WESTERN UNION TEL. CO. v. ENGLER.

(Circuit Court of Appeals, Ninth Circuit. June 1, 1896.)

No. 265.

1. NEGLIGENCE—CHARGING JURY—DEFINITION OF TERMS.
When the court, in an action for personal injuries, has correctly instructed the jury in respect to the defendant's duty to use "ordinary care" and "reasonable diligence," and its liability for "negligence," and no request is made to have such terms defined, the court commits no error in failing to give the jury definitions thereof.

2. SAME—NOTICE.
Plaintiff was injured in an accident caused by a telegraph wire which had been allowed by the company owning it to remain for more than two months sagging across, and within two feet of the surface of, the highway. *Held*, that he was not precluded from recovering damages because neither he nor any one else had notified the telegraph company of the condition of the wire.

3. DAMAGES—PERSONAL INJURIES.
Plaintiff suffered a compound fracture of the leg, causing the bone to protrude through the flesh, and denuding the bone of the periosteum. More than 100 pieces of bone were taken out, and pieces of bone continued for over 20 months to work out of the wound, during all which time plaintiff suffered intense pain. He was disabled for many months from attending to business, incurred large expenses for medical attendance, and would probably be permanently lame. *Held*, that a verdict of $15,000 would not be set aside as excessive.

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

This was an action by Louis Engler against the Western Union Telegraph Company for personal injuries. The plaintiff recovered judgment in the circuit court for $15,000. A motion for a new trial was denied. 69 Fed. 185. Defendant brought error. Affirmed.

Torreyson & Summerfield and Evans & Rogers, for plaintiff in error.

E. S. Farrington, for defendant in error.

Before McKENNA, GILBERT, and ROSS, Circuit Judges.

ROSS, Circuit Judge. This was an action for damages. The plaintiff in error was defendant in the court below. It built and operated a line of telegraph from the town of Elko to the town of Tuscarora, in Elko county, state of Nevada, which line crossed a public road of that county, called the "Old Grand Prize Road." On the occasion of the accident which was the ground of the action, the defendant in error, who was plaintiff in the court below, was driving along the highway, when his horses struck the wire of the telegraph company, which had fallen from its proper place on the poles to within about two feet of the ground, and, becoming frightened, suddenly turned and ran, thereby throwing the plaintiff in the suit from the vehicle in which he was riding, by which fall the plaintiff received a compound, comminuted fracture of the ankle bones of the left leg. His left foot was doubled over, both bones protruding through the flesh, and through his leather shoe into the ground, and were denuded of the periosteum for a space of 4½ inches. The base bone

in the heel of the foot was also denuded of the periosteum. Over 100 pieces of the denuded bones, some of them quite large, were subsequently, at various times, removed. More than twenty months after the injury, pieces of bones were still working out of the foot, and the cavities discharging pus. During all of this time the plaintiff suffered intense pain. He was confined to his bed for a period of six months, and for the first three months was compelled to lie on his back, without being able to turn on either side. At the time of the trial in the court below, he was compelled to use crutches. His physician testified that in his opinion the plaintiff would be well and free from pain or further treatment in about three months from that time, but that the ankle joint would always be stiff, and that there would be a slight deformity of the foot. The testimony was that the plaintiff will be permanently lame. From the time of the injury to the time of the commencement of the suit, the physician's bill for medical attendance upon the plaintiff amounted to $1,545, and his necessary expenses for nursing was over $800. From the time of his injury, the plaintiff was incapacitated from attending to his business, except for about two weeks, during which period he endeavored to give it some attention, but was obliged to discontinue his efforts in that direction. The jury awarded him damages in the sum of $15,000, with which verdict the court below refused to interfere, on motion made by the company for a new trial.

But two points are pressed upon our attention by counsel for the plaintiff in error as grounds for a reversal of the judgment. One relates to the failure of the court below to "give to the consideration of the jury any rule of notice as to the plaintiff in error having had reasonable time to observe or notice the condition of its line, or being put upon inquiry as to any defect therein, or that the same was out of repair," and to the alleged failure of the court "to define negligence, reasonable care, or reasonable diligence"; and the other is the claim that the damages awarded were excessive, and should not, therefore, be permitted to stand.

