MEYER, HENRIETTA V PACIFIC RAILROAD MARCH 1867 COUNTY OF ST. LOUIS
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State of Missouri } Be it Remembered that
County of St Louis } heretofore to wit on the 2nd
day of June, 1865 there was filed in the Office of
the Clerk of the Circuit Court of St Louis County
and State of Missouri a petition which is in the words
and figures following, to wit:

Petition of Plff

Henriette Meyer Plaintiff
against
The Pacific Railroad Defendant } St Louis County, to wit
In the St Louis Circuit
Court, September Term . 1865.

Plaintiff States that the defendant is and at the time
hereinafter mentioned was a Corporation duly estab-
lished as such by law and then was and for a long time
prior thereto had been engaged in running locomo-
tives, Cars and trains of Cars on and along its Rail-
road track in the City and County of St Louis, and
had in its employ divers agents and Servants en-
gaged in the business of running, conducting and
managing such locomotives Cars and trains of cars
for defendant. Plaintiff further States that on
or about the 27th day of April 1865 the defendant
by Officers, agents and Servants then in its em-
ploy was running a locomotive and train of cars
on and along its tracks in St Louis City and near its
depot on Seventh Street in said City, and that August
Meier, the husband of Plaintiff being on one of the cars
of said train, the said Officers, agents, Servants and
employees of defendant, then in charge of said lo-

Comotive and train of cars and using the same in the business of defendants conducted themselves so recklessly and so carelessly and unskillfully and so managed and conducted said locomotive and train of cars, that by and through the negligence unskillfulness and criminal intent of the said officers, agents servants and employees of defendants whilst running, conducting and managing the aforesaid locomotive and train of cars, the said Meier without any fault on his part was thrown from the aforesaid car on which he then was and was precipitated in between the same and the car immediately in the rear thereof and was struck with great force and violence by one of said cars and was run over by the same whereby he was crushed wounded, mangled and otherwise injured and that after lingering some hours the said Meier died on the day aforesaid in consequence of the injuries aforesaid resulting from and occasioned by the negligence unskillfulness and criminal intent of the said officers agents servants & employees of defendants whilst running, conducting and managing the aforesaid locomotive and train of cars.

Plaintiff further states that the aforesaid August Meier was her lawful husband at the time of the injuries and death aforesaid: that said injuries were inflicted and said death resulted therefrom within six months next before the filing of this petition

3 ; that said injuries were inflicted and said death resulted therefrom within six months next before the filing of this petition: that the defendants by reason of the premises has forfeited and become liable to pay plaintiff the sum of five thousand dollars for which & her costs of said she prays judgment against the said defendant . By Woerner & Kehr Her attys

Henriette Meyer, Plaintiff, being duly sworn on her oath says, she believes the foregoing petition and the matters therein as stated, to be true.

Henriette Meyer

Sworn to and subscribed before me this 2nd day of June 1865.

Rudolph Schulenburg
Notary Public for & within the County of St Louis, State of Missouri

And on the same day, to wit: the second day of June 1865, the following Summons was issued, to wit:—

Summons

County of St Louis ss. The State of Missouri
To the Sheriff of St Louis County - Greeting:
We Command you to Summon the Pacific Rail Road to appear before the Judge of our Circuit Court on the first day of the next Term thereof to be held in the City of St Louis, within and for the County of St Louis, on the last Monday of September next, then and there to answer the complaint of Henriette Meyer as set

4 forth in the annexed petition; and have you then and there this writ. Witness F. A. H. Schneider, clerk of our said Court with the seal thereof hereto affixed at office in the city of Saint Louis this second day of June in the year of our Lord eighteen hundred and sixty five

(Seal & U.S. stamp 50 cents)

F. A. H. Schneider, clerk

Return Executed this writ in the County of Saint Louis, June 7th 1865 by delivering a copy of the writ and Petition as furnished by the Clerk to George R. Taylor the President of the Pacific Rail Road

$1.50 John C. Vogel, Sheriff

L. Burg D. S.

Deft's Answer And afterwards, to wit, on the third day of October 1865 the following answer was filed, to wit:—

Henrietta Meyer
vs.
The Pacific Rail Road } St Louis Circuit Court
September Term, 1865

Answer. The Pacific Rail Road for answer to the petition in this cause says that it has no knowledge or information sufficient to form a belief, whether or not the Plaintiff was the wife of the said Augustus Meyer named in plaintiff's petition. It denies, that its Officers servants, agents or employees at the time alleged in said petition conducted themselves unskilfully or carelessly or that they managed and conducted said train

5 of Cars so that by their negligence unskillfulness and Criminal intent of said officers agents servants and employees whilst running conducting and managing their Locomotive and train, the said Meyer was without fault on his part thrown from said Car and precipitated between the same.

They deny that the injuries received by said Meyer resulted from the negligence, unskillfulness and Criminal intent of defendants, agents, officers servants or employees, whilst running, conducting or managing said train train, but they aver the fact to be that said injuries from which death ensued, resulted from the negligence and Carelessnesses of said Meyer in placing himself upon the platform of one of their Cars in Violation of the printed regulations of defendant in that respect posted up at the time in a Conspicuous place inside of the passenger Cars then in the train, said defendant having furnished sufficient room for all passengers thereon, and in his refusing to Conform to the reasonable requirements of defendants officers then in Charge of said train for his safety, and otherwise Carelessly, negligently and improvidently Conducting himself thereon. Wherefore defendant prays judgment that it be discharged and for its costs

Geo. E. Leighton

Atty for Deft.

State of Missouri } ss
County of St Louis } George R. Taylor being duly sworn says he believes the foregoing an-

6 swer and the matters therein as stated, to be true

G. W. Taylor

Sworn to before me and subscribed in my presence
this 1st October 1865 Seal J. M Cooper
Notary Public
St Louis County

Case submitted to 11 Jurors

And afterwards, to wit on November 8th 1865 the following further proceedings were had, to wit:-

Henriette Meyer
vs.
The Pacific Rail Road

Now come the parties by their respective attorneys and by consent of parties also come eleven jurors, to wit: William Grohl, Willis Lyles Frank Breisel, D. W. Mueller, R. S. Harris, Henry Grundlach, R. L. Billingsly, John A. Becker William Hazendine Georg Hilger and August Bukman Eleven good and lawful men who being duly elected tried and sworn the issues herein joined well and truly to try, the trial progressed, but not being finished is laid over until tomorrow morning at ten o'clock.

And afterwards to wit, on Thursday November 9th 1865 the following further proceedings were had,

Verdict for pltff $5000.

to wit: Now come the parties by their respective attorneys and also the jurors empannelled and sworn herein and the trial of this cause progresses, and being finished the jurors aforesaid upon their oaths aforesaid say they find for the plaintiff and assess her damages at the sum of

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five thousand dollars. It is therefore considered by the court that the plaintiff recover of the defendant the damages aforesaid as by the jury assessed together with her costs and charges in this behalf expended and have execution therefor And afterwards, to wit, on Saturday Nov. 11. 1865 the following further proceedings were had, to wit:

Motion for new trial

Motion for New trial filed (see page 31) and affidavit in support filed (see page 32)

And afterwards, to wit on Wednesday November 29th 1865 the following further proceedings were had to wit

Overruling of Motion

The motion for a New trial heretofore filed herein being heard and fully considered by the Court is overruled.

And afterwards to wit on Dec 12th 1865 the following bill of Exceptions was filed, to wit:-

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Bill of Exceptions

Henrietta Meyer
vs.
The Pacific Rail Road
} In the St Louis Circuit Court

Be it Remembered that on the 8th day of November at the September Term of said Court this cause came on for trial before a jury, And the Plaintiff in support of the said action first called as a witness Maria Ahrens who being duly sworn said: I know Henrietta Meyer, she is my sister. I knew Augustus Meier in his life time. He was the husband of Plaintiff. I was present when they were married. It was some twenty years ago.

Testimony of Maria Ahrens for Plff

There was no Cross-Examination

The plaintiff then read in evidence the deposition of Aretus L. Sexton taken and filed in this cause and which is as follows:- Aretus L. Sexton, of lawful age being produced sworn and examined on the part of the Plaintiff, deposeth and saith as follows:- My name is Aretus L. Sexton. I am thirty years old. I am private in Company D 23rd Regiment Veteran Reserve I have seen the Plaintiff at the house where the inquest was held. I was within fifteen feet from August Meyer when he was injured by the Pacific Rail road It was on the 27th day of April 1865 between three and five o'clock in the afternoon at or near the Seventh Street depot. I was sitting on the railing that runs along the northern edge of the platform of the depot

Deposition of Aretus L. Sexton for Plff.

10 This railing is west of the office building and runs along the rail road track. I was sitting opposite the end of the car on which Meyer was. The train was going out. The train consisted of the locomotive, the baggage car and three or four passenger cars. I first observed Meyer about the time the Conductor signalled the train to start. Meyer at that time stood on the rear platform of the baggage car. The Conductor stood near the rear end of the baggage car on the platform of the depot; his face was towards the Engine. He threw up his right hand and said "Go ahead". This I suppose he said to the Engineer. The Bell then rung once or twice and the train started. As the train started, the Conductor turned around about half left face and stepped right on the rear platform of the baggage car. As he stepped on the platform he said something to the man, standing on the platform. this man was Meyer. the man said something to the Conductor. I could not understand what either one of them said. The last of Meyer's sentence was "fourteenth", that is all I could make out of what he said. The Conductor said "Damn you, get off from here". and stepped right forward to him and put up his left hand to the mans throat and his right hand on the man's shoulder. they stood nearly facing each other. They stood very near the door that goes into the Baggage Car, and the Conductor swung him round out from the door towards the end of the plat-

11 form of the Baggage Car: the Conductor stepped between Meyer and the door of the Baggage Car, Meyers back stood right at the opening between the two cars I mean the opening of the Railing where one can pass from one car to the other. The Conductor had hold of Meyer at this time. As the Conductor stepped between Meyer and the door of the baggage car, he kind of pushed the man back or he stumbled and fell right down between the two cars. I mean Meyer fell between the two cars. The Conductor had hold of him till he started to fall down. I mean till his feet were off the car. The man went down through unto the track under the car: when Meyer fell, the cars were just fairly started. They went slow.

Question. Were the Conductors hands on Meyer until he fell? Objected to by defendants Counsel

Answer. The Conductor held on to him until he was about half down between the cars. I looked to see the man and he appeared to be walking on his hands and knees. the train was still in motion: he walked right on the track ahead of the wheel of the car. He walked about five or six feet right ahead of the wheel of the first passenger car, the car wheel overtook him and ran over his legs. I got off the railing, ran across the platform of the depot and at the time I got to the track, the train had stopped or had nearly stopped. A crowd gathered around there and they took the man out from under the car, laid him on the platform of the depot and the train

went out. There was a policeman. I dont know his name his number is ninety. The policeman got some help and carried the man off on a stretcher. I reported all I had seen to the policeman No. 90.

Question. Did you observe the Conductor and Meyer from the time the Conductor got on the platform?

Answer. Yes, I did until the man fell off.

Question. Did you observe the man after he fell off?

Answer. I observed him, when he fell off, till the car went over him.

Question. In what position was the man's body from the time he fell off to the time he was run over?

Answer. He fell down, with his feet first, his body nearly erect, after his feet struck the ground, he fell forward. and he crawled along the track with his hands and feet right ahead of the car wheels, he appeared to be trying to get over the rail on the outside. Whilst he was crawling he was between the rails and he succeeded to get his body I think nearly over the North rail, before the wheels overtook him, the North rail was the one nearest to me.

Question Did you observe whether or not any signal was given to stop the train before the man was run over?

Answer. I did not notice any.

Question did one or more car wheels pass over the mans body?

Answer. There were two wheels passed over the limbs

13 I am certain. I think there were four. I am pretty sure; but I am not positive. I dont think the body was dragged along on the tracks any distance. It may have been three or four feet. It seems to me the body was taken from between the two passenger cars. I am pretty sure, it was. When the man was laid on the platform, I noticed both legs were cut nearly off below the knees. I had not much chance to see, the crowd gathering so quick I did not notice any other injuries. I think the man was just alive. I have never seen the body afterwards There was nobody with me at the time this took place. I heard the name of the Conductor to be Derby I have been soldier since August 15th 1862 and have been doing duty in St Louis since March 14th 1864 In April 1865. I was acting as gardner for the Company on a lot on North West corner of Fifth and Pine streets. My family resides in Saybrook, Ashtabula County State of Ohio. I exspect to be mustered out of service shortly. When mustered out I exspect to go to Ohio. At the present I regard that as my home

Cross examination by Defendants' Counsel

I did not have good chance to judge what Meyer's age was. He was probably from 35-45 year of age his weight was somewhere near 145 pounds. I did not notice Meyer till the Conductor signalled the train to start. Meyer was then standing on the platform of the baggage car. I dont think the train had moved

than six or ten feet when the Conductor took hold of Meyer. the train had barely started. The train had started about twelve, fifteen or twenty feet when Meyer fell between the cars. I dont think it was over fifteen feet, the train was running slow. I did not see when the train stopped. I was looking at the man under the car. The train must have run about thirty or forty feet till it stopped. I cannot tell exactly. It may be the train ran more than that.

Question. How long was it after the man fell that the the train stopped?

Answer. It was a minute probably. I cannot say exactly. it might be a little more. I left the railing where I was setting, about the time the wheel ran over the man. The whole accident took place right at the platform of the depot.

Question. Describe as near as you can the position of Meyer and the Conductor while Meyer was falling and what hold the Conductor had of Meyer when he let him go?

Answer. The Conductor's left hand was at Meyer's throat, and the Conductor held Meyers head up, the Conductor's right hand was on Meyers left shoulder

Question. Was that their position when the Conductor let Meyer go?

Answer. That was the position when Meyer started to fall, when his feet were going down. After that I did not notice the Conductor, but only Meyer

15 Question. At the time the Conductor held Meyer in the position described, where were Meyer's hands
A. I think they were hanging by his side. I did not see him catching at anything.
There was nobody else present on the platform of the car.
Question. Did not the Conductor have a hold of Meyer until or nearly until Meyer's feet reached the ground?
Answer. The Conductor must have hold of him till the feet were near the ground
Question. How could Conductor have hold of Meyer in the position you described when Meyer's feet were near the ground and the Conductor on the platform?
Answer. The Conductor was leaning against the rail and whilst the man was going down, the Conductor was bent over considerably, his legs were against the railing and he bent over in an angle of about forty five degrees.
Question. How high above the platform was Meyer's head when his feet touched the ground?
Answer. As near as I can tell, his head was very little above, if any.
Question. How was it possible that the Conductor with his legs against the railing could hold Meyer in the position you described without bending over at a much greater angle than 45 degrees?
Answer. I dont think the Conductor held him till Meyer's feet quite touched the ground, and he may

16 have bent over a little more than forty five degrees: the railing he bent over was on the South side of the opening where one can pass from one car to the other.

Question Do you mean to state in your direct examination that no signal was given to stop the train?

Answer I mean to say, that I did not notice any, there may have been one.

Question How far was the railing on which you were sitting from the cars or track?

Answer. About twelve or fifteen feet.

Question. Can you state of your own knowledge whether Meyer was drunk or sober at the time you saw him on the platform of the car?

Answer. I can't tell. I did not see him before the Conductor took hold of him, or about half a minute before

(Signature of deponent) Arthur L. Sexton.

State of Missouri } I Rudolph Schulenburg, Notary
County of St Louis } Public for and within the County of St Louis State of Missouri do certify that in pursuance of the notice hereto annexed came before me at the office of Woerner & Kehr attorneys at law Room No. 1 up stairs in the building on the South west corner of Pine and Third streets in St Louis city, in the County of St Louis and State of Missouri and on the thirtieth day of June A. D. 1865, between the hours of eight O'clock in the forenoon and six O'clock in the afternoon of that day,

17 Arelius L Sexton the deponent whose place of residence is Saybrook Ashtabula County, State of Ohio; that he was sworn by me to testify the whole truth of his knowledge touching the matter in Controversy in the Cause aforesaid: that defendant was examined and his examination reduced to writing and subscribed by said deponent in my presence and his depositions are now herewith returned.

Seal
& U.S. stamp 5 cents

In witness whereof I have hereunto set my hand and affixed my Official seal at the city of St Louis, County and State aforesaid this third day of July A.D. 1865 Rudolph Schulenburg
Notary Public

Testimony of H. Harker

The Plaintiff called H. Harker who testified as follows I was brother in law to Augustus Meier, have known him seven years. He lived in St Louis on fourteenth Street between Rudolph & Poplar, not far from 14th Street Depot. He was a sadler. Plaintiff is the wife of Meier. I was sent for to the house after Meier was injured Plff was about to prove that Meiers death resulted from injuries received at time and place stated in the petition when defendants Counsel remarked that that was admitted by the answer; whereupon no further questions were addressed to the witness.

There was no Cross examination

Plaintiff then stated that the testimony offered was all that Plaintiff could offer at that time, but that Henry

18 J. Mudd who was a witness subpoenaed employed by Plaintiff was not then present in Court, and Plaintiff before resting his case desired to introduce said Mudd, and desired to offer said Mudd as a Witness hereafter in said cause Defendant by his attorney consenting thereto, leave was given to introduce said Mudd as a witness hereafter, and the Plaintiff reserving such leave, closed his case

Testimony of Hiram Darby } The Defendant then called Hiram Darby who being duly sworn testified as follows:— I am 56 years of age. I have resided in St Louis 40 years. I am a conductor on the Pacific Rail Road and have been since it started. I was the Conductor of the Franklin accommodation Train in April 1865. Have been Conductor of that train about 8 years. It is a passenger Train on the evening of the 27th of April 1865, I gave the usual signal to start about two minutes before starting as usual I was on the platform of the depot. The train started and then I stepped on. Then I stepped on the platform of the baggage car: there was a man standing there. I had never seen him before to my knowledge. I saw that he was very much intoxicated and asked him to step inside I said "my friend step inside". He said "no I am only going to Fourteenth Street. I then told him he would fall off if he would not go inside. Just at that time the Engineer gave the Engine more steam and he did fall when he commenced falling I tried to catch him I caught with the left hand one of the fingers of

19 that hand had been broken a few days before and two of them mashed. They were tied up at that time I bruised them much more by Myers fall. I held him until I found I could hold him no longer without going myself, and then let him go. I immediately pulled the bell to stop the train and put on the brake of the smoking car. I mean the first passenger car, the one next the baggage car. The baggage man who I think was standing near the baggage car door put on the other break. The train ran about the length of a car about 20-30 feet before it was stopped. I then had deceased taken out from between the cars and placed on the platform of the depot We had lost some time and the train went out. My right hand was broken 30 years ago. I have only the use of one finger. I understand the man's name was Augustus Meier. When I first saw Meier he was on the south side of the door on the platform of the baggage car and leaning against the car, his head leaning forward. He was very much intoxicated. I guessed so from his manners. He was staggering, that is what drew my attention to him. I did not say anything to him about getting off the train. There was no conversation between Meier and myself other than what I have stated. I made use of no profane expression. There were in this train three passenger cars and a baggage car. There were not many passengers There were a dozen seats or more in the car next

to where Meier stood. It would seat Seventy (70) persons, and was not near full.

Question by Dept. What regulations are there about passengers standing on the platform?

Answer. There was a metalic plate posted on the outside of the door of each passenger car containing these words "Passengers are not allowed to stand on the platform whilst the Train is in Motion."

Plaintiff objects to this evidence as incompetent & irrelavent & not going to sustain the allegations of the answer. The Court overrules the objection to which plaintiff except and the Evidence is then admitted.

It is on each door. There was on every car of that train a notice about standing on the platform The words are, I think "Passengers are not allowed to stand on the Platform while the train is in motion It is on each door next to the platform. It can be seen right or left on each side as you step on the platform. It was in the baggage car.

It was a very short time after I put my hand on Meyer to catch him that he fell. When the train gave a jerk Meier fell forward. My Catching him Swung me around. I think he would weigh 160 or 170 lbs or more. I was excited when he fell for I knew that if a man fell there it should be death.

There are links between every two cars. When the train stops the links are slack and the draw heads come together. When a little more steam is put to put on

21 it causes a jerk. There is also a jerk whenever the train starts. It is universally the case in starting trains. The jerk or motion was not such as to endanger any person within the cars. It would be much more dangerous to a person standing on the platform of a car. The notice about standing on the platform on the door is a foot or so long and five or six inches wide, prominent Capital letters.

On Cross Examination he said:- The depot platform extends several hundred feet. The smoking car is the first passenger car, next to the baggage car. The signal I generally give for starting is by lifting my hand. Going slow would not hinder the train from giving a jerk. I first signaled the train to start and then got on. When I got on the car I suppose the train had gone some twelve or fifteen feet. When I first saw Meier I dont think he had hold of anything. I suppose it was not over a minute from the time I stepped on the car until he fell. It is not often that people ride on the platform I do all I can to prevent it. I invariably try to keep them off. I never permitted anybody to ride there especially not since this accident happened. On starting the Engineer puts on Steam slowly at first until he gets the Coupling stretched out. The principal jerk is when he puts on more steam. When the jerk came I did not fall, but the man did. I was excited when I saw the man was going to fall, not before.

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Testimony of Joseph Brooks

Defendant then called Joseph Brooks who testified as follows:- Resides in St Louis. In April 1865 I was in the employ of dept as baggage master on Franklin accommodation Train. Was on train 27th April 1865. I first saw Aug. Meier about 20 feet from the baggage Car on the depot platform. It was perhaps a minute or a minute and a half before the time of starting. He was staggering towards the car to get aboard. I saw him get on the platform of Baggage Car No. 24. At the time Capt Darby was leaning against the railing of the platform of the depot. The signal had not been given to start. When the train started I was leaning on my desk in the baggage car about three feet from the door. This desk permanently attached to the end of the car next to the passenger Cars The door was open. I was there when Darby stepped on the train. Meier in the mean time had moved to about the middle of the platform facing the baggage Car door. I heard Darby speak to Meier. He asked him where he was going. He said he was going up to 14th Street. Capt Darby told him he had better step inside or he would fall off. Darby was standing on the upper step of the platform of the car. I did not see Darby lay hands on Meier just as the train started Meier went to step back and stepped between the two cars. Then I saw Capt Darby make an effort to get a hold of him but his back was towards me, and I could not see whether he caught him or not. Capt Darby immediately stepped on the

passenger car and pulled the bell and put on one brake and Frank out and put on the other. I was in the other cars on that day. There were fifteen or twenty seats in the first passenger car Vacant. The other cars were more crowded. Still there were seats Vacant

On Cross Examination he said:— Have been in employ of Pacific Rail Road about 5 years.

When Meyer was on the platform he leaned with his side against the car. His face was turned north towards the platform of the depot. When the train started he had got up to the door of the car with his face towards the baggage car. Capt. Darby got on the train I think a second before she started. Meyer meant to go from the baggage car to the smoking car and walked backward his back turned to the smoking car. He went through on the north side of the coupling. I am familiar with the handling of cars. Whenever a train is started there is a jerk generally: always so unless the coupling have previously been straightened out which is never done.

On Re examination he said:— There is also a jerk when more steam is put on. Capt Darby was between me and the man when he fell. The grade of the road at that point is about level.

Testimony of John M. Frazier

The defendant then called John M. Frazier who testified:— In April 1865 I resided in St Louis on April 27th about 4 o'clock P.M. I was standing upon the platform of the Freight Depot of Defend-

ant, across the Street South of the passenger train and about 60 feet distant. I was about opposite the baggage car. perhaps a little west of opposite. The passenger train was at the depot. I did not see Augustus Meyer step on but saw him leaning against the end of the baggage car. He was on the car platform leaning against the end of the baggage car. He was on the car platform leaning against the car and seemed reling or staggering. There was no one else there at first. Afterwards I saw Mr Darby with one foot on the platform, and one on the step. This man seemed to face around and staggered back against the Iron Railing facing toward the door of the car. He fell over the railing through the opening. I can't tell which. I was watching carefully. When he fell back against the railing Mr Darby made a Spring at him. Mr Darby did not touch him until he began to fall. The cars were in motion when he fell.

On Cross Examination he said:- I was receiving Clerk at the Freight Depot at the time. Had been there about four months. Left there about the first of May or June 1865. Freight Depot is South of passenger depot. Street is say 20 yds wide. I was at the west end of the main depot. There were quite a number of persons about. I noticed this man particularly. I can't say why I noticed him, but when I first saw him he was reling and that attracted my

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attention. Thought he might fall. He was on the south end of the platform of the car. His shoulder was against the car his fall rather south west. His back and right shoulder to the North, towards the passenger depot. I did not notice that he had hold of anything. I think when I first saw him the car was beginning to move. I did not notice Capt Darby step on the car. When I first noticed him he was on the car. Never was an Engineer or brakeman. There is a guard & railing upon every car. I did notice the jerking of the car as it always is. The car had moved I think about six or eight feet The car gave a jerk when the train started. On every car there is a guard running along at its side also a railing at the end of the platform: this railing is about 2½ feet above the platform: the brakes are connected with it: the opening in the railing is about 15-18 inches wide just sufficient to admit the body of a man passing from one car to the other.

Testimony of August Massman

The Defendant then called August Massman who testified:- I am a policeman No. 9 I was present when Meyer was killed. I first saw Meyer about six or eight minutes before starting time. He was on the platform of the passenger depot. I noticed his condition. He was intoxicated so as to stagger when he walked. I can say whether I saw him get on the cars or not. When train started I went on the front end of baggage car to go to 14th Street. When train had

gone about the length of a car I heard persons hallowing Stop! My mind struck me at once that Meier was under the car before I had known or seen who it was. I jumped off on South side, ran down I think about two lengths of a car and found Meier under the second passenger car of the train. I did not see the accident.

On Cross examination he said:- I had been on that beat about a year. In going from 7th Street to 14th Street, I frequently rode upon the platform. Never was ordered off by Mr. Darby. Have seen others riding on the platform too without objection. I had a talk with Meier before getting on: he spoke intelligently.

On Re-examination, he said:- I knew it was against the rules to ride on the platform of the cars

Testimony of Henry Singleton

Defendant then called Henry Singleton who testified:- I reside at Kirkwood. Was a passenger on the train April 27th 1865. I saw Augustus Meier My attention was attracted to him some minutes before the train started, when he was on the platform of the depot. He was cursing and swearing around there I saw him talking with a policeman something about Jeff Davis being hung. After the train started I was standing in the door of the car next to the baggage car, the smoking car. Meier was standing on the platform of the baggage car. I heard Mr Darby ask him where he was going. He said he was going to 14th

street. Mr Darby told him to go in, he would fall there. I saw Meier fall. When he was falling Mr Darby tried to catch him. I did not see Darby put his hands on Meier.

On Cross examination he said:- I am 15 years of age. Meyer fell head foremost through the passage way in the railing. He fell toward the North side. I did not see Darby on, but saw him afterwards. Meyers head went down first — This was all the testimony offered by defendant.

Testimony of Henry T. Mudd.

The Plaintiff then called Henry T. Mudd, who testified:- I live at Kirkwood I was on the train on the 27th April last. When Meier was killed. I have his name on a Memorandum made at the time I was on the car when the Train started. I opened the door to go from the smoking car to the baggage car and saw Darby & Meier on the platform right opposite to me. Darby had one of his hands at Meiers throat, and the other on one of his shoulders. The train was moving. Darby said to the man "get off" and I think also "God d—d you". I am positive as to the former but not quite so as to the latter. I think the man did not want to get off. Meier was then holding with one had to the Guard running along the side of the car and held on to it until Darby passed him around until he got him to the opening of the railing, when he went down. Darby's hands were on him until he went down. He went down to the

north of the coupling with his feet foremost, his body nearly erect, his back towards the smoking car and his face to Darby. There was upon this car as there is upon every car a railing or guards on the side, and also a railing at the end of the platform to which the brakes are attached. This railing is about 2½ feet above the platform

Cross examination

I did not see Darby when he first took hold of the man. They were in the position I have described when I first saw them. I do not know what had taken place between them, before I saw them. Darby did not say "get inside" but he said "get off". I think he also used the oath. I think he was trying to prop him to the north side, towards the passenger depot. Darby did not speak loud and angry, but loud enough to be understood. I did not notice that the man was drunk The whole thing took but a moment. The man fell feet foremost This was all the testimony in the case. The plaintiff then requested the Court to instruct the jury as follows:—

Plaintiff's Instructions Given

If the jury believe that August Meier exercised ordinary care and prudence on his part, and that the injuries from which he died resulted from or were occasioned by the negligence unskillfulness or criminal intent of the officers, agents servants or employees of the defendant or any one of them whilst engaged in running the locomotive and train of cars mentioned in

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the petition. And further find that the Plaintiff Henriette Meyer was the wife of said August Meier at the time of the latter's death, then the jury will find for the Plaintiff and assess her damages at five thousand dollars

2nd If the jury believe from the evidence that the Conductor Darby was about to put Meier off the the cars, it was his duty, first to stop the train before attempting to do so.

Which instructions the Court gave as asked to which giving defendant excepted. And the Defendant thereupon asked the Court to instruct the jury as follows:—

Instructions Given for Defendant

1st If the jury believe from the evidence that deceased received the injuries complained of, through his own want of ordinary care and prudence plaintiff cannot recover.

2nd In order to entitle the Plaintiff to recover it is incumbent on her to show that the injuries complained of were occasioned by the negligence unskillfulness or Criminal intent of the officers servants or employees of defendant, whilst running Conducting and managing their Locomotive and train of Cars without any fault on the part of deceased Contributing thereto

3rd Even if the jury believe that the officers and employees of Defendant were guilty of slight negligence whilst running Conducting and managing the train in question, yet if they find also that the want of ordinary

care and prudence on the part of deceased directly contributed to occasion the injuries complained of, Plaintiff cannot recover.

4th If the jury find that deceased was thrown from Defendants Cars and thereby killed by reason of his voluntarily taking a dangerous and improper place or position on defendants Car when it was practible to get into a safe and secure place or position within the same, then the defendant is not liable in this action

5th If the jury believe that deceased at the time he received the injuries complained of, had voluntarily placed himself on the platform of one of defendants Cars and that he was thrown therefrom by a sudden jerk or movement of the train while in motion whereby he received the injuries complained of and that such jerk or movement was not such as to increase the danger or risk to persons within the Cars, and that defendant had provided ample room for passengers within the Cars, they must find for defendant.

And they said Defendant also asked the following further instructions, to wit:-

6th If the jury believe that at the time deceased received the injuries complained of he was so intoxicated as to be unable to exercise the care and prudence ordinarily exercised by prudent and sober men while travelling upon railroads and that such inability on his part contributed to cause the injuries aforesaid Plaintiff cannot recover, which instruction the Court

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gave, having first however made an interlineation therein so as to make said instruction read as follows:- to wit: If the jury believe that at the time deceased received the injuries complained of he was so intoxicated as to be unable to exercise, and did not exercise the care and prudence ordinarily exercised by prudent and sober men while travelling upon railroads and that such inability and want of care on his part directly contributed to cause the injuries aforesaid, plaintiff cannot recover. In which shape said Instruction was read to the jury. to which interlineation the defendant then and there objected.
And the cause was then submitted to the jury who found the issue joined for the plaintiff and assessed the damages at five thousand dollars

Verdict for Plff

Henrietta Meyer vs. The Pac R.R. Co } We the jury in the above case find for the Plaintiff and assess the damages at five thousand dollars Jno A Becker, Foreman

And afterwards to wit, on the 11th day of November A. D. 1865 at the term aforesaid and within four days after said trial defendant filed his motion to set aside said Verdict and for a new trial with reasons therefor in the words following, to wit:-

Motion for New trial

Henrietta Meyer vs. Pacific Railroad } Ct. Ct. Sept T. 65 Motion for New Trial

And now comes defendant by his attorney and moves

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the Court to set aside the Verdict rendered in this cause and for a New trial thereof for the following reasons:-

1st Because the Verdict was against the evidence.

2nd Because the Verdict was against the law and the instructions of the Court

3rd Because the Verdict was against both law and evidence, and against the law under the Evidence

4th Because the Verdict was against the weight of evidence

5th Because there was no evidence to support the allegations of the Petition.

6th Because the Court gave on behalf of Plaintiff improper and illegal instructions

7th Because the instructions given on behalf of plaintiff were calculated to mislead

8th Because of the surprise on the part of Defendant and its attorney by the Evidence of H. F. Mudd in this: that he was offered by Plaintiff after defendants case had closed, and that his testimony was different in its effect from testimony heretofore given

9th Because of the absence of Jay M. Brown a material witness for defendant, at the time of the trial

Geo. E. Leighton

Attorney for Deft

And on the same day defendant filed in support of said motion the following affidavit

Affidavit in support of Motion

Henrietta Meier vs. Pacific Railroad } 115 Sept T. 1865

Affidavit on motion for new

33 trial. Geo. E Leighton being duly sworn says that he is the agent of defendant which is a Corporation. He further says that at the trial of this cause one Jay M. Brown was a material witness on behalf of the defendant, whose testimony it was impossible to procure in time for the trial of this cause and that he was absent from this city and State at the time of said trial, and has been so absent ever since this suit was brought; that said Brown's evidence was material in the cause as showing that the accident to said Brewer was not the result of any interference with him by the officers of defendant, but was inevitable. The said Brown's Deposition was taken in May last in the case of the State vs. Hiram Darby, pending in the Criminal Court of this County, involving the same facts as this case, a copy of said deposition is herewith attached.

That defendant could not move for a continuance on account of the absence of said Brown for the reason that his evidence was Cumulative and was substantially to the same effect as that of Darby, Brooks Singleton and Frazier, whose evidence was produced in said trial.

That since the said Brown left the city, this affiant as agent has made diligent effort to find his whereabouts, but has been unable to do so, further than that he was somewhere on the plains. Said witness Brown was at the time of said accident an Officer of the 2nd Mo Art., and has been with said Regiment, since, serving

in the Indian campaign.

That since this trial, affiant has learned that said Brown within a few days past arrived at Leavenworth, and that his deposition can be secured.

Affiant further says that the defendant was surprised, and his cause thereby much prejudiced by the evidence of Henry F. Mudd, a witness upon the part of Plaintiff, whose evidence was offered after the defendant had closed its case. That such surprise consisted in the fact that the testimony of said Mudd differed very materially from his testimony given before the Coroner's jury on the inquest held over the body of deceased, in this that in the testimony given before said Coroner, witness gave his recollections and impressions, then fresh upon his mind with much less positiveness than on the trial of this cause. A copy of said Mudd's testimony before the Coroner is herewith filed.

Defendant further says that it was greatly prejudiced and surprised by the testimony of said Mudd in this that the said Mudd wilfully and persistently insisted upon giving his thoughts, impressions and conclusions of the intentions of defendant's officers, after objections were made thereto and after being instructed not to do so by the Court.

Affiant further says that he believes that defendant has a just, true and meritorious defence in this cause, that the Verdict rendered in this

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Cause was against an overwhelming preponderance of evidence in his behalf, that the same was unjust and unwarranted by the instructions of the Court or the evidence Affiant further says that he believes that if a new trial is granted defendant will be able to procure the evidence of said Brown, and that the same would if produced, produce a different result

Geo. E. Leighton

Sworn to and subscribed before me this 11th Nov. 1865

F. A. H. Schneider Clk

Jay M. Brown of lawful age produced Sworn and examined on the part of the defendant deposeth and Saith:-

Jay M. Brown — I know Hiram Darby I was on the train when a man said to be named Meyer was killed. The train was known as the Franklin accommodation train Conducted by Capt Darby the defendant. I did not see the deceased to my knowledge before the accident occurred. When I first saw him he was on the side of the track. I had a glimpse of him when he was falling through. I heard nothing said between the deceased and Capt Darby I was in the passenger Car, two or three seats from the end window of the car, looking through the window in the direction in which the accident occurred I neither saw or heard any conversation or altercation between Capt Darby and deceased.

The first I saw was Capt Darby in the act of

catching something: Immediately I saw him put his hands up as if to ring the bell. The defendant then immediately turned the brake to stop the motion of the cars. The train was stopped after running about the length of a car or not more than six feet beyond that distance, during the running of the train from the depot. I should think it was not more than that distance. When I say that I saw him defendant catching at something, it was the time when it was the time when I first got a glimpse of the deceased when falling. I unshackled the cars which was passed over the deceased and called on the crowd to help shove the car back which was done, and deceased taken up and laid on the platform. There was but one car which passed over deceased; the wheels of the next car was on his legs. I think the front wheel was on his legs. I will probably leave the city tomorrow for Nashville Tennessee

Cross Examined

I think there were three passenger coaches and a baggage car in the train. I sat in the first passenger car in the train. I sat in the first passenger car joining the Baggage car and in the front end looking forward. I think Defendant was on the rear end of the Baggage car. His face towards mine. I did not see defendant have his hands on deceased. I saw him in the act of catching at him when falling. I can't say whether de-

37 fendant pushed deceased off the car or not. I saw deceased falling. I did not see him on the Platform but he must have been on it. I passed out at the front end of the car in which I was. I should think there were only two cars pushed back. The train started with a sudden jerk. Immediately I saw the man falling and Capt Darby grasping at him. The train had not yet left the depot. The train soon after the occurrence, moved off. Capt Darby went with it. Judging from what I saw of the Conduct of Capt Darby, I am satisfied he did not push the man off.

(Signed) Jay M Brown

I. W. C. Huffman clerk of the Law Commissioners' Court of St Louis County, within and for the county of St Louis in the State of Missouri do certify that in pursuance of an agreement between the Circuit Attorney and the attorneys for Defendant came before me at the Law Commissioners' Court Room in the County and State last aforesaid J. M. Brown who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination reduced to writing and subscribed by him in my presence on the day, between the hours and at the place in that behalf first aforesaid, and that said deposition is now herewith returned

(Seal) Given under my hand and official seal at the city of St Louis County of St Louis and State of Missouri this 18th day of May A. D. 1865

(Signed) I. W. C. Huffman, Clerk of Law Commissioners' Court

St Louis Criminal Court

State of Missouri }
County of St Louis } ss Be it remembered that on the Eleventh day of May 1865 there was filed the Office of the Clerk of the St Louis Criminal Court, a Coroner's Inquest of which the following is a part of the Testimony, to wit:

State of Missouri }
County of St Louis } ss H. T. Mudd of lawful age being duly sworn, on oath says:-

I think this is the man that on yesterday evening, as the Franklin accommodation was leaving Seventh Street depot, was standing on the rear platform of Baggage car. Captain Darby had his hands on his arms. I had the impression that Captain Darby wanted to put him off. Captain Darby was in the act of passing him around as I thought to get off: the deceased was on the outer side of Captain Darby and on the South of the door: as the defendant got round to the door of the railing, his feet seemed to slip off and the deceased fell with the small of his back across the North rail between the baggage car and the first passenger or smoking Car. I could not say whether the deceased was under the influence of liquor. It seems to me that if he was not he could have caught some of the irons of the car. The cars were in motion at the time: the deceased let go his hold and seemed to make no resistance, and I thought that Captain Darby was passing him around to put him on to the platform, north of the track. I was standing in the door of the

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smoking car. It was to the rear of the baggage car and to next the platform where the men were standing. I thought Captain Darby did not wish to hurt him. he could have pushed the deceased into the street on the South side of the train, if he wanted to do so.

Mr Darby is of a kind and good character, a good Conductor, and has to my knowledge been always lenient to passengers, and very particular with drunken persons, when he had such persons to deal with. The train was stopped in a few seconds. There was a good deal of excitement at the time

Henry T. Mudd

Sworn to and Subscribed before me this 28th day of April A. D 1865 P. S. O'Reilly M.D.

Coroner of St Louis County

State of Missouri } ss
County of St Louis }

I John McNeil, Clerk of the St Louis Criminal Court within and for said County certify the foregoing to be a full, true and Comple Copy of the testimony of Henry T. Mudd in the case of the State of Missouri vs. Kieran Darby as fully as the same remains on file in my Office

Seal U.S. Stamps cents } Witness my hand and the seal of the St Louis Criminal Court hereto affixed at Office in the City of St Louis this tenth day of November A. D eighteen hundred and Sixty five

John McNeil

Clerk

overruling of Motion

And afterwards, to wit: On the twenty ninth day of November A. D. 1865 at the term aforesaid, the Court after

due consideration, overruled said motion for new trial, to which overruling the defendants then excepted. Whereupon defendant prays an appeal and that his exceptions be signed and sealed and that the same ordered to become a part of the Record in this cause which is done.

James C. Moody,
Judge

State of Missouri }
County of St Louis } ss I, F. A. H. Schneider Clerk of the Circuit Court in and for said County and State certify that the foregoing is a true and Complete transcript of the records and proceedings in the cause of Henrietta Meier vs The Pacific Rail Road as fully as the same remains on file and of Record in my Office.

Witness my hand and the seal of said Court this 28th day of December A. D. 1865

F. A. H. Schneider Clk.

State of Missouri }
County of St Louis } ss At the September Term
1865 of the Circuit Court within and for said
County the following proceedings were had to wit:

Saturday December 30th 1865

Henrietta Meyer
vs.
The Pacific Rail Road } Now comes the defendant and files and affidavit for an appeal

Affidavit for appeal & Bond filed

and on its motion an appeal is allowed it to the Supreme Court from the judgment herein rendered, it thereupon files an appeal bond which is approved by the Court.

Which affidavid for appeal & appeal Bond are in the words & figures following, to wit:

Affidavit for Appeal

Henrietta Meier
vs.
The Pacific Railroad } In St Louis Circuit Court
Sept. Term 1865
Affidavit for appeal

Geo. E Leighton, agent of defendant which is a corporation, now comes and makes oath that the appeal in this cause is not made for delay or vexation, but because affiant is believes that the appellant, The Pacific Railroad is agrieved by the judgment or decision of the Court

Sworn to & subscribed be- Geo E Leighton.
fore me this 30th Dec. 1865
F. A. Schneider, Clk.

Appeal Bond

Appeal Bond

Know all Men by These Presents, That we The Pacific Railroad as principal, and ——— ——— as Surety are held and firmly bound unto Henrietta Meier in the sum of Ten Thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at St Louis, this thirtieth day of December A. D. 1865

The Condition of the above Obligation is Such, that whereas The Pacific Railroad has appealed from the judgment rendered against it and in favor of Henrietta Meier in the St Louis Circuit Court, for the sum of Five Thousand dollars and ——— cents, together with costs.

Now if the said appellant will prosecute said appeal, with due diligence, to decision in the Supreme Court; and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the St Louis Circuit Court to give; and, if the judgment or any part thereof be affirmed will comply with and perform the same so far as it may be affirmed; and pay all damages and costs which may be awarded against it by the Supreme Court, then this obligation shall be Void, otherwise it shall remain in full force and effect

Pacific Railroad by
G.R. Taylor pres't. (seal)
G. R. Taylor (seal)
Geo. E Leighton (seal)

approved Dec. 30
1865 in open court
J.A.H. Schneider
Clk

St Louis Circuit Court September Term 1866.

Be it Remembered, that on this 30th day of December 1865 appeared the Pacific Railroad by Geo. R. Taylor its president the principal, and Geo. R. Taylor and ——— the securities in the foregoing bond, and acknowledge that they executed the same for the purposes therein expressed

In witness whereof, I hereto set my hand and affix the seal of said Court, at office, in St Louis, the day and year last aforesaid

Clerk

State of Missouri } ss
County of St Louis }

I J. A. H. Schneider Clerk of the Circuit Court within and for said county Certify the foregoing to be a true Transcript of part of the Record & proceedings in case of Henrietta Meier against The Pacific Railroad, as the same remains on file & of record in my office

Witness my hand & the seal of said Court at office in the city of St Louis this 4th day of December A.D. 1866

J.A.H. Schneider Clk.

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~~XXX~~ / ~~206~~ (2)

28 ~~[illegible]~~ 28

March Term 1867

Henrietta Meyer
Appellee

The Pacific Rail Road
Appellant.

Appeal from St Louis Cir Ct.

Leighton for appellant

Woerner & Kehr for appellee

Filed Feby 2d, 1866
O. F. Fishback
Clk.

$10.00 paid by Leighton

24.20 paid by Appellants

1866 Oct. 15 Due Cir for bill of Ex for appeal $13.00

1866 Feby 6. Assignment of Errors.

" Dec 3. Motion to dismiss appeal filed

" " 4 Dismiss of Record Ing - Motion Ord.

1867 March 21 Stmt of Appellee

" April 4 Arg & Sub. Stmt & brief of Res & brief of Appellee filed

" " 15 Appeal & Remanded. Opinion filed

Henrietta Meier - Plaintiff
Appellee
v
The Pacific Railroad Deft.
Appellant

IN SUPREME COURT,
March Term, 1866.

And now come the said Pacific Railroad appellant and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellant assigns the following, to wit:

1. ~~That said Court admitted improper and illegal testimony offered by~~
2. ~~That said Court rejected proper and legal testimony offered by~~
3. That the Court gave to the Jury improper and illegal instructions. on the part of plaintiff
4. That the Court refused to give to the Jury proper and legal instructions offered by defendant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the plaintiff when it should have been rendered for the defendant
10. That said Court overruled the motion for a new trial, made by defendant
11. ~~Because~~ That there was no evidence to support the allegations of the petition or to support the verdict and judgment.
12. That the instructions given on behalf of plaintiff were calculated to mislead.

G. W. Leighton
Atty for Appellant

And now come the said Respondents and for joinder in error say, that there is no error in the record and proceedings of said St Louis Circuit Court in said cause, as assigned by said appellants

Boerner & Kehr
Attys for Resp'ts

155

Henrietta Mein
Appellee

v

Pacific Railroad
Appellant

Assignment of Errors

Filed Febry 6th, 1866.
O. T. Fisleback
Clk.

32
315
28.83

Henriette Meier Respondent
vs
Pacific Railroad Defendant
below. Appellant here

In the Supreme
Court of Missouri
October Term 1886.

Now at this day comes Henriette Meier, the above named Respondent and moves the Court to dismiss the alleged appeal herein, because

1. The record fails to show any order by the Circuit Court allowing an appeal in said cause.

2. The record herein contains neither an affidavit by Appellants for an appeal, nor does it show the execution of an Appeal bond to stay Execution.

3. It does not appear that any appeal was prayed for in this cause by Appellant or allowed by the Circuit Court at or during the Term of Court in which the Judgment herein was rendered.

Woerner & Kehr
Attys for Respondent.

No 155

Supreme Court

Henriette Meier

vs

Pacific Railroad

Motion to dismiss appeal.

Filed Dec 3d 1866
O D Dishtack Clk
by E P McCarty Deputy

Henrietta Meyer
vs.
Pacific Rail Road

In Supreme Court
No 155 – Oct T – 1866

Statement of Case

This is an action by Henrietta Meyer widow of August Meyer dec'd against defendant for damages for the death of her husband.

The action is instituted under the 2d Sec of the act relating to damages (Rev Stat 1866. Chap 147)

The petition charges that "on or about the 27th day of April 1865 the defendant by officers, agents, and servants then in its employ was running a Locomotive and train of cars on and along its track in St Louis City, and near its depot on Seventh Street in said city and that August Meyer the husband of plaintiff being in one of the cars of said train, the said officers, agents, servants and employees of defendant then in charge of said Locomotive and train of cars and using the same in the business of defendants, conducted themselves so recklessly, and so carelessly and unskilfully ran, managed and conducted said locomotive and train of cars that by and through the negligence unskilfulness and criminal intent of the officers, agents, servants

and Employees of defendant whilst running conducting and managing the aforesaid locomotive and train of cars, the said Meyer without any fault on his part was thrown from the aforesaid car on which he then was, and was precipitated in between the same and the car in rear of same and was killed &c

The answer denies that the officers servants agents or employees at the time alleged conducted themselves unskilfully or carelessly or that they managed and conducted said train of cars so that by the negligence, unskilfulness, and criminal intent of said officers agents servants and employees whilst running conducting and managing their locomotive and train said Meyer was without fault on his part thrown between the same

It denies that the injuries received by said Meyer resulted from the negligence, unskilfulness and criminal intent of defendants agents officers servants or Employees, whilst running conducting or managing said train. But avers the fact to be that said injuries resulted from the negligence and carelessness of said Meyer in placing himself upon the platform of one of the cars of said train in violation of the printed regulations of defendant in that respect, posted up at the time in a conspicuous place inside the passenger cars then in the train, and in refusing to

conform to the reasonable requirements of its officers thereon in charge of said train for its safety, and otherwise carefully, negligently and imprudently conducting himself thereon.

Upon the precise method in which the accident occurred there is some conflict in the evidence, (adverted to hereafter), but the following are undisputed facts in the case -

The accident occurred at the depot of defendant at St Louis on the date named in the petition. The Franklin accommodation train was at the station. For some time, 10 or 20 minutes before the train started the deceased had been about the depot platform intoxicated and even somewhat boisterous in his conduct, staggering when he walked. (Evidence of Singleton and Massman)

When the train started, Meyer was standing upon the rear platform of the baggage car leaning against the baggage car door in a reeling or staggering ~~position~~. The proof showed that the notice about riding on the platform was posted up on the outside of the cars, instead of the inside - that there were three passenger cars in the train, and that there was a large number of vacant seats.

The conductor gave the signal to start from station platform and as the train started

moving very slowly he stepped upon the platform where Meyer was. The train had not moved more than 30 or 40 feet from the place of starting before the signal had been given to stop and the train fully stopped. (Evidence of Sexton and others)

Meyer was under the cars fatally injured. How he came there is the only question upon which there is any conflict in the evidence.

The theory of the plaintiffs evidence is that the conductor in attempting to put him off either by criminal intent or carelessness forced him between the cars

The theory of the defendants evidence is that he fell ~~from~~ the cars from the simple ~~jerk~~ shock of starting the train familiar to all travellers - his drunken condition rendering him unable to stand up - and that the conductor attempted to save him.

The plaintiff offered two witnesses - Sexton and Mudd.

Sexton states that he was standing on the depot platform - 12 or 15 feet from the cars - conductor gave the signal to start from the platform of the depot and stepped on the platform of the car where Meyer was standing. Conductor said something to Meyer and Meyer said something to conductor, could not

understand what either said except that the last of Meyers reply was "fourteenth". Conductor said damn you get off of here — stepped forward put his left hand to the mans throat and his right on the mans shoulder — Conductor swung him round out towards the edge of the platform — he kind of pushed the man back or he stumbled and fell down between the two cars — Conductor had hold of him — till he started to fall — till his feet were off the car — the cars were just fairly started — they went slow. The Conductor held on to Meyer until he was half down between the cars. Witness jumped off the railing ran across the platform (15 feet) and by the time I got to the back the train had stopped or nearly stopped

On cross examination he said Meyers age was 35 to 45 = He would weigh 145 pounds.

The train had moved from six to ten feet when the conductor stepped on — and 12, 15 or 20 feet when Meyer fell — I dont think more than 15 — It was running slow — It had moved 30 or 40 feet before it stopped.

The Conductor had hold of Meyer till his feet were near the ground — He was bent over considerably his legs against the railing and his body bent 45° or more — Cant say whether Meyer was drunk or sober — did not see him before the Conductor took hold

of him. ——————————— Mudd whose ~~[illegible]~~ testimony was offered after defendants had closed ~~Mudd~~ states that he was on the train — opened the door to go from smoking car to baggage car saw Daily (Conductor) and Meyer on platform right opposite — Daily had one of his hands on Meyers throat and the other on one of his shoulders. Daily said to the man "get off" and I think also God "damn you" — am positive as to the former, but am not as to the latter — Meyer was holding with one hand to the guard, and held there untill Daily passed him round untill he got him to the openening of the railing when he went down, Daily's hands were on him untill he went down.

On cross examination — he said he did not see Daily when he first took hold of the man. They were in the position described when I first saw them — Do not know what had taken place before — Daily did not say "get inside" — he said "get off" — Think he was trying to push him towards the north side, towards the depot — Daily did not speak loud or angry — did not notice that the man was drunk — the whole thing took but a moment.

This was <u>all</u> the evidence offered by plaintiff as to the manner in which the accident

occurred.

Defendant offered as witnesses Hiram Darby — Joseph Brooks — John M Frazier & Henry Singleton as to the manner in which the accident occurred and Augustus Meesman as to deceased drunken condition and conduct prior to the starting of the train.

Hiram Darby testified — I am 56 years of age: I have resided in St Louis 40 years: I am a conductor on the Pacific Rail Road, and have been since it started. I was the conductor of the Franklin accommodation train in April 1865 have been conductor of that train about 8 years. it is a passenger train. On the morning of the 27th of April 1865, I gave the usual signal to start about two minutes before starting, as usual; I was on the platform of the depot; the train started and then I stepped on; then I stepped on the platform of the baggage car; then was a man standing there; I had never seen him before to my knowledge; I saw that he was very much intoxicated, and asked him to step inside, I said "My friend step inside"; he said "No I am only going to 14th street"; I then told him he would fall off if he would not go inside; just at that time the engineer gave the Engine more steam, and he did fall;

when he commenced falling I tried to catch him; I caught with the left hand — one of the fingers of that hand had been broken a few days before, and two of them mashed; they were tied up at that time — I bruised them much more by Meyers fall; I held him until I could hold him no longer without going myself, and then let him go; I immediately pulled the bell to stop the train, and put on the brake of the smoking car, (I mean the first passenger car — the one next the baggage car; the baggage man who I think was standing near the baggage car door put on the other brake; the train ran about the length of a car, about 20 — 30 feet before it was stopped — My right hand was broken 20 years ago; I have only the use of one finger — I understand the mans name was Augustus Meyer; when I first saw Meyer he was on the South side of the door on the platform of the baggage car, and leaning against the car, his head leaning forward; he was very much intoxicated; I guessed so from his manners; he was staggering — that is what drew my attention to him; I did not say anything to him about getting off the train; there was no conversation between Meyer and myself other than what I have stated, I made use of no profane ~~expressions~~ language

There were in this train three passenger cars and a baggage car; there were not many passengers; there were a dozen seats or more in the car next to where Meyer stood; it would seat 70 persons, and was not near full.

There was a metallic plate posted on the outside of the door of each passenger car, containing these words "Passengers are not allowed to stand on the platform whilst the train is in motion"

Plaintiff objects to this evidence as incompetent and irrelevant and not going to sustain the allegations of the answer — The Court overrules the objection, to which plaintiff excepts, and the evidence is then admitted.

It is on each door; there was on every car of that train a notice about standing on the platform; the words are, I think, "Passengers are not allowed to stand on the platform while the train is in motion"; this on each door next to the platform; it can be seen right or left, on each side as you step on the platform; it was ~~in~~ on the baggage car — It was a very short time after I put my hand on Meyer to catch him that he fell; when the train gave a jerk Meyer fell forward; my catching him swung me around; I think he would weigh 160 or 170 pounds, or more; I was excited when he fell for I knew

that if a man fell there it should be death. There are links between every two cars; when the train stops the links are slack, and the draw heads come together; when a little more steam is put on, it causes a jerk; there is also a jerk whenever the train starts; it is universally the case in starting trains; the jerk or motion was not such as to endanger any person within the cars. it would be much more dangerous to a person standing on the platform of a car; the notice about standing on the platforms, on the door is a foot or so long and four or six inches wide. prominent capital letters

On cross examination he said; the depot platform extends several hundred feet; the smoking car is the first passenger car next to the baggage car; the signals I generally give for starting is by lifting my hand; going slow would not hinder the train from giving a jerk; I first signalled the train to start and then got on; when I got on the car I suppose the train had gone some 12 or 15 feet; when I first saw Meyer I don't think he had hold of anything; I suppose it was not over a minute from the time I stepped on the car until he fell; it is not often that people ride on the platform — I do all

I can to prevent it – I invariably try to keep them off – In starting the engineer puts on steam slowly at first until he gets the coupling stretched out; the principal jerk is when he puts on more steam; when the jerk came I did not fall, but the man did; I was excited when I saw the man was going to fall not before.

Joseph Brooks testified — I reside in Saint Louis. In April 1865 I was in the employ of defendant as baggage master on Franklin accomodation train. It was on train 27th of April 1865. I first saw Aug Meyer about 20 feet from the baggage car on the depot platform. It was perhaps a minute or a minute and a half before the time of starting; he was s(t)aggering towards the car to get aboard. I saw him get on the platform of baggage car No 24. At the time Capt Darby was leaning against the railing of the platform of the depot. The signal had not been given to start. When the train started I was leaning on my desk in the baggage car, about three feet from the door; this desk – permanently attached to the end of the car next to the passenger cars; the door was open; I was there when Darby stepped on the train; Meyer in the mean time had moved to about the

middle of the platform facing the baggage car door I heard Darby speak to Meyer; he asked him where he was going; he said he was going up to 14th street; Capt Darby told him that he had better step inside or he would fall off. Darby was standing on the upper step of the platform of the car. I did not see Darby lay hands on Meyer. Just as the train started Meyer went to step back, and stepped between the two cars; then I saw Capt Darby make an effort to get hold of him, but his back was towards me. And I could not see whether he caught him or not. Capt Darby immediately stepped on the passenger car and pulled the bell and put on one brake, and I ran out and put on the other. I was in the other cars, on that day. There was fifteen or twenty seats in the first passenger car vacant. The other cars were more crowded — still there were seats vacant.

On cross examination he said. Have been in employ of Pacific Rail Road about 5 years. When Meyer was on the platform he leaned with his side against the car; his face was turned south towards the platform of the depot. When the train started he had got up to the door of the car with his face turned towards the baggage car. Capt Darby got on the train I

think a second before she started. Meyer meant to go from the baggage car to the smoking car, and walked backward his back turned towards the smoking car. He went through on the North side of the coupling. I am familiar with the handling of cars. Whenever a train is started there is a jerk generally; always so unless the couplings have previously been straightened out, which is never done.

