

New Jersey Court of Errors and Appeals.

CHARLES J. BROOKS, Adminis-
trator &c. of Frank Brooks,
deceased,

Plaintiff-Respondent.

vs.

PENNSYLVANIA RAILROAD
COMPANY, et al,

Defendant-Appellant

At Law.

*On Appeal
from Hudson
County Cir-
cuit Court.*

BRIEF OF PLAINTIFF—RESPONDENT.

STATEMENT.

The appellant has filed twenty-three grounds of appeal (Case Page 11 &c.), all of which deal with the charge of the Trial Judge or the admission or exclusion of the testimony, with the exception of the first two, which relate to refusal to grant a non-suit and refusal to direct a verdict in favor of the defendant.

As I understand from the reading of appellant's Brief, all of these reasons are abandoned with the exception of the propriety of the Court's ruling in refusing a non-suit or a

direction of verdict.

In the Statement of Facts contained in appellant's Brief, it calls attention to the fact that "on the west side near the tracks, is a sign containing the words, 'No thoroughfare — N. Y. S. & W. property.' " (Appellant's Brief, Page 5, l. 28).

In order that this Court may not be misled as to that matter, we particularly call the Court's attention to the fact that this signboard was placed upon a pole in such a way that the signboard was parallel to Dey Street, and at right angles to the railroad right of way, and undoubtedly was intended to notify people who were accustomed to use a pathway running from Dey Street along the right of way to the south, that such pathway was within the lines of the private property of the railroad (not the appellant's railroad) and that the users of such pathway were using private property. (Case page 267, l. 10 &c.; Page 268, l. 27 &c.; Page 269, l. 1 &c.; Page 270; Page 280, l. 8 &c.; Page 281; Page 283, l. 20; Page 298, l. 1 &c.; Page 299, l. 3; Page 302, l. 17).

The motion for non-suit was based upon eight specific causes (Case page 176) which cover four grounds, to wit: (1) want of negligence in defendant; (2) contributory negligence in plaintiff's intestate; (3) plaintiff's intestate was a trespasser and was killed not within the lines of Dey Street; and (4) that Dey Street was not a public thoroughfare,

The argument of appellant's Brief seems to be confined to the question as to whether or not there was sufficient evidence in the case to go to the jury as to whether Dey Street was a public thoroughfare crossing the right of way of the N. Y. S. & W. Railroad at grade.

POINT I.

AS TO WHETHER PLAINTIFF'S INTESTATE WAS KILLED WITHIN THE LINES OF DEY STREET WAS A FACT IN SUBSTANTIAL DISPUTE UNDER THE TESTIMONY AND WAS PROPERLY SUBMITTED TO THE JURY.

The locus of the accident, as fixed by the evidence of plaintiff's witnesses, placed the deceased well within the lines of Dey Street, and the evidence of defendant's witnesses placed him at a considerable distance without those lines. The Court charged the jury that if he was killed while not within the lines of Dey Street, then the verdict should be for defendant. The jury found against the defendant on this issue and this finding was subsequently confirmed by the Trial Judge upon a rule to show cause. It was a clear question of fact.

POINT II.

ASSUMING THAT DEY STREET WAS A PUBLIC THOROUGHFARE CROSSING THE RAILROAD RIGHT OF WAY UPON WHICH DEFENDANT WAS OPERATING ITS TRAINS, THEN THE EVIDENCE CLEARLY DISCLOSED THAT PLAINTIFF WAS KILLED THROUGH ITS NEGLIGENCE.

The defendant had separated a freight train at the crossing of Dey Street, leaving an interval of about four or five feet between the two cars standing within the lines of that Street. There was no person to guard this opening at Dey Street, and the train was made up of a great number of cars linked together on the north and three or four cars on the south of Dey Street. Plaintiff's intestate walked down the southerly side of Dey Street intending to cross the tracks, and was passing through this opening between the cars, when without any warning, the engine at one end was started and the cars were jammed together, crushing him so he instantly died. This state of facts was testified to by two disinterested witnesses, children to be sure, but the only witnesses who actually saw the occurrence. No warnings of any kind were given, nor any protection offered.

POINT III

ASSUMING THAT DEY STREET WAS A PUBLIC HIGHWAY CROSSING THESE RAILROAD TRACKS AT GRADE, PLAINTIFF'S INTESTATE, A BOY THIRTEEN YEARS OLD, WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, AS A MATTER OF LAW, IN PASSING BETWEEN TWO CARS STANDING IN THE HIGHWAY AND SEPARATED FOUR OR FIVE FEET, APPARENTLY TO MAKE A PASSAGEWAY FOR PEDESTRIANS.

The evidence showed that this highway was frequently blocked by standing cars for a considerable time, and at times, passageway would

be left between the cars and such passageway used by people crossing. (Case page 99, 1. 20 &c.).

Appellant cites no authority for the proposition that a boy of thirteen years, crossing a railroad at a public highway under such circumstances, would be guilty of contributory negligence as a matter of law, and its failure to cite any such authority is probably due to the fact that none can be found.

POINT IV.

THE TRIAL COURT COMMITTED NO ERROR, HARMFUL TO THE APPELLANT, IN SUBMITTING TO THE JURY THE QUESTION AS TO WHETHER DEY STREET WAS A PUBLIC THOROUGHFARE CROSSING THE RAILROAD TRACKS AT GRADE.

The appellant has failed to furnish to this Court a complete State of Case, so far as the evidence involving the above question is concerned. The plaintiff produced and put in evidence a number of maps showing Dey Street as a public thoroughfare crossing the railroad right of way. These maps were the following:

(1) Assessment map and list for the opening of Dey Street in the City of Hudson, N. J. (Exhibit P-2, Case Page 128);

(2) Fowler's map (Exhibit P-3, Case Page 128);

(3) Fowler's map (Referred to in Case Page 132);

(4) Map entitled: "Adopted by the Board of Street & Water Commissioners, Jersey City, November 12, 1894, and by the Commissioners of Adjustment for said City, October 26, 1894" (Case Page 132);

(5) Post Map (Case Pages 133 and 134);

(6) Map of the 9th, 10th, 11th and 12th Wards, former City of Hudson, made by the Mayor and Aldermen of Jersey City, 1871 (Case Page 134).

Municipal proceedings for the acquiring and opening of Dey Street were begun in October, 1866 (Case Page 115, I. 26 &c.) and were virtually completed in January, 1870 (Case Page 119, I. 10 &c).

In addition to the documentary evidence showing the acquisition and opening of Dey Street across and on both sides of the railroad right of way, there was abundant testimony of witnesses, offered by the plaintiff, establishing the fact that Dey Street has been used for a period of over twenty years by the traveling public from one end to the other, across the railroad right of way. (See testimony of plaintiff's witnesses Charles J. Brooks, Cecelia E. Brooks, Margaret Donohue, Frederick Dietz whose testimony showed its use from 1883. Case Page 153, Elizabeth Greenwald, John Amen, August Kloeber and others.)

If any error were committed by the Trial Judge in submitting this question to the jury, such error consisted in not directing the jury that this was a public street crossing the railroad right of way at grade, and that the defendant owed the traveling public such duty as that fact entailed.

In the recent case of *Drelich vs. Erie Railroad Company*, 103 Atl. Rep., 189, evidence of a far less forceful character than that presented by the present case, was held sufficient to submit the question of public user by prescription to the jury. In this case, the evidence of the acquisition and opening of this highway by municipal authority under its charter powers is conclusive and I do not understand that the defendant seriously disputes that fact; its contention seeming to be that the mu-

nicipal authorities opened this highway on the west to the westerly line of the railroad right of way and then opened the street on the east up to the easterly line of the railroad right of way, thus leaving an hiatus to the width of the right of way through this public thoroughfare.

If, such were in fact the case, and yet the traveling public, without information on the subject, used the highway from one end to the other across this right of way for twenty years and over, surely the most favorable consideration for the rights of the defendant would require the submission of the question to the jury.

There is an intimation in appellant's Brief, that the plaintiff, in order to make out his case, was bound to prove affirmatively that the defendant, because it did not own the right of way and was a mere user of same by permission of the owner, had knowledge that this was a public highway in order to charge it with the responsibility thereby imposed to the traveling public.

No authority is cited to sustain such a contention. We submit that such is not the law, but if it were, there is ample evidence to show that the defendant did know that it was a public highway. Particular reference may be made to the testimony of defendant's witness Chase (Case Page 207, I. 23); defendant's witness Watson (Case Page 290); defendant's witness Harding (Case Page 293, I. 21) and in fact, to the testimony of all of defendant's witnesses.

It is respectfully submitted that the judgment should be affirmed, with costs.

WARREN DIXON,
Of Counsel with Plaintiff-Respondent.