In The SUPREME COURT,
State OF FLORIDA.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

ANNIE E. YNIESTRA,
DEFENDANT IN ERROR.

January, A. D. 1886, Decided

THE CHIEF-JUSTICE delivered the opinion of the court:

The appellee, Annie E. Yniestra, brought her suit in the above stated county to recover damages from the L. & N. R. R. Co. for the killing of her husband, Moses G. Yniestra, by an engine and tender operated by the employes of the defendant company. On the trial of the cause it appeared that Moses G. Yniestra on the morning of the 14th day of February, A. D. 1884, was walking on the track of the Pensacola and Atlantic R. R. Co. There was another track running parallel, at the distance of eight feet, with the one on which Yniestra was found, belonging to the defendant. The two were used in common by the Louisville and Nashville Railroad Company and the Pensacola and Atlantic Railroad Company for the purpose of a switch yard, making up trains, &c. The time Yniestra was killed was about the break of day, when, according to the evidence, an object the size of a man could be distinguished fifty or sixty yards. The track was laid in a public street in the city of Pensacola. Yniestra had been in the habit of walking through said switch yard for about three years. The deceased was forty-seven years of age and a man quick in his movements. The walking between said tracks and on either side of them was good, better than on the track. Engines were switching over the yard continuously both day and night. Just before the killing of Yniestra, the engine which ran over him had gone up the P. & A. track to a switch connecting the tracks of said companies some 300 or 400 feet above where he was killed, and switched on to the L. & N. track.

The engine passed through the switch and backed down the Louisville track about 500 or 600 feet to a cattle pen, and returned to the switch. Mathena, one of the switchmen, just before the engine got to the switch, saw Yniestra walking down the Pensacola and Atlantic track. He was walking about as fast as a man usually walked. The engine was in six or eight feet of him. Directly afterward Mathena threw the switch, and the engine and tender passed on to the Pensacola and Atlantic track, the one on which Mathena had just seen Yniestra walking, and backed down the same some 300 or 400 feet, and ran over and killed him. The headlight of the engine was burning brightly, the bell was ringing, and at the time of the killing the machinery was not working, the engine was merely rolling, about as fast as a man usually walks.

There was no light nor cowcatcher on the rear of the tender. There was no lookout to warn people off the track on the rear of the tender. There were five men on the engine--the engineer, yardmaster, fireman and two switchmen.

The wood was piled so high on the tender that the persons on the engine could not see down the track on which they were backing.

There were no witnesses as to the killing except the employes of the defendant who did it, and there is no conflict in their evidence. There was a verdict and judgment for plaintiff.

The appellant assigns as error the refusal of the court to give instructions numbered 16, *b* and *c*, asked by appellant's counsel. These instructions are as follows:

16. "The facts in this case show contributory negligence in the deceased, and do not show such negligence by the defendant or its employes, after their discovery of the peril of the deceased, as to authorize a verdict in favor of the plaintiff, and you will find for the defendant."

b. "If you find from the evidence that the place at which the death of Moses Yniestra occurred was used by the defendant as a part of its switch yard, where the switch engine and trains were constantly switching backward and forward, and that Moses Yniestra knew this fact and that he knew that at that time an engine was going backward and forward in said switch yard near and on both sides of the track on which he had placed himself, and might at any minute back down on said track, and that at night, or when it was dark, he walked along or crossed said track at said point in said switch yard, that there was good walking alongside of said track, and that he was killed by the engine on said track, the plaintiff cannot recover, unless she proves that the said Moses Yniestra was in the exercise of due care at the time of the accident, or that the employes on the train after they discovered that he was on the track were guilty of recklessness, wantoness, or willfulness that caused his death."

c. "If you find from the evidence that the place at which the death of Moses Yniestra occurred was used by the defendant as part of its switch yard, where the switch engine and trains were constantly going backward and forward, and that he knew this fact, and he knew that at that time an engine was going backward and forward in said switch yard near and on both sides of the track on which he placed himself, and might at any time come down on the said track, and that at night or when it was dark he walked along or crossed said track at said point in said switch yard, that there was a good walk alongside of said track, and that he was killed by the engine, the plaintiff cannot recover unless she proves that those persons in charge of the engine after they discovered that he was on the track were guilty of recklessness, wantoness or willfulness which caused his death."

