

Insurance Co., 44 Cal. 264, and it was there held that a complaint with a similar allegation was fatally defective. * * * We are of opinion that the objection to the complaint just above discussed is well taken, and that the demurrer to it should have been sustained."

See, also, *McCormack v. Insurance Co.*, 78 Cal. 468, 21 Pac. 14.

The facts, as alleged in the complaint (which on demurrer are assumed to be true), that the defendant had been ever since 1892 fully advised and informed of the breaches of said bond, and the resulting loss to plaintiff, did not, whatever may have been their effect otherwise, dispense with the furnishing of proof of loss, as a condition precedent to plaintiff's right of action. The bond plainly provides that any loss sustained by the employer shall be payable within three months next after notice, "accompanied by satisfactory proof of such loss." In order to state a cause of action upon said bond, the complaint must unquestionably allege, among other things, that the requisite proof of loss was furnished the defendant at least three months before the commencement of the action. As I have already shown, no such allegation has been made, either specifically or in general terms.

There is another objection to the complaint, which manifestly is well taken. The obligation of the defendant, as expressed in the bond, was to make good "all and any pecuniary loss sustained by the employer, * * * and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer." The allegation, hereinbefore quoted, that "the defendant nevertheless was and has been fully advised and informed of and concerning the aforesaid breaches of said bond by said Collins, and the loss thereby occasioned to the plaintiff, ever since the month of May, 1892," is probably tantamount to alleging that the loss was discovered in May, 1892, which was during the continuance of the bond, but certainly does not show—nor is there any other allegation in the complaint which does show—that the discovery was within six months from the death or dismissal or retirement of the employé. In the two particulars just indicated, I hold that the complaint is defective, without, however, passing upon any of the other objections thereto. Demurrer sustained, with leave to plaintiff to amend in 10 days if it shall be so advised.

DOYLE v. BOSTON & A. R. CO.

(Circuit Court of Appeals, First Circuit. October 6, 1897.)

No. 144.

1. ISSUE OF NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.

Where the real issue, as made before the jury, was the negligence of the defendant, it was not error for the court to charge that the burden of proof of the entire case was on the plaintiff, and to refuse to charge that the burden of showing plaintiff's want of care was on defendant.

2. **NEGLIGENT STARTING OF TRAIN—NOTICE TO PASSENGER—INSTRUCTIONS, AND REFUSAL.**

The question of the conductor's negligence in starting the train and giving plaintiff notice having been submitted to the jury in a charge sufficiently clear and explicit, it was not error to refuse to instruct the jury that, if the conductor shouted "All aboard," it was proper for them to consider whether or not plaintiff might not reasonably suppose the train would not start until he had an opportunity to board it.

3. **NEGLIGENCE OF EMPLOYEES—DEFECTIVE PLATFORM AND LIGHTS—EFFECT OF INSTRUCTION.**

In an action for personal injuries alleged to result from the negligent starting of a train, and failure to provide suitable platform and lights, the question of negligence arising from defective platform and lights, having been submitted to the jury, was not withdrawn from their consideration by a charge that "this case must be treated precisely as though this suit had been brought directly against the conductor and engineer, if the accident happened through the fault of the conductor and engineer."

4. **INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.**

Where other questions were involved, but the gist of plaintiff's case, on the pleadings and evidence, was the negligent starting of a train, it was not error for the court to so state to the jury, where he clearly informed them that they were the judges of the fact, no matter how strongly he might express his personal views thereon.

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

Richard M. Saltonstall and E. Eugene Bolles, for plaintiff in error.

Samuel Hoar and George P. Furber, for defendant in error.

Before COLT, Circuit Judge, and WEBB and BROWN, District Judges.

COLT, Circuit Judge. This was an action by a passenger against a railroad corporation for personal injuries. The injuries were received at a station known as Riverside, on the evening of August 19, 1893, while the plaintiff was in the act of boarding the defendant's train. The verdict was for the defendant, and the plaintiff tendered a bill of exceptions, and sued out this writ of error. Before coming to the consideration of the errors assigned, it may be observed that they are generally open to the criticism of not giving all that the court below said in its charge to the jury upon the particular point to which exception was taken. It is not a sufficient ground for error to take a single sentence or passage from the charge, disconnected from the general context, or from what precedes or follows. In determining whether the court below was right or wrong, we must examine the whole context, in order to find out what was in fact the ruling. The numerous errors assigned may be considered under several general heads:

1. The court refused to instruct the jury that the burden of proof was upon the defendant to show that the plaintiff was not in the exercise of due care at the time of receiving the injury complained of, and that the defendant must show this by a fair preponderance of the evidence, or the plaintiff is entitled to recover, so far as his own negligence is concerned; but the court did instruct the jury as follows:

"The plaintiff is to prove his entire case, as I shall submit it to you, by a preponderance of evidence." "I do not withdraw what I said to you,—that the burden of the proof of this entire case, as I submit it to you, is on the plaintiff."

