

The appellee insists that it was the duty of the receiver to provide suitable machinery and a safe place for the laborers to work at; to furnish a safe track, free from obstructions, for the repair train to run on; and to provide proper rules and regulations for the protection of his workmen against the dangers incident to the performance of their duties. This may be conceded, but will not avail the cause of the appellee, as we see this case. It is not shown that any material defect existed in any of the machinery used by the workmen, and the safe place at which to work must be considered in connection with the dangers attending the labor, to do which the servant was employed. There is no testimony tending to show that the track was not in good order. It is shown that the trains passed over it safely, daily, and that it had no connection with the accident, unless, as is claimed, the hand car was an obstruction on the track, for which the receiver was responsible. But, if the two gangs of workmen were fellow servants, then the receiver was not responsible for such obstruction; and if the hand car was on the track when it should not have been, and if it caused the accident by the negligence of its foreman, then, under the facts of this case, the conclusion is not justified that the receiver failed in his duty to his employés. It has been repeatedly held that the negligent use by one employé of proper and safe machinery provided by the master will not be held a breach of the latter's duty to other employés. If appellee's contention in this respect can be sustained, then all negligent use of machinery, and all collisions of trains caused by negligence, must be held to be a breach of the master's duty to provide a safe place to work. We can find no authority to sustain this position, and we see no reason for it. The fact is that all men working on railroad trains, being aware, as they are, that many other trains must pass over the same track that their train does, assume the risk when they take employment of the negligence of those operating such other trains.

For the reasons mentioned, we think the circuit court should have given the first and second instructions asked for by the defendant below. We do not find it necessary to the proper disposition of this case to consider other questions referred to in the record, and argued by counsel. The decree appealed from will be reversed, the verdict of the jury set aside, and a new trial had.

THOM v. SMITH. SAME v. WALTERS' ADM'R. SAME v. PEACE'S
ADM'R.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

Nos. 72, 73, and 74.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This was a suit by Newgass & Co. against the Atlantic & Danville Railroad Company to foreclose a mortgage on its road, in which Alfred P. Thom was appointed receiver. Gilbert Smith filed a petition, claiming damages for personal injuries received while in the employ of the receiver, and R.

E. Cogbill, as administrator of E. S. Walters, and also as administrator of Nelson Peace, filed petitions claiming damages for the death of said Walters and said Peace, respectively. The circuit court rendered decrees for the petitioners, severally. The receiver appeared.

Richard Walke, for appellant.

Robert M. Hughes, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. These cases are separate appeals from three decrees rendered by the circuit court of the United States for the eastern district of Virginia, at Norfolk, in the chancery cause of Newgass & Co. against the Atlantic & Danville Railroad Company. The appellant in each case was the receiver of the said railroad company, operating the same under the appointment of, and by the direction of, such court; and the appellee Gilbert Smith was a laborer employed on said railway by the receiver. E. S. Walters was employed by the receiver, and was acting as flagman on a material or work train used by such receiver along the line of railway mentioned, and Nelson Peace was a laborer on such train. On the 21st day of July, 1891, a collision took place on said railroad between such work train and a hand car, in which the said E. S. Walters and Nelson Peace were killed. R. E. Cogbill was appointed administrator of the estate of the decedent E. S. Walters, and also of the estate of the decedent Nelson Peace, and as such administrator he is appellee in two of these cases. With the permission of the court, the said Gilbert Smith and R. E. Cogbill, as administrator of E. S. Walters and Nelson Peace, filed petitions in said chancery cause, claiming damages against the receiver,—Smith, because of injuries received by him; and the administrator, because of the death of Walters and Peace. It was charged in the petitions that the collision was on account of the carelessness and improper conduct of the receiver, and petitioners prayed for inquiries as to such damages, respectively, and that the same, when ascertained, might be decreed them. The receiver answered, denying any liability, and the issues made were tried to a jury; it being agreed that one jury might hear and determine the three cases, which was done, and verdicts returned in favor of the petitioners, on which the three several decrees complained of were rendered against the receiver. From these decrees, appeals were prayed for by the receiver, and allowed by the court. The testimony and the bills of exceptions are the same as in the case of Thom v. Pittard, 62 Fed. 232, decided by this court during the present term thereof. Reference is made to that case, as the facts are the same; and by agreement, as shown in the record, the evidence in all the cases was submitted to the same jury, and the one bill of exceptions was to be applicable to all. The assignments of error are the same, all of which are fully examined and disposed of in the opinion of the court, filed in said last-mentioned case. For reasons therein stated, it follows that the decree complained of in each of these separate appeals must be reversed, the verdicts rendered in favor of the respective petitioners must be set aside, and new trials of said issues had, and it is so ordered.

CITY OF NEW ORLEANS v. ABBAGNATO.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1894.)

No. 227.

1. MUNICIPAL CORPORATIONS—LIABILITY FOR DAMAGES FOR DEATH BY ACT OF MOB.

In the absence of a statute giving a remedy, a city is not liable for damages for the taking of human life by a mob, although its officers may have been negligent in preserving the public peace.

2. SAME—CIV. CODE LA. ART. 2315.

Civ. Code La. art. 2315, declaring that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair