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RAILROAD-CROSSING ACCIDENT—INJURY TO STOCK—FAILURE TO GIVE SIGNAL—INSTRUCTIONS.—*Graybill* v. *Chicago, M. & St. P. Ry. Co.*, 84 N. W. 946 (Iowa, January 19, 1901, Supreme Court). In this case the court interprets the statute requiring signals at railroad crossings in a very reasonable and interesting way. The question of construction arose because of the plaintiff's action brought under said statute, to recover the value of stock killed at a highway crossing. "The stock having escaped from plaintiff's enclosure were killed in the daytime (on a public grade crossing) by a train running as a special."

The plaintiff charges negligence, first, because of the engineer's failure to ring the bell and blow the whistle,—these signals being required by statute on the approach to public crossings; and also,

secondly, because the train at the time of the accident was running at a dangerously high rate of speed.

There was a trial by a jury,—the court gave the following instructions: "The statutory requirement that the whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and that after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, is for the safety of animals as well as persons; and a failure to give the signals required by this statute would be negligence on the part of the defendant,—but before such negligence would justify a recovery against the defendant, it must appear that if such signals had been given, they would have prevented the cattle from going on the track or frightened them away from the crossing." There was a verdict and judgment for the plaintiff.

The defendant on appeal urged that this instruction was erroneous, for the reason usually given by a defendant railway company under these conditions, viz., that the judge below should, in view of the facts, have emphasized the necessity for positive and direct evidence to show that a strict compliance with the above statutory requirements would have changed the action of the cattle,—would have averted the collision. The defendant contends, in other words, that the plaintiff did not introduce the evidence necessary for a verdict, —and that the attention of the jury was not called to the plaintiff's failure to show negligence.

But Sherwin, J., affirmed judgment and held generally (in regard to the instruction that the statute requiring signals was for the safety of animals as well as persons) that there is nothing in the language of the statute tending to show that the legislative intent was to restrict its operation to persons. On the contrary the statute ought to be construed in the light of the following common knowledge, inconsistent with said restriction: "that the attention of dumb animals is quickly attracted by any unusual noise, and that the approach of an unfamiliar object ordinarily holds the attention and arouses the instinct of fear and self-preservation which all animal nature possesses." The legislature, therefore, in view of this fact, must have intended to protect animals as well as men.

Having thus construed the statute the court applied it to the facts and *held,* in answer to the defendant's assignment for error above stated, that it is a proper question for the jury, considering the location of the highway and track, the distance the train could be seen, the action of the cattle, and in this particular case the fact that a lad had driven them from the track shortly before the accident, whether from these facts a reasonable inference might be drawn, that the accident would not have happened had the statute been complied with.

Aside from the main question in this case it was held also that the following were correct instructions, viz.: First, that the statute covers not only those animals *on* the track, but also those that in an ordinarily prudent man's judgment were about to go on the track.

Second, that the railroad company has a right to "run trains at

any time of the day or night, and the fact that the train in question was an extra train, and not running on schedule time, was not negligence."

The interpretation of the statute, however, involves the real point of controversy in this case and is of much importance because it furnishes a key to many of the statutes passed for a like purpose in the different states. It is desirable, then, to inquire into its full meaning and influence, and in doing this we really inquire into the intention of the legislature which gave the statute that meaning. It is fair to say that this intention was born of a desire to remedy some insufficiency in the common law. We will look therefore into the law on this subject divested of statutes, and then consider the tendency of the decision to-day,—whatever difference there is, must be due to the statute (other conditions being equal) and we may thus measure its exact influence.

For our purpose, then, we must first consider the common-law liability for failure to signal. Broadly "to determine the fact of negligence reasonable probability of injury, is the test." (See AMERICAN LAW REGISTER for February, 1901, p. 35, F. H. Bohlen. "The Test of Liability in Negligence.") "This reasonable probability is to be measured by the standard of the reasonable anticipation of the normal man as it appeared to him when he acted."

Lack of reasonable care, then, is the test at common law: it should follow from this, that there is an action, irrespective of statute, for negligence where there is a failure to give signals which ordinary care would have required, and such is the law: *Penna. Co.* v. *Krieck*, 47 Ind. 368 (1875).

It is the duty of the engineer to give sufficient signals on the approach of his train whenever the circumstances at the crossing seem to require it. The common law requires signals at crossings only when ordinary care dictates them, where, in other words, there is reasonable probability of injury. There the omission of the signal is negligence: *Gates* v. *R. R. Co.*, 39 Iowa, 45 (1878); *Jackson* v. *R. R. Co.*, 36 Iowa, 451 (1874); *Eddy* v. *Evans*, 58 Federal, 151 (1898).

