

ROBERT V. DELL, PLAINTIFF AND APPELLEE, VS. MANILA ELECTRIC RAILROAD AND LIGHT COMPANY, DEFENDANT AND APPELLANT.

G.R. No. 4290. July 21, 1909

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the 1st day of April, 1907, the plaintiff commenced an action in the Court of First Instance of the city of Manila to recover the sum of P500 as damages for injuries done by the defendant to a hearse belonging to the plaintiff, which damages, it was alleged, were caused through the neglect of the employees of the defendant in operating a car upon the street railway owned by the defendant. The defendant filed a general denial.

After hearing the evidence adduced during the trial of the cause, the lower court who saw and heard the witnesses made the following findings of fact;

"From the evidence presented at the trial it appears that a car, belonging to the defendant and operated by employees of the defendant, running along Calle Cabildo, and reaching a street running at right angles to it, Calle Victoria, there ran into a hearse belonging to the plaintiff which was being hauled by one horse."

"The driver of the hearse was thrown to the ground and injured, and could only testify as to the fact of being injured, and could not give any more information for the reason that he became unconscious on being thrown from the hearse which he was driving.

"A witness, who was not present in court, but whose declaration was received as though made in court, testified that the car was running at great speed, and that it was not giving any notice by ringing of the bell of its coming. It appears that the defendant's car struck the hearse in the rear part of it and shoved it along so that finally the wheels were smashed and the hearse was overturned at the corner of the street further on from where the collision took place, and the car went clear across Calle Victoria and before it was stopped it was practically its full length beyond.

"There was evidence on the part of the defendant that the car was running at the usual speed, and that the gong on the car was repeatedly sounded; and one witness testified that the car was only going as fast as one would walk.

"I am of the opinion that if the car had only been going as fast as one would walk, it could have been stopped without collision with the hearse, and failure to do so constituted a negligent act on the part of the defendant. The fact that the car went, after the collision took place, across the street and ran nearly the length beyond the street, would indicate that it must have been going at a greater rate of speed and probably a higher rate of speed than would be justified at such places as that where the accident occurred, and that the running at such a rate would constitute negligence on the part of the defendant.

"The fact that the hearse had nearly crossed the track, so that the car only came in collision with the hind part of it, would indicate that plaintiff's driver had not heard the striking of the gong, and that he had the right of way.

"The evidence in relation to the value of the injury to the hearse was very poor. The plaintiff testified that the hearse was completely destroyed, so that it would be as expensive to repair it as it would to make a new one, and that it was worth probably the sum of P500.

"In the light of the circumstances which appeared in the case, that the hearse was driven along by the car, the wheels smashed and then the hearse overturned, must indicate that the hearse was not wholly destroyed, or that if it was so destroyed is to render it entirely worthless that it was of small value in the first place, and I find from a fair deduction, from the evidence as presented, that the value of the damage to the hearse was the sum of P300.

"The conclusions are, that the defendant, having operated its car upon the street in a negligent manner, so that the plaintiff's hearse was collided with and partially destroyed, is liable for the damages arising therefrom."

Upon these facts the lower court rendered a judgment in favor of the plaintiff and against the defendant for the sum of P300 and the costs of the action. From this decision of the lower court the defendant appealed, and made the following assignments of error:

"I. The court erred in finding that the damage to plaintiff's property was caused by defendant's negligence.

"II. The court erred in failing to find that the negligence of plaintiff's employee caused, or contributed to, the damage.

"III. The court erred in rendering judgment for plaintiff.

"IV. The court erred in denying defendant's motion for a new trial."

With reference to the first above-noted assignment of error the lower court found that the defendant was guilty of negligence. Upon this question the lower court said :

"I am of the opinion that if the car had only been going as fast as one would walk, it could have been stopped without collision with the hearse, and failure to do so constituted a negligent act on the part of the defendant. The fact that the car went, after the collision took place, across the street and ran nearly the length beyond the street, would indicate that it must have been going at a greater rate of speed and probably a higher rate of speed than would be justified at such places as that where the accident occurred, and that the running at such a rate would constitute negligence on the part of the defendant.

"The fact that the hearse had nearly crossed the track, so that the car only came in collision with the hind part of it, would indicate that plaintiff's driver had not heard the striking of the gong, and that he had the right of way."

