

### THE MYSTERY OF THE THIRD BUZZARD.

It takes Texas to provide interesting cases and new law. In *Scott v. Texas Electric Railway Company*,<sup>1</sup> the plaintiff, a passenger in defendant's train, sued the railway for damages on ground of negligence in not slackening speed when buzzards were observed on the track. The motorman testified that "he saw two or three birds on the track about two hundred yards in front of his car; that they flew up and out of his sight to the west; and that after the car had about reached the place from which they rose, a buzzard flying from the east or southeast suddenly flew in front of the car and crashed through the centre pane of the glass and fell inside."

In spite of this defence the plaintiff got judgment; the jury found that the passenger's injury was the proximate result of defendant's negligence in numerous respects varying from "First, in failing to furnish him a safe method of transportation" to "Seventh, in leaving on its track a dead opossum which attracted the buzzards."

This judgment was reversed by the Court of Civil Appeals, and there was a further appeal to the Commission of Appeals of Texas.

The plaintiff introduced a witness, "the only one, aside from the motorman who testified to seeing the buzzards before the collision." He maintained that he saw two fly up; and one came through the window within sixty seconds. The motorman thought there were three buzzards on the track, but the jury found that he was travelling at a speed exceeding fifty miles an hour, and that the speed was not slackened, or the gong sounded. The Commission of Appeals reviewed this evidence and decided that "The motorman operating the car was bound to have known that if he got within such close distance of the buzzards going at the rapid speed at which the car was travelling that these large ponderous birds might not be able to clear the track before the car reached them, and if one of them should collide with the glass in the front end of the car it would be shattered with such force that a passenger might be injured thereby. It was therefore his duty, upon discovering the buzzards upon the track, to exercise that high degree of care which a very cautious, competent and prudent person would have exercised under the circumstances to prevent a collision by sounding the gong and slackening the speed of the car in order that the buzzards

<sup>1</sup> 32 S.W. (2nd), 641.

might be frightened and given time to fly clear of the track before the car reached them."

The judgments of the trial Court and the Court of Civil Appeals were reversed and the cause remanded to the district court. The decision of that Court will solve the mystery of the third buzzard and define the extent to which a common carrier is an insurer of his passenger against the contingencies that arise when buzzards act as funeral directors to Mr. Opossum.

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STATE AND FEDERAL TAXATION.—There is probably no more perplexing problem in American constitutional law than the mutual relation between the States and the national government. With our dual form of government, and the consequent operation within the same territory and often upon the same subject matter, of two separate and largely independent governmental systems, the problem of adjustment between them has been one of great difficulty and one which will perhaps never be fully settled. In this matter, as in many others, the ultimate authority, the Supreme Court of the United States, has not been able to do more than to determine the point of boundary in specific cases, without attempting to draw a line which will determine on which side any possible case will fall. Of this perplexing problem one of the most difficult phases is that of taxation. It is often laid down in general terms that neither government may levy a tax which will interfere with the functions of the other, but this obviously means nothing until the Supreme Court has determined the situations in which such interference exists or does not exist. Recent decisions of that Court have to some extent clarified the situation, but the matter still presents many difficulties.

R. C. BROWN in *Virginia Law Review*.