

malicious conduct obtains. It is contended that in such cases the corporation is held because of its contract to carry safely. That is one reason, and a cogent one, for holding the company in such cases, but it is only one of the grounds for so holding. If public policy and safety require that carriers who undertake to convey persons by the powerful, but dangerous, agency of steam, shall be held to the greatest possible care and diligence, and, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of carriers' agents, or their wanton malice, the same public policy and safety demand that these all-pervading corporations, who commit to the custody and use of their servants, in such great numbers, these terrible expressions of the powerful and dangerous agency of steam, shall maintain discipline in their ranks, and, by the utmost care and diligence, protect the public, not only from its negligent use, but from its wanton or malicious use, by these servants, to the hurt of any one in the lawful enjoyment of the state's peace. To say the engineer and fireman who have charge of the locomotive on a regular run may, while so running it, so blow the whistle, wantonly and maliciously, that by their manner of blowing it and motive for blowing it, in the indulgence of their love of mischief or other evil motive, they separate themselves, in and by that act, and for that instant, from the company's service, is to refine beyond the line of safety and of sound reason. Public policy and safety require that the use of the steam whistle by those servants who are in charge of the locomotive, and while the locomotive is in motion on its regular or authorized runs, should be held to be done within the scope of the employment of those servants, so far as to charge the company with liability therefor. The rule propounded by the plaintiff in error, so far as it is sound, does not reach the case. In my opinion the judgment of the circuit court should be affirmed.

PARDEE, Circuit Judge, being recused, this case was heard by Judges McCORMICK and LOCKE, who differing in opinion as to the law of the case, the judgment of the circuit court is affirmed by a divided court.

CRAFT v. NORTHERN PAC. R. CO.

(Circuit Court, D. Oregon. August 13, 1894.)

No. 2,044.

1. MASTER AND SERVANT—NEGLIGENCE—DEATH OF EMPLOYE—EVIDENCE.

In an action against a railroad company for the death of plaintiff's intestate, evidence that deceased could have been seen in time to avoid running over him, and that the engineer was probably asleep, is sufficient to sustain a verdict of negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

The fact that a railroad employé was walking on the track when killed is not conclusive of his negligence.

8. PROVINCE OF JURY—CREDIBILITY OF WITNESSES.

Under Code Or. § 683, making the jury exclusive judges of the credibility of witnesses, they may disregard uncontradicted testimony, where it is unsatisfactory to their minds.

Action by Julia Craft, administratrix of the estate of Benjamin P. Craft, deceased, against the Northern Pacific Railroad Company. There was a verdict for plaintiff, and defendant moves for a new trial. Denied.

E. B. Watson and B. B. Beekman, for plaintiff.
Joseph Simon, for defendant.

BELLINGER, District Judge. This is an action for damages for the death, through defendant's negligence, of Benjamin P. Craft, son of the plaintiff, who brings the action as administratrix of his estate. The jury found a verdict for plaintiff in the sum of \$3,320. Defendant moves for a new trial on the ground that the evidence is insufficient to sustain the verdict. The deceased was a car counter for the defendant on the terminal grounds in this city. He was run over and killed by an engine in the yards of the company early in the morning of August 15, 1893. He was last seen alive about 1:30 on that morning, some three or four hundred feet north of the depot, in this city, going north on the platform along the track, carrying a lighted lantern. The accident occurred about 2 o'clock, or a little after, near the spot where the deceased was last seen, about 50 feet north of such place, according to the testimony of the witness who last saw him alive. The engine that ran over Craft came into the station about 12:45 that night with a train, and shortly afterwards went north to the coal bunkers, not quite a quarter of a mile from the depot, to coal up. Having done this, the engine started back to the depot. Stapleton was the engineer in charge. A switchman named Berry and a watchman named Cobb accompanied the engine. A platform extends from the depot to a point a little north of where Craft was struck. About 200 feet south of the north end of this platform is a switch leading to the roundhouse. It was Berry's habit, when coming up from the coal bunkers with an engine, to jump off the engine after reaching the platform, and run ahead, and throw this roundhouse switch. On this occasion he jumped off at a point about 50 feet south of the north end of the depot platform, and ran ahead to the switch,—a distance of about 150 feet. He had reached the switch, and taken hold of it, when he heard somebody halloo, and, looking in that direction, saw a man on the end of the pilot of the engine, being pushed along. Berry hallooed twice to the engineer—calling him by name—to stop the engine. The engine was stopped shortly after this, when Berry, jumping upon it, laid his hand on the engineer, saying, "Stapleton, the engine has run over a man." At this time the engineer was sitting in his seat, but, upon being accosted by Berry in this way, he threw his legs around the lever, and got down off the engine. Cobb was in the act of getting off the engine when Berry got on. According to Berry's statement, the engineer did not have hold of the lever when he, Berry, took hold of him. The man on the pilot passed under the

