

struction may have been one of the perils which, in the mind of the superintendent, made that employment extremely dangerous to a boy of 14. The superintendent of the mine represented and stood in the place of the defendant in the action, and was not a fellow servant with the plaintiff, and the jury may have believed from the evidence that all the acts of the plaintiff were done in consequence of the superintendent's instructions, notwithstanding the fact that the plaintiff was at the time of the injury under the immediate supervision of the driver, who was his fellow servant. The plaintiff, in entering the employment of the defendant, took upon himself the risks incident to the service which he engaged to perform, but he did not assume the risk of service other than those he contracted to render, and which neither he nor his father would have reason to believe he would be required to encounter.

We think the principles involved in this case are fully covered by the decision of the supreme court in *Railroad Co. v. Fort*, 17 Wall. 553. In that case a boy of 16 was engaged as helper in a machine shop. His duties were to receive and carry away moldings as they came from the molding machine. He was directed to ascend a ladder to a considerable height, among dangerous machinery, and adjust a belt which was out of place. In so doing, he lost his arm. The court held it to be immaterial whether the boy was acquainted with the danger of the undertaking, and that, in view of the tender years of the boy, the fact that the injury did not occur in the discharge of the duties his father had engaged he should do, and the peril of the unusual service he was required to render, all of which facts were found in a special verdict, the railroad company was liable for the injury.

The judgment is affirmed, with costs to the defendant in error.

ATLANTIC & PAC. R. CO. v. LAIRD.

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 140.

1. PLEADING—AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.

The complaint in an action against two railroad companies charged negligence of both, causing personal injury to plaintiff, a passenger on a railroad alleged to have been operated by both defendants. Amendment being allowed, plaintiff set forth the same injury from the same occurrence, but charged that the railroad was operated by one of the original defendants, and that its negligence caused the injury, corrected a mistake as to the incorporation of such defendant, and struck out the other defendant as a party. *Held*, that the amended complaint did not set out a new cause of action.

2. CARRIERS—INJURIES TO PASSENGERS—ACTION EX DELICTO—JOINT LIABILITY.

An action against two railroad companies for personal injuries to a passenger from their negligence causing derailment of a train is an action ex delicto, notwithstanding an allegation in the complaint that plaintiff held a ticket for transportation on the railroad, and the right to recover against one is not affected by the fact that plaintiff fails to sustain the action against the other.

8. SAME—REQUISITES OF COMPLAINT.

To charge a railroad company with liability for personal injuries sustained by a passenger by reason of the derailment of a train, it is unnecessary to allege that defendant is a common carrier, or that it owed a duty to plaintiff.

In Error to the Circuit Court of the United States for the Southern District of California.

At Law. Action by Mary J. Laird against the Atlantic & Pacific Railroad Company to recover damages for a personal injury caused by negligence in suffering a train upon which she was a passenger to be derailed. Judgment for plaintiff. Defendant brings error. Affirmed.

C. N. Sterry, for plaintiff in error.

Frank H. Short and Edwin A. Meserve, for defendant in error.

Before McKENNA, Circuit Judge, and HANFORD, District Judge.

HANFORD, District Judge. This action was originally against the Atchison, Topeka & Santa Fe Railroad Company and the plaintiff in error; the complaint charging that, at the time of the accident in which she was injured, the railroad upon which it occurred was being operated by the two corporations jointly, and that both were negligent, and responsible for her injury. The first trial of the case resulted in a verdict and judgment in favor of the Atchison, Topeka & Santa Fe Railroad Company, and against the plaintiff in error for \$8,000. After vacating said verdict and judgment against the plaintiff in error, the circuit court permitted a second amended complaint to be filed, which sets forth as the cause of action the same injury resulting from the same accident, but corrects a mistake in the original complaint as to the manner in which the plaintiff in error became incorporated, and charges that said railroad was being operated by the plaintiff in error, and that its negligence caused said injury. Numerous exceptions were taken to the rulings of the circuit court upon various motions and proceedings, by which the plaintiff in error claimed exemption on the ground that the second amended complaint substituted a cause of action entirely different from the one originally sued on, after it had become barred by the statute of limitations. A second trial resulted in a verdict and judgment against the plaintiff in error for \$3,000.

Although the assignment of errors in the record contains nine specifications, counsel was careful to inform this court that a new trial is not desired, and that the only grounds relied upon for reversing the judgment are errors of law in permitting the second amended complaint to be filed, and in refusing to strike it from the files, and in allowing the plaintiff to recover upon the cause of action set forth therein. In the brief of counsel for the plaintiff in error he claims that when the second amended complaint was filed, "for the first time in the history of the case, the plaintiff in error was alleged to be a corporation incorporated under the laws of the United States as a common carrier of passengers, and that the plaintiff in error, as a common carrier of passengers, was carrying the plaintiff below in one of its cars on a ticket which entitled her to

ride at the time of her injury, and it was alleged for the first time that the plaintiff in error was by itself operating the railroad at the point where plaintiff was injured, and that it was through its carelessness, and the carelessness of its servants, that the injury occurred."

