

right on the part of the carrier to persist in the assault cannot arise out of a resistance by the passenger greater than necessary "to denote" that he is "being removed by compulsion and against his will." The passenger's right to remain on the train secure from assault cannot be lost or impaired by such persistent resistance to a wrongful assault. In *Railroad Co. v. Winter's Adm'r* the passenger was hurt as a consequence of a resistance obviously much more than sufficient "to denote" that he was "being removed against his will," but the carrier was held for such hurt. As stated in the report, "there was no question in the case respecting the measure of damages." The dictum above quoted was aside from the case. I agree that we must affirm. But, since we hold that the order to leave the train does not make the passenger who disobeys a trespasser, our judgment must necessarily mean that the defendant is liable for the consequences of whatever resistance the passenger wrongfully assaulted and expelled saw fit to make. The judgment of the circuit court is affirmed.

CHICAGO & N. W. RY. CO. v. NETOLICKY.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1895.)

No. 508.

1. NEGLIGENCE—QUESTION FOR JURY.

The tracks of the C. Ry. Co., running east and west, crossed a highway, running north and south, near a large city. For some distance north of the tracks the highway ran between a grove on the west and a 20-foot embankment on the east, on which were the tracks of the B. Ry. Co., the C. Ry. tracks passing through the embankment by a culvert about 120 feet from the highway. The embankment and culvert obstructed the view of the C. Ry. tracks from the highway, up to a point very near such tracks, and also obstructed the sound of trains approaching from the east. One T., while driving an empty wood wagon, at a trot, southward, along the highway, was struck at the crossing by a freight train coming from the east, and killed. It appeared that persons in a sleigh some distance behind T. heard the train before T. reached the crossing; that T. apparently knew nothing of the train until it whistled for the crossing, and then looked first west, then north on the B. tracks, and then east, and was nearly on the tracks before he appeared to see the train, when he whipped up his horses, and tried to cross the tracks. There was also evidence that the first whistle was sounded by the engine when it was between the whistling post, east of the crossing, and the culvert, and about 400 or 500 feet from the crossing; and that the train was running at a speed of 18 miles or more per hour; and that some persons near by heard no whistle or bell till the engine was entering the culvert. *Held*, that the questions of the negligence of the railway company and the contributory negligence of T. were for the jury.

2. SAME—DANGEROUS CROSSING.

It is not necessarily a sufficient exercise of care on the part of a railway company, whose tracks cross a highway at grade, to sound the whistle and ring the bell of its engines, at the distances from such crossing prescribed by a statute requiring such warnings to be given; but such company is bound so to manage its trains, and to give such warnings of their approach, or take such other reasonable precautions, as not to cause unnecessary risk to persons on or about the crossing.

3. SAME—EVIDENCE—SIMILAR OCCURRENCES.

Following *District of Columbia v. Armes*, 2 Sup. Ct. 840, 107 U. S. 519. *held*, that it is not error, in an action against a railway company for damages for an accident at a grade crossing, to permit witnesses who are familiar with the locality to testify to narrow escapes they have had at the same crossing, in connection with descriptions of the locality, for the purpose of showing the nature of the crossing and the difficulties of travelers in passing over it.

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

This was an action by Voclov Netolicky, as administrator of the estate of Joseph Tripkosh, deceased, against the Chicago & Northwestern Railway Company, to recover damages for the death of the intestate. The plaintiff recovered judgment in the circuit court. Defendant brings error.

N. M. Hubbard and Frank F. Dawley (N. M. Hubbard, Jr., on the brief), for plaintiff in error.

Charles A. Clark, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a railroad crossing case. The defendant in error, Voclov Netolicky, suing as administrator of Joseph Tripkosh, deceased, brought an action against the Chicago & Northwestern Railway Company, the plaintiff in error, for the death of his intestate, Joseph Tripkosh, who was killed by a freight train of the defendant company on December 1, 1892, at a point a few miles south of the city of Cedar Rapids, in the state of Iowa, where the defendant company's railroad crosses one of the main traveled thoroughfares leading from the south into the city of Cedar Rapids. The undisputed testimony in the case warrants the conclusion that the railroad crossing in question was more than ordinarily dangerous, for the following reasons: Owing to the location of the crossing near a large city, many vehicles pass over the crossing daily and hourly. For a considerable distance north of the crossing, in the direction of Cedar Rapids, the public thoroughfare runs parallel to and on the west side of the track of the Burlington, Cedar Rapids & Northern Railroad Company, hereafter spoken of as the "Burlington Road," which track is there laid on a high embankment. For at least 80 rods north of the crossing in question the public highway is quite close to this embankment, and in the lee thereof, so that the view to the east is entirely cut off. On the west side of the highway there is a grove, which also extends from the crossing for a considerable distance to the north, and effectually obstructs the view to the west. The track of the defendant company runs about due east and west, passes underneath the track of the Burlington road through a culvert in the embankment, and crosses the highway at grade, at right angles to it, and at a point not more than 120 feet west of the mouth of the culvert. Travelers on the highway approaching the crossing from the north cannot see a train on the defendant's road approaching from the east, until they are, as some witnesses say, within 10 feet of the crossing. The embankment of the Burlington road, at the culvert and for some distance both north and south, is