

to manufacture the articles which he now offers for sale, even though it were from M. Gullian & Co. direct, cannot change his status or impair his rights. The injunction was issued, not to prevent the manufacture and sale of fermented milk, but to forbid the use of the trade-mark "Matzoon" as an aid in procuring purchasers. It is true that Senekerim is now using the prohibited word for that purpose, but he does not base his right upon any grant or transfer from M. Gullian & Co., the defendants, but upon the ground that Dadirrian, the complainant, has no exclusive privilege to do so. Leave to file the supplemental bill is denied.

PEIROE v. BANE.

(Circuit Court of Appeals, Seventh Circuit. June 8, 1897.)

No. 347.

MASTER AND SERVANT—RAILROAD APPLIANCES—ASSUMPTION OF RISK.

A railroad company or a receiver operating a railroad owes no duty to its or his servants to provide cars or engines of but one pattern, and any risk arising from an obvious difference in construction of particular cars or engines from those to which they are accustomed is assumed by such servants.

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

The injury which was the subject-matter of this action happened to George Bane, the defendant in error, while in the service of the receiver of the Toledo, St. Louis & Kansas City Railroad Company, in the capacity of brakeman upon freight trains. On the 18th day of January, 1895, at about 4 o'clock p. m., the defendant in error and the train crew were summoned at Frankfort, Ind., to take charge of a through freight train destined for Charleston, Ill. At that time he was notified that a certain switch engine, which had then just come from the repair shops at Frankfort, and was standing on a siding, was to be taken out in the train as a "dead engine"; that is, an engine without steam, and not doing active work. This engine was to be taken to Charleston for service there in switching. It was constructed with a sloping tank, extending to within two feet of the rear end of the tender, and with a footboard at the rear end of the tender, being in length a foot and 5 inches less than the width of the engine, and being 14 inches above the rails. Above this footboard, and upon the floor of the tender, were two hand rails, each about 2 feet long, one upon each side of the drawbar, with a space of 10 inches between them. These were placed 15 inches back from the rear end of the floor of the tender, and 30 inches back from the end of the drawbar. This switch engine, being in perfect repair, was placed in the freight train with six or eight freight cars between it and the locomotive that hauled the train and a number of miscellaneous freight cars behind it. The defendant in error, as head brakeman, was placed at the head end of the train. When near Cayuga, and going up a steep incline, known as "Cayuga Hill," the train, in order to surmount the hill, was parted into two sections. The first section proceeding up the incline became uncoupled immediately behind the dead switch engine, by reason of the pin in the coupler rising, and letting out the link. The conductor and the defendant in error at this time were at the rear end of the section, some three cars behind the dead engine, and, upon the uncoupling of this section, applied the brakes to bring the rear portion of the section to a stop. Bane then descended, and signaled to the engineer to back up. As the front part of the section returned, he went towards it, stepped upon the footboard of the dead engine, and, when the two parts of the section came together, he coupled them with the pin, which still remained in the drawbar

head. The section was then taken over the hill, and placed upon a siding, the engine returning for the rear section which it brought up, when the train was again coupled and proceeded. At about 11 o'clock at night, about two hours after leaving Cayuga, and when nearing Ridge Farm, Ill., the train again became uncoupled immediately behind the dead switch engine, and in the same manner as before. Bane was at that time on top of a box car between the two engines. The forward part of the train proceeded to the switch at Ridge Farm, and then the engineer, upon being informed of the mishap, reversed his engine, and backed the train to the rear portion, which had become disengaged, and was about a quarter of a mile distant. In going that distance, Bane stood upon the footboard of the dead engine, having hold of the hand rail on the south side of the rear end of the tender. Upon approaching the rear end of the train, he signaled to the fireman with his lantern, which he held in his right hand, holding to the hand rail with his left hand. The train not slowing, Bane undertook to cross upon the footboard to the other side of the engine, in order to signal to the engineer. He stood with his back to the tender, and, turning to pass around the drawbar, he examined, with the aid of his lantern, the step on the further side of the drawbar, satisfying himself that it was in proper condition, but paid no attention to the hand rail on the tender, and did not examine it. In attempting to cross around the drawbar, he reached for the hand rail, and his hand rested on the smooth surface of the frame of the tank in the 10-inch space between the two hand rails. He lost his balance, fell backward upon the north rail of the track, and received the injuries complained of. The negligence charged in the declaration is the failure "to have upon the rear end of the tender of the switch engine a hand rail reaching from one side thereof to the other, to reasonably protect employes engaged in operating such switch engine and tender, and in coupling the same to other cars." At the trial the case was rested upon the conclusion of the evidence for the plaintiff, the defendant below offering no testimony, but moving the court to direct a verdict for the defendant. The adverse ruling of the court upon that request is assigned for error.

Clarence Brown and Charles A. Schmettau, for plaintiff in error.
F. W. Dundas, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The test of liability is failure in the discharge of duty. Unless the master stood in breach of duty in hauling, as part of this freight train, a switch engine of the construction of the one in question, responsibility for the injury here cannot justly be imposed upon him. This switch engine was not being operated. Bane had no concern with it except as it constituted part of the freight train being hauled. Neither the hand rail nor the footboard was for use in connection with the operation of the train. Bane used these instrumentalities as a convenience in an attempt to cross from one side to the other of the train. He assumed, without examination, that with respect to the hand rail the switch engine was of like construction to some others with which he was familiar, and that the hand rail was continuous across the engine. Liability is asserted upon the broad pretense that the master had no right to haul a switch engine in this train unless it was equipped with a continuous hand rail across the rear end. The contention cannot be upheld. The master owes no duty to the servant to provide cars or engines of but one pattern. There rests no such obligation upon the master. "A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those