No. 14815 A

Supreme Court of Illinois

C. & A. R. R. Co.

vs.

G. W. Howard

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14815 A

Mr. Chief Justice Walker delivered the opinion of the Court:

~~Walker, Ch. J.~~ This was ~~an action~~ qui tam action for the recovery of various penalties of the rail road company for a failure to ring a bell or sound a whistle at road crossings in the county of McLean as required by the statute. The declaration contained twenty counts. Each count contains an averment, that the defendants were the owners of the railroad, situated in part in the county of McLean, over which road they propelled engines and cars, and that their said road crossed a public highway in the county, and that on the day and year aforesaid, the said defendants propelled an engine across said highway, without blowing a steam whistle or ringing a bell of thirty pounds weight, at the distance of eighty rods from the place where the said railroad crosses the public highway, and while crossing the said highway contrary to the statute in such case made and provided &c. To this declaration a demurrer was filed, which the court sustained, and defendants abiding by their demurrer, the court rendered a judgment on the demurrer in favor of plaintiffs; to reverse which this appeal was taken.

The [illegible]

It is insisted that these various counts of the declaration are fatally defective, for want of certainty. It will be observed that the road is not described, where the offence is charged to have been committed. Upon either count in the declaration appellee could have proved an omission to sound a whistle or ring a bell at any road crossing in the County of McLean. It is a familiar rule of pleading that each pleading must be sufficiently certain, to apprise the opposite party of what he is required to meet on the trial, and the court of the issues. In this we think this declaration was fatally defective. It should have named, to certainty, by the termini of the various roads, have apprised appellants of the place where the offence was charged to have been committed.

Another reason for requiring [illegible] this degree of certainty, is that a record should be capable of pleading in bar of the penalties claimed in the declaration ~~that~~ appellants, ~~should~~ would have the right to plead a former recovery. If such a suit were brought, we are at a loss to perceive how this judgment could be interposed as a bar, inasmuch as

the expiring at which any of those offi-
ers are ~~all~~ charged to have been commit-
ted are not specified, by a discription
of the road or otherwise.

It is likewise urged, that this
suit ~~suit~~ was improperly brought. That it
should have been under the ~~42~~ section
of the act, (Scott's Comp. 948) ~~and~~ in the
name of the people alone, and instit-
uted by the state's attorney. ~~That section~~
~~declares~~ Section 38, imposes the duty,
and declares the penalty. It provides, that
if the road fails to sound the whistle or ring
a bell, ~~as~~ as therein required, it shall pay
a penalty of fifty dollars, one half
the informer, and ~~and~~ the other half to
the state. It is declared by the 42 section
that all penalties imposed by the act, may
be sued for by the ~~district~~ state's attorney, and
in the name of the people of the state.
It is insisted, that the word may in this
act must be construed to mean shall.
That such is its meaning in all cases, where
the public alone have an interest, in the
duty is imposed upon a public officer, does
seems to be no question. Also where the
public or a private individual has a right
de jure, that the person should be exercise
This is the rule announced, in the case of

Schuyler County vs. Mercer County, 4 Gil. 20., and it has been cited since been referred to by this court.

We, however, do not perceive that the rule applies to this case. The public do not alone have a right to this penalty, unless they shall first sue for its recovery. If an informer sues, he acquires an equal right with the public. If the People sue they acquire a right to the whole recovery. But the rights of each are fixed by being the first to institute proceedings for the recovery. By the [illegible] section of the act is the only provision for bringing suit. It would have to be brought by the state's attorney and in the name of the people. But under the 39th section a common informer may sue, in the common law way, in his own name as well as on behalf of the people. In the case of Schuyler Co. vs. Mercer Co. the law was passed by the circuit court of the county sued, and hence it was held the word may could only be construed as being imperative. But in this case two modes of bringing suit is provided. The judgment must be reversed and the cause remanded.

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Opinion by

Walker

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