The court below instructed the jury, among other things, as follows:

"A telegraph company is bound to use ordinary care and reasonable diligence to place and keep its telegraph line and wires in a safe condition, where it extends over or along the public, traveled road. If you believe from the evidence that the defendant failed to perform such duty, and that by reason of its negligence, or the negligence of its servants or agents, in that regard, its line of wire was suffered to hang over the road so low at the point where it crosses the old Grand Prize road, as has been testified to by the witnesses, as to obstruct the public travel upon such road, and to be in such a dangerous condition that by reason thereof the plaintiff, while exercising reasonable care on his part, received the injury complained of, then the defendant is liable, and you may find a verdict for the plaintiff. If you should find from the evidence that the defendant has not been guilty of any negligence, as I have explained to you, it will be your duty to find a verdict in favor of the defendant. But if you should find from the evidence that the defendant was guilty of negligence, and that by reason of such negligence the plaintiff was injured, then you must consider the question whether or not the plaintiff was guilty of any negligence which contributed to the injury which he received."

No objection is made to the instruction of the court upon the subject of contributory negligence. If the defendant wished the court "to define negligence, reasonable care, or reasonable diligence," it ought to have asked the court to do so. Not having asked any such instruction, the appellate court cannot reasonably be expected to reverse a judgment for the failure of the trial court to define terms used in instructions which are too clear to be misunderstood by the ordinary mind. The evidence contained in the record is to the effect that the wire which was the cause of the accident to the plaintiff had been permitted by the defendant company to hang in its fallen position across the highway, at from 1½ to 2 feet from the ground, for a period of about two months and a half. Counsel for plaintiff in error seem to think that, notwithstanding this fact, a party injured by such gross negligence is precluded from recovering damages therefor unless he, or somebody else, had notified the company of its own neglect. We have no hesitancy in denying the soundness of any such position. It was the duty of the company to exercise proper supervision over its own lines, and to maintain its wire in such a position as not to injure those lawfully traveling the public highway with due caution, and without fault on their part.

We see no just ground to hold excessive the amount of damages awarded by the jury, and with which award the experienced and able judge before whom the case was tried refused to interfere. Damages, in such a case, said the supreme court in The City of Panama, 101 U. S. 453–464—

"Must depend very much upon the facts and circumstances proved at the trial. When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

The court below, in declining to set aside the verdict on the ground that the damages awarded were excessive, said:

"The amount allowed by the jury in the present case was large, but the injury was severe, and the bodily pain intense, and continued for a long period of time. The plaintiff was present in court. The condition of his foot was plainly to be seen, and, with the testimony of his physician, the nature and extent of the injury and of the bodily pain suffered by the plaintiff, was clearly and intelligently presented to the jury. The injury and the pain were real. No attempt was made at the trial to magnify or exaggerate either the injury or the pain, as is sometimes, in bad taste, attempted to be done in cases of this character. No appeal was made to the jurors to arouse either their passions, prejudices, or sympathy. There was nothing at the trial, in the acts or conduct of the jury, or of any juror, to indicate in any manner that they were influenced or controlled by any such feeling."

Judgment affirmed.

SMITH v. SOUTHERN RY.

(Circuit Court, N. D. Georgia. June 17, 1896.)

NEGLIGENCE—QUESTION FOR JURY.

In an action to recover damages for personal injuries, it appeared that the plaintiff, the foreman of a squad of track hands on a railroad, was taking two hand cars, one of which was out of repair, from one station to another. The disabled car was in the rear, and ran up very close to the other, when one of the men, who was sitting on the forward car, raised his foot and kicked the rear car back. Immediately afterwards the forward car ran off the track, injuring the plaintiff, who was riding on it. There was evidence tending to show both that the kick did, and that it did not, cause the derailment. *Held*, that this question, as well as the questions whether the kick was such an act of negligence as to render the railroad company liable, and whether plaintiff was guilty of contributory negligence in running the disabled car too near the other, was properly left to the jury.