As the case was submitted, if no question of care on the part of the plaintiff was left for the consideration of the jury, the plaintiff was not injured. The declaration contained two counts. In both counts the injury was alleged to have been caused by the defendant's carelessly starting the train while the plaintiff was about to board it. The second count further declared that the defendant was negligent in not providing suitable platforms, lights, and other facilities for passengers alighting from and taking trains at this station. The evidence in the case was directed mainly to the point whether the defendant was negligent in starting the train. Upon the pleadings and proofs, we think the court below properly held that the question did not arise whether the plaintiff was in the exercise of ordinary care at the time of receiving the injury. The only real issue before the jury was the negligence of the defendant, and upon this issue the burden of proof was upon the plaintiff. The language of the court, therefore, was proper and unobjectionable. This instruction was favorable to the plaintiff, because it eliminated from the consideration of the jury one ground of defense, namely, that, assuming the defendant was negligent, the plaintiff's right of recovery could still be defeated by proving that he was not in the exercise of ordinary care at the time of receiving his injury. But in fact, as appears in the charge printed in the record, but not noticed in the bill of exceptions, the court did instruct the jury on the question of the plaintiff's negligence, and the rule of this court as to the burden of proof on this issue, as follows:

"I do not recollect any point at which the question of the plaintiff's care comes up, but, if there is any point where it comes up as a ground of defense, the burden is on the defense; and I instruct you now, as requested by the plaintiff, that 'the burden of proof is not upon the plaintiff to show that he himself was in the exercise of due care at the time of receiving the injury, but, if the defendant claims the plaintiff's neglect contributed to the injury, the burden of proof is on the defendant to show that fact.'"

If either party had cause to complain that the consideration of the plaintiff's negligence was taken from the jury, it was the defendant. In its answer such negligence was alleged as a ground of defense, and upon the whole evidence the defendant might well have insisted that the jury should pass upon it. If the verdict had been for the plaintiff, it would have been a serious question whether the defendant ought not to have a new trial.

2. The court refused to instruct the jury as follows:

"If the conductor, prior to starting the train, shouted 'All aboard,' it is proper for you to consider this fact in considering whether or not the plaintiff, if he was then in or upon the premises where passengers might properly wait, might not reasonably suppose that the train would not start until he had an opportunity to board it forthwith after hearing said warning."

While the judge refused this request in the form in which it was stated, he did leave the question to the jury whether the conductor, under the circumstances, was negligent in starting the train, and whether he gave the plaintiff sufficient notice before starting. We think the charge of the judge on this point was sufficiently clear and explicit, and that he properly refused to give the instruction in the terms in which it was prayed for.

3. It is urged that the court did not properly submit to the jury, as a ground of action, the alleged negligence of the defendant by reason of defective platforms and lights, contained in the second count of the declaration, but did charge as follows:

"The burden of this case, as I will show you, is upon the proposition that the train started with a jerk." "As the case stands, if the train had not started with a jerk there would be no case." "The second count also contains what I will read to you from the first, 'Just as the plaintiff was taking the train, it started,' and which I say is the pith of the case."

We think the court was entirely justified in the use of this language in the connection in which it was used in the charge. The real point in the case was the negligence of the defendant in starting the train. This is conceded in the plaintiff's brief, in the following words:

"The gist of the plaintiff's claim, upon the pleadings and evidence, was that the train was carelessly started."

