CUNNINGHAM v. NEW YORK CENT. & H. R. R. CO.

(*Circuit Court, S. D. New York.* February 10, 1892.)

DAMAGES—OPINION EVIDENCE—FUTURE EFFECT OF INJURIES.

In an action to recover damages for personal injuries, the opinions of medical experts as to the permanence and probable future effect of those injuries may be received.

At Law. Action by Edward H. Cunningham against the New York Central & Hudson River Railroad Company to recover damages for personal injuries. There was a verdict for plaintiff, and defendant moves for a new trial. Motion overruled.

Daniel Nason, for plaintiff.

Austen G. Fox, for defendant.

WHEELER, District Judge. The plaintiff got a verdict for injuries to his person while a passenger on one of the defendant's freight trains. The principal questions saved at the trial, and relied upon now, relate to the testimony of expert physicians who attended upon him, and have since examined him, as to the permanency and probable future effects of the injuries, and to his right to recover damages for what these effects are likely to be. "The opinions of medical men are constantly admitted as to the cause of disease or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind as collected from a number of circumstances, and as to other subjects of professional skill." 1 Greenl. Ev. § 440. The questions objected to were allowed because thought to be within this rule, and they are still thought to be so. The principal objection to answers allowed to stand is that they were not positive, but more or less conjectural. They could not, however, from the nature of the subject, be absolutely positive, but, being as to opinion, must be more or less uncertain. Their weight, according to their positiveness, with other respects, was for the jury, and was left to the jury. *Fetter* v. *Beal*, 1 Ld. Raym. 339, 692, 1 Salk. 11, 12 Mod. 542, was for the coming out of part of the plaintiff's skull in consequence of a battery, after recovery for the battery; and, on demurrer to a plea of the former recovery, Lord HOLT, C. J., said: "If this matter had been given in evidence as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it;" and the demurrer was sustained. This case is not shown nor seen to have been overruled or questioned, but seems to have been approved, and to be correct in principle. Sedg. Dam. 104; *Whitney* v. *Clarendon*, 18 Vt. 252; *Fulsome* v. *Concord*, 46 Vt. 135; *Stutz* v. *Railway Co.*, 73 Wis. 147, 40 N. W. Rep. 653; *Treadwell* v. *Whittier*, 80 Cal. 575, 22 Pac. Rep. 266. The ruling on this subject seems to be within this principle. Another point suggested now, as to expenses of treatment and of journey home, does not appear to have been saved at the trial, perhaps because not of much importance, and it could have been helped by amendment. Motion for new trial overruled.

St. Louis & S. F. Ry. Co. *v.* O'Loughlin.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1892.)

1. Railroad Companies—Killing Stock—Instruction—Harmless Error.
In an action for the killing of a mule, struck by a locomotive on the prairie in broad daylight, three passengers on the train testified that they saw a bunch of mules ahead of the train; that they ran a considerable distance along the track; that the train was running at a good speed, and was not slowed up until it ran into and scattered the mules; and that it seemed as if the engineer were trying to run them down. Defendant failed to call the engineer as a witness, or to offer any evidence on this issue. *Held* harmless error to charge that the engineer was bound to use the "utmost" care, as it was evident that no care whatever was exercised.
2. Indian Territory—Limitations—Missouri Statutes.
The statutes of the territory of Missouri, including the statute of limitations, ceased to operate in the region now composing the Indian Territory when that region ceased to be a part of Missouri, and there was no statute of limitations in force in the Indian Territory from that time until May 2, 1890, when congress extended over it the statute of Arkansas.

In Error to the United States Court in the Indian Territory.

Action by John O'Loughlin against the St. Louis & San Francisco Railway Company to recover for the killing of a mule. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

E. D. Kenna and *L. F. Parker*, for plaintiff in error.

S. B. Dawes and *W. P. Thompson*, for defendant in error.

Before Caldwell, Circuit Judge, and Shiras and Thayer, District Judges.

Caldwell, Circuit Judge. This action was commenced in the United States court in the Indian Territory by O'Loughlin against the railway company, to recover damages for a mule alleged to have been killed by the negligence of the company. The defense was a general denial, and a plea of the statute of limitations of three years. The plaintiff recovered judgment below for $241.65, and the company sued out this writ of error.

The first error assigned is that there is no evidence of negligence. There is in the record the testimony of three witnesses, who were passengers on the passenger train which struck and injured the plaintiff's mule, and from which injuries it soon thereafter died. One of these witnesses testifies that "the train was running at about its usual rate of speed. There was a bunch of mules on the prairie in front of the train, and the engineer seemed to be trying to run them down; for we were going over a rough road, and running at a good speed, as fast or faster than its usual speed on good road. There was a slough on one side of the track, and some mud holes on the other side. I saw the bunch of mules on the prairie, near the track, in front of the train. When the train run into the bunch, they scattered." The second witness testified that he "was looking out the window, and saw a bunch of mules, four or six in number, on the prairie, near the railroad, in front of the train. They started off in a run down the track, and it looked like the engineer was trying to run them down. The train run into the bunch. * * * I then