

M'CLARY v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, W. D. Missouri, W. D. March 16, 1891.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate attempted to cross a street on which were two railroad tracks, about nine feet apart. Just as he reached the second track, a train on it came up, and, in order to avoid it, he stepped back upon the first track, and was struck by an engine that was backing up on that track. Held, that the railroad company was not responsible for the accident.

At Law.

This was an action by plaintiff for the killing of her husband, Frank McClary, on March 12, 1889, by a switch-engine of defendant. The accident occurred at Twentieth and Harrison streets, in Kansas City, Mo. The trains of defendant used the tracks of the Kansas City Belt Line, which were laid on Twentieth street. There were two tracks running east and west. The distance between the two tracks was nine feet. About the time of the accident a passenger train of the defendant was going east on the south track, and a switch-engine was backing west on the north track. The switch-engine struck and killed McClary. There was evidence tending to show that the switch-engine was running faster than authorized by ordinance; that deceased was going south on Harrison street; that he walked across the north track, and was about stepping on the south track, when he glanced up and saw the passenger train, consisting of three or four cars, within a very few feet of him; that to get out of the way of that train he stepped backward, never looking eastward, till he reached the north track, and stood on one of the rails thereof. Just as the rear end of the passenger coach got by him, the switch-engine going east struck him, causing his death. The defendant demurred to the evidence.

Hollis & Latshaw, for plaintiff.

Pratt, Ferry & Hagerman, for defendant.

Before CALDWELL and PHILIPS, JJ.

CALDWELL, J., (*orally, after stating the facts as above.*) This, in my opinion, is what would be called a simultaneous transaction. The deceased for the moment seems to have been utterly absent-minded. He went upon those railroad tracks, not looking to the right or to the left, at a time when there were two trains approaching. It is a case that is remarkable. He proceeded to cross one track onto the second track, and had just reached that, when he was in the attitude of being run down by that train, and barely discovered it in time to escape being killed there. He must have been somewhat agitated and confused by the great peril which he had just escaped. All plaintiff's witnesses have testified that he had walked forward and then backward onto the other track, and I think it is perfectly obvious, taking this testimony all into consideration, that the man traversed that space of nine feet between the two tracks, and had just reached the other track, when he was killed; he

getting there, however, not in time to give any one an opportunity to take order for his safety. His neighbor, who stood upon the side of the track, had not time to recover his breath, and halloo to him between the time he was in the act of being run down by the train on the south track, and the instant he was struck by the other. There was no time for any one to take order for his safety. There was no time when that engineer and fireman, if both looked in the direction of the deceased, could have taken order for his safety, and saved him, in my judgment, upon this testimony; nor do I think it is open to reasonable doubt. I think it is so clear that the court could not uphold a verdict found upon any other hypothesis, that while he was passing from the south track to the north track, over that space of nine feet, that by the time he had got onto the second track, the other train was there,—the switch-engine was there.

There is no rule of law applying to this state of facts to warrant a verdict supported by the evidence. It is not a case that may be called near the line. It is not a case like the colors of the rainbow, where you cannot tell where one begins and another ends, and which must be left to the jury to say on which side of the line it falls; but this is obviously and palpably on one side of the line, and so clearly so that the duty of the court is clear. Of course this is a deplorable accident, but upon this state of the case the railroad company is not answerable or liable in damages for the misfortune that befell this man from his own absent-mindedness, that led him into this peril, by which he lost his life.

Demurrer sustained.

PHILIPS, J., concurs.

RENNER *v.* NORTHERN PAC. RY. CO.

(Circuit Court, D. Washington, E. D. April 20, 1891.)

CONTRIBUTORY NEGLIGENCE.

A person traveling in a public street, and finding it obstructed by a freight train at full stop, to which a locomotive is attached, who, relying upon the assurance of a brakeman that he can safely climb over the bumpers, and pass between the cars, as the train will remain stationary for some time, attempts to do so, and while in the act suffers an injury by the train being started suddenly, without warning by ringing the bell or sounding the whistle, is guilty of such contributory negligence as will prevent his recovery for the injury.

At Law.

Turner & Graves, for plaintiff.

