

456; *Milburn v. Railway Co.*, 86 Mo. 104; *Railway Co. v. Geiger*, 21 Fla. 669; *Railway Co. v. Bolson*, (Kan.) 14 Pac. Rep. 5; *Walsh v. Railroad Co.*, 8 Nev. 111; *Railway Co. v. Betts*, (Colo. Sup.) 15 Pac. Rep. 821; *Railway Co. v. Heiskell*, 13 Amer. & Eng. R. Cas. 555; *Railroad Co. v. McMillan*, 37 Ohio St. 554; *Railway Co. v. Henderson*, (Colo. Sup.) 13 Pac. Rep. 910.

In reference to stock injured or killed by railroad companies upon their tracks, several of the states have passed statutes imposing more extensive duties and liabilities on the companies than was imposed by the common law. Some of the states have enacted statutes making proof that an animal was injured or killed by a railroad company *prima facie* evidence of negligence on the part of the company. A statute in Arkansas is construed by the supreme court of that state to have this effect. The court said:

"The true construction of the act in question is that, the killing being shown or confessed, the presumption is that it was done by the train, and that it resulted from want of care. At common law, the *onus* of proving these facts was on the plaintiff." *Railroad Co. v. Payne*, 33 Ark. 816, 824.

But the statute of Arkansas, here referred to, was not among those put in force in the Indian Territory by the act of congress. It will be observed that the rule in that state, that, the killing being shown, the law presumes that it resulted from negligence on the part of the railroad company, is grounded on a statute, and that the court declares that at common law the *onus* of proving the negligence was on the plaintiff. The plaintiff must prove the negligence as well as the killing; but, as we pointed out in the case of *Railway Co. v. Washington*, 49 Fed. Rep. 347, (at the present term,) these facts may be proved by circumstantial evidence, and, as is there shown, it is not such a difficult task as counsel seem to suppose to prove facts and circumstances from which a jury might rightfully infer both the killing and the negligence. But in that territory the inference in such cases is not one of law, but of fact, to be drawn by the jury from all the evidence in the case. The judgment of the court below is reversed, and the cause remanded, with instructions to grant a new trial.

EDDY et al. v. DULANEY.

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

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

Clifford L. Jackson, for plaintiffs in error.

G. B. Dentson and *N. B. Muxey*, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was commenced by the plaintiff below to recover damages for the alleged negligent killing of his cattle by the defendants below while operating the Missouri, Kansas & Texas Railway, as

receivers. The plaintiff recovered judgment, and the defendants sued out this writ of error. Upon the trial the court gave the same instruction to the jury that was given in the case of these same plaintiffs in error against Lafayette, 49 Fed. Rep. 798, (decided at this term.) This was error. The judgment of the court below is reversed, and the case remanded, with instructions to grant a new trial.

EDDY *et al.* v. WALLACE.

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

1. CARRIERS—INJURY TO PASSENGERS—MOVING TRAIN.

Plaintiff took passage on defendants' freight train, which, when it reached his station, halted in such a position that the caboose in which he was riding was quite a distance from the station. He had alighted, or was in the act of alighting, when the brakeman told him not to get off, for, after the freight was unloaded, the train would be moved so as to bring the caboose near the platform. The train, instead of slowing up as the caboose neared the platform, increased its speed, and plaintiff, acting under the advice of the brakeman, jumped off, and was injured. *Held*, that defendants were estopped by the act of their servant from claiming that plaintiff was in fault in not leaving the train when it first stopped, or that its contract of carriage was fully performed at such time; that defendants could not avail themselves of their general custom as to the stoppage of freight trains, nor of the rule that passengers on freight trains assume increased risks; and that plaintiff was entitled to recover if, in jumping off the train, he acted as a prudent man would have acted in the circumstances.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is a defense which will not avail defendants, unless sustained by a preponderance of the evidence.

3. SAME—DAMAGES.

In an action for personal injuries caused by defendants' negligence, where it appears that plaintiff has not fully gained the use of the injured member, damages may be given for future loss.

Error to the United States Court in the Indian Territory.

Action by William J. Wallace against George A. Eddy and H. C. Cross, as receivers of Missouri, Kansas & Texas Railway, for personal injuries. Verdict and judgment for plaintiff. Defendants bring error. Affirmed.

Clifford L. Jackson, for plaintiffs in error.

W. L. Hutchings and Sandels & Hill, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. The plaintiffs in error are the receivers having charge of the Missouri, Kansas & Texas Railway, and operating the trains thereon, under the orders of the United States circuit court for the district of Kansas. The defendant in error, on the 7th day of May, 1890, became a passenger on a freight train operated by the receivers, for the purpose of going from Kiowa to Stringtown station, in the Indian Territory. The train contained many cars, and, when it reached the station last named, it was halted in such a position that the caboose in which the defendant in error was seated was quite a distance from the