Was this finding of fact in accordance with the preponderance of evidence adduced during the trial of said cause? If it is, then the finding of fact by the lower court must be sustained. (*Rakes vs. Atlantic, Gulf & Pacific Co.*, 7 Phil. Rep., 359; sec. 1, Act No. 1596.)

The proof relating to the negligence of the parties is as follows: Alfred B. Jones testified-

"That on the 2d day of March, 1907, the said witness was accompanying a hearse owned by Mr. R. V. Dell, and was going along Calle Victoria toward Calle Cabildo, in the city of Manila; that as the said hearse reached the corner of Calles Victoria and Cabildo, a car owned by the Manila Electric Railroad and Light Company was going through said Calle Cabildo at a high rate of speed in the direction of the Luneta; that as the car was nearing the said corner no signal was given nor was the gong sounded to warn the public; that on the said date and under the said circumstances the car above referred to collided with the said hearse owned by R. V. Dell, breaking and destroying the same through no carelessness on the part of the persons in charge thereof, and that the said collision and damage were caused solely through the negligence of the Manila Electric Railroad and

Light Company and its agents who conducted the said car on the aforesaid occasion."

Lorenzo Hieronimo, a witness for the plaintiff, testified:

"Q. On or about the 2d day of March of this year what work were you engaged in for Mr. Dell?-A. I was employed by him as a cochero.

"Q. Were you driving a carriage of his on that day?-A. Yes, sir.

"Q. What happened to that carriage on that day?-A. We were coming from Bagumbayan in the direction of the Bureau of Health to obtain a license, and we were approaching Calle Cabildo; we did not hear anything to show that a street car was coming, and so I did not slacken the speed of my horse, and when I was crossing the track at Calle Cabildo coming along Calle Victoria the carriage was struck by a street car.

"Q. How far were you on the track when you noticed the car coming?-A. The horse was already on the track where the street cars pass by.

"Q. Did you hold up the horse or try to go ahead?-A. I continued driving ahead, so that the street car would not catch us.

"Q. At what speed were you going?-A. Not very fast, and not very slow, the horse was on a trot.

"Q. Is this a very fast horse?-A. No, sir; not very fast.

"Q. Did you have him under control at that time?-A. Yes, sir.

"Q. Did this man here [indicating Van Hoven] come to the hospital to talk with you?-A. I believe so, I believe he spoke to me at the hospital.

"Q. Did you tell Mr. Van Hoven at the hospital that you tried to stop the horse before you collided with the street car, but that you could not because he was hard bitted?-A. I did not say such a thing.

"Q. Did you say that to anybody at the hospital?-A. No, sir; to nobody."

Antonio Legarda, a witness for the defense, testified:

"Q. Were you a passenger on the street car last March when it struck an undertaker's wagon?-A. Yes, sir.

"Q. Where did the accident happen on Calle Cabildo?-A. At the crossing of Calle Victoria with Calle Cabildo, in front of the Young Men's Christian Association building.

"Q. Will you please state to the court what you saw in regard to the accident?-A. When the car came near to Calle Victoria I observed that the motorman rang the bell rapidly. Then I put my head out of the window on the right-hand side of the car as going on, and I saw a horse pulling a wagon, and observed that the driver held the reins very tight, then I withdrew my head from the window and saw the wagon just in front of the street car at approximately the distance of one meter or a meter and half from the driver of the wagon to the street car. Then I said to myself that a collision will be inevitable. At the time the motorman was ringing the bell continually, and he put on the brakes, and when the street car struck the wagon one of those who were sitting on the box of the wagon jumped on the sidewalk and the cochero was dragged by the horses because he did not let go of the reins, but was holding on to them tightly, and a few seconds afterwards I saw that his head was bleeding.

"Q. Where did the street car stop?-A. Two or three meters beyond Calle Victoria.

"Q. In front of the Young Men's Christian Association building?-A. Yes, sir.

"Q. Was the car clear of Calle Victoria when it came to a stop?-A. I believe so, but I am not sure.

"Q. And the first thing you saw when you looked out of the window was the cochero?-A. No, sir; I saw about

two-thirds of the horses.

"Q. How many horses were there?-A. Either one or two, I do not remember.

"Q. When the street car struck the wagon what happened to the wagon?-A. It was dragged along, and the two wheels were torn off.

