

NEW JERSEY & N. Y. R. CO. v. YOUNG.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

1. **MASTER AND SERVANT—PERSONAL INJURIES—IMPUTED NEGLIGENCE.**
Negligence cannot be imputed to a fireman because he does not endeavor to enforce upon the engineer obedience to the regulations of the railroad.
2. **SAME—KNOWLEDGE OF DEFECTS—CONTINUANCE IN SERVICE.**
For a fireman, knowing of a defect in the air-brake, to remain upon a locomotive is not conclusive of negligence on his part, and it is a proper question for the jury whether the defect is such that a man of ordinary prudence and intelligence would not have remained, and also whether the accident would have happened had the brake been in proper order.
3. **SAME—PROMISE TO REPAIR.**
That a servant continues in a dangerous service in consequence of the master's assurances that the danger shall be removed precludes any argument that the servant, by remaining, assumes its risks, and recovery can be had for an injury caused by the defect after the lapse of a reasonable time for its correction.
4. **SAME—FELLOW-SERVANTS.**
The negligence of a fellow-servant does not excuse the master from liability for an accident which would not have happened had the master performed his duty. 46 Fed. Rep. 160, affirmed.

On Writ of Error from Circuit Court, Eastern District of New York. Action by William H. Young against the New Jersey & New York Railroad Company, for damages for personal injuries. The cause was originally brought in the supreme court of New York, and subsequently removed to the federal court. Verdict and judgment were there rendered for plaintiff, and a new trial was denied. Defendant brings error. Affirmed.

Robert W. De Forest, for plaintiff in error.

Charles C. Suffren, (*Irving Brown*, of counsel,) for defendant in error. Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the original suit to review a judgment for the plaintiff rendered upon a verdict of the jury. The plaintiff, a fireman in the employ of the defendant, while firing the locomotive of an express train on the defendant's railway on a trip from Jersey City to Haverstraw, was injured by a collision between his train and some cars upon a side track of the railway. The side track was not disconnected from the main track at the time, and this fact was indicated by a danger signal of a red light, indicating that the switch was open. A white light would have indicated that it was closed. The track was straight for a considerable distance ahead of the switch. The side track was at a station where there is a junction between the tracks of the defendant's railway and those of another railway. Among the regulations of the defendant, furnished to its engineers, were the following:

"All trains must approach * * * junctions * * * prepared to stop; and must not proceed until the switch or signals are seen to be right, or the track is plainly seen to be clear. * * * He [the engineer] must always run upon the supposition that at any station he may find a switch out of place, and he must have his train well in hand, on approaching a switch or station."

As the train was approaching the switch, at the rate of 25 miles an hour, and when several hundred feet distant, the plaintiff noticed the signal was a red light, and the engineer immediately reversed his engine and applied the air-brake. The testimony upon the trial authorized the jury to find that the air-brake was out of repair; that if it had been in proper order the train could have been stopped between the place where it was applied by the engineer and the switch; that both the plaintiff and the engineer knew the brake was out of order; that within the previous week the engineer, in the presence of the plaintiff, had notified the defendant's superintendent that the brake was out of order; and that the superintendent, through the engineer, had directed the defendant's repairer to put it in order, but the repairer had neglected to do so. The testimony also authorized the jury to find that, owing to the fog at the time, the color of the signal was not distinguishable further away than the place at which the brake was applied. At the close of the testimony the defendant's counsel requested the judge to instruct the jury to render a verdict for the defendant on the grounds (1) that no negligence on the part of the defendant was shown; (2) that the accident was caused by the negligence either of the plaintiff or of the engineer, his fellow-servant; and (3) that the proximate cause of the accident was the negligence of the engineer or fireman with reference to the danger signal, irrespective of any defect in the brake. The court refused these instructions, and the defendant took an exception. The defendant assigns error because of the refusal of the trial judge to give these instructions. We think the instructions were properly refused.

It is not fairly open to discussion that the facts in evidence would authorize a recovery by the plaintiff if he had not been aware of the defective condition of the air-brake, or if the engineer had not been guilty of negligence in running his train in violation of the regulation; especially so when he knew that the brake was out of order. A fireman has no authority to interfere with the engineer in the management of a train, and therefore negligence cannot be imputed to the plaintiff because he did not endeavor to enforce obedience to the regulations upon the engineer. His personal negligence, if there was any, is to be found in his conduct in remaining as a fireman upon a locomotive which was so defectively equipped that it could not be seasonably stopped. It was clear after the accident that the brake was so defective that the train could not be stopped within a distance at which, on a foggy night like the one in question, danger signals could be discerned. But there is nothing in the evidence to indicate that this was manifest to the plaintiff before the accident took place. It was a question for the jury to determine whether the defect was such that a man of ordinary prudence and intelligence would not have remained upon a locomotive as a fireman after knowledge of it. That the plaintiff knew of the defect in the appliance was not, under the circumstances, and as a matter of law, absolutely conclusive of negligence on his part, even though there had been no assurance from the defendant that it should be repaired. *Ford v. Railroad Co.*, 110 Mass. 240, 261; *Laning v. Railroad Co.*, 49 N. Y.

