

done long ago; and now, when, by reason of their forbearance, the trustees have received their rent in full, and enough money has been earned to pay them in full, they, who might have insisted on payment out of the first net earnings, going to make up the great fund of \$6,000,000 since earned, must be paid.

The order will be that all Tennessee judgments for timbers furnished and work and labor, for personal injuries, and for injuries to property, and all Kentucky judgments for injuries to property and persons, and for breaches of contracts of affreightment, will be paid in full, with interest to January 3, 1899, and that out of the remainder of the fund a pro rata dividend will be paid to all the other creditors upon their claims, with interest down to January 1, 1898. This last date is fixed for convenience, because this was the date to which the master calculated interest on all claims. The case will be referred to the master, to report to the court the claims to be preferred and paid in full under this order, and the amounts, with interest to January 3, 1899, and also the dividends to be paid on other claims allowed, but not preferred. This report must be filed with all convenient speed. The master may have the assistance of the auditor of the receiver in the preparation of this report.

Since writing the above, the master has filed an additional supplemental report of more judgments against the defendant company, which may vary the figures I have given above; but they cannot change the principle to be applied in the distribution of the fund. The result of my conclusion, stated generally, is that, out of the \$200,000 of earnings to be distributed, the Tennessee and Kentucky judgments of the preferred class will be paid in full, and the rest of the creditors of the defendant company will receive between 20 and 25 per cent. of their claims. If the railroad continues to earn money for the next year as it has during the past year, on or before January, 1900, all the claims will be paid in full. It is hoped that such a prosperous condition will enable the defendant company speedily to adjust its liabilities, and procure the dismissal of the bill and the lifting of the receivership. If not, then until a sale shall be had and confirmed, dividends will be distributed by the court at every quarter, if the net earnings over and above the rental due the city under the lease will permit it.

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THOMAS v. CINCINNATI N. O. & T. P. RY. CO.

(Circuit Court, D. Kentucky. December 14, 1898.)

RAILROADS—COLLISION AT CROSSING—BURDEN OF PROOF AS TO NEGLIGENCE.

Where a freight train on defendant's road separated on account of the breaking of a drawbar stem, and some of the cars ran back downgrade, and collided with a train on another road at a crossing, the burden rested on defendant to prove freedom from negligence of its employes; and such burden is not met where it is not shown that the stem was not defective, that it had been inspected within a reasonable time, or that the train was properly handled.

On exceptions to the report of the special master on the intervening petition of the Louisville & Nashville Railroad Company.

Edward Colston, for receiver.

J. W. Bryan and O'Hara & Rouse, for creditors.

TAFT, Circuit Judge. In 1895 the Louisville & Nashville Railroad Company filed an intervening petition in this cause. The petition averred that in 1891 a collision occurred at Junction City, where the line of the Cincinnati, New Orleans & Texas Pacific Railway crosses the line of the Louisville & Nashville road, whereby the tender of an engine and a box car were materially injured; that this collision occurred through the negligence of the employes of the Cincinnati, New Orleans & Texas Pacific Railway Company. The intervening petitioner claims a lien on the property of the railroad company under a statute of Kentucky passed in 1876. The receiver filed a demurrer to that part of the petition which set up a lien, filed a plea of the statutes of limitation to the claim, and also filed an answer denying the negligence. The master found that there was no lien, because the statute under which it was claimed was invalid by reason of the constitution of Kentucky. The master overruled the plea of the statute of limitation, finding that the statutory period was five years, and that the cause had accrued within less than that time before the filing of the intervening petition. On the facts in the case the master found that there was no negligence.

The undisputed facts were as follows: A freight train of the Cincinnati, New Orleans & Texas Pacific Railway Company, at night, approached the Louisville & Nashville crossing at Junction City, and stopped. The engine and nine cars were then uncoupled from the rest of the train, and proceeded across the Louisville & Nashville track, upgrade, into the freight yard of the Cincinnati, New Orleans & Texas Pacific Railway Company, to the north of the junction, for the purpose of cutting off and leaving there one of the nine cars. While the Cincinnati, New Orleans & Texas Pacific train was thus engaged, a freight train approached the junction from the west on the Louisville & Nashville track, and, receiving the proper signals, was proceeding slowly over the crossing. About the time the engine reached the crossing, a drawbar stem of the fourth freight car from the end of the cut of cars which had been taken across the track by the Cincinnati, New Orleans & Texas Pacific Railway engine broke, and four cars started down the somewhat steep grade towards the Louisville & Nashville track. The distance was 400 or 500 feet, and the velocity attained by the cars before reaching the junction was between 10 and 20 miles an hour. A brakeman upon the cars attempted to stop them, but, failing to do so, jumped to the ground. The conductor of the Cincinnati, New Orleans & Texas Pacific train was on the platform of the junction station. He is the only witness who is called to testify as to how the accident occurred. He said he examined cars after the accident, and, when asked what the cause of it was, said a broken drawbar stem. "Q. Whereabouts did it break? A. In the keyway,—what we call the hole punched through the drawbar stem to hold it in its place. Q. State how long you have been a freight

conductor. A. About 14 or 15 years. Q. And what experience have you had with switching and handling freight cars in the yard generally,—what length of time? A. In that length of time we do more or less every day in regard to switching. Q. State whether or not, in your experience, the breaking of a drawbar stem, as you describe it, is a common accident, or otherwise. A. Yes; frequently occurs. Q. State whether or not any practicable inspection would discover the liability to such an accident. A. It could not, not being visible to the outside eye, you know." Witness then stated that the engineer was a competent and careful man, but that he could not observe his manner of handling the engine at that time.

