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Thomas B. Mooney v. The Denver and Rio Grande Western Railroad Company : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

THOMAS B. MOONEY,
Plaintiff and Respondent,

vs.

**THE DENVER AND RIO GRANDE
 WESTERN RAILROAD COMPANY,**
 a corporation,
Defendant and Appellant.

FILED

AUG 28 1952

Clerk, Supreme Court, Ut.

Case No.

~~7879~~

7847

BRIEF OF APPELLANT

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In the
Supreme Court of the State of Utah

THOMAS B. MOONEY,
Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,
Defendant and Appellant.

Case No.
7373

BRIEF OF APPELLANT

STATEMENT OF FACTS

A prior appeal in this case taken by the plaintiff from an order dismissing the action, pursuant to a motion of the defendant based upon the grounds of forum non conveniens was disposed of in an opinion reported in 221 P. 2d 628.

This Court held that the courts of this State are not required by any statutory or constitutional mandate to entertain suits of non-residents based upon an alleged violation of the Federal Employers' Liability Act occurring outside this State, but concluded that the lower court abused its discretion in dismissing the action under the circumstances revealed by the evidence then in the record. The order of dismissal was vacated and the cause remanded with directions to permit both parties to present evidence in support of or in opposition to the motion (221 P. 2d at 649). Pursuant to this direction, the defendant renewed its motion to dismiss, supporting the same by an affidavit of one of its attorneys (R. 17-25). One of plaintiff's attorneys filed on his behalf an affidavit in opposition to the defendant's motion to dismiss (R. 27). This affidavit admitted parts and denied parts of the affidavit of defendant's attorney (R. 27-29). Upon the hearing of defendant's renewed motion to dismiss, it introduced evidence in support of the motion (R. 36-37). The plaintiff offered no evidence in opposition (R. 57). The trial court denied the motion (R. 34). No findings of fact, conclusions of law, or judgment other than the minute entry of the order was made or entered.

Plaintiff, a brakeman on a work train, was injured on January 5, 1949, when he fell from a car described in the pleadings and evidence as a Jordan Spreader car, which was standing on a side track in the defendant's yard at Tabernash, Colorado (R. 219-220). The Jordan Spreader car may be briefly described as a snow plow (R. 219). It

consists of flanges with attachments to operate the same, all of which are mounted on an ordinary railroad flat car (R. 219) (Exhibit C). It is used to remove snow from the railroad tracks and also to spread ballast on the road bed. It is equipped with a hand brake (Exhibit C).

The brake on the Spreader consists of a perpendicular shaft extending above and below the top surface of the car at the end thereof and over toward one side. Underneath the car the shaft or staff is connected with a mechanism by which, when the shaft is rotated, it tightens or releases the brake shoes. Attached to the top of the shaft is a wheel which is turned in applying or releasing the brake. Attached to the shaft at the top surface of the car is a ratchet, the rotation of which is controlled by a pawl. When the wheel is turned to apply the brake, the pawl engages the ratchet and holds the brake in a fixed position until released. The brake shoes may also be set by air (R. 254-255) (Exhibit C). In order to release the brake after the air has been let out, it is necessary to tighten it enough to release the tension on the pawl. The latter may then be disengaged from the ratchet by kicking it or by hand. According to the testimony of the plaintiff, the pawl was covered with ice, and frozen in the ratchet (R. 258). He picked up a brake shoe and pounded on the pawl to jar it loose from the ice. He says he then tightened the brake and disengaged the pawl. According to the plaintiff's version, the brake shaft was bent, and when he released the pawl, the shaft whirled and threw him from the car (R. 258-259).

The present appeal is from the judgment in favor of plaintiff entered upon a jury verdict.

STATEMENT OF POINTS RELIED ON

POINT I.

THE COURT ERRED IN INSTRUCTING THE JURY UPON ISSUES NOT WITHIN THE PLEADINGS OR SUPPORTED BY EVIDENCE.

POINT II.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY WITH RESPECT TO THE PLAINTIFF'S CONDUCT BEING THE SOLE CAUSE OF THE ACCIDENT AND INJURY.

POINT III.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT NO PRESUMPTION OF LIABILITY ARISES OUT OF THE FACT OF INJURY AND THAT PLAINTIFF MUST PROVE NEGLIGENCE TO RECOVER UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

POINT IV.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS UPON THE GROUND OF FORUM NON CONVENIENS.

ARGUMENT

POINT I.

THE COURT ERRED IN INSTRUCTING THE JURY UPON ISSUES NOT WITHIN THE PLEADINGS OR SUPPORTED BY EVIDENCE.