Burton Smith, for plaintiff.
Dorsey, Brewster & Howell, for defendant.

NEWMAN, District Judge. Smith was the foreman of a squad of track hands carrying two hand cars from one station to another. One of the hand cars was disabled and unfit for use. The disabled car was in the rear, and they were running along at a short distance from each other. He had hands on each car, propelling them and riding on them. The rear car ran up very close to the front car, when one of the hands, who was sitting on the rear of the first car, with his legs hanging over the car, stretched out his right leg so that the rear car ran against his foot, and he gave it a push to keep it off of the front car. Immediately afterwards the front car jumped the track, and Smith, the foreman of the squad, and the plaintiff here, was thrown from the car and injured. The plaintiff brought suit for damages, and there was a verdict for the defendant. He now moves for a new trial, on the ground that the verdict was erroneous. The plaintiff's case was based, both by the pleadings and the evidence, and by the general direction given to the case, on the ground that the kicking of the rear car threw the front car from the track, and that this was negligence. It is true that in the pleadings the near approach of the rear car to the front car was claimed to be a distinct ground of negligence, but under the evidence it was clear that, if the kick was the cause of the derailment, it was the immediate and proximate cause, and that while, necessarily, the near approach of the rear car enabled the man to give it the kick, still the kick, under the plaintiff's view of the case, must have been relied on as the distinct cause of the accident. What would have occurred if the hand who was sitting on the rear of the front car had simply thrown up his legs and allowed the two cars to strike, would be mere speculation. It was contended by the defendant that the kick did not cause the derailment, and there was considerable evidence pro and con upon this subject. It is also claimed that the kick to the rear car was not *an act* of negligence, but that it was a natural and proper thing

to do. When it resulted, unfortunately it was unforeseen and not to be expected, and consequently not such a want of ordinary care upon the part of a fellow servant as would render the company liable. It is also said, for the defendant, that the plaintiff himself was not free from fault, as he must be, by the statute of Georgia, in order to recover for the negligence of a fellow servant. It is contended that his running the two cars so close together, and one of them a disabled car, which could not be readily controlled, was a negligent act, and that this negligence on his part really brought about the condition of things which resulted in the accident.

My conclusions are:

1. That there was sufficient evidence to justify the jury in finding that the kicking of the rear car was not sufficient to account for the derailment of the front car; that there must have been some other and unknown reason for it. This point was contested, and there was evidence both ways.

2. That the jury was justified in finding for the defendant as to its contention that the act of the hand who gave the rear car the kick was not such an act of negligence as would render the defendant company liable. This issue was distinctly made in the case, and was submitted by the court to the jury.

3. There was abundant evidence to justify the jury in concluding that the foreman—the injured person—himself put in motion the chain of events which culminated in the accident to himself, and that the manner in which he was moving these hand cars at the time of the accident was negligence. This was also an issue in the case as to which there was evidence, and which was submitted by the court to the jury.

Certain requests to charge made by the plaintiff were not given by the court, and this is claimed, on motion for new trial, to have been error. An examination of the requests to charge, and the charge as given, shows that the case was fairly submitted to the jury on all points involved, and that this ground of the motion is without merit. The verdict being supported by the evidence, and there being no such error in the instructions given to the jury as would justify a new trial, the motion is overruled.

SLOSS IRON & STEEL CO. v. SOUTH CAROLINA & G. R. CO.

(Circuit Court, D. South Carolina. July 2, 1896.)

1. COSTS—WITNESSES—VOLUNTARY ATTENDANCE.
   A party is entitled to the per diem allowance and mileage for the attendance of witnesses who have attended without subpœna, and have either been sworn and examined, or not sworn, because their evidence was made unnecessary by a ruling of the court.

2. SAME—MILEAGE.
   A party is entitled to tax mileage for the attendance of witnesses only to the extent of 100 miles, when the witnesses reside more than that distance from the place of trial of the cause, and out of the jurisdiction.