Since this is the test generally applied there is only one factor that can account for the lack of general uniformity in the decisions of the different states upon the identical facts under consideration; this is the *statute*. Given the same test, given the above facts of collision in any given state, the case will be decided according to the interpretation of the statute requiring signals in that state.

Since this interpretation is the very problem under consideration, we may look to the cases for a solution. As we have indicated, modern decisions fall naturally into classes according to the various effect of legislation upon the common-law test for negligence.

In the principal class the test is extended, in its application from those crossings within the discretion of the engineer, to *all public grade* crossings. In this action to recover the value of stock killed at a highway crossing the plaintiff must prove that there was an

omission of the statutory signals and that the cattle would *probably* have left the track had the signal been given.

The case under consideration, *Graybill* v. *Chicago, M. & St. P. Ry. Co.*, heads the line of authorities in this division, which includes a large number of the courts of the various states: *Bemis* v. *Connecticut R. R. Co.*, 42 Vt. 375 (1867); *Lapine* v. *New Orleans R. R. Co.*, 20 La. 188 (1868); *Ill. R. R. Co.* v. *Peyton*, 76 Ill. 340 (1875); *Olcutt* v. *R. R. Co.*, 24 Pac. (Cal.) 301 (1890); *Kohl* v. *Chicago R. R.*, 63 N. W. 742 (Minn.) (1895).

Missouri was also included in the list (98 Mo. 578, *Kansas City R. R. Co.*, v. *Turner*), until 1881, when it was provided in an Amendment Act to the statute that the plaintiff must prove merely the failure to signal and the injury. This creates a presumption of the defendant's negligence, which he may rebut by showing that the failure to ring the bell or sound the whistle was not the cause of such injury: *Perkins* v. *St. Louis R. R.*, 11 An. Law Rep. 426 (1891). It will be seen that under this decision the burden of proving negligence, which according to the common-law rule is upon the plaintiff, is shifted to the defendant, who must disprove.

But in Pennsylvania and West Virginia it has been held in direct opposition to the cases cited, and among them to the case in hand, that there can be no negligence *qua* the cattle because of a failure to signal, for this fundamental reason: The failure to ring cannot be the cause of or reason for the accident as to cattle. Judge Paxson added, "that to apply rules to dumb animals which were intended for reasonable beings only, brings us dangerously near the realm of absurdity." This seems contrary to the actual experience of railroad engineers, who recognized the possibility of driving cattle from the track when they adopted the "cattle alarm."

The question of contributory negligence on the part of the owner entered into the short decision in that case, however, so that it does not stand strictly for this proposition. But in West Virginia it was held flatly that signals were not intended for cattle from the nature of things. The opinion of Paxson, J., was cited with approval and the following was quoted therefrom, this being the only argument given in the opinion to support his position: "If it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule to 'stop, look and listen'": *Fisher* v. *P. R. R.*, 126 Pa. State, 293 (1889); *Toudy* v. *R. R.*, 38 W. Va. 694 (1894).

Does not this statement really mean that the law by not requiring signals will withdraw its protection from those who are too helpless to know where to look or listen, just *because* they are in that condition? If it does, surely it cannot be supported. Even granting that cattle cannot locate sound so as to be warned, still the signal might cause them to turn and to see the danger, or it might call some one to their aid.

Of course the straying cattle on the tracks raises in many states the question of contributory negligence, this making the defendant liable in some cases for wanton negligence only.

On this question, the decisions in Tennessee stand in strong contrast to those in almost all the other states, for there contributory negligence does not bar the action; it merely goes in mitigation of damages. The statute makes a defendant railroad absolutely liable for a failure to give the required signals (Code of Tennessee, 1884, para. 1284–1300). It therefore entirely overrides our common-law test for negligence.

It has also been held in North Carolina that failure to signal creates an absolute liability,—is negligence *per se: Hinkle* v. *Richmond R. R.*, 109 N. C. 472 (1892).

This rough summary will show that no strict general rule can be deduced from the cases; on the contrary, it will verify the statement made at the beginning, that this case would be decided in the various jurisdictions according to the influence of the different statutes upon the common-law test for negligence. In some states, as, for example, Tennessee, that test is overridden and the liability made absolute; in others it is not applied because there is no duty of care, but more often, as in the present decision, it is enforced and extended.

V. L.