No. 11804

Supreme Court of Illinois

Ill. Cent.R.R.Co.

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vs.

Nunn

In the Supreme Court—1st Grand Division.

MT. VERNON,

JUNE TERM, 1869.

ILLINOIS CENTRAL R. R. CO.
vs.
WILLIAM NUNN.
} *Appeal from Effingham.*

ABSTRACT.

GEO. W. WALL,
Att'y for Appellant.

Tribune Pt. Du Quoin, Ill.

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This is an action on the case commenced by the appellee *vs.* appellant, at the March term, 1868, of the Effingham Circuit Court. 1

The *first count* of the declaration charges that on the 27th September, 1867, the plaintiff was owner of certain rails in a fence on his farm in said county; that defendant was owner of a railroad running through said farm and near said fence; that defendant was owner of a strip of ground, called the right of way, 100 feet wide on each side of its track; that it was the duty of defendant to keep said right of way, where it adjoined the plaintiff's premises, free from dry grass and other combustible material, so that fire would not communicate from locomotives running on said railroad to the combustible material on the right of way, and thence to plaintiff's fence; but that defendant knowingly and negligently omitted so to do, and suffered the right of way to become foul, and whilst a locomotive was being run along said road by servants of defendant, fire communicated from it to the dry grass, &c., on right of way, and thence to plaintiff's fence, and burned said rails, &c., without the fault or negligence of the plaintiff. 3 4

The *second count* is substantially the same as the first, charging another burning of fence on a different day. 5–6

[11804-2]

7 The *third count* is substantially the same as the others, charging a fire on a different day, and the destruction of the plaintiff's pasture on the farm aforesaid.

To this declaration defendant filed a *plea of not guilty*, and the case was tried by jury on the following

EVIDENCE.

8 First Witness — Benton Rinehart: Knew plaintiff's farm; fires occurred on 23d and 24th September; suppose it caught each day from engine on freight train going south; on the 23d it caught from the right of way on the west side of the track; on 24th from right of way on east side of track; on 23d, 3700 rails were consumed, and 25 acres of meadow burnt over; rails worth $4 per 100; I was sitting on my porch, 1-8 mile from track, when the freight train passed down, about half-past 1 P. M.; this was two miles south of Effingham; about fifteen minutes after train passed I saw the fire. The fire on 24th burned about 150 rails; it was prevented from doing more damage by plowing ahead of it. Previous to these fires no plowing had been done by plaintiff, nor other precaution taken
9 to prevent fire from spreading from right of way to plaintiff's property. The season had been very dry, but little rain having fallen for more than two months, and grass had dried up much earlier than usual.

10 Second Witness — John Upton: On 23d September last, a few minutes after freight train passed south a fire broke out on right of way and spread to plaintiff's fence, burned 3700 rails, and burned over 25 acres of meadow; rails worth $4 per 100; can't say how much meadow was injured; consider it an advantage to the meadow, but a disadvantage as to fall pasture; the season was very dry. Fire on 24th did but little damage, further loss was prevented by plowing; had plowing been done prior to 23d, think it would have prevented the loss that occurred on that day.

Third Witness — Isaac B. Humes: Knew the plaintiff's meadow; think meadow burned over as that was would be injured $3 per acre; some regard it no damage to have meadow burned over.

FOURTH WITNESS — J. J. Moore: I live on plaintiff's 11
farm; on the 23d September, a few minutes after the freight train passed south, which was due about half-past 1 P. M., I saw the fire on right of way; burned 3700 rails that day, and burned over 25 acres of meadow; I estimate damage to meadow, $100. On 27th September, about two hours after the freight train passed south, which was due there at half-past 1 P. M., I discovered another fire on right of way, which burned 900 rails; I was in Effingham when the train passed south. Plaintiff lives in Kentucky; I am his tenant. Wind was very high on the 23d. Fire had caught on right of way several times previous to 23d, but soon went out itself without doing any damage or spreading much. A fire had communicated to a farm about a mile north of plaintiff's, and burned some property.

FIFTH WITNESS— H. Goldenkamp: Know there was a fire on 27th September last, and burned 76 panels of plaintiff's fence.

