No. 13965

Supreme Court of Illinois

Chicago & Alton R. R. Co.

vs.

McKnight

71641

In the Supreme Court, State of Illinois.

Central Grand Division.

JANUARY TERM, A. D. 1874.

CHICAGO & ALTON RAILROAD COMPANY,
vs.
ROBERT P. McKNIGHT.

Brief for Appellant.

This is an action of trespass on the case, brought by Appellee against Appellant, to recover the value of a mare, claimed to have been killed by the train of the Appellant. A verdict and judgment were rendered in favor of Appellee, for the sum of Eight Hundred Dollars. From which an appeal has been taken, and various errors assigned. We shall proceed to discuss them in their order:

First, the court erred in the instructions given for the Appellee. The first instruction given for the Appellee, announced the proposition, "That if the jury believe from the evidence in this case, that the Defendant's line of railroad, or any part thereof, has been open for use six months prior to the commencement of this suit, that the law requires the defendant to erect, and keep in good repair, fences on the side of its road so open for use." This instruction should have been so modified as to have announced the law to be, if the Defendant's

road had been open for use six months prior to the injury complained of by the Plaintiff, at the point where the injury was alleged to have been sustained, that then it was the duty of the Defendant to have erected, and kept in good repair, fences on the sides of the road so open for use. The jury were told by this instruction, that if they believe from the evidence that the road had been open six months prior to the commencement of this suit, that then the Defendant was required to have erected, and kept in good repair, fences, when the injury for which this suit was brought might have occurred on the first day on which said road was open for use. The proposition embodied in the clause above quoted is manifestly erroneous, and the instructions should have been refused.

By the second instruction, the jury were told, "That in assessing the Plaintiff's damages, they will take into consideration all of the qualities, proven by the evidence in the case, to have been possessed by the Plaintiff's mare, such as speed, gaits, habits and gentleness, size, form, age, and training." This instruction was manifestly misleading. The jury were practically told, that in estimating Plaintiff's damages, what she would, as shown by the evidence, have brought in the market on the 9th day of March, was not to be regarded by them, but they were to estimate the damages by the qualities proven to have been possessed by the mare, such as speed, gaits, habits and gentleness, size, form, age, and training, and from them they were to assess Plaintiff's damages. Although the evidence may have disclosed that the damages the Plaintiff may have sustained by the killing of his mare, possessing all the qualities spoken of, that the damages was only such an amount, yet the jury were told that they might disregard the amount of damages as stated by the witnesses, and estimate the damages for themselves, having the data of the qualities of the mare, and upon that alone, notwithstanding their estimate may not be sustained by any evidence in the case as to the amount of damages.

The third instruction was erroneous, as, not being based upon any

evidence in the case as to where the mare was when the engineer could have seen her, or how far she ran after he did see her. No one has testified, and the instruction, for this reason, should have been refused.

The second error assigned is, the court erred in refusing to give new trial, and in rendering judgment.

In the discussion of the first error, we have given one class of reasons why a new trial should have been given. We shall now proceed to give other and further reasons: The evidence in this case discloses the fact, that for horses, such as the one of the Appellee, there was no general market—that placed upon that market, the mare of Appellee would not have brought to exceed two hundred dollars, if that; she was a pacer, and, in the language of Mr. Walker, one of the witnesses, her speed as a pacer added nothing to her value. We shall examine the evidence somewhat in detail. Mr. Walters states, that he did not know what the mare would have brought in the general market; that there was no general market for that character of horses; that a general market is where you carry a horse to St. Louis aad put him up in the market for cash; that is what I would call a general market. With this distinct avowal on his part, he places his estimate of the value of Appellee's mare at eight hundred dollars. If there is no general market for that character of stock, no fixed price in the market—which he admits—his estimate must be based upon some imaginary or conjectural theory of value. The mare was only worth what she would have brought, sold in the market, on the 9th day of March, 1873. And any value placed upon her upon any other data was manifestly wrong, and the value placed upon her by Walters was not based on what she would have sold for; for he says he did not know.

Mr. McKnight, the Appellee, stated that the mare was worth one thousand dollars. "The reason she was worth that money is this: It was on account of her speed and her breeding qualities after she would have been broken down for any practical purposes on the

track; her colts would all have been valuable to horse men. The mare had never been bred, to my knowledge."

The value placed upon the mare by Mr. McKnight is not based upon what the mare could or would have brought in the market on the 9th day of March, 1873. His estimate is based upon her speed and her future qualities of a breeder. He knew nothing of her quality as a breeder, yet he estimates this quality in fixing his estimate—a mere conjectural value, with no reason to support it. What her value for speed would be, without her breeding qualities are, or what the value of the breeding qualities are, is not stated. His estimate, based upon the data and reasons as stated by him, was not of the character to charge Appellant with his estimate.

James Conner, who states that on the 10th day of March, he, in company with Mr. Christopher and Mr. Vail, appraised the mare at six hundred dollars; now states that he thinks she was worth one thousand dollars; that he swore to his appraisement of six hundred dollars; that the appraisement would have been true if that amount had been paid, but was not true because it was not paid; that he has been engaged in the dry goods trade for the last ten years and does not know the value of horses; has not been engaged in buying or selling; did not know what the mare of McKnight's would have brought in the market. We maintain that his testimony should have been disregarded by the jury. When first called on to appraise the mare, he swore to the value of the mare, and affixed it at the sum of six hundred dollars, and now swears to one thousand dollars, and states that the value would have been true if the money had been paid, and that it was not true if not paid. We leave his testimony without further comment.

James H. Christopher, who was one of the appraisers with Mr. Conner, who stated that the price for such stock as Mr. McKnight's mare varies so much that it was hard to tell what she was worth; that he thought she was worth six hundred dollars; this was the

amount at which he appraised her. It is manifest from his testimony that such stock had really no fixed or settled price—that there was no general market for such stock.

Salem Brown stated that he had trained the mare of Mr. Mc Knight's for two summers, and in his judgment she was worth one thousand dollars; and the reason given was, on account of her speed. "She showed me she would make a very fast trotter whenever put to work, let alone pacing." His estimate is not, therefore, based on what the mare really was as a pacer, but what he supposed she would become as a trotter; not what her value then was, but what it might be. He makes no statement as to what the value of the mare was, put upon the market on the 9th day of March, 1873, nor what she could have been sold for, but bases his estimate on the supposed future quality of the mare as a trotter.

William G. Davis stated, that there was no general market for such mares as was Mr. McKnight's; that they had no fixed value; that he had not seen the mare since October, 1872; in his judgment the mare was worth from six to seven hundred dollars; she was a pacing animal. His estimate is not based upon what such animals were selling for in the market, nor the value of such animals in the market, but is based on what he terms a fancy market for fancy horses—which market is controlled by a few fancy horse men; yet he fails to state that there was, on the 9th day of March, '73, any fixed value in this special market for horses of this description, which market, as was well said by Mr. Christopher, *varies* so much it is hard to tell what such stock is worth at any time.

Mr. Walker and Mr. Eastham, examined for the Appellant, were fancy stock men; had been dealing in such stock. In their judgment, the mare of Appellee was not worth exceeding two hundred dollars. Their estimate was based upon a knowledge of all the qualities of the mare, and with a knowledge of the value of such stock in the market.

Pennington and Gov. Palmer, also examined on the part of Appellant, state that in their judgment the mare was worth six hundred dollars. They do not state what was the market value of such animals on the 9th day of March, '73.

We maintain that the evidence in this case, taken as a whole, does not sustain the verdict. That a careful examination of the evidence offered by Appellee discloses the fact that the value placed upon the mare of Appellee was based, not upon her value in the market at the time she was killed, nor upon the qualities she then possessed, but upon some fancy or conjectural theory, as to her value and future qualities.

She was a pacing mare of some speed, kind, gentle, &c. The main item given of her value, was her speed as a pacer; she was worth no more than any other animal of the same size, character and disposition, for ordinary buggy purposes; her value for speed would depend on the purposes for which she was to be used, and the success she had attained in the use to which her speed had been applied. If she was to be used for racing purposes, her speed would be valuable if it was of such a character as to win; but if it was just fast enough to lose, her speed, instead of being valuable, would have been a detriment. And the proof in this case nowhere discloses the fact that the speed of this mare was ever sufficient to win a race.—On the contrary, Mr. Walker states that her speed was of no value. The value placed upon fast horses is simply a gambling value, and the value of this mare as a pacer—fast horse—was a false value, for she was not fast enough to win.

Of what value was the speed of this mare as shown by the evidence? Did it enhance her value one cent? For ordinary use, to which such animals are put, was she worth in the market any more than an ordinary buggy animal? which all the evidence shows could have been purchased for two hundred dollars.

If, as we maintain, the value of fast horses over other horses of

less speed is the profits which may be realized by racing, and these profits depend entirely on the winning, the excess in value of such horses is a contingent and prospective one, for which the party is not entitled to recover; they may or may not be valuable. And we maintain, further, that it is not the reason nor the policy of the law to sanction or encourage parties in the assertion of a claim for such contingent or prospective value.

The verdict of the jury, in allowing to Appellee the sum of eight hundred dollars, was not authorized by the evidence. Appellee, himself, admits that his mare was not any more valuable than an ordinary horse for buggy purposes, except that her speed and breeding qualities made her so. We have endeavored to show that her speed did not add to her value, and as to the mare as a brood-mare—no one testified as to her character in that particular. Neither of these qualities should have added anything to her value. The evidence taken all together, with the opportunities for knowing and estimating the value of the mare on the 9th day of March, '73, clearly shows that the damages are excessive, and the estimate of the jury was based not upon what she would have brought in the market, but upon the conjectural and prospective value of the mare as a fast mare and good breeder, and their participation in the general feeling against railroad corporations.

The verdict of the jury should have been set aside.

In the discussion of the second error, we have necessarily discussed the third and fourth errors. The existence of the first, third, and fourth, or either of them, being admitted, establishes the second, and in the presentation of this argument we have first discussed the error in the instructions given for Appellee.

And secondly, that the verdict was contrary to the law and the evidence. And in doing so, we have attempted to show that Appellant could only be liable for the value of Appellee's mare on the 9th day of March, '73, and that this value was to be determined by what the mare would have brought in the market on that day. That no con-

jectural or prospective qualities of the mare should be taken into consideration in estimating her value; that the qualities shown to have been possessed by the mare of Appellee did not give to her a value in the market exceeding two hundred dollars; that her speed added nothing to her intrinsic value. The speed of this mare was of that character which would always cause the owner to lose, if he should be toolhardy enough to bet; and, even if she had had speed sufficient to engage and compete as a racer, her additional value could only be determined by the amount of money won, and in her case by the amount she might win. Such contingent value should not have been estimated by the jury; and that as to her qualities as a broodmare, there was no evidence, and no addition to her value should have been given on that account. Then, for what was the Appellant required to pay Appellee eight hundred dollars? For a kind, gentle buggy mare, eight years old? A mare possessing all the qualities all the witnesses concur,could have been bought for from one hundred and fifty to two hundred dollars, yet the jury, in total disregard of the law and the evidence, assess Appellee's damages at eight hundred dollars. The proof shows that there was no market for this kind of stock. If such verdicts are allowed to stand, the tracks of railroads will furnish a market, to which all owners of this class of stock could take them, and the railroad companies be required, unwillingly, to become purchasers. Courts should not countenance nor encourage such verdicts. We, therefore, most respectfully ask a reversal.

W. R. WELCH,
Attorney for Appellant.

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...ICAGO & ALTON RAILROAD CO., Appellant,

vs.

ROBERT P. McKNIGHT, Appellee.

APPEAL FROM MACOUPIN.

BRIEF FOR APPELLANT.

Enquirer Job Office, Carlinville.

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S. S. HAMMARGREN
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