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No 56

STATE OF MICHIGAN.

SUPREME COURT.

JAMES HUGHES, &c.,
Plaintiff and Appellee,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY,
Defendant and Appellant.

BRIEF FOR APPELLANT.

This is a personal injury case. A part of the defendant's station-yard in the city of Detroit, extends from Beaubien street on the west, to a point some distance beyond Hastings street on the east. The latter street passes through the yard. On the north side of the yard, from Hastings street easterly, and between the yard premises and Franklin street, is a narrow strip of land, on which are some small tenement buildings. In one of these, fronting on Hastings street, plaintiff resided with his parents. In the southerly part of the yard, easterly of and adjacent to Hastings street, are some cattle pens, which are

used by the defendant for transferring cattle from and into cars.—Record, p. 10. There is a track leading from the main track to these pens. Other tracks there are used for cars loaded with coal. This coal is delivered to wagons from the cars while standing on these tracks.—Record, pp. 21 and 55.

In addition to the track leading to the cattle pens and the team tracks used for coal cars, all of which terminate on the easterly side of Hastings street, there are two tracks that cross the street and lead to the freight shed situated between Antoine and Beaubien streets. These are the main tracks in this part of the yard. The other tracks mentioned are connected with one of them by the usual switches, at a point some three hundred feet easterly of Hastings street.

Defendant uses switching engines to haul cars on these main tracks across Hastings street, to and from its freight shed, and to deliver to and take cars from the spur tracks terminating at Hastings street. One of these engines was engaged in this service on the occasion of the accident in question. They are peculiarly constructed. The water tank, instead of being in a tender attached to the engine, is located on top of the boiler in the form of a saddle. It is about 14 inches in thickness and extends nearly the entire length of the boiler and about half of its circumference.

At the front of the engine, one foot above the top of the track, is a foot board, seven feet and ten inches in length. Three feet above this is a hand rail, across the front of the engine, six feet and ten inches in length.

On the 17th day of July, 1884, in this yard, on the easterly side of Hastings street, the plaintiff was run

over by one of these switching engines, and one of his legs was cut off.

The declaration alleges it to have been defendant's duty, 1st, to construct a fence or other barrier to keep children off the premises; 2nd, to maintain a watchman at Hastings street for this purpose,—which defendant did,—whose duty it was to prevent the plaintiff from going upon the premises, or, finding him there, to drive him off; 3rd, to discover the plaintiff on the premises and on the engine, where it is averred he was standing on the front foot-board, and to remove him therefrom before starting the engine; and it is charged that defendant's negligence resulting in plaintiff's injury consisted, in not providing such fence or other barrier; in its watchman at Hastings street neglecting to keep plaintiff off the premises; in the failure of the watchman, engineer and other servants of defendant to keep plaintiff from getting upon the foot-board of the engine; in suddenly starting the engine while plaintiff was standing on the foot-board; and in suddenly stopping the engine, by which he was thrown from the foot-board to the ground, run over and injured; and in permitting other children and adults to be and ride upon the foot-board of these engines, thus tempting and inviting the plaintiff to do so.

After a manner of its own the declaration states these specific grounds of negligence, and does not state any others, either specifically or generally.

I.

Whether the view taken by the learned judge of the superior court in respect of the grounds of action declared upon, be correct or not, (and I think it was clearly correct,) there can be no doubt of his error in leaving it to the jury to find defendant liable on the theory that the engineer of the locomotive saw the plaintiff standing on the foot-board when he started the engine.

This—defendant's knowledge of the presence of the plaintiff on the engine in a place of imminent danger, and reckless disregard of the fact in starting the engine, &c.—was not alleged in the declaration, as it should have been if relied upon as ground for recovery. Not only was it not alleged, but the declaration affords conclusive evidence that it had not been conceived as a fact when that instrument was prepared. It was evidently born later when the legal exigencies of the case had become better understood. The declaration states it to have been "the duty of the defendant and its said agents to see the said plaintiff when going and being on the premises aforesaid, &c., &c.," and "that by the exercise of ordinary care and diligence they could have seen him when going and being on and about said premises and engines; and that he was in plain sight of them all;" "and that it was their duty not to so start the engine while he was standing on said step or to so manage or so check the engine, and then immediately propel it forward as aforesaid, without looking to the front of it, &c."—Record, pp. 7-8.