The original complaint predicated liability upon a violation of the Safety Appliance Act, Title 45, Section 11, U. S. C. A., which provides "it shall be unlawful for any common carrier subject to the provisions of Section 1-16 of this title to haul or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in Section 16 of this Title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes." It was alleged that the hand brake on the Jordan Spreader car was inefficient, dangerous and unsafe in that it was likely to release unexpectedly, that the staff was sprung and bent (R. 1-5). On the opening of the trial, plaintiff was permitted to file an amendment to his complaint by adding to Paragraph VI of the complaint two additional subparagraphs (D) and (E). Paragraph VI of the complaint alleged that the defendant was careless, reckless, and negligent and acted in violation of the Federal Safety Appliance Act in the particulars set forth in the subparagraphs A, B, and C, which as above indicated, related solely to the inefficiency of the brake. Subparagraph D of the amendment to the complaint alleged simply that the defendant, in violation of the Safety Appliance Act, used a Jordan Spreader car equipped with an inefficient, dangerous, and unsafe hand brake in this: that the area upon the car around the brake did not provide a safe and adequate place for a workman to station himself while manipulating the hand brake. Subparagraph E of the Amendment to the complaint alleged that the defendant failed to furnish plaintiff a reasonable safe place wherein and whereon to

do and perform the ordinary duties of his employment in that the defendant required the plaintiff to release the hand brake on the Jordan Spreader car at a time when the area upon said car around said brake did not provide a safe and adequate place to position himself while manipulating said hand brake (R. 76-77).

The court submitted to the jury the issue of liability under the Safety Appliance Act and in that connection instructed them that if they determined that the plaintiff had proved a violation of this act and that such violation contributed to the plaintiff's injuries, they could not make any deduction from the plaintiff's damages by reason of his contributory negligence if any.

Trial court also submitted to the jury an issue of negligence under the Federal Employers' Liability Act and in that connection instructed the jury that if they found such negligence to exist and if it contributed to the plaintiff's injuries, they could diminish the plaintiff's damages in proportion to the contributory negligence if any of the plaintiff. The jury, by its verdict, did diminish the plaintiff's damage because of the contributory negligence of the plaintiff (R. 141). The legal effect therefore of the jury's verdict is that it has absolved the defendant from any liability predicated upon the alleged violation of the Safety Appliance Act. It is legally equivalent to a finding by the jury that the hand brake on the Jordan Spreader was not an inefficient hand brake and that its staff was not sprung or bent.

The issue of negligence was submitted to the jury in Instruction No. Six, which reads as follows:

"You are instructed that under the provisions of the Federal Employers' Liability Act applicable to this case the law imposes the duty upon the defendant company to exercise reasonable care to provide its employees with a reasonably safe place to work. This duty does not require the absolute elimination of all danger, but it does require the elimination of all dangers which the exercise of reasonable care by the railroad company could remove or guard against.

"In this connection I instruct you, therefore, that if you shall find from a preponderance of the evidence that the deck of the Jordan Spreader surrounding the brake staff had tools, chains, or other objects thereon which required plaintiff to stand in a place from which he could not operate the hand brake in reasonable safety, then and in that event you may consider such facts, if any, in ascertaining whether or not the defendant company is negligent under the terms of the Federal Employers' Liability Act. And if you further find from a preponderance of the evidence that such negligence, if any, proximately caused, in whole or in part, injuries to plaintiff, then you should return a verdict in favor of the plaintiff and against the defendant and award plaintiff damages as in these instructions set forth."

It is the contention of the defendant that the trial court committed prejudicial error in so instructing the jury, for the reason first that there is no evidence to support a finding by the jury that the defendant was negligent in failing to move from the deck of the Jordan Spread "tools, chains, or other objects thereon," or that any failure to remove from the deck of the spreader any tools, chains, or other objects thereon caused either in whole or in part the accident or injury of which the plaintiff complains.

The only evidence in this record concerning the existence of any "tools, chains, or other objects" on the deck of the spreader is to be found in the testimony of the plaintiff. He testified that he was standing on the east side of the spreader when the conductor directed him to release the brakes; that he climbed over the coupling to the west side of the spreader and mounted the car from that side; (R. 254) that he went over to that side because there was a tool box "and other stuff, chain and things like that" on the east side of the spreader and he thought it was safer to get on the car from the west side (R. 254 and 304 and 309). When asked about the condition of the floor of the car at the place of the brake staff, he stated, "Well, behind me was a grab iron and there was very little room to stand and there was stuff scattered all over there. Tools had been thrown on there after we had done some work with the spreader at Granby. We had a little trouble with the flanges sticking out and the tools were taken off and thrown back on again." He then identified Exhibit "C" as an accurate photograph of the Jordan Spreader taken a few days before the trial. When asked if there was any difference between the corner where the brake is located and the area of the deck of the car as shown in Exhibit "C" and at the time of the accident, plaintiff stated that Exhibit "C" did not show the tool box. The brake staff was located six inches from the south end of the car, twenty inches from the center and sixteen inches from the side of the car (R. 309).

On cross examination, plaintiff stated:

"Q. Isn't it a fact when you climbed up on the west side of the car you climbed up there because this side was cleaned off?