engine just after Berry heard the halloo and saw him. The dead body of Craft was afterwards found on the track at this point. It appeared from an examination of the track that deceased was struck about 150 feet from where his body was found. His lantern was picked up near the place where he was first struck. It was lying alongside of the track, unbroken, but with the light out. The engine had a large headlight, which was burning when the accident occurred. There was also an electric light at the depot, probably three or four hundred feet distant. The engineer testified that he could have seen a man lying on the track a distance of 50 feet, if the headlight was thrown straight on the track. A man standing or walking on the track could be seen further. The track curves before reaching the point where the deceased was struck, but there is nothing tending to show that the ability of those on the engine to see far enough ahead to have noticed a person lying or walking on the track in time to have stopped the engine was in the least affected by the curve. There is a clear, unobstructed view for a distance of 100 feet from where deceased was struck, and the light must have been reflected upon the track at least a considerable part of this distance. The engineer testifies that the engine was running about four miles an hour. At least her speed was slow enough to permit the switchman to jump off, and run ahead to the switch. The deceased had made arrangements to go on his vacation, for a month, on the next day. He had taken some beer during the evening, and there is testimony to the effect that he was more or less intoxicated. One witness, an employé, met deceased about 11:45. They had one glass of beer together. He saw deceased eat his lunch about 12:30, and was the last person to see him alive, as he went down the platform with his lantern about 1:30 in the morning. This witness says deceased was pretty full, but that he was able to do his work; that he staggered a couple of times, and bumped against the witness, as they crossed the street together. Another witness says he saw deceased, about 12 o'clock, walking between the witness just referred to and a Mr. Tucker, and that he was jogging first against one and then the other; that he seemed to be a little unsteady on his feet. This Mr. Tucker was also a witness, and he testified that he had one glass of beer with deceased; that he could not see anything wrong with him, and could not swear that he was under the influence of liquor. When pressed by the attorney for the company, he said, in answer to a leading question, that deceased was "slightly intoxicated." All these witnesses are in the service of the company. There was testimony to the effect that near where deceased was struck there were indications of some one having vomited. Berry, the switchman, testifies that he rang the engine bell up to the time he got off the engine, and the engineer testifies to the same thing.

Upon these facts it is contended that there is no evidence tending to prove negligence on the part of the company, and that it conclusively appears that the accident was the result of the negligence of the deceased, or at least was contributed to by negligence on his part. The deceased was last seen about one-half hour before the accident. He was then in the vicinity of where the accident oc-

current, and was walking on the platform, going north. The theory of the defense is that he became sick, and fell or lay down on the track where he was struck. This is not a necessary inference from the evidence, and the jury was not required to adopt it. It is not for the court to determine as to the probabilities. That is for the jury. The alleged intoxication of deceased, and the evidence of sickness, were proper to be considered; but neither the evidence of those facts, nor the facts themselves, are such as to preclude the jury from finding as it did. Neither of the witnesses as to the intoxication of the deceased seemed to regard it as in any way interfering with the proper discharge of his duties. He ate his lunch at 12:30, no indications of which were found in what is claimed to have come from his stomach not longer than one and a half hours thereafter. If he was so much intoxicated that he fell helpless upon the track within 50 feet of where he was last seen, his intoxication must have been so gross as to render him incapable of rational talk or action at the time he is described as walking up the platform with his lighted lantern, seemingly capable of doing his work all right, and just after he had talked "rationally enough" with one of the witnesses whose testimony is relied upon to prove his intoxication. True, he may have gone into a saloon further up the track, but there is no presumption that he did so. The jury was not only not required to find that deceased was lying upon the track when struck, but such a finding would have been against the strong probabilities. Had he been lying upon the track, he would probably have been run over on the spot, and would not have been seen at the end of the pilot, being pushed along 150 feet further south, hallooing loud enough to attract Berry's attention. The testimony warrants the inference that the deceased went up the track from where he was last seen about some of his usual duties, and that he was returning along the track. Having come from a direction where there was no platform, he might naturally continue along the track for a short distance after reaching the point to which the platform extended. While thus walking with his back to the approaching engine, he was overtaken by it. The inference is also warranted that the engineer was asleep in his seat, or partially so, or was otherwise incapable of properly attending to his duties. A wide-awake man, looking ahead, must have seen deceased, whether he was walking upon the track or lying across it. There must have been something unusual in the conduct of the engineer, that caused the switchman to jump upon the engine, and lay hold of him, and say, "Stapleton, the engine has run over a man." The engine had stopped, but the engineer did not move. He did not even have hold of the lever, as he would likely have had, had he; and not Cobb, stopped the engine. The testimony of the switchman has a significant bearing upon this part of the case. The witness could not be got to say that Stapleton was asleep, and that Cobb was running the engine. But the way in which he avoids saying it is suggestive of the fact that such was the case. Cobb was in a position to know about the facts of the accident. If the engineer was sleeping in his seat, Cobb probably knows it. He knows whether he or the engineer stopped the engine. It was stated in court, upon in-

formation furnished by Stapleton, that Cobb was in the service of the defendant at Tacoma; but his whereabouts were not disclosed to the company's attorney, who inquired at its office in this city for the purpose of finding him. The absence of Cobb creates an impression unfavorable to the defense. The probabilities are that Stapleton was asleep; that when Berry heard the cry of deceased, and halloed to the engineer, Cobb stopped the engine; and that deceased was run over while walking along the track in the same direction the engine was going. Such, in my opinion, are the probabilities of the case, but probabilities are not required. It is enough if the facts warrant such inferences as will sustain a finding of negligence against the defendant. The fact that deceased could have been seen in time to avoid running over him is evidence sufficient to sustain a verdict of negligence. *Railroad Co. v. Patterson* (Colo. App.) 36 Pac. 913; *Felch v. Railroad Co.* (N. H.) 29 Atl. 557. The fact that the deceased was walking upon the track is not conclusive of his negligence. It is a fact for the jury to find from, not one to authorize a judgment by the court.

It is argued with much force that at least the deceased must be conclusively presumed to have been guilty of contributory negligence, since the uncontradicted evidence is that the engine bell was rung, and that this bell could be heard for a long distance. If the bell was rung, the deceased must have heard it, and hence must have been guilty of negligence in remaining on the track, or if, for any reason, he could not hear, he was guilty of such negligence in placing himself where he could not be warned of the approach of an engine. The switchman, Berry, and the engineer, Stapleton, both swear that the bell was rung. There is nothing to contradict this testimony. But suppose, nevertheless, the jury refuse to believe the testimony. This, it must be assumed from the verdict, is what they have done. It is the province of the jury to pass upon the credibility of all witnesses, whether they are contradicted or not; and, while a witness is presumed to speak the truth, the manner in which he testifies, or the character of his testimony, is sufficient to overcome that presumption. Code Or. § 683. The jury are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a presumption or other evidence satisfying their minds. *Id.* § 845. It must not be assumed that this right of a jury to disregard the testimony of any number of witnesses is a right to be arbitrarily or wantonly exercised. If it should be unreasonably exercised, it would become the duty of the court to correct the injury done in the particular case by setting aside the verdict. In this case, what has already been said as to Stapleton justified the jury in disregarding his testimony. There was enough in the manner in which Berry testified to lead the jury to distrust him, where a question of his own failure of duty was involved. He was an interested witness, beyond the interest which his employment and its consequent duty involved. He has every inducement that can exist, where the question is one of responsibility for the death of a fellow workman, to shield himself from blame. The distance from the coal bunkers to where Berry got off was comparatively short,