"Q. What happened to the carriage after that, was it tipped over, or did it stand up?-A. It was thrown on the side.

"Q. And when the wagon tipped on its side what part of the street was it on?-A. As we were going, on the right-hand side of the street.

"Q. Tell the court if you can just where the car stopped.-A. Just about the first window of the Young Men's Christian Association building.

"Q. The front end or the rear end?-A. If I remember it was the middle.

"Q. Then the car was just about clear of the corner of the Young Men's Christian Association building?-A. About that.

"Q. And what became of the driver?-A. He was dragged along by his horse; he did not let go of the reins.

"Q. Did the horse run away?-A. I think it was stopped at last by some people there.

"Q. Were the ruins of the carriage after the accident clear of Calle Victoria?-A. It was on Calle Cabildo."

Matias Enriquez, a witness for the defense, testified :

"Q. Did you see the undertaker's wagon before the car struck it?-A. Yes, sir.

"Q. From which direction was the wagon coming?-A. From the left-hand side, going in the direction of Calle Palacio.

"Q. At what speed was the wagon going before it was struck?-A. It was a big horse, and it was going quite fast.

"Q. How fast was the street car going?-A. It was going very slow, because a woman passenger had just got off the car.

"Q. State whether or not the gong of the car was rung before coming to the corner?-A. Yes, sir.

"Q. Was the wagon pushed along by the street car?-A. Yes, sir; and on account of the fastness of the horse the wagon tipped over, and the cocher fell at the door of the cafe" of the Young Men's Christian Association."

Eulalio Atillo, a witness for the defense, testified:

"Q. What is your occupation?-A. At the present time I have no job; I am working as a day laborer.

"Q. Were you formerly a motorman for the Manila Electric Railroad and Light Company?-A. Yes, sir.

"Q. Do you remember a collision between a Santa Ana car and an undertaker's wagon last March?-A. Yes, sir.

"Q. What were you doing at the time?-A. I was a motorman, No. 2028.

"Q. Were you in charge of the street car that struck the undertaker's wagon?-A. Yes, sir.

"Q. At what place did that accident occur?-A. At the corner of Calle Victoria and Calle Cabildo.

"Q. At what speed was the car running before coming to the corner of Calle Victoria?-A. There is a post to stop at near the Army and Navy Club, and a woman passenger wanted to get off there, so I stopped the car between

this post and the next one following:

"Q. How fast were you running at the time of the accident?—A. I was just getting the current.

"Q. Was the gong ringing or not?—A. When I started I rang the bell, and when near Calle Victoria I rang the bell again.

"Q. Where were you when you first saw this undertaker's wagon?—A. There was no time to see; I saw the wagon all of a sudden; I was just arriving at the corner of Calle Victoria and did not have time to stop, and as a matter of fact the street car struck the rear part of the wagon, and I could reach the wagon with my hand.

"Q. Where did your car come to a stop?—A. Near the Young Men's Christian Association building; the whole of the car had not passed Calle Victoria.

"Q. When you stopped the current, how near were you to Calle Victoria?—A. As I have stated there are two posts, one near the Army and Navy Club and one near Calle Victoria, and I stopped the car between these two posts to let a woman passenger get off.

"Q. Do you know how far apart these posts are?—A. Yes, sir.

"Q. How far apart are they?—A. Something farther than from where I am sitting to that wall yonder [indicating a distance of about 30 feet].

"Q. When you started your car after the woman got off between those two posts, did you turn on the full current?—A. No, sir; as I was ahead of time I was going very slow. I only turned it on to the first mark.

"Q. How fast does the car go when you turn the crank to the first point, if you know?—A. About as fast as a man could walk.

"Q. And did you increase the speed before coming to the corner?—A. I did not.

"Q. Did you shut the power off any time after you commenced?—A. I did on coming to cross the corner.

"Q. From the point where the woman got off, did you not shut off your current so that you could keep within your time?—A. No, sir."

Celestino Chaves, a witness for the defense, testified:

"Q. Were you a passenger on the street car last March, when it came in collision with an undertaker's wagon?—A. Yes, sir."

"Q. What part of the car were you seated in?—A. Second class.

"Q. Where did that accident occur?—A. Just at the corner of Calle Cabildo and Calle Victoria.

Q. State what you saw of the accident.—A. I was reading a newspaper, and when the collision took place I lifted up my head and saw that the undertaker's wagon was tipped over on the right-hand side of the street car.