It is impossible to believe that the lawyer who drafted these averments of the declaration had then heard the story of the engineer's having told the fire-

man "not to ring the bell until the little fellow gets off."—Record, p. 33.

To the point that the plaintiff must recover, if at all, on the breach of duty alleged in the declaration,—"that he cannot sue for the breach of one duty and recover for the breach of another." See

Flint, &c., R. R. Co. vs. Stark, 38 Mich., 714.
Shaw vs. Boston, &c., R. R. Co., 8 Gray, 45.

II.

The judge erred in saying to the jury, "I believe it is practically conceded that he (the plaintiff) was on the foot board."

It was not "practically" or otherwise conceded, and the point was a very material one in the case.

The state of the testimony on the subject did not warrant the judge in so saying.

Four of the witnesses testified in express terms to having seen plaintiff standing on the foot board. These are,

The plaintiff, Record, pp. 31, 32-33, 37-38;
The girl Bushey, Record, pp. 12, 14-15-16, 21;
The boy Peter Tean, Record, pp. 42,44; and
John Graney, Record, p. 47.

But their statements on the point are not consistent with each other, nor is each altogether consistent with itself.

According to the Bushey girl, plaintiff was on the foot-board when the engine was backing the cars towards Hastings street.—Record, pp. 12-13-14.

On the contrary, the plaintiff evidently, unless (which I suspect is the fact,) his testimony was given automatically—meant the jury to understand that the engine moved only towards the switch after he got on.—Record, pp. 31-38.

The witness, Tean, only saw him on the foot-board when the engine was moving eastwardly.—Record, pp. 42-44.

John Graney's testimony tends to show that plaintiff was either trying to get on or off the foot-board when the accident occurred.—Record, p. 47.

It is not certain whether he meant to testify to having seen the plaintiff on the engine more than once on this occasion or not.

What he says about seeing "a little boy on the train," and his remark to the watchman about it, taken in connection with his testimony as to the accident, would indicate that he twice saw the plaintiff on the engine when it was moving. (Record, pp. 47-49.) His story on this point reads like a falsehood!

He is expressly and circumstantially contradicted by the watchman Sandy, who denies that Graney made any remark to him about the boy, and in reference to Graney's story about getting some tobacco of him, Sandy says, he never carries or uses tobacco.

Rosa Bushey saw altogether too much. Her testimony is, to say the least, suspicious.

The plaintiff's entire story as to his leaving the house prior to the accident; what his mother said and did; his subsequent movements about the station premises, getting on and off the engine; what the engineer said to the fireman, &c.—when it is remembered that he was testifying to an occurrence of a year and a half before, when he was only five years of age—becomes, I submit, totally unworthy of weight as evidence.

On the other hand, defendant's theory was that the plaintiff fell in attempting to get upon the foot-board of the engine, and that he was not seen by the engine men.

The plaintiff's witness, Richardson, sustained this theory.—Record, pp. 52-53.

And so the testimony of the enginemen, neither of whom saw him on the foot-board. The engineer saw him for the first time just in front of the driving-wheels.—Record, p. 60.

The testimony of defendant's witness Forbes, is to the same effect.—Record, p. 68.

From one part of her testimony, it would appear that Rosa Bushey, when she saw plaintiff riding on the engine, was sitting in the back door of her house, and that she saw him fall.—Record, p. 13.

But she admits, on cross-examination, that she did not see him fall, although she "saw when it gave a jerk."—Record, p. 21.

And what she says in another part of her testimony indicates that she went to the fence in the rear of her house, being attracted there by the ringing of the engine bell, and, looking over, then first saw him standing on the footboard.—Record, p. 16.

Her manner of testifying strongly suggests lying. See, particularly, her confused account of how she learned of the accident.—Record, pp. 15-16.

It was in this state of the testimony, and in respect to the very pivotal point of plaintiff's case, in the view taken of it by the judge in his instruction to the jury, that he threw the weight of this remark into the scale against the defendant. This was error.

Bradley vs. Coolbaugh, 91 Ill., 148.

Burlington, &c., R. R. Co. vs. Coates, Ia. (15 Am. & Eng. R. R. Ca., 265.)

III.

There was also error in leaving to the jury to find, as an element of damage, the pecuniary value of the "mortification and humiliation" plaintiff would experience in life from the loss of his leg.—(Third assignment of error).

In the case of *Batterson vs. C. & G. T. Ry. Co.*, 49 Mich., 184, this court expressly held that "mortification" of feelings on account of the loss of a hand was not an element to be considered by the jury in awarding damages. It said, "to assume that mortification, and to a degree capable of being some criterion of damage, has followed or will follow such an injury as that done to the plaintiff, is going too far."

I am aware of the subsequent case of *Powers vs. Harlow*, 23 N. W. Rep., 606, decided by this court two years later, in which an instruction to the jury that they might "take into account * * * the humiliation that would naturally follow by reason of such injury," was held not erroneous. But the instruction was sustained on the hypothesis that the judge only meant by the word "humiliation," "annoyance from the mutilation of a limb."

The learned judge of the Superior Court did not leave any such avenue of escape here. He said to the jury: "You may also take into consideration the mortification and humiliation, if you find that that would exist, which would attend the mutilation of his body." "The mortification and humiliation of being disfigured" is his language used in the same connection.

Webster defines mortification as follows: "Humiliation or vexation; the state of being humbled or depressed by disappointment, vexation, crosses, or

anything that wounds or abases pride;" while he defines "humiliation" as "The act of humbling, the state of being humbled, the abasement of pride, mortification."

It requires no argument to show that the jury had a right to, and probably did, take and understand these words from the lips of the judge, in their broadest sense, the sense in which they were very evidently used by him. I submit, that the courts of this country, and of England, have already gone quite far enough into the realm of the unreal, the domain of irresponsible imagination and fancy, in holding that physical pain has its equivalent in money, which a jury may ascertain and fix.

It is a rule of danger, and in practice is, I believe, more fruitful of bad than good. Unjust verdicts are one of the results.

A large increase of litigation with its great expense to the public, is another.

A hungry and unscrupulous class of lawyers, with the train of evils inevitably connected with this, is a third.

In the case of the *Ill. Cent. R. R. Co.* vs. *Sutton*, 53 Ills., 397, a distinction was made between wilful injury and injury resulting from negligence merely, in respect of the right to recover for mental suffering, and it was held that in the latter such suffering is not an element of damage. On page 399 it is said, "The law is well settled, where the injury is not wilful, mental suffering forms no part of the inquiry by a jury."

And so in the case of *Flemington vs. Smithers*, 2 C. & P., 292.

Subsequently, in the case of the *Indianapolis &c. R. R. Co.* vs. *Stables*, 62 Ills., 313, the law of the Sut-

ton case, so far as the latter distinguishes between wilful and negligent injury, was overruled. The court says, (page 320,) "In fact we cannot readily understand how there can be pain without mental suffering."

But still later, in the case of *Joch* vs. *Dankwardt*, 85 Ills., 331, where the judge had instructed the jury that they might award damages "for mental and bodily suffering," the court held the instruction "improper, in allowing compensation for mental suffering, as a distinct element of damage, in addition to bodily suffering."

The absolute impossibility of distinguishing between or separating, bodily and mental suffering as incident to physical pain, makes nonsense of any rule of law based on such supposed distinction.

The rule of pecuniary compensation for physical suffering, is too deeply rooted in the law of damages to be easily disturbed, and the weight of authority appears to be against the distinction between willful injuries, and those resulting from negligence. But I insist, that the rule should not be extended, and that recovery for suffering, either mental or physical, should end with the end of the physical suffering resulting from the injury.

IV.

It was error to permit proof to be made of the presence at other times of other children than the plaintiff on the premises of the accident, and that they had been seen riding on defendant's engines. (4th, 5th, 6th, 8th and 9th assignments of error.)

And it should not be held that this error was cured by the subsequent instruction to the jury given in the

final charge, that all of this testimony should be disregarded by them.

This court, all the judges concurring, held in the case of *Detroit & Milwaukee R. R. Co. vs. Van Steinburg*, 17 Mich., p. 108, that where the trial court had permitted a witness to give hearsay testimony, subsequent instruction to the jury to disregard it as evidence of a substantive fact, did not cure the error.