"A. It had been tramped down by getting up and down off that side.

"Q. And comparatively speaking, it was cleaned off?

"A. It wasn't cleaned off. Men had been climbing up and working and had tromped it down.

"Q. But there weren't tools and equipment on that side?

"A. No, sir. There was a chain lying somewhere there and a brake shoe somewhere in the vicinity.

"Q. That didn't in anyway interfere with you up there.

"A. No, not for my foot space (R. 309). * * *

"Q. So that I take it, after you had climbed up in this position with your feet in approximately the position indicated on that drawing, that you then braced your feet. Did you not?

"A. Yes, sir.

"Q. And you had a firm stance on the deck of the car in that position?

"A. Well, I had hold of the wheel to help me make my feet firm.

"Q. The rules require you to get a firm stance, don't they, before you operate a brake?

"A. In this particular instance it was very hard to really pick out a good place that was good and firm and safe.

"Q. You did get a firm stance on the deck of the car, didn't you?

"A. I got the best I could get for the conditions.

"Q. Well, there wasn't anything about the way you were standing that in anyway contributed to your accident was there?

"A. No, sir" (R. 311-312).

The staff of the brake was about three feet above the floor of the car and the wheel by means of which the brake is released would strike a workman of average height about at the waist (R. 310).

We submit that this evidence fails completely to establish any negligence on the part of the defendant in failing to remove from the deck of the spreader any tools, chains, or other objects. It will be noted that the Jordan Spreader car was an ordinary flat car, and, therefore, does not have any brake platform or deck. The brake mechanism is simply attached to the floor of the car. It is also to be kept in mind that the Jordan Spreader car was a snow plow used to clear the tracks of snow. It was a part of a work train and not a car used in the transportation of freight. The presence of tools, chains, or other objects on the floor of such a piece of equipment is perfectly normal, natural, and to be expected. Any failure to remove such objects from the floor of the car prior to directing a workman to release the brake could not within the realm of reason be determined a breach of the duty to provide the brakeman a safe place in which to perform his duties. Furthermore, as the evidence demonstrates, any "chains, tools, or other objects" that may have been on the floor of the Jordan Spreader car did not in any manner interfere with the plaintiff's operations in releasing the brake. He did not stumble over, slip on, or stand on any "chain, tool, or other object" while releasing or attempting to release the brake. There was ample space between the tool box which was on the floor of the spreader and the brake ratchet for the plaintiff to stand while releasing the brake.

He did stand in that position and did release the brake without coming in contact in anyway with any "chain, tool, or other object" that may have been on the floor of the spreader. There is not the remotest causal connection between the accident sustained by the plaintiff and the presence of any "tools, chains, or other objects" that may have been "lying around" on the car. The condition of the floor of the car neither caused or contributed in the slightest degree to the fall of the plaintiff from the car. He testified positively and unequivocally that he was thrown from the car by the whirling of the brake staff following his disengaging the pawl. His description of the accident removes even the remotest possibility that the condition of the floor of the car contributed in the slightest degree to the fall from the car. We quote from his testimony.

"Q. Did you release the brake on the spreader on this occasion?

"A. Yes, sir.

"Q. Tell us what happened.

"A. I climbed there and there was snow and ice froze all over the deck of the car and it had been quite cold the night before, around 20 below, and I seen a brake shoe lying there and I thought if I would pound on the dog or jar it it would knock the ice off a little, and I wouldn't have that to contend with when I was releasing it. I did that, and I proceeded to release the brake in the normal manner by pulling and straining on the brake to get the dog out. I had my foot against the dog. It had to come out just a very little to free the brake, and I was pulling as hard as I could against it and pushing with my foot against the dog and when it released it threw me off.

"Q. What was it that threw you off?

"A. The brake staff was bent and when it came around it came around with a whirl and threw me backward. Otherwise it would come around straight up and down, but being bent it had a tendency to unwind (R. 258). * * *

"Q. What was the next thing you knew after you were whirled off?

"A. I came to on the ground" (R. 259).

Plaintiff did not qualify, add to, or deduct from the foregoing version of the manner in which he sustained his injury. Nothing is more clearly established in this case than the fact that plaintiff was thrown from the car by the spinning of the brake wheel or the whirling of the staff, and that the presence of any chains, tools, or other objects on the floor of the car was merely a static condition which played no part in the accident in which the plaintiff sustained his injury. Numerous authorities sustained these conclusions.

See:

Brady v. Southern Ry. Co., 64 S. Ct. 232, 320 U. S. 476;

Reynolds v. Atlantic Coast R. R. Co., 69 S. Ct. 507, 336 U. S. 207;

Kenney v. Boston & Maine R. R., 33 Atl. 2d 557, 92 N. H. 495;

Central Vermont Railway Company v. Perry, 10 F. 2d 132 (1st Cir.);

Dade v. Boston & Maine R. R., 30 Atl. 2d 485, 92 N. H. 294;

Lowden v. Bowen, 183 P. 2d 980, (Okl.);

Tremelling v. Southern Pacific Company, 170 Pac. 80, 51 Utah 189;

Ehalt v. McCarthy, et al., 138 P. 2d 639, 104 Utah 110.

In *Brady v. Southern Railway Company*, supra, the deceased was fatally injured when thrown from a car in a moving train. The car was derailed when it ran over "the wrong" end of a derailer. One of the grounds of negligence alleged was that the rail opposite the derailer was weak and defective, being worn on top and on the side. Plaintiff claimed that if this rail had been without defect the car would have gone over the derailer and stayed on the tracks. The Supreme Court of the United States held that although there was sufficient evidence of a defect in the rail, such defect was not negligence causing in whole or in part the fatal injuries. We quote from the opinion:

"The Supreme Court of North Carolina (222 N. C. at page 370, 23 S. E. 2d at page 338) was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, at page 475, 24 L. Ed. 256; 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' Events too remote to require reasonable provision need not be anticipated.

* * *

The case of *Reynolds v. Atlantic Coast R. Company*, 69 S. Ct. 507, 336 U. S. 207, is directly in point upon the

proposition that there is no causal connection between the condition of the floor of the car and the injury sustained by the plaintiff. In that case, a brakeman fell between the sixth and the seventh cars of a moving train. He was proceeding from the caboose to the seventh car in order to pass a signal. The complaint alleged that the railroad was negligent in allowing canes to grow alongside the roadbed and in failing to provide an additional brakeman. It was claimed that if the canes had been removed from the side of the roadbed the deceased could have given the signal from the sixth car and further, that if an additional brakeman had been provided, the deceased would not have had to give a signal from the moving cars. The Supreme Court of the United States conceded that the railroad might properly have been held guilty of negligence under the Federal Employers' Liability Act in failing to remove the canes from alongside the tracks and in failing to provide an additional brakeman, but held that there was no causal connection between such negligence and the fall of the brakeman between the moving cars.

Having demonstrated the total absence of any causal connection between the presence of any tools, chains, or other objects on the floor of the Jordan Spreader and the fall of the plaintiff from that car, it necessarily follows that the court committed prejudicial error in instructing the jury that if such negligence proximately caused in whole or in part the injuries to the plaintiff, it should return a verdict in favor of the plaintiff.

In the case of *King v. The Denver and Rio Grande Western Railroad Company*, 211 P. 2d 833, ... Utah ... ,

the deceased was killed when a car which he was riding ran over a trestle. The court permitted the jury to determine that if the brake on the car was not an efficient hand brake within the meaning of the Safety Appliance Act, the plaintiff could recover. There was no evidence in the case tending to show that the brake was defective or inefficient. This Court reversed the judgment of the lower court because it had permitted the plaintiff to recover upon a basis unsupported by the evidence. See also, *Fowkes v. J. I. Case Threshing Mach. Co.*, 46 Utah 502, 151 Pac. 53; *Kendall v. Fordham*, 79 Utah 256, 9 P. 2d 183; *Industrial Comm. v. Wasatch Grading Co.*, 80 Utah 223, 14 P. 2d 988; *Peterson v. Sorenson*, 91 Utah 507, 65 P. 2d 12.

POINT II.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY WITH RESPECT TO THE PLAINTIFF'S CONDUCT BEING THE SOLE CAUSE OF THE ACCIDENT AND INJURY.

Defendant requested the court to instruct the jury that if they believed from the evidence that the sole cause of the accident and injury sustained by the plaintiff was his failure to use a brake club properly to release the brake, their verdict must be in favor of the defendant. (Defendant's requested Instruction No. 6.)

The plaintiff had been instructed by the conductor in charge of the train crew to use a brake club to release the brake on the Jordan Spreader (R. 472). The plaintiff disobeyed this instruction. Even if this in-

struction had not been given to the plaintiff, the simplest degree of ordinary prudence would have dictated that plaintiff use a brake club to release this brake. The Jordan Spreader was standing on a grade track. The weather was extremely cold and undoubtedly the rails were slippery. In view of these conditions, the brake on the Jordan Spreader had been set very tight. The plaintiff was familiar with all of these conditions and circumstances. Nevertheless, he undertook to release the brake without any implement by which he could regulate the tension of the brake. Instead he used a brake shoe to pound loose the pawl and having only his hands to control the tension after the pawl had been disengaged. Had he used a brake club in releasing the brake, he could have readily and easily prevented the staff from spinning and whirling (R. 433). In short, he could have avoided the accident and injury by obeying the instruction of his superior, or following the dictates of the most elementary prudence. In this state of the evidence, well settled principles of law entitled the defendant to have the jury instructed that if they found that the sole cause of the accident and injury was the plaintiff's failure to use a brake club to release the brake, their verdict must be in favor of the defendant.

