

ers to equalize assessments. This point was involved in the case of *Andrews v. King Co.*, 1 Wash. St. 46, 23 Pac. 409. In that case the lower court refused an injunction to a taxpayer who alleged that, by the method of assessing, the valuation of mortgages was relatively higher than the valuation placed upon other kinds of property, and held that a court should not be called upon to perform the labor of revising an entire assessment roll, and that the complainant, instead of delaying until after the tax roll had been made, and taxes levied and partly collected, should have applied to the board of county commissioners to equalize the assessments, and, if aggrieved by an erroneous decision of the board, he should have sought relief by an appeal to the court, under a statute then in force, authorizing an appeal from any order or decision of the county commissioners. The opinion of the supreme court shows that the question whether the plaintiff had another adequate remedy than the one invoked was considered. The lower court was reversed, and it was distinctly held that a general rule or method of assessing property for taxation, which operates to discriminate against and unduly burden any particular class of property, is unlawful in this state; that an assessment according to such rule or method is in fact fraudulent, and that an aggrieved party is entitled to an injunction to prevent the collection of a tax levied upon such unlawful and fraudulent assessment. The decision of the supreme court must therefore be understood as declaring that the law vesting in the board of county commissioners power to equalize assessments does not provide an exclusive remedy nor limit the power of a court of equity. According to that decision the plaintiff would be clearly entitled, by laws of this state, to the relief prayed for, if this suit had been brought in a court of the state, and the same remedy should be available.

Under the circumstances alleged in the amended bill, failure to make a legal tender, and keep it good, does not constitute a bar to relief in equity. The complainant is not called upon to make a tender, for the reason that it is not liable for any part of the tax, there being no assessment against the bank. Moreover, a tender of less than the whole tax levied would be useless. If the bank were legally liable for part of the tax, it would be excused from making a tender by the declaration of the board of county commissioners to not accept less than the whole amount levied, which is nothing less than a notice of a refusal to accept a tender.

The foregoing are my conclusions touching the several questions argued by counsel, and I am constrained thereby to overrule the demurrer.

GLENN v. ROOSEVELT et al.

(Circuit Court, S. D. New York. July 17, 1894.)

EVIDENCE—COMPARISON OF HANDWRITING.

Laws N. Y. 1880, c. 36, which provides that comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made "by witnesses," and that "such

writings and the evidence of witnesses respecting the same may be submitted to the court and jury," does not authorize the submission of the writings to the jury without any comparison by witnesses.

On motion for a new trial.

Burton N. Harrison, for plaintiff.
Thos. F. Wentworth, for defendants.

LACOMBE, Circuit Judge. An examination of the signatures of Cotting to the checks which were put in evidence, and of the signature to the St. Louis subscription list, shows that the jury probably based their conclusion on the comparison of these writings which they were allowed to make. Certainly, if it was error to allow them to make such comparison, their verdict should not stand. The checks were put in evidence under the state statute (chapter 36, Laws 1880), which provides:

"The comparison of a disputed writing with any writing, proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

In the case at bar the checks were proved to the satisfaction of the court to be genuine. No comparison of them with the disputed signature was made by any witness, but they were nevertheless submitted to the jury as evidence of the genuineness or otherwise of the writing in dispute. The plaintiff seasonably objected, and now assigns this as error. The statute in question may have been, as defendants contend, remedial, but it should not, for that reason, be so construed as to open the door for the admission of evidence calculated to mislead the jury. There are such variances in the handwriting of an individual at different times and under different circumstances that it is not difficult to select samples of genuine writing so dissimilar to the one in dispute that a jury, uninstructed as to the fundamental characteristics which underly the variances, may easily fall into error when making their comparison. The case at bar is a conspicuous instance. All the checks, which, of course, bear the signature registered at Mr. Cotting's bank, have a scroll beneath the name, and a capital C of the standard shape. The name as written on the subscription list is without the scroll and has a lower case c written large. In all other respects there is such similarity between them all that it is difficult to understand how any fair-minded person can escape the conviction that they were written by the same hand. Still the jury, impressed no doubt by the different type of the C and by the scroll, reached the opposite conclusion. It is suggestive that no genuine signatures of Cotting to anything but bank checks were introduced for purposes of comparison. The statute, it will be seen, permits the comparison "to be made by witnesses," and it is the "writings and the evidence of witnesses respecting the same," which may be submitted to the jury. Literally construed, it does not warrant the submission to the jury of the genuine writings, unless a comparison with the disputed writing has been made by witnesses. Certainly the "evidence" respecting the genuine

writings which is to be submitted to the jury cannot be the evidence of their genuineness, for that is addressed solely to the court, who is to determine that question to his satisfaction without interference by the jury. And no other "evidence" respecting these genuine signatures is competent, except such as the statute provides for, viz. a "comparison * * * by witnesses." It is such evidence, therefore, which the statute couples with "such writings" as proof proper to submit to the jury. The diligence of counsel has presented upon their briefs the entire body of state authorities construing this statute, and in them there is found nothing which requires a different construction. The verdict is set aside, and a new trial ordered.

TEXAS & P. RY. CO. v. NOLAN.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1894.)

No. 217.

1. NEGLIGENCE—AVOIDING CONSEQUENCES OF CONTRIBUTORY NEGLIGENCE.

The rule that plaintiff cannot recover if himself guilty of negligence contributing to his injury, though not applicable where defendant, by the exercise of reasonable care, might have avoided the consequences of plaintiff's negligence, applies, without qualification, where the party inflicting the injury is not chargeable with negligence indulged after the position of the injured party was discovered, or, by the exercise then of reasonable care, would have been discovered.

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Giving an instruction not applicable to the case cannot be held to have injured defendant, where other instructions gave the correct rule, and the jury could not have found for him under any proper instructions.

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

This was an action by the widow of James Nolan against the Texas & Pacific Railway Company for damages for the death of said Nolan. At the trial the jury found for plaintiff, and judgment for plaintiff was entered thereon. Defendant brought error.

T. J. Freeman, for plaintiff in error.

R. C. De Graffenried, for defendant in error.

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

McCOBICK, Circuit Judge. This is a suit by the widow of James Nolan, on her own behalf and for their four minor children, to recover damages for the killing of her husband. James Nolan was a locomotive engineer, about 40 years of age, and had worked for the Texas & Pacific Railway Company about 20 years. For 7 or 8 years just before and up to January, 1893, he had run, as a locomotive engineer for that company, in and out of Longview junction, the point in Texas where the International & Great Northern Railway Company's road intersects that of the Texas & Pacific. His family, the defendants in error, resided in Longview junction. Their home was near the passenger depot at that place. This depot is a union depot. At this point the course of the main track