In the SUPREME COURT, State OF FLORIDA

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
ANNIE E. YNIESTRA,
DEFENDANT IN ERROR.

Brief for Defendant in Error

J. C. Avery and C. B. Parkhill, Attorneys for Defendant in Error

The plaintiff in error assigns as error:

1st. The refusal of the court below to give instruction marked 16.

2nd. The refusal to give instructions marked b.

3nd. The refusal to give instructions marked c.

4th. The refusal to grant a new trial.

Plaintiff in error abandons all other exceptions, and all grounds on which a new trial was prayed for, except the 1st, 2d and 7th of the motion.

First assignment:

Instruction 16 was properly refused.

It requires the court to instruct the jury that the facts in the case show contributory negligence on the part of the deceased, and do not show negligence on the part of the agents of the company, after discovery of the peril of the deceased.

Such an instruction could not be given in Florida, while the statute provides as it now does, that "it shall be the duty of the judge presiding * * * to charge the jury only upon the law of the case; that is, upon some point or points of law or exceptions to evidence arising in the trial." McClellan's Digest, 338, § 34; Act March 2, 1877, § 1.

This instruction if given would have taken from the jury the consideration of the evidence. It assumes conclusively that the evidence shows certain facts, and those facts thus declared by the

court to have been proven, and not even recited in the instruction, are taken as a basis for the declaration that in law certain consequences must follow. The province of the jury could not be more completely and arbitrarily usurped by the court.

This court has held "that it is error to charge that there is no conflicting evidence in the case." Metsger vs. The State, 18 Fla. 482.

The instruction prayed for here goes even further. It tells the jury not only (in effect) that there is no conflicting evidence, but also that they must find that the evidence establishes certain facts (in the mind of the court, but not expressed to the jury) and that those facts are conclusive proof of negligence on the one side and absence of negligence on the other.

Whether a party has been negligent in a given case is of course a question of mingled law and fact--1st, whether a particular act has been performed or omitted, and 2d, whether the performance or omission of this act was a breach of legal duty. Shear. & Red. on Neg., § 11.

Some courts have gone so far as to take from the jury cases involving questions of negligence and have decided them for themselves. But such a course would never be proper under such a law as ours.

The question of negligence must always be under our practice one of fact for the jury, under the instruction of the court, as to care or want of it, in either party, according to the circumstances of the case. Ibid, § 11, note; 47 Penn. St., 300.

Even were such an instruction permissible under our law under any circumstances, the circumstances of this case would not warrant it.

Second assignment:

Instruction (b) was properly refused.

1st. It involves the proposition that plaintiff must prove that deceased was in the exercise of due care. But the rule of law is that such care is presumed. Shear. & Red. on Neg., § 31; Oldfield vs. R. R. Co., 3, E. D. Smith, 103; Penn. R. R. Co. vs. Weber, 76 Penn., 157.

If deceased was not in the exercise of due care then he was guilty of contributory negligence. But it was decided in this case, on demurrer to the declaration, in accordance with reason and the weight of authority, that contributory negligence is a matter of defence to be charged and proved by the defendant. Shear. & Red. on Neg., §§ 43 and 46, and note; Cooley on Torts, 42, note; 15 Wall., 401; 22 Am. Reps., 714; 11 Am. Reps., 443; 48 Cal., 409; 12 Bush., 41; 46 Penn. St., 316; 66 Penn. St., 30; 5 Dutch., 544; 24 Ala., 112.

Therefore this charge could not be given because it in effect states that absence of contributory negligence (a negative) must be proven by the plaintiff.

2nd. It involves the proposition that the defendant had a right to use as a switch yard the place

where the killing occurred, without leaving it to the jury to determine whether that locality was a street of a city; and, if so, whether the defendant had ever been authorized to use it as a switch yard.

3rd. It involves the proposition that, if the facts detailed in the hypothetical case existed, then, without considering any other evidence in the case, the jury must find for defendant.

One of the most important features of the evidence is entirely omitted, i.e., that the locality where the deceased was run over and killed was in a public street of the city. There can be no hypothetical case presented fully corresponding with this case, from which that element is omitted.

The court below in the charge which forms part of the bill of exceptions, gave great prominence to this fact. The charge was not excepted to and is unexceptionable.

The rule of law is that travelers have the same right to walk upon a highway where a railroad track is laid that they would have if the track was not there. Shear. & Red. on Neg., § 491; Fash. vs. R. R. Co., 1 Daly, 148; William vs. R. R. Co., 3 Bosw., 314.

If they have a right to walk there, then their being there cannot raise the presumption, or be evidence of want of due care; in other words, they are not trespassers as they would be if the track was not in a highway.

Hence, in a case where it is claimed that deceased was killed while on a track laid along a public highway, and there is evidence to show the fact, and no evidence to the contrary, it would not be proper to give such an instruction as is prayed for here without qualifying it so as to enable the jury to understand that they must also determine whether the killing was in such highway; and in the event that it was, that then the other circumstances detailed in the charge would not necessarily require a verdict against the plaintiff.