3. SAME—DEPOSITIONS.
   A party is entitled to tax costs for any deposition taken in the cause, and to which no exception is made, though it is not read or offered in evidence on the trial.

Smythe, Lee & Frost, for plaintiff.
J. W. Barnwell, for defendant.

SIMONTON, Circuit Judge. This case comes up on an exception to the taxation of costs made by the clerk. There are two exceptions.

Roberts and McQueen, citizens and residents of Birmingham, Ala., attended the trial of the case, witnesses for the plaintiff, not under subpœna. The latter was sworn and examined. The former was present, but was not sworn. A ruling of the court as to the issue before the jury prevented him from going on the stand. Plaintiff has charged per diem and mileage from Birmingham for each of these witnesses. The clerk has allowed the per diem, but has not allowed mileage for more than 100 miles. Plaintiff excepts to this.

Two questions are made:

First. Are they entitled to pay as witnesses, in the absence of the subpœna? Judge Deady, in Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13,221, holds that the subpœna is necessary, and his conclusion has been followed by other judges. With deference, I cannot concur in this view. The costs of witnesses are a part of his disbursements, to which the successful party is entitled. The purpose of the subpœna is to enforce attendance. If it be disobeyed, the party summoned can be attached; but, if he attend without compulsion, he is entitled to compensation. This is the conclusion reached by Mr. Justice Gray on circuit, in U. S. v. Sanborn, 28 Fed. 302, and was concurred in by Mr. Justice Brown (then district judge) in The Vernon, 36 Fed. 116. In the conflict of persuasive authority, the two cases just cited will be followed.

The next question presents greater difficulty: To what mileage are these witnesses entitled? Must they be paid for coming from and for returning to Birmingham, which is out of the jurisdiction, and more than 100 miles from the place of trial, or must their mileage be limited to 100 miles? The practice in the circuit courts on this question differs. In the First circuit the witness is entitled to the whole mileage, without any limit as to 100 miles, and without regard to his residence within the jurisdiction. U. S. v. Sanborn, 28 Fed. 302; Prouty v. Draper, 2 Story, 200, Fed. Cas. No. 11,447; Whipple v. Cotton Co., 3 Story, 84, Fed. Cas. No. 17,515; Hathaway v. Roach, 2 Woodb. & M. 63, Fed. Cas. No. 6,213. In the Second circuit the rule is to the contrary of that in the First circuit. Anon., 5 Blatchf. 134, Fed. Cas. No. 432 (Mr. Justice Nelson and Shipman, J.); Beckwith v. Easton, 4 Ben. 357, Fed. Cas. No. 1,212; The Leo, 5 Ben. 486, Fed. Cas. No. 8,252; Buffalo Ins. Co. v. Providence & S. S. S. Co., 29 Fed. 237; The Syracuse, 36 Fed. 830. So, also, in the Third circuit the rule is the same as in the Second circuit. The Progresso, 48 Fed. 240. The Sixth circuit concurs with the Second and Third circuits. The Vernon, 36 Fed. 117. So does the Eighth circuit. Pinson v. Railroad Co., 54 Fed. 464. And in the Ninth circuit the same rule prevails. Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13,221; Haines v. McLaughlin, 29 Fed. 70. There is no reported case in the circuit court on this