The appellant also assigns as error the refusal of the court to grant a new trial

The motion for a new trial was based on the following grounds:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the charge of the court.

4. The verdict is unsupported by the evidence.

There were other grounds, also, which it is unnecessary to notice here. The evidence has already been set forth. The charge of the court was as follows: "The plaintiff sues the defendant for damages resulting from the killing of her husband, which she alleges occurred through the negligence of the agents of the defendant. In order to sustain her claim she must show that her husband was killed by the defendant's agents, and she must show that the killing was by their negligence. The defendant admits that under the ruling of the court upon the question of the right of Moses Yniestra upon the railroad track, the defendant's agents in charge of the locomotive were guilty of negligence. The killing by the agents of the defendant is admitted, but the negligence of the defendant's agents must be proven. If you find such negligence you must find for the plaintiff, unless you find that the plea of defendant, setting up contributory negligence, be true. If Mr. Yniestra was himself negligent, and that negligence was the proximate cause of his death, the law calls that contributory negligence, and the plaintiff could not recover. As to whether the defendant was negligent, and whether the deceased was guilty of contributory negligence, that is a matter for you to determine under all the circumstances. If you find that the defendant's agents were negligent, and that Moses Yniestra was not negligent, then you will find for the plaintiff and assess her damages. In assessing her damages, you will give her compensation for the loss of her husband--the pecuniary loss. You cannot take into consideration the amount which would be required to support her and her children, but simply how much she has lost by his death in a money sense. In estimating this you must confine yourself to such a sum as paid now will furnish compensation for his loss. If you find, however, that there was no negligence on the part of the defendant or its its agents, or that his death happened from his own contributory negligence, you will find for the defendant. It is insisted by the defendant that the deceased was a trespasser on the track of the defendant, and even if the defendant or its agents were negligent, the plaintiff cannot recover. The law upon this point is that the streets of a city belong to the public, and that the public have a right to walk on the railroad track laid on the streets and are not trespassers in so doing, so that the mere fact that the deceased was walking on the track will not prevent a recovery by the plaintiff. If you find for the plaintiff, you will state in what sum you find for her. If you find for the defendant you will simply say: We, the jury, find for the defendant."

The court also, at the request of the defendant's counsel, gave to the jury special instructions designated in the bill of exceptions as 4, 5, 6, 10 and 11, as follows:

4. "In order that you may find for the plaintiff it will not be sufficient for you to find that the deceased met his death by being run over by the engine of the defendant. The defendant is not liable except for the negligence of itself or its employes, and such negligence must be proved by the evidence before you. The mere fact of killing raises no presumption of negligence of the defendant or its employes."

5. "The plaintiff cannot recover unless the deceased was in the exercise of reasonable care at the

time of the accident, and if you find that he was not, you must find for the defendant in spite of any negligence which you may find the employes of the defendant in charge of the engine to have been guilty of, unless such negligence was after knowledge of the deceased's carelessness, and an opportunity to avoid the results of it."

6. "The presumption is that the deceased was not negligent, but if it appears from the evidence that the deceased was in a position of peril on the track at the time of the accident, and no explanation which is consistent with due care on his part is given why he was there, the plaintiff fails and you must find for the defendant, unless it appears from the evidence that the accident happened from the negligence or want of ordinary care of the employes of the defendant after they discovered his position of peril."

10. "The employes of a railroad in charge of its train or engine have a right to presume that an adult person walking on the track is in possession of his faculties, and that he will get off to avoid the train."

11. "And the railroad company will not be responsible for an injury to him by the train or engine unless the employes in charge were negligent in not taking proper measures to avoid an injury to him after they had reasonable cause to apprehend that he would not get off."

