

the stationary engine referred to, and was severely injured. Plaintiff was an old, experienced railroad man, and was perfectly familiar with the movements of engines, and had frequently assisted in moving engines in the same manner as this one was being moved. The work in which he was assisting was done in broad, open daylight. The position of each engine was seen by him before he commenced, and he had equal opportunities of knowing, with the others, whatever danger there might be incident to the work. In his testimony he says: "A. I went down in front of the two engines, or at least in front, and between the two engines. I could see both engines as I approached them, and their location." He was not directed or commanded to work at any particular place at the engine, and the position taken by him was of his own choice, and with the full knowledge of the fact that said engine, as it would be moved forward, would come closer to the one standing on the other track. There were some 30 or 40 men engaged in the work. The general foreman and the roundhouse foreman were both present when the first engine was removed from the turntable to make room for the dead engine, and the proof shows that they and others who assisted in its removal believed there was sufficient space for the dead engine to pass without any difficulty. The plaintiff himself said he thought there was plenty of room to get between the two bumper beams of the two engines, but that, in the hurry and excitement of the occasion, he was "considerably confused," and that before he knew it he was made fast, and could not extricate himself. Indeed, the evidence tended to show that by the use of due care the plaintiff could have escaped all danger. We think it is clearly to be deduced from the evidence that, whatever may have been the risks incident to the work, they were patent and obvious and were assumed by the plaintiff. *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, and authorities therein cited; *Railway Co. v. Minnick* (decided by this court at last term) 57 Fed. 362.¹ On the facts of the case, the injury to the plaintiff was not caused by any negligence of the general foreman, or of the foreman of the roundhouse. We are therefore of opinion that it was proper to direct a verdict for the defendant. The judgment is affirmed.

McGRATH v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 181.

1. MASTER AND SERVANT—RISKS OF EMPLOYMENT—RAILROAD BRIDGE.

A railroad employé, who, when engaged in removing a wrecked train, goes upon a bridge which is obviously a new and temporary structure, the defects of which are patent, assumes the risk arising from such defects.

2. SAME—NEGLIGENCE OF FELLOW SERVANT—WRECK MASTER.

A railroad employé, who is one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the

¹ 6 C. C. A. 387.

negligence of the wreck master, who has charge of the wrecking car. *Railroad Co. v. Baugh*, 13 Sup. Ct. 914, 149 U. S. 368, followed.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Action by John McGrath against the Texas & Pacific Railway Company for personal injuries. Defendant obtained judgment. Plaintiff brings error.

Wendel Spence, for plaintiff in error.

T. J. Freeman, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge. The facts disclosed by the testimony are that the plaintiff was a car repairer in the car department of the defendant; that one White was the foreman of the car department, in which was included the wrecking department of the company. White had authority to employ and discharge persons working in that department, and did employ the plaintiff. There was a wreck on defendant's road. White sent one Schmalzreid and the plaintiff and others to the scene of the accident with a wrecking car, on which were a derrick and appliances with which to remove the wreck. Schmalzreid had charge of the wrecking car and machinery while it was operated in removing the wreck, and while in charge of the work was called the "wreck master," and had experience as such. The wrecking car was placed on a bridge, at the place of the wreck, which the evidence tended to show was defective and insecure. It had been damaged at the time of the recent wreck, and had been but temporarily repaired. The evidence also tended to show that, while the wrecking car was provided with sufficient and suitable ropes to secure and keep the derrick on the car in position, they were not properly fastened or used at the time of the injury complained of. The plaintiff was working on the car, and participated in handling the ropes, and had been so working for a day and a half before the injury occurred. The car and derrick toppled over, and he was severely injured. The evidence further tended to show that the injury resulted from Schmalzreid's negligence in placing the car on the bridge to do the work, when it was unnecessary to do so, and in not properly fastening the ropes to secure and keep the derrick in position. The general charge of the court, to which the plaintiff excepted, and now assigns as error, was as follows:

"So far as the faulty construction of the bridge is objected to by plaintiff, it was obviously a new and temporary structure, the defects of which, so far as they may have contributed to the injury of plaintiff, were patent, and open to the eyes of the plaintiff. Under the evidence in this case, you are instructed that plaintiff cannot recover under his allegations of negligence on the part of Schmalzreid, the wrecking master. You will therefore find for the defendant."

The plaintiff also requested several special charges, which were refused by the court, and to which plaintiff excepted.

We think the facts of this case bring it directly under the ruling

in the case of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, and of the case of Railway Co. v. Rogers (decided by this court at the last term) 57 Fed. 378,¹ and that there is no error in the charge of the court, and therefore none in its refusal to charge as requested by the plaintiff. Judgment affirmed.

HAILE'S CURATOR v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 167.

COMMON CARRIERS OF PASSENGERS—NEGLIGENCE—INSANITY.

Where a passenger on a railroad train receives no bodily injury from an accident caused by the company's negligence, but is made insane by the excitement, hardship, and suffering resulting therefrom, the company is not liable in damages therefor, since insanity is not a probable or ordinary result of exposure to a railroad accident.

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

Action by the curator of James T. Haile, a lunatic, against the Texas & Pacific Railway Company, for injuries to plaintiff's ward. Defendant obtained judgment on exceptions to the petition. Plaintiff brings error.

In his petition the plaintiff in error (also plaintiff in the lower court) avers: That on or about January 29, 1892, in company with James T. Haile, his ward, he took passage on the passenger train of the defendant company, at Dallas, Tex., and paid fare, and provided tickets, for himself and his brother, to Baton Rouge, La., in consideration of which fare the said company contracted and bound itself to convey them safely, and without delay and harm, to such destination. "That this trip was undertaken under directions of a physician, who advised that rest, quiet, and change of scene would restore to full vigor of mind and body the said James T. Haile, who had for some time previous been suffering from an attack of grippe, and was at this time, and in consequence thereof, greatly depressed, mentally and physically, and in an intense nervous condition. That the greater part of said journey had been accomplished in safety, and without any bad effect upon the said James T. Haile, until on the next day, January 30, 1892, about 8 a. m., when near the town of Robeline, La., the said train was suddenly, and without warning, precipitated through a burning bridge, and was completely wrecked, and immediately after caught fire and was destroyed. That the shock from the accident was so great that it hurled said James T. Haile from his seat to the floor, where he lay utterly helpless and prostrated by the shock, and unable to move. The train having in the mean time caught fire, petitioner was forced to carry his brother out of the car, and, on account of the marshy condition of the surrounding country, and his nervous and prostrated condition, to place him on the roadbed, where he was in full view of the burning wreck, and in the midst of the wounded and dying, whose cries and lamentations, added to his already intense nervous state, caused by the accident itself, threw him into a state of excitement, so that petitioner, and those around him, were unable to control or quiet him. That his nervous state became greatly worse during the several hours they were forced to wait on the scene of the wreck for conveyance to the town of Robeline, where they were to wait for the relief train to be sent out by the railroad company. After a further delay of some hours, the relief train arrived, consisting, as petitioner afterwards found, of what is known as an 'emigrant