

Commonwealth of Massachusetts.

SENATE, June 8, 1886.

The Committee on Claims, to whom was referred the petition of E. C. Hawks for compensation for certain damages, report as follows : —

This is a long contested claim ; the facts seem established beyond all question. They are reported first in the report of the Commissioners on Contagious Diseases among Cattle (Senate Doc. No. 4, 1882). Next, after hearing of the full case, they are substantially stated in the Report of the Committee on Claims (Senate Doc. 243, 1883). Third, Mr. Hawks brought suit in the Superior Court nominally against the manager of the Troy & Greenfield Railroad, but really against the State, since judgment, if recovered, is payable out of the treasury under a special statute (ch. 77, Acts 1875). In this suit, after hearing both sides through an elaborate trial lasting three days, Mr. Justice Barker rendered judgment for \$3,543 in favor of Mr. Hawks, and on questions of law reported all the facts of the case as he found them, to the Supreme Judicial Court.

The different statements substantially agree, and the committee deemed it idle to go beyond the record to inquire into facts so thoroughly established.

The following is a statement of the material circumstances, taken mainly from Judge Barker's report : —

On the twelfth day of August, 1881, there was an accident at Charlemont on the State's railroad, by which several cars of a Fitchburg east-bound freight train were derailed

and broken. In the train were two cars containing western swine being carried as freight. The swine were released by the accident and were about the wreck in a condition likely to cause danger and delay to the trains of the various companies operating the State road. Under the contract by which the State road is operated, the manager has the right, in case of accidents, to direct the clearing of the road, and on this occasion he went in person with a gang of his section men and assumed charge of the wreck. He directed his section master, Martin King, to take his men, collect the swine, and put them into some safe place. King, in carrying out this order, set to work his section men and others from the bystanders, among whom were some employees of the Fitchburg Railroad, transmitting to them the order of the manager. In carrying out the order, George Lester, a section man, at 5.30 p. m. drove about thirty of the swine to the barnyard of Mr. Hawks, about half a mile away, and putting them into the yard shut them in. Soon the other section men, in carrying out the same orders, drove in other lots until about one hundred and twenty-five were put there. This occurred while Mr. Hawks was away from home, and the swine were placed on his premises by a trespass without any assent or permission on his part.

Mr. Hawks came home about seven o'clock and when within a few rods of his house first heard it stated by a bystander that swine were being placed on his premises and saw some being driven towards his yard but gave no assent to their being placed there, nor did he make any objection.

At nine o'clock Mr. S. N. Holden, an agent of the Fitchburg Co., came to his house and asked him to feed them, saying he should be paid. Mr. Hawks consented and fed them. Next morning some forty more were collected by the section men and placed in his yards, and Hawks himself brought in a few; and the same day the section men took the western swine away to the cars, Mr. Hawks helping. Soon after, in entire ignorance that he had suffered any special damage by reason of the western swine, Mr. Hawks sent Holden a bill for the corn fed, for work in helping to remove the swine and collect the few he brought in, and for their trampling of his meadow grass while being driven to his yards. But the bill was not paid.

A considerable part of the western swine when placed in Mr. Hawks' yards were affected with a very contagious and fatal disease, known as swine plague — a disease prevalent in the West but not known in this State within eighteen years before this, the germs of which pass out in the excretions and from wounded places on sick swine, infecting the soil with the virus of the disease and rendering it unsafe for a long time to keep swine in the vicinity of the place.

Neither the manager or any other person knew until considerable time after the swine had been taken away from Mr. Hawks' premises that they were diseased, certain symptoms being attributed to injuries caused by the accident.

When the western swine were placed on his premises Mr. Hawks was a breeder of and dealer in choice thoroughbred swine, of a valuable stock known as Chester Whites; and had, by breeding and selecting his stock with great care, during a period of twenty-eight years so improved his herd that they were much better than ordinary Chester White swine and had such a wide reputation that he was able to sell pigs bred from them at very high prices and had calls for them from various States.