point in this circuit, and none within my knowledge. In the case of In re Williams, 37 Fed. 325, a witness for the government in the district court was allowed mileage from his residence in New Jersey. That, however, was a criminal case, and, although the case does not state it, was decided under the conviction that the testimony of the witness could not have been taken by deposition or commission. An accused person has the right to be confronted with the witnesses against him. Amend. Const. U. S. art. 6. The question was made, but not decided, in Young v. Insurance Co., 29 Fed. 273. The law compensates a witness for attending upon the court, because, in obedience to its mandate, he has turned aside from his ordinary avocations to assist in the promotion of justice. It can compel him to do so, and, of course, he will then be compensated. Even if he does not await the process of the court, and attends without it, his voluntary service will be compensated. This is because he has come voluntarily when he might have been compelled to come. But a witness residing more than 100 miles from the place of trial cannot be compelled to attend the court; and, if he attends without compulsion, it is not a waiver of the subpœna, or an obedience to the authority of the court without requiring an express order, but a voluntary attendance controlled by some other motive. Besides this, great weight can be attached to the argument ab inconvenienti. If mileage can be taxed for witnesses from their place of residence, the burden of litigation could not be borne. This country is so vast, and its population so closely interwoven in their domestic and business relations, that in a large number of cases the testimony of witnesses residing out of the jurisdiction is needed. For this reason, witnesses can be examined by commission and by deposition. But if, instead of adopting this mode, the witness should attend in person from a remote part of this country or from abroad, the costs of the case might be ruinous. In the divergence of opinion of judges of eminence, this court concurs with the majority of the courts, and adopts the views expressed by Judge Brown in The Vernon, 36 Fed. 116, including his qualification of the rule. Cases may occur—exceptional cases, of rare occurrence—in which the presence of a witness is absolutely necessary. Such cases can be provided for by special order, and full mileage be allowed. In the present case the exception to the taxation by the clerk is overruled.

The other exception is taken by the defendant. Certain depositions were taken for defendant in this cause. Under the ruling of the court directing a verdict, these were not used at the trial. The plaintiff has charged costs for them. The clerk allowed the costs, and defendant excepted. The language of the statute is "for each deposition taken and admitted in evidence in a cause." 10 Stat. 162. Now, the deposition was taken; no exception was made thereto; and, as the deposition was that of the defendant, it can safely be assumed, at least as to it, that no exception could be taken. It was therefore in a sense admitted in evidence in a cause to be used as evidence. As Mr. Justice Nelson says in Nail Factory v. Corning, Fed. Cas. No. 14,197, this language of the statute "relates to

testimony taken out of court under authority, which will entitle it to be read as evidence." The service in taking a deposition is rendered when it is taken, and for this compensation is given. Merely reading or listening to it during the trial is service of another character. The exception is disallowed.

HOLYOKE MACH. CO. v. JOLLY et al.

(Circuit Court, D. Massachusetts. June 23, 1896.)

No. 150.

PATENTS—ANTICIPATION—WATER WHEELS.

The McCormick patent, No. 265,689, for an improvement in turbine water wheels, consisting in providing the acting face of the buckets with corrugations to better retain the water therein, and in so constructing these corrugations that substantially equal amounts of water will pass through them, is void, because of anticipation and want of invention.

This was a suit in equity by the Holyoke Machine Company against James Jolly and others, for alleged infringement of a patent for an improvement in water wheels.

John L. S. Roberts, for complainant.

George D. Robinson and William H. Chapman, for defendants.

CARPENTER, District Judge. This is a bill in equity to enjoin an alleged infringement of the second claim of letters patent No. 265,689, issued October 10, 1882, to John B. McCormick, for water wheel. The claim is as follows:

"(2) The buckets provided with water-guiding grooves or corrugations on their acting faces, substantially as and for the purpose set forth."

The scope of the invention is stated by the complainant as follows:

"The invention in question relates more particularly to water wheels of the kind commonly known as 'turbine' wheels, in which the axis of rotation is vertical, the water entering at the sides and striking against the face of the buckets, so called, giving the wheel a rotary motion. One of the inventions mentioned in the preamble of the patent in suit consists in providing the acting face of the buckets of a turbine wheel with corrugations in order to enable the water to be better retained thereon, and thereby producing an increased force. Another invention mentioned relates to the construction of these grooves or corrugations by which the water is guided, so that substantially equal amounts of water will pass through them."

Interpreting the patent in this way, I find the claim fully anticipated by letters patent No. 21,578, of September 21, 1858, to Alpha Smith; No. 60,983, of January 1, 1867, to Anthony Wrealsh and William Burns; No. 116,071, of June 20, 1871, to George W. Leonard; and No. 172,140, of January 11, 1876, to John B. McCormick and James L. Brown; and I therefore find that the claim involves no patentable invention.

The bill will be dismissed.