

No. 13409

Supreme Court of Illinois

Ohio & Miss.R.R.Co.

vs.

Shanafelt

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In the Supreme Court of the State of Illinois.

FIRST GRAND DIVISION, AT MOUNT VERNON.

NOVEMBER TERM, A. D., 1860.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY,

VS

SAMUEL SHANAFELT.

This was a suit in case, for killing stock, brought by the Appellee against the Appellant, and tried at the May Term, A. D. 1860, of Jefferson Circuit Court. Verdict for plaintiff, \$188,00.

1—4] Copy of Record on change of venue from Marion to Jefferson county, including transcript of the proceedings in the Marion Circuit Court.—
Certificate of Clerk of Marion county.

5] Copy of summons.

DECLARATION.

6] The Ohio and Mississippi Railroad Company, defendants herein, were summoned to answer Samuel Shanafelt, the plaintiff, in a plea of trespass on the case, whereupon the said plaintiff, by Bryan & Schaeffer, his attorneys, complains: For that whereas the said defendants heretofore, to-wit, on the first day of October, A. D., 1858, at the county of Marion and State of Illinois, and from thence hitherto, were the owners and proprietors of the Ohio and Mississippi Railroad, which said Railroad, or a part thereof, to-wit, over and across said county of Marion, had been and was opened for use, and had been and was operated and used by said defendants for a long space of time previous to the day and year last aforesaid, to-wit, from the 14th day of February, 1855, and thence hitherto, whereby and by reason whereof the said defendants became

7] liable for all injuries done to horses, cattle, sheep and hogs, in the event and upon the condition that they failed, neglected or refused, from and after the 14th day of August, 1855, to erect and maintain fences on the sides of said Railroad, or the part thereof so open for use as aforesaid, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on the said Railroad within five miles of each and every settlement along said line of Railroad, with openings and gates or bars at the farm crossings of said Railroad, for the use of the proprietors of the lands adjoining said Railroad, and to construct where the same had not already been done, and thereafter maintain at all road crossings then existing or thereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on the said Railroad, except where the proprietors of adjacent lands had already erected said fences, or agreed so to do, or at the crossing of public roads and highways, or within the limits of cities, towns and villages, or where it was not necessary to fence said Railroad to prevent cattle, horses, sheep and hogs from entering upon the same. Yet the said defendants, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the said

plaintiff in this behalf, to-wit, on the first day of October, 1858, and from thence hitherto, wrongfully and unjustly neglected and refused to erect and maintain said fences, etc., as aforesaid, whereby two yearling colts and one sucking colt, the property of said plaintiff, of great value, to-wit, of the value of \$250, lawfully feeding and depasturing in and upon the unenclosed lands and common adjacent to said Railroad, to-wit, on the 14th day of October, 1858, and one yearling calf, the property of said plaintiff, of great value, to-wit, of the value of eight dollars, lawfully feeding and depasturing in and upon the unenclosed lands and common adjacent to said Railroad, as aforesaid, to-wit, on the 21st day of February, 1859, went, erred and escaped from and out of said common, for the want of such fence, etc., as aforesaid, into and upon said Railroad track of the said defendants, that is to say, within five miles of a settlement 8] and at a point upon said Railroad where the said defendants were bound by law to erect and maintain such fence, etc., as aforesaid, that is to say, at a point where the owners of the adjacent lands had not enclosed the same and had not agreed to fence the same, and where it became and was necessary to fence said adjoining lands to prevent cattle, horses, sheep and hogs from getting on to the track of said Railroad from the adjoining lands, and without the limits of any and every city, town and village, and where there was no crossing of any public road or highway, and thereby then and there the said two yearling colts, the said sucking colt, and the said yearling calf, of the said plaintiff, were 9] run over and killed by a locomotive and train of cars, of the said defendants, passing along and over said Railroad, to-wit, in the county of Marion and State of Illinois aforesaid, whereby the said plaintiff says he is injured and has sustained damage to the amount of \$500,00; and therefore he brings his suit, etc.