A case directly in point is *Henwood v. Coburn*, 165 F. 2d 418. In this case Coburn, the conductor in charge of a freight train, was fatally injured when the caboose in which he was riding was struck by a passenger train. It was Coburn's duty to require the flagman to set a warning signal to the passenger train of the location of the caboose. There was evidence from which the jury could have de-

terminated that Coburn failed to see to it that the flagman put out the proper signals, and that the passenger train ran into the caboose because of the absence of such warning. The action to recover damages for his death was predicated upon the Federal Employers' Liability Act, and the defendant railroad requested an instruction as follows:

"And you are also instructed that even if you should find and believe from the evidence that the flagman left the caboose in time to flag the passenger train, still if you further find that he returned to the caboose at a time when there was danger of a collision between the passenger train and freight train number 681, and if you find that conductor Coburn permitted him to return to the caboose and to remain in the caboose under such circumstances, and if you find that conductor Coburn was negligent in so permitting the flagman to return to the caboose and to remain in it, and that such negligence was the sole cause of the collision between the two trains, then you are instructed that the plaintiff is not entitled to recover and your verdict must be for the defendant."

This request was refused although the court did instruct as follows:

"In order for this defense to prevail, you will be required to find from the evidence that there was no other negligence on the part of the defendant or any of its officers, employees, or agents that proximately caused the collision in question and that the plaintiff's intestate was guilty of the sole and only negligence that caused the collision."

The Circuit Court of Appeals held that inasmuch as there was evidence from which the jury could determine

that Coburn was negligent and that such negligence was the sole cause of the collision, the trial court committed prejudicial error in refusing to submit such defense to the jury, and that the instruction given did not adequately present the defendant's defense:

"The point we are trying to make is that the considerations which presumably prompted the trial court to refuse to give the trustee's requested instruction No. 2 were not questions which the court had a right to resolve in favor of the administratrix as a matter of law in deciding whether the requested instruction should be given or refused. As we have pointed out, under the teaching of the recent decisions of the Supreme Court, the domain of the jury in circumstantial cases under the Federal Employers' Liability Act may not be narrowly bounded, and the settling of any question of negligence or proximate cause, where more than one rational possibility is involved on the evidentiary facts, is exclusively within its field. This is true for every purpose in the case, and, in according the jury its inherent function, recognition of the right in one aspect or incident of a case is as important as in another * * * As a matter of legal test, a jury in the latitude which is open to it might legitimately infer from the facts that, if Coburn knew that Story had returned to the caboose and failed to send him back out (which the witnesses on both sides agreed that a conductor should do in such a situation), this neglect of duty could have constituted the sole efficient cause of Coburn's death, if the jury should be of the view that on the circumstances which we have set out neither Story nor the engineer of the passenger train ought to be regarded as having been negligent. The trustee was therefore, we think, entitled to have had this theory submitted to the jury, as he sought to have done by his requested in-

struction No. 2. What we recently said in another case may be repeated, that, 'as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made.' *Chicago & N. W. Ry. Co. v. Green*, 8 Cir., 164 F. 2d 55, 61. The requested instruction here was in no way legally incorrect but, if the trial court desired to amplify or clarify it in any way, it of course was at liberty to do so."

This court has repeatedly announced that a party to a lawsuit is entitled to have the jury pass upon his theory of the case when there is evidence to sustain it. See *Pratt v. Utah Light and Traction Company*, 57 Utah 7, 169 P. 863; *Webb v. Snow*, 102 Utah 435, 132 P. 2d 144; *State v. Newton*, 105 Utah 561, 144 P. 2d 290. The proposition is stated succinctly in the *Pratt* case as follows:

"Each party to a suit is entitled to have his theory, when there is evidence to support it, submitted to the jury and the judgment of the jury on the facts tending to support such theory assuming always that there is testimony offered to support the same."

The issue embodied in the defendant's request was a controlling issue in the case, and the refusal of the court to submit it deprived the defendant of its right to have its principal defense passed upon by the jury. See *Wilson v. Union Pacific Railroad Company*, 231 P. 2d 715, . . . Utah

POINT III.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT NO PRESUMP-

TION OF LIABILITY ARISES OUT OF THE
FACT OF INJURY AND THAT PLAINTIFF
MUST PROVE NEGLIGENCE TO RECOVER
UNDER THE FEDERAL EMPLOYERS' LIA-
BILITY ACT.

In its Instruction No. 11, the defendant requested the court to instruct the jury that the defendant is not an insurer of the safety of any employees and is not liable to respond in damages merely because the plaintiff was injured while engaged in the performance of his work as a brakeman; that there is no presumption that the defendant was negligent or that it violated the Safety Appliance Act, or that such negligence or violation on its part, even if established, was the proximate cause of the accident and injury to the plaintiff, and that negligence, if any, and violation of the act, if any, and whether such negligence or violation, if any, was the proximate cause of the accident and injury must be proved by the plaintiff by a preponderance of the evidence.

