running of the cars on the said Railroad." On the trial in the Circuit Court, before the evidence was heard, plaintiff's counsel stated to the jury that the suit was brought to recover damages for an injury done to plaintiff's mare by the Railroad cars of defendants.

If this suit was not a suit to recover damages for injury done by the running of the cars solely, it is impossible that such a suit can be instituted. In each Court, the plaintiff has so stated his claim. This Court has repeatedly decided that a party shall be bound by the cause of action which is stated and relied upon by him before the Justice.

Morton vs. *McClure*, 22 Ill. 257.

If the plaintiff had been seeking to recover the statutory penalty on account of the neglect of defendants below to fence their road, build cattle guards, &c., an action of debt and not trespass would have been the proper remedy.

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Vaughn vs. *Thompson*, 15 Ill. 39.
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Although the Court will not reverse a judgment because the Justice has made a technical error in naming the suit, still a party will not be permitted to commence an action on the case to recover damages for negligence, try that action before the Justice, get judgment for damages in that action, and on the trial in the Circuit Court failing to support the first cause of action, change it entirely and recover a penalty given by the Statute. The testimony in relation to the cattle guards ought to have been excluded from the jury on motion of the defendant. This suit not having been brought upon the Statute, this case is precisely within the reason of the case of the *Terre Haute, A. & St. Louis R. R. Co.* vs. *Augustus*, 21 Ill. 186.

We submit that there is no proof entitling the plaintiff to recover against the defendant, either for negligence in running the cars, or on account of an insufficient fence or cattle guards.

First, is there proof authorizing the plaintiff to recover independent of the Statute? What must be proved to authorize such recovery? "Railroad companies are not liable for injuries to cattle, unless they be wilfully or maliciously done, or under circumstances exhibiting gross negligence."

Great Western R. R. Co. vs. *Thompson*, 17 Ill. 131.

A Railroad Company has a right to run its cars upon its track without obstruction, and an animal has no right upon the track without consent of the Company, and if suffered to stray there, it is at the risk of the owner of the animal.

Central R. R. Co. vs. *Rockafellow*, 17 Ill. 541.

Animals wandering upon a track of an uninclosed Railroad are strictly trespassers, and the Company is not liable for their destruction unless its servants are guilty of wilful negligence evincing reckless misconduct. The burden of proof is upon the plaintiff to show negligence. The mere fact that an animal was killed, will not render a Company liable.

Ill. Central R. R. Co. vs. *Reedy*, 17 Ill. 580.

Tested by these principles, it requires no argument to show that the plaintiff ought not to recover upon this proof, for any damages for negligence in running the trains.

Does the proof show that he is entitled to recover under the Statute, even if the action had been brought upon the Statute?

If the suit had been brought upon the Statute, to enable the party to recover, he must prove the same facts which are necessary to be averred in the declaration, if the suit were originally brought in the Circuit Court.

And those averments are,

First, That the Road has been opened and used six months.

Second, It must be shown that the place where the fence or cattle guard was insufficient was not within the limits of a town, city or village.

Third, That the fence or cattle guard was not in good repair.

Fourth, It should also appear that the animal was not killed at a crossing of a public road, or in the limits of a town, city or village.

There is no pretence that it *was proven* in this case that this road had been opened six months at that time, prior to the injury of the animal.

C. R. & Q. B. R. Co. vs. *Carter*, 20 Ill. 390.
Ill. Central vs. *Finnigan*, 21 Ill. 646.
Case decided at Mt. Vernon, not reported.
Scates' Statutes, page 953, 954, Sec. 1.

The plaintiff failed to prove that the mare was not in the town of Tiskilwa, and upon a public crossing when she was killed. A digest of the testimony on that subject is as follows:

George Wilkinson, plaintiff's witness, says the cattle guard is on or near the line of the town of Tiskilwa. The crossing is on a street or half street in the town; think the east cattle guard was east of the line of Tiskilwa, but don't know certainly. The cattle guard at the place where the mare was hurt was the east one; can't say whether it is in the town or not.

Cross examined: The crossing is in the incorporated limits of the town of Tiskilwa; the street is 40 feet wide. I suppose it is in the corporation. I think the line of the corporation is in the centre of the street, or at the east side of it. I suppose the cattle guard is outside of the fields, east of the road which crosses the Railroad, is on the line of the street and town. Think the street is all in the town; could not say whether the cattle guard was part east and part west of the fence; never took notice.

Ralph Jones, plaintiff's witness; cars struck the mare on the east cattle guard.

Cross examined: My impression is that the east line of the corporation of the town of Tiskilwa is either in the centre of the street or on the east line of the street.

Daniel McCarthy, plaintiff's witness: There was a hole ploughed up in the ground *upon the crossing* on the west side of the east cattle guard near the end of the plank. I believe the

mare was struck there; there was hair there; saw no sign of the mare's being struck at any other place. I went east of the crossing on the track about 60 feet to make examination.

John Vanzile, plaintiff's witness: When I first saw the mare she was standing on track west of the west cattle guard, and there was a kind of a hole in the ground *upon the crossing* near the east end of the plank; the ground was kind of ploughed up at that place.

DEFENDANT'S WITNESSES.

O. W. Beattie: I know the crossing spoken of; it is a public street in the village of Tiskilwa. I think the cattle guards are in the street, the whole of them. I once owned the land on the east side, and found the line. I saw the mare that morning about six o'clock, west of the west cattle guard, and north of track, about 25 or 30 feet west of crossing. I think she was struck *on the crossing*. I saw the ground there torn up.

John Cushman: Saw the mare in the morning; saw the place in the road where we all thought she was struck; saw marks of hair on the west cattle guard, but none on the east cattle guard.

John McCarty: Our conclusion was that the mare was struck *on the crossing*, near the east cattle guard. The fence angled towards the crossing. I think the mare was struck on the east end of the plank which is placed to carry wagon wheels over the Railroad track. We all came to the conclusion that the mare was struck there.

The burden of proof was upon the plaintiff, to prove that the mare was not upon the crossing. This he utterly failed to do, and the defendant did prove that the mare was struck on the crossing.

The 5th instruction given for the plaintiff is clearly not the law. It is in direct conflict with the cases above cited, and the giving of this instruction was the only reason why a verdict was found for the plaintiff. It is said that no exception was taken to this instruction, nor to the third. As the Record appears here, this is so. But the Record does show that the verdict which was given in pursuance of that instruction was moved to be set aside and a new trial granted, and to the refusal of the Court to grant a new trial, an exception was properly taken.

It seems to me that when a verdict is manifestly the result of improper instructions, and is really not sustained by the evi-

2d. If it was, they have not by proof brought themselves within the Statute in any one particular. A declaration containing all the averments about which there is any proof, in this case, would be bad because the Court could not know from it that this road was obliged to fence their road at *that time* and *place.*

3d. There is no proof tending to show such gross carelessness in the running of the cars as would entitle the plaintiff to recover.

These points are independent of the instructions.

B. C. COOK, *for Appellant.*

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The Chicago & Rock Island R. R. Co
vs
Matthew M. Reed

Pltff's argt.

Filed May 31. 1860
L Leland
Clk

STATE OF ILLINOIS---THIRD GRAND DIVISION.

Supreme Court thereof, April term, 1860.

THE CHICAGO & ROCK ISLAND R. R. Co.
vs
MATTHEW M. REID. } *Appeal from Bureau.*

Page 5 This suit was commenced before a Justice of the Peace, August 13, 1859. Appealed to the Circuit Court.

page 6 COPY OF SUMMONS.

STATE OF ILLINOIS, *Bureau County.* } The People of the State of Illinois, to any Constable of said County, Greeting:

You are hereby commanded to summon Chicago and Rock Island R. R. Company to appear before me at my office in Tiskilwa, on the 19 day of Aug., A. D. 1859, at one o'clock P. M., to answer the complaint of Matthew M. Reid, for a failure to pay him a certain sum not exceeding one hundred dollars; and hereof make due return as the law directs.

Given under my hand and seal, this 13th day of August, A. D. 1859.

I. I. COOK, [SEAL.]

page 4 COPY OF TRANSCRIPT FILED IN CIRCUIT COURT.

STATE OF ILLINOIS, *Bureau County.* } In Justice's Court, before I. I. Cook, P. J.

M. M. REID,
vs.
C. & R. I. R. R. Co. } Trespass on personal property. Damages, $100.

1859, August 13th. Summons issued, returnable on the 19th day of August, at one o'clock P. M. Summons returned served by leaving a copy with O. W. Batty, agent at Tiskilwa Station, Ills., this 13th day of Aug., 1859.

JAS. WILSON, Const.

Aug. 19. Parties appear by counsel. Plaintiff claim damage of defendants for an injury done to plaintiff's mare by the said defendants, in the running of the cars on the said Chicago and Rock Island Rail Road Company. After hearing the testimony in the cause, it is considered by the Court that the plaintiff have and recover of the said defendants the sum of one hundred dollars for his damages, and costs of suit. I. P. COOK, P. J.