But in fact the court did submit to the jury the question of defective platforms and lights, contained in the second count. The judge said:

"There are two counts, which differ in certain particulars. The second count contains allegations touching the condition of the platform, and touching the condition of the lights. I do not know that there is any evidence here that the condition of the platform, if it was in an incumbered condition, contributed to this accident. The matter of lights is one of those things about which the court is unable to form any proper conception. It is one eminently suitable for you to determine. * * * The first count only alleges that the train started, and that that was the cause of the accident. The other count charges the condition of the platform, the want of light, and the starting of the train,—all three. Now, gentlemen, under the second count the plaintiff is not bound to prove all three; he may prove one, two, or three of those allegations, provided you are satisfied they contributed to the accident."

4. It is urged that the court erred in charging the jury, in substance, that the fault of the railroad company was the fault of the conductor and the engineer, and that "this case must be treated precisely as though this suit had been brought directly against the conductor and the engineer, instead of against the railroad company." But the qualifying words of the court, "if the accident happened through the fault of the conductor and engineer," are omitted in the assignment of errors. In this, as in others of the errors assigned, where the whole context is examined the charge of the judge is found to be unobjectionable. As this proposition was in fact stated to the jury, it cannot be said that the court took away from their consideration the question of negligence arising from defective platforms and lights, for which neither the conductor nor the engineer was liable. Nor did this passage in the charge contain an erroneous statement of law. It simply referred to the rule in this class of cases that the fault is the fault of the servant alone, and that on grounds of public policy the master is held responsible for the fault of his servant.

5. The comments of the court on the evidence are assigned as error. We find nothing in those statements which was unfair to the plaintiff. Further, it appears that all questions of fact were finally left to the jury. In the comments on the evidence set out in the twentieth assignment of error the court said, "You [the jury] will consider, it is a matter for you to determine," etc.; and in the comments referred to

in the twenty-first assignment the court said: "You are to determine whether that is true." "You are to judge whether or not the conduct or did not give this man ample time." The judge charged the jury generally on this subject as follows:

"So, gentlemen, it may be, in the course of the charge, I shall direct you upon certain questions of fact as well as upon certain questions of law, that you ought to find so and so, and, if I do, I will make it clear at the time that I intend so to direct you, and you must follow my directions; but unless I say to you, on a certain proposition of fact, that you must find the facts so and so, you are to understand you are the judges of the fact, no matter how strongly, as I go along, I may express my personal views upon certain questions."

The expression of an opinion by the judge in submitting the case to the jury, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on a writ of error. *Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1. Judgment of the circuit court affirmed.

CHILTON v. TOWN OF GRATTON.

(Circuit Court, D. Nebraska. September 30, 1897.)

1. TOWNSHIP BONDS—VALIDITY—INNOCENT PURCHASERS.

The question whether the petitioners for an issue of township bonds were freeholders of the township, as required by the statute, is one which cannot be questioned by the township, as against innocent holders of the bonds, after the same has been determined by the county board, the bonds issued, and the avails thereof received.

2. SAME—BONDS OF TOWNSHIP CONTAINING SECOND-CLASS CITY.

Under the statutes of Nebraska, the powers and jurisdiction of a second-class city, and of a township in which it may be located, are entirely separate and distinct, and therefore the township may issue bonds based on the combined assessed valuation.

3. SAME—CONSTITUTIONAL LIMITATION—OVERISSUE OF BONDS.

The Nebraska constitutional limitation on municipalities is not as to the bonded indebtedness for all purposes, but upon the amount to be issued for works of internal improvement, which do not include a county court house.

4. SAME—STATUTORY LIMITATION—DETERMINATION VESTED IN BOARD.

When limitations as to amount of indebtedness are imposed by statute, and not by the constitution, the legislature may create a board with authority to determine the questions of fact upon which the amount of limitation depends, and its finding will be conclusive in favor of bona fide purchasers.

5. SAME—NOTICE FROM RECORDS.

When the limit of an issue of bonds is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, or they have better access to the information than other persons, and can ascertain the amount with more certainty than strangers, then the bonds will be held valid in the hands of bona fide holders.

6. SAME—COMPLIANCE WITH CONDITIONS—RECITALS IN BONDS.

Purchasers of railway aid bonds are not required to ascertain what conditions as to time of completing the road were imposed by the proposition voted on, where such conditions were not shown on the face of the bond, and the bonds recite a compliance with the law.

7. SAME—PROCEEDING TO ENJOIN TAX TO PAY BONDS—BONDHOLDERS NOT PARTIES.

Holders of municipal bonds, who were not made parties to a suit brought by taxpayers to enjoin the proper officers from levying and collecting a tax