LAMBURTH v. WINCHESTER AVE. R. CO.

(Circuit Court, D. Connecticut. September 23, 1896.)

CONSTITUTIONAL LAW—VESTED RIGHTS—DAMAGES FOR INJURIES OR DEATH.

The Connecticut statute making a written notice, with general description, etc., of any claim for injuries or death by accident, within four months after the accident, a condition precedent to the maintenance of suit therefor against street or steam railway companies, and which provides that, where the damages occurred before the date of the act, such notice might be given within four months after such date (Pub. Acts 1895, c. 176), was not, as to the latter provision, any denial or abridgment of existing rights, but only a reasonable restriction upon their exercise.

This was an action by Anderson R. Lamburth against the Winchester Avenue Railroad Company to recover damages for personal injuries. The case was heard on demurrer to the complaint.

A. E. Carroll, for plaintiff.
Robert Harbison, for defendant.

TOWNSEND, District Judge. To the complaint herein, claiming damages for personal injuries through defendant's negligence, defendant demurs because there is no averment therein of notice of said injury. A Connecticut statute passed in 1895, after the cause of action accrued, but before the complaint was filed, provides:

"Section 1. No suit or action for damages on account of injury to, or death of, any person caused by negligence shall be maintained against any electric, cable, horse, or steam railroad company, unless written notice of a claim therefor, giving a general description of such injury and the time, place, and cause of its occurrence, as nearly as the same can be ascertained, shall have been given to the defendant company within four months after the neglect complained of. Such notice may be given to the secretary or any agent or executive officer of the company.

"Sec. 2. Notice of any claim for damages occurring prior to the passage of this act may be given within four months after this act shall take effect." Public Acts of the State of Connecticut (1895) c. 176.

It appears from the decisions of the supreme court of the state of Connecticut that the giving of such written notice is a condition precedent to the maintenance of such action, and that the failure to allege such notice is good ground for demurrer. Fields v. Railroad Co., 54 Conn. 9, 4 Atl. 105; Shalley v. Railway Co., 64 Conn. 381, 30 Atl. 135. The legislature, prior to the bringing of this suit, had fixed a reasonable time after the passage of said act within which such notice of injuries suffered prior to its passage might be given. Manifestly, it intended to require that such notice should be given in every case. Such requirement is neither a denial nor an abridgment of plaintiff's right, but only a reasonable restriction upon its exercise. Shalley v. Railway Co., supra. The demurrer is sustained, with leave to plaintiff to amend within 10 days after the filing of this memorandum.

GOWEN v. BUSH.

(Circuit Court of Appeals, Eighth Circuit. October 5, 1896.)

No. 535.

1. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—NEGLIGENCE.
Plaintiff was induced by an agent of the defendant to come from another state, and take service in defendant's coal mine. The agent represented that the mine was free from explosive gas and in every way safe. Two or three days after plaintiff began work an explosion occurred, by which he was seriously injured. *Held*, that the representations made by the agent touching the condition of the mine were within the apparent scope of his authority, and admissible against the employer, though made without express authority.

2. MASTER AND SERVANT—FELLOW SERVANTS—PERSONAL DUTY OF MASTER.
When a miner is charged with the duty of going through the mine from time to time and inspecting it, and seeing whether it is free from gas, he is discharging a personal duty of the master, and while thus engaged is not a fellow servant of the other miners.

3. ESTOPPEL BY SILENCE.
A person is not estopped by silence to subsequently deny statements made in his presence, when his silence was the result of physical suffering or semiunconsciousness.

4. EVIDENCE—RES GESTÆ.
Statements made by one of several victims of an accident, three-quarters of an hour after its occurrence, concerning the cause thereof, and the whereabouts at the time of the injured persons, form no part of the res gestæ.

In Error to the United States Court in the Indian Territory.

J. W. McLoud, for plaintiff in error.

William H. H. Clayton (James Brizzolara, James B. Forrester, and James Parks & Son, with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The writ of error in this case was heretofore dismissed for want of jurisdiction in this court to hear and decide the case. 18 C. C. A. 572, 72 Fed. 299. It has since been restored to the docket in compliance with the provisions of an act of congress approved on February 8, 1896 (29 Stat. 6, c. 14), and is now before us for determination on the merits. The action was brought by William N. Bush, the defendant in error, against Francis I. Gowen, sole receiver of the Choctaw Coal & Railway Company, the plaintiff in error, to recover damages for personal injuries which the plaintiff below sustained by reason of an explosion in a coal mine located at Hartshorne, in the Indian Territory. The mine in which the explosion occurred was being operated at the time by the defendant, Francis I. Gowen, in his capacity as receiver of the aforesaid company. The plaintiff, William N. Bush, was a common miner in the employ of the receiver, who had worked only 2½ nights in the mine when the explosion occurred. The complaint on which the case was tried charged, among other things, as a ground for recovery, that when the plaintiff took service in said mine it was represented to him by the agents of the receiver who employed him that the mine