The loose practice of letting all sorts of things in as evidence in the progress of a trial, and relying on the effect of final instructions to repair the damage, is an extremely vicious one, and the remedy is in this court. Irreparable mischief is often the result. The average human mind is incapable of entirely throwing off effects thus produced. An impression once made, no matter how produced, is not only liable, but likely to warp the judgment.

The law recognizes this in requiring that the triers of the fact shall be unprejudiced when they enter upon their duties. They must not have formed or expressed an opinion. The rule is sound in principle, and essential to justice in practice.

It is the high duty of the court to see to it that the jury do not acquire a bias against either party in the progress of the trial by hearing what they should not.

The fact that the case finally went to the jury on the single question of whether the engineer knew that plaintiff was on the foot-board of the engine when he started, does not render this error immaterial. The testimony had done its work in the minds of the jurors, to defendant's prejudice.

V.

The purpose of the testimony of what the mother of the plaintiff said to her children when she last saw the plaintiff before the accident, was to fit into and corroborate the boy's statement in that behalf.—(7th assignment of error.)

The pretense for its introduction undoubtedly was, and will be here, that it tended to show due care of the child.

Her testimony in this connection would indicate that the plaintiff was out of her sight only for a minute or two. She says "five or ten minutes."

But if her story is true as to what she did between giving the injunction to the children, and her discovery of the "people running down Hastings street," it is almost impossible that half of ten minutes could have elapsed.

The plaintiff's own testimony, if it is worth anything, shows conclusively that he was absent from the house a much longer period of time, probably not less than half an hour.—Record, pp. 33-34-35-36-37-38-39.

But the testimony had no tendency to show want of negligence in the parent.

The boy was under five years of age. If there was any duty on the mother to keep him from the danger of defendant's premises, something more than a general injunction addressed to all the children to "sit still," was required.

According to the mother's testimony, the boy's sister, who was ten years of age, was sitting with him on the steps.—Record, p. 24.

She was of sufficient age to have been left in care of him.

In the exigencies of the case it was desirable, if not necessary, to prop up the plaintiff's testimony, wherever possible. A corroboration in one place helped it in another.

This no doubt was the origin of the testimony on this point, and it answered the purpose of its invention. For this reason defendant may justly complain of the testimony, and for the error of its admission the judgment should be reversed.

VI.

The eleventh error assigned is that the court admitted Woodlyn's testimony of what defendant's witness Martin said to him the morning after the accident.

Martin had given material testimony tending to show that the Bushey girl had not told the truth, that in fact she did not see the plaintiff on the engine on the occasion of the accident.—Record, pp. 57-58.

The only ground on which this testimony could have been legally got before the jury would be to contradict Martin on some material point of his evidence, and the necessary foundation for this had not been laid.—See Martin's testimony, Record, pp. 57-58-59-60.

I can hardly suppose it will be contended that this testimony was admissible without the foundation for it having been first laid, by questioning the witness Martin as to whether he did not say these things to Woodlyn, definitely naming time and place.

The rule is a general one.—*1 Greenleaf's Ev., Sec. 462.*

It is recognized by this court in:

Lightfoot vs. People, 16 Mich., 511.
Smith vs. People, 2 Mich., 415.
Sawyer vs. Sawyer, Walker Ch., 48.

VII.

Finally the plaintiff, on account of his youth, and want of appreciation of the obligation of an oath, ought not to have been permitted to give testimony in the case.—(10th assignment of error.)

At the time of the trial, (December, 1885,) he was past six years of age—how much past does not appear. He gave his age as "six going on seven."—Record, p. 28.

His mother, referring to the date of the accident, says, "He was entering his sixth year that summer."—Record, p. 23.

This is a little want of harmony here, but it is not material.

The position in life and the circumstances of the child are sufficiently apparent.

In the first place, I submit that the testimony of a child six years of age, in respect to a matter that occurred nearly one and a half years before, should never be accepted.

The child of that age, who should have any adequate conception of the meaning of an oath as an obligation to tell the truth, and nothing but the truth, would be a prodigy. To almost every child of that age the oath must be as meaningless as if administered in unknown tongue.

