

and act accordingly. He will be required to make conductor's running reports, and return them to the proper officials. (77) When the conductor is disabled, the engineman will be accountable for the full charge of the train until an authorized person takes charge of it."

The plaintiff here closed the evidence on his part.

On Behalf of Defendant.

Mr. Golden: I wish here, now, if the court please, to offer rule sixty-seven. Objection: I don't think it proves any issue in the case. Mr. Golden: Let the court look at it. The Court: I don't know in what light this case may be presented. Several different views. Depends on the views of counsel. I am inclined to think this ought to go. Objection not sustained.

Mr. Golden then read as follows: "(67) Should any portion of the train be uncoupled while running, the brakeman must stop the rear section as quick as possible, the engineman being careful to keep the forward section out of its way. The engineman and fireman must look back frequently to see that all is right, and, in case the train is broken apart, great care must be taken to keep the forward part out of the way of the detached part, and every precaution used to prevent a collision. The engineman must in all cases go back, under the protection of the flagman, after the detached portion. It must be absolutely sure it has stopped. Trains going up behind will wait indefinitely, unless otherwise ordered by the train dispatcher."

BAKER, District Judge. Notwithstanding the statement referred to by counsel for the plaintiff in error, found on page 60 of the record, it would seem from what is disclosed on page 59 of the record that all of the printed rules of the time card were in evidence before the jury. These rules had been exhibited to the defendant in error while testifying as a witness in his own behalf, and were identified by him. Thereupon, the attorney of the defendant in error offered two of them in evidence. Counsel for plaintiff in error then said, "If they offer the rules, we will offer them." The court said, "They can be considered in evidence." But, if we are mistaken in the conclusion that the record did not contain all the evidence, it was an immaterial error, because we examined the evidence with care, and reached the conclusion that it was sufficient to carry the question of negligence to the jury. We still adhere to that opinion. Hence, no error was committed in refusing to give a binding instruction.

The other questions presented in the petition of the plaintiff in error were considered and decided adversely to its contention. Having considered—and, as we still think, correctly decided—all the questions presented by the record, no good purpose would be subserved by a further discussion of them. Petition for a rehearing overruled.

FLYNT BLDG. & CONST. CO. v. BROWN.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

1. NEGLIGENCE—CONSTRUCTION OF RUNWAY—EVIDENCE OF CUSTOM.

In an action for injuries received by tripping over a wooden runway, built across a sidewalk, on which to carry materials for a building, the claim of plaintiff being that the runway was composed of two layers of two-inch plank, making its entire height four inches above the sidewalk, and that its sides arose therefrom perpendicularly, plaintiff, for the purpose of proving that the runway was not properly made, may show that

the usual and ordinary way of constructing them was to have the sides slope gradually to the sidewalk.

2. SAME—OPINION EVIDENCE.

In such case, where defendant claimed that the runway was composed of ceiling boards seven-eighths of an inch thick, laid two deep, plaintiff, for the purpose of showing that the runway must have been more substantial, may ask an expert witness what effect it would have to run eight loads per day, weighing two tons each, over a runway composed of such boards, a witness for defendant having testified that that was the number and weight of the loads driven over it daily.

Error to the Circuit Court for the Eastern District of New York. Action by Jacob A. Brown against the Flynt Building & Construction Company for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles J. Patterson, for plaintiff.

Jesse Johnson, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. In December, 1891, the Flynt Building & Construction Company, the defendant in the circuit court, was engaged in altering a building upon Adams street, in Brooklyn, and for the convenience of the company and for the protection of the sidewalk had built across the paved walk a wooden runway, over which material was carried into the building. The plaintiff tripped over this runway, about 5 o'clock in the afternoon of December 18, 1891, at a point under the elevated railway, where the light was very dim, and broke his arm, and thereafter brought this suit against the construction company to recover damages for its alleged negligence. The height of the runway above the sidewalk was a material and disputed question of fact. The plaintiff's testimony was to the effect that the structure consisted of two tiers of planks, each two inches thick, the tiers or layers being placed crosswise to each other, and one above the other; making the entire height of the wooden way four or four and one-half inches above the sidewalk, from which its square sides rose perpendicularly. The defendant's testimony was to the effect that the runway was made of ceiling boards seven-eighths of an inch thick, laid in two similar layers, and that on each side where foot passengers approached the way the boards were beveled off with a hatchet. The jury rendered a verdict for the plaintiff. The defendant assigned two causes of error, each of which related to the admissibility of testimony.

