No. 13080

Supreme Court of Illinois

Johnson

vs.

Moss, et al

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STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

WILLIAM S. MOSS *et al.* vs. JOHN M. JOHNSON.

Appeal from Tazewell.

POINTS AND BRIEF.

1st. The Court ought to have awarded a change of venue in the cause. The application was in due form, and the notice was properly given.

The defendants did not know of the existence of the prejudice till within ten days of the time of the application.

Application made and notice given on the 7th April. The trial was on the 8th of April, 1858.

Reasonable notice is such as gives the parties time to examine the application. This notice was given before the issues had been made up.—See Statute, "Venue," p. 1179., 2 Vol. Purple's Stat.

2d. The demurrer to the second plea should have been overruled.

The plea presented a full defence to the action.

The authorities sustain the position. Plaintiff was an employee engaged in the construction of the road, &c..—See Plea, p. 14, 15, Record.

AUTHORITIES.

Degg vs. Midland R. W. Co., Law Reg. 500.
Tanout vs. Webb, " " 306.
Noyes vs. Smith & Lee, " " 617.
Wiggell vs. Fox, 11 Exchequer R. 832.
Seymour vs. Maddox, 5 Eng. L. & E. R. 265.
Coon vs. N. & I. R. R. Co., 6 Barbour 231.
Farewell vs Boston & Worcester R. R. Co., 4 Met. 49.
Horner vs. Ill. Central R. R. Co., 15 Ill. 550.

3d. The Court below erred in admitting evidence as to the manner of making up the train.

The declaration attributes the injury solely to the *carelessness* and *negligence* of the defendants below, in running and conducting the train; and not at all to any imperfect manner of its being made up.

The evidence was clearly inadmissible under the declaration.

The allegations and proof do not at all correspond.

The proof is clear, from all the witnesses, that there was no carelessness or mismanagement in the running or conducting the train. In the declaration this is the only thing complained of.

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Moses vs Johnson

Plff's Points & Brief

Filed April 25, 1859

L. Leland

Clerk

JOHN M. JOHNSON, *Appellee,*

vs.

WILLIAM S. MOSS,
WILLIAM KELLOGG,
CHARLES S. CLARK,
HERVEY LIGHTNER,
RICHARD GREGG, } *Appellants.*

TRESPASS ON THE CASE.

In the Supreme Court to be held at Ottawa on the third Monday of April, A. D. 1859.

ABSTRACT.

THIS suit was commenced in Peoria county, and removed by change of venue to Tazewell county, where it was tried by jury at the April term 1858, and a verdict and judgment
Record, Page 41. rendered for the Plaintiff for $4,000.

The declaration contained two counts.

The first count states in substance, that the Defendants were lessees and proprietors of the Peoria and Oquawka Rail Road, and cars used thereon for carrying passengers for hire, from Peoria to Edwards Station. That on the 19th Nov. 1856, the Plaintiff, at the special instance and request of the Defendants, became a passenger on said road, to be safely carried from Peoria to Edwards Station for a certain fee or reward: That Defendants received the Plaintiff as such passenger: That it was Defendant's duty to see that Plaintiff was carried on his journey in safety, which they did not do; by reason whereof the cars ran off the track, and the Plaintiff's legs were broken, and he was otherwise seriously injured and damaged, and was prevented from attending to business, and compelled to expend large sums
Ps. 5—9. of money in curing his wounds, &c.

The second count is substantially the same as the first, with this additional averment "That the Defendants, not regarding their duty in that behalf, so carelessly, negligently, unskillfully, and improperly managed and conducted said cars, that, whilst said cars were proceeding on said Rail Road, (with the Plaintiff as a passenger,) the said cars, by and through the carlessness, negligence, and improper conduct of the said Defendants and their servants, ran off the track, &c." whereby the Plaintiff was injured, as stated in first count.

The Defendants pleaded:

P. 12½ 1st. The general issue—Not Guilty; upon which Plaintiff took issue to the country.

2nd. That the causes of action in the two counts are the same: That at the time when, &c., the Plaintiff was one of the servants of the Defendants, engaged as a carpenter and bridge builder, aiding as such in the construction of said road; and that without any request or invitation of the Defendants, and without paying or assuming to pay any fare, had
Ps. 14—15. got voluntarily upon the freight and construction train of the Defendants, to ride from Peoria to the place where he was engaged in work on said road for Defendants: That while he was so proceeding on said train, without any gross fraud or negligence on the part of the Defendants, the Plaintiff received the injuries complained of in the declaration.

To this plea the Plaintiff demurred specially, assigning for causes:

1. That it amounts only to the general isssue.

P. 13. 2. That it is double, and attempts to set up two defences in the same plea.

3. It neither confesses nor avoids the cause of action set forth, nor denies it.

P. 41. The court sustained the demurrer to the plea: the Defendants' counsel abided by the demurrer.

The court proceeded to trial upon the issues joined, and a verdict and judgment were
P. 41. rendered for the Plaintiff of $4,000, as before stated.

Prior to this time, to wit: on the 7th of April A. D. 1858, and after the venue in the cause had been changed to Tazewell county, and at the April term of said court, the Defen-
P. 15. dants gave notice that they would apply for a change of venue in the cause, on account of the prejudice of the inhabitants of the county of Tazewell, and filed their petition, which states as follows: "The petition of the undersigned, defendants in this suit, respectfully represents, that the inhabitants of the county of Tazewell, in which this suit is pending, are prejudiced against the Defendants, so that they fear that they will not receive a fair trial in the circuit court of Tazewell county aforesaid, in which said suit is pending, for the reason aforesaid; and that the said Defendants did not ascertain the existence of such
Ps. 16—17. prejudice, until within the last ten days; and that the cause of the prejudice aforesaid, did

not come to the knowledge of the petititoners aforesaid, until within the last ten days:—Petitioners therefore pray for a change of venue in this cause, pursuant to the statute in such cases made and provided.

"WM. S. MOSS, HERVEY LIGHTNER,
"WM. KELLOGG, RICHARD GREGG."
"CHARLES S. CLARK,

The petition was sworn to by WM. KELLOGG, who states, also, that the application is made by the consent of all the Defendants.

Pr. 17—19. The court overruled the motion for a change of venue, and the Defendants filed their bill of exceptions, setting out the notice of application, &c., which was signed by the Judge.

The cause then proceeded to trial at the April term A. D. 1858, and after the rendition of the verdict, and the entry of the judgement thereon, the following bill of exceptions was taken, and signed by the judge, to wit:

"Be it remembered, that on this day, this case came on to be tried, and the Plaintiff, to prove the issue on his part, called JAMES D. BARR, who states:

Ps. 26—39. "My occupation is that of a carpenter. I was in 1855, foreman of the carpenters employed on the Peoria & Oquawka Rail Road. The Plaintiff was also at the same time employed as a carpenter on said road; and was working under me, and had been so working for the company for a month or two. At the time he received his injury, he was going out on the freight and construction train to his work on a water tank, being a hand employed on said road as a carpenter. I have no recollection that I directed or requested Plaintiff to go out on the cars that morning. I and several hands were going out to work on the road. It was usual for them to ride out on the train. There was a box car attached to the train, which had been fitted up with seats to convey the hands and passengers who wished to travel on the route of the road, in which Plaintiff was at the time of the accident. This box car was placed in front of the other cars, and behind the engine, and next to the tender. Two of the other cars immediately in rear of the box car, were loaded with iron for the road, and the other still behind them with ties. This was not the usual manner of making up a train, and in my judgement was improper. The box or passenger car ought to have been placed behind the others.

"There were forty or fifty persons in the box car, principally hands of the Defendants, going to their work. E. D. PALMER was engineer, and SMITH FRYE conductor on the train. There were two or three passengers who paid fare in this box or passenger car.

"The accident happened about five miles from Peoria, at a curve in the road. It was a slight curve. The car ran off the track about one hundred feet before we reached the trussel work, and as soon as that was reached it was broken down, and the car in which the Plaintiff and other hands and passengers were, was overturned, and fell down off the trussel work some 15 or 20 feet. The Plaintiff's leg was broken, and his shoulder dislocated.—several other persons were injured, and a brakeman was killed. Johnson was taken into a car, and taken back to Peoria. The engine did not run off the track. Some of the wheels of the tender did. We were running 8 or 10 miles an hour. Plaintiff had nothing to do with the running of the cars. On the embankment, before reaching the trussell work, there were no chairs to hold the rails. They were only secured by spikes.

"At the speed we were running, I think the spikes were sufficient. Some roads use larger ones. The spikes had been put in at every place where they ought to have been. The Plaintiff was a hand employed in the construction of the road. He was not requested by Defendants or any other person to ride out on the cars. The road was unfinished, and in process of construction. The Plaintiff had been over this portion of the road before. The cars had been running over the road for more than a year previous to the accident, and none had previously occurred. The Plaintiff might, if he had chosen, have got on the hind car, instead of into the box or passenger car. I think he was not as good a judge as myself as to the manner in which a train out to be made up. There was in my judgment no carelessness or negligence in the conducting or running the train; and this portion of the road, where the accident occurred, had been constructed by the Peoria & Oquawka Rail Road Company before the Defendants came into the possession of the road. The Defendants had been operating and constructing the road, since April previous to the accident."

The witness further stated, that, in his opinion, "the accident occurred by reason of a defect in the friction plate of the car; that it was too tight to allow the car to turn easily."

The Defendants objected to all evidence given or offered by this and all other witnesses, in relation to the manner of the making up the train, and the condition or imperfect construction of the road at the place where the accident occurred, as not being proper evidence under the declaration, and excepted at the time to all evidence given in relation to such matters.

E. D. RICHARDSON, called by the Plaintiff, testified:

"I was a passenger in the car at the time when the accident happened. The box car in which I rode, was next to the tender, and the cars loaded with iron next to it in the rear.—This is not the usual way of making up a train. The passenger car was thrown from the track. The Locomotive did not run off. One man was killed, and Mr. and Mrs. Lowe were injured. Johnson the Plaintiff was also injured. I was not. I went back to see how the accident occured, and think I know. There were no chairs where the accident happened. There is a slight curve in the track. It had the appearance that the flange of the wheels had struck the square end of the rails which had got out of place, not coming square

together at the ends, thus throwing the cars off the track, and running the same against the trussel work, knocking the same down, and throwing the cars off the track. The track had been in that way for several days. The man that was killed had thrown off a stick of wood at the place a day or two before, to show the superintendent that the road was out of order there. The man that was killed was named Morrissey. He was a brakeman, and I think the cause of the accident was the misjoinder of the rails.

There was no mismanagement in the running or conducting of the train. It was not running on that day as fast as usual. At the time the accident occurred, 3 or 4 of the iron rails on the car behind the box car ran through and into said box car."

The Defendants objected to all evidence offered in relation to injuries to other persons than the Plaintiff; and to all evidence in relation to the manner of making up the train; and to all evidence in relation to the condition and manner of construction of the road, at the time the same was offered; and excepted to the admission of such evidence at the time the same was offered and given.

W. G. Wheaton, called by the Plaintiff, testified:

"That he is an engineer by occupation. Has been so for nine or ten years. The proper manner of making up a freight and passenger train is, to put the passenger car behind, in order to insure safety. I should not think it was proper to put passenger cars before heavy loaded freight trains and cars.—I never considered a road finished without chairs; but with proper attention they might be safe. They would be less safe on a curve, and less safe with a half inch spike. This road was in process of construction at the time of the accident; but I do not know the condition of the road at this particular place.—All the roads with which I am acquainted, except this, use a large spike, which is a ⅝th inch spike, which makes the road safer."

The Plaintiff then gave in evidence the statement of Edward Dickinson, M. D., which was admitted by agreement of counsel, and was as follows:

"I am a Physician & Surgeon. I know the Plaintiff in this suit: was called upon to attend him at his house in Peoria, Peoria county, on the 19th day of November 1855, in consequence of injuries said to have been received on the Peoria & Oquawka Rail Road. I went to his house immediately. Plaintiff soon after arrived: was brought in a wagon on a bed. Dr. Arnold came with him, and assisted in dressing his injuries. The shoulder was dislocated. The most serious injury was to his right leg, which proved to be a compound and communated fracture near the ankle, and extended into the joint. The large bone was broken into several fragments, and driving through the skin, some of which eventually were discharged. The injury was of a nature so serious as to render it doubtful for two or three weeks whether the limb could be saved. After three weeks, inflammation ensued, and extensive suppuration. I attended him about three months. Charged him $70,00, which the Defendants paid me. There were other expenses of a considerable amount. At one time his life was thought to be in danger. He is still lame, and will never fully recover. Can walk with a cane. Is much incommoded in working at his trade, that of a carpenter. I judge, from his appearance in walking, that he has improved in the last six months. His sufferings were necessarily severe and acute."

This was all the Plaintiff's evidence.

Edward Palmer, called by the Defendants, testified, that he "was engineer, and was running the engine in the train, at the time the accident occurred. The train was running at the rate of 8 or 10 miles per hour. I had been employed on the road from two and a half to three years. I was employed first by the Peoria & Oquawka Rail Road Company. I think this portion of the road was constructed by the Peoria & Oquawka Rail Road Company before the Defendants had charge of the road. I had run over the road for a year or more previous to the accident to the Plaintiff. The speed of the cars was checked at the place, I think. It was the usual practice to do so. I know the Plaintiff. He was a hand employed on the road. He was not a passenger, on the day of the accident, for fare. He got on the train to ride to the work with the rest of the hands. Think the train was carefully and prudently managed and conducted on that day."

This was all the evidence.

The court, at the request of the Plaintiff, gave the following instructions:

1st. If the jury believe, from the evidence, that the accident to the Plaintiff was caused by the negligence and carelessness of the Defendants in running their cars, the plaintiff is entitled to recover.

2nd. If the jury believe, from the evidence, that the road was unsafe, and that the accident happened in consequence of the road being unsafe, or in consequence of the cars being out of order, the Plaintiff is entitled to recover.

3d. If the Defendants undertook to carry the Plaintiff in their cars, they were bound to use proper care, skill, and prudence, in carrying him; and if the accident happened in consequence of a want of such care, skill, and prudence, then the Plaintiff is entitled to recover.

4th. That, whether the Plaintiff was, or was not in the employment of the Company, unless he had some control over the train or road, they were bound, if they undertook to transport him upon the cars, to have a safe road, well built of sufficient material, and to use ordinary care, skill, and diligence, in transporting him; and if they have failed in either of these particulars, the Plaintiff is entitled to recover.

5th. The Defendants were bound to know whether their road and machinery were safe

and in proper condition, and if they were not safe and in proper condition, and the accident was occasioned by reason of the road or machinery not being safe and in proper condition, the Plaintiff is entitled to recover.

6th. It makes no difference whether the Plaintiff paid any fare or not, if he was lawfully on the train. It was the duty of the Defendants to use all reasonable care and prudence to insure his safety.

7th. In assessing damages, the jury can find such an amount as will fully compensate him for his suffering and the injuries he has sustained.

All which instructions were excepted to by the Defendants at the time they were given.

The Defendants requested the court to instruct the jury,

1. "That a master who employs several servants, who are engaged in different branches of the same business, is not liable for the negligence or carelessness of one through which another sustains an injury."

"If the jury believe from the evidence, that the Plaintiff was a carpenter employed by the Defendants in the construction of the Peoria & Oquawka Rail Road, that he had without any special request from the Defendents been in the habit of riding into Peoria at night, and back to his work in the morning, free of charge or expense, and that if he had on the day of the alleged injury got voluntarily on to the construction train, to go to his work, P. 37. without the request of the Defendants, and without the payment of fare, the Defendants are not liable, although the injury may have occurred through the carelessness of their servants."

"That if the jury believe, from the evidence, that at the time the injury was received by him, he was a hand employed by the Defendants upon the road as a carpenter, aiding in the construction of the same, and that he got voluntarily upon the cars without paying any fare, or assuming to pay any, without any request from the Defendants, and that the accident occurred without the gross fault or negligence of the Defendants, they will find for the Defendants."

"If the jury believe, from the evidence, that the Plaintiff's injury was occasioned by reason of any defect in the construction of the Rail Road, or any defect in the same, they P. 39. will find for the Defendants."

"That unless the jury beleive, from the evidence, that the Defendants were guilty of gross negligence in conducting and running the train of cars at the time this accident happened, they will find for the Defendants."

All which instructions the court refused to give, and the Defendants then and there excepted.

After the verdict was rendered, and before judgement, the Defendants moved for a new trial for the following reasons:

1st. The verdict is against law and evidence.
2nd. The court permitted improper evidence to be given to the jury by the Plaintiff.
3d. The court misdirected the jury in giving the instructions asked by the Plaintiff.
4th. The court refused proper instructions asked by Defendants.
5th The court refused proper evidence offered to the jury by the Defendants.

The motion was overruled and judgement entered on the verdict, and Defendants excepted.

Errors assigned.

1st. Admitting the Plaintiff's evidence, which was objected to by Defendants.
2nd. Giving Plaintiff's instructions.
3d. Refusing instructions asked by the Defendants.
4th. Overruling Defendants' motion for a new trial.
5th. Rendering judgement for Plaintiff upon the verdict.
6. Refusing change venue

N. H. PURPLE,
Attorney for Appellants.

Authorities

Hegg vs Midland R.R. Co. Lane, Reg. 500
Johnston vs Webb " " 306
Noyes vs Smyth & Lee " " 617
Maggill vs Hoy 11 Eych. Rep. 832
Seymour vs Madox 5 Eng. L. & E.R. 265
Coon vs N. J. R.R. Co 16 Barbour 231
Harwell vs Boston & Worcester R.R. Co 4. Met. 49
Homer vs Ill. Central R.R. Co 15. Ill. 550

Solu. M. Johnson
vs
Mr & Mich
Ratter

Abstract

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Geo. Gray
Clerk

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