and since he expected to get off, and run ahead to the switch, he may have been occupied with this object, and omitted to ring the bell. He says he always watched out when he struck the platform, so as to get off, and does not remember whether anybody rang the bell after he got off. This tends to show that the matter of ringing the bell was not regarded as of the first importance. The greater care was in looking out for switches. I think it probable that the bell was not rung on the return from the coal bunkers, notwithstanding Berry's statement that it was. However that may be, if the jury concluded that the bell was not rung, as they must have done, and my own belief was otherwise, I should not, in view of the facts in the case, feel justified in setting the verdict aside on that account. The motion for a new trial is denied.

WEEBER v. UNITED STATES.

(Circuit Court, D. Colorado. June 15, 1894.)

No. 2,657.

POST OFFICE—USE OF MAILS TO DEFRAUD—INDICTMENT.

In an indictment under Rev. St. § 5480, as amended by Act March 2, 1889, for sending by mail a letter in execution of a scheme to defraud, it is sufficient to allege facts showing that defendant, having devised a scheme to defraud, in the execution of that scheme, and as a necessary or convenient step therein, transmitted through the post office a letter used, or designed to be used, to carry that scheme into effect. It is immaterial that such use of the mails did not result as intended, and was not likely so to result, or that it was only one step in a series of acts intended to accomplish the fraudulent scheme.

In Error to the District Court of the United States for the District of Colorado.

This was an indictment against William J. Weeber for sending through the mail a letter in execution of a scheme to defraud. Defendant was convicted, and brought error.

Charles D. May, for plaintiff in error.

H. V. Johnson, U. S. Dist. Atty.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

BREWER, Circuit Justice. Section 5480, Rev. St., as amended by the act of March 2, 1889. (25 Stat. 873), so far as is material, provides that:

"If any person having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person whether resident within or outside the United States, by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall in and for executing such scheme or artifice or attempting to do so, place or cause to be placed any letter * * * in any post office * * * to be sent or delivered

by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall upon conviction," etc.

Congress has power to provide what shall be carried in the mails, and for what purpose the post office shall be used, and to punish any one for a violation of its provisions in respect thereto. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374.

The indictment before us charges a scheme to defraud, to be effected by means of a correspondence through the post office establishment, and that in executing such scheme the defendant placed a letter in the post office, and subsequently received it therefrom. The scheme, briefly stated, is this: Stephens was not in fact indebted to Kearney. Kearney pretended to have a claim against Stephens, and placed it in defendant's hands for collection. A suit was pending in the federal court by the United States against Stephens et al. for the recovery of moneys alleged to be due for lumber taken off government lands. The defendant caused to be passed through the mails a letter purporting to be from the United States district attorney to himself, in reference to the furnishing of testimony tending to show Stephens liable to the government, and then caused the letter thus passing through the post office to be sent, by one apparently a stranger, to Stephens, the intention and expectation being that thereby Stephens would be frightened—blackmailed—into paying the claim of Kearney, in defendant's hands for collection, in order to prevent any disclosures by defendant to the United States district attorney. Now, that the post office was used to carry this letter; that the defendant was the one who thus used the post office for the transmission of the letter,—is plainly alleged. That there was a scheme or artifice to defraud is charged, and, indeed, is obvious. The allegation is specific that defendant intended and expected, by this scheme, to compel Stephens to pay this claim of Kearney, which claim was fictitious and fraudulent. There is charged a wrongful use of the mails,—a purpose of defrauding Stephens,—and that this use of the mails was to aid in carrying into effect that scheme or artifice of defendant. That it did not result as intended—that it did not frighten or compel Stephens to pay the claim—is immaterial. That it was uncertain, even exceedingly doubtful, whether Stephens or any other man would be frightened by such a scheme, is also immaterial. The criminality of the defendant does not rest upon the probabilities of the success of a scheme, or upon the fact of success, nor is it avoided by the fact that the act of using the mails is only one step in a series of acts intended to accomplish the fraudulent scheme. It is enough that the defendant, having devised a scheme to defraud, in the execution of that scheme, and as a necessary or convenient step in the execution thereof, transmits through the post office a letter used, or designed to be used, for the purpose of carrying that scheme into effect. I think the indictment is sufficient.

