

thereto there can be no recovery in this case. The intervenor chose to use the track of the railway company for his personal convenience, without regard to constantly moving trains thereon; and the railway company having a right to suppose the track free, pursued its ordinary course of business. The injury, therefore, occurred through the gross negligence of the intervenor, without any fault on the part of the railway company.

Master's report confirmed.

NOTE.

Where a party voluntarily goes upon and walks along a railroad track, and fails, without excuse, to look and listen for danger, and is injured by reason thereof from a passing train, he is guilty of such contributory negligence as will defeat recovery. *Laverenz v. Chicago, R. I. & P. R. Co.*, (Iowa,) 10 N. W. Rep. 268.

Such person is a mere trespasser, and while it would be the duty of the persons operating trains, if they saw him, and could avoid injuring him, to do so, yet if they did not see him, and were ignorant of his dangerous position, they would not be bound to look out to save him from injury. *McAllister v. Burlington & N. W. Ry. Co.*, (Iowa,) 20 N. W. Rep. 488.

A railroad company does not owe a mere trespasser upon its track the duty of having an engineer running a train to look to see whether he is there. *Scheffler v. Minneapolis & St. L. Ry. Co.*, (Minn.) 21 N. W. Rep. 711.

A person going upon a railroad track between stations, without first looking and listening for an approaching train, is guilty of contributory negligence, and cannot recover for injury sustained. *Ivens v. Cincinnati, W. & M. Ry. Co.*, (Ind.) 2 N. E. Rep. 134.

When a trespasser on a railway track is injured by the negligence of the railroad company, he may not recover unless such negligence was willful; mere gross negligence is not sufficient. *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286.

A person who, without right, and with full knowledge of the location, voluntarily places himself upon a railroad track, at a place where there is no crossing, and which is a known place of danger, and is killed by a passing train, is negligent, and no damages can be recovered for his death, except for wanton injury. *Pittsburgh, Ft. W. & C. Ry. Co. v. Collins*, 87 Pa. St. 405.

One who, without authority, enters upon a railway track, and while there becomes insensible from providential causes, and while in this state, and in plain view, is injured by a train, may recover damages of the company, although the injuries were not wanton or willful; but otherwise, if his insensibility was by reason of voluntary intoxication. *Houston & T. C. Ry. Co. v. Sympkins*, 54 Tex. 615.

Except at public crossings a railway company owes no duty to a young child on its track. *Cauley v. Pittsburgh, C. & St. L. Ry. Co.*, 95 Pa. St. 398. See *Meeks v. Southern Pac. Ry. Co.*, 56 Cal. 513; *Central Branch, etc., R. Co. v. Henigh*, 23 Kan. 347; *Hestonville P. R. Co. v. Connell*, 88 Pa. St. 520; *Moore v. Pennsylvania R. Co.*, 99 Pa. St. 301.

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co. and others. (NOONAN, Intervenor.)¹

(Circuit Court, E. D. Missouri. March 24, 1886.)

RAILROADS—CONTRIBUTORY NEGLIGENCE—RIDING ON DEFECTIVE CAR.

The foreman of the crew of a switch-engine complained to the yard-master that one of the foot-boards of his engine was in a dangerous condition, but it was not repaired. Three days after making the complaint, and while riding on the defective foot-board, he was thrown off in consequence of the defect, and injured. He might have ridden on the caboose platform, which was safe. *Held*, that he had not been guilty of such contributory negligence as to prevent a recovery.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.
v.26F.no.12—57

In Equity. Exceptions to master's report.

Petition for damages for injuries received by the intervenor in consequence, as alleged, of the negligence of the defendants. At the time of the accident in question the intervenor was the foreman of the night crew of a switch-engine used in the Moberly yards. On the morning of May 29, 1885, he got on the engine for the double purpose of informing the foreman of the day crew about the position of cars in the yard and of riding home. He took his position on the foot-board at the forward end of the car. This foot-board was suspended by four wrought-iron hangers or straps from a heavy piece of timber or cross-beam secured by bolts to the frame of the engine. This cross-beam had become loose, and when subjected to pressure would turn so as to swing the foot-board under its outer edge. When the pressure was removed it would spring back. It had been in this defective condition for several weeks, and several attempts had been made to fix it, but they had been unsuccessful. On the twenty-sixth of May the intervenor had told the yard-master that the step "was not fit for a man to work on,—was not safe," and had told him about it two or three times before. Nothing was done, however. This foot-board was adjacent to the platform of the caboose, and when the intervenor took his position on it as above stated he might, by a little exertion, have gotten on said platform, which was unoccupied. He did not do so, however, and the speed of the engine being suddenly increased, and the pressure on the cross-beam relieved, the foot-board suddenly sprung up, jerked the intervenor off, and threw him under the wheels of the caboose, which ran over one of his legs. The master reports that although there was great negligence in leaving the foot-board in its dangerous condition, yet the accident was directly contributed to by the intervenor in getting on the foot-board, which he knew to be unsafe, instead of climbing on the caboose platform.

Dyer, Lee & Ellis, for intervenor.

Wills H. Blodgett and *H. S. Priest*, for receivers.

TREAT, J., (*orally*.) In the light of the evidence, the construction by the master of the technical rules governing such causes is too narrow. The intervenor, an employe of the railway company, complained of the defective machinery, which it was the duty of the railway company to repair. In the hurry of business, in the discharge of his duties, and possibly for his personal convenience, he sought to use the machinery, which ought to have been perfect, to reach his home. The injury occurred by his using the defective step, concerning which he had theretofore complained. It seems to the court that the doctrine of contributory negligence under the facts proved would be pushed to an extreme if the railway company could, through its neglect of duty, after due notice, be relieved from its obligations to its employes because an employe who having repeatedly given notice to

the railway company, should, in the hurry of business, meet an accident resulting from such defective contrivance. It may be that, having complained of the defects, it would have been prudent on his part to observe whether the defects had been remedied; yet, in the conduct of business requiring rapid action with regard to incoming and outgoing trains, it becomes important that the employes should be prompt and efficient for the general conduct of the commerce of the country involved in rapid and safe transit. Railroad corporations ought not to be relieved from their obligations on which the safety of life and property depend, and on which the safety of employes also depend, by any strained or narrow rules. An employer and employe, each for the benefit of the other, and of the general public, should be held respectively to the obligations involved in the nature of the employment. Hence under the evidence presented, the exceptions by the intervenor must be sustained, and the case referred back to the master to determine the damages sustained by the intervenor.

BACHELOR v. KIRKBRIDE.

(Circuit Court, D. New Jersey. February 19, 1886.)

CONTRACT — WORK TO BE PAID FOR ON CERTIFICATE OF ARCHITECT — REFUSAL TO CERTIFY — RECOVERY OF QUANTUM MERUIT.

Where a contractor agrees to erect a building, to be paid for as the work progresses, on certificates signed by the supervising architect, and the architect fraudulently refuses to sign a certificate, and the contractor is unable to finish the building, he may recover of the owner on a *quantum meruit*, for the work actually done, although there was no collusion between the architect and such owner.¹

On Motion for New Trial.

S. H. Gray and *A. C. Hartshorne*, for the rule.

J. Frank Fort and *A. Q. Keasbey*, *contra*.

NIXON, J. The case comes up on a rule to show cause why a new trial should not be granted. Several grounds are stated why the rule should be made absolute, but only one has suggested any serious question. The pleadings and evidence reveal the following state of facts: A contract was entered into between the plaintiff and the defendant for the construction of a hotel at Key East, on the New Jersey coast. By the terms of the agreement the builder was to be paid, during the progress of the work, the sum of \$40,000, as follows: On November 15, 1883, \$5,000; on December 15, 1883, \$10,000; on January 15, 1884, \$5,000; on February 15, 1884, \$5,000; on March 15, 1884, \$5,000; on May 15, 1884, \$5,000; on June 15,

¹See note at end of case.