The security of the witness' oath is necessary—is the right of parties to the suit. Greenleaf says: "A security to this extent, for the truth of testimony, is all that the law seems to have deemed necessary; and with less security than this, it is believed that the purposes of justice cannot be accomplished."—*1 Greenleaf on Evidence, Sec. 328.*

It is an established rule of law that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath.

"It is now settled * * * * * * that the statement of a child cannot be received except upon oath, and that where the child is incapable of understanding the nature and obligation of an oath, its testimony will be rejected."—*1 Phillips on Evidence, p. 15.*

It is unfortunate for the proper determination of this question, that it has generally arisen in criminal cases, where, except for the testimony of a child, some criminal would escape merited punishment. I cannot help thinking that this has too often rendered courts blind to the violation of both law and reason involved in permitting children of this age to go through the mockery of taking an oath as a witness.

The following are some of the cases in which the question has been considered:

Johnson vs. State, 61 Ga., 35.—Johnson was on trial for rape on a child seven years of age. She was permitted to testify. The case does not show to what examination the child was subjected to test her competency.

The court say: "The judge in this case thought she did understand it, (the oath.) He saw her, looked at her, heard her talk, and concluded that she did understand its nature; we cannot say that he abused his discretion."

In *State vs. Jackson*, 9 Ore., 457, a child six years old had been permitted to testify to an assault upon her by the defendant. The bill of exceptions did not purport to give all of the preliminary examin-

ation to test her competency, and the court therefore declined to disturb the judgment. On page 459, it is said "There is no precise age at which children are absolutely excluded from testifying."

Surely this is not reasonable. The court would not justify accepting the testimony of a child only two or three years of age! It would, I assume, be the universal judgment of intelligent people, the consensus of the competent, that no child of the last-named age could "appreciate the nature and obligation of an oath,"—and therefore that no such child should be admitted to testify.

And it seems to me quite as certain that not one child in a hundred, and of the class to which this child belonged, not one in a thousand, of the age of six years, could any more appreciate the oath and its obligation.

In the case of *Williams* vs. *State*, 12 Texas Appeals, 127, a girl nine years of age had been adjudged incompetent as a witness after an elaborate examination as to her competency by the trial court, and the court of appeals sustained the ruling.

Beason vs. *State*, 72 Ala., 191, held it to have been error in the trial court to admit the testimony of a girl eleven years old, whose preliminary examination disclosed an exceptional degree of ignorance.

And so the case of *Carter* vs. *State*, 63 Ala., 52, held that the trial court erred in permitting a girl of nine to testify, the record showing what the preliminary examination was, and that she did not manifest the required intelligence.

In *Blackwell* vs. *State*, 11 Ind., 196, a girl under ten years of age was admitted to testify, after a preliminary examination which appears in the record of the case, and the supreme court held the showing established her competency. The witness appeared to appreciate fully the obligation of the oath.

In *Draper* vs. *Draper*, 68 Ills., 17, a divorce case, the witness was nine years of age, and fully demonstrated her competency on the preliminary examination.

The witness in *Commonwealth* vs. *Hutchinson*, 10 Mass., 225, was between eight and nine years old. The record says, "The court put sundry questions to him, in order to ascertain the measure of his understanding and moral sense, to most of which he gave rational and pertinent answers."

State vs. *Whittier* 21 Me., 341. A boy thirteen years of age was examined as to his competency, and admitted. He was clearly competent, and the Supreme Court so held.

The Supreme Court of Louisiana, in *State* vs. *Richie*, (28 La. Ann., 327,) refused to reverse a judgment, because the testimony of a child six years of age had been admitted.

The record does not show what the preliminary examination was.

The Supreme Court of Arkansas, in *Flanagin* vs. *State*, (25 Ark., 92,) held that the trial court erred in rejecting a witness, thirteen years of age, on account of his youth, and said, that "as to children, there is no precise age within which they are absolutely excluded on the presumption that they have not sufficient understanding."

