

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. COSTELLO.

Opinion delivered March 24, 1900.

RAILWAY—STOCK-KILLING.—The *prima facie* case of negligence where stock was killed by a train is not overcome by testimony of the engineer that he was looking ahead and saw the cow step on the track in front of the engine, and that she got on so suddenly that he could not do anything to keep from striking her, as it does not appear that he could not have seen her danger before she came upon the track in time to have used the necessary precautions to avoid killing her. (Page 33.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

This is a suit for damages growing out of the alleged negligent killing of a cow. The proof showed that the cow was struck about 8 o'clock at night by a passenger engine which was provided with a "fine electric headlight." The track was straight at the place where the witness for the plaintiff said she saw the cow killed. She was looking "right down the track, and saw the engine as soon as it came in sight." Witness said there was nothing in the way; the cow was right between witness and the engine, going across the track; was not looking for the cow, but saw her about the time the engine struck her. The engine was right on the cow when the whistle blew. The engineer testified that he struck a cow at the place testified to in the case. He was looking ahead, and saw the cow step on the track in front of the engine. She got on so suddenly he could not do anything to keep from striking her.

Samuel H. West and Jno. T. Sifford, for appellant.

Where the uncontradicted testimony of the engineer shows he was keeping a lookout, the statutory presumption of negligence in cases of stock killing is rebutted. 39 Ark. 413; 40 Ark. 336; 41 Ark. 161; 47 Ark. 321; 53 Ark. 96; 51 S. W. 319.

WOOD, J., (after stating the facts.) The *prima facie* case of negligence resulting from the killing was not overcome by the proof of the engineer, nor the witness for plaintiff who saw the killing. The track was straight, and the engine had a fine head light. The engineer says he saw the cow step on the track in front of the engine, but he does not say that he did not see her upon the right of way, or near to the track before she came upon the same. If he did see the cow, and she was so near as to indicate danger to her, he was negligent in not sounding the alarm, slowing up, or doing whatever else was necessary to frighten the cow from the track. If he could have seen her before she came upon the track in time by the use of the stock alarm, or other necessary precautions, in the exercise of ordinary care, to have avoided injuring her, and failed to do so, he was still guilty

of negligence. These propositions are not rebutted by his evidence, nor by the plaintiff's witness, because she says she was not looking for the cow. For aught that appears to the contrary, the cow was or might have been seen by the engineer before she came upon the track in time to have avoided killing her by the use of the ordinary precautions.

Affirmed.
