LUCAS *v.* RICHMOND & D. R. CO.

Circuit Court, D. South Carolina. December 2, 1889.

RAILROAD COMPANIES—WALKING ON TRACK—NEGLIGENCE.

In an action for personal injury, it appeared that plaintiff was walking on defendant's railroad track, and stepped off a few feet, when a train passed, and he saw the shadow of something, and was felled to the ground; that a severe wound was found on his head, and a stick of wood, similar to the sticks used on the locomotive, was found imbedded in the earth near where he fell. There was no other evidence that the wood was thrown from the locomotive, or how it was thrown, or that it struck plaintiff. The speed of the train was about 60 miles an hour. *Held* that, as therewas contractual relation between plaintiff defendant, there was no presumption of negligence against the latter, and a verdict should be directed for the defendant.

On Motion to Instruct the Jury to Find for Defendant.

Andrew Crawford and *G. T. Graham,* for plaintiff.

J. L. Orr and *J. C. Haskell,* for defendant.

SIMONTON, J. The plaintiff brings this action against the defendant for negligence. He was walking on the railroad track from Batesburg to Leesville, in this state. The track had been used for over 20 years as a pathway by the inhabitants of these two towns, which are about two miles apart. While so walking he heard a coming train, and stepped off the track, placing himself along-side of an embankment, about breast high, and some eight or nine feet from the track. Just as the engine and tender, which constituted the train passed him, he saw the shadow of something in the air, and was felled to the ground. He lost consciousness for a time. Recovering, he pursued his way to Leesville, and was attended by a physician. A severe wound was found on the side of his head, made by some blunt instrument. The accident was about noon-day. In the afternoon he walked to the place of the accident, some 600 yards from Leesville, There he found a piece of wood, similar to that used for firing up locomotives on this road, and supposed that it was the piece which struck him. It was imbedded in the bank where he was standing. The witnesses for plaintiff say that the train was running at an unusual speed, some say 60 miles an hour. The track at this place is smooth and straight, within the corporate limits of Leesville, in the outskirts of the town. The gist of this action is negligence, It must, be alleged and proved. There being no contractual relation between

these parties, there is no presumption of negligence against the defendant. There is no proof that the stick of wood found by plaintiff, and supposed to be the cause of the injury, was not lying in the place it was found anterior to the accident. There is no proof that it ever was on the engine or tender. None that it came from either, or, if it did come from either, whether it came from under the engine, from in front of it, or from the top or the back of the tender. It may have been on the track, thrown off by the cow-catcher. It may have been on the rail, and have been thrown off by the wheel. It may have come from the tender, although there is no proof that the tender was full of wood, or, indeed, had any wood at all in it. This constitutes the distinction between this case and the class of cases quoted by Mr. Thompson in his work on Negligence. *Kearney* v. *Railway Co.*, and notes, 2 Thomp. Neg. 1220. The maxim, *res ipsa loquitur*, does not apply. A case must be made out by facts, not conjecture. Proof must be furnished the jury, not grounds for guess-work; and these facts and proofs the plaintiff must establish before he can retain his standing in court. The jury are instructed to find a verdict for defendant. The circuit judge has been detained in Baltimore by trial of a capital case. This case is important to plaintiff. He should have the benefit of a full court. Leave is given him to move for a new trial before the court as soon as the circuit judge shall arrive.