UNITED STATES *v.* ENGERMAN *et al.*[1]

(*District Court, E. D. New York.* May 12, 1891.)

EMINENT DOMAIN—RIGHT TO JURY TRIAL.

In a proceeding taken by the government under Act Cong. Aug. 18, 1890, to condemn lands to the use of the United States, the owner of the land is not entitled as a matter of right to a trial by jury.

At Law.

The United States having filed a petition in this court under the act of August 18, 1890, (26 St. at Large, 316,) to condemn a part of Plum island, upon which the government wished to erect a mortar battery, the owner of the land appeared, and filed an answer, denying the allegations of the petition. The case coming on for trial, defendants demanded a trial by jury, claiming that there must be a trial of the question of the right to condemn before the question of the amount of compensation is entered upon.

Jesse Johnson, U. S. Dist. Atty.

Thomas E. Pearsall, (*Robert D. Benedict*, of counsel,) for defendants.

BENEDICT, J. In this matter, which is a proceeding to condemn certain lands to the use of the United States, instituted in pursuance of a statute of the United States passed August 18, 1890, (26 St. at Large, p. 316,) two questions have been presented for decision. One is whether the hearing upon the petition and answer is required to be had before the judge and a jury, or whether it can be had before the judge alone, without the aid of a jury.

Upon this question my opinion is that the provision in the seventh amendment to the constitution of the United States, upon which the respondents rely, does not entitle the defendants, as a matter of right, to a trial by jury, and consequently that the refusal of the respondents' request for a trial by jury was not error.

The second question is whether the evidence produced is sufficient to prove that the parties were unable to agree upon a price to be paid for the land, within the meaning of the provision in the general statute of New York Laws of 1890, to which statute the district attorney has sought to make the present proceeding conform.

Upon this question my opinion is that the evidence is sufficient to warrant finding that the parties have been unable to agree upon a price for the land.

[1]Reported by Edward G. Benedict, Esq., of the New York bar.

SHANKENBERY *v.* METROPOLITAN ST. RY. CO.

(Circuit Court, W. D. Missouri, W. D. March 17, 1891.)

1. STREET-RAILWAY COMPANIES—ACCIDENT AT RAILROAD CROSSING—NEGLIGENCE.
Where a passenger on a street-railway car is brought into apparent imminent danger from a collision at a railroad crossing by the negligence of the motor-man in attempting to cross when he could see that there was a probability of the engine reaching there first, she can recover for injuries received in attempting to flee from it, though she would have been uninjured if she had kept her seat; but, if it would not have been brought into such danger except for the sudden, unexpected, and unanticipated obstruction of the car by a wagon, then there would be no liability on the part of the company.

2. SAME.
The right of precedence in crossing between two railroad trains considered.

At Law.

Hollis & Latshaw, for plaintiff.

Pratt, Ferry & Hagerman, for defendant.

PHILIPS, J., (*orally charging jury.*) This action is predicated of the negligent conduct of the defendant in its failure to comply with and perform its contract with the plaintiff in carrying her as a passenger on its cars from some point over in Kansas into Kansas City, Mo. The law exacts of a carrier of passengers, in consideration of the hire it receives for the service, that it shall carry them safely, and as expeditiously as possible, from the point of their admission to their destination. By this, however, is not meant that a carrier of passengers is an absolute insurer of their safety. Its undertaking under its contract is to exercise the highest degree of diligence and care in seeing that no injury comes to them by failure on its part to perform its contract, which is for the safe carriage and transportation of the passenger. The law as applied to these personal injuries on railway cars is that, when an injury to a passenger occurs, the plaintiff has made out a *prima facie* case by showing the accident and consequent injury, then it devolves upon the defendant, the carrier, to show by evidence that it has exercised due care and caution in order to prevent the accident. If it has done that, it has exonerated itself. The law, gentlemen of the jury, is a reasonable thing. It proceeds on lines of common sense, and possesses sufficient flexibility to adapt itself to the varying circumstances of each particular case as it arises. Its rules are not senselessly arbitrary. In this case there was no disaster to the carriage or car in which plaintiff was being transported. There was no mismanagement on the car by which any derailment or any collision with any obstacle was occasioned, by reason of which this injury occured; but the injury in this case resulted from fright of the plaintiff, which caused her to flee from what she supposed to be an impending danger, and in getting from the car while it was yet on the track the injury occurred. Now in order, under that state of facts, to fix a responsibility upon the railroad company, it devolves upon the plaintiff to show by evidence to your satisfaction that this danger to which the plaintiff in this case was seemingly exposed, which caused her to