The argument is that the action is *ex contractu*; that the original complaint alleged a joint contract and liability of the two original defendants; that the second amended complaint describes a different contract, because the Atchison, Topeka & Santa Fe Company is not a party to it, and therefore a distinct and new cause of action has been substituted for the one originally sued on. There is no contract specifically pleaded, but the action is said to arise *ex contractu*, because the allegation that the plaintiff was a passenger holding a ticket entitling her to transportation on the railroad presupposes a contract, and it is said that unless the action is based upon a contract the complaint does not state facts sufficient to constitute a cause of action. Counsel contends that an actionable tort is not sufficiently alleged, because there is no specification of any particular duty which the defendant owed to the plaintiff. The original complaint is also criticised because it contains no averment that the defendant is a common carrier.

We consider all the positions assumed by counsel for the plaintiff in error to be untenable. In the first place, the last complaint manifestly states the same cause of action as the one attempted to be set forth in the original complaint; the injury, and the time, place, and manner of its occurrence, according to the last complaint, being the same as at first alleged. Instead of substituting a different cause of action, the amended pleading only corrects the mistakes of the first. Even under the common-law system of practice, since the statute of jeofails, in actions *ex contractu* the courts have power to allow amendments of this nature. In Dicey, Parties, p. 506, the rule applicable to such cases is stated thus: "In an action on contract, * * * misjoinder of defendants is, unless amended, fatal." The Code of California is equally liberal. It expressly provides that "the court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect." Code Civil Proc. Cal. § 473.

Secondly, we hold that the injury and the wrong complained of constitute the gravamen of this action. It is therefore to be classed as an action *ex delicto*, and the right of the plaintiff to recover damages from a party legally liable is in no way affected by her failure to substantiate her claim against another party sued as a joint tortfeasor. The supposed defect in the complaint, for want of any specification of the duty of the defendant in the premises, does not exist. Facts amounting to a breach of duty are distinctly alleged. This is sufficient. The law imposes upon all railroad corporations engaged in running trains the duty of exercising due care to prevent the same from being derailed, and to avoid all accidents whereby the lives of passengers may be endangered. An allegation to this

effect would not tender an issue. It would be a mere legal conclusion, and therefore both unnecessary and improper in a complaint. And it was equally unnecessary to allege that the plaintiff in error is a common carrier. Railroads are quasi public highways, and all railroad corporations actively engaged in operating passenger trains are subject to the liabilities and duties imposed by law upon common carriers of passengers. We find no error in the record. The judgment should be affirmed, and it is so ordered.

UNITED STATES v. SAUL.

(District Court, W. D. North Carolina. November 10, 1893.)

1. CARRIERS OF PASSENGERS—TRANSPORTATION OF EXPLOSIVES—DYNAMITE.

The prohibition in Rev. St. § 5353, against transporting nitroglycerin upon vehicles engaged in interstate passenger traffic, extends also to dynamite, which is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient.

2. SAME—WHAT ARE PASSENGER TRAINS.

A freight train may be regarded as a passenger train, within the meaning of this section, when passengers are conveyed thereby for compensation, in any kind of cars, by authority of the railway company.

Indictment of W. S. Saul under section 5353, Rev. St. U. S., for transporting nitroglycerin on a railway train employed in conveying passengers from the state of Georgia into the state of North Carolina.

R. B. Glenn, U. S. Atty., and D. A. Covington, Asst. U. S. Atty.
G. F. Bason and R. L. Leatherwood, for defendant.

DICK, District Judge, (charging jury.) This is the first time that my judicial duty has required me to construe and apply the provisions of the statute upon which this indictment is founded. The manifest design of the statute is the security and preservation of passengers when traveling upon public conveyances employed in transporting them from one state into another. The statute was enacted by congress in exercising the power to regulate interstate commerce. In another section, (Rev. St. U. S. § 4280,) relating to the same subject, express provision is made that the preceding sections shall not be so construed as to prevent a state or a municipal corporation from passing laws or ordinances regulating to some extent the traffic and transportation of the dangerous explosive articles and substances mentioned in the statute. Railway companies are invested with charter privileges for the purpose of transporting passengers and freight, which is a commercial business, and involves intercourse, and interchange of commodities; and they are properly regarded as commercial corporations intended in many respects for public convenience and benefit. Though penal laws and criminal proceedings are, as a general rule, to be strictly construed and observed, yet the obvious intent of the legislature must not be defeated by a narrow and technical construction and application. The manifest design of the statute