SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

**Texas and Pacific Ry. Co. Vs. Bourman**

**Texas and Pacific Ry. Co. Vs. Bourman**

**SooperKanoon Citation** : sooperkanoon.com/90713

**Court** : US Supreme Court

**Decided On :** Feb-23-1909

**Appeal No.** : 212 U.S. 536

**Appellant** : Texas and Pacific Ry. Co.

**Respondent** : Bourman

**Judgement** :

Texas & Pacific Ry. Co. v. Bourman - 212 U.S. 536 (1909)
U.S. Supreme Court Texas & Pacific Ry. Co. v. Bourman, 212 U.S. 536 (1909)

**Texas & Pacific Railway Company v. Bourman**

**No. 56**

**Argued January 6, 7, 1909**

**Decided February 23, 1909**

**212 U.S. 536**

I N ERROR TO THE CIRCUIT COURT OF

*APPEALS FOR THE FIFTH CIRCUIT*

## SYLLABUS

The engineer of a train and the section foreman are fellow-servants of a section hand, and the latter cannot recover against the employer for an injury occurring through the negligence of either of the former.

*Northern Pacific Railroad v. Egeland,* 163 U. S. 93 , distinguished.

160 F. 452 reversed.

The facts are stated in the opinion.



MR. JUSTICE MOODY delivered the opinion of the Court.

The defendant in error, hereafter called the plaintiff, brought an action in the circuit court of the United States against the plaintiff in error, hereafter called the defendant, to recover damages for injuries alleged to have been suffered through the defendant's negligence. The plaintiff had a verdict, which was affirmed by the circuit court of appeals, and, under existing statutes regulating the jurisdiction of this Court, the defendant, because it is incorporated under a law of the United States, has a further appeal, and brings the judgment here by writ of error.

The facts of the case are few and simple. The plaintiff was a section hand employed by the defendant, and working under direction of a foreman named Hadnott. The plaintiff, with others, had been employed under Hadnott's direction in clearing up a wreck near a flag station on the defendant's road. When the work was finished, the men were taken aboard an express



passenger train, known as the Cannon Ball, to be conveyed to Waggaman, a regular station on the road, where they lived. The express ordinarily did not stop at Waggaman, but simply slowed down to take on the mail. The conductor, however,

directed the engineer to stop on this occasion and let the section hands off, and the train did in fact stop at Waggaman, though whether as the result of the order or of the injury to the plaintiff was in dispute. As the train approached Waggaman the men were standing on the steps of the car, ready to alight, and the train was slackening its speed. The plaintiff was on the lower step. What happened is shown by the plaintiff's testimony. He said:

"I stood all the time on the platform. The train blew for the station. When she blew, we all got on the steps with out tools in our hands. She was slacking up speed. I was on the lower step, holding on to the rod of the step. That was the way to get off when we was to get off at the depot. The foreman said: 'Boys, throw your tools off, and let us get off.' That was before she got to the station, and when she slacked up, she slacked up slow enough for anybody to get off, and when I went to get off, she jerked, and I grabbed, and the engineer put more speed to the engine, and that threw me down and I could not let go, and she dragged me along until got weak in the arms, and let go. She was running slow and she slacked up speed, and then she let go again and she made a jerk. After she slacked, she started up again. I held on until I lost my grip and could not hold on any more. I fell, going under, and the wheel run over my leg. The conductor hallowed to the engineer to back up the train. He said: 'He ought to be satisfied.'"

On cross-examination, he testified as follows:

"Q. Did he [the foreman] speak to you?"

"A. No, sir; he did not."

"Q. He said nothing to you at all?"

"A. When we were on the way coming, we were all speaking, but when the train slacked up -- when they blew the whistle for the train to stop at the depot -- he told us, 'Boys, get your tools, we will get off.' "

Page 212 U. S. 540

"Q. That was while she was slacking up?"

"A. Yes, sir."

"Q. You say that you jumped when the train slowed at the depot?"

"A. Yes, sir."

"Q. That was before it stopped?"

"A. She was not going to stop there at all."

"Q. You did not know that, that is, before she stopped?"

"A. Well, she did not stop at all."

"Q. You jumped while the train was moving?"

"A. Yes, sir."

"Q. Then you say that the train started up suddenly?"

"A. Yes, sir; at the time I was getting off, she jerked before I jumped loose."

"Q. Do you think it would have been the same, that you would have been hurt if the train had not started again?"

"A. No, sir; I do not think it would."

The petition, which was very inartificially drawn, does not clearly state the ground upon which the plaintiff sought to hold the defendant liable. It states generally that "said misfortune" was "due to the fault and negligence of the said defendants;" that the plaintiff was "entitled to a safe transport" to Waggaman, and that the

"train being about to pass the station, your petitioner had no further alternative than, when ordered by his foreman, to jump from the moving train, which just then increased its speed."

The answer denied the allegations of the petition, and averred that, if the plaintiff was injured, it was by his own voluntary act in jumping from the train, or through

the negligence of one or the other of his fellow servants -- the section foreman or the conductor and engineer of the train.

But, passing the question of pleadings, upon which nothing seems to have turned below, we consider the case as it appears from the evidence. Since the plaintiff jumped from the train in obedience to a suggestion, if not an order, of his immediate superior, the section foreman, the jury might have found that the plaintiff reasonably thought he could rely upon the judgment of the section foreman, and that, under the circumstances, the plaintiff's act was not so obviously reckless and dangerous

Page 212 U. S. 541

as to constitute contributory negligence. *Northern Pacific Railroad v. Egeland,* 163 U. S. 93 . It becomes necessary, then, to consider the negligence of the defendant. The evidence discloses two possible grounds upon which a recovery might be rested -- first, carelessness of the section foreman in directing the plaintiff to jump when he did; second, carelessness of the engineer in suddenly starting up the train after it had slowed down. These two possible causes of the plaintiff's injury were distinctly before the jury, and the defendant had the right to appropriate instructions upon the issues thus raised. The jury may well have based its verdict on either the carelessness of the section foreman or the carelessness of the engineer. Indeed, it is difficult to see any other theory upon which the verdict was rendered. It may be, as thought by the circuit court of appeals, that the instructions to the jury were academically correct, so far as they went, but they omitted to cover vitally important aspects of the case and were therefore insufficient.

The presiding judge refused to instruct the jury as requested by the defendant, that the engineer and the section foreman were, respectively, fellow servants of the plaintiff, and that, if the injury occurred through the negligence of either, the plaintiff was not entitled to recover. We think these instructions should have been given. Both the engineer and the section foreman were fellow servants of the plaintiff, and, if the plaintiff's injury was caused by the negligence of either, the law, as it many times has been declared by this Court, will not permit a recovery.

*Baltimore & Ohio Railroad v. Baugh,* 149 U. S. 368 ; *Northern Pacific Railroad v. Hambly,* 154 U. S. 349 ; *Central Railroad Company v. Keegan,* 160 U. S. 259 ; *Northern Pacific Railroad v. Peterson,* 162 U. S. 346 ; *Northern Pacific Railroad v. Charless,* 162 U. S. 359 ; *Martin v. Atchison, Topeka & Santa Fe Railroad,* 166 U. S. 399 ; *Alaska Mining Company v. Whelan,* 168 U. S. 86 ; *New England Railroad v. Conroy,* 175 U. S. 323 ; *Northern Pacific Railroad v. Dixon,* 194 U. S. 338 .

The case of *Northern Pacific Railroad v. Egeland, supra,* which evidently was misunderstood in the court below, is not

Page 212 U. S. 542

in any way inconsistent with the foregoing cases. The fellow servant doctrine was not there considered by the court. The plaintiff in that case was a section hand, who received injuries by jumping from a moving train in obedience to the order of the conductor. The only question before this Court was whether the act of the plaintiff was, in itself, as matter of law, contributory negligence, and it was held that, under the circumstances disclosed in the evidence, it was proper to submit the question of contributory negligence to the jury. It does not appear in that case what was the negligence for which the plaintiff sought to hold the defendant responsible. In the trial court, the defendant made two requests: first, that no negligence on the part of the defendant was shown, and second that the plaintiff was guilty of such contributory negligence that he could not recover. The defendant saw fit to bring to this Court only the question of contributory negligence, and the opinion of the Court expressly stated that the discussion would be confined to that question alone. An examination of the case, as it was exhibited to the circuit court of appeals, discloses that contributory negligence was the only question passed upon by that court. 56 F. 200.

*Judgment reversed.*

**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**