No. 14812 A

Supreme Court of Illinois

C. & A. R. R. Co.

vs.

Utley

71641

~~Chicago & Alton~~
Rail Road Co.

v.

~~Utley~~

Mr. Justice Lawrence F. delivered the ~~opinion of the Court~~: This was an action in the case brought by the appellee against the appellant to recover the value of a mare killed by a train upon the rail road. The jury found for the plaintiff below, and the defendant appealed.

The mare of the appellee was being driven at night, and becoming frightened ran away, separated herself from the vehicle, and was found the next morning, not very far from the point where she took fright, dead, on the track of the rail-road. ~~with parts of the harness still upon her~~ Her injuries indicated very clearly that she had been killed by a locomotive. The place where she was found was not in a town or village or at a rail-way crossing, but at a part of the track where the company was required by the statute to fence. The real question presented by the evidence was, whether the cattle guard at the crossing, near which the

mare was killed, and the fences along the line of the road, were good and sufficient.

On the trial the court instructed the jury for the plaintiff, "that the mere fact of the mare being killed on the track is evidence of negligence on the part of the company". If, by this instruction, was merely meant that the fact of the mare being killed on the track, ~~is~~ was a circumstance which the jury had a right to take into consideration in determining the question whether the fences and cattle guards were good and sufficient, it would be unobjectionable. But the jury could not well have understood it in that qualified sense. They would doubtless consider it as meaning that, if the mare was killed on the track, that fact, of itself, would prove negligence on the part of the company. Understood in that ~~way~~ manner the instruction would be clearly wrong, for the fences and cattle guards might be good and sufficient ~~and yet~~ in the sense in which these terms are used in the statute, and yet an animal, maddened with fright, might break through or rush over them.

and be killed in the night by a passing train, without any fault being justly attributable to the latter. Instructions should be framed with reference to the circumstances of the case on trial and not be expressed in abstract and general terms, which when such terms may mislead instead of enlightening a jury.

The court also instructed for the plaintiff "that it is incumbent on the defendant to prove an entire absence of negligence on its part". This was also, in the circumstances of this case, an error. The liability of railways, under the statute upon which this suit is brought, has been often expounded by this court. In the case before us ~~it devolved upon the plaintiff to prove that~~ if the fence or cattle guard was insufficient at the point where the mare came upon the railroad, that fact alone would render the company liable. But if the fence and guards here ~~was~~ good and sufficient for turning stock under all ordinary circumstances, and the mare, in her flight, broke the fence, or leaped the guards in a mode that only an infuriated animal would have attempted, and in that way came upon the track, then it

would not devolve upon the company ~~would not devolve upon the company~~ to prove an entire absence of negligence, but on the contrary they would only in passing the train be liable upon the plaintiff's proving against them ~~clear and downright~~ carelessness or wilful injury. The mare, in ~~this~~ such event, would be where she had no right to be, and the company, having performed its duty in fencing, would not be liable for an accidental collision, and the burden of proof would be on the party alleging the negligence. Galena & Chicago Union R. R. Co. v. Loomis, 25 Ills. 529.

The 5th and 6th instructions asked by the defendants are substantially embodied in the 7th instruction which was given, and therefore their refusal was not error.

The 4th instruction was properly refused. A good and sufficient fence must be one not merely which will turn ordinary stock, for a slight barrier might do that, but one that will turn ~~any stock~~ stock even though to some extent unruly. ~~under all ordinary circumstances~~

The mare was killed in the night. There is no evidence whatever

showing the manner or circumstances. There is therefore no question to be made as to the negligence of the company when the injury actually occurred. The only real question in the case on the evidence now in the record, is ~~as~~ whether the fence and cattle-guards ~~were sufficient and~~ had been, in the language of the statute, duly made, and ~~were~~ in good repair. If the jury, on another trial, ~~and as~~ the evidence being what it was here, shall find this question in the negative, they should ~~find~~ the company liable for the value of the mare, but if they answer this question affirmatively, their verdict should be for the defendant. The judgment is reversed ~~and remanded~~ and the cause remanded.

Judgment reversed.

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Opinion

Lamar J.

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O.K.

Record Book

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