"Q. Did you not see the wagon before it was struck?—A. No, sir.

"Q. At the time the car reached Calle Victoria at what speed was it running?—A. It was going slowly.

"Q. State whether or not the gong was ringing.—A. I did not pay any attention to that, as I was reading.

"Q. Did the motorman do anything to stop the car at Calle Victoria?—A. Yes, sir.

"Q. What did he do?—A. He put on the brakes.

"Q. Where did the car come to a stop?—A. Almost in front of the Young Men's Christian Association building.

"Q. Had the street car struck the wagon when you saw the motorman put on the brakes?-A. When I heard the striking of the street car with the wagon I lifted up my head, and saw the motorman putting on the brakes.

"Q. About where was the carriage lying?-A. The carriage remained almost tipped over the sidewalk.

"Q. In front of any special building?-A. In front of the Young Men's Christian Association building."

Juan Ignacio, a witness for the defense, testified:

"Q. Were you on a street car last March when it struck an undertaker's wagon,-A. I was.

"Q. Where did this collision occur?-A. At the corner of Calle Cabildo and Calle Victoria.

"Q. What did you see?-A. I was in the street car, looking forward, and saw the motorman ringing the bell repeatedly, and when we were near Calle Victoria this wagon was passing by, and bear in mind the two corners at Cabildo and Victoria are very sharp, and the wagon coming up Calle Victoria tried to avoid the collision, and as a matter of fact the wagon was struck in the rear part, and the motorman was ringing the bell all the time.

"Q. What did the motorman do to avoid the collision, if anything?-A. He put on the brakes, that is what I saw. We were going very slow, and that is the way the wagon was struck in the rear part, and it was pushed along. The cochero had hold of the reins very tight and as they did not break he was dragged along by the horse and fell down, and I believe his head struck on the sidewalk.

"Q. Where did the street car stop?-A. Just on Calle Victoria, I believe the car had gone on 3 or 4 meters. The front of the street car was ahead of Calle Victoria.

"Q. Did you hear the bell ring before you came to Calle Victoria?-A. Yes, sir.

"Q. How fast was the horse going just before it crossed the track?-A. Slow, and then when the cochero saw the street car coming he tried to go fast, and as a matter of fact the rear part of his wagon was pushed onto the sidewalk.

"Q. How far away were you from the corner before you saw the horse on the track?-A. I saw the wagon passing by, and when I paid attention was when the street car struck it.

"Q. You paid no attention to it when you first saw it?-A. Yes, I saw the wagon coming from Calle Victoria, but I did not pay much attention until the car struck it.

"Q. Then before the accident happened you could not say-you do not know how near or far away you were from the horse and wagon?-A. I could not tell how far; I saw the wagon coming from Calle Victoria, and just as the car was passing by it struck the wagon.

"Q. Was the street car going very slow?-A. Very slow."

An examination of this proof shows some conflict with reference to some important facts. Some of the witnesses testified that the hearse driven by the plaintiff was going slowly at the time the accident occurred, while others testified that the hearse was going rapidly. Some of the witnesses testified that the motorman was sounding the gong all the time while the car was passing Cabildo Street. The motorman himself, however, who probably was giving more attention to that particular matter than the passengers or any of the other witnesses present, stated that he sounded the gong when he came near to Victoria Street and does not pretend that he was sounding the gong all the time. His testimony is open to the clear inference that he did not sound the gong until after he saw the hearse and horse in the street in front of him. All the witnesses agree that the hearse was crossing the street from left to right. Some of the witnesses (passengers on the car) testified that they looked out of the right-hand side of the car and saw the horse and a part of the hearse before the car came in contact with the hearse. Had the car been moving

slowly, as contended by the defense, and had the motorman had the control of his car which he should have had, he certainly might have stopped his car, without causing the injuries complained of. The lower court found that the fact that the car went across the street after the collision took place, and nearly the full length of the car beyond the street, indicated that the car, was moving at a higher speed than could be justified at such places, and that moving at such a rate of speed constituted negligence on the part of the defendant.