In the yard where the western swine were placed was his whole herd of one hundred and eighteen swine (except a few kept by him on his farm in Hawley), in pens to which the western swine had access; and as Justice Barker finds from the evidence, within a few minutes from the time the western swine were placed in Mr. Hawks' yard they had infected his yards and premises with the virus of swine-plague and imparted the disease to his herd. The premises were so infected that it was inconsistent with ordinary prudence, to keep swine thereon during a period of two years.

About twelve days after the western swine had been removed Mr. Hawks' herd began to sicken with the plague, and some of them, which had been put on his Hawley farm, infected the rest of his herd there.

They began to die rapidly despite his care, and he finally called in the State Commission before referred to, whose veterinary surgeon, on the 13th of October, made a *post-mortem* examination of several, which proved, beyond doubt, as the Commission testify, and the court find, that

the disease was swine plague. At that time all Mr. Hawks' swine were dead but fifteen, of which number nine were sick, and all were killed by order of the Commission. Mr. Hawks was required by the Commission to disinfect his premises, and exhume all his dead swine, which had been buried three feet deep, and re-bury them six feet deep, to prevent spread of the contagion. This he did.

The fact of the destruction of Mr. Hawks' herd, and the infection of his premises by swine plague, became directly a matter of public notoriety, whereby his customers were, and had up to time of Judge Barker's decision, in November, 1883, been deterred from making further purchases of swine from him. This, with the destruction of his herd and his inability to keep swine on his premises, or to replace his herd with stock equally good, totally destroyed for a long time his business of breeding and selling swine, and will work for many years a great reduction thereof.

Judge Barker found from the evidence that the profits of this business to Mr. Hawks were \$500 to \$1,000 per annum.

The Superior Court found in favor of Mr. Hawks a judgment for \$3,543 damages, with costs, in November, 1883. The items of damage allowed were for injury to his grass, loss of his swine, labor in caring for sick swine, and in exhumation and re-burial of dead swine, unavoidable consequential damages to his business of breeding and selling swine, and loss of profits thereof and interest as damages to the time of the judgment.

The case went to the Supreme Judicial Court. The two leading questions of law were these: First, it being conceded that a master is liable for the damages caused by the trespasses of his servants committed in the performance of his work, although he does not specifically authorize them, the question arose, whether the manager was about the State's work; that is, whether he was acting within the scope of his authority as an agent of the State, when he took charge of the wreck and control of the workmen there and issued the order concerning the swine, whereby the State would become responsible for the consequences of his action and that of the employees under his charge.

The Supreme Judicial Court decided clearly that he was.

The second question was this: The general principle of law is, that if a person, having diseased swine but ignorant that they are diseased, applies in the ordinary course of business to another to take them upon his premises and care for them for pay, and the other accepts the charge, whereby it happens that his own swine are infected, he cannot recover damages therefor. For this is a matter of business in which each is equally innocent and the law leaves the damages to lie where they happen to fall.

But if a man by trespass and without license puts diseased swine on the premises of another he is responsible for all the damages, direct and consequential, necessarily resulting, whether he is aware that they are diseased or not. He assumes the responsibility of doing it and therefore does it at his own risk. Mr. Hawks therefore, since his swine were infected by the western swine, within five minutes after they were placed in his yard, had at nine o'clock in the evening a clear right of action against the State through its manager to recover all the damages which had been done him, including those afterward in the ordinary course of events accruing from the trespass as a proximate cause. If he had turned out the western swine into the highway and refused to feed them his right to recover would have been clear. But he fed them at the State's request and let them stay till morning. This act it was claimed in behalf of the State was a waiver of the original trespass and was equivalent to a prior license to put the western swine on his premises, by which waiver it was claimed that Mr. Hawks ignorantly lost his rights and the State could escape paying him because he would technically be in the same condition as if he had originally taken the swine to keep voluntarily.

On this question the Superior Court ruled as a matter of law that Mr. Hawks did not lose his rights. But the Supreme Judicial Court decided that this was incorrect. They held, if we correctly interpret their decision, that the Superior Court could not decide this as a matter of law, but must consider it as a question of fact and must find it as a jury would, and not as a court deciding upon a question of law. So the whole trial went for nothing and a new trial

was ordered in the Superior Court. (See *Hawks v. Locke*, 139 Mass. 205.)