PLEAS.

1st. General Issue.

10] 2. And for further plea defendant says *actio non*, because they say that the said defendants are an incorporated company chartered by an act of the Legislature of Illinois, said act approved Feb. 12th, 1851, and now still in force and here to the court shown; and in accordance with said act said defendants did proceed to construct and complete and furnish said Road across said State from St. Louis to Vincennes. And said defendants aver that on or before the first day of February, 1855, said defendants had completed and in use the whole of their Road, or much the larger share thereof; and defendant also avers that by the terms of their charter and the act incorporating them, nor by any law then or subsequently binding on defendants, by being then or afterwards accepted, added to or incorporated into their charter by their consent, they were not bound to erect and maintain such fences as would prevent the horses of plaintiff from straying and escaping into and upon the said Railroad of defendants, and there, without the negligence of defendants or their agents, being killed by the running of defendants' trains, and this the said defendants are ready to verify. Wherefore, &c.

3d. And for a further plea, by leave, &c., defendants say *actio non*, because they say that by an act of the Legislature of the State of Illinois, approved Feb. 12, 11] 1851, and now still in force, the said defendants were chartered and incorporated for the purpose and with the right and power to construct and operate a Railroad across the State of Illinois from a point on the Mississippi River opposite St. Louis to or in the direction of Vincennes, to a point on the Wabash opposite Vincennes, as will more fully and with greater certainty appear on reference to said charter, herewith shown to the court. And defendants aver that after the passage of the act aforesaid they did construct and complete and equip said Railroad, as they lawfully might by virtue of said charter; and defendants further aver that on or before said first day of February, 1855, they had expended large sums of money in the construction of said Road, and had in fact completed and in full operation a very large portion of said Road; and defendants aver that by the terms of their charter nor by any law in force before the day last aforesaid they were not bound to fence their Road nor to erect and maintain fences along the line of said Road, or any part thereof, for the prevention of the straying or escaping of cattle of plaintiffs or others upon their Road so constructed as aforesaid. Nor were they in any way liable for the value of cattle killed on their Road without fault on the part of said defendants or their agents or servants. And defendants further aver

12] that neither by act or deed expressly or impliedly have they in any manner accepted as part of their charter the provision of the act of Feb. 14, 1855, passed by the Legislature of Illinois. Nor have they since its approval, nor do they now consent to be bound by its provisions in any manner. And defendants further aver that the grievances in plaintiff's declaration mentioned, if any such were committed, occurred without the fault or negligence of defendants their servants or agents whilst lawfully using and operating the Road chartered, constructed and operated as aforesaid in their ordinary course of business, and by the fault and negligence of plaintiffs turning their horses, cattle, &c., at large upon the unenclosed lands adjacent to the track of said Road, and permitting them to escape upon the same at the place in declaration mentioned, and this they are ready to verify. Wherefore, &c.

General Demurrer to 2d and 3d pleas of defendants.

13-15] Affidavit for change of venue. Filing of demurrer.

16-17] Order of Court sustaining demurrer. Trial of the cause. Verdict of Jury, \$188.00. Motion for new trial and in arrest of judgment. Motion overruled—judgment upon the verdict.

18-19] Exception to the judgment and finding of the court, and appeal. Appeal Bond.

20] Certificate of John S. Bogan, Clerk, &c.

ERRORS ASSIGNED.

1. The court erred in sustaining the demurrer to 2d and 3d pleas of defendant.
2. The court erred in overruling the motion in arrest of judgment and for a new trial.

WILLIAM HOMES, } *Attornies for Appellant.*
I. N. HAYNIE, }

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The Ohio & Miss Roco
vs 86
Sam^t Shanafelt

Abstract

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Filed Nov. 14. 1860.
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Filed Dec 5/60
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