

LITTLE ROCK & M. R. CO. v. MOSELEY.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 232.

1. APPEAL—REVIEW—WAIVER OF ERRORS.

A party who has requested an instruction which assumes that there is some evidence as to a certain matter cannot allege error in the giving of another instruction, relating to the same matter, on the ground that there was no evidence in relation thereto.

2. MASTER AND SERVANT—RISKS OF EMPLOYMENT — SWITCHMAN NOT CHARGED WITH KNOWLEDGE OF DEFECTIVE TRACKS.

In an action for personal injuries suffered by plaintiff, a switchman, while coupling cars, the failure of defendant to keep the spaces between the ends of the ties properly filled was alleged as a cause of the injury. Plaintiff had been working five nights before the accident as night switchman in the yard where it occurred, which was a mile long and half a mile wide, and he testified that he did not know the condition of the track at the place of the accident. *Held*, that an instruction that plaintiff could not recover if he began or continued work with knowledge of the defect, and that he was bound to take notice of apparent defects, was sufficient, without a further charge that before taking service in the yard he was bound to inform himself of the condition of all the tracks. Plaintiff was not bound to examine all the tracks to see whether he could safely walk on them.

3. SAME — SAFE APPLIANCES — RAILWAY COMPANY RESPONSIBLE FOR NEGLIGENCE OF CAR INSPECTORS.

A railway company is responsible to a switchman in its service, who is injured by the breaking of a defective coupling link, for the negligence of its car inspectors, in failing to discover and remedy the defect in the link. *Railroad Co. v. Herbert*, 6 Sup. Ct. Rep. 590, 116 U. S. 642, 652, and *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, 149 U. S. 368, followed.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

At Law. Action by H. W. Moseley against the Little Rock & Memphis Railroad Company for personal injuries suffered by plaintiff while in defendant's service. Judgment was given for plaintiff. Defendant brings error. Affirmed.

U. M. Rose, (W. E. Hemingway and G. B. Rose, on the brief,) for plaintiff in error.

Geo. H. Sanders and Sterling R. Cockrill, for defendant in error.

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

THAYER, District Judge. This is a suit for personal injuries which were sustained by the defendant in error while attempting to couple cars at Hopefield, Ark., on the line of the Little Rock & Memphis Railroad Company. The defendant in error was a switchman in the employ of the last-mentioned company. The accident occurred on October 18, 1891, before daylight, in the switch yards at Hopefield, while the defendant in error was helping to make up a freight train that was about to leave that station. Among other things, the complaint alleged, in substance, that the injury complained of was due to the fact that the railway company failed

to provide a suitable roadbed, grounds, and switch yard where the switching was required to be done, and that it also failed to provide suitable coupling links wherewith to do the coupling, and that it neglected to properly inspect the coupling links that were in use on its cars, and keep them in a safe and proper condition to be used.

On the trial in the circuit court the defendant in error, who was the plaintiff below, recovered a verdict for \$4,000. The evidence showed that, as he was attempting to make a coupling on the occasion in question, the coupling link broke, and a large piece thereof was thrown against plaintiff's right leg, and broke it in two places.

It is assigned for error that the circuit court improperly gave an instruction, to the effect that in employing switchmen to couple and uncouple cars a railway company undertakes "to provide and keep a reasonably safe and suitable roadbed, grounds," etc. The chief objection urged against this instruction is that the evidence showed that the condition of the roadbed and grounds, had nothing whatever to do with the injury complained of, and that the instruction was misleading, because it assumed that the condition of the roadbed may have contributed to the accident. This objection is not tenable, for the following reasons: The defendant company did not request the court to charge the jury that there was no evidence tending to show that the condition of the track contributed to the injury. On the contrary, it assumed that there was some evidence of that character, by requesting the court to give the following instruction, which appears to have been given at its request:

"If you find that the spaces between the cross-ties had not been filled with earth, you will inquire whether that fact had anything to do with the accident. If it did not, if the accident is one that might as well have happened upon a track thoroughly ballasted as on the track in question, then you will dismiss the fact from your minds, in arriving at a conclusion."

A party will not be heard to complain of an error which was committed at his instance, or to criticise an instruction of a trial court because it took a view of the law or the testimony which the party himself entertained, as shown by his requests for instructions. *Walton v. Railway Co.*, (8th Circuit,) 12 U. S. App. 511, 6 C. C. A. 223, 56 Fed. Rep. 1006, and citations. And where the evidence is such as to warrant a request for a peremptory instruction to find for the defendant on a given issue, that arises under the pleadings, a failure to ask for such an instruction will preclude the party from assigning as error that the court allowed such issue to be determined by the jury. *Insurance Co. v. Unsell*, 144 U. S. 439, 451, 12 Sup. Ct. Rep. 671. In view of these rules of law, it is manifest that the plaintiff in error is in no position to complain because the circuit court instructed the jury relative to the duty of the railway company in taking care of the tracks and grounds within its switch yard.

It is further assigned for error that the trial court refused to give the following instruction: