

ANTONIO MESTRES, PLAINTIFF AND APPELLANT, VS. THE MANILA ELECTRIC RAILROAD & LIGHT CO., DEFENDANT AND APPELLEE.*G.R. No. 8745. December 11, 1915*

Ponente: MORELAND, J.

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This is an action to recover damages for an injury to plaintiff's automobile as the result of a collision with one of defendant's trolley cars, which, it is alleged, was wholly the fault of the defendant because (a) "the motorman * * * failed to use care and diligence * * *;" (b) "failed to cause the gong of said car to be struck;" and (c) "* * * was proceeding at an excessive rate of speed * * * ." The answer is a general denial, coupled with an averment that the injury was caused solely by the negligence of the person in charge of the automobile.

The judgment was for defendant, dismissing the action after trial, and the plaintiff appealed.

On the part of the appellant it is contended that, on the night of the 24th of December, 1911, between the hours of 10 and 11 o'clock, the appellant's automobile, while in the possession of and being operated by one Luis R. Yangco, to whom it had been loaned, was proceeding along the left side of Arquiza Street, in the city of Manila, at a slow rate of speed and, on arriving at Nebraska Street, which runs at right angles to Arquiza, turned to the left into that street. The automobile had entered Nebraska, which is one of the streets of the city of Manila occupied by defendant company's street car tracks, but had not yet completed the turn when the street car belonging to the defendant company collided with the automobile, forcing it along Nebraska for a distance of about 60 feet in a direction opposite to that in which it was going and damaging it seriously. It is claimed by appellant that, when the automobile turned into Nebraska from Arquiza, the street car was at Mercado Street, a distance of 111.35 meters from the automobile and approaching "pretty fast;" and that, notwithstanding every effort of Yangco to complete the turn and leave the track, he was unable to do so before the collision as the motorman of the car made no effort to stop or slacken speed until within a yard or a yard and a half of the automobile when it was too late.

It is contended on behalf of the appellee that the street car was running along Nebraska Street at a reasonable rate of speed and, when near Arquiza, the automobile in charge of Yangco came into Nebraska from Arquiza at an excessive rate of speed without the slightest precaution on the part of the driver and, as a result, collided with the street car before the motorman could bring the car to a stop.

We are satisfied that the judgment dismissing the action is correct and must be affirmed.

The appellant bases his whole case on the claim that the motorman saw the automobile on the street car track 371 feet ahead of him and that, notwithstanding, he drove the car forward at full speed utterly regardless of the presence of the automobile and its occupants. Appellant says: "It was proved beyond reasonable doubt, and not even disputed, that: (a) When the automobile turned into Nebraska, the street car was at Calle Mercado—a distance of 111.35 meters or 371 feet from the auto; (b) The collision occurred at a point about six feet south of electric light pole No. 895. (c) The street car dragged the auto back and south along Nebraska to about the center of

Arquiza, a distance of 71 feet from pole No. 895."

Arguing from these premises counsel for appellant says: "From these undisputed facts it necessarily follows that while the auto was proceeding north on Calle Nebraska for a distance of no more than 60 feet, the street car traveled south on Calle Nebraska a distance of not less than 300 feet. Or in other words the street car had a speed at least five times greater than the speed of the auto. Mr. Yangco states he was making the turn on first speed at the rate of about 5 to 8 miles an hour. Therefore, if the auto was traveling at the rate of 5 miles an hour, the street car must have had a speed of 25 miles an hour. If the auto had a speed of 8 miles an hour, the street car must have had a speed of 40 miles an hour."

We do not believe that counsel's statement of the facts is sustained by a fair preponderance of the evidence or that his arguments, based on the facts stated, are sound. His facts are not sufficient to account for the accident. It appears from the evidence in the case, indeed, is undisputed, that the moment that the automobile issued from Arquiza into Nebraska it touched the tracks of the defendant company. It is also undisputed that the instant the automobile issued from Arquiza into Nebraska, if not before, the driver thereof could, if he looked, have seen the street car at or beyond the intersection of Nebraska and Mercado, a street running parallel to Arquiza and, therefore, at right angles to Nebraska, 371 feet distant. It is also a fact undisputed that an automobile entering Nebraska from Arquiza, while, perhaps, touching the tracks of the defendant company while making the turn, will, going at a speed which is usual under such circumstances, be clear of the track within a few seconds. It necessarily follows from these facts that, if the appellant's contention is true, namely, that Yangco saw the street car at Mercado the instant that he entered Nebraska from Arquiza, he must have remained on the track while the street car was running 371 feet. It is undisputed that the street car stopped at the intersection of Mercado and Nebraska, and plaintiff himself says that the automobile came into Nebraska while the street car was still at or near Mercado. According to his own contention, therefore, the automobile must have remained on the track while the street car was leaving Mercado, while sufficient time elapsed for it to reach its usual speed (plaintiff says an excessive speed), while it covered the balance of the 371 feet and, finally, collided with the automobile. Under this theory of the case, therefore, it is clear that both the motorman and the driver of the automobile were grossly negligent, the former in that he failed to see the automobile on the track, or, seeing it, failed to stop, although he traversed a distance of 371 feet, and the latter because he failed to leave the track, although to do so he had at his disposal the time occupied by the street car in covering a distance of 371 feet from a standstill. Under the *Rakes* case plaintiff cannot recover under such circumstances, as the negligence of the automobile driver was one of the determining causes of the accident; in other words, he contributed to the principal occurrence as one of its determining factors. (*Rakes vs. Atlantic, Gulf and Pacific Co.*, 7 Phil. Rep., 359; *Bernardo vs. Legaspi*, 29 Phil. Rep., 12.)