9 On the trial, before the evidence was heard, plaintiff's counsel stated to the jury that the suit was brought to recover damages

for an injury done to plaintiff's mare by the rail road cars of defendant; that the mare was, at the time of the injury, running at large at or near the village of Tiskilwa.

Plaintiff called

GEORGE WILKINSON, who testified as follows: I know plaintiff;
10 have seen his mare that was hurt; saw her before she was injured and soon after; it was at a crossing east from Tiskilwa; the mare was on the west side of the crossing; they had got her through the fence on the south side of the rail road. It appeared that there were some three or four horses on the track. East of the crossing outside of the limits of Tiskilwa, the fence runs right up to the cattle guard. There was nothing to hinder the horses from going across the cattle guard; they were filled up. I thought from the examination I made, that the mare and three or four other horses had gone over the east cattle guard, or at the side of it, on to the rail road east of Tiskilwa, and that they had come running west, and that the morning train going west struck the mare just as she was about to jump the cattle guard. To the east of the cattle guard there was hair on the ground and on the cattle guard. I have drove horses out both sides of that crossing. I saw the animal three or four hours, probably, after the accident. The cattle guard is on or near the line of the town of Tiskilwa; the crossing is on a street or half street in the town. Think the east cattle guard was east of the line of Tiskilwa, but don't know certainly. The fence east of the street was all right. The cattle guard at the place where the mare
11 was hurt was the east one; can't say whether it is in the town or not. I think the mare was hurt by the cars going west that morning. I did not see her hurt. I think no whistle was sounded or bell rung at that crossing that morning. The mare was a large, fine three year old mare. She had her leg all broke to pieces, and was otherwise injured. She aint worth anything now to speak of; she is no value to work at all; she may be worth something to breed from—$20 or $25—and may not be worth anything. The mare, before she was hurt, was worth $125. I live near the rail road, and if they ring or whistle I am sure to hear it. I was up and standing at a window when the train passed. I was 30 or 40 rods off from the railroad. They blew the whistle at the whistling post, 80 rods east from the depot.

Cross Examination.—The whistling post is east of the crossing; they whistled there that morning. I think there are two eighty acre lots between the crossing and the whistling post. The horses had been running about as hard as they could; so I judged by the tracks. I followed the tracks east from the crossing 30 or 40—20 or 30 rods. The horses had been running towards the west. All but this one went over the fence. When they come to the crossing they brooke the fence down. I saw by their marks where they had run. The crossing is in the incorporated limits of the Town of Tiskilwa. The street is forty feet wide. I suppose it is
12. in the corporation. I think the line of the corporation is the center of the street, or at the east side of it. I suppose the cattle guard is out side of the fields, east of the road which crosses the Rail

Road, is on the line of the street and Town. Think the street is all in the Town. Could not say whether the cattle guards was part east and part west of the fence; never took particular notice. Mare was worth $125 before she was hurt. Might and might not now be worth from $20 to $25. I would not give any thing for her.

12 Plaintiff called

RALPH JONES, who testified as follows: I know the place where the mare was killed; was there two or three hours after. I made some examination of the place. It appeared that the cars were running west; horses were inside of the fence and cattle guard. I went down east again. Can't say how far—think about ten rods—were tracks where the horses had run. Some of the horses went over the fence. This one ran on to the cattle guard, and the cars struck on the east cattle guard; threw her across the crossing and cattle guard. I knew the mare before she was hurt. It was on the 24th or 25th day of last May. The Mare before she was hurt was worth $100 at least, and peahaps more. I don't think she is
13 worth any thing now, might be, and might not be. One fore leg was broke, and the other was badly jammed. She was a good sized mare. She seemed to be hurt inwardly. She had good care. It was a hard matter to save her at all.

Cross Examination—I suppose she was killed by the morning train; there was no night train going west that night. I saw the tracks on the Rail Road; three or four horses had been going west on a run. I went down about ten rods from the crossing. I saw three or four tracks in the sand, which had been made by horses going east. My impression is that the east line of the corporation of the Town of Tiskilwa is either in the center of the street, or on the east line of the street. The cattle guards are poor, and well
13 filled up. Cattle could go across the cattle guards.

E. A. DEAN, called by plaintiff, testified as follows: I was in the train of cars at the time the mare was said to have been killed. I did not know that we struck anything. I have no recollection of whistle being sounded between Bureau Junction and Tiskilwa. It may have sounded. I was not thinking about it. I think I know the crossing. I don't know anything about the nature of the cattle guard. I knew the mare. I knew that she was Reid's. In my judgment she was worth $150. I tried to trade with Reid a little before she was hurt. I examined her closely. I thought she was one of the best mares in town. I would not give anything for
14 her now.

Cross Examination.—I examined her closely when I tried to trade for her. I don't believe she could have been sold for $1 right way after she was hurt. I don't know whether she would be worth anything for breeding or not.

DANIEL MCCARTHY, called by Plaintiff, testified as follows:—The mare was hurt on the 24th day of May last, sometime in the morning. I am an employee of Defendant.

Cross Examination.—I am not sure whether there was a freight running west that night. I found the mare that morning north of the Rail Road, pretty near the track. It was my opinion she was struck on the crossing, between the cattle guard on the public road. First saw the mare that morning, between 6 and 7 o'clock, standing on north side of the Rail Road track, near the fence. Train went west between 3 and 4 that morning. I had three men with me on hand car when we came there that morning. The fence was not broke down on either side of the crossing. We broke down the fence to get the mare out. There was tracks of horses east of cattle ground inside the fence. Can't say which way the tracks led.—there was a hole ploughed up in the ground on the crossing, on the west side of east cattle guard, near the end of the plank. I believe the mare was struck; there then was hair there. Saw no sign of
15 the mare's being struck at any other place.

Direct resumed.—I traveled east of the crossing over three miles on a hand car. I went east of the next crossing on the track to make examination about 60 feet.

Cross Examination.—Examined the east cattle guard that morning; saw no marks upon it.

JOHN VANZILE, called by plaintiff. I knew the crossing; about 30 or 40 feet from one cattle guard to the other. It may be 20 or 30 rods to the next public crossing west of this crossing. When I first saw her she was standing on the track west of the west cattle guard. That cattle guard had hairs on it. There was a kind of a hole in the ground as if something had been jammed over there. I did not go on the east cattle guard. The cattle guard on each side were poor; cattle could go in and out. The cattle guard was filled up, and they could walk around the fence. The hole was on the crossing near the east end of the plank. The ground was kind of ploughed up.

The defendant moved to exclude the evidence offered to prove that the cattle guard was not sufficient to turn cattle, upon the ground that this action was an action of trespass, and evidence which would support an action on the case was not relevant.

The Court overruled the objection, and decided that the plaintiff might prove a cause of action in case if he could; and if he did he could recover in this suit. To which the defendant, by its counsel,
16 then and there excepted.

JOHN BAGGER, a witness called by plaintiff, testified as follows: I saw the train of cars that morning; they blew whistle at whistling post; it is half a mile from the crossing.

The plaintiff then asked the witness this question:

State whether they rung any bell or sounded any whistle on the train after leaving the whistling post until they reached and crossed the crossing.

The defendant, by its counsel, objected to the question; the Court overruled the objection, and permitted the witness to answer

the question—to which decision of the Court the defendant then and there excepted.

The witness testified they did not ring any bell or sound any whistle after leaving the whistling post until they crossed the Main street in Tiskilwa, about twenty or thirty rods west of the crossing, when they struck the bell a tap or two. Did not whistle after leaving the post. I did not see the mare when she was struck. Saw her about three hours after. Have seen the mare several times. Am a poor judge of horses. Should think her value was $125 before she was hurt. I would not want her at all after she was hurt. There is at the crossing an embankment on each side of the rail road to bring
17 the highway to the level of the rail road. The rail road embankment is from three to five feet high on each side of the crossing.

Cross examination.—The rail road fence at cattle guards from 6 to 8 feet apart; crossing from 30 to 40 feet wide. Should think more of the cattle guards were outside the crossing than in. I don't remember the day of the week or month. I heard the colt was hurt that morning; saw them lead it off. Can't tell how I remember that the bell did not ring that morning; know I heard two taps as it crossed Main street. The bell rung yesterday. Don't know whether it was last Wednesday.

Here the plaintiff rested his case.

O. W. Beattee, called by defendant, testified as follows I know the crossing spoken of; it is a public street in the village of Tiskilwa. I think the cattle guards are in the street. I once owned the land on the east side and found the line. I saw the animal that morning, but did not examine to see where it was done.

Cross Examination.—The street is in the village of Tiskilwa. I think the cattle guards are in the street, the whole of it. I am in employ of defendant.

William O'Neal, called by defendant, testified as follows: I worked on that division of the rail road; I was running up and down on the hand car. I saw the mare that morning about 6 o'clock, west of the west cattle guard and north of track, about 25 or 30 feet west of crossing. I think she was struck on the cross-
18 ing; I saw ground there torn up.

Cross examination.—The mare was west of the west cattle guards when I saw her first that morning. The crossing is the third crossing east of the depot in the town of Tiskilwa; it is the next crossing to the Bark Bone. Saw the ground torn up crossing; horses travelling over it might tear up the ground. There was no fence broke down. I am in the employ of defendant.

John Cushman, called by defendant, testified as follows: I worked on the hand car. Saw the mare in the morning; her leg was broke; we tore down the fence on the south side of the road and turned her out. I saw place in the road where we all thought she was struck. I saw marks of hair on the next cattle guard, but none on east cattle guard.

Cross examination.—We got a hammer and broke down the fence and turned her out. I turned the same mare out of there 3 or 4 days before; I drove her out over the cattle guard.

JOHN MCCARTY, called by defendant, testified as follows: I was at the crossing, and saw the mare in the morning just after they turned her out. Our conclusion was that the mare was struck on the crossing, near the east cattle ground, and taken over the next cattle guard. The fence, which was up to the rail road track at the crossing, was not on a right angle with the fence along the line of the road; it angled towards the crossing.

19 *Cross ex.* There was a field on each side of the rail road as it runs east from the crossing. I think the mare was struck on the east end of the plank, which is placed to carry wagon wheels over the rail road track. We all came to the conclusion that the mare was struck there. We did not examine the east cattle guard. The hand car stood there on the east side of the crossing.

This was all the evidence in the case.

At the request of the plaintiff, instructed the jury as follows:

2d. If the jury find for the plaintiff, they should assess his dam-
19 ages at what they believe, from the evidence, he sustained by reason of the injury of the mare in question.

3d. If the jury believe, from the evidence, that the plaintiff's mare was injured by the defendant's cars, upon their rail road, by reason of the neglect of the defendant's servants to keep any whistle sounding or bell ringing while said cars were approaching and crossing a public road or street, then the plaintiff should recover in this action.

5th. If the jury believe, from the evidence, that the defendants omitted to ring a bell or sound a whistle in the manner required by
20 law, such omission constituted a *prima facia* case of negligence, and the defendants are liable to the plaintiff for the loss and damage proved to have been sustained by him for such neglect.

To the giving of each of which instructions the defendant, at the time, excepted.

The defendant asked the Court to instruct the jury as follows:

That the plaintiff cannot recover in this cause except he has shown that the injury to the plaintiff's horse was occasioned by the negligence of the agents or employees of the defendants, other than that of not having the fences or cattle guards in repair at the time of such injury.

4th. That the form of the action in this case is trespass on personal property, and unless an actual trespass has been proved, the plaintiff cannot recover; and merely showing negligence on the part of the defendants in not keeping their fences and cattle guards in repair, or in not running their trains with due care, would not prove that the defendants were guilty of a tresspass upon the plaintiff's property.

6th. That if the plaintiff suffered his horse to run at large in the neighborhood of and upon the track of the defendants' rail road, knowing that the cattle guards were out of repair, that then the plaintiff is not entitled to recover in this action.

ERRORS ASSIGNED.

1st. The Court erred in receiving evidence objected to by defendant.

2d. The Court erred in overruling defendants' motion to exclude evidence.

3d. The Court erred in deciding that the plaintiff might prove cause of action in case in this suit.

4th. The Court erred in receiving the testimony of John Bagger, which was objected to by defendants.

5th. The Court erred in giving such of the instructions asked for by the plaintiff severally.

6th. The Court erred in refusing to give the 1st, 4th and 6th instructions asked for by defendant, and each of them severally.

7th. The Court erred in overruling the motion for a new trial.

8th. The Court erred in rendering the judgment aforesaid in manner and form aforesaid.

POINTS.

1st. This action being in trespass for trespass on personal property, the evidence wholly failed to sustain it.

2d. The 3d instruction is not the law.

3d. The 5th instruction is clearly not the law.

Ch. B. & Q. R. R. vs. ***Rockyfellow***, 17 *Ill.*, 541.
G. & C. U. R. R. Co. vs. ***Dill***, 22 *Ill.*, 264.

4th. The suit was not brought under the statute, and the 1st instruction asked by defendant should have been given.

Terre Haute, A. & St. L. R. R. Co. vs. *Augustus*, 21 *Ill.*, 186.

6th. The 6th instruction asked by defendant should have been given.

GLOVER, COOK & CAMPBELL,
for appelants.

The C & R. R. R.
178 - J
Martha M. Reid

abstract

Filed Apr. 19 - 1860
L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

THE CHICAGO & R. I. R. R. CO.
188. *vs.* } *Appeal from Bureau.*
MATTHEW M. REED.

ARGUMENT FOR APPELLANT.

THE first instruction asked for the defendant should have been given.

First, because the suit was brought against the defendants expressly for damages done by defendant in the running of the cars and not for negligence in not having sufficient fences and cattle guards; see the entry on the Justice's docket, in which the suit is called trespass on personal property; see also the transcript which says, "Parties appear by counsel; plaintiff claims damages of defendants for an injury done to plaintiff's mare by the said defendants in the running of the cars on the said Railroad." On the trial in the Circuit Court, before the evidence was heard, plaintiff's counsel stated to the jury that the suit was brought to recover damages for an injury done to plaintiff's mare by the Railroad cars of defendants.

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If the plaintiff had been seeking to recover the statutory penalty on account of the neglect of defendants below to fence their road, build cattle guards, &c., an action of debt and not trespass would have been the proper remedy.

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Although the Court will not reverse a judgment because the Justice has made a technical error in naming the suit, still a party will not be permitted to commence an action on the case to recover damages for negligence, try that action before the Justice, get judgment for damages in that action, and on the trial in the Circuit Court failing to support the first cause of action, change it entirely and recover a penalty given by the Statute. The testimony in relation to the cattle guards ought to have been excluded from the jury on motion of the defendant. This suit not having been brought upon the Statute, this case is precisely within the reason of the case of the *Terre Haute, A. & St. Louis R. R. Co.* vs. *Augustus*, 21 Ill. 186.

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Ill. Central R. R. Co. vs. *Reedy*, 17 Ill. 580.

Tested by these principles, it requires no argument to show that the plaintiff ought not to recover upon this proof, for any damages for negligence in running the trains.

Does the proof show that he is entitled to recover under the Statute, even if the action had been brought upon the Statute?

If the suit had been brought upon the Statute, to enable the party to recover, he must prove the same facts which are necessary to be averred in the declaration, if the suit were originally brought in the Circuit Court.

And those averments are,

First, That the Road has been opened and used six months.

Second, It must be shown that the place where the fence or cattle guard was insufficient was not within the limits of a town, city or village.

Third, That the fence or cattle guard was not in good repair.

Fourth, It should also appear that the animal was not killed at a crossing of a public road, or in the limits of a town, city or village.

There is no pretence that it *was proven* in this case that this road had been opened six months at that time, prior to the injury of the animal.

C. R. & Q. B. R. Co. vs. *Carter*, 20 Ill. 390.
Ill. Central vs. *Finnigan*, 21 Ill. 646.
Case decided at Mt. Vernon, not reported.
Scates' Statutes, page 953, 954, Sec. 1.

The plaintiff failed to prove that the mare was not in the town of Tiskilwa, and upon a public crossing when she was killed. A digest of the testimony on that subject is as follows:

George Wilkinson, plaintiff's witness, says the cattle guard is on or near the line of the town of Tiskilwa. The crossing is on a street or half street in the town; think the east cattle guard was east of the line of Tiskilwa, but don't know certainly. The cattle guard at the place where the mare was hurt was the east one; can't say whether it is in the town or not.

Cross examined: The crossing is in the incorporated limits of the town of Tiskilwa; the street is 40 feet wide. I suppose it is in the corporation. I think the line of the corporation is in the centre of the street, or at the east side of it. I suppose the cattle guard is outside of the fields, east of the road which crosses the Railroad, is on the line of the street and town. Think the street is all in the town; could not say whether the cattle guard was part east and part west of the fence; never took notice.

Ralph Jones, plaintiff's witness; cars struck the mare on the east cattle guard.

Cross examined: My impression is that the east line of the corporation of the town of Tiskilwa is either in the centre of the street or on the east line of the street.

Daniel McCarthy, plaintiff's witness: There was a hole ploughed up in the ground *upon the crossing* on the west side of the east cattle guard near the end of the plank. I believe the

mare was struck there; there was hair there; saw no sign of the mare's being struck at any other place. I went east of the crossing on the track about 60 feet to make examination.

John Vanzile, plaintiff's witness: When I first saw the mare she was standing on track west of the west cattle guard, and there was a kind of a hole in the ground *upon the crossing* near the east end of the plank; the ground was kind of ploughed up at that place.

DEFENDANT'S WITNESSES.

O. W. Beattie: I know the crossing spoken of; it is a public street in the village of Tiskilwa. I think the cattle guards are in the street, the whole of them. I once owned the land on the east side, and found the line. I saw the mare that morning about six o'clock, west of the west cattle guard, and north of track, about 25 or 30 feet west of crossing. I think she was struck *on the crossing*. I saw the ground there torn up.

John Cushman: Saw the mare in the morning; saw the place in the road where we all thought she was struck; saw marks of hair on the west cattle guard, but none on the east cattle guard.