CALDWELL, Circuit Judge. I submitted the record and briefs in this case to Mr. Justice BREWER, who gave the same a patient and careful examination, and his views are expressed in the foregoing

opinion: Circuit Judge SANBORN and myself had previously arrived at the same conclusion.

The other assignments of error have been carefully examined and considered, and found to be without merit.

The result is that the judgment of the lower court must be affirmed.

APPLETON et al. v. ECAUBERT.

(Circuit Court, E. D. New York. April 19, 1894.)

1. PATENTS—WHO ENTITLED—PRIORITY OF INVENTION.

In a suit between owners of rival patents, each praying cancellation of the other's patent under Rev. St. § 4898, the evidence was substantially the same as that in interference proceedings in the patent office, in which priority had been awarded to complainant's assignor, who was shown to have been the first to embody the invention in a perfected machine, as against defendant, whose only prior effort was an abandoned experiment, and who, if he had previously conceived of the invention, as he testified, did not reduce it to practice, but remained for years inactive, without adequate excuse. *Held*, that the issue must be determined in favor of complainant.

2. SAME.

The Ecaubert patent, No. 434,539, for a method of ornamenting watch-case centers and other like articles, canceled, as containing nothing patentable not covered by the prior invention of the Hofmann patent, No. 435,835.

This was a suit by Daniel Fuller Appleton and others against Frederic Ecaubert for cancellation of a patent.

On the 31st day of December, 1887, Adolph W. Hofmann, the assignor of Appleton et al., filed in the United States patent office an application for a patent for an improved method of ornamenting watch-case centers and other like articles, which application was, on the 11th day of January, 1889, put in interference with an application of Frederic Ecaubert, filed February 13, 1888, for a similar invention. Testimony was taken at large in the interference, and on the 2d day of August, 1890, final judgment of priority was rendered in favor of Hofmann by the commissioner of patents. While the interference was still pending, undetermined, Ecaubert filed a second application, covering the subject-matter at issue in the interference, which application was allowed to go to patent by the examiner after the decision in the interference case, and resulted in letters patent No. 434,539, dated August 19, 1890. On September 2, 1890, patent No. 435,835 issued upon the Hofmann application, and, on the 10th of September following, Appleton et al., as owners of the Hofmann patent, filed a bill in the eastern district of New York, under section 4898, Rev. St., against Ecaubert, as the owner of the Ecaubert patent, praying the cancellation of the latter patent. Ecaubert answered the bill, and filed a cross bill praying in turn the cancellation of the Hofmann patent.

The opinion of the commissioner of patents on appeal from the decision of the examiners in chief in the interference proceedings between Ecaubert and Hofmann was as follows:

Mitchell, Commissioner. This controversy relates to an improved method of ornamenting the peripheries of watch-case centers and other like articles; including also, as stated in the letter declaring the interference, the claims of the respective parties for combinations to carry into effect said method of ornamenting. Prior to the invention of the method in controversy watch-case centers had been ornamented by hand engraving. They had also been ornamented by a knurling process, in practicing which an engraved knurl or die roll was continuously rotated in contact with the outer face of the watch-case center, the latter being mounted upon a rotating