J. M. Ashton, for defendant.

HANFORD, J. Is a person traveling in a public street, and finding it obstructed by a freight train at a full stop, to which a locomotive is attached, and being informed by a brakeman on the train that he can

safely climb over the bumpers, and pass between the connected cars, as the train will remain stationary for a considerable time, who, relying upon such assurance, does attempt to so climb over the train, and while in the act suffers an injury by reason of the train being started suddenly, and without previous warning being given either by ringing of the bell or sounding the whistle, guilty of such contributory negligence as to preclude him from recovering damages for such injury, in an action against the company to which the train belongs? This question is raised by a demurrer to the complaint in this action. It is a question upon which there is a conflict of authority. The following decisions cited by the defendant's counsel sustain them in maintaining the affirmative: *Railroad Co. v. Pinchin*, 112 Ind. 592, 13 N. E. Rep. 677, 35 Amer. & Eng. R. Cas. 383; *O'Mara v. Canal Co.*, 18 Hun, 192; 2 Lacey, Dig. R. Dec. 770; and *Andrews v. Railroad Co.*, (Ga.) 12 S. E. Rep. 213. There are also other cases similar in character, though not based upon the identical facts in this case, which, by analogy, support their position. Among others, the following may be cited: *Smith v. Railroad Co.*, 55 Iowa, 33, 7 N. W. Rep. 398; *Dahlstrom v. Railroad Co.*, (Mo.) 8 S. W. Rep. 777; and *Lewis v. Railroad Co.*, 38 Md. 588. The contrary view is supported by the following text-books and decisions: 2 Shear. & R. Neg. § 479; *Nichols v. Railroad Co.*, (Va.) 5 S. E. Rep. 171; *Railroad Co. v. Sykes*, 96 Ill. 162; and *McIntyre v. Railroad Co.*, 37 N. Y. 287.

I find the question difficult to determine, not only by reason of the conflicting precedents, but because, in the light of reason, the case seems to be located exactly on the boundary line separating questions of law proper for the court to decide from the province of the jury as judges of all questions of fact. The plaintiff shows very clearly by the statements of his complaint that he must have been conscious at the time of attempting to climb over the train that he was thereby exposing himself to danger, and he voluntarily exposed himself to the danger of which he was thus conscious. The information given by the brakeman could not have been an assurance to him upon which he could prudently depend, for it was certainly apparent that the brakeman did not have such control of the train as warranted him in giving a positive assurance. I do not consider the rule that a person who voluntarily places himself in a position known to be dangerous is to be deemed to have assumed the ordinary risks incident to such position as applicable to this case, there being no contract relation between the parties. The defendant was a wrong-doer in suffering its train to obstruct the street, but that wrong was not necessarily productive of the injury to the plaintiff, of which he now complains. He would have no cause of action if this were the only wrong or negligent act chargeable against the defendant. The starting of the train suddenly, and without previous warning, at such a place, was a further wrong, and something which the plaintiff was not bound to anticipate when he attempted to climb over the train. Although he knew that in doing so he was incurring danger, he was not bound to anticipate the particular negligent act which caused his injury. It was not certain that the train would not remain stationary a sufficient time to en-

able him to go across it, and he had a right to assume that a warning would be given before it did start, because it was the duty of the men in charge to give such warning. *Owen v. Railroad Co.*, 35 N. Y. 518.