John McCarty: Our conclusion was that the mare was struck *on the crossing*, near the east cattle guard. The fence angled towards the crossing. I think the mare was struck on the east end of the plank which is placed to carry wagon wheels over the Railroad track. We all came to the conclusion that the mare was struck there.

The burden of proof was upon the plaintiff, to prove that the mare was not upon the crossing. This he utterly failed to do, and the defendant did prove that the mare was struck on the crossing.

The 5th instruction given for the plaintiff is clearly not the law. It is in direct conflict with the cases above cited, and the giving of this instruction was the only reason why a verdict was found for the plaintiff. It is said that no exception was taken to this instruction, nor to the third. As the Record appears here, this is so. But the Record does show that the verdict which was given in pursuance of that instruction was moved to be set aside and a new trial granted, and to the refusal of the Court to grant a new trial, an exception was properly taken.

It seems to me that when a verdict is manifestly the result of improper instructions, and is really not sustained by the evi-

dence, if the same was applied according to correct legal principles, that a refusal to grant a new trial and an exception thereto, will present to this Court the whole question appearing upon the Record. The Court erred in refusing to set aside a verdict which was manifestly given because the jury were wrongly advised as to the law, and which verdict was wholly unsupported by the testimony. The reason why the Court should have granted a new trial was because he had wrongly instructed the jury, and the verdict in pursuance of such instruction ought not to be allowed to stand; besides, the evidence upon which the instruction is based was objected to at the time it was introduced, and an exception was properly taken at the time. *John Bagges*, one of the plaintiff's witnesses, testified: I saw the train of cars that morning; they blew the whistle at the whistling post; it is half a mile from the crossing. The plaintiff then asked him this question, State whether they rung any bell or sounded any whistle on the train after leaving the whistling post, until they reached and crossed the crossing. To this question, there was an objection, and overruled and an exception. Rec. p. 16.

If the horse was on the crossing at the time, the simple neglect to ring the bell is not such gross negligence as would entitle the plaintiff to recover, and they have failed to make out their case upon that ground. If the horse was on the inside of the Railroad enclosure, owing to a defect in the cattle guard, this evidence must be irrelevant; no obligation to ring the bell except at the crossings.

The 6th instruction asked by defendant should have been given. If the plaintiff knew that the cattle guard was out of repair, and that his horse could cross on to the Railroad track, he was guilty of negligence in allowing it to run at large near that place.

The fact that the cattle guard was out of repair might have been known to plaintiff before it became known to defendant. Could he, without giving notice to the defendant of the fact, allow his horse to run upon the track, endangering the lives of those traveling upon the road, and risking the destruction of large amounts of property, and still recover the full value of his horse if injured?

We insist, therefore,

1st. That this suit is not brought upon the Statute at all.

2d. If it was, they have not by proof brought themselves within the Statute in any one particular. A declaration containing all the averments about which there is any proof, in this case, would be bad because the Court could not know from it that this road was obliged to fence their road at *that time* and *place.*

3d. There is no proof tending to show such gross carelessness in the running of the cars as would entitle the plaintiff to recover.

These points are independent of the instructions.

B. C. COOK, *for Appellant.*

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The Chicago & Rock Island
Rail Road Company
vs
Matthew M. Reed

Pltf's. argument

Filed May 31. 1860
L. Leland
Clerk

State of Illinois - Third Grand Division
Supreme Court thereof A.D. 1860

The Chicago & Rock Island R.R. Co.
vs Appeal from Bureau
Matthew M. Reed

And now comes the appellant -
and says that there is manifest - Error
in the Record & the proceedings &
the Court below in this Suit

1st - The Court - Erred in receiving Evidence objected to by appellant -

2nd - The Court - Erred in Overruling Appellants Motion to Exclude Evidence.

3d - The Court Erred in deciding that the appellee might prosecute a Cause of action in Case in this Suit.

4th - The Court - Erred in receiving the Testimony of John Bagger which was objected to by appellant.

5th - The Court - Erred in giving such of the instructions asked for by the appellee Severally

6 The Court erred in refusing to give the 1st 4th & 6th instructions asked for by appellant and each & them severally

7th The Court erred in overruling the Motion for a new Trial &

8th The Court erred in rendering the judgment aforesaid in manner & form aforesaid

Wherefore the appellant prays that the judgment & the Court below be reversed

Glover Leake & Campbell
& Peters & Harwell
for appellant.

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State of Illinois }
Bureau County } ss.

Be it remembered that on the 6th day of September A D 1859. came into office of the Clerk of the Circuit Court of the County of Bureau and State of Illinois. The Chicago & Rock Island Railroad Company, and filed their Bond for appeal to the Circuit Court herein in the words and figures following to wit:

Know all men by these presents that we the Chicago & Rock Island Railroad company and Frank L. Sherman, Milton T. Peters are held and firmly bound unto Matthew M. Reid in the penal Sum of Two hundred and twenty three dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves or heirs and administrators jointly severally and firmly by these presents Witness our hands and seals this 6th day of Septem A.D. 1859

The condition of the above obligation is such that whereas the said Matthew M. Reid on the 11th day of August A. D 1859 before J. J. Cook a Justice of the Peace for the County of Bureau State of Illinois, recovered a judgment against the [illegible] bounden Chicago & Rock Island Rail Road Company for the Sum of one hu

dollars damage and Eleven dollars and fifty cents costs from which Judgment the said Chicago & Rock Island Rail Road company has taken an appeal to the Circuit Court of the County of Bureau aforesaid. Now if the said Chicago & Rock Island Rail Road company shall prosecute their appeal with Effect and shall pay whatever judgment 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 this 6th day of Sept. A.D. 1859
E. M. Fisher Clk.
by W. A. Fisher. Dep

Henry Farnham Prest. &
W. L. St. John G. F. A. for Chicago & Rock Island R. R. Co (Seal)
Frank D. Sherman (Seal)
Milton T. Peters (Seal)

Copy of Supersedeas

State of Illinois } ss.
Bureau County }

The People of the State of Illinois
to S. T. Cook

Esq. Justice of the Peace ~~and ex-officio~~ in and for the said County greeting

Whereas in a certain suit lately pending before you the said Justice of the Peace wherein Matthew M. Reid was Plaintiff and Chicago & Rock Island Rail Road Company defendant, judgment was rendered in favor of the said Matthew

M. Reid for the sum of One hundred dollars and Eleven & fifty one hundredths dollars costs as by the transcript of said Judgment from the docket of the said Justice, filed in the Clerks office of our Circuit Court in and for the said County by the said Chicago & Rock Island Rail Road Company in this behalf appears, and whereas the said Chicago and Rock Island Rail Road company has taken an appeal from the said Judgment, and has given bond and security to the said Nathan M. Reid for the due prosecution thereof according to law; which said bond is filed as of Record in the said Clerks office; We therefore command and enjoin you the said J. J. Cook ~~and~~ so being Justice ~~and constable~~ as aforesaid that you do entirely supersede, and desist from proceeding any further in said suit and that you do forthwith suspend all proceedings in relation thereto, and cease from molesting the said Chicago & Rock Island Rail Road company in any wise on that account until the said Circuit Court shall make other order to the contrary. And this you are in no wise to omit at your peril

Witness Edward M. Fisher Clerk of our said Circuit Court and the seal thereof at Princeton in said County this 1st day of September in the Year of our Lord One thousand Eight hundred and Sixty nine

In the Supreme Court

On the back of which supersedeas there appears the following endorsement "I served this writ by reading to the within named S. T. Cook Sept 8th 1857

D. E. Norton Shff Bu Co. Ill
by S. H. Mitchell deputy

Copy of Summons

State of Illinois } ss. The People of the State of Illinois
Bureau County } To the Sheriff of Bureau County greeting

We command you to summon Matthew M. Reed personally to be and appear before the Judge of the Circuit Court in and for said County on the first day of the ensuing September term thereof to commence on the third monday of said month at the Court House in Princeton to answer unto Chicago & Rock Island Rail Road company upon an appeal brought into our said Circuit Court by the said Chicago & Rock Island Rail Road company from a Judgment lately rendered before S. T. Cook Esquire against them in favor of the said Matthew M. Reed. Herein fail not and have you then and there this writ.

In testimony whereof I hereunto set my hand and the seal of said Court at Princeton this 6th day of September A.D. 1857

(L.S.)

E. W. Fisher Clerk
by H. A. Fisher dep Clk

4

On the back of which Summons there appears the following Endorsement to wit

"I served this by leading to M. M Reid Sept 8th 1859

L. E. Norton Sheriff Bu Co Ills
by S. H. Mitchell deputy

Copy of Transcript

State of Illinois } In Justices Court before J. J. Cook P. J.
Bureau County }

M. M. Reid
vs
C & R. I. R. R. Co

Trespass on personal property
Damages $100.00

1859 Aug 13th Summons issued returnable on the 19th day of Augxst at One Oclock P. M.

Justice cost $2.13

Summons returned Served by leaving a copy with O. M. Kelly Agent at Tiskilwa Station Ills this 13th day of Aug 1859

Const Cost $2.50

Sal Wilson const.