In *People* vs. *Bernal*, 10 Cal., 66, respondent had been convicted of the crime of rape on the person of a child eight years of age. The testimony of the child was received without any preliminary examination as to her competency. For this, the judgment was reversed. While saying that there is no precise age

within which a child is excluded in the law as a witness, the court recognizes the rule, that the child must be able to "appreciate the nature and obligation of an oath."

This case is authority for the position that, in a person of that age, the record must affirmatively show competency.

The case of *Oliver* vs. *Commonwealth*, (77 Va., 590,) holds simply that the bill of exceptions did not disclose anything to show that a witness nine years of age, was incompetent. Neither the statement of the case, nor anything in the opinion shows what appeared on the subject in the bill of exceptions.

See Best's Principles of Evidence, Secs. 155-6-7-8.

In England, the rule that the witness must understand and appreciate the obligation of an oath, was well settled, and uniformly regarded in practice, until relaxed by Parliament.

(32 and 33 Vict.)
See 1 Best's Evidence, 151.
Williams, 7 C. & P. 320.

The question has been twice before in this court, and in criminal cases both times.

In *Washburn* vs. *People*, (10 Mich., 372,) the child was seven years of age, and in the case of *McGuire* vs. *People*, (44 Mich., 286,) he was only a few months past six. In both cases it was held that the testimony was properly admitted.

The report of the Washburn case, does not show the preliminary examination of the witness, and the question is disposed of in the opinion, by two sentences, as follows: "The objection to the testimony of James Washburn, a child of seven years of age, cannot be sustained. He was competent to testify, but the question of his credibility was for the jury,

and the defendant must have had the full benefit of his objection before the jury."

This conclusion may have been warranted either by the facts disclosed in the bill of exceptions, which do not appear in the report, or, possibly, by the failure of the bill to affirmatively show anything against the witness' qualifications, except his age.

In the latter event, however, I submit, the presumption of law from the age of the witness should be against his competency.

All that appears in the report of the McGuire case respecting the examination of the child to test his capacity, is that the judge, being in doubt about it, in the language of Judge Campbell, "took the lad into his room and had a long conference with him, in addition to what appeared in court, and he finally came to the conclusion that the child was sufficiently conscious of the duty of speaking the truth, that he might be received as a witness, &c."

I respectfully insist that the view here taken of this question disregards a material legal right of the objecting party.

Conceding the indisputable legal right of the party to have the security of the oath of a witness against falsehood, it is not enough that the trial judge, on a private examination, may be convinced that the witness is under a sense of duty to tell the truth. The witness must be able to appreciate the obligation in this regard of the oath prescribed by law. This is the only legal sanction for his testimony, and is the shield (inadequate as it too often is) which the law affords against false testimony. To substitute for this the opinion of the judge derived from a private examination, that the witness is "conscious of the duty of speaking the truth," is not only unwarranted in the

law but is most dangerous in practice. Under such a practice the law abdicates its functions in determining the competency of witnesses and turns the whole question over to the unreviewable discretion of the trial judge.

But, in the second place, it affirmatively appears from the record in this case, that the plaintiff had no conception of the oath he was to take, nor appreciation of its obligation. In fact, he was not at all examined as to the matter. He was asked whether he "must tell the truth or not," to which he made the laconic reply: "Tell the truth." Being asked what would happen to him if he did not tell the truth, he answered: "Go to hell." The following questions and answers then followed: "Q.—Would you be punished here if you did not tell the truth? A.—Yes, sir. Q.—Do you know what would be done to you here? A.—Be punished. Q.—Do you know what punishment you would get? A.—I would be punished. Q.—How would you be punished? A.—God. Q.—How would you be punished here if you did not tell the truth? A.—I don't know."

On further examination by the judge, he said his mother told him the day before, that he would go to hell if he did not tell the truth; that he believed it, and was going to tell the truth.

This is all there was of the examination to establish the witness' appreciation of the obligation of an oath.

The parrot-like answers he made to the questions about the punishment that would follow his falsehoods, evidently were as barren of meaning to him, as an algebraic proposition would have been.

His declaration to the judge of an intention to tell

the truth, is immaterial. There is no law substituting such intention even when entertained with all the tenacity of mature years coupled with a lifelong habit of truth, for the obligation of an oath, or the statutory affirmation.

If the oath is to be abolished, let it be done in proper order, and by the law making power.

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