On re-examination he said – There is also a jerk when more steam is put on. Capt Darby was between me and the man when he fell. The grade of the road at that point is about level

John M Frazier testified – In April 86 I resided in Saint Louis. On April 27th about 4 oclock P M. I was standing upon the platform of the freight depot of defendant, across the street South of the Passenger train and about 60 feet distant. I was about opposite the baggage car, perhaps a little West of opposite. The passenger train was West of the depot. I did not see Augustus Meyer step on but saw him leaning against the car and seemed reeling or staggering. There was no one else there at first. Afterwards I saw Mr Darby with one foot on the platform and one on the step. This man

seemed to face round and staggered back against the iron railing facing towards the door of the car. He fell over the railing through the opening; I cant tell which, I was watching carefully. When he fell back against the railing Mr Darby made a spring at him. Mr Darby did not touch him untill he began to fall. The cars were in motion when he fell.

On cross examination he said — I was receiving clerk at the freight depot at the time, had been there about four months. I left there about the 1st of May or June 1865. Freight depot is South of passenger depot. Street was easy 20 yards wide. I was at the West end of the main depot. There were quite a number of persons about. I noticed this man particularly. I cant say why I noticed him, but when I first saw him he was reeling and that attracted my attention; thought he might fall. He was on the South end of the platform of the car. his shoulder was against the car; his face rather South West; his back and right shoulder to the North, towards the passenger depot. I did not notice that he had hold of any thing. I think when I first saw him the car was beginning to move. I did not notice Capt Darby slip on the car; when I first noticed him he was on the car

Never was an Engineer or Brakeman. There is a guard and railing upon every car. I did notice the jerking of the car as it always is. The car had moved, I think about Six or Eight feet. The car gave a jerk when the train started. On every car there is a guard running along its side, also a railing at the end of the platform; the brakes are connected with it; the opening in the railing is about 16-18 inches wide, just sufficient to admit the body of a man passing from one car to the other -

Henry Singleton Astificd - I reside at Kirkwood - Was a passenger on the train April 27th 1865. I saw Augustus Meyer; my attention was attracted to him some moments before the train started, when he was on the platform of the depot. He was cursing and swearing around there. I saw him talking with a police-man something about Jeff Davis being hung.

After the train started I was standing in the door of the car next to the baggage car, the smoking car, Meyer was standing on the platform of the baggage car. I heard Mr Darby ask him where he was going. He said he was going to 14th st. Mr Darby told him to go in, ~~he~~ he would fall there. I saw Meyer fall. When he was falling Mr Darby tried to catch him. I did not see Mr Darby put his hands

on Meyer

On Cross Examination he said

I am 15 years of age. Meyer fell head foremost through the passage way in the railing; he fell towards the South side. I did not see Darby – on, but saw him afterwards. Meyers ~~had~~ went down first.

August Meesman testified – I am a policeman, No 9. I was present when Meyer was killed. I first saw Meyer about Six or Eight minutes before starting time; he was on the platform of the passenger depot. I noticed his condition. He was intoxicated so as to stagger when he walked. I can't say whether I saw him get on the cars or not. When train started I went on the front end of baggage car to go to 14th St. When train had gone about the length of a car I heard persons hallooing stop! My mind struck me at once that Meyer was under the car before I had known or seen who it was. I jumped off on South side, ran down, I think about two lengths of a car, and found Meyer under the second passenger car of the train. I did not see the accident.

On cross Examination he said

I had been on that beat about a year. In going from 7th st. to 14th st. I frequently rode upon the platform. Never was ordered off by Mr. Darby. Have seen others ride upon the platform, too, without objection. I had a talk with Meyer before getting on; he spoke intelligently.

On Redamination he said —
I knew it was against the rules to ride on the platform of the cars.

This was all the testimony in the case.

The plaintiff then requested the court to instruct the jury as follows:

If the jury believe that August Meyer exercised ordinary care and prudence on his part, and that the injuries from which he died resulted from or were occasioned by the negligence, unskilfulness or criminal intent of the officers agents servants or employees of the defendant or any one of them whilst engaged in running the locomotive and train of cars mentioned in the petition; and further find that the plaintiff Henrietta Meyer was the wife of said August Meyer at the time of the latters death, the jury will find for the plaintiff and assess her damages at five thousand

dollars.

2d If the jury believe from the evidence that the conductor Darby was about to put Meyer off of the cars, it was his duty first to stop the train before attempting to do so.

Both of which the Court gave as asked, to which giving defendant excepted.

And the defendant thereupon asked the Court to instruct the jury as follows

1st If the jury believe from the evidence that deceased received the injuries complained of through his own want of ordinary care and prudence plaintiff can not recover

2d In order to entitle the plaintiff to recover, it is incumbent on her to show that the injuries complained of were occasioned by the negligence, unskilfulness or criminal intent of the officers servants or employees of defendant whilst running conducting and managing their locomotive and train of cars, without any fault on the part of deceased contributing thereto.

3d Even if the jury believe that the officers & employees of defendant were guilty of slight negligence whilst running conducting and managing the train in question, yet if they

find also that the want of ordinary care and prudence on the part of deceased directly contributed to occasion the injuries complained of plaintiff can not recover.

4th If the jury find that deceased was thrown from defendants car and there by killed by reason of his voluntarily taking a dangerous and improper place or position on defendants car, when it was practicable to get into a safer and securer place or position within the same, then the defendant is not liable in this action

5th If the jury believe that deceased at the time he received the injuries complained of had voluntarily placed himself on the platform of one of defendants car, and that he was thrown therefrom by a sudden jerk or movement of the train while in motion whereby he received the injuries complained of; and that such jerk or movement was not such as to increase the danger or risk to persons within the cars; and that defendant had provided ample room for passengers within the cars — they must find for defendant.

6th Which instructions were given — Defendant also asked the following further instructions to wit.

6th If the jury believe that at the time

deceased received the injuries complained of he was so intoxicated as to be unable to Exercise the care and prudence ordinarily Exercised by prudent and sober men while travelling upon Railroads, and that such inability on his part contributed to cause the injuries aforesaid plaintiff cannot recover.

Which instruction the court refused to give as asked — but gave it after having interlined the same so as to make it read as follows to wit:

If the jury believe that at the time deceased received the injuries complained of he was so intoxicated as to be unable to Exercise, and did not Exercise, the care and prudence ordinarily Exercised by prudent and sober men while travelling upon Rail roads and that such inability and want of care on his part directly contributed to cause the injuries aforesaid. plaintiff cannot recover.

To which interlineation the defendant Excepted

The Jury found a verdict for plaintiff

The motion for new trial was overruled and the case is in this court by appeal

G. W. E. Leighton
for Appellant

35

No 155 - Sup. Ct.

Meyer
v
Pacific RR

Appeal

Appellants
~~Defendants~~ Statement
of the case

G W E Leighton

Filed March 21, 1867
C T Fishback Clk
per E P McCarty Dep

Henriette Meyer Respondent
vs
The Pacific Railroad Appellant

In the Supreme Court of Missouri

Respondent's Statement

This is an action founded on the 2d Section of an "Act for the better Security of life, property & character" R.S. 1855 p. 647, and is brought by the widow who alleges that her husband on or about the 27th April 1865 died from injuries occasioned by the negligence, unskillfulness and criminal misconduct of the officers, agents, servants & employees of Deft. while running, conducting & managing a locomotive & train of cars belonging to Deft. The answer denied all negligence, unskillfulness or criminal misconduct on the part of the agents & servants of Deft. while running, conducting or managing its locomotive & cars, and alleges that the deceased came to his death in consequence of his own negligence, carelessness & imprudence.

Plaintiff offered Evidence (see testimony of Sexton p. 9 & of Rudd p. 27 of record) tending to show that as the defendant's train was about leaving the 7th Street depot in the City of St Louis on the afternoon of the 27th April 1865 the deceased was observed standing on the rear platform of the baggage car of the train; that the conductor having given

started the train, stepped on the platform of the car in question, and observing deceased said to him "D- n you get off from here", and approaching him put his left hand to the throat of deceased and his right hand on his shoulder with a view to eject him: that deceased with one hand held to the guard running along the side of the car, but that the Conductor forced him around to the opening in the railing at the rear platform of the platform through which deceased were down falling between the cars which passed over him and crushed him so as to cause his death. "The Conductor (Darby) hands were on him till he went down. He went down to the north of the coupling with his feet foremost: his body nearly erect, his back towards the Smoking car & his face to (Darby) the Conductor" (Pp. 28 & 29 of record.)

The plaintiff's theory of the case was that the conductor attempted to remove deceased from the cars by force while the train was in motion & that in doing so the injuries were occasioned which resulted in his death.

The defendant's theory was that the deceased being intoxicated fell off the platform in consequence of a sudden jerk given by the Engine, and that the Conductor put his hands on him merely in attempting to catch him & prevent him from falling, and gave evidence tending to show such to be the fact.

When the evidence was closed (on both sides) the following instructions were given:

The plaintiff then requested the Court to instruct the jury as follows:

If the jury believe that August Meier exercised ordinary care and prudence on his part, and that the injuries from which he died resulted from or were occasioned by the negligence, unskilfulness or criminal intent of the officers, agents, servants or employees of the defendant or any one of them whilst engaged in running the locomotive and train of cars mentioned in the petition. And further find that the Plaintiff Henriette Meyer was the wife of said August Meier at the time of the latter's death, then the jury will find for the Plaintiff and apsess her damages at five thousand dollars.

2nd If the jury believe from the evidence that the Conductor Darley was about to put Meier off the cars, it was his duty, first to stop the train before attempting to do so.

Which instructions the court gave as asked to which giving defendant excepted. And the Defendant thereupon asked the Court to instruct the jury as follows:

1st If the jury believe from the evidence that deceased received the injuries complained of through his own want of ordinary care

and prudence plaintiff cannot recover.

2nd In order to entitle the Plaintiff to recover it is incumbent on her to show that the injuries complained of were occasioned by the negligence, unskilfulness or criminal intent of the officers, servants or employees of defendant, whilst running, conducting and managing their Locomotive and train of cars without any fault on the part of deceased contributing thereto.

3rd Even if the jury believe that the officers and employees of defendant were guilty of slight negligence whilst running, conducting and managing the train in question, yet if they find also that the want of ordinary care and prudence on the part of deceased directly contributed to occasion the injuries complained of, Plaintiff cannot recover.

4th If the jury find that deceased was thrown from Defendants cars and thereby killed by reason of his voluntarily taking a dangerous and improper place or position on defendants car when it was practible to get into a safe and secure place or position within the same, then the defendant is not liable in this action.

5th If the jury believe that deceased at the time he received the injuries complained of, had voluntarily placed himself on the platform of one of defendants cars and that he was thrown therefrom by a sudden jerk or movement of the train while in motion wherely he received the injuries complained of, and that such jerk or movement was not such as to increase the danger or risk to persons within the cars, and that defendant had provided ample room for pasengers within the cars, they must find for defendant.

And the said Defendant also asked the following further instructions to wit:

6th If the jury believe that at the time deceased received the injuries complained of he was so intoxicated as to be unable to exercise the care and prudence ordinarily exercised by prudent and sober men while travelling upon railroads and that such inability on his part contributed to cause the injuries aforesaid, plaintiff cannot recover.

Which instruction the court gave, having first however made an interlineation

therein so as to make said instruction read as follows, to wit: If the jury believe that at the time deceased received the injuries complained of he was so intoxicated as to be unable to exercise and did not exercise the care and prudence ordinarily exercised by prudent and sober men while travelling upon railroads and that such inability and want of care on his part directly contributed to cause the injuries aforesaid, plaintiff cannot recover. In which shape said instruction was read to the jury, to which interlineation the defendant then and there objected.

And the cause was then submitted to the jury who found the issue joined for the plaintiff and assessed the damages at five thousand dollars.