Aug 19th Parties appear by council Plaintiff claim damage of defendants for an injury done to plaintiffs mare by the said defendants in the running of the Cars on the said Chicago & Rock Island R. R. Company

After hearing the testimony in the cause it is considered by the Court that the plaintiff have and recover of the said defendants One hundred dollars for his damages and cost of suit

Witness fees

J. Wilson	$0
J. Reid	$0
T. Williamson	$0
E. A. Dean	$0
J. Geiger	$0
L. J. Earle	$0
R. Jones	$0
D. McCarty	$0
G. Gibson	$0
E. A. Dillman	$0
J. Nichols	$0
J. Savage	$0
J. Smith	$0

J. J. Cook P. J.

6 State of Illinois }
Bureau County } ss

I S. T. Cook a Justice of the Peace in and for said County do certify that the foregoing transcript is truly copied from the files and books of my Office

In witness thereof I have hereunto set my hand this 16th. day of Sept. A. D 1859

S. T. Cook
Police Justice

Copy of Justice's Summons

State of Illinois } ss. The People of the State of Illinois
Bureau County } to any constable of said County greeting

You are hereby commanded to summon Chicago Lock Manufacturing Company to appear before me at my Office in Tiskilwa on the 19th day of Aug A. D 1859 at one O'clock P.M. to answer the complaint of Matthew M. Bill for a failure to pay him a certain sum not exceeding one hundred dollars and hereof make due return as the law directs. Given under my hand and seal this 13th day of Aug A. D 1859

S. T. Cook (Seal)
Police Justice of the Peace

On the back of which Summons there appears the following indorsement Served by leaving a copy with O. M. Batty Station agent at Tiskilwa

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Ills. this 13 day of August 1859

James Wilson. Constable

Pleas before the Hon. M. E. Hollister. Judge of the ninth Judicial Circuit of the State of Ills. held at a term of said Circuit Court begun and held at the Court House in Princeton within and for the County of Bureau on the second monday in the month of December in the Year of our Lord one thousand Eight hundred and fifty nine.

Present Hon. M. E. Hollister Judge

E. M. Fisher Clerk

D. E. Porter Sheriff

Washington Bushnell States attorney

Matthew M. Reed

vs

The Chicago & Rock Island R. R. Co.

appeal

To wit on the 12th day of said June to wit & Dec 24th 1859

Now comes the said plaintiff by Peter his attorney and the said defendants come by Peters & Farwell their attorneys. and by agreement It is ordered that this cause be set for hearing on wednesday of the third week of the present term of this Court

8 Matthew M. Reid
vs appeal
The Chicago & Rock
Island R. R. Co. To wit on the 16th day of said Term.

Now comes the said Plaintiff by Porter his attorney and the defendants come by Peters, Farrell & Cook their attorneys and the Court orders that a Jury be Empannelled to try the issues herein, and a jury comes of twelve good and lawful men to wit, James Ross, E. G. Read, W. H. McBride, Hezekiah Epperson, Walter Galbraith, James R. Moon, George Dutro, Martin G. Goodspeed, Thomas Walker, N. D. D. Carpenter, William Jackson and Stephen Ruffer, who being duly Elected tried and sworn well and truly to try the said issues, and a true verdict render according to the Evidence, and said Jury upon their oaths say "we of the Jury do find the said issues in favor of the said plaintiff and assess his damages herein in the sum of one hundred dollars, and the said defendants by his said attorneys enter their motion for a new trial herein, and the Court being fully advised in the premises considers that said motion be overruled. It is therefore considered by the Court, that the said plaintiff have and recover of the said defendants the said sum

9 of One hundred dollars for his damages aforesaid.
Together with all his costs in this Court as well as in the Court below by him in and about his said suit in this behalf expended. and that he have execution therefor. and the said defendants by their said attorneys prays an appeal to the Supreme Court which is allowed upon the defendants entering into bond to the said Plaintiff in the penal sum of two hundred dollars. with Burton C. Cook as security. said bond to be filed with the Clerk of this Court within thirty days from this date

Copy of Bill of Exceptions

Matthew M. Reid
vs
The Chicago and Rock
Island Rail road Co.

Appeal

Be it remembered that when this cause came on to be tried the counsel for the plaintiff stated to the jury that the suit was brought to recover damages for an injury done to plffs mare by the Rail Road cars of defendant that the mare was at the time of the injury running at large at or near the village of Tiskilwa

Plff calls George Wilkinson who testified as follows, I know plff. have seen his mare that was hurt

saw her before she was injured and soon after it was at a crossing East from Tisikiwa, the mare was on the West side of the crossing, they had got her through the fence on the South side of the Rail Road. It appeared that there was some 3 or 4 horses on the track, East of the crossing outside of the limits of Tisikiwa the fence run right up to the cattle Guard there was nothing to hinder the horses from going across the cattle Guard they were filled up. I thought from the Examination I made that the mare and 3 or 4 other horses had gone over the East cattle guard. or at the side of it on to the Railroad East of Tisikiwa, and that they had come running West and that the morning train going west Struck the mare just as she was about to jump the cattle guard. To the East of the cattle Guard there was hair on the ground and on the cattle guard. I have drove horses out both sides of that crossing I saw the animal 3 or 4 hours probably after the accident the cattle guard is on or near the line of the Town of Tisikiwa. the crossing is on a street or half street in the Town. think the East cattle guard was East of the line of Tisikiwa but dont know certainly the fence East of the street was all right. the Cattle guard at the place where the mare was hurt was the East one. cant say whether

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it is in the Town or not. I think the mare was hurt by the cars going West that morning I did not see her hurt. I think no whistle was sounded or bell rung at that crossing that morning. the mare was a large fine three year old mare. She had her leg all broke to pieces and was otherwise injured. She aint worth any thing now to speak of. She is no value for work at all. she may be worth something to breed from 20 or $25 I may not be worth anything the mare before she was hurt was worth $135. I live near the Railroad and if they ring or whistle. I can to hear it. I was up and standing at a window when the train passed. I was 30 or 40 rods off from the Rail road they blew the whistle at the whistling post 80 rods East from the depot

(Cross Examined) The whistling post is East of the crossing they whistled there that morning. I think there are two Eighty acre lots between the crossing and the whistling post. The horses had been running about as hard as they could. so I judged by the tracks. I followed the tracks East from the crossing 30 or 40. 20 or 30 rods. the horses had been running towards the West all but this one next over the fence when they come to the crossing they broke the fence down. I saw by their marks where they had run. The crossing is in the incorporated limits of the Town of Litchfield The Street is 40 feet wide I suppose it is the

12 corporation. I think the line of the corporation is the center of the street or at the East side of it. I suppose the cattle Guard is outside of the street but don't know. The fence East of the fields East of the road which crosses the Rail Road is on the line of the street of Town. This the street is all in the Town. could not say whether the cattle guard was part East and part west of fence never took particular notice. mare was worth $125. before she was hurt. might and might not now be worth from $20 to $25 would not give any thing for her

Sitt[n] called Ralph Jones who testified as follows. I know the place where the mare was killed. was there two or three hours after. I made some examination of the place. it appeared that the cars were running west. horses were inside of the fence and cattle guard. I went down East afterwards cant say how far think about ten rods were struck where the horses had run. some of the horses went over the fence. this one run onto the cattle guard & the cars struck on the East cattle guard. threw her across the crossing onto cattle guard. I knew the mare before she was hurt. It was on the 24th. or 25th. day of last May. the mare before she was hurt was worth $100 or least and perhaps more, as to what she is worth any thing now might be and might

not. one fore leg was broke and the other was badly jammed She was a good sized mare, she seemed to be hurt inwardly She had good care It was a hard matter to save her at all

Cross Examined I suppose she was killed by morning train there was no night train going west that night I saw the tracks on the rail Road 3 or 4 horses had been going west on a run. I went down about ten rods from the crossing, I saw 3 or 4 tracks in the sand which had been made by horses going East my impression is that the East line of the corporation of the Town of Fitchburg is Either in the center of the street or on the East line of the street the cattle guards are poor and well filled up cattle could go across the cattle Guard,

E. C. Dean called by Defendant testified as follows I was in the train of cars at the time the mare was said to have been killed I did not know that we struck anything, I have no recollection of cattle being scared between Burnes Junction & Fitchburg, it may have been scared I was not thinking about it I think I know the crossing I dont know anything about the nature of the cattle guards I knew the mare, I knew that she was killed In my judgment she was worth $150. I tried to trade with Pat a little before she was hurt I Examined her closely, I thought she was one of the best mares in Town, I would not give my

thing for her now

Cross Examined

I Examined her closely when I tried to trade for her. I dont believe she could have been sold for $1 right away after she was hurt I dont know whether she would be worth anything for breeding or not

Daniel McCarthy

Called by plaintiff testified as follows, the mare was hurt on the 24th of May cut some time in the morning I am an employee of defendent

Cross Examined

I am not sure whether there was a freight running west that night, I found the mare that morning north of the Rail Road pretty near the track It was my opinion she was struck on the crossing between the cattle guards on the public road, first saw the mare that morning between 6 & 7 Oclock Monday on north side of the Rail Road track near the fence, train went west between 3 & 4 that morning I had three men with me on hand car when we came there that morning. the fence was not broke down on either side of the crossing we broke down the fence to get the mare out there was tracks of horses East of cattle ground inside the fence cant say which way the tracks led, there was a ridge plowed up in the ground on the crossing on the west side of East cattle guard near the end of the plank I believe the mare was struck there there was hair there saw no sign of blood

Direct resumed

of the mares being struck at any other place I travelled East of the crossing over 3 miles on a hand car. I went East of the next crossing on the track to make examination about 60 feet

Cross Examined

Examined the East cattle guard that morning saw no marks upon it.