All these assignments of error, appellant's counsel states, are only insisted on to show contributory negligence on the part of Yniestra**.**

The first error assigned is the refusal of the court to give the jury instruction numbered "16." A reference to this instruction will show that it required the court to assume and to charge the jury that certain facts were proven, the truth or falsity of which alleged facts it was the exclusive province of the jury to determine. Such a charge was properly refused. Section 1, chap. 1324, Laws of Florida, McClellan's Digest, 338, sec. 34, provides: "That upon the trial of all common law and criminal cases in the several Circuit Courts of the State, it shall be the duty of the judge presiding on such trial 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 of said cause, and such charge shall be wholly in writing."

The next error assigned is the refusal of the court to give the jury the instruction, *supra*, 16 *b*.

We apprehend the correct rule to be (although there is great conflict in the decisions of courts and in the opinions of commentators) as is insisted by counsel for appellee, that contributory negligence is a matter of defence to be plead and proved by the defendant, but with the qualification that if it appears from the plaintiff's own evidence in support of his cause of action that a presumption of contributory negligence by the deceased is fairly inferable from said evidence, the burden of proof is shifted and it becomes incumbent on the plaintiff to remove such presumption. B. & O. R. R. Co. vs. Whitacre, 35 Ohio St. 627; Robison & Weaver vs. Gary, 28 Ohio St. 241. In Bancroft, Adm'r, vs. Boston & Worcester Railroad Corporation, the court say that under circumstances similar to those detailed in instruction 16-*b* that the plaintiff cannot recover "without adequate proof that he took active measures of precaution to guard against accident."

The instruction does not ask that plaintiff should be required to prove that at the time of the accident the deceased was in the exercise of due care, as an independent and unconnected proposition of law, but relatively to the supposed facts which precede it. Those facts, if proven, in our judgment were such as would warrant the presumption of want of due care and caution by the deceased in the protection of his person, and made it incumbent on the plaintiff, to remove such presumption.

We think the court erred in refusing to give the instruction.

The next errors assigned are the refusal to give to the jury the instruction designated 16-*c*, and the refusal of the court to grant a new trial.

We propose to consider this charge which the court refused, and those given by the court and designated in the bill of exceptions, as 4, 5, 6, 10 and 11, in connection with the evidence in the case with the view of determining whether the deceased contributed by his want of proper care of himself to his death, and whether it was the duty of the court on the evidence to declare as matter of law that the deceased was guilty of negligence.

The action of the employes in running a locomotive and tender when it was dark along a public street without a light or cowcatcher on the rear of the tender, or a lookout thereon to warn persons off the track, and with wood piled so high on the tender as to prevent persons in the cab from seeing down the track on which they were going, was certainly negligent and deserves the utmost reprobation, and if we were permitted to look at this alone our duty of affirming the judgment of the Circuit Court would be plain, but the authorities establish beyond controversy, and on a foundation too solid to be weakened now by doubt or argument, the doctrine that a person who has been injured in person or property by the negligent act of another cannot recover damages for such negligent injury in a suit therefor if he has in any manner by his own wrong, negligence or want of ordinary or reasonable care contributed to such injury.

The injury must be "solely" caused by the negligence of the defendant. It is not enough that it should be "essentially" so caused. Grippen vs. The N. Y. Central R. R. Co., 40 N.Y. 34; Central R. R. Co. of New Jersey vs. Teller *et al.*, 84 Penn. St. Repts., 226; Railroad Company vs. Jones, 95 U.S. 439; Havens vs. Erie R. R. Co., 41 N.Y. (2 Hand) 296; Pennsylvania Railroad Company vs. Beale, 73 Pa. 504; Wilds vs. Hudson River R. R. Co., 28 N.Y. (Smith, 10,) 430; Salter vs. Utica and Black River R. R. Co., 75 N.Y. (30 Sickles) 273; Penn. R. R. Co. vs. Bentley, 66 Pa. 30. "When negligence is the issue it must be an unmixed case." Dascombe vs. Buffalo & State Line R. R. Co., 27 Barbour, 221; Wilcox vs. R. W. & O. R. R. Co., 39 N.Y. (12 Tiffany) 358; Chicago, Rock Island & Pacific R. R. Co. vs. Bell, 70 Ill. 102; Telfer vs. Northern R. R. Co., 30 N.J. 188; Neal vs. Gillett, 23 Conn. 437.

The evidence to our mind shows conclusively that the deceased, by voluntarily walking on the track of the railroad when it was known to him that an engine was engaged in switching there night and day, when the walking was equally as good on either side of said track, needlessly assumed a dangerous risk, and directly contributed to his own misfortune. Ordinarily the question of contributory negligence is a question of fact for the jury under instructions from the

court, but when there is no contradiction in the evidence and the facts are undisputed and the conclusions and inferences to be drawn from it are indisputable, involving a common instinct of mankind--self-preservation--it would seem clear that in such a case contributory negligence becomes a matter of law and it is the duty of the court to instruct the jury hypothetically that if they believe such evidence to be true that they establish a case of contributory negligence.

The great current and weight of authority certainly establishes this conclusion. Beach on Contributory Negligence, p. 454, § 162; Rorer on Railroads, 1054; Baltimore & Potomac R. R. Co. vs. Jones, 95 U.S. 439.

But it is insisted that the fact that the track of the railway company being laid in a public street where the deceased had a right to walk relieves his act of being on the track at the time of the accident of the presumption of want of due care and precaution which would arise if he were a trespasser on the track. We are unable to perceive the force of this argument. It is not a question as to the exercise of a right but rather a question as to whether in the exercise of that right at the particular juncture when the accident occurred he was using the necessary precautions for his safety that the law enjoined on him as an indispensable prerequisite to his recovery for the negligent act of the defendant. These questions are separate and distinct, and the question is narrowed down to the simple inquiry, "was the deceased in the exercise of ordinary care when he was tun over and killed."

In the scores of decided cases for damage to persons when a railway crosses a highway, the question of the right of the party injured to be on the track has never been considered a factor in determining whether the plaintiff was entitled to recover. The only questions in such cases have been of negligence on the part of defendant and contributory negligence on the part of the plaintiff.

In this case there was no necessity for the deceased to walk on and along the track of the railroad. The walking was as good on either side. In the case of crossings there is in addition to the right to cross the track a necessity for doing so when the person crossing has any occasion to go to the opposite side of the track from the one on which he may be. In this, then, the right to cross is less a subject of dispute, and a higher right because the person desiring to cross has no other means of accomplishing his purpose.

Yet in these cases where the right to cross is universally admitted, and the necessity of its exercise is apparent, the question as to the right of recovery for injury has been only one of negligence *vel non*. The cases here cited sustain this view as well as the position that the deceased was not in the exercise of ordinary care in being upon the track at the time of the accident.

In the case of Butterfield vs. Forerter, 11 East, 60, and which has ever since been regarded as a leading case, where a person was riding along a public street in Derby at a very rapid speed and ran against an obstruction in the street left there by the carelessness of another, the court say "one person being in fault will not dispense with another using ordinary care of himself."

In the case of Stubley vs. London and N. W. Railway Company, Law Rep., 1 Ex. 13, Bramwell,

B., said: "Passengers crossing the rails *are bound to exercise ordinary and reasonable care for their own safety*, and to look this way and that to see if danger is to be apprehended, and such ordinary care would be sufficient to prevent most accidents and would have prevented this."

In Grippen vs. N. Y. Central R. R. Co., 40 New York, (1 Hand) 34, the court say: "If the injured party, by looking up the track in the direction of the approaching train could have seen it in time to avoid the injury, his omission to do so was negligence, and the refusal of the court to so instruct the jury was error."

In 58 Maryland, Bacon vs. The Baltimore & Potomac R. R. Co., 482, the court say: "If the deceased did see or hear the approaching train in time and failed to get out of the way he was certainly guilty of the grossest negligence, and if he did not see or hear it, it must have been because he did not use his senses for his protection and he was therefore guilty of negligence, and that negligence directly contributed to his death." Central R. R. of New Jersey, 84 Pa. 226. "One who is approaching a railway crossing is not absolved from the duty of looking up and down the track to see whether a train is approaching by the omission to ring the bell or blow the whistle, and if failure to take such precaution contributes to any injury received by him by a collision with trains running on said railroad he cannot recover for such injury." Havens vs. Erie R. R. Co., 41 N.Y. (2 Hand,) 296.

"The approach by a public road crossing a railroad was particularly dangerous because the railroad from na ural and other obstructions could not be seen or the whistle heard. The deceased in approaching the railroad did not stop to listen, and in crossing the road he was killed by the locomotive. Held that the deceased was guilty of negligence, and his family could not recover damages for his death." 73 Penn St., Beale vs. Penn. R. R. Co., 504.

"One driving in a highway across a railroad is guilty of negligence fatal to an action if he does so without looking for a train, which he would have seen, or listening for signals of its approach which he would have heard in time to have avoided a collision." Wilds vs. Hudson R. R. Co. 24 N.Y. 430.

"It is the duty of a traveler upon a highway approaching a railroad crossing to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching, and if by a proper use of his faculties he could have discovered the approach of a train and so have escaped injury, and failing to do so is injured, he is chargeable with contributory negligence, and cannot maintain an action." Salter vs. Utica & Black River R. R. Co., 75 N.Y. (30 Sickles,) 273.

"It is negligence in a traveler crossing a railroad not to stop and look up and down, because he is bound to presume that a train may be approaching." Penn. R. R. Co., vs. Bentley, 66 Pa. 30.

"It should be regarded very little short of recklessness for any one to drive upon the track of a railroad without first looking and listening to ascertain whether a moving locomotive is near." Dascombe vs. Buffalo & State Line R. R. Co., 27 Barbour, 221.

"When the deceased was killed in attempting to cross a railroad track within the limits of the

public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars in season to have avoided them had he first looked before attempting to cross, it will be presumed he did not look; and by omitting so plain and imperative a duty he will be deemed to have been guilty of negligence which precludes a recovery. A traveler in crossing a railroad track is required to exercise at least ordinary sense, prudence and capacity; which requires that he should use his ears and eyes, so far as he has an opportunity to do so, and a failure to do this will preclude a recovery in his favor in case of accident." Wilcox vs. R. W. & O. R. R. Co., 39 N.Y. (12 Tiffany) 358.

"In view of all the circumstances, the conclusion forces itself upon the mind that the deceased being fully advised of the approach of the train recklessly continued upon the crossing in front of the advancing train, or that if not so apprised, it was for the want of the simple precaution of looking and listening to find out whether a train was approaching, which would be a lack of common care and caution, and in either event the deceased's own want of ordinary care would have contributed directly to the injury which under the well settled doctrine, would preclude a recovery for any damage sustained." C. R. I. & P. R. R. Co. vs. Bell, 70 Ill. 102.

"The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveller on the street from the necessity of taking ordinary precaution for his safety. Before attempting to cross the railroad track, he is bound to use his senses--to listen and to look--in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if using them, he sees the train coming, and instead of waiting for it to pass undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks he must suffer the consequences. They cannot be visited on the railroad company." Railroad Company vs. Houston, 95 U.S. 697.

In the case of the C. C. & C. R. R. Co., 8 Ohio St. 570, it was said by the court: "When the party injured is an adult of ordinary mental capacity, but partially deaf, her infirmity not being known to the employes of the company, will not increase their responsibilities as to care; nor will it excuse her from the full measure of care, which prudent persons partially deaf, but conscious of their infirmity, would ordinarily observe under similar circumstances."

In Zimmerman vs. Hannibal & St. Joseph R. R, Co., 71 Mo. 476, the plaintiff was injured while walking along the track of the railroad laid in a street of the city of Hannibal. The court say: "Here the plaintiff had lived for six years, within a few blocks of where he was injured, was on and over the railroad every day, knew that the passage of the train over the road at any hour was not an impossibility, could have seen the train from the bridge over Bear creek, and if he had not been deaf could have heard it, could have seen it when he walked on the track if he had looked in the direction from which it was approaching, was in his right mind, his visual organs were unimpaired, but he did not look in that direction, and there were but two directions in which he had to look to see an approaching train that could have injured him. He did not look or listen, but recklessly pursued his course upon the track of the railroad, between its rails, when there was ample space north of the track on which he could have-walked in safety, and yet it is urged that he was guilty of no negligence, but acted just as a prudent man would have acted under the circumstances. If, in such a case, a recovery can be had against a railroad company, the law

might be declared in a very few words, that if any man crosses or walks along a railroad track and gets injured, he, or if he be killed, his representatives, may sue the company and recover damages; and all the difficulties and nice distinctions as to proximate and remote causes, and contributory, and non-contributory negligence which have so embarrassed the courts would immediately vanish."

In Harlan vs. R. R. Co., 64 Mo., the court say: "This court has, time and again, decided that it was the duty of every person about to cross a railroad track to approach cautiously, and endeavor to ascertain if there is present danger in crossing, as all persons are bound to know that such an undertaking is dangerous, and that they must take all proper precaution to avoid accident in so doing, otherwise they could not recover for injuries thereby received." See also, Lake Shore and Michigan R. R. Co. vs. Lovering, 25 Mich. 274; 53 Penn. St., 255; (Evans vs. P. F. & W. & C. R. R. Co.) 28 A. & E. R. R. cases, 59; Telfer vs. Northern R. R. Co., 30 N.J.L. 188.

In this case the court say that the blame attaches *prima facie* to the person obstructing the track.

The question which has divided the courts, as to whether the rights of the public are superior, equal or subordinate to the rights of the company operating such a railway, is one which, in our opinion, when the motive power, construction, ponderousness and manner of operating a train are considered, is of easy solution. The fact that a person has a right to go upon the railway track, does not justify him in attempting to exercise the right when, from passing trains, it is dangerous to do so, even though such trains are being run negligently and without care, or even when, as some of the cases say, they were being run at a time which was prohibited by city ordinance. The law once permitting locomotives and trains to be run on a track located in thoroughfares, but one result can follow, and that is that they have practically, from their inherent incidents and characteristics, the superior right on their own track, whatever ingenious legal refining may be expended on the subject.

Unlike sentient beings, they have no choice of paths, but are restricted to one single course, already marked out and defined. They can turn neither to the right nor left, to one side or the other, nor can they be stopped when in motion from their frequently fatal track with the abrupt suddenness that any sentient being can exercise, and which is so often the only method of preventing a fatal catastrophe.

I feel constrained to say in conclusion that in my opinion, and speaking for myself individually, the operation of the principle of contributory negligence is unjust and inequitable. By the law, as it unquestionably stands, no matter how negligently or with what amount of care trains are run, if a person injured by one of them has failed to exercise care on his part, he cannot recover. As it happens in nearly every instance of collision, if not all, that the person on the track is alone injured or killed, the train receiving no damage, there is no present incentive of personal safety on the train hands to use caution, nor a fear of being compelled to make pecuniary compensation when they can rely upon being absolved from their admitted negligence by some careless act of the plaintiff. The law says you were both at fault, and draws from that premise the conclusion that one alone must bear all the damage, provided that one is the plaintiff. If that damage were in some instances inflicted on the train, and in some on the person on the track, and not as is almost invariably the case on the latter, the hardship would not be so apparent, and railroad companies

would not have as they do now, a monopoly of the defence called contributory negligence.

Various reasons have been given by judges and commentators in justification of this, to my mind, narrow rule--that it is required by public policy, that the injury was of the plaintiff's own producing, and that the "law has no scales to determine in such cases whose wrong doing weighed most in the compound that occasioned the mischief." In another branch of jurisprudence these reasons have not been found potent, its "scales" seem better adjusted, and from the same premises of both plaintiff and defendant being in fault is drawn the more rational conclusion that the damages must be equally apportioned between them. This rule in admiralty courts has so commended itself that by act of Parliament, (36 and 37 Victoria) it is made the rule of the other courts in like case, where it used not to be. The law, in cases at least where human life is concerned, certainly needs legislative revision.

Judgment reversed and new trial granted.