The witness Chaves testified in effect that the motorman put on the brakes at the time the car struck the hearse. This fact is also corroborated by the motorman. He said, in answer to the question, "How fast were you running at the time of the accident?:" "I was just getting the current." "Getting the current" is a different effort from stopping the car. The motorman further said in answer to the question, "Did you shut off the power any time, etc.?" "I did on coming to cross the corner." We have then the proof that some of the passengers saw the horse and a part of the hearse out of the window on the right-hand side of the car before the collision took place; that the motorman put on his brake at the time of the collision, and also that at the time of the collision the motorman was just "getting his current."

This all goes to show that the motorman had not taken the precautions necessary to avoid the accident which actually occurred, or, in other words, he did not have that control of his car required under the conditions, considering the exceedingly narrow streets through which he was running and which he was crossing. The driver of the hearse, so far as the record shows, had no notice that the street car was approaching, and entering and crossing, as he did and having nearly crossed the street, he had the right of way. The car had no paramount right of way over the vehicle at the intersection or crossing of the streets. The rights of each were equal.

Upon the question of the duty of a street railway company operating in the streets of a city, there have been literally hundreds of decisions in the United States as well as in the different states of Europe. In the United States, especially, for the reason that the facts are found by a jury, and the question of negligence or the lack of care or the exercise of care has so largely depended upon the peculiar circumstances, perhaps existing at the time of the trial only, it is futile to attempt to harmonize the rules as to what particular set of facts will or will not constitute negligence. There are, however, some general rules relating to the duty and obligations of those who use the public thoroughfares, whether they be pedestrians, carriages, or street car companies that are well recognized. They may be stated as follows:

First. The entire public has a right to the use of the public highways and streets of the city. A street car company has no paramount right of way over pedestrians or vehicles at street crossings. The rights of each are equal. (Joyce on Electric Railways, section 589.)

Second. This right in the street is equal and each may use it to his best advantage, having a just regard for the equal rights of others. (O'Neil vs. Railroad Company, 129 N. Y., 125.)

Third. The right to use the street for lawful purposes is not different or enlarged or diminished simply because one uses it in one way as a pedestrian or another uses it in another way with his horses and carriages and still another uses it by other means of locomotion. However, it may be that certain portions of the street may be designated or especially prepared for pedestrians and another portion for carriages, in which case if a pedestrian should use that portion assigned for horses and carriages or vice versa, a different degree of care might be required.

Fourth. The mere fact that a car company has been permitted to operate its cars in the streets has in no way, in the absence of express provisions of law, abridged or lessened the rights of others who desire to make use of the streets. Owing to the fact, however, that a street car runs upon rails fixed in place, it must follow the track. Other persons using that portion of the street must recognize this fact, and, therefore, the "rules of the road" with reference to turning out, etc., do not apply to such companies.

Fifth. The laying down of rails in the streets of a city and the running of street cars over them for the accommodation of persons desiring to travel in that way on the streets is only a later mode of using the land as a way—using it for the very purpose for which it was originally taken. This use of the street may be a change in the mode, but it is not a change in the use and purpose for which streets are dedicated. The land is still used for a highway. This rule of law applies equally whether the motor for propelling the car is a horse or electricity.

Sixth. The people of a city and vehicles of whatever kinds, in the absence of express legislation, have the same right to pass along an intersecting street as a street car to go across it. The car has a right to cross and must cross the street, and pedestrians and vehicles have a right to cross and must cross the railroad track; neither has a superior right over the other; their rights are equal.

Seventh. The drivers and conductors of street railway cars, whatever the mode of power, have, in general, the same rights, and duties, and no greater and no less than those who manage other vehicles crossing their course.

Suppose, for example, that a street railway company should operate two lines of cars on cross streets in the same city, would the company allow its employees to cross an intersecting street with its cars without having the car under such complete control that it might be stopped at any moment in order to avoid collision? This question the railroad company, of course, would answer in the negative. This rule would be adopted and enforced simply out of the abundance of caution to protect its own property and the lives of its patrons, but the crossing lines have no greater right simply because they are owned and operated by the same company. The same rules must be enforced when such crossing lines are controlled by different companies, or otherwise there would be endless confusion and injury. The street car company having no greater rights in the streets than other carriages, etc., then the same degree of care must be exercised as to carriages as would be exercised as to other cars crossing streets.

Eighth. One about to drive across a street car track at a public street crossing is not required to look along the whole length of the visible track to see if a car is coming, but only far enough to warrant an ordinarily careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car is in such proximity, as, if properly managed, to endanger his safety in crossing.