An expert witness was asked by the plaintiff, "What is the usual and ordinary way of constructing these runways resting upon the sidewalk?" The question was asked for the purpose of proving that the customary way was to nail a triangular board, called a "skewback," upon each edge of the double layer of planks, so that the top service of the skewback should slope towards the sidewalk, and present a gradually inclined surface to persons as they approach the runway, and prevent stumbling over a perpendicular edge. The defendant objected to this question, which the court

admitted. It is true that the person who is charged with an act of negligence which has caused an injury cannot protect himself by showing that similar acts were customary in the community where he lived. If an act is careless in itself, the legal responsibility for the carelessness is not mitigated by the fact that others are alike careless. But when the question is whether a structure is properly made, or work which, from its nature, involves danger, is properly carried on, it is competent for the party who has the burden of proving negligence to show that the other abandoned the use of precautions which universal experience had shown to be necessary. Thus, where work in a mine was being carried on under known circumstances of danger, without precautions on the part of the superintendent to avert the result of which he had been warned, evidence was given that "such precautions were practicable, and frequently adopted in other mines" (*Pantzar v. Mining Co.*, 99 N. Y. 368, 2 N. E. 24); and where the question was whether sufficient precautions were provided by an employer for the safety of his workmen in their work, evidence was given that a specified method of construction of the machinery and appliances would have added to the safety of the employes, and was usual in like work (*Davidson v. Cornell*, 132 N. Y. 228, 233, 30 N. E. 573). While it is true that the question of the inherent negligence of an act which has produced an injury does not depend upon the fact that similar acts had become common without injury, yet, when general experience has shown that in the construction of buildings or machinery certain precautions must be taken to avoid calamity, it is evidence tending to prove negligence that these precautions were deliberately omitted. As has been stated, the height of the runway above the sidewalk was a question in issue. The defendant asserted that the wooden walk was made of boards seven-eighths of an inch thick. A witness for the defendant had testified that the weight of the loaded trucks which were driven over the runway was two to two and a half tons, and that on some days as many as eight such loads were driven over said runway. For the purpose of showing that the runway must have been more substantial than as claimed by the defendant, an expert witness for the plaintiff was asked what effect it would have to run eight loads per day of brick, of two tons each, over a runway composed of seven-eighths inch pine planking. The admissibility of this question against the objection of the defendant as incompetent is the second subject of error. The defendant thinks that the question was asked for the purpose of disproving that which the plaintiff had admitted in his complaint, viz. that the runway was made of boards. The question was asked for the purpose of showing the improbability of the defendant's testimony that the walk was made of thin ceiling boards, and was admissible. The judgment of the circuit court is affirmed, with costs of this court.

TEXAS & P. RY. CO. v. CODY.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

No. 316.

1. TRIAL—OMISSION TO INSTRUCT ON MEASURE OF DAMAGES.

Defendant cannot complain of the court's omission to instruct the jury as to the measure of damages when he has failed to request a proper charge; and this is especially true where the action is for personal injuries producing total disability on the part of a man, but 35 years old, previously in vigorous health and earning over \$65 a month, who claims only \$10,000, as in such case it would seem safe to trust the average jury to measure the damages correctly.

2. RAILWAY COMPANIES—ACCIDENT AT CROSSING—INSTRUCTIONS AS TO NEGLIGENCE OF TRAVELER.

An instruction declaring, in substance, that a person about to cross a railroad track is required to exercise due care fitted to the time, occasion, and circumstances,—such care as an ordinarily prudent man would exercise under similar circumstances,—held to be correct and sufficient; and held, further, that there was no error in refusing a requested charge, that plaintiff was bound "to stop, look, and listen," before attempting to cross the track.

3. SAME.

A requested charge "that the rights of the railway company and of the public are not equal, but the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings," held to be defective and misleading, even if conceded to be technically correct, as people have the same right to travel upon streets as railway companies have to run trains on their tracks.

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

This was an action by Henry D. Cody against the Texas & Pacific Railway Company to recover damages for personal injuries sustained while attempting to cross defendant's tracks on Jennings avenue, in the city of Ft. Worth, Tex. In the circuit court judgment was rendered for plaintiff, upon the verdict of a jury, in the sum of \$7,500. Defendant brings error.

Among the instructions given by the court, which are complained of by the defendant and assigned as error, were the following:

"The plaintiff, if he was injured on Jennings avenue while attempting to cross defendant's track, was required to use due care himself to avoid danger. The care which a person who crosses a railroad track on a street in a city is required to use is a question of fact for the jury. It varies with the surrounding circumstances. Such person is required to use due care to avoid danger. Should he not do so, and his own negligence is the proximate cause of his injuries, he cannot recover, although the railroad company may not have given the signals which the law requires to indicate the approach of the train."

"Should you believe from the evidence that the plaintiff knew, or by the use of reasonable diligence might have known, of the approach of defendant's train, and thereby have avoided the danger, then you will find for the defendant."

"A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault, and such neglect on the part of the road results in his injury, then he cannot recover."