

earnings tax, also. That tax, as well as the tax on the lands of the company, is long overdue. Upon these facts the plaintiff has no standing in a court of equity to enjoin the collection of either tax. When the company seeks to enjoin the collection of the taxes on its lands upon the ground that a tax which it has agreed to pay on its gross earnings has the effect to exempt its lands from taxation, it must aver the payment or tender of such gross-earnings tax before a court of equity will consider the question of the legality of the tax upon its lands. It cannot, while refusing to comply with the alleged contract on its own part, ask a court of equity to enforce it against the state. It cannot have the exemption without first paying the consideration. That the company is liable to pay the taxes on its gross earnings, or the taxes upon its lands, or both, cannot be disputed; but it has not paid, and does not propose to pay, either tax.

The rules that obtain in the federal courts in cases where it is sought to enjoin the collection of the public taxes are well settled. They will be found in *State Railroad Tax Cases*, 92 U. S. 575, and *Pacific Express Co. v. Seibert*, 44 Fed. Rep. 310, and cases there cited, and need not be here repeated. The demurrer to the bill is sustained, the temporary injunction dissolved, and the bill dismissed, for want of equity, at the plaintiff's costs.

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BROOKS v. NORTHERN PAC. R. CO.

(Circuit Court, D. Washington, E. D. September 18, 1891.)

1. MASTER AND SERVANT—RISKS OF EMPLOYMENT—DEFECTIVE MACHINERY.

One who accepts employment from a railroad company as a switchman in its yard assumes the risk of injuries resulting to him from a visible defect in the locomotive on which he was to work, consisting of a draw-head so short as to leave too small a space between the locomotive and any car to be coupled to it for the switchman to work in with safety.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where one of the rules of the company, which formed a part of the switchman's contract of employment, required him to inspect and take notice of the style of draw-heads, etc., used in coupling engines and cars, and he alone directed the movements of the engine towards the car to be coupled to it, an injury resulting to him from their sudden coming together must be due to contributory negligence which will defeat his recovery.

At Law.

Action by an employe against employer to recover damages for personal injury caused by negligence. Upon the trial before the court and a jury, after the introduction of plaintiff's evidence, defendant moved for a peremptory instruction to the jury to return a verdict for the defendant, on the ground that the evidence was insufficient to justify a verdict for the plaintiff. Motion granted.

*W. M. Ridpath* and *D. W. Henley*, for plaintiff.

*Hyde, McBride & Allen*, for defendant.

HANFORD, J. The only charge of wrong on the part of the defendant upon which the claim for damages in this case rests is in this: that the engine with which the plaintiff was required to work in performing his duties as a switchman was improperly constructed, and unsuitable for use as a switch-engine, the draw-head being so short that a coupling could not be effected without bringing the tender and the car to be coupled so near together as to leave but an insufficient space for a person to operate safely in coupling them. The plaintiff, in accepting employment from the defendant as a switchman in the yard in which this engine was used, must be held to have assumed the risk of all injuries to himself ordinarily incidental to that situation, including such as were liable to occur in consequence of any visible defect in the machinery and appliances supplied for use in connection with his work. The alleged defect in this engine was visible, and should have been, if it was not in fact, known to the plaintiff before he suffered the injury described in this complaint. He cannot be heard to say that he did not know of the existence of the defect, or that he could not discover it, for he must be regarded as having guaranteed to the defendant his own competency for the situation in which he was employed, which necessarily required the possession on his part of sufficient knowledge of locomotive engines, draw-heads, and coupling apparatus to be able to recognize, upon seeing it, a dangerous defect of the character described. One of the rules of the company, forming part of the contract which he entered into upon entering its service, required the plaintiff to inspect and take notice of the style, construction, and condition of the draw-heads, links, and pins to be used in coupling engines and cars. The plaintiff could not, therefore, have failed to see the draw-head which he claims was defective and unsuitable in time to have avoided the injury without being guilty of gross negligence and breach of duty. He controlled the engineer in moving the locomotive towards the car which was to have been coupled, and he alone, if any one, was to blame for the sudden coming together of the two, whereby he was caught between them and crushed. To me it is too plain to admit of any doubt that, by the plaintiff's showing, it appears that the defendant could not have caused his injury in the manner alleged without such contributory negligence on his part as to preclude a recovery by him of any damages therefor, and it would be error for me to refuse to grant the present motion.

## WOODRUFF v. NORTHERN PAC. R. Co.

(Circuit Court, D. Washington, E. D. September 3, 1891.)

## 1. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—TRESPASSERS—PLEADING.

In an action against a railroad company for injuries to plaintiff's child, a complaint which fails to allege that the child was enticed or licensed by defendant to come on its track, or that the place of the accident was a public crossing or within a public highway, or that its servants, after seeing the child, intentionally or wantonly committed the injury, does not state a cause of action; as the defendant is under no duty to look out for intruders on its track on ground dedicated for its exclusive use as right of way.

## 2. SAME—UNLAWFUL SPEED.

An allegation in such complaint that the train by which the child was injured was running at an unlawful speed is immaterial, there being no facts alleged to support it, and no reference to any statute fixing a lawful rate of speed.

At Law. On demurrer to complaint.

*T. C. Griffiths*, for plaintiff.

*J. M. Ashton* and *S. C. Hyde*, for defendant.

HANFORD, J. The plaintiff prosecutes this action in his own right to recover damages for an injury to his child caused by negligence, resulting in expense to the plaintiff for medical and surgical treatment and loss of service during the minority of the child. The complaint charges, as the ground for holding the defendant liable, that the child, being at the time of the age of 22 months, went upon the defendant's railroad, and was run over by a passing train, and so maimed and injured as to be crippled for life, and that the engineer or servant of the defendant in charge of the locomotive could have seen the child on the track in time to have stopped the train and averted the disaster, and that failure to see the child and stop the train in time was negligence. By a demurrer to the complaint, the question is raised whether the facts stated are sufficient to constitute a cause of action. I hold that the facts are not sufficient. The defendant was not bound by any contract with the plaintiff to take care of or provide for the safety of his infant, and owed no duty to look out for intruders upon its track on ground dedicated and reserved for its exclusive use as a right of way. The complaint does not charge that the child was enticed or licensed by the defendant to come upon its track, nor that the place where the injury happened was at a public crossing or within a public highway, nor that the defendant's servants, after seeing the child, intentionally or wantonly committed the injury; and without one or the other of these elements, or something equivalent thereto, I cannot regard the defendant's conduct as being morally culpable or legally wrong, so as to give rise to a legal claim for damages. While there are cases holding railroad companies responsible for injuries to trespassers not seen in time, but who might have been, by ordinary care and vigilance, discovered in time to have avoided the infliction of injuries, I find a decided preponderance of authority to the contrary. See 1 Thomp. Neg. 448; *Saldana v. Railroad Co.*, 43 Fed. Rep. 862; *Ross v. Railroad Co.*, 44 v.47F.no.10—44