The authorities cited are not only irreconcilable, but unsatisfactory in themselves. In Shearman and Redfield's work there is no candid or full discussion of the subject. The allusions made to it in the text and notes are too sarcastic and captious to have much weight; and the case of *Rauch v. Lloyd*, 31 Pa. St. 358, is cited in support of the rule, stated broadly in the text, that "it is not deemed negligence for the plaintiff to cross by the only path left open to him, whether by climbing over a platform, or walking between two separated cars." The opinion of the court in that case does not state or affirm any such general rule. On the other hand, the case of *Railroad Co. v. Pinchin*, cited by the defendant, could not have been as well considered by the court as a casual reader of the opinion might infer. Numerous authorities are there cited, and seem to have been relied upon to support the several propositions maintained; among them this: "A person who has knowledge that a train of cars is stopping temporarily at a way station has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it." And the first case in the list of those cited to this point in the case as printed in 112 Indiana is *Rauch v. Lloyd*, 31 Pa. St.,—the very case cited by Shearman and Redfield in support of their general rule above quoted. And in the case as printed in 35 Amer. & Eng. R. Cas. 383, the Pennsylvania case is omitted entirely, and in its place is cited *Owen v. Railroad Co.*, 35 N. Y. 516,—a case which I have read without being able to discover even a suggestion of the doctrine of the Indiana decision. These considerations cause me to doubt the soundness of the proposition, when regarded as one of law purely, that the plaintiff's conduct was so negligent, and so contributed towards his own injury, as to preclude him from recovering; and yet I am unable to positively deny it. The question in this present situation of the case seems to resolve itself into one of expediency. Undoubtedly the opinion of the court of last resort will be required by whichever party may suffer defeat in this court. Now, is it better to sustain the demurrer, and send the case at once to a higher court for a decision of this vital question, with the probability of a second appeal being taken should the appellate court return the case here for a trial, or, by overruling the demurrer, subject the parties to the labor and expense of a trial which will be fruitless if the appellate court should reverse such ruling of this court? The case cannot be tried at this term, and it will be possible for the plaintiff to obtain a decision of the circuit court of appeals in time to have a trial, if a trial shall be ordered at the September term here. I deem that the best course for the case to take, and therefore sustain the demurrer.

JOHNSON v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Washington, E. D. April 15, 1891.)

1. CARRIERS OF PASSENGERS—EJECTION FROM CARS.

Plaintiff purchased a ticket for an extended journey, the latter part of which was over defendant's road. By mistake the agent punched the ticket so as to indicate that it expired on the day on which it was issued. The mistake was not discovered until she was on the first division of defendant's road, when the conductor, upon telegraphing to the head office, received orders to honor the ticket until further instructions. At the end of his division, when he left the train, he delivered her the telegram. The conductor of the next division, notwithstanding the telegram, and the evidence on the face of the ticket that it had been honored, telegraphed to the division superintendent, and received no answer, and meanwhile, from time to time, for several hours, worried plaintiff by making remarks calculated to disturb her, and make her realize the disadvantages of her situation, and showing a desire to be unduly familiar. Finally, about midnight, after she had been carried a great distance, he put her off the train. She had explained in her first conversation that she was far from home, her means were exhausted, and she was not able to pay her fare. *Held*, that plaintiff was entitled to recover damages for the expulsion and ill treatment, in an action on the contract represented by the ticket.

2. SAME—VERDICT—MEASURE OF DAMAGES.

A verdict for \$1,000 having been set aside, and a new trial granted, a second verdict for \$500 was rendered. That, too, was set aside, and on the third trial another verdict for \$1,000 was rendered. *Held*, that the limits of the court's discretion had been reached, and the verdict would not be disturbed as excessive.

3. SAME—MISCONDUCT OF JURY.

Where it appears that the jury arrived at a verdict by each juror writing the amount which he was willing to give, adding the several amounts together, and dividing the total by 12, the verdict will not be aside for that reason, where it further appears that no agreement was made to abide the result, and where the amount agreed upon is much less than the quotient so obtained.

At Law. On motion for new trial.

L. H. Prather and *R. J. Danson*, for plaintiff.

J. H. Mitchell, Jr., for defendant.

HANFORD, J. The first trial of this case was had in the territorial district court, resulting in a verdict in favor of the plaintiff for \$1,000, which was set aside, and a new trial granted, on motion of the defendant. Upon a second trial the jury returned a verdict for \$500. That verdict was also set aside by the court. The third trial of the case was had in this court, and resulted in a verdict in favor of the plaintiff for \$1,000, and the defendant for the third time asks for a new trial. Three principal grounds are urged in the argument. The first is that the plaintiff is not entitled to recover damages in this action. The decision of that question necessitates consideration of the pleadings and the evidence, and a review of the whole case.

The action, as I construe the pleadings, is based upon a contract to recover damages resulting from personal injuries caused by a tortious breach of the contract, and it is therefore to be distinguished from numerous decisions holding that where in his complaint the plaintiff pleads only a wrongful and forcible expulsion from a passenger train, and the defendant justifies by showing the failure of the plaintiff to present, when called upon, a proper ticket, pay fare, or leave the train. In such an action the complaint is for a tort, pure and simple, and, as it is the