521; *Daley v. Printing Co.*, 150 Mass. 77, 22 N. E. Rep. 439; *Myers v. Iron Co.*, 150 Mass. 125, 22 N. E. Rep. 631; *Hough v. Railway Co.*, 100 U. S. 213; *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044. But the evidence authorized the jury to find that the plaintiff had been assured that the defendant would repair the air-brake. "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks." *Cooley, Torts*, 559. This doctrine is cited with approval in *Hough v. Railway Co.*, *supra*, as is also the following language from *Shear. & R. Neg.* (3d Ed.) § 96: "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." See, also, *Holmes v. Clark*, 10 Wkly. Rep. 405; *Laning v. Railroad Co.*, *supra*; *Greenleaf v. Railroad Co.*, 33 Iowa, 52; *Railroad Co. v. Platt*, 89 Ill. 141. If it should be assumed that the engineer was guilty of negligence, either by his disregard of the regulations or otherwise, which contributed to the accident, such negligence would not necessarily defeat the action, if the negligence of the defendant was also contributory. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493. The defendant would not be liable if the negligence of the engineer was the sole cause of the accident, because, being a fellow-servant with the plaintiff, his negligence was one of the risks for which the defendant, as master, did not assume to be responsible. But negligence of a fellow-servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty. *Coppins v. Railroad Co.*, 122 N. Y. 557, 25 N. E. Rep. 915. It was a fair question of fact in the present case whether the accident would have happened if the air-brake had been in proper order, because, notwithstanding the train was proceeding at an improper rate of speed and in violation of the instructions, there was evidence to indicate that the train could have been stopped before reaching the switch after the brake was applied.

The judgment is affirmed.

*In re MILLS et al.**(Circuit Court, S. D. New York. December 4, 1891.)***CUSTOMS DUTIES—CLASSIFICATION—ELASTIC CORDS AND BRAIDS—SILK AND INDIA RUBBER—SILK CHIEF VALUE.**

Elastic cords and braids, manufactured of silk and India rubber, silk being the component material of chief value, are dutiable at 50 per centum *ad valorem*, under Schedule L, tariff act of March 3, 1883, (Heyl, Tariff Ind., New, par. 333,) and not at 30 per centum *ad valorem*, under the provision for India rubber fabrics, etc., in Schedule N of said tariff act, (Heyl, Tariff Ind., New, par. 453.)

At Law.

Application by the collector of the port of New York, under the provisions of section 15 of the act of congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," for a review by the United States circuit court of the decision of the board of United States general appraisers at the port of New York, reversing the decision of the collector of said port relating to the classification for duty of certain elastic cords and braids, which were entered at said port by the importers July 28, 1890, and were classified for duty by the collector as "manufactures of silk and India rubber, silk chief value," and duty accordingly assessed thereon at the rate of 50 per centum *ad valorem* under Schedule L of the tariff act of March 3, 1883, (Heyl, Tariff Ind., New, par. 333,) which provision is as follows:

"All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem*."

Against this classification the importers duly protested, claiming that the merchandise was dutiable at no more than 30 per centum *ad valorem* under the provision in Schedule N of said tariff act, (Heyl, Tariff Ind., New, par. 453,) which is as follows:

"India rubber fabrics, composed wholly or in part of India rubber, not specially enumerated or provided for in this act, thirty per centum *ad valorem*."

The board of United States general appraisers in their decision sustained the protest of the importers, and reversed the decision of the collector, finding as matters of fact that "the merchandise consisted of fabrics in the piece, composed of silk and India rubber, of which the silk was the component of chief value; that it was invoiced as elastic braids and elastic cords, and belongs to a class of goods commonly and commercially known as 'India rubber fabrics.'" The collector procured the return of the board of United States general appraisers to be filed in the circuit court, pursuant to the above-mentioned statute of June 10, 1890, and thereafter further procured an order of the court referring the matter to one of the said board of general appraisers as an officer of the court to take testimony therein, no testimony having been taken in the proceedings before the board of general appraisers. Upon the reference it was proved in behalf of the collector and the government by competent trade witnesses that in March, 1883, and immediately prior thereto, the