We submit that this request embodied correct principles of law applicable to the evidence in the case and that the refusal to give it deprived the defendant of a fair trial. In denying defendant's request, the trial court apparently was under the impression that the Supreme Court of the United States has by its recent decisions abandoned its previously announced conceptions of the law of negligence under the Federal Employers' Liability Act. Such an impression is entirely erroneous. That court has repeatedly declared that railroad companies are not insurers of the safety of their employees, that no presumption of liability

arises out of the fact that an employee is injured while acting in the course of his employment, and that proof of negligence causing the injury is a condition precedent to liability. See *Moore v. Chesapeake and Ohio Railroad Company*, 340 U. S. 573, 71 S. Ct. 428; *Tennant v. Peoria, etc.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Brady v. Southern Railway Company*, 320 U. S. 476, 64 S. Ct. 232; 88 L. Ed. 239; *Coray v. Southern Pacific Company*, 335 U. S. 520; 69 S. Ct. 275; *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

In the *Wilkerson* case, Mr. Justice Black delivering the opinion of the court said:

“Much of the respondents’ argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275.
* * * ”

“There are some who think that recent decisions of this Court which have required submission of negligence questions to a jury make, ‘for all practical purposes, a railroad an insurer of its employees.’ See individual opinion of Judge Major, *Griswold v. Gardner*, 7 Cir., 155 F. 2d 333, 334. But see Judge Kerner’s dissent from this view 155 F. 2d 333, at page 337 and Judge Lindley’s dissenting opinion 155 F. 2d 333, at pages 337, 338. This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads. This is contrary to fact, as shown for illustration by other

Federal Employers Liability cases, * * * ."
(Citing cases.)

Mr. Justice Douglas in a concurring opinion added:

"The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. * * * The basis of liability under the Act is and remains negligence. * * *"

The latest expression of the Supreme Court that we are able to find reaffirming the principles embodied in the requested instruction is set forth in *Moore v. Chesapeake and Ohio Railway Company*, supra, as follows:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32, 64 S. Ct. 409, 411, 88 L. Ed. 520. The negligence she alleged was that respondent's engineer made a sudden and unexpected stop without warning, 'thereby causing decedent to be thrown from a position of safety on the rear of the tender' into the path of the train. * * * The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped. * * *"

Nowhere in its charge to the jury did the court direct them that the burden rested on the plaintiff to prove negligence causing the injury, or that they could not predi-

cate liability upon the mere happening of the accident, or that the defendant was not an insurer of the safety of its employees. By refusing and failing to require the jury to apply these well settled principles of law to the evidence, the trial court authorized the jury to render a verdict for the plaintiff without requiring him to meet the conditions precedent to a recovery under the terms of the Federal Employers' Liability Act and prevented the defendant from having its defense to the action submitted to the jury for its determination.

We need not cite again the numerous decisions of this court which hold it to be reversible error to refuse to submit to the jury a defense which is raised by the pleadings and supported by the evidence. We submit that the refusal of the court to instruct the jury as requested in defendant's Instruction No. 11 deprived the defendant of a fundamental right.

POINT IV.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS UPON THE GROUND OF FORUM NON CONVENIENS.

In its opinion vacating the Order of Judge Hendricks dismissing the action upon the grounds of forum non conveniens, this Court held specifically and unequivocally that the courts of this State have the power to refuse to hear or determine the plaintiff's cause of action. The exercise of that power was held to be the exercise of a sound legal

discretion. It was determined that the evidence then before Judge Hendricks was not sufficient to warrant a refusal to entertain the action.

It is the contention of the defendant upon the present appeal that it supplied upon the retrial of its motion all of the evidence which this Court determined necessary to justify a refusal to entertain the suit, and there being no evidence contradicting, impeaching, or in any other manner impairing the evidence presented by the defendant, the trial court did not exercise a sound judicial discretion in proceeding to hear and determine the case over the objection of the defendant.

The renewed Motion to Dismiss was supported by the Affidavit of Clifford L. Ashton, one of the attorneys for the defendant. The facts set forth in the Affidavit were that the accident on account of which damages were claimed by the plaintiff occurred in January, 1949, at Tabernash, Colorado, some sixty-six miles from Denver, Colorado. That the plaintiff was at all times a resident of Denver, Colorado. That the defendant is incorporated under the laws of the State of Delaware, operates a line of railroad in Colorado and Utah, and has its general offices and headquarters in Denver, where the major portion of its business is carried on. That it is qualified to do business in the State of Utah. That the plaintiff's claim was predicated upon a violation of the Safety Appliance Act. That both federal and state courts are located in the City and County of Denver, and are open and have jurisdiction to entertain the plaintiff's present cause of action. That plaintiff's