John Vanzile

Called by Plaintiff. I know the crossing about 30 or 40 feet from one cattle Guard to the other. It may be 20 or 30 rods to the next public crossing West of this crossing when I first saw her she was standing on the track west of the next cattle Guard that cattle guard had hair on it there was a kind of a hole in the ground as if something had been jammed over there. She did not go on the East cattle guard, the cattle guards on Each side were poor cattle could go in and out the cattle guard was filled up & they could walk around the fence the hole was on the crossing near the East end of the plank the ground was kind of ploughed up. The defendant moved to Exclude the Evidence offered to prove that the cattle guards was not sufficient to turn cattle upon the ground that this action was an action of trespass and Evidence which would support an action on the case was not admissible.

The Court overruled the objection and decided that the plaintiff might prove a cause of action in case it existed and if he did he could recover in this suit. to which ruling the defendant

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by its counsil then and there Excepted

John Bagger A witness called by plaintiff testified as follows I saw the train of cars that morning they blew whistle at the whistling post it is half a mile from the crossing The plaintiff then asked the witness this question. State whether they rung any bell or sounded any whistle on the train after leaving the whistling post until they reached and crossed the crossing. The defendant by its counsel objected to the question this Court overruled the objection and permitted the witness to answer the question To which decision of the Court the defendants then and there excepted the witness testified they did not ring any bell or sound any whistle after leaving the whistling post until they crossed the main street in Fulton about twenty or thirty rods west of the crossing when they struck the bell a tap or two did not whistle after leaving the post. I did not see the mare when she was struck I saw her about three hours after. have seen the mare several times am a poor judge of horses should think her value was $125 before she was hurt I would not want her at all after she was hurt. there is at the [illegible] crossing an Embankment on each side of the Rail road to bring the highway to the level of the Rail Road the Rail road Embankment is from

1st 3 to 5 feet high on each side of the crossing

Cross Examined The Rail road fence at cattle Guards from 6 to 8 feet apart crossing from 30 to 40 feet wide should think more of the cattle guards were outside of the crossing than in, I dont remember the day of the week or month, I heard the cow was hurt that morning saw them haul it off cant tell now I remember that the bell did not ring that morning know I heard two taps as it crossed main street the bell rung yesterday dont know whether it was last wednesday here the plaintiff rested his case

C. W. Beattie Called by defendant testified as follows, I know the crossing spoken of it is a public street in the village of Tiskilwa I think the cattle guards are in the street, I once owned the land on the East side & found the line, I saw the animal that morning but did not examine to see where it was done

Cross Examined The Street is in the village of Tiskilwa. I think the cattle guards are in the Street the whole of it I am in the employ of deft.

William O. Neil Called by defendant testified as follows, I work on that division of the Rail road I was running up and down on the hand car, I saw the mare that morning about six o'clock west of the west cattle guard and south of track, about 25 or 30 feet west of crossing, I think she was struck on the crossing I saw ground there torn up

Cross Examined) The mare was west of the west cattle guard when I saw her first that morning. The crossing is the 3rd crossing East of the depot in the Town of Tekkilva it is the next crossing to the Back Bone saw the ground tore up crossing horses travelling over it might tare up the ground there was no fence broke down I am in the Employ of deft.

John Cushman Called by deft testified as follows I worked on the hand car saw the mare in the morning her leg was broke we broke down the fence on the South side of the road and turned her out. I saw place in the road where we all thought She was struck. I saw marks of hair on west cattle guard but none on East cattle guard

Cross Examined We got a hammer & broke down the fence and turned her out,

I turned same mare out of there 3 or 4 days before I drove her out over the cattle guard

Jon M. Carty Called by deft testified as follows I was at the crossing & saw the mare in the morning first all they turned her out our conclusion was that the mare was struck on the crossing near the East cattle guard & taken over the west cattle guard the fence which was up to the Rail Road track at the crossing was not on a right angle with the fence along the line of the Road it angled towards the crossing

19 Cross Examined There was a fuit on Each side of the Railroad as it runs East from the crossing I think the mare was struck on the East End of the plank which is placed to carry waggon wheels over the Rail Road track, We all came to the conclusion that the mare was struck there we did not Examine the East cattle guard the hand car stood there on the East side of the crossing. This was all the Evidence in the case at the request of the Plaintiff. Instructed the Jury as follows

2nd If the Jury find for the plaintiff they should assess his damages at what they believe from the Evidence he sustained by reason of the injury of the mare in question

3d If the Jury believe from the Evidence that the plaintiffs mare was injured by the defendants cars upon their Rail road by reason of the neglect of the defendants servants to sop any whistle sounding or bell ringing while said cars were approaching and crossing a public road or street then the plaintiff should recover in this action

4th If the Jury believe from the Evidence that the defendants omitted to ring a bell or sound a whistle in the manner required by law such omission constituted a prima facia case of

20 negligence and the defendants are liable to the plaintiff for the loss and damages proved to have been sustained by him for such neglect

The defendants asked the Court to instruct the jury

1st. That the Plaintiff cannot recover in this cause Except he has shown the injury to the plaintiffs horse was occasioned by the negligence of the agents or employees of the defendants. other than that of not having the fences or cattle guards in repair at the time of such injury

2nd. That if the Jury believe that the horse of the plaintiff was first Struck by defendants cars on a public crossing on a street or highway in the village of Fishkiwa and that the injury to the plaintiffs horse was occasioned by such striking on such crossing that then the plaintiff cannot recover unless he has proved that such striking and injury was occasioned by the negligent running of defendants cars

3rd That if the Plaintiff suffered his horse to run at large and that she got on a public crossing, she was there at the risk of the owner and he could not recover of the defendants for Injury to his mare on such crossing unless he has proved the defendants guilty of

21 negligence in the running of their cars

4th That the form of the action in this case is trespass on personal property and unless an actual trespass has been proved the plaintiff cannot recover, and merely showing negligence on the part of the defendants in not keeping their fences and cattle guards in repair or in not running their trains with due care would not prove that the defendants were guilty of a trespass upon the plaintiffs property

5th That if the negligence of the Plaintiff if any contributed as much towards the injury to the Plaintiffs horse as the negligence of the defendants if any, than the plaintiff cannot recover

1st That if the Plaintiff suffered his horse to run at large in the neighborhood of and upon the track of the defendants Railroad Company that the cattle guards were out of repair that then the Plaintiff is not entitled to recover in this action.

The Court gave the 2nd 3d & 5th of the instructions asked for by defendants and refused to give the 1st 4th & 6th of said instructions to the refusal of the Court to give said 1st 4th & 6th instructions and each of them severally the defendants by its

Counsel then and there excepted

The Jury found a verdict for $100. for the Plaintiff the defendants moved the Court for a new trial. which motion was overruled by the Court To which decision of the Court in overruling said motion the defendant by its counsel then and there excepted and prays that this its bill of Exceptions be signed sealed and made a part of the Record which is done

S. C. Hollister
Judge of the ninth Judicial Circuit

Seal

Copy of appeal Bond)

Know all men by these presents that we the Chicago and Rock Island Rail road company as principal and Burton C. Cook as surety are held and firmly bound unto Matthew Mc. Reed in the penal Sum of two hundred dollars lawful money for the payment of which well and truly to be made we bind ourselves and the said Cook binds his heirs Executors and administrators Jointly severally & firmly by these presents In witness whereof the said Rail Road company has hereto affixed its seal and caused its name to be subscribed by John F. Tracy General Superintendent of said Rail road and said Cook has affixed his name and seal

hereto this 30th day of December A.D 1859
The condition of this obligation is such that
whereas the said Matthew M. Reed did at the
December Term A.D. 1859 of the Circuit Court
holden in and for the County of Bureau in the
State of Illinois by the consideration and
Judgment of said Court recover a judgment
against the Chicago & Rock Island Rail Road
Company for the sum of one hundred dollars
besides costs from which said judgment the said
Rail Road company has prayed for and obtained
an appeal to the Supreme Court of said State
Now if the said Railroad company shall prose-
cute its appeal with effect and without delay
and shall pay said judgment and all costs in-
terests and damages that shall be adjudged
against it in case the judgment aforesaid shall
be affirmed then this obligation to be void other-
wise in force

