

CINCINNATI, H. & D. R. CO. v. VAN HORNE.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

No. 306.

EVIDENCE—OF REPAIRS TO MACHINE CAUSING INJURY.

Plaintiff sued a railway company for injuries caused by catching his foot in a guard rail. A statute made it obligatory upon the railway company to block its guard rails so as to prevent the feet of its employes from being caught therein. The defendant claimed that a block which would have prevented the injury would have been inconsistent with the safe running of trains, and so could not be required. *Held*, that evidence that after the accident a sufficient block was placed in the guard rail, without endangering trains, was admissible to show that such a block could be used with safety. *Railroad Co. v. Hawthorne*, 12 Sup. Ct. 591, 144 U. S. 202, distinguished.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action by Stephen A. Van Horne against the Cincinnati, Hamilton & Dayton Railroad Company for personal injuries. Plaintiff recovered judgment in the circuit court. Defendant brings error. Affirmed.

Wm. K. Maxwell (Ramsey, Maxwell & Ramsey, of counsel), for plaintiff in error.

Charles M. Cist and Edgar W. Cist, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is a proceeding in error to review the judgment of the circuit court for the Southern district of Ohio in favor of Stephen A. Van Horne for \$1,000. The plaintiff was a switchman in the employ of the defendant in its yards at Ivorydale, Ohio, in September, 1890. In the discharge of his duties his foot was caught in a guard rail on the track of the defendant company in such a way that he was unable to extricate himself before he was struck by a locomotive. His foot was torn from the shoe which he had on, and luckily was not caught under the wheels, but a bone in his foot was broken, and he suffered other injuries confining him to the hospital for some time.

A statute of Ohio passed March 23, 1888 (85 Ohio Laws, 105) provides that:

"Every railroad corporation operating a railroad, or part of a railroad, in this state, shall, before the first day of October, in the year 1888, adjust, fill or block the frogs, switches and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet of its employes from being caught therein. The work shall be done to the satisfaction of the railroad commissioner."

The question of fact at issue in the case was—First, whether the guard rail in question had been blocked at all; and, second, whether, if blocked to the extent which the safety of trains would permit, the accident in this case could have been avoided. The defendant introduced evidence to show that a block which would have prevented

the injury would have been inconsistent with the safe running of trains, and contended that the statute did not require such an impossible precaution. To meet this evidence and contention, the plaintiff introduced evidence to show that there was a block, sufficient to have prevented this accident, put into the guard rail after the accident, which did not interfere with the running of trains. The only ground upon which a reversal is asked is the action of the court in allowing evidence to be introduced as to the presence of a block immediately after the accident between the guard rail and the switch. Counsel for plaintiff, in introducing this evidence, disclaimed any intention of relying upon it to show that there was negligence in not having put the block between the rails before, but insisted on its relevancy to show the possibility of blocking the guard rail without interfering with the running of trains. It is undoubtedly true that under the decision in *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, a subsequent alteration or repair of a machine alleged to be negligently constructed is not competent evidence of negligence in the original construction. The reason for this opinion is stated by the supreme court of the United States, adopting for that purpose the language of the supreme court of Minnesota in the case of *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358:

"But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employes in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon humane conduct, and virtually holds out an inducement for continued negligence."

The case of *Railroad Co. v. Hawthorne* has no application to the present case. There was no issue before the jury as to whether the failure to insert a block was negligence on the part of the railroad company. It was negligence as a matter of law, and the court properly charged the jury that, if the block was not there, and the absence of it caused the accident, the defendant was liable. The defendant was therefore not prejudiced by the tendency of the evidence to prove an admission by it that the block ought to have been there because such an admission only tended to prove what the law referred to conclusively established. Nor does the case of *Railroad Co. v. Hawthorne* decide that the character of evidence therein held to be incompetent for the purpose of showing an admission of negligence might not be admissible for some other purpose. On the contrary, in that case the supreme court expressly distinguished a case from Massachusetts,—that of *Readman v. Conway*, 126 Mass. 374, 377,—where such evidence was admitted to show, not an admission of negligence by the defendant, but an admission that the

instrumentality, the defect in which was charged to have caused the accident, was under the control of the defendant company. So here this evidence was competent to show that a block could be used which would not interfere with the running of trains, and yet which would have prevented the accident which here occurred. Judgment affirmed.

CREFELD MILLS v. GODDARD et al.

(Circuit Court, S. D. New York. July 12, 1895.)

CORPORATIONS—DOING BUSINESS IN OTHER STATES—NEW YORK STATUTE.

A statute of New York (Laws 1892, c. 687, § 15) provides that "no foreign stock corporation * * * shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state. * * * No such corporation now doing business in this state shall do business herein after December 31, 1892, without having procured such certificate; * * * but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this state, without such certificate, shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate." *Held*, that the effect of such statute is not to invalidate contracts made in the state by foreign corporations doing business there without a certificate after December 31, 1892, but only to suspend the remedy thereon until such certificate has been procured.

This was an action upon contract by the Crefeld Mills against Warren N. Goddard and Frederick N. Goddard. The jury gave a verdict for the plaintiff, and the defendants moved for a new trial. Denied.

Hornblower, Byrne & Taylor, for plaintiff.
Abraham Gruber, for defendants.

WALLACE, Circuit Judge. Upon this motion for a new trial the defendants principally rely upon a review of the ruling at the trial adverse to their contention in respect to the invalidity of the contract upon which the suit is founded, this defense having been overruled pro forma, in order that it might be deliberately considered upon motion for a new trial in the event of a verdict against the defendants. The complaint alleges a cause of action in behalf of a corporation of the state of Connecticut, for a breach on the part of the defendants of a contract by which the plaintiff was to manufacture, and the defendants were to accept, certain cotton goods at a specified price. Among other defenses set up by the defendants in their answer they allege that the contract cannot be enforced by the plaintiff because of the provisions of chapter 687 of the Laws of New York of 1892 (section 15), which is as follows:

"No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or, if