The defense is that this was an inevitable accident, and the question is whether the evidence above given proves it to have been, so that the defendant can escape liability. It seems to me that this case must be controlled by the rules of law laid down in *The Olympia*, reported in 22 U. S. App. 69, 9 C. C. A. 393, and 61 Fed. 120. In that case a collision in the river was caused by the breaking of a tiller rope, and the principles that governed the liability of the parties were thus stated by Judge Lurton, speaking for the court of appeals:

"The defendant says that the tiller rope broke, and that the vessel became unmanageable, and the collision unavoidable. That only shows that the breaking of the tiller rope was the cause of the collision. It must go further, and show that the cause which operated to break the tiller rope was unavoidable. The collision was but the result of the cause which produced a broken tiller rope. If that cause is not shown to be unavoidable, how can it be said that the collision was an inevitable accident? Unless the defendant can get rid of the negligence proved against it, by showing the cause which broke this wheel rope, and that the result of that cause was inevitable, or by showing all the possible causes which might have produced such an effect, and then showing that the result of each one of these possible causes could not have been avoided by it, it has not met the burden of proof which rests upon it. This is the doctrine of the late case of *The Merchant Prince* [1892] Prob. 179, 187."

I do not understand that the rule at common law is any different in this respect from the rule in admiralty. The fact that this accident occurred as it did occur puts the burden on the Cincinnati, New Orleans & Texas Pacific Railway Company, or its representative, the receiver, of showing that the drawbar stem did not break through any negligence of its employes. There is nothing to contradict the hypothesis that the drawbar stem was partly broken or defective before the accident. There was no evidence to show that a due inspection of it had taken place within any reasonable time before the break. There is no evidence to show that the breaking of the drawbar stem did not occur through some careless handling of the engine by the engineer. It is possible that any one of these causes might have led to the breaking of the drawbar stem. No evidence has been introduced to negative these possibilities. The evidence which was introduced, therefore, does not support the burden of proof which the fact itself puts upon the defendant. I think this was a mistake of law on the part of the master, and that the exceptions must therefore be sustained, and that the Louisville & Nashville Railroad Company is entitled to a

decree finding the Cincinnati, New Orleans & Texas Pacific Railway Company indebted to it in the sum of \$476.26, the amount required to repair the injury done in the collision.

The exceptions and proof in support of the exceptions filed by counsel for the Louisville & Nashville Company do not complain of the holding of the master that no lien could arise in this case against the property of the railroad company. I do not find it necessary, therefore, to consider this issue, and merely make an order finding the indebtedness as already stated.

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CENTRAL OF GEORGIA RY. CO. v. HITCHCOCK et al.

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

No. 764.

RAILROADS—CLAIMS AGAINST RECEIVER—REPAIRS TO ROAD.

Where materials for the repair of a railroad track furnished to the lessee were taken possession of and used in making such repairs by the receivers of the general system of which such line of road formed a part, the seller became a creditor of such receivers therefor; and they are not relieved from liability by the fact that they afterwards surrendered such line of road to a receiver appointed in another suit for that line singly.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

All of the facts are contained in an agreed statement of facts, which is substantially as follows:

In December, 1891, the Richmond & Danville Railroad Company was operating the Chattanooga, Rome & Columbus Division of the Savannah & Western Railroad Company, under color of a lease made by the Central Railroad & Banking Company of Georgia to the Georgia Pacific Railroad Company. At that time the Central Railroad & Banking Company of Georgia owned all the stock of the Savannah & Western Railroad Company, and transferred, or attempted to transfer, the right to control the properties of the Savannah & Western Railroad Company through said stock to the Georgia Pacific Company, by virtue of the aforesaid lease; and the Georgia Pacific Company, being itself under the control of the Richmond & Danville Railroad Company, had allowed the Richmond & Danville Company to go into the possession of the lines of road controlled by the Central, including the Savannah & Western Railroad Company's lines; and during the said month of December, 1891, the said Richmond & Danville Railroad Company were actually operating the said railroad lines. That on March 4, 1892, the validity of the aforesaid lease and possession was attacked by a bill filed by Rowena M. Clark and others, stockholders of the Central Railroad & Banking Company of Georgia, in this court; and H. M. Comer and the other directors of the Central Railroad & Banking Company of Georgia were appointed receivers of the Central Railroad properties, and went into possession of the Chattanooga, Rome & Columbus Division of the Savannah & Western Railroad Company, as part of the assets and system of the Central Railroad & Banking Company of Georgia. And said receivers continued to operate said Chattanooga, Rome & Columbus Division of the Western Railroad Company, under said stockholders' bill, until the 4th day of July, 1892, when the Central Railroad & Banking Company of Georgia filed an ancillary bill, declaring its inability to meet its matured and maturing obligations; and H. M. Comer was appointed the sole receiver under said ancillary bill, and continued under said stockholders' bill until the 23d day of January, 1893, when the Farmers' Loan & Trust Company of New York, trustee for the bondholders, filed a bill, which