

ANDERSON *v.* WINSTON and others.

(Circuit Court, D. Minnesota. June Term, 1887.)

1. MASTER AND SERVANT—LIABILITY OF MASTER—SERVANT'S KNOWLEDGE OF DANGER—ORDERS OF FOREMAN.

Plaintiff, one of a gang of workmen employed by contractors, while excavating a tunnel, was injured by an earth slide produced by a crack in the soil from blasting, and sued his employers for damages. *Held*, denying his motion for a new trial, that, as the danger was apparent to plaintiff personally, he could not recover, though the foreman of the gang, also knowing the danger, ordered plaintiff to work, without notifying him thereof.

2. SAME—FELLOW-SERVANT—FOREMAN OF GANG.

The foreman of a gang of laborers, employed by a contractor, is a fellow-servant of one of the gang.

At Law.

*Henry Johns* and *H. S. Williams*, for plaintiff.

*Kitchel, Cohen & Shaw*, for defendants.

NELSON, J. In this case a motion for a new trial is made by plaintiff. Defendants were contractors excavating a tunnel through a hill in the northern part of the city of St. Paul, in this district. It was a face cut. One side of the hill was a little higher than the other, where the excavation was made. It appeared from the testimony that the contractor worked night and day gangs. The plaintiff was an employe in the night gang, under a foreman, and brings this suit to recover damages from a personal injury suffered, as charged from the negligence of the defendants. This cut was through a hill which was about 30 feet in height. It was worked by having a platform raised some 15 feet, so that the men could work upon the platform, and also under it, in making the excavation. The sides of the cut were sloped, and the evidence shows the usual slope was given to them. In this face cut, when the day gang went off, the night gang came on, and it was while the night gang were at work that the injury occurred. Blasts had been made on account of the character of the soil. A crack was formed, shortly after a blast, in the afternoon of the day before the accident, and some time during the morning there was a slide of earth, and plaintiff was injured. It is claimed that the foreman of the gang saw the crack, and did not inform the men of the fact that it was a dangerous place, and plaintiff was ordered to go to work there. The evidence of all the parties, with the exception of one who testified in regard to the character of the excavation, goes directly to the point that the foreman saw the crack, and that they also saw it. Anderson testifies that he did not see it, but it is obvious that, if there was any danger, it was as apparent to Anderson as to any one else. There is another reason why the plaintiff cannot recover in this case, and that is, the foreman, if he was at fault, was a co-servant with Anderson. An effort is made by the plaintiff to bring this case within the decision of the United States supreme court in *Railway Co.*

v. *Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. No such case is presented.

The motion for a new trial is denied.

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CHURCH, Adm'r, etc., v. NORTHERN PAC. R. CO.

(Circuit Court, D. Minnesota. June Term, 1887.)

NEGLECTANCE—DEATH AT RAILROAD CROSSING—EVIDENCE TO RENDER RAILROAD LIABLE.

In an action against a railroad company to recover damages for causing the death of plaintiff's intestate, who was picked up on a crossing on a dark night in November, having been struck apparently by defendant's train, which had passed a few minutes before, the principal witness for plaintiff testified to living near the crossing; that, from his house, having retired for the night, he heard a scream as the train passed, and the jumping of the wheels on the rails; that he heard no bell or other signal; that he went down, and found plaintiff's intestate on the track, having received injuries from which he afterwards died, and saw the train disappearing, with cars ahead of and behind the locomotive. There was no flag-man at the crossing. There was evidence that the deceased had been drinking intoxicating liquors. *Held*, that there was not sufficient evidence to justify a verdict for plaintiff; and that, after verdict for defendant, a motion for a new trial should not be granted.

At Law. Action to recover damages for death of the plaintiff's intestate through injuries caused by the defendant's negligence. On motion for new trial.

*C. F. Baxter*, for plaintiff.

*N. O. Clough*, for defendant.

NELSON, J. This case was tried at the last term of this court, a verdict found for the defendant, and a motion for a new trial is made by the plaintiff. The administrator of Soren England brought suit to recover for the death of his intestate. The latter was found lying alongside of the track of the Northern Pacific Railroad Company on the night of November 27, 1885, in the city of Minneapolis, at a crossing on Twenty-first avenue north, and died soon after being removed to the hospital. Bruises and fractures upon his person and blood upon the rails indicated that he had been struck and run over by defendant's train. The night was dark. There were two tracks at this point, and the body was found near the west track. There is no testimony offered of any person who saw the injury inflicted. The accident occurred about 10 o'clock at night. The principal witness, who lived near the track on the north-west corner of Twenty-first avenue north, testified that he was in his room in the second story of his house, and heard the train passing, and says he heard the scream of a man, and the wheels jumping on the rails; and, believing that some one was hurt, got up and arrived within five minutes of the time that this accident happened, and found this man in a position