In The SUPREME COURT,
State OF FLORIDA.

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

Brief for Plaintiff in Error

W. A. Blount, Attorney for Plaintiff in Error.

There are but two errors assigned:

1. The refusal to give instructions asked for by the plaintiff in error and marked 16--b. and c.

2. The refusal of the court to grant a new trial.

Both of these assignments of error, so far as they will be insisted upon here, are based upon the contention that the evidence was such as to show contributory negligence on the part of Yniestra, or at least to throw the burden upon defendant in error to show that there was not such negligence.

The consideration of these questions divides itself into three parts.

1. Does the evidence show contributory negligence on the part of Yniestra which should prevent defendant in error from recovering?

2. If not, does it raise such an inference of negligence on his part as required defendant in error to prove due care, and if so, has she proved it?

3. The jury having determined the question of contributory negligence in the negative, can this court review such finding, and if so, under what circumstances?

The facts are as follows:

The death of Yniestra occurred in the switch yard of defendant. The part of the yard

where he was killed was in the public street. At that point there were two parallel lines running north and south, about eight feet apart. Between them, and on both sides of them for fifteen or twenty feet and for some distance north and south, the walking was good, better than on the track. About 300 or 400 feet north from where he was killed was located a switch by means of which an engine could be transferred from one of the parallel tracks to the other. At this part of the yard there was no other way of getting from one to the other. The parallel track to the east was called the Pensacola & Atlantic track, or track No. 2, and the one to the west the Louisville & Nashville main track, but they were used in common by both roads. To the south of where he was killed, the P. & A. track diverged into several switches, switch No. 2 being about 300 feet south from the point of killing. To the north of the switch, where the P. & A. and L. & N. tracks came together, were sidings upon which cars were left. Yniestra, for about three years, had been in the habit of going to and from his home twice a day along these tracks and through this switch yard, and had frequently passed while the trains were switching. Engines switched over this switch yard and at this point continuously, day and night. The streets to the east of this on which the railroad was were open as thoroughfares. Yniestra lived to the northeast.

Upon the morning of the killing between four and half past five o'clock, when it was cloudy and dark, or just between daylight and dark, the switch engine of the defendant took a car from the side track, or switch, to the south of the point of killing and proceeded up the P. & A. track (or track No. 2,) to the switch connecting the P. & A. and the L. & N. Upon the engine were Levi Miller, the engineer, Joe Rosique, the fireman, O. F. Godfrey, the yard-master, Henry Mathena, switchman, and James McMahon, switchman. The engine passed through the switch (Mathena having gotten off and thrown it,) and Godfrey got off and went north to the siding to take the number of some cars on the siding. The headlight of the engine was burning brightly. While Godfrey was proceeding up the track he met Yniestra walking southward on the L. & N. main track. He was then about from 90 to 120 feet from the engine. The engine passed through the switch backing down the L. & N. track to a cattle pen on that track about 500 or 600 feet from the switch. McMahon got off and went over to switch No. 2. The engine proceeded north on the L. & N. track to the switch. Just before it reached the switch Mathena, who was on the engine, saw Yniestra walking down (south) on the P. & A. track about as fast as a man usually walks. He was about six or eight feet away. Mathena got off, threw the switch, the engine passed through, Godfrey, who had taken the number of the cars, got on, the engine backed down on the P. & A. track, Mathena got on, the engine continuing to back. Shortly afterwards, when she had gone about 300 or 400 feet, (by the scale) from the switch, Yneistra was struck and killed. The engine was going at the time about three or four miles an hour, "not faster than a man can walk." She was rolling, the engineer having shut off steam so that the valves could be oiled. The bell was ringing continuously at the time. When the engineer felt the jar under the engine he reversed the engine and stopped it, and Yniestra was found dead about fifteen feet in front of the engine.

McMahon, standing at No. 2 switch, about 300 feet south of where Yniestra was killed, heard the bell ringing all the time while the engine was passing up the L. & N. track and while she was backing down the P. & A., and as she was backing through the switch he

saw the engine, i.e. he saw the cab light.

There was no light on the rear of the tender, nor was there any lookout there. Pine wood was piled on the tender to such a height as to prevent the engineer from seeing any object that was a short distance in front of the tender. An object as large as a man could be seen 30 or 50 yards off. There was no cowcatcher on the engine, and Miller swears that it is not usual for switch engines to have them.

I submit that these facts clearly establish negligence on Yniestra's part which contributed to his death.

Of course it will be admitted by defendant in error that no matter what negligence there was on the part of the employes of the plaintiff in error, if the deceased by his own negligence contributed proximately to his own death the defendant in error should not recover, unless the employes were negligent recklessly, wantonly or willfully, after their discovery of the peril of Yniestra. Rorer on Railroads 1010, n. 2, 1013 n. 2, 1026 n. 2; Jacksonville, &c., R. R. Co. vs. Chappell, 21 Fla.

There is no pretence that the employes ever discovered his peril, so if his negligence contributed proximately to his death defendant in error cannot recover. The doctrine of contributory negligence, as set forth above, is the admitted doctrine in this State and in all the States of the Union save three--Illinois, Georgia and Kansas.

Negligence is defined as the failure to show care and skill which the situation demands. R. R. Co. vs. Lockwood, 17 Wall., 383.

Or, in other words, the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such a person under the circumstances would not have done. R. R. Co. vs. Jones, 95 U.S. 439.

If we adopt the view most favorable to Yniestra, we must assume that he continued walking down the track until he was killed, and that he did not get off and then get on again. If so, he was negligent both in what he did and in what he did not do--in choosing a pathway on the track under the circumstances and in not getting off at the proper time.

Was he negligent in going on the track under the circumstances?

There was no necessity of his going on the track. The streets were open as thoroughfares from his home, there was safe walking space between the tracks, better than on them, and there was good walking on both sides. The risk which he took then was gratuitous.

And the circumstances were such as to inform him of this risk. The place where he was walking was a switch yard where switching was being done continually day and night. He knew this fact for he had been passing over the same locality for three years, and had seen the passenger train come in and switching done frequently at the same time of the morning as that at which the accident happened. The passenger train was due behind him

about this time and he had a right to assume that it was on time. 39 N.Y. 358.

Besides this, the circumstances on this particular morning were such as to put him on his guard and to make his going on the track, without assuring himself of a want of danger, carelessness. In other words, the surroundings were dangerous, and it behooved him before getting on the P. & A. track to ascertain positively that there was no danger. He saw the engine before he got to the P. & A. track, its headlight shining full in his face. He saw that it was a switch engine. He knew that this engine traversed the whole of the yard. He saw this engine backing on the L. & N. He again saw it when it passed him just as he got on the P. & A., and he again saw that it had left the car and had none attached to it, and it was again emphasized that it was a switch engine. He saw that it was going northward. He knew that the main tracks lay to the northward and that the switch engine had nothing to do on the main tracks. He knew that the switches lay to the southward and that the only way to reach them was by backing down on the track upon which he chose to walk.

Moreover, it was dark, so that his sense of sight was less available than usual, and the fact that it was so should have made him more careful in putting himself into a position in which there might be a danger which he would not have all the usual means of guarding himself against. Rorer on Railroads, 1061-2 n. 2.

If it be said, as in the court below, that the danger was not certain, the answer is that it was evident that there might be danger and that he was negligent in choosing a path in which there might be peril, in preference to taking one equally convenient and accessible, and in which there would have been none. He took the risk, the result was against him and he cannot complain. Railroad Co. vs. Houston, 95 U.S. 697.

An ordinarily prudent man would not have chosen, without necessity, the more dangerous path.

He had the opportunity of knowing the danger, and, neglecting that opportunity, there should have been no recovery. Rorer on Railroads, 1,030-1,031; 43 Penn. St., 449; 33 Ind. 335.

A person does not exercise due care who goes upon the track in view of an approaching train. 24 N.Y. 430-440; 1 Vroom, 188-203; 70 Ill. 102-108.

And the same is true when he has reasonable ground to believe that the train will approach.

Here, Yniestra knew that the engine could only go back on the track which it was leaving when he last saw it, or go north on the main track, or come on the track upon which he chose to walk. The first course was improbable, the second entirely out of the usual course of things, but the third was the probable and natural sequence.

The inference of want of exercise of due care for his own safety seems irresistible.

But, furthermore, he was negligent in remaining on the track.

I assume that no less a degree of care is required of a person who is walking on the track and making a highway of it than is required of one who is about to enter upon the track for the purpose of crossing it. The requirements are of the same character, but in the latter case the obligation to be alert is a continuing one, and of stringent force during each moment of remaining on the track.

But one about to cross must, before crossing, "stop, look and listen" for approaching trains. 39 N.Y. 227; 33 Ind. 335; 24 N.Y. 430-40; Rorer on Railroads, 1010, n. 2, 1061, n. 1, 1062.

And the looking must be both up and down the road.

The same obligation being upon Yniestra, it was his duty, the danger of trains being both before and behind him, and that of which he should have had a reasonable apprehension being behind, to stop or turn his head at such intervals as was necessary to insure his safety.

He did neither of these things. An object as large as a man could have been seen from thirty to fifty yards away, and an engine looming against the sky, presumably, at a greater distance. If he was standing still when he was struck, then the engine was approaching him for 500 or 600 feet before it struck him. If he was walking along at the pace which he employed when last seen, the engine, moving but little faster, must have been in sight of him for some time before he was struck. Whether he was standing still or moving the engine was in the scope of his vision a sufficient time, if he had looked, to have enabled him to get off twenty times. We must infer that he did not look.

If, taking into account all the circumstances, he must have seen the train if he had looked, it is to be inferred that he did not look. Pierce on Railroads, 346, n. 2; 75 N.Y. 273.

Nor did he listen. The bell was ringing continuously all the time. There was nothing to interfere with his hearing. He is not shown to have had any defect in it, and if he had his carelessness in putting himself in the dark in the path where he knew trains passed, without being able to hear them, would effectually bar the action. He could have heard the bell from the minute when the engine started back on the P. & A. track. McMahon heard it, though he was from eight hundred to one thousand feet off, when Yniestra was at no time more than five hundred feet. McMahon heard it when Yniestra was between him and the engine.

Of course we have no positive proof that he did not exercise his senses, but if there is nothing to show whether he did or not, and it appears that if he had he would have perceived the approach of the engine, it will be presumed that he did not. 39 N.Y. 358; R. R. Co. vs. Houston, 95 U.S.; 22 Mich. 165.

The alternative here is fatal to the action. Yniestra was bound to use both the senses of sight and hearing, and if either could not be available the obligation to use the other is stronger. R. R. Co. vs. Miller, 25 Mich. 274.

If he did not use them he did not exercise due care, and his contributory negligence should defeat the action. If he did use them, he saw and heard the engine, and his remaining on the track was the grossest negligence.

Though this negligence may have arisen from absent mindedness it does not the less amount to contributory negligence, such as to bar a recovery. Pierce on Railroads, 345, n.8; 30 N.J., 188; 25 Mich. 274.

While it may not be universally true that a traveler must stop, look and listen, but that a failure to do so may be, under some circumstances, excused, yet the excuse must appear from the evidence. It does not appear here.

His negligence both in going on the track and in remaining on it seems to be almost mathematically demonstrable, and demonstrated above.

A case very analogous to this in its facts is Wilcox vs. Rome, &c., R. R. Co., 39 N.Y. 358.

But it is said that the above rules and argument are not applicable because this happened upon a track laid in the street, where Yniestra lawfully was.

But when a track is laid in the street the rights of the public to the use of that track are subordinate to those of the railroad company, and persons walking on the track must keep out of the way of trains. Zimmermann vs. Hannibal, &c., R. R. Co., 71 Mo., 476; Pierce on Railroads, 342, n. 2; 53 Penn. St., p. 255; 18 A. & E., R. R. Cases, 59.

But if this be not so in its broadest extent, let us examine it in the view most favorable to defendant in error. I am aware that there are authorities which say that the rights of the public and of the railroad company are equal, but this I apprehend is not correct. The primary right to the use of a public street is in the public, but that public for its own convenience impresses different portions of it with different uses. A portion is set apart for sidewalks, a portion for vehicles, and in some instances, a portion for railroad tracks. The cases of each of themare distinct, the public surrendering its absolute right to use the whole street for any purpose which it might see fit in favor of a separation of the uses. A man driving a wagon has no right on the sidewalk, and a foot traveler has no right in the portion set apart for conveyances except for the purpose of crossing. So neither the foot passenger nor the vehicle has any right on the railroad track except at crossings, and then only for the purpose of crossing. 53 Penn. St., p. 255.

It is impossible for two persons or things to have an equal right to occupy the same space at the same time, and the only sense in which two persons could have such an equal right would be that the first occupant should have the right of possession. But it cannot be

contended that a person getting on the track has a right of occupancy as against a railroad train. If not, then the rights are not equal. What it meant, I apprehend, is that there is a duty of care on each side--on the part of the railroad company to avoid injury to a person on the track, and on the person to get out of the way. If there is a failure on both sides to exercise this care, then the plaintiff cannot recover because of contributory negligence.

So the fact that the railroad is in the street does not absolve the foot passengers from the duty to be careful. 69 Ill. 174; 39 N.Y. 358; see R. R. Co. vs. Houston, 95 U.S.

There can be no greater rights, and no more absolution from the duty to exercise care, in the case of a traveler along the railroad between crossings in a street than at public crossings themselves, and yet the authorities already cited show that great care by the traveler is required at such crossings. See as to relation of railroads and travelers: Rorer on Railroads, 531 et seq.; 24 N.Y. 440; 1 Vroom, 203; 45 N.Y. 664; 70 Ill. 108; 53 Penn. St., p. 255; 39 N.Y. 358.

So that, in any event, whether Yniestra's right to be upon the track were subordinate to that of the train, or whether it was the duty of each to exercise care towards the other, defendant in error should not have recovered, because Yniestra did not exercise due care, and thus contributed to his death.

2. But, if we have failed to demonstrate clearly that there was contributory negligence on Yniestra's part, yet the evidence is in such a position that the judgment should be reversed.

I conceive the better opinion to be that the burden is upon the defendant to show contributory negligence. But this burden may be shifted and I insist has been in this case.

The presumption is of due care on both sides, but when a person is found in a position necessarily more or less perilous, into which he must have gone by his own voluntary act, it lies upon him to explain that his position there is consistent with due care. 35 Ohio St. 627; 28 ib., 241; 13 A. & E. R. R. cases, 645; 79 Penn. St., 211; 97 Mass., 278. Or, in other words, when the facts on the face of the transaction indicate that the accident probably might not have occurred if the "person injured" had been in "the exercise of proper care and watchfulness on his part," the plaintiff must prove due care. Redfield on Railways, Vol. II, p. 615; Redfield on Railways, Vol. II, p. 253, § 15 and note 2; Beatty vs. Gillman, 4 Harris, 563; 35 Maine, 423.

In the case at bar, even if the court does not find the evidence of negligence so conclusive as to authorize it to disturb the verdict of the jury upon that ground, yet the judgment should be reversed because the evidence is such as to raise a grave suspicion as to Yniestra's exercise of care--and it devolves upon defendant in error to remove it, and she has not done so.

Instructions b and c set forth the facts constituting negligence and should have been given. 31 Ala., 501.

3. The last question is whether the court will determine the question of negligence in opposition to the verdict of the jury, and if so under what circumstances.

That the courts do not hesitate in overturning the verdicts of juries and declaring that the person injured was guilty of contributory negligence, when the jury said that he was not, is evidenced by hundreds of cases decided by all the courts of the Union. Many of them heretofore cited for other purposes are in point. R. R. Co. vs. Jones, 95 U.S. 439; 33 Ind. 335; 49 Penn. St., 60; 70 Ill. 108.

The question is when will they do so? When the facts are not in dispute or there is no conflict of evidence. Rorer on Railroads, 1054, 1081; 27 Barb., 221; 27 Barb., 528; 16 A. & E. R. R. cases, 363; 15 A. & E. R. R. cases, 410, 439; Pierce on R. R., 312, 316, note 5.

When the material facts admit of no other rational inference but that of negligence. Rorer on Railroads, 1056, note 4.

When the facts admit of no other inference. 31 Ala., 501.

When there are inferences which amount to conclusions from complicated facts. Rorer on Railroads 1056, note 1.

Applying the most stringent of these rules the evidence is such as to warrant and require the court to reverse the finding of the jury.

There is no dispute as to the facts and no conflict of evidence, there are no complex inferences to be drawn, for the facts relied on to prove negligence--the going and the remaining on the track--stand out boldly, and can admit of no other inference but that of negligence. This seems to be fully developed by the preceding argument.

But if more specific omissions which amount in law to negligence are required, they will be found in his failure to use his senses of sight and hearing.

He is bound to use them and his failure to do so is negligence, and should be so pronounced as matter of law. R. R. Co. vs. Miller, 25 Mich.; R. R. Co. vs. Hunter, 33 Ind. 335; R. R. Co. vs. Heleman, 49 Penn. St., 60; 70 Ill. 108; Rorer on Railroads, 1031, note 2; Pierce on Railroads, 316, note 5.

The corrective functions of the courts in setting aside verdicts of juries on questions of negligence is essential to the administration of justice. Pierce on Railroads, 312.

I submit that the evidence does not show that the plaintiff below was entitled to a verdict, but shows on the contrary that she was not. The court has power to, and should so declare.

Filed: July 31st 1885 WM. A. Blount, Attorney for Plaintiff in Error