action could be heard and determined with reasonable promptness in either of the state or federal courts in Denver. That in order to defend the plaintiff's claim, it would be necessary to bring from Denver and nearby Golden, Colorado, a number of witnesses, estimated to be eleven. The distance which these witnesses would be required to travel from Denver is 570 miles. The Affidavit sets forth the names of the witnesses and the nature and character of the testimony expected to be given by them. Four of the witnesses allegedly required by the defendant were physicians and surgeons residing in Denver, each of whom had previously treated the plaintiff for various ailments or for the injury sustained in the accident at Tabernash. The name of one of these doctors has not been ascertained at the time the Affidavit was made, but the nature of the testimony expected to be given by him was outlined. It was further pointed out in the Affidavit that the doctors were private practitioners, actively engaged in the practice of their professions, and unwilling to leave their fields of practice and come to Salt Lake City, except by meeting their own terms of compensation and expense. It was also pointed out that none of the witnesses could be compelled by process to attend the trial in Salt Lake City, and that the plaintiff could obtain their services as witnesses only by meeting such terms as they saw fit to impose. A detailed estimate of the cost to the defendant of defending the plaintiff's claim in the District Court of Salt Lake County was set forth in the Affidavit, as well as the difference in the expense to the defendant in trying the plaintiff's case in Denver and in Salt Lake City. The Affidavit also pointed

out the desirability to the defendant of permitting the jury to inspect the car from which the plaintiff claimed to have been thrown by a defective brake. That the car was in the defendant's yards at Denver, and it could not be brought to Salt Lake City except at considerable expense and inconvenience to the defendant. Finally, it was asserted that the trial of the case in the court where it was pending would add to the congestion of the calendar of that court and delay the trial of the cases involving local citizens and local problems of pressing importance, and also that it imposed an unnecessary and unjust burden upon the taxpayers of this State.

Mr. Wayne L. Black, one of plaintiff's attorneys, filed on his behalf an Affidavit in opposition to the renewed Motion to Dismiss, in which virtually all of the material facts set forth in the defendant's Affidavit were denied. The issues raised by the Affidavit were set down for hearing at which both parties appeared. At this hearing, the defendant put in evidence consisting of the testimony of Mr. Ashton, and a Certificate of the Clerk of the District Court of the Second Judicial District, City and County of Denver, State of Colorado. The plaintiff offered no evidence whatever.

The Certificate of the clerk of the Colorado court introduced in evidence by the defendant recited that any case set for trial at the time of his Certificate in either of two divisions of the court of which he was Clerk could readily be tried within a period of three months if both sides diligently pursued the case to trial. That in the other three divisions

of his Court, under the circumstances above stated, cases could be tried within a period of not to exceed four and one-half months; that if the attorneys cooperated with the court a case after being set for trial can be disposed of by any one of the five divisions within a period of four and one-half months after the case has been set. That cases being filed can be put at issue within a period of two months, if there is no unreasonable delay caused by either party. The Certificate was dated December 11, 1950 (R. 33).

Mr. Ashton's testimony corroborated and established each of the facts recited in his Affidavit. He broke down the expense to the defendant of defending this action in the court in which it is pending. He itemized the fees of each witness which the defendant would be compelled to pay in order to obtain his attendance at the trial in Salt Lake City (R. 42-43). He based the estimates upon experience in other like cases, and pointed out the difficulties and uncertainties incident to producing these witnesses in Salt Lake City. Of course, none of them could be compelled to come to Salt Lake City, and in no event would any of the witnesses come here except upon such terms as each of them might impose. Assuming that the trial could be consummated in two days, Mr. Ashton computed the cost to the defendant of defending this action here at \$1615.44. This item, however, did not cover the cost of transporting the witnesses from Denver to Salt Lake City. He considered that expense to the defendant to try the case in Denver would not exceed \$350.00 (R. 44-5).

It was stipulated between the parties that Mr. Robert Olsen, who is a Deputy Clerk of Salt Lake County, would testify if called as a witness that the present condition of the calendar of the Third Judicial District was that on April 1, there were approximately 110 cases ready for trial, and that on that day eighteen cases would be assigned to each of the five Judges for trial.

On cross-examination Mr. Ashton admitted that he did not know in what County the accident to plaintiff occurred, nor in which District Court that place might be located, or what the condition of the calendar in such District Court then was. He also admitted that it had not been necessary in the past for the defendant to produce any witness to testify to the earnings of a railroad employee in any action against the defendant tried in the courts of Utah, because the plaintiff in all cases in the past had stipulated to a tabulation of such earnings prepared by the defendant. He also admitted that under "the Labor Management Agreement railroad employees were required to attend court when requested by the management if they are paid the amount which they would have earned at work that day" (R. 53).

In determining the factors which should control the discretion of the trial court to dismiss an action upon the ground of forum non conveniens, this Court has in its opinion reversing the order of Judge Hendricks proceeded, we respectfully submit, upon an erroneous theory of that doctrine. It is not true that the plaintiff has a *right* to bring his action in this State. If he had any such right, obviously the courts of this State could have no discretion to deny it.