Respondent's Brief

Woerner & Kehr. for Respdts

In addition to the usual averments that the verdict is against the law, the evidence and the weight of evidence, the errors assigned by appellant, deft below, may be grouped under 3 heads, namely

1. That the Court gave illegal & improper Instructions on the part of plaintiff & that plff's Instructions were calculated to mislead

2 That the Court refused to give proper & legal Instructions offered by deft

3. That there was no evidence to support the allegations of the petition or to support the verdict & judgment.

I. The Court gave but 2 Instructions on the part of the plaintiff:

1. The correctness of the first one of these is not questioned by appellant & is beyond cavil.

2. The Evidence both on the part of the plaintiff & the defendant concurred in showing that the train was in motion when the conductor got on & laid hold of the deceased. The plff's theory was that the conductor attempted forcibly to eject the deceased from the car whilst the train was in motion & the Instruction told the jury, that if they believed such to be the case, it was the conductor's duty first to stop the

train before attempting to put off the man. If authority is wanted to sustain a proposition so plain it is to be found in Section 43. Chapter 39. 1 R. S. 1853 page 435 - also

Sandford's Adms vs Eighth Av. Railroad Comp.

23 N. York Rep. (9 Odc. E. P. Smith) p 343

the facts of which are strictly analogous to those of the case at bar.

3. It is not perceived how either of these 2 instructions could mislead a jury.

II. The defendant asked 6 instructions embodying its view of the law governing the case, all of which were given as asked except the last which was slightly modified by the Court - The law was laid down as favorably for the defendant as it had asked - In defts motion for a new Trial the refusal to give the 6th Instruction as asked is not assigned for error. The point not having been made below cannot be urged here.

Again: the Court did not err in modifying the Instruction in question -

III. Plaintiffs evidence tended directly to support the allegations of the petition. - Defendant did not question the relevancy and sufficiency of Plffs testimony upon the trial, for it neither objected to

its introduction, nor did it ask an instruction that pltff could not recover upon the evidence as offered by her or that there was a failure of proof in that the evidence did not support the allegations of the petition. In its Mo. for New Trial defts discovers for the first time that the evidence, as it contends, does not support the allegations of the petition. The Court below, with this point before it overruled the motion for New Trials — "When the verdict of a jury comes here endorsed by the refusal of the Court which tried the cause to grant a new trial, this Court will not interfere on the ground that the evidence does not support the verdict." p 246 19 Mo. R. State vs Anderson.

IV. The matter in dispute was a question of fact which was submitted to the triers of the fact upon proper instructions & they have pronounced upon the facts. The jury by their verdict have found the facts to be as alleged in the petition, that is, they have found the allegations of the petition to be true & hence if the petition is good, the verdict & judgment must stand. But the entire sufficiency of the petition is not questioned.

V. Under Section 2nd of the act in question, if death results from "the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee whilst running,

conducting or managing any locomotive, car or train of cars, ---- the corporation in whose employ such agent + shall be, at the time such injury is committed shall forfeit + pay" ---- It will be perceived that the negligence, unskillfulness or criminal intent of the servant &c. need not be in running a locomotive or car, but "while" running the same. -- Again "criminal intent" certainly means something more than negligence or unskillfulness, for whilst a conductor may be guilty of negligence or unskillfulness in the running or management of a train, it is not easy to perceive how he can be guilty of "criminal intent" in the mere use of the implements placed in his hands by the corporation, whereas he may well be guilty of criminal intent in his conduct "whilst" or "at the time of running or managing the train.

In Schultz vs Pacific Railroad 36 Mo. R. the decision of the law under which this case arises was elaborately considered by the Court. In page 28 it is said: "We must conclude then that the true purport of the statute is that whenever any person whatever ---, shall die from any injury which is occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing the engines + trains the employer ---- shall be liable". Also bottom of page 31 "The employer is made liable for their negligence or unskillfulness or criminal intent, in the same manner as if it were his own.

(Stevens)

The facts of this case as sanctioned by the

Verdict show that Meyer died from an injury occasioned by the negligence, unskillfulness or criminal intents of Darby, the Conductor, whilst running, conducting & managing Defts train, and hence Defts liability is established.

Defts had established by the testimony of Darby the Conductor, the imminent danger the inevitable death of a person falling between the couplings: Pltff had a right to assume this fact as established & Darby in connection with the admitted fact that the train was in motion made Pltffs & Instruction perfectly proper.

No

Supreme Court of Mo.

Henriette Meyer

vs

Pacific Railroad

Respondent's Statement & Brief.

Woerner & Kehr
for Resp.d

Filed April 4. 1867
O. T. Fishback Clk
per E. P. McCarty Dep

Henretta Muir. Res. }
vs. } In Supreme Court,
Pacific Railroad, Apl. } No. 155. Oct. '66.

Statement of Points and
Authorities for Appellants.

First. Whatever view may be taken of the construction of the statute (hereafter considered) there was an overwhelming preponderance of evidence in favor of the defendant.

The case comes clearly within the rule laid down by this Court (Baker vs. Stonebroker's Adms. 36 Mo. 345). The preponderance is so great as to imply gross partiality on the part of the Jury. This Court will in such a case set aside the judgment.

Second. But if the Court will not interfere with the verdict on this ground, it is well settled that where on examination they are satisfied of that fact they will insist that the instructions given for the successful party are rightly correct; and that the unsuccessful party's rights have not been prejudiced by erroneous proceedings, or instructions in the Court below.

Carroll vs Pauls Admr. 16 Mo. 240.

Third. There was no evidence to sustain the verdict under the law and the issue as made by the pleadings

This ~~unites~~ limits in some measure the question of the meaning of the law. It is a statute and its terms are well defined. The suit is brought under the 2d Sec. (Rev. Stat. 1866 p).

That section limits the right of action to a case of negligence &c. in the running, management, or conduct of the train.

The evidence of plaintiff considered alone makes a case under the 3rd Sec. of the act. but there is no evidence of any negligence in the running, management, or conduct of the train.

There is a substantial difference between the two sections and the rights of defendants under them. The 3rd Sec. is general and remedial. The 2nd is limited by its terms, and in its very nature and terms is penal; the question of actual pecuniary injury does not arise.

The second section was intended to cover the special case of neglect in the management of the train itself. and to afford a remedy not only to passengers

but to third persons for any negligence in directing and controlling so great a physical power, as is placed in their charge.

For any other neglects on the part of railway companies, steamboat owners, &c. the parties have their remedy under the 3rd " Sec. The penalty was only intended for neglect in the management of the motive power. It would apply to collisions to running out of time, running at too great a speed, crossing highways without warning, and numerous other cases where the lives of the public or passengers are carelessly exposed to risk.

Although not decided in terms, the whole spirit of the decision of this Court in Schultz vs Pacific R. R. 36 Mo. 22 to 23. clearly shows that this construction was in the mind of the Court. That was a case within the meaning of this section.

The language of the statute is negligence "whilst running, conducting, or managing any locomotive, car, or train of cars." "whilst running, conducting, or managing, any steamboat, or any of the machinery thereof" or of "any driver of any stage coach or whilst in charge of the same as driver," It means clearly negligence in the management of the thing itself (whether loco-

motive, steamboat, or stage coach) by the person entrusted with and using the dangerous means in his hands.

The construction contended for does not deprive any person of his remedy for injuries done. It merely limits the claim under the 2d Sec. of the Act, but allows it under the 3rd Sec. The latter, (which is substantially the Lord Denman Act) is the only statute upon the subject, in most if not all of the States, and affords ample remedy in every conceivable case. The second section cannot be found in the Statutes of any other State, or in England. It is peculiar to Missouri, and while the 3rd Sec. is so ample in its terms, as to cover every case that could arise under the 2d Sec. the Court will not extend the provisions of the 2d Sec. by construction beyond the ordinary and natural meaning of the words employed. It cannot be construed to cover a case of private controversy between an employee and a ~~passenger~~ third person in which by the negligence of the employee death ensues, though such a case would create a liability under the 3rd Sec. giving

out of the duties of all employees to ~~the~~ passengers, and to the public.

This section is penal and its meaning cannot be extended.

But whether penal or not, the plain and obvious meaning of the words employed is so clear, that when the injured party has ample remedy under another section there is no occasion for extending it.

If this construction be correct, the verdict under the pleadings is wholly unsupported by evidence and the Supreme Court will set it aside. There is not a particle of proof in the case of negligence (in the) (whilst) "running, conducting, or managing the train."

State vs. Burnside 37 Mo. 343.
Morris vs. Burnes Adms. 35 " 412
Hageman vs. Jamieson 33 " 365

There was "no evidence on which the jury could be authorized upon any rational principles or according to the ordinary course of human reasoning and experience to infer the fact in issue."

Baker vs. Stonebroker, 36 Mo. 345.
Greene vs. Gallagher, 35 Mo. 226.

Fourth. The first instruction given for plaintiff was erroneous;

1st It had no basis in the evidence. There was no evidence of care or prudence on the part of deceased nor was there any evidence of negligence "whilst running conducting or managing the train".

2d It is not in the words of the statute, nor does it truly interpret the statute The instruction proceeds upon the theory that defendants are responsible under this section for the negligence of any conductor or employee whilst engaged in the running &c and ignores the idea that such negligence must exist in the ~~sup~~ method of running or conducting the train.

3rd It does not confine the plaintiff to the issue made in the pleadings. The issue as made by the pleadings is that by the negligence of defendants, whilst running &c "deceased was thrown from the train". The instruction allows a recovery if the "injuries to deceased resulted from the negligence &c. The Court cannot by instructions

change the issue made by the pleadings nor ignore the particular case there made.

Moffitt vs Conklin 35 Mo. 453.

4th It ignores the idea that the care and prudence of deceased must have existed at the time the injuries were received.

Sandford vs. 8th Av. R.R. 7 Bos. (N.Y.) 136.
Butterfield vs. Western R.R. 10 Allen, 532.
Bridge vs. Grand Junction R.R. 3 M. & Wels. 244.

Fifth. The second instruction given for plaintiff was clearly erroneous. Not an authority can be cited to support it. It was inapplicable to the case and if applicable was erroneous and a gross assumption of the province of the jury.

1st It was inapplicable, because under the issue made by the pleadings, the case of a conductor putting deceased off the cars could not arise. The allegation is that by the negligence &c whilst running &c. the train, deceased "was thrown from the car on which he was and was precipitated between the cars". By no legitimate construction of these words in the petition can the apply to the personal

act of the conductor in removing him from the train. They mean simply that he was thrown off by mismanagement of the train. The theory of this ~~con~~instruction was an afterthought. The inquiry must be confined to the very transaction described by the petition.

Shaw vs. Bost. & Worcester R.R. 8 Gray 69. 71.

2d " It was illegal, calculated to mislead and an assumption of the province of the Jury. It is not true as a proposition of law ~~that~~ and not an authority can be cited to support it. It is intended to be an application of the law of carriers to a particular fact, and the instruction should have been that if the conductor was about to put Meyer off the cars it was his duty to exercise care and prudence in doing so, or not to do so at a dangerous time or in a dangerous manner. What that care and prudence required, what was a dangerous time or dangerous manner, was a question for the Jury; whether it required the train to be fully stopped or whether in this

case it did not (the train going at a snail's pace) was an inference of fact to be made upon the evidence and whatever that inference may have been, it was not a question for the Court. If there is any point settled in this state upon the law of carriers, it is that the Court has no right by instruction to determine what particular act constitutes or does not constitute misconduct or negligence.

Boland & wife v Missouri R.R. Co 36 Mo 491
Huelsenkamp vs Citizens R.R. 34 Mo. 54

Same case affirmed, 37 Mo. 537.