The Chicago & Rock Island Rail
Road Company by
John F. Tracy Gen. Supt.
Seal Burton C. Cook Seal

24 State of Illinois } ss.
Bureau County }

I Edward M. Fisher Clerk of the Circuit Court within and for the County of Bureau and State of Illinois do hereby certify that the foregoing transcript is a true and perfect transcript of all the proceedings in the above Entitled cause, as the same appears on file and of Record in my Office

In testimony whereof I have hereunto set my hand and affix the seal of said Court this 3rd day of March A. D 1860 E. M. Fisher Clerk

per Wm Hall Jenkins Dep'y Clk

Clerks Fees $7.00 for Transcript & Cert & Seal -

And now comes the appellant and says that in the record & proceedings aforesaid and in the rendition of the Judgt aforesaid there is manifest error in this to wit

1 The Court erred in receiving evidence offered by Pltff

2 The Court erred in overruling defendants motion to exclude evidence

3 The Court erred in deciding that plaintiff might prove cause of action in case in

this suit

4 The court erred in excluding the testimony of John Bayer which also objected to by defts

5 The court erred in giving such of the instructions asked for by the plaintiff severally

6 The court erred in refusing to give the 1st 2d & 6th instructions asked for by defts & each of them severally

7th The Court erred in overruling the motion for a new trial

8th The court erred in rendering the Judgt aforesaid in favor of the aforesaid

Gloss Cook & Campbell

178

Matthew M Reed
vs
Chicago & R I R R Co

Filed April 17, 1860
L. Leland
Clk

STATE OF ILLINOIS---SUPREME COURT,

Third Grand Division thereof---April Term, 1860.

THE CHICAGO & R. I. R. R. Co.
vs.
MATTHEW M. REID.
} *Appeal from Bureau.*

Although it is stated in the abstract that the defendants excepted to the giving of each of plaintiff's instructions; this is untrue in point of fact. There was no exception to them or either of them. This is, of course, a sufficient answer to the fifth of the assigned errors.

The 1st, 4th and 6th instructions asked for by defendant were properly refused.

The first instruction is wrong, because it requires the plaintiff to prove a greater amount of negligence than that required by the Statute. By the 1st section of the Act of Feb. 14th, 1855, (Scates Stat. p. 953), Railroad companies are expressly made liable for the destruction of animals which get upon their track, not upon the street or road crossings and not within towns, cities or villages by reason of fences and cattle-guards being out of repair. It is only in cases where the fences and guards are in good repair that the legislature has enacted that the company shall not be liable, unless the act is negligent or wilful.

Whether the injury was received by the mare on or off the road-crossing, in or out of the corporate limits of Tiskilwa, was a question of fact for the jury about which there was a conflict of evidence.

The 4th instruction and the exception in relation to the evidence of plaintiff below, present the same question.

The defect of the reasoning in support of these exceptions is in the assumption that the action was one of trespass to personal property. Supposing, for the sake of the argument, that upon the evidence in this record the remedy of plaintiff below was *case* not *trespass*, does the fact that the justice of the peace has mis-named the thing, make it the thing he has miscalled it? If the Dutch painter had written "this is a *horse*" under a plain and palpable *cow*, it would still have remained a representation of the latter animal in spite of the misnomer.

The Justice of the Peace had jurisdiction to try the question, whether the cars killed the mare under circumstances which would render the Railroad Company liable to pay for her. Act of 1857, p. 49, and the justice has done this only. We think, if he had called this upsetting of the mare a trover and conversion of her, his ignorance of the proper nomenclature would not have destroyed the plaintiff's right to recover. If upon the evidence in the case, it appears that he had jurisdiction of the subject matter it is enough.

Ballance vs. McCarty, 11 Illinois 501.

The 6th instruction was properly refused. The fact that the Railroad Company kept bad fences and insufficient cattleguards, ought not to have the effect of an ordinance of a township meeting to prevent stock from running at large. It might with the same propriety be said that a man could not depasture his own land adjoining an unfenced railroad except at his own risk, and that the company could, with impunity, avoid the damages occasioned by want of fencing, because the owner knew as he necessarily would, that there was no fence or an insufficient one.

This, we believe, disposes of all the errors.

LELAND & LELAND AND STIPP.

For Appellee.

178

Ch. & R. I. R. R. Co.

vs.

Matthew M. Reid

Brief of appellee -

Filed May 11, 1860

L. Leland

Clerk

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178

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Brief of Appellee

12913

Filed May 11, 1860

L. Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

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188. *vs.*
MATTHEW M. REED.
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ARGUMENT FOR APPELLANT.

THE first instruction asked for the defendant should have been given.

First, because the suit was brought against the defendants expressly for damages done by defendant in the running of the cars and not for negligence in not having sufficient fences and cattle guards; see the entry on the Justice's docket, in which the suit is called trespass on personal property; see also the transcript which says, "Parties appear by counsel; plaintiff claims damages of defendants for an injury done to plaintiff's mare by the said defendants in the running of the cars on the said Railroad." On the trial in the Circuit Court, before the evidence was heard, plaintiff's counsel stated to the jury that the suit was brought to recover damages for an injury done to plaintiff's mare by the Railroad cars of defendants.

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We submit that there is no proof entitling the plaintiff to recover against the defendant, either for negligence in running the cars, or on account of an insufficient fence or cattle guards.

First, is there proof authorizing the plaintiff to recover independent of the Statute? What must be proved to authorize such recovery? "Railroad companies are not liable for injuries to cattle, unless they be wilfully or maliciously done, or under circumstances exhibiting gross negligence."

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A Railroad Company has a right to run its cars upon its track without obstruction, and an animal has no right upon the track without consent of the Company, and if suffered to stray there, it is at the risk of the owner of the animal.

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Animals wandering upon a track of an uninclosed Railroad are strictly trespassers, and the Company is not liable for their destruction unless its servants are guilty of wilful negligence evincing reckless misconduct. The burden of proof is upon the plaintiff to show negligence. The mere fact that an animal was killed, will not render a Company liable.

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Tested by these principles, it requires no argument to show that the plaintiff ought not to recover upon this proof, for any damages for negligence in running the trains.

Does the proof show that he is entitled to recover under the Statute, even if the action had been brought upon the Statute?

If the suit had been brought upon the Statute, to enable the party to recover, he must prove the same facts which are necessary to be averred in the declaration, if the suit were originally brought in the Circuit Court.

And those averments are,

First, That the Road has been opened and used six months.

Second, It must be shown that the place where the fence or cattle guard was insufficient was not within the limits of a town, city or village.

Third, That the fence or cattle guard was not in good repair.

Fourth, It should also appear that the animal was not killed at a crossing of a public road, or in the limits of a town, city or village.

There is no pretence that it *was proven* in this case that this road had been opened six months at that time, prior to the injury of the animal.

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Ill. Central vs. *Finnigan*, 21 Ill. 646.
Case decided at Mt. Vernon, not reported.
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The plaintiff failed to prove that the mare was not in the town of Tiskilwa, and upon a public crossing when she was killed. A digest of the testimony on that subject is as follows:

George Wilkinson, plaintiff's witness, says the cattle guard is on or near the line of the town of Tiskilwa. The crossing is on a street or half street in the town; think the east cattle guard was east of the line of Tiskilwa, but don't know certainly. The cattle guard at the place where the mare was hurt was the east one; can't say whether it is in the town or not.

Cross examined: The crossing is in the incorporated limits of the town of Tiskilwa; the street is 40 feet wide. I suppose it is in the corporation. I think the line of the corporation is in the centre of the street, or at the east side of it. I suppose the cattle guard is outside of the fields, east of the road which crosses the Railroad, is on the line of the street and town. Think the street is all in the town; could not say whether the cattle guard was part east and part west of the fence; never took notice.

Ralph Jones, plaintiff's witness; cars struck the mare on the east cattle guard.

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mare was struck there; there was hair there; saw no sign of the mare's being struck at any other place. I went east of the crossing on the track about 60 feet to make examination.

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DEFENDANT'S WITNESSES.

O. W. Beattie: I know the crossing spoken of; it is a public street in the village of Tiskilwa. I think the cattle guards are in the street, the whole of them. I once owned the land on the east side, and found the line. I saw the mare that morning about six o'clock, west of the west cattle guard, and north of track, about 25 or 30 feet west of crossing. I think she was struck *on the crossing*. I saw the ground there torn up.

John Cushman: Saw the mare in the morning; saw the place in the road where we all thought she was struck; saw marks of hair on the west cattle guard, but none on the east cattle guard.

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The burden of proof was upon the plaintiff, to prove that the mare was not upon the crossing. This he utterly failed to do, and the defendant did prove that the mare was struck on the crossing.

The 5th instruction given for the plaintiff is clearly not the law. It is in direct conflict with the cases above cited, and the giving of this instruction was the only reason why a verdict was found for the plaintiff. It is said that no exception was taken to this instruction, nor to the third. As the Record appears here, this is so. But the Record does show that the verdict which was given in pursuance of that instruction was moved to be set aside and a new trial granted, and to the refusal of the Court to grant a new trial, an exception was properly taken.

