

## LYON v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. May 11, 1888.)

## RAILROAD COMPANIES—ACCIDENTS TO TRAINS—PLEADING.

A complaint alleged in substance that plaintiff was an express messenger on defendant's train of cars; that the air-brake apparatus of the several coaches were different and not adjustable, and that by reason thereof, when the train was stopped at B. and the engine detached, the brakes were not set, and the train, by force of gravity, moved down a steep grade, and was thrown from the track, and plaintiff was injured; and also alleged that the accident occurred through defendant's employes negligently leaving the train without setting the brakes. *Held*, that the complaint stated a good cause of action.

At Law. Action for damages. On demurrer to complaint.  
*C. M. Campbell*, for plaintiff.  
*Teller & Orahood*, for defendant.

BREWER, J. In *Lyon, Conservator of Edward S. Kelly, a lunatic, v. Union Pacific Railway Co.*, is a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The chief vice of the complaint, as I read it, is that there are too many words in it. It is very diffuse and prolix. I know that some people can shoot an idea at you in a single sentence, short and pithy, and others take a whole page to express the same idea. Of course the former is much pleasanter to examine, but the mere matter of form is not sufficient to sustain an objection to a complaint good in substance; and while it is not very easy to extract from this complaint the pith of it, I think it may be boiled down to about this: That the lunatic, whose conservator the plaintiff is, was an express messenger on the defendant's train. As such express messenger he has all the rights of a passenger without pay. He was riding on a mixed train. The train was made up of coaches; some belonging to the defendant and some to the Denver & Rio Grande Railway Company. The air brake apparatus of the respective coaches were different and not adjustable one to another, in consequence whereof, when the train stopped at Breckenridge and the locomotive was detached, the brakes were not set, and the train, by force of gravity, started off down a steep hill, and was thrown from the track, and Mr. Kelly injured. That is the first count. The second count is that the defendant negligently employed incompetent and unskillful agents and servants, and that one of these incompetent agents negligently left the train without setting the hand brakes; in consequence whereof, when the engine was detached, the train went off, the car was thrown from the track, and Mr. Kelly injured. The first count charges the use of defective appliances, and the second the negligent employment of unskillful agents and servants, in consequence of which Mr. Kelly, the lunatic, was injured. Now, if this is the gist and pith of this complaint and its two counts, I think it will have to be adjudged that it states a cause of action, and the demurrer will be overruled; defendant to answer in 20 days.

TOMES *et al.* v. BARNEY.

(Circuit Court, S. D. New York. April 9, 1888.)

## 1. LIMITATION OF ACTIONS—DISABILITIES AND EXCEPTIONS—ABSENCE FROM STATE.

Under section 100 of the New York Code of Procedure, as amended July 10, 1851, which provides for an extension of the time limited to six years by section 91 of that Code for the commencement of actions therein specified, by the departure from and residence out of the state of a person after a cause of action has accrued against him, mere absences of such person from the state for business or pleasure, without any intention of remaining away, and respectively followed by a return thereto as his place of residence, though aggregating twelve months in seven successive years, do not constitute departure from and residence out of the state within the meaning of section 100, and such period of twelve months is not to be added to the six-years limitations prescribed by section 91.

## 2. COURTS—FEDERAL—FOLLOWING STATE DECISIONS.

Where a question arising under a statute of a state has been passed upon by a federal court in that state in the light of apparently conflicting opinions of the state courts, the federal court will, in a subsequent case involving the same question, where its attention is called for the first time to a decision of the state court of last resort definitely interpreting that statute, reverse its former decision, and follow the ruling of such state court notwithstanding the fact that that ruling was made prior to the earlier decision of the federal court.

## At Law.

This action was commenced February 3, 1868, by the service upon the defendant, Hiram Barney, of a summons issued out of the superior court of the city of New York, in the state of New York, to recover, besides other things, "fees" illegally exacted from the plaintiffs' firm by the defendant as collector of customs at the port of New York in said state, for oaths to entries, stamps on invoices, and delivery orders in case of various importations made between April 8, 1861, and June 30, 1864, from a foreign country or countries to the United States at said port. Certain of these "fees" were exacted more than six years prior to the commencement of this action, viz., February 3, 1868. February 17, 1868, this action was duly removed by writ of *certiorari* from said superior court into this court. March 11, 1868, the plaintiffs filed and served a common-law declaration in *assumpsit*, which alleged indebtedness as existing January 2, 1868, and was for money had and received. Subsequently the following pleadings were filed and served: *First.* Defendant's plea of the general issue, and that the supposed causes of action in said declaration mentioned did not any of them accrue to the plaintiffs at any time within six years next before the commencement of this suit. *Second.* Plaintiffs' replication that, after the causes of action had accrued, defendant departed from and resided out of this state for several successive periods, amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months after the said several causes of action and each and every thereof accrued. *Third.* Defendant's rejoinder that defendant did not depart from and reside out of this state for several successive periods, amount-