The Court cannot say that a certain state of facts show negligence or misconduct or that a certain other state of facts does not show misconduct, (Cases cited above) Under this instruction the Court say that under the circumstances of this case it was a violation of duty (in other words negligence or misconduct) for the conductor to put deceased off the train while in motion however slight that motion may have been. It is hard to conceive of a case where this question of negligence was so clearly a question for the

jury and not for the Court. Let it be remembered that there is not a particle of proof even tending to show that the train was going at a rate to make it in the least dangerous to put a man off. The train did not move forty feet in all before it stopped. It had only moved 12 or 15 feet when Meyer fell (Sexton's Evidence) It could not have moved one third as fast as a man's ordinary walk. By its side was the depot platform even with the ~~platform~~ steps of the car. To assume that it was dangerous under such circumstances as a conclusion of law is clearly without authority. Under plaintiff's theory, the gist of the whole action, misconduct, violation of duty is determined by the Court. ##

In Lovett vs Salem & South Danvers R.R. 9 Allen 557, the law is ~~laid down~~ well stated that deceased should not have been ejected from the train when the train was going at a rate of speed to make it dangerous, but this was left to the jury. In Sanford vs 8th Av. R.R. 7 Bosmith (N.Y. Sup. Ct.) 127-134 the law is similarly stated. In that case the car was running slowly, and it was left to the jury to

The going of this instruction, deprived three given for defendant of their whole force and effect - They are all predicated upon the determination of the question of misconduct or negligence by the jury. When the Court assumed to determine that a particular act was in itself negligence - there was nothing left for the jury to consider but the existence of that particular act - whether it was negligent or not was taken away from them - and determined by the Court.

say whether the ~~train~~ car was moving at a rate, that would make it dangerous to eject deceased from the car under all the circumstances - The true rule is - "wherever the matter rests upon experience - discretion and judgment it is for the jury - and not the court."

Read X Redfield J. - in Vinton vs Schwab 32 Vt. 614 "The court has no right to instruct the jury that if they find certain facts proved, it is negligence"

Read X Ellsworth J. in Williams vs Town of Clinton 28 Conn. 266.

Read X See also McCully vs Clark & Thaw 40 Pa State 406 - in which the instructions held properly refused was very similar to the one excepted to in this case

The following cases all bear directly upon this question, and sustain the view here taken

Read X McGrath vs Hudson R.R.R. 32 Barb. 147-150
" Bernhardt vs Reus. & Sar. R.R. do 169 -
" Clark vs 8th Av R.R. do 662 -
" Citizens Ins Co vs Marsh 41 Pa St. 393 -
" Pa. R.R. vs Ogier 35 Pa St. 71.
" Balt & Ohio RR vs Worthington 21 Md. 286-290-91
Richmond vs Soc. R.R. 18 Cal. 353.

Read X See also Galena & Chicago RR. vs Yarwood 17 Illinois. 519 - a case very similar to this upon the point in question —

Read

In Fletcher v Bost & Maine RR - 1 Allen 9 the law is well stated. "Care and diligence should vary according to the exigences which require vigilance and attention commensurate in amount and degree to the particular circumstances under which they are to be exerted". See also Holly v Boston Gas Light Co - 8 Gray 131, Gahagan admr v Bost & Lowell RR. - 1 Allen 190.

Read X

"It is not the right of a party in a case of this kind to rely upon one or two or more facts ~~in issue~~ bearing upon the question of fault and ask the court to rule upon effect."

Sawyer v Eastern RR Co. 46 Maine 405.

The following cases are all in point upon this question and sustain the appellants view of the law. Moon v Rockwell 21 NH. 106 - Central Railroad v Moore 4 Zab. (N.J.) 830 - Aldrich v Great Western RR 2 Eng R.R cases 852. Bradley v Bost & Maine RR. 2 Cush 539 - See also Angel on Carriers § 16 - where the law is well stated - also 8 Met 91. 11 Mass 97 - 25 - 6 Shep 174 - 3 Mason C.C 132 - 8th Mees & W. 238 - 13th Ohio State 66.

way whether it was moving at a rate that would make it dangerous to eject deceased from the car under all the circumstances. In Beers vs. Housatonic R.R. 19 Conn. 566 the Court refuse to determine the question of negligence even where the facts are admitted - as that belonged solely to the jury.

That the question of negligence or misconduct is a question for the jury to be determined under the circumstances of each case is well settled law. See Aldrich vs. Great Western R.R. 2 Eng. Railway Cases, 852. Bradley vs. Boston & Maine R.R. 2 Cush. 539. See also Angel on Carriers §16. where the law is well stated. Also 8 Met. 91. 11 Wend. 25. 6 Shep. 174. 3 Mason (C.C.) 132. 8 Mees & W. 238. 13 Ohio State 66.

Sixth. The sixth instruction asked by defendant should have been given as asked, without underlineation or change. It presented defendant's case in a phase warranted by the evidence and in which he had a right to present it - the simple question of deceased's drunken condition and its contribution to cause the injury.

Seventh. The verdict was against the instructions given by the Court.

1st " Under the whole evidence it was a clear case where negligence on the part of deceased directly contributed to cause the injury and under the 3rd " and 4th " instructions given for defendant there could be but one verdict, which should have been for defendant.

That he was drunk, so as to feel and appear before and up to the time of the accident is undisputed

That he while in this condition voluntarily placed himself in a dangerous position is also undisputed.

That this misconduct directly contributed to cause the accident is sustained by overwhelming proof. Even the plaintiffs evidence considered alone does not show that there was any imprudence on the part of defendants agents, or that there was any danger of accident or injury to deceased if he had been sober and qualified to exercise reasonable care over himself.

Under such a state of facts plaintiff

was not entitled to recover. This is well settled.

See 36 Mo. 435 — 32 Barb. 398. Redfield on R. 331, 19 Ga. 440, 3 B & Ald. 304, 24 Vt. 487. 13 Barb. 9, 36 Barb. 230, 10 Mich. 193, and cases cited below.

2nd " Under the 1st instruction given for plaintiff and under the 1st 2nd & 3rd given for defendant care and prudence on the part of deceased or the absence of all negligence were made the conditions of any recovery. There is not in the whole case not even in plaintiffs own evidence one idea of proof of care on his part. The law is clear that plaintiff must show affirmatively the exercise of care and that deceased was without fault. Wilds vs Hudson R. R. 24 N. Y. 430. Maryum vs Brooklyn R. R. 36 Barb. Boland Admr vs Missouri RR 36 Mo 491 — 230. Butterfield vs Western R. R. 10 Allen 532. Sanford vs 8th Av. R. R. 7 Bos. N. Y. 136. Bridge vs Grand Junction R. R. 3 M & W. 244, See also 26 Ill. 255. 10 Mich. 193, 12 Shep. 39, 12 Met. 415. 2 Peck, 261.

There was no proof that the baggage car was permitted to be used by pass-

under which it was offered was a surprise.

It is well settled that a new trial will be granted on affidavit of surprise when the testimony of a witness is different from that on a former trial and when it could not reasonably have been anticipated.

This exception to the rule applied in Shepard vs. Citizens Ins. Co. 8th Mo. 272, is authority for the rule.

W. B. Laughlin
for Appellant

In Sup Ct No 155

Henrietta Meyer

v

Pacific Railroad

Points & Authorities

G W E Leighton
for Appellant

Filed April 4, 1867
O T Fishback Clk
per E M Carf Dep

In the Sup Ct. Mo
March T. 1867,

Henrietta Meyer Res,
vs
The Pacific R R Co Appll. } Appeal from St Louis Cir Ct

Opinion of the Court

There are two grounds urged in this Court for a reversal of the judgment; first that there is not sufficient evidence to support the verdict, and secondly, the Court improperly instructed the jury for the respondent. The doctrine is so well established that it is hardly necessary to re-iterate it, that this Court will not disturb a verdict because it is against the weight of evidence, where there is a complete and total failure of evidence, and it has no tendency to prove the issue, the Court will be warranted in determining the whole case as a question of law. But where there is any evidence

convincing to support the issue or how the allegations made by the pleadings, it is for the jury to say what weight shall be attached to it. It must be apparent at first blush, that the jury have been actuated by prejudice, or misconduct, and that their finding is wholly unsupported by the facts in the case before we have liberty or authority to interfere. This doctrine is so firmly embedded in our jurisprudence, that to hold otherwise, would be judicial usurpation, and the unsettling of well established principles. The constitution and laws of the country, have imposed upon juries peculiar duties, and without they grossly abuse their trust, this tribunal is not to invade their province and revise their work. Their opportunities for judging of the capacity, integrity and credibility of witnesses by seeing them face to

face, and observing their manner of giving their testimony, make them possess advantages which we are debarred of.

There is not such an absolute failure or want of evidence in this case as would justify us in interposing for that reason.

The second instruction given for the respondent, tells the jury, that if they believe the conductor was about to put Meyer off the car it was his duty first to stop the train before attempting to do so. And as all the evidence shows that when the supposed attempt was made, the train was not stopped, it was equivalent to withdrawing the whole question of negligence from the jury, and instructing them to find for the respondent.

From the evidence it appears that the train was just starting, and going at a remarkably slow rate of speed, and if an attempt was made to put Meyer off, it was a fact that

should have been submitted whether it was done negligently, or in a way to endanger life. To attempt to put a person off of a train when it is under full headway, or in the night at a dangerous place, would unquestionably be deemed gross carelessness and highly sinister conduct. and a court would be fully warranted in so declaring it, while expelling a man when the cars are scarcely in a perceptible motion might be devoid of all hazard, and without any negligence. Therefore it is a question for the jury, to determine with a full view of all the circumstances as shown by the facts, and the court cannot single out an isolated fact and say that it amounts to negligence as matter of law.

All the instructions asked by the defendant were given, except one which will presently be noticed, and no complaint is alleged against them. The first one

given for the appellant is not liable to any objection so far as we can see.

After the regular series were given on both sides the defendant asked the court to instruct, that if the jury believes that at the time the deceased received the injuries complained of he was so intoxicated as to be unable to exercise the care and prudence ordinarily exercised by prudent and sober men, while travelling upon railroads and that such inability on his part contributes to cause the injuries Plaintiff could not recover. The court refused to give it in that shape, but interlined it, and then gave it, making it read that if the jury believes that at the time the deceased received the injuries complained of he was so intoxicated as to be unable to exercise, and did not exercise, the care and prudence ordinarily exercised by prudent and sober men while travelling upon railroads

and that such inability and want of care on his part, directly contributed to cause the injuries plaintiff could not recover. To this action of the court in making the interlineation the plaintiff excepted.

Parties have the right to present such instructions as they see proper, and it is the duty of the court to either give or refuse them, without making any alteration or modification whatever. It is the privilege of the party to stand or fall by his own proposition, in the shape he has chosen to offer it, and if the court dissents from it, it has but one course of action to pursue, and that is to refuse it without qualification.

The conduct of the court, therefore, in this case, must be regarded as a refusal to give plaintiffs instructions; and the giving of the one in its modified form as of its motion.

In our opinion the court states

the law correctly. Without Myers' intoxication directly contributed to cause the injury, and in consequence thereof he did not exercise ordinary care and prudence, we do not see how it should be made to obviate to the detriment of the plaintiff.

The very proposition is monstrous, that because a man is drunk, although that, ~~drunkenness~~ is not the proximate cause of ~~contributed to~~ the injury, he is therefore placed beyond the pale of legal protection and may be killed with impunity.

The second instruction given for the plaintiff is erroneous and on that account the judgment is reversed and the cause remanded.

The other judges concur.

Dario Hagner

Judge Holmes concurs in reversing the judgment, but not in all the reasoning of the court.

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Henrietta Meyer
vs
The Pacific R R Co.

Opinion of the
Court - Hagner

Filed April 15. 1867
O T Fishbackelf
per E M Hardy Dep

Reversed & Remanded