

supported by the testimony of the intervenor himself, one Spicer, a switchman, and the boy, Warner, who claims to have been in the car second behind the locomotive, and to have been looking out of the window at the time that the intervenor met with his accident; and is corroborated by the proved admissions of the conductor, and the failure of the defendant to produce or account for the engineer in charge of the outgoing locomotive. The theory of the defendant is that the intervenor met with his accident while the train was being made up in the yard of the company at Gouldsborough, and while the conductor was absent at the dispatcher's office to receive orders, or at least before he had taken charge of the train. The master has found that the intervenor's witnesses are to be believed, and that the main witnesses of the defendant company are to be discredited.

The conclusion that I reach after a full examination of all the evidence is that the intervenor's evidence, supported as it is by the opinion of the master, preponderates in the case. At the same time I dissent *in toto* from the claim of the intervenor, apparently acquiesced in by the master, that the testimony of the two main witnesses, Nash and Cass, for the defendant, is collusive and false. The case shows that the ordinary way in which the business is done at Gouldsborough, after crossing the river on the ferry-boat, is for the conductor to go at once to the dispatcher's office, some distance up the yard, to obtain and receipt for orders; and that, while this is being done, the train is made up under the yard-master's orders, the cars composing the train are switched by a yard-engine to their proper places, and, when the train is made up, the engine that is to haul it is attached; it being the duty of the porter or brakeman, as intervenor was, to attach and properly tie the bell-cord as soon as the outgoing engine is attached. The evidence of Nash and Cass is to the effect that the accident to the intervenor occurred before or at the time the outgoing engine was attached, and not after the train was fully made up and turned over by the yard-master to the conductor. It is corroborated by the fact that no explanation whatever is given as to what the intervenor was doing, and why he did not tie the bell-cord while the conductor was obtaining orders, and by the statement of the intervenor as to the manner in which he received his hurt, taken down by Dr. Kearney, in the presence of Dr. Postell, at Plaquemine, where the intervenor was first examined by a surgeon; and it is further corroborated by the absence of any motive on the part of Cass and Nash to swear falsely,—the idea that motive is presumed because they were railroad employes being rejected as absurd.

The damages allowed are based upon the theory that the intervenor will never fully recover the use of his arm. The testimony on this subject is not sufficiently clear and conclusive. Of course it is hardly to be expected that, in the ordinary course of healing such an injury, it will be cured pending the investigation of the case, and in the determination of the amount of damages to be recovered from the railway, if the injury is permanent, the sum allowed by the master is not excessive; but, if otherwise, the sum of \$1,500 is ample. The intervenor may have an

order recommitting the case to the special master to take additional expert medical evidence as to the permanency of intervenor's injury; or an order confirming the master's report as to the liability of the defendant company, allowing damages in the sum of \$1,500, as he may elect, within five days from this date.

NEWMAN v. ALABAMA G. S. R. Co

(Circuit Court, S. D. Mississippi, E. D. May 24, 1889.)

1. CARRIERS OF PASSENGERS—INJURIES—DEFECTIVE TRACK.

In an action for damages for injuries to a passenger by the derallment of a car, several witnesses for plaintiff testified that the ties at the point where the accident occurred were in a very rotten condition, and that the rail was much worn and mashed. The only testimony to rebut this was that of defendant's section boss, who testified that he examined the track a day or two before the accident, and that the rail was sound, but admitted that one of the ties was somewhat decayed. Defendant did not produce the broken portion of the rail.

Held, that plaintiff was entitled to recover.

2. SAME—DAMAGES—DIABETES.

There being an irreconcilable conflict among the medical witnesses as to whether, if plaintiff has *diabetes* in its incurable form, the disease was caused by the accident, or was latent in his system prior thereto, and was in some measure accelerated by the accident, no damages can be allowed on account of such disease.

At Law. Action by Louis T. Newman for damages for personal injuries.

Miller, Smith & Hush, for plaintiff. *Fewell, Watkins & Brahan* and *John C. McMartin*, for defendant.

HILL, J. This is an action brought by the plaintiff against the defendant for alleged injuries received by him while a passenger on defendant's train, caused by the negligence of defendant in not keeping its railroad track in sufficient repair. Such is the substance of plaintiff's declaration, and to which the defendant has interposed the plea of the general issue, and upon which, by stipulation, the questions of fact as well as of law are submitted to the court, the finding of the court to be in lieu of the verdict of a jury. The proof shows that the plaintiff was a passenger on defendant's train, and that he had paid his fare, and had a ticket from Chattanooga to Vicksburg, and had also paid the additional fare demanded, and was in the Mann boudoir car,—one of the cars in said train; that by reason of the breaking of one of the rails on the track said car was thrown from the track, and plaintiff was thrown from his seat or place of repose, and that by some sharp substance a deep cut or wound was made on the right side of his face, which severed one of the arteries, or perhaps two of them, from which a large quantity of blood flowed, which greatly weakened him, producing temporary faintness, and from