It is true that the driver of a street car may not, without liability under either the criminal or the civil law, or both, intentionally drive the car against or over a person on the street car track, even though such person may not be, lawfully there, or may be guilty of gross negligence in remaining there. He must use ordinary care even though persons on the street car track are there by reason of their own negligence and are occupying the track negligently or unlawfully. It may be said, however, that, where a person is nearing a street crossing toward which a car is approaching, the duty is on the party to stop and avoid a collision who can most readily adjust himself to the exigencies of the case, and where such person can do so more readily, the motorman has a right to presume that such duty will be performed. Ordinarily the motorman on a street car has a right to assume that a person who has placed himself on the street car track ahead of the car will move therefrom before the car has reached him, provided the distance between the car and the person on the track is such that such person will have time and, apparently, has the ability to do so. In the case at bar it was the duty of the driver of the automobile, assuming that he saw the car approaching at a distance of more than 370 feet, to leave the track. It is undoubted that he had

abundant time to do so before the street car reached him; and, if he permitted the car to collide with his automobile under such circumstances, he is guilty of such negligence as would prevent a recovery for the damage sustained.

It was definitely established by the testimony of the defendant that a clear view of Nebraska as far north as Mercado and even farther was obtainable by the driver of the automobile for some little distance before he arrived in Nebraska. This appears from the testimony of defendant's witnesses Bartholomai and Bailey and also from that of Pablo Lucas, a servant of Yangco, who was sitting in the rear seat of the automobile at the time the accident occurred. This is also, in effect, admitted by Yangco himself in his testimony. If, on approaching Nebraska, the driver of the automobile saw the street car coming south on Nebraska at such a distance and proceeding in such a manner that he could not have passed into Nebraska safely, it was his duty to reduce speed or even stop the automobile altogether. Certainly if the automobile was struck on turning into Nebraska and before it could leave the street car track, then the street car, at the time the automobile entered Nebraska, was at a point and coming at a speed which rendered the entrance into Nebraska dangerous. It having already been observed that the driver of the automobile could have seen the street car coming down Nebraska for a considerable distance before he entered that street, it is entirely clear that he was negligent in not taking such precautions as would have avoided a collision. On entering Nebraska from Arquiza it was the duty of the driver to use reasonable care, and particularly when he saw, as plaintiff admits he did, a street car coming towards him at a distance and with a speed which made the attempt to enter Nebraska dangerous.

From the evidence it appears that the driver of the automobile was in one of the two situations just described. He, being on the street car track, saw the car coming at a distance of 371 feet and failed to leave the track; or else, seeing, or being able to see, the street car coming at a distance and with a speed making it dangerous to enter Nebraska, nevertheless, entered that street and received the injury complained of. The appellant has adopted the theory that the driver of the automobile calmly remained on the track and permitted himself to be struck by the street car, which, when he first saw it, was 371 feet away. The defendant has pinned its faith to the theory that the automobile dashed suddenly out of Arquiza into Nebraska without forethought or care on the part of the driver and collided with the car which was passing on Nebraska. Of these two theories, that proposed by the defendant is to us, under all the facts and circumstances of the case, far more reasonable and that it is the correct theory is far more probable. We cannot believe that a person of ordinary intelligence will permit a street car to collide with him when he sees it approaching at a distance of more than 20 rods. It is equally improbable that a motorman of a street car would drive his car to a collision with an automobile which he had seen standing on the street car track ahead of him for a distance of more than 20 rods, without making any effort whatever to avoid a collision. Both of these assumptions are necessary if we are to support the theory of the appellant's case. On the other hand, the theory offered by the defendant explains every fact and circumstance of the case and gives to it an air of normality and ordinariness which it sadly lacks under the theory adopted by the appellant. It is clear from the whole record that the automobile was driven from Arquiza into Nebraska without previous investigation, without precaution of any kind to determine the existence of danger from a passing street car; