

Shoemaker Vs. Kingsbury

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Decided On : 1870

Appeal No. : 79 U.S. 369

Appellant : Shoemaker

Respondent : Kingsbury

Judgement :

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Shoemaker v. Kingsbury

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ERROR TO THE CIRCUIT COURT

FOR THE DISTRICT OF KANSAS

SYLLABUS

1. When contractors for building a railroad, running a construction train, consent to take a passenger for hire on their train, they are private carriers for hire, and are only bound to exercise such care and skill in the management and running of the

train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances.

2. The passenger in such case takes upon himself the risks incident to the mode of conveyance.

3. Where an accident occurs to a passenger carried on such a train by the car in which he was carried being thrown off the track, the contractors are not responsible unless the accident is directly attributable to their negligence or unskillfulness in that particular -- that is to say in the management and running of the train. Accordingly, an instruction that it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution, was held erroneous, in that it turned the attention of the jury from the question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident.

In 1867, Shoemaker and another were contractors for building the Eastern Division of the Union Pacific Railway in Kansas; and in October of that year, they ran a construction train over a portion of the road, carrying material for it. To this train was attached what was called a "caboose car" -- a car for the accommodation of the men connected with the train, who had their "sleeping bunks" in this car, and who stored their tools there, as also the lamps used on the cars. The road was not yet delivered over to the Pacific Railway Company, and the contractors did not wish to carry passengers. Persons, however, were sometimes carried on the caboose car, and sometimes fare had been charged for their passage, but not always.

In this state of things, one Kingsbury, a sheriff in Kansas, and a deputy marshal wanted to make an arrest on the line of the road, and he applied for passage as far as to a place called Wilson's Creek, asking the conductor to stop the train there in order that he might make the arrest. He was accordingly taken on the train, and the train stopped until he had made the arrest.

A part of the fare charged was paid by Kingsbury on the cars, and the balance afterwards. The train ran from Ellsworth to Walker's Creek in Kansas. In going towards Walker's Creek, the train was made up and ran in the usual way of making up and running railway trains, the engine being in front, with the caboose and flatcars attached in regular order. But on the return from Walker's Creek, as there was, as yet, no turntable on the road, the usual order for making up such trains was reversed, and both engine and tender were backed over the road a distance of more than fifty miles, the tender being ahead, the engine next, the caboose and other cars attached, and following in regular order. When about three miles from Ellsworth, on this return trip, both the engine and tender were thrown from the track and upset. At the time this accident occurred, Kingsbury was riding in the caboose car with the conductor of the train, and either jumped out or was thrown out, which of the two did not exactly appear. Whichever of the two things was true he was hurt, and for the injuries which he received he brought the action below.

The accident was occasioned by the engine's running against a young ox which leaped on to the track about twenty feet in front of the advancing train from grass or weeds five or six feet high growing on the sides of the road. The train was running at its usual rate of speed. The accident occurred just after dark, but it was a moonlight night, and the engineer testified that he could have seen an animal two hundred yards distant on the track; that the animal was only about twenty feet from the engine when first seen. He continued his testimony thus:

"As soon as I saw the animal, I shut off the steam and seized

the lever to reverse the engine, and had it about half over when the engine went off the track. Something struck me on the head, and I did not know anything more. I was injured. I did what I thought was best to be done to stop the train. The whistle lever was in the top of the cab. I did not whistle for brakes. I had no time to do so after I saw the animal and before the engine went off the track. The train could have been stopped in about one hundred and fifty yards. When danger appears, the first thing to be done is to reverse the engine and then sound the whistle for brakes. Both could not be done at the same time. In order to reverse and blow the whistle two motions are necessary -- first, to cut off the steam, and then take hold of the lever to throttle valve and move it over. It takes both hands to reverse. The whistle is sounded by a lever in the top of the cab. Brakemen would know, by shutting off steam and reversing, that something was the matter. It would take about ten seconds to do all this. I did it as quick as I could. I could have done nothing more than I did do."

There was no fence on the sides of the road. The plaintiff had been several times before over the road and knew its condition and the manner in which the trains were made up and run.

The court, among other instructions, gave the following as a fifth to the jury, to which the defendants excepted:

" When it is proved that the car was thrown from the track, and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, OF GOOD HABITS, and in every respect qualified and suitably prepared for the business in which they were engaged, AND that they acted on this occasion with reasonable skill and with the utmost prudence and caution, and if the disaster in question was occasioned by the least negligence or want of skill or prudence on their part, then the defendants are liable in this action."

There was no evidence in the case in relation to the skill, habits, or qualifications of the agents and servants of the defendants except what arose from the fact that the engineer had been employed on a railroad about four years and had been

engineer for more than two years and that the fireman had been on a railroad for about eighteen months.

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Verdict and judgment having gone for the plaintiff, the defendants brought the case here on error.

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MR. JUSTICE FIELD delivered the opinion of the Court.

From the whole evidence in this case it is plain that the defendants were not common carriers of passengers at the time the accident occurred which has led to the present action. They were merely contractors for building the Eastern Division of the Union Pacific Railway, and were running a construction train to transport material for the road. The entire train consisted, besides the engine and its tender, of cars for such material and what is called in the testimony a "caboose car." This latter car was intended solely for the accommodation of the men connected with the train; it contained their bunks and mattresses; they slept in it, and deposited in it the lamps of the cars, and the tools they used. It was not adapted for passengers, and, according to the testimony of the conductor, the defendants did not wish to carry passengers, although when persons got on to ride, the defendants did not put them off, and sometimes, though not always, fare was charged for their carriage.

The plaintiff, who was sheriff of a county in Kansas and deputy marshal of the district, desired to arrest a person on the line of the road, and, to enable him to accomplish this purpose, he applied to the conductor for passage on the train as far as Wilson's Creek, and requested that the train would stop there until the arrest could be made. His wishes were granted in both respects, and for the services rendered he

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paid at the time a portion of the fare charged, and the balance subsequently.

In the rendition of these services for the plaintiff, the defendants were simply private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. The latter undertake, for hire, to carry all persons indifferently who apply for passage, and the law, for the protection of travelers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character. If any injury results from a defect in any of these particulars they are liable.

They are also bound to provide careful and skillful servants, competent in every respect for the positions to which they are assigned in the management and running of the cars, and they are responsible for the consequences of any negligence or want of skill on the part of such servants.

They are also bound to take all necessary precautions to keep obstructions from the track of the road, and although it may not be obligatory upon them, in the absence of legislative enactment, to fence in the road so as to exclude cattle, it is incumbent upon them to use all practical means to prevent the possibility of obstruction from the straying of cattle on to the track as well as from any other cause. As said by the Supreme Court of Pennsylvania, in speaking of the duty of railway companies in this particular: [*](#)

"Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of a passenger any more than a defective

rail or axle. Whether they maintain an armed police at crossroads, as is done by similar companies in Europe, or fence, or place cattle guards within the bed of their road, or by any other contrivance exclude this risk is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if by some means they do not exclude the risk, they are bound to respond in damages when injury accrues."

It is evident that the defendants in this case were not subject to any such stringent obligations and responsibilities as are here mentioned. They did not hold themselves out as capable of carrying passengers safely; they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest in it beyond its construction. It was no part of their duty to fence it in or to cut away the bushes or weeds growing on its sides.

The plaintiff knew its condition and the relation of the defendants to it when he applied for passage. He had been previously over it several times, and was well aware that there were no turntables on a portion of the route -- a fact which compelled the defendants to reverse the engine on the return of the train from Walker's Creek. He therefore took upon himself the risks incident to the mode of conveyance used by the defendants when he entered their cars. All that he could exact from them under these circumstances was the exercise of such care and skill in the management and running of the train as prudent and cautious men experienced in that business are accustomed to use under similar circumstances. Such care implies a watchful attention to the working of the engine, the movement of the cars and their running gear, and a constant and vigilant lookout for the condition of the road in advance of the train. If such care and skill were used by the defendants, they discharged their entire duty to the plaintiff, and if an accident notwithstanding occurred by which he was injured, they were not liable. They were not insurers of his

safety, nor responsible for the consequences of unavoidable accident.

The question should have been put to the jury whether the defendants did in fact exercise such care and skill in the management and running of the train at the time the accident occurred. They were not responsible to the plaintiff, unless the accident was directly attributable to their negligence or unskillfulness in that particular.

The evidence in the case shows that the accident was occasioned by the tender and engine running against a steer. The train was proceeding at its usual rate of speed when the steer suddenly, from a mass of high weeds or grass growing on the sides of the road, leaped upon the track directly in front of the advancing train at a distance from it of about twenty feet. This distance was so short and the movement of the animal was so sudden that it was impossible to arrest the train, and a collision followed which threw the engine and tender from the track. The plaintiff, on the happening of the collision, either leaped from the "caboose car," in which he was at the time sitting, or was thrown from it, it is immaterial which, and was injured.

The fifth instruction given by the court turned the attention of the jury from the simple question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident. It held proof that the agents and servants were possessed of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, as essential as proof that they acted on the occasion with skill, prudence, and caution. And it made the occurrence of the accident presumptive evidence that they were destitute of such skill, habits, and qualifications.

We are of opinion that the court erred in this instruction, and that it misled the jury. On this ground, the judgment of the court below must be

Reversed and the cause remanded for a new trial.

* *Sullivan v. Philadelphia & Reading Railroad Company*, 30 Pa.St. 234.