He gets into the courts of this State not by virtue of any right but solely by comity. He is not a resident of this State and contributes nothing to the heavy burden of maintaining our courts. That burden is borne solely by the citizens of this State. He was not summoned into the courts of this State. He was not injured here, nor do any of his witnesses reside here, except one whom he employed long after the injury occurred. It is obvious, and the plaintiff undoubtedly would confess, that his sole reason for invoking the jurisdiction of the courts of this State is that he considers them one of the "soft spots" in our judicial system. In such circumstances it is a perversion of the doctrine of *forum non conveniens* to say that the plaintiff has a right to come into the courts of this State, and that his convenience is to be considered in determining whether our courts should entertain his suit. The vital matter to be considered when confronted with such an attempt to transport litigation is the convenience of the defendant, of the witnesses and the expense to the taxpayers of this State.

This court in its opinion also states that our courts should reject imported litigation only in *exceptional circumstances*. But the principle of *forum non conveniens* requires that the courts of a state *entertain* imported litigation only in exceptional circumstances. Such litigation is necessarily a heavy inconvenience upon the defendant and to litigants of the state who help to bear the burden of maintaining the courts. This is not an isolated case of migratory litigation. As the records of this Court will disclose, it is a car in a long train of transported lawsuits. Such litigation thrives upon the indifference of

our courts to the rights of the taxpayers of this State and to the rights of local citizens. A proper application of the doctrine of forum non conveniens requires the rejection of all cases that are prosecuted here, solely because the plaintiff considers that the machinery of our courts has been geared to afford him greater relief than he can obtain in the courts of his own state.

The evidence submitted by the defendant in support of its motion to dismiss was not in any manner contradicted, impeached, or impaired. It established that the defendant was required to incur great expense to defend the action in this State. It established that the defendant could not require the attendance of any of the witnesses necessary to establish its defense. It was compelled to rely upon their depositions, or meet any terms that they might impose as a condition to their attendance at the trial here. It established that the defendant could not foresee the disadvantages and the difficulties it would be confronted with in defending the action far from the scene of the accident and the residence of the witnesses. A striking illustration of such disadvantage actually occurred. The original complaint was founded solely upon an alleged violation by the defendant of the Safety Appliance Act. On the opening of the trial, the plaintiff was permitted to file an amendment to the complaint. In this amendment he set up a completely new theory of liability. He claimed that his accident and injury was caused by a violation of the Federal Employers' Liability Act. Had the defendant been confronted with such a situation in the courts of the state where the ac-

cident occurred and where all of the witnesses resided, it could have investigated the facts on the ground and summoned the additional witnesses necessary to meet it. Being confronted with the situation here, defendant was forced to rely upon the weaknesses of the plaintiff's testimony. Such situations are, of course, common in litigation, and the fact that they arise is a compelling reason why the courts of this State should not entertain this type of litigation.

The plaintiff submitted no evidence in opposition to the defendant's motion, although he put in issue substantially all of the grounds alleged by the defendant in support of the motion. The trial court made no findings of fact nor conclusions of law on these contested issues, and there is no basis whatever in the evidence to support the ruling complained of.

We respectfully submit that the court abused its discretion in denying the defendant's motion to dismiss.

CONCLUSION

In summary, appellant contends that there was no evidence to prove that it was negligent in failing to remove from the floor of the Jordan Spreader car "tools, chains, or other objects," or that its failure to do so caused in whole or in part the accident and injuries of which the plaintiff complains; that the evidence without conflict disclosed that the plaintiff fell from the car because of the action of the brake staff following the disengaging of the pawl from the ratchet, and for these reasons the trial court committed prejudicial error in permitting the jury to base a verdict against the defendant upon a ground of lia-

bility unsupported by any evidence; that there was ample evidence to support a finding by the jury that the sole cause of the accident and injury sustained by the plaintiff was his failure to make use of the brake club in releasing the brake as he had been instructed to do by his superior officer and as ordinary care would dictate, and for these reasons the court committed prejudicial error in refusing to submit this issue to the jury for its determination as requested by the defendant; that the Federal Employers' Liability Act does not make the defendant an insurer of the safety of its employees, that liability under that Act is predicated upon negligence, that such negligence is not established by the fact that the employee may have been injured in the course of his employment, that the burden rested upon the plaintiff to prove that the defendant was negligent and that such negligence caused in whole or in part the accident and injury of which the plaintiff complains, and the court committed prejudicial error in refusing to apply these propositions of law to the evidence in this case as requested by the defendant; and finally that the trial court erred in refusing to dismiss the action upon the ground of forum non conveniens. Because of each and all of the foregoing errors of the trial court, the judgment appealed from should be reversed.

Respectfully submitted,

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