It seems to me that when a verdict is manifestly the result of improper instructions, and is really not sustained by the evi-

dence, if the same was applied according to correct legal principles, that a refusal to grant a new trial and an exception thereto, will present to this Court the whole question appearing upon the Record. The Court erred in refusing to set aside a verdict which was manifestly given because the jury were wrongly advised as to the law, and which verdict was wholly unsupported by the testimony. The reason why the Court should have granted a new trial was because he had wrongly instructed the jury, and the verdict in pursuance of such instruction ought not to be allowed to stand; besides, the evidence upon which the instruction is based was objected to at the time it was introduced, and an exception was properly taken at the time. *John Bagges*, one of the plaintiff's witnesses, testified: I saw the train of cars that morning; they blew the whistle at the whistling post; it is half a mile from the crossing. The plaintiff then asked him this question, State whether they rung any bell or sounded any whistle on the train after leaving the whistling post, until they reached and crossed the crossing. To this question, there was an objection, and overruled and an exception. Rec. p. 16.

If the horse was on the crossing at the time, the simple neglect to ring the bell is not such gross negligence as would entitle the plaintiff to recover, and they have failed to make out their case upon that ground. If the horse was on the inside of the Railroad enclosure, owing to a defect in the cattle guard, this evidence must be irrelevant; no obligation to ring the bell except at the crossings.

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The fact that the cattle guard was out of repair might have been known to plaintiff before it became known to defendant. Could he, without giving notice to the defendant of the fact, allow his horse to run upon the track, endangering the lives of those traveling upon the road, and risking the destruction of large amounts of property, and still recover the full value of his horse if injured?

We insist, therefore,

1st. That this suit is not brought upon the Statute at all.

2d. If it was, they have not by proof brought themselves within the Statute in any one particular. A declaration containing all the averments about which there is any proof, in this case, would be bad because the Court could not know from it that this road was obliged to fence their road at *that time* and *place.*

3d. There is no proof tending to show such gross carelessness in the running of the cars as would entitle the plaintiff to recover.

These points are independent of the instructions.

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Although the Court will not reverse a judgment because the Justice has made a technical error in naming the suit, still a party will not be permitted to commence an action on the case to recover damages for negligence, try that action before the Justice, get judgment for damages in that action, and on the trial in the Circuit Court failing to support the first cause of action, change it entirely and recover a penalty given by the Statute. The testimony in relation to the cattle guards ought to have been excluded from the jury on motion of the defendant. This suit not having been brought upon the Statute, this case is precisely within the reason of the case of the *Terre Haute, A. & St. Louis R. R. Co.* vs. *Augustus*, 21 Ill. 186.

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If the suit had been brought upon the Statute, to enable the party to recover, he must prove the same facts which are necessary to be averred in the declaration, if the suit were originally brought in the Circuit Court.

And those averments are,

First, That the Road has been opened and used six months.

Second, It must be shown that the place where the fence or cattle guard was insufficient was not within the limits of a town, city or village.

Third, That the fence or cattle guard was not in good repair.

Fourth, It should also appear that the animal was not killed at a crossing of a public road, or in the limits of a town, city or village.

There is no pretence that it *was proven* in this case that this road had been opened six months at that time, prior to the injury of the animal.

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The plaintiff failed to prove that the mare was not in the town of Tiskilwa, and upon a public crossing when she was killed. A digest of the testimony on that subject is as follows:

George Wilkinson, plaintiff's witness, says the cattle guard is on or near the line of the town of Tiskilwa. The crossing is on a street or half street in the town; think the east cattle guard was east of the line of Tiskilwa, but don't know certainly. The cattle guard at the place where the mare was hurt was the east one; can't say whether it is in the town or not.

Cross examined: The crossing is in the incorporated limits of the town of Tiskilwa; the street is 40 feet wide. I suppose it is in the corporation. I think the line of the corporation is in the centre of the street, or at the east side of it. I suppose the cattle guard is outside of the fields, east of the road which crosses the Railroad, is on the line of the street and town. Think the street is all in the town; could not say whether the cattle guard was part east and part west of the fence; never took notice.

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DEFENDANT'S WITNESSES.

O. W. Beattie: I know the crossing spoken of; it is a public street in the village of Tiskilwa. I think the cattle guards are in the street, the whole of them. I once owned the land on the east side, and found the line. I saw the mare that morning about six o'clock, west of the west cattle guard, and north of track, about 25 or 30 feet west of crossing. I think she was struck *on the crossing*. I saw the ground there torn up.

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John McCarty: Our conclusion was that the mare was struck *on the crossing*, near the east cattle guard. The fence angled towards the crossing. I think the mare was struck on the east end of the plank which is placed to carry wagon wheels over the Railroad track. We all came to the conclusion that the mare was struck there.

The burden of proof was upon the plaintiff, to prove that the mare was not upon the crossing. This he utterly failed to do, and the defendant did prove that the mare was struck on the crossing.

The 5th instruction given for the plaintiff is clearly not the law. It is in direct conflict with the cases above cited, and the giving of this instruction was the only reason why a verdict was found for the plaintiff. It is said that no exception was taken to this instruction, nor to the third. As the Record appears here, this is so. But the Record does show that the verdict which was given in pursuance of that instruction was moved to be set aside and a new trial granted, and to the refusal of the Court to grant a new trial, an exception was properly taken.

It seems to me that when a verdict is manifestly the result of improper instructions, and is really not sustained by the evi-

dence, if the same was applied according to correct legal principles, that a refusal to grant a new trial and an exception thereto, will present to this Court the whole question appearing upon the Record. The Court erred in refusing to set aside a verdict which was manifestly given because the jury were wrongly advised as to the law, and which verdict was wholly unsupported by the testimony. The reason why the Court should have granted a new trial was because he had wrongly instructed the jury, and the verdict in pursuance of such instruction ought not to be allowed to stand; besides, the evidence upon which the instruction is based was objected to at the time it was introduced, and an exception was properly taken at the time. *John Bagges*, one of the plaintiff's witnesses, testified: I saw the train of cars that morning; they blew the whistle at the whistling post; it is half a mile from the crossing. The plaintiff then asked him this question, State whether they rung any bell or sounded any whistle on the train after leaving the whistling post, until they reached and crossed the crossing. To this question, there was an objection, and overruled and an exception. Rec. p. 16.

If the horse was on the crossing at the time, the simple neglect to ring the bell is not such gross negligence as would entitle the plaintiff to recover, and they have failed to make out their case upon that ground. If the horse was on the inside of the Railroad enclosure, owing to a defect in the cattle guard, this evidence must be irrelevant; no obligation to ring the bell except at the crossings.

The 6th instruction asked by defendant should have been given. If the plaintiff knew that the cattle guard was out of repair, and that his horse could cross on to the Railroad track, he was guilty of negligence in allowing it to run at large near that place.

The fact that the cattle guard was out of repair might have been known to plaintiff before it became known to defendant. Could he, without giving notice to the defendant of the fact, allow his horse to run upon the track, endangering the lives of those traveling upon the road, and risking the destruction of large amounts of property, and still recover the full value of his horse if injured?

We insist, therefore,

1st. That this suit is not brought upon the Statute at all.

2d. If it was, they have not by proof brought themselves within the Statute in any one particular. A declaration containing all the averments about which there is any proof, in this case, would be bad because the Court could not know from it that this road was obliged to fence their road at *that time* and *place.*

3d. There is no proof tending to show such gross carelessness in the running of the cars as would entitle the plaintiff to recover.

These points are independent of the instructions.

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STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

THE CHICAGO & R. I. R. R. CO.
188. *vs.* } *Appeal from Bureau.*
MATTHEW M. REED.

ARGUMENT FOR APPELLANT.

THE first instruction asked for the defendant should have been given.

First, because the suit was brought against the defendants expressly for damages done by defendant in the running of the cars and not for negligence in not having sufficient fences and cattle guards; see the entry on the Justice's docket, in which the suit is called trespass on personal property; see also the transcript which says, "Parties appear by counsel; plaintiff claims damages of defendants for an injury done to plaintiff's mare by the said defendants in the running of the cars on the said Railroad." On the trial in the Circuit Court, before the evidence was heard, plaintiff's counsel stated to the jury that the suit was brought to recover damages for an injury done to plaintiff's mare by the Railroad cars of defendants.

If this suit was not a suit to recover damages for injury done by the running of the cars solely, it is impossible that such a suit can be instituted. In each Court, the plaintiff has so stated his claim. This Court has repeatedly decided that a party shall be bound by the cause of action which is stated and relied upon by him before the Justice.

Morton vs. *McClure*, 22 Ill. 257.

If the plaintiff had been seeking to recover the statutory penalty on account of the neglect of defendants below to fence their road, build cattle guards, &c., an action of debt and not trespass would have been the proper remedy.

1st Chitty's Pleadings, 112.
Vaughn vs. *Thompson*, 15 Ill. 39.
Strange vs. *Powell*, 15 Ala. 452
2 Foster, 234.
Adams vs. *Woods*, 3 Cranch, 341.
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