SIXTH WITNESS: —— Dryman: Know that on 27th of Sept'r last there was a fire that burned 900 rails on plaintiff's farm, worth $5 per 100; did not see the fire until about two hours after it started.

The plaintiff here rested his case, and the jury then heard

DEFENDANT'S EVIDENCE.

FIRST WITNESS — Wm. Bell: Am Master Mechanic, 12
and have control of defendant's locomotive shops at Champaign; have charge of all engines that run between Champaign and Centralia; had 20 years' experience in this business; it is a part of my business to inspect engines before they go out, and permit none to leave unless in good order; I have a record, and know what engines go out each day; on 23d September, 1867, engine 48 went down with the freight train which passes Effingham a little after 1 P. M.; on 24th, engine 70 went south with same train; on 27th, engines 59 and 76 went south with two freight trains, which passed Effingham about 1 P. M.; all of these engines were in good order when they departed on those days, and in same condition on their re-

turn; each of them had on spark arresters to prevent the escape of sparks at the time; these appliances were as good as any in use at the time; I know what appliances were generally in use on railroads at that time, and consider the appliances then on those engines as good as any; there are none that will wholly prevent the escape
13 of sparks. I know the I. C. R. R. Co. have from time to time adopted new inventions for this purpose; some on trial proved to be better than others, and the Co. has always used the best that could be obtained; at that time we were using different kinds of spark arresters; in my judgment they are all about alike, so far as preventing the escape of sparks is concerned. In November last, a new kind was introduced which seems to be the best yet tried; it was not known anywhere in September, so far as I know; it was introduced by Mr. Hayes, Superintendent of Machinery, and Mr. Hughitt, the Gen'l Sup't of this road, and patent has been applied for. I have 70 or 80 men under me; the engines are always examined before they go out and after they come in; there is a blower used on engines; it is a necessary part of engine, and is used for purpose of starting the fire to get more steam; when there is a fresh fire it makes engine throw more sparks than ordinarily; it is never used when engine is running, except at slow rate, say one or two miles an hour.

14 SECOND WITNESS—John McWilliams: Am an engineer employed by defendant; have been for eight years; I had charge of engine 70, in September last, which drew freight train from Champaign to Centralia; that engine was in good order on 23d of last September; the spark arrester on it was in good order, and as well adapted for the purpose of preventing the escape of sparks as any appliance then used. We sometimes use a blower; it is used only when engine is stationary, or sometimes when going very slowly out of a station; don't use it longer than while going 200 feet.

THIRD WITNESS—Wm. Vaughn: Am engineer in defendant's employ; have been for 8 or 9 years. In September last, I had charge of engine 48, running freight between Champaign and Centralia; that engine was, on

24th September last, in good order, and was provided with a spark arrester, which was as good as any in use; the defendant had tried a great many different kinds, and tries all the inventions as they come out, retaining those that prove to be the best; there has not yet been found one that would entirely prevent the escape of sparks.

FOURTH WITNESS—E. B. McClure: I am Road Master, in employ of defendant; have been for ten years. My division extends fifty miles north from a point four miles south of Effingham; I have the general charge of the road bed, and use every effort I can to prevent accumulations of dry grass, &c., on right of way; it is my custom to burn off the dry grass and rubbish every fall as soon as it becomes dry enough to burn; it does not ordinarily become combustible until after a frost; the summer of 1867 was unusually dry, and grass became combustible earlier than usual; in ordinary seasons it would not have burned so early; I gave orders to my foremen to burn off the dry stuff as soon as they could do so with safety. In this particular locality, along plaintiff's, the grass, &c., was all burned off in the fall of 1866, and there was nothing there in the fall of 1867 save what had grown there during that season.

FIFTH WITNESS—M. Carren: Was section foreman in September, '67, along plaintiff's farm where fire occurred; I had orders from McClure to burn off when I could do so safely, which I did to the best of my discretion, but had not burned off this place prior to the 23d.

SIXTH WITNESS—John McNary: Was foreman in fall of 1866. The right of way through plaintiff's farm was clear of all rubbish that fall.

The defendant here rested case. Plaintiff recalled John Upton, who stated that the right of way was not burned over along plaintiff's farm in 1867, prior to Sept. 23d; think it might have been burned safely at any time within two or three weeks prior to Sept. 23d.

B. Rinehart was recalled by plaintiff, and stated that the right of way was not burned off in 1867 prior to Sept. 23d; a few days after the fire I burned off a half mile of the right of way, on both sides, some distance south of

plaintiff's farm, safely; think it might have been done safely prior to Sept. 23d; thought of doing it myself, but neglected it.

J. J. Moore was recalled by plaintiff, and said: think grass could have been burned off safely two weeks prior to Sept. 23d; fire had caught along the right of way several times, but would only burn a little patch and then go out; the fire of 23d was first one that amounted to anything. The section foreman had five or six hands in September; frequently saw them passing. I took no precaution to burn off right of way or to run furrows or other means to prevent fire from crossing to plaintiff's farm, because I did not suppose it was my business to do so.

This was all the evidence in the case. The Court then gave the following

INSTRUCTIONS FOR PLAINTIFF.

1st. The Court instructs the jury for plaintiff: That if they believe from the evidence that fire was negligently suffered to escape from defendant's engine, and thereby communicated to the fence and pasture of plaintiff, they should find for plaintiff, and assess his damages at the amount proven.

2d. If the jury believe from the evidence that defendant left the dry grass and stubble on right of way adjoining plaintiff's premises, and that by reason of said dry grass and stubble being left there negligently by defendant fire communicated to the fence and pasture of plaintiff, then the jury should find for plaintiff the amount of damage proven to have resulted from said fire, no matter whether the best appliances were used on the engine which communicated the fire or not.

3d. That no matter what mechanical appliances were on the smoke-stack, if the fire got out through the negligence of defendant's engineer, the defendant is liable, and the jury should find for plaintiff, and assess the amount of damages proven in this case.

The defendant, by counsel, excepted then and there to the giving of these instructions and each of them.

The defendant then asked the following instructions: 19

1st. That a R. R. Co. is not bound to use any more diligence in respect of the removal of dry grass and other combustible matter from the right of way than a prudent and cautious man would use in respect to the removal of such combustible matter from his own premises if exposed to a similar hazard; and in this case, if the jury find from the evidence that it was the custom of the defendant to clear off such rubbish and dry grass from the right of way every fall, when the same became combustible from frost or otherwise, and that the dry grass on the right of way at the time the fires in question was such only as had grown during the summer of 1867, and that by reason of an unusual drouth it had become combustible sooner than common, and that under ordinary circumstances it would not have been combustible at that time, then the defendant would not be chargeable with negligence because of such dry grass and combustible matter then being on the right of way.

2d. Before the plaintiff can recover in this action, it must appear that his neglect has not in any way contributed to the loss in question.

3d. If the plaintiff has, by his own neglect in not taking means to prevent fire from passing from the right 20 of way to his property, contributed to the loss in question, then he cannot recover in this action.

But the Court refused to give these instructions, and in lieu of the 2d and 3d, the Court gave to the jury the following—

If the jury believe from the evidence that the loss of plaintiff occurred by reason of his own negligence or want of ordinary care on his part, then the plaintiff cannot recover.

To all which the defendant excepted at the time.

The jury rendered verdict for plaintiff for $183.44.

The defendant moved for new trial: because the verdict was contrary to law; it was contrary to evidence; it was contrary to law and evidence; because Court gave

[11804-5]

improper instructions for plaintiff, to-wit: No. 1, 2, 3; because the Court refused instructions, 1, 2, 3, asked by defendant, and gave an improper instruction in lieu of No. 2 and 3 asked by defendant.

Motion overruled; motion in arrest overruled; judgment on the verdict; and exceptions by defendant.

ERRORS ASSIGNED.

I. The Court erred in giving instructions No. 1, 2, 3, for plaintiff.

II. The Court erred in refusing instructions No. 1, 2, 3, asked by defendant, and in giving the instruction in lieu of 2 and 3 asked by defendant.

III. The verdict is manifestly against the evidence.

IV. The Court erred in not granting a new trial.

V. The Court erred in not arresting the judgment; by reason whereof the appellant prays that said judgment may be reversed, &c.

GEO. W. WALL,
Att'y for Appellant.