Ninth. Negligence in approaching the crossing of a street car track, without having his horses under control, will not preclude a recovery for injuries which he receives by a collision with a street car in attempting to cross in front of the car, if at the time he discovered the car the circumstances were such as to justify a prudent man in attempting to make the crossing. (*Garritty, etc., vs. Detroit Street Railway Company*, 37 *Lawyers' Reports Annotated*, 529.)

Tenth. The right which a street car (whatever be its motive power) has in a highway or street is not in its nature higher than the right of other travelers, but is a common right with the others, the exercise of which the street car and the other travelers shall use and conduct so as not to interfere unreasonably with the just rights of each.

With reference to the second above assignment of error, the defendant and appellant cites many cases in support of his argument that the plaintiff by his own negligence contributed to his injuries and, therefore, can not recover. This court in a divided opinion (*Rakes vs. Atlantic, Gulf and Pacific Co.*) has repudiated the doctrine of contributory negligence as adopted in the United States and England and has adopted in its stead a doctrine which might be designated a proportional contributory negligence doctrine. This doctrine must stand until it is overruled, whether we agree with it or not. Mr. Justice Tracey wrote that opinion. The doctrine established in the majority opinion seems to have been taken from the jurisprudence of France, Spain, and Canada. (*Rakes vs. Atlantic, Gulf and Pacific Co.*, 7 *Phil. Rep.*, 359, 371, 372.) In that case this court adopted the doctrine that the contributory negligence of the person injured had the effect only of reducing the amount of damages which he might recover, and cited decisions of the supreme court of France in its support. The court further held that contributory

negligence did not exonerate the defendants whose fault had been the immediate cause of the accident, but entitled them to a reduction of damage's only.

Upon the question of the amount of damages, the only proof is that found in the testimony of the plaintiff himself. He testified that the damages were "in the neighborhood of P500." From the record it appears that the defendant, through its claim agent, indicated to the plaintiff that P200 would be paid to settle the claim made by the plaintiff. The lower court rendered a judgment in favor of the plaintiff and against the defendant for P300 and costs.

We are of the opinion, and so hold, that in view of all the facts, the judgment of the lower court should be affirmed, with costs.

Arellano, C. J., Torres and Mapa, JJ., concur.

Carson and Willard, JJ., dissent.

DISSENTING TRACEY, J.,

The driver of the plaintiff's wagon was guilty of negligence which contributed as a cause to the accident itself, and for that reason the plaintiff should not recover. The rule of contributory negligence in this jurisdiction was laid down in the Rakes case (7 Phil. Rep., 359) to be that, where the negligence of the party injured has contributed only to his own injury, he may recover his proportional damages, but when it has contributed as a cause to the accident itself, he can not recover, the court saying at page 374:

"Difficulty seems to be apprehended in deciding which acts of the injured party shall be considered immediate causes of the accident. The test is simple. Distinction must be made between the accident and the injury, between the event itself, without which there could have been no accident, and those acts of the victim not entering into it, independent of it, but contributing to his own proper hurt. For instance, the cause of the accident under review was the displacement of the crosspiece or the failure to replace it. This produced the event giving occasion for damages; that is, the sinking of the track and sliding of the iron rails. To this event, the act of the plaintiff in walking by the side of the car did not contribute, although it was an element of the damage which came to himself. Had the crosspiece been out of place wholly or partly through his act or omission of duty, that would have been one of the determining causes of the event or accident for which he would have been responsible. Where he contributes to the principal occurrence as one of its determining factors, he can not recover. Where, in conjunction with the occurrence, he contributes only to his own injury, he may recover the amount that the defendant responsible for the event should pay for such injury, less a sum deemed a suitable equivalent for his own imprudence."

Under the prevailing American rule, the plaintiff can not recover if chargeable with contributory negligence of any kind.

In this case, the plaintiff's servant, the driver of his wagon, testified as follows:

"And we were approaching Calle Cabildo, we did not hear anything to show that a street car was coming, and so I did not slacken the speed of my horse, and when I was crossing the track at Calle Cabildo, coming along Calle Victoria, the carriage was struck by a street car.

"Q. How far were you on the track when you noticed the car coming?-A. The horse was already on the track where the street cars pass by.

