THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) .. } APPELLANTS;

AND

WILLIAM H. EGGLESTON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1905
*Oct. 27.
*Nov. 27.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Operation of railway—Straying animals—Negligence—Duty as regards trespassers—Herding stock—Evidence—Inferences.

A railway company is not charged with any duty in respect of avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered. Idington J. dissented though concurring in the judgment on other grounds.

APPEAL from the judgment of the Supreme Court of the North-West Territories affirming the decision of Mr. Justice Scott, at the trial, which maintained the plaintiffs' action with costs.

The action was for damages for injury to a number of horses, the property of the plaintiffs, killed or injured by a train operated by the defendants on the line of the Calgary and Edmonton Railway. The band of horses were being driven north from Montana and had arrived, in charge of the drovers, on the evening of the day of the accident, at a point near Wetaskiwin, in Alberta. The drovers camped for the night and left the horses loose upon the prairie about a mile from the railway. At this point the ditches on both sides of the track were full

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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of water, the line of railway was not fenced and the defendants were under no obligation to build fences enclosing this portion of the line of their railway. During the night the horses strayed on to the tracks of the railway and a train of cars ran into the bunch, killing or injuring over forty head of horses. The train struck the bunch of horses about three miles south of Wetaskiwin, whilst running through a ground-fog which obscured the view of the engine-driver and ran through the herd for a distance of 500 or 600 yards until the engine was derailed at a culvert bridge over which the horses were unable to pass.

The trial judge found that the straying animals had got on to the track at a point north of the derailment and had wandered along the track between the ditches until they were crowded together on the track between the flooded ditches and headed off by the culvert. He also found that the moonlight, on the occasion in question, gave sufficient light to enable the engineman to see the horses a quarter of a mile ahead, and that the train could have been stopped within a distance of one hundred yards; that the engine-driver had not kept a continuous look-out ahead; that there was a heavy fog on the prairie, and that simultaneously with the engine entering the fog-bank it struck the horses.

The learned judge held that the engine-driver could, by reasonable and ordinary care, have seen the horses and stopped the train in time to avoid injury, and that he was guilty of negligence "either in not keeping a proper look-out ahead of his engine, or in not stopping the train in time to prevent the injury." He also held that at the time of the accident the horses were trespassers upon the railway property, but that the injuries were due to the negligence of the

railway company's engine-driver and a verdict was entered for the plaintiffs. This decision was affirmed upon appeal, Wetmore and Prendergast JJ. dissenting.

G. Tate Blackstock K.C. for the appellants.

C. deW. Macdonald, for the respondents.

THE CHIEF JUSTICE.—We are all of opinion that this appeal should be allowed with costs and the action dismissed with costs. Mr. Justice Maclennan has written the opinion of the majority of the court.

GIROUARD and DAVIES JJ. concurred in the reasons stated by Mr. Justice Maclennan.

IDINGTON J.—I concur in the result of the opinion of my brother Maclennan. I desire, however, with great respect, to say that I am unable to assent to the proposition that seems implied therein, that until *aware* of the presence of animals on the railway track the company could not have any duty in respect to them.

The probabilities of meeting trespassers on the track might be so well known to a railway company and its servants as to render it their duty to keep some look-out or take some degree of care. To limit the duty to trespassers, to cases of actual knowledge of their being in the act of trespassing, narrows the definition too much I conceive.

Bird v. *Holbrook*(1) illustrates the principle that I think should prevail in many conceivable cases of trespassers.

(1) 4 Bing. 628.

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MACLENNAN J.—I am of opinion that this appeal should be allowed and the action dismissed.

I think the case is very fully and fairly discussed by Mr. Justice Wetmore in his dissenting judgment in the court below and, agreeing as I do in that judgment, I do not think it necessary to add many observations to what he has well said.

I think the law is well settled that, the plaintiffs' animals having been wrongfully on the track, no duty rested upon the defendants or their engineer until they or he became aware of their presence. In other words, the company is not obliged, as between them and such wrongdoers, to be on the look-out for such animals. They may assume that owners of animals will observe the law and will not trespass upon the company's line.

The learned trial judge's finding on the evidence is that the engineer, by exercising only reasonable and ordinary care, might have seen the horses on the track in time to stop the train to avoid injuring them, and that he was guilty of negligence, either in not keeping a proper look-out ahead of his engine, or in not stopping the train in time to prevent injury. On this dilemma he founds his judgment against the defendants. He does not say on which ground of negligence he rests it. If on the first it would be clearly wrong, and he has not found as a fact that, after seeing the animals, he was guilty of delay in stopping the train.

In that state of the findings of the learned trial judge it was competent to the appellate court to form its own opinion on the facts.

Unfortunately the majority of the Supreme Court of the Territories rests its judgment mainly on the same erroneous view of the law taken by the trial judge, and without finding whether or not, as a fact

upon the evidence, there was negligence after discovery by the engineer that the animals were on the track.

The learned judge goes on to say that, however the law might be in England or the Eastern provinces on the duty of railway companies expecting and looking out for animals on their tracks, such a rule might not be applicable to the conditions of the territories where horses have the right to, and do, roam at large. No attempt was made to uphold that view of the law before us.

Under these circumstances, none of the witnesses having been discredited by the trial judge, it was competent to the Supreme Court of the Territories, as it is competent to us, to take an independent view of the evidence and the inferences to be drawn therefrom. That being so, after a perusal of the evidence, I think the preferable view is that of Mr. Justice Wetmore, that it is not sufficiently proved that after he had become aware of the presence of the animals the engineer was guilty of any negligence in stopping the train in order to prevent doing them injury.

Nor am I pressed, by the number of the animals killed, even to suspect undue delay on the part of the engineer. The whole herd contained 227 animals, besides sucking colts. Having got on the track between two ditches full of water, they naturally formed a large group, or "bunch," as it was called by the witnesses, in front of the engine, there being an impassable culvert in front of them. Under these circumstances, it does not seem to me surprising that one out of every five of the whole herd was injured.

I think the appeal should be allowed with costs.

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Appeal allowed with costs.

Solicitors for the appellants; *Lougheed & Bennett.*

Solicitors for the respondents; *Macdonald & Griesbach.*