JORDAN v. WELLS.

Case No. 7,525.
{3 Woods, 527.}[1]

Circuit Court, N. D. Georgia. March Term, 1878.

PRACTICE IN EQUITY—SUIT AGAINST RECEIVER—RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—FELLOW SERVANT.

1. A court by which a receiver has been appointed ought not to allow the receiver to be sued, unless the petition for leave states a prima facie cause of action against him.

{Cited in Davis v. Duncan, 19 Fed. 481.}

{Cited in brief in Lyman v. Central Vermont R. Co., 59 Vt. 170,10 Atl. 348.}

2. To justify a recovery against a master by one servant for an injury caused by the carelessness or negligence of a fellow-servant, it must be shown that the servant by whom the injury was caused was incompetent, and that the master was guilty of willful negligence in employing him.

This was a petition wherein leave was asked by the petitioner {William R. Jordan} to bring suit against B. E. Wells, as receiver of the Rising Fawn Iron Company. The principal cause was a suit in equity in this court to foreclose a mortgage on the property of the Rising Fawn Iron Company, executed to secure a series of bonds made and sold the defendant company. On motion of the complainants, B. E. Wells had been appointed receiver of the property and effects covered by the mortgage, with authority to take care of the property and carry on the business of the company. The petition of Jordan alleged that, in order to perform the duties imposed on him by the order of the court, it became necessary for Wells, the receiver, to cause to be run a locomotive engine belonging to the company over a railroad track, also the property of the company. That on May 13, 1878, the engineer who was usually in charge of said locomotive was off duty, with the consent of the receiver, and one Tidwell, a person unskilled in the running of locomotives generally, and of this one in particular, was put in charge of the same by the receiver and required to run it. The petitioner was employed by the receiver as fireman and coupler on said engine, and it was his duty to make all couplings and change all switches as necessity required, and after changing a switch he was required to get back on the engine while the same was in motion, the order of the receiver not allowing the engineer to stop the engine, but merely to bring it to a slow rate of speed. That petitioner, on May 13, 1878, after adjusting the switch, undertook, as usual, to mount the engine, but was unable to do so, because of the speed at which the said Tidwell caused it to run, he being unacquainted, with it and unable to control it. The petitioner's foot slipped from the step and was caught under the wheel of the tender and so badly crushed that amputation became necessary, and was performed on May 25, 1878. Petitioner alleged that he had sustained great damage in the premises, and asked for leave to sue the receiver in order that the measure of his damage might be fixed and ascertained. The substantial facts alleged in

the petition are verified by an affidavit of the petitioner, and are not upon this hearing disputed.

E. W. Hoge, for petitioner.

J. L. Hopkins, J. T. Glenn, and H. C. Erwin, contra.

WOODS, Circuit Judge. It may be laid down as a general rule that leave should be granted to sue a receiver where the petitioner makes out by his petition and affidavits a prima facie cause of action. The court ought not to undertake in advance, on such a petition, to decide the case against the petitioner. But it is essential that the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing, the plaintiff has no cause of action. Do the facts set out in this petition show that the petitioner has a case against the receiver on which he ought to recover? It is settled by the great preponderance of adjudicated cases that the master is not liable for an injury sustained by one servant from the carelessness or negligence of his fellow-servants. To justify a recovery in such a case, the master must knowingly and negligently employ incompetent servants, and the injuries for which redress is sought must be caused by the incompetency of the servant. Cooley, Torts, 559. The averment of the petitioner in reference to the employment of the engineer alleged to be incompetent, is as follows: that "one L. S. Tidwell, a person unskilled in running locomotive engines, and this engine in particular, was put in charge by said receiver, and required to run said engine." There is no averment that the receiver negligently and knowingly employed an unskillful and incompetent engineer. From all that appears either in the petition or affidavit, the receiver may have believed and have had good grounds to believe that Tidwell was a competent and skillful engineer. It appears to me to be clear that, if the facts set out in the petition and affidavit were embodied in a declaration, it would be demurrable, because it did not set forth a good cause of action. The petitioner, to justify a recovery, must not only aver, but prove, willful negligence on the part of the receiver, in the employment of an unskillful person, and an injury to him by reason of such unskillfulness of the person so employed. As this is not shown either in the petition or affidavit, the petitioner does not make out a prima facie case, and his petition for leave to sue the receiver must be denied.

[1] {Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.}