"Q. Did you hold up the horse or try to go ahead?-A. I continued driving ahead, so that the street car would not catch us.

"Q. How far away was the car when you first saw it?-A. I did not pay any attention to the distance of the car, I only paid attention to my own rig, to avoid its being struck by the street car.

"Q. Where did this accident happen?-A. On Calle Cabildo.

"Q. And what other street?-A. Crossing Calle Cabildo, going along Calle Victoria.

"Q. Are the corners of the street there very sharp?-A. Yes, sir; they are sharp.

"Q. And coming up Calle Victoria you can not see down Calle Cabildo until you are about to cross?-A. Yes, sir; until you get to the corner you can not see Calle Cabildo.

"Q. What part of the carriage did this street car strike?-A. I could not tell you, because when the street car struck the carriage I fell from the box and do not know what happened.

"Q. At what speed were you going?-A. Not very fast and not very slow, the horse was on a trot.

"Q. Is this a very fast horse?-A. No, sir; not very fast.

"Q. Did you have him under control at that time?-A. Yes, sir."

Antonio Legarda, a passenger on the car, testified:

"Then I put my head out of the window on the right hand side of the car as going on, and I saw a horse pulling a wagon and observed that the driver held the reins very tight, then I withdrew my head from the window and saw the wagon just in front of the street car at approximately the distance of one meter or a meter and a half from the driver of the wagon to the street car.

"Q. Do you know at what speed the horse was going before the collision?-A. At the moment before the street car struck the wagon, it was going very slow, and it seems to me that the cochero was pulling on the reins.

"Q. And the first thing you saw when you looked out of the window was the cochero?-A. No, sir; I saw about two-thirds of the horses.

"Q. Do you know whereabouts the street car struck the wagon?-A. On the rear part, about the rear wheel."

Matias Enrique, a policeman, also a passenger on the car, testified:

"Q. Did you see the undertaker's wagon before the car struck it?-A. Yes, sir.

"Q. From which direction was the wagon coming?-A. From the left-hand side, going in the direction of Calle Palacio.

"Q. At what speed was the wagon going before it was struck?-A. It was a big horse and it was going quite fast.

"Q. How fast was the street car going?-A. It was going very slow because a woman passenger had just got off the car.

"Q. State whether or not the gong of the car was rung before coming to the corner.-A. Yes, sir.

"Q. In what part of the car were you standing?-A. I was on the first seat, first class."

Eulalio Atillo, the motorman, said "and as a matter of fact the street car struck the rear part of the wagon and I could reach the wagon with my hand."

Juan Ignacio, another passenger, testified "and as a matter of fact, the wagon struck in the rear part and the motorman was ringing the bell all the time."

The two streets in question, like most of those in Intramuros, are narrow, with scant sidewalks and lined with solid buildings, meeting at right angles, so that coming down one street it is impossible to see up the other until almost in the crossing roadway. To approach this crossing with a horse at a fast trot, without slackening speed, without listening, and without noticing the rumble of the car (waiving the disputed question of the ringing of the bell), all the time knowing that cars were continually crossing there, was negligence on the part of the driver. Street cars could not run at a rate of speed to render them of service to the public were it necessary to so slow them down that they could be stopped on the instant of the breaking forth from cross streets of vehicles traveling too fast to be pulled up before crossing the track. Indeed, to control the heavy cars of modern street railways to this extent, would be impossible. Approaching such corners the motorman of the car is obliged to be on his guard and on the lookout for crossing vehicles, and an equivalent duty rests upon the drivers of those vehicles to be on the lookout for the car.

In *O'Neil vs. The Dry Dock Railroad Company* (129 N. Y., 125), Judge Earl well states the law of city street crossings. Referring to vehicles traveling along the railway tracks, he observes (p. 130) :

"As to such vehicles, the railways have the paramount right to be exercised in a reasonable and prudent manner. But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street, and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other."

It was the duty of the driver of the wagon on reaching the crossing to look for an approaching street car. Had he done so, he could not have failed to observe it. That he did not do so, is apparent from his frank testimony; that he had ample time to do so, is indicated from the fact that the car struck the rear part of the wagon. He either did not look for the car, or he saw it and took his chance of clearing the crossing. A grosser case of contributory negligence can hardly be found in the books. It contributed to the accident itself, and, applying the rule of the *Rakes* case, the plaintiff should not recover.

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