4th. It is very doubtful whether, under a statute like ours, requiring the Judge to charge only on points of law arising on the trial, it would be proper to give such a charge as this, even if it embraced all of the facts of the case.

Third assignment:

Instruction c was properly refused.

1st. It involved the proposition that if certain facts enumerated were found by the jury they must find that deceased was guilty of contributory negligence, notwithstanding the existence of other facts, which should have been included in the hypothetical case, prominent among which was the uncontradicted claim that the track was laid along a highway.

2nd. It, in effect, declares that the presumption of due care on part of deceased would be conclusively overcome by the existence of hypothetical circumstances detailed, without permitting the jury to take into consideration other facts proven before them, but not embraced in

the hypothetical case, which would enable them to conclude that the presumption of due care had not been overcome.

Most of what has been said above, with reference to instruction b, is also applicable to this instruction.

The obvious purpose of both is, first, to induce the court to say that the facts enumerated make a prima facie case of contributory negligence; and second, that there are no facts in the case, not detailed in the hypothesis, which, if added to the hypothetical facts, would change the legal consequence.

Before this court can say that either instruction should have been given to the jury, it must find that there was nothing in evidence not in the hypothesis which was material. Because the prayers both say the "plaintiff cannot recover," if the hypothetical facts are proven.

Fourth assignment:

There was no error in overruling the motion for a new trial.

The first, second and seventh grounds of the motion, which are all that are here insisted upon, may be considered together:

Appellee contends that the charge of the court and special instructions given at the request of the appellant comprise a correct statement of the law of the case, and all that was properly prayed for in the instructions asked for by appellant and refused by the court. The two important questions were these:

1st. Must plaintiff allege and prove absence of contributory negligence?

2nd. Is one who walks upon a railroad track laid along a highway necessarily a trespasser?

The court below answered both in the negative, and is sustained by the authorities cited above.

If the court did not err as to the law, there is no doubt about the correctness of the verdict of the jury.

It was admitted by defendant's counsel at the trial below, (which was certified to by the Circuit Judge,) that defendant was guilty of negligence, provided the court was correct in its ruling as to the right of deceased to walk upon a railroad track laid along a street of a city. And such negligence was clearly proved

The engine which did the killing was a switch engine which never turned, but went backward as often as forward; and yet there was no cow-catcher or headlight on the end of the tender, though both were as necessary there as at the front end of the locomotive. The wood was piled up so high in the tender that it prevented the engineer from seeing an object on the track near at hand, while it was too dark to see such object far away. Though there were several men on the

locomotive, and though deceased had been seen on the P. & A. track, no one was on the lookout in the direction in which they were moving and in which he had been seen, The engine which did the killing was an engine of the Louisville and Nashville Railroad Company and was on the track of that company when it passed the deceased, he being on the track of the Pensacola and Atlantic Railroad company, and no notice was given that the engine was to leave the track of the company by which it was being run to go down upon that of the other company where deceased was walking. Even if he heard the engine coming he would hardly expect that she had been switched so as to pursue him without notice being given him; and the two tracks were so near together that the sound of the approaching engine would fail to indicate that she had been switched a few feet to the eastward of the line on which she had been moving when he had seen her going north, up the track.

It seems quite clear that there was such negligence on the part of the defendant, both as to conduct of agents and equipment of engine, as to create a legal responsibility, unless the deceased himself contributed to the accident by his own negligence.

That does not appear, unless being upon the track was itself such negligence, which has been shown not to be the law, when the track is laid along the public highway.

No one saw the deceased when he was killed; no one testified as to how the killing occurred, except that deceased was killed by being run over by the locomotive of defendant. There is a total absence of any evidence to show what deceased was doing when he was struck--that he was either careful or negligent.

The presumption of the law is, that he was careful. That presumption the plaintiff must have the benefit of. The burden of showing contributory negligence was upon the defendant; and it offered no evidence upon the subject.

Under such circumstances how could the jury have failed to find in favor of the plaintiff?

The case of Penn. R. R. Co. vs. Weber, 76 Penn. St., 157, supra, is squarely in point.

To summarise:

The evidence shows that defendant was negligent in conduct of its agents and equipment of its engine.

It shows no negligence on part of deceased, unless his being on the track was evidence of such negligence, overcoming the presumption of due care.

But he had a right to be on the track if laid along a highway, provided he used due care. That due care is presumed, and there was no evidence to overcome the presumption. The verdict therefore was properly given in favor of plaintiff.

Even if this court should find that deceased had no right on the railroad track and was a trespasser by being there, still, the verdict can be sustained, because it was the duty of the

company to have some one on the lookout on the end of tender when it was dark and when there was no headlight or cowcatcher at the end, and the wood was so piled on the tender as to prevent the engineer from seeing what was on the track. Had such a lookout been kept the presence of deceased on the track would have been discovered in time to warn him or stop the engine before he was run down by it.

In other words, by the use of ordinary care defendant might have prevented the injury, and it was its duty to do it, notwithstanding deceased should be held to have been a trespasser on the track.

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JNO. C. AVERY & C.B. PARKHILL, Attorneys for Defendant in Error.