merchandise in question was known in the trade as "silk elastic strands" or "silk braid," "satin oval braids or elastics," and "silk elastic cord," and that these articles were never known at that time in the trade as "India rubber fabrics." It appeared also by the trade testimony that, so far as the term "India-rubber fabrics" had any specific meaning in trade, it applied to a class of dry goods which were commonly non-elastic. It also appeared that the articles involved in this proceeding came in the piece, running about 36 yards in length, wound on cards, and a quarter gross in a box. On the trial it was contended on behalf of the government that the testimony of the trade witnesses examined before the officer of the court had disproved the fact found by the board of general appraisers that these articles were known in the trade as "India-rubber fabrics;" that the term "India-rubber fabrics," as used in the statute, not having any distinct or special trade signification, was not as specific a designation of the merchandise as the description, "all goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value," as contained in paragraph 383 of the Silk Schedule L; and that under the decision of the United States supreme court in the case of *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. Rep. 751, the enumeration in the silk paragraph was a special enumeration, rather than the term "India-rubber fabrics," as used in paragraph 453; and consequently that the rate of duty provided for in the silk schedule as assessed by the collector was the correct one, and that the decision of the board of general appraisers should therefore be reversed.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for collector and the United States.

Curie, Smith & Mackie, for importers.

LACOMBE, Circuit Judge. These articles seem fairly within the dictionary meaning of the word "fabric," and I do not find sufficient in the testimony of the trade witnesses to show a specific trade meaning for the term "India-rubber fabrics," such as would take these out of such ordinary meaning. The word "fabric" is rather a broad one in common speech. It is certainly as broad, if not broader, than the word "cloth." I feel constrained by the decision in the supreme court in *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. Rep. 751, to reverse the decision of the board of general appraisers in this case, in view of the fact that the court in that case had before them a cloth which was composed in part of wool, and still found that it was dutiable under the provision of Schedule L, for the reason that silk was the component material of chief value. It appears that silk is the component of chief value in this case, and I understand that I am but following the rule of the supreme court in holding that the silk clause should control here as against the term "India-rubber fabrics," just as in the other case it controlled the classification of a "cloth" which was "composed in part of wool." The decision of the board of appraisers is reversed, and the articles should be classified under paragraph 383. This decision applies to the articles covered by the collector's appeal.

In re GOURD et al.

(Circuit Court, S. D. New York. January 11, 1892.)

CUSTOMS DUTIES—CLASSIFICATION—“BENEDICTINE CORDIAL.”

The *liqueur* cordial known as “Benedictine,” prepared in France after a secret formula derived from Benedictine monks of the abbey of Fecamp, in that country, and put up in bottles with labels signed and trade-marked by the proprietors, and accompanied, in the case of each bottle, by a circular claiming for the liquor certain therapeutic and prophylactic qualities; but the fact appearing in evidence that the “Benedictine” was a pleasant after-dinner drink, taken in small *liqueur* glasses, and that the greater part of it was sold to grocers, liquor dealers, and private families, and used as a beverage, *held*, that it was dutiable under Schedule H (paragraph 313, Tariff Ind. New) of the tariff act of March 3, 1883, as a cordial containing spirits, at two dollars per proof gallon, and not as a proprietary preparation under Schedule A (paragraph 99, Tariff Ind. New) of the same act.

(Syllabus by the Court.)

At Law. Application by the importers under the provisions of section 15 of the act of congress entitled “An act to simplify the laws in relation to the collection of the revenue,” approved June 10, 1890, for a review by the United States circuit court of the decision of the board of United States general appraisers affirming the decision of the collector at the port of New York in the classification for duty of certain Benedictine entered at said port, September 22, 1890, which was assessed for duty as “cordial (not proof) cases of 12-1 and 24-2 bottles each, 3 gallons to the case,” at the rate of two dollars per gallon, under the provisions of Schedule H (Heyl’s Tariff Ind. New, par. 313) of the tariff act of March 3, 1883, and at three cents per bottle on the bottles containing the same, under the provisions of paragraph 310 of the same schedule and act. Said paragraph 313 reads as follows:

“Cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon.”

The importers duly protested, claiming that the merchandise was dutiable at 50 per cent. on the value of the Benedictine, as a proprietary preparation, under Schedule A (Heyl’s Tariff Ind., New, par. 99) of said tariff act, and at 30 per cent. on the value of the filled bottles containing the same, under Schedule B of said act, (Heyl’s Tariff Ind., New, par. 133.) Said paragraph 99 provides as follows:

“Proprietary preparations, to-wit, all cosmetics, pills, powders, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or preparations or compositions, recommended to the public as proprietary articles, or prepared according to some private formula as remedies or specifics for any disease or diseases or affections whatever, affecting the human or animal body, including all toilet preparations whatever, used as applications to the hair, mouth, teeth, or skin, not specially enumerated or provided for in this act, fifty per centum *ad valorem*.”

Testimony was taken before one of the board of the United States general appraisers, as an officer of the court, in behalf of the importers and of the government, by which, and from the sample of the *liqueur* pro-