

not now a question before this court. In Illinois, where a motion in arrest of judgment prevails the suit is not at once dismissed as of course, but new pleadings are ordered by the court. In the case at bar the judgment is reversed, and the cause remanded to the circuit court with the direction that plaintiff be required to file a new declaration within a time to be fixed by the court, and in default thereof that the suit be dismissed.

WOODS, Circuit Judge. While assenting fully to the foregoing opinion, I am the more ready to concur in reversing the judgment in question because of the ground upon which it was based. Regardless of "the exempting clauses contained in the regulations promulgated by the director general," I think it cannot be true, as declared in the opinion below, that "nothing short of exhaustive carefulness, all the circumstances considered," could "fully meet the moral and legal obligations imposed," or that it is "the law of this case that the management of the exposition was under legal obligations to safeguard, by the highest intelligence and protection, compatible with the ephemeral character of the buildings, the exhibits of the plaintiff." At most, the plaintiff in error was bound, I think, to exercise ordinary care, and therefore liable only in case of a failure of the management to use ordinary prudence according to the circumstances to protect the exhibits.

ANDERSON v. HOPKINS et al.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1899.)

No. 505.

1. RAILROADS—ACTIONS FOR PERSONAL INJURIES—PLEADING.

In a declaration in an action to recover for personal injuries to an infant, an averment that, while plaintiff was riding on the footboard of a switch engine, the servants of defendant "so negligently managed and controlled the engine, by bringing it to a sudden stop," that plaintiff was thrown therefrom by the jerk, and was run over, is a sufficient allegation that the sudden stopping of the engine was negligent, and excludes the idea that it was necessary and proper.

2. SAME—INJURY TO TRESPASSERS—MEASURE OF CARE REQUIRED.

The failure of employes of a railroad operating an engine to exercise reasonable diligence to avoid an injury to one perceived to be in a position of peril, from which he is not likely to extricate himself, though he is a trespasser, will render the railroad company liable for an injury which results.

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

W. L. Taylor and M. Millard (F. C. Smith, of counsel), for plaintiff in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This action was brought by William Anderson, a minor, by next friend, against E. O. Hopkins and James

H. Wilson, receivers of the Louisville, Evansville & St. Louis Consolidated Railroad Company, to recover damages caused by being thrown from the footboard of the tender of a switching engine in the use of the receivers, at the city of East St. Louis. A demurrer to the amended declaration was sustained, and, the plaintiff declining to amend further, judgment was given for the defendants.

Four causes of demurrer were assigned, but they are all embraced in the one proposition that the declaration does not state a cause of action. The declaration shows that on the 16th day of November, 1895, the receivers were operating the road of the company named through Railroad avenue and across Main and Fourth streets, in the city of East St. Louis, St. Clair county, state of Illinois, and had in their use for that purpose a certain locomotive switching engine; that the plaintiff was at the time an infant "eight years old, and, by reason of his youth and want of experience, unable to appreciate the danger of being and riding upon said engine, but the defendants' servants in charge of said engine, notwithstanding the premises, then and there carelessly and knowingly permitted the plaintiff to get upon and ride upon the footboard of the tender attached to said engine, in a position of great peril to the plaintiff, which the defendants' said servants well knew; * * * that while he was then and there riding upon said footboard, with the knowledge of the defendants' said servants, and exercising such care and diligence as he was capable of using, the defendants' servants in charge of said engine so wantonly and negligently managed and controlled the same, by bringing it to such a sudden stop and jerk, that the plaintiff was thereby jerked and thrown from said footboard to the ground, and the wheels of said tender then and there passed over both of his legs, and so crushed and mangled the same that amputation thereof became and was necessary."

The chief objection urged against the declaration is that it does not show that the bringing of the engine to a sudden stop was not, under the circumstances, necessary, or apparently so, for the purpose of saving the boy from harm or for some other imperative reason. We think the averment that the servants of the receivers "so negligently managed and controlled the engine by bringing it to a sudden stop," etc., is equivalent to an averment that they negligently brought the engine to a sudden stop. So construed, the averment excludes the idea of necessity or excuse for the act. Whatever was negligently done cannot be said to have been done necessarily or reasonably.

It is further urged that the plaintiff, having been a trespasser, is without relief, unless the injury was willfully or maliciously inflicted. That rule does not apply when the injury befalls one who is perceived to be in a position of peril, from which, by reason of inability or inattention, he is not likely to extricate himself. A failure to exercise reasonable diligence to avoid injury to one perceived to be so situated is an actionable wrong, if harm results.

It is suggested that the declaration contains no averment that the plaintiff was free from fault, and himself exercising due care, at the time he was hurt. The averment quoted we think sufficient on that

point. The judgment below is reversed, with direction to overrule the demurrer.

SHOWALTER, Circuit Judge, did not participate in this decision.

ALKIRE GROCERY CO. v. RICHESIN et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. January 9, 1899.)

1. FEDERAL COURTS—JURISDICTION—CREDITORS' BILL.

A judgment creditor in a state court, who has sued out an execution and obtained a nulla bona return, may file a creditors' bill based on said judgment and nulla bona return in the circuit court of the United States for the district comprising the county in which the judgment of the state court was rendered.

2. JUDGMENT—RES JUDICATA—COURTS—JURISDICTIONAL AMOUNT—PLEAS TO JURISDICTION—DEMURRER.

The Alkire Grocery Company, a corporation organized under the laws of the state of Missouri, recovered a judgment in the circuit court of Boone county, Ark., against Jesse R. Richesin, and afterwards acquired two judgments, rendered in the same court, against said Richesin, one from Simmons Hardware Company, and one from A. Frankenthal & Bros., both citizens of Missouri, and all of said judgments were for sums less than \$2,000, but the aggregate more than \$3,000. The Alkire Grocery Company sued in the Boone circuit court in Arkansas on all the three judgments, and recovered judgment in its own name for \$3,264.66, sued out execution, and procured a nulla bona return, and then filed this bill against the judgment debtor and his wife and son to vacate certain alleged fraudulent conveyances to them. The property held by the son was \$400 in value; that held by the wife more than \$2,000. Each of the defendants filed pleas to the jurisdiction on the grounds (a) that Alkire Grocery Company only held the judgments of Simmons Hardware Company and A. Frankenthal & Bros. colorably, and sued on them and secured judgment in the Boone circuit court in order to raise the amount so as to give the United States circuit court jurisdiction; and (b) the son also assailed the jurisdiction on the ground that the property claimed by him was worth only \$400. *Held*: (1) That the judgment of the Boone circuit court was conclusive as to the judgment debtor; (2) that, in the absence of allegations of the want of jurisdiction in the Boone circuit court as to either the parties or subject-matter, and in the absence of any allegations of collusion or fraud in the procurement of the judgment between the judgment creditor and debtor, the judgment in the Boone circuit court is also conclusive upon the judgment debtor's co-defendants in a creditors' bill to vacate fraudulent conveyances; (3) that the amount claimed by the judgment creditor against the judgment debtor determines the jurisdiction of this court, and not the value of the property held by the latter's assignee; (4) that all the pleas were bad, and should be overruled; (5) that demurrers to pleas to the jurisdiction and motions to strike them from the files are irregular, and nothing is required except to set the pleas down for hearing, like a demurrer, unless the complainant desires to put the facts pleaded in issue, when a replication is required.

(Syllabus by the Court.)

Read & McDonough, for complainant.
Hill & Brizzolara, for defendants.

ROGERS, District Judge. The complainant, the Alkire Grocery Company, a mercantile corporation organized under the laws of the