The precise question before the committee was whether the State as defendant ought to avail itself of such a defence, if it could, — whether it ought to prosecute such a litigation at great expense to both parties, and loss of time to the plaintiff, who has now litigated his case during a period approaching five years and reduced the defence to this point of waiver, or take it out of court and pay him.

Suppose the State could win in such a controversy? Will this Commonwealth say to Mr. Hawks: “It is true at nine o’clock in the evening you had a right to compel us to pay damages. But we asked you to accommodate us by feeding these swine, and leaving them in your pens till morning. You acted like a man about it. You did not turn them out into the night, and compel our manager and his section men to hunt the by-ways all the next day and lose perhaps a large part of them. Nor did you inhumanly insist that they should go without anything to eat. You were ignorant of your rights and of how much we had injured you, and this honorable conduct on your part — these kindly acts done at our request — enable us to take advantage of that ignorance and escape paying you what we should otherwise be held for. Fortune has favored us with a technicality by which we can dodge payment for the injuries we did you, and we propose to avail ourselves of it if our courts will let us”?

The committee do not feel that the State ought to shield itself behind such a plea if it could. They believe a sense of justice would induce the legislature to pay Mr. Hawks even if the State should win the suit. And if the State is to pay, winning or losing, what is the profit of putting this petitioner to further vexation and useless expense finally to come from the treasury?

Another trial was had in March, at which Judge Bacon, if Mr. Hawks’ counsel is correct, took the case away from the jury by ruling, as a matter of law, that the facts named did constitute a waiver of the trespass, falling, as the attorney claims, in the opposite direction, into the same error which the Supreme Judicial Court had corrected in its former decision. If that is so, the natural result will be that the Su-

preme Judicial Court will order a third trial in the Superior Court, which cannot be had before November, at which the presiding justice will naturally be requested to define what constitutes a waiver in this case by instructions to the jury, which will, very likely, be excepted to and the case again carried to the Supreme Judicial Court for argument in September, 1887.

Objection was formerly made to this claim on the ground that Mr. Hawks might recover of the Fitchburg Company. It was operating the road and the inference was that it was in control of freight and the manager was exceeding his authority in dealing with the swine. But the Supreme Judicial Court seemed to have disposed of this theory by deciding that the manager was acting in the scope of his authority in this matter. For if he was, then he, and not the Fitchburg Company, was in control. And that company cannot be held for trespasses committed by men not under its control but acting under his orders.

As to the amount to be paid, Mr. Hawks offered to try the question with witnesses before the committee, but the committee did not think a fairer or more painstaking auditor than Mr. Justice Barker could be found, and concluded that since the State had had the benefit of its day in court on that question it ought not to be opened again by reason of a technicality which the State repudiates. Some doubt, however, having arisen as to whether the plaintiff should, since he seeks another tribunal, recover the costs which Judge Barker awarded him, the committee have concluded to favor the allowance to him of the amount \$3,543, for which Judge Barker gave him judgment, which is exclusive of costs and does not include any interest accruing since Judge Barker's decision in November, 1883. It may be remembered, also, that Mr. Hawks had been compelled to incur the expense of twice bringing many witnesses to Boston in presenting his case at two sessions before he commenced his suit at law, for which, of course, he can receive no indemnity.

The committee report the accompanying Resolve.

H. C. JOYNER,
For the Committee.

Commonwealth of Massachusetts.

In the Year One Thousand Eight Hundred and Eighty-six.

RESOLVE

In favor of Edward C. Hawks.

1 *Resolved*, That the sum of three thousand five hundred
2 and forty-three dollars be allowed and paid from the treas-
3 ury of the Commonwealth to Edward C. Hawks of
4 Charlemont, in full settlement for all damages caused
5 by the placing of infected swine upon his premises by
6 servants of the State in the employ of the manager of
7 the Troy and Greenfield Railroad and Hoosac Tunnel;
8 said sum to be paid said Hawks forthwith after he shall
9 file in the office of the clerk of courts for the county of
10 Franklin a discontinuance, without costs to either party,
11 of an action brought by him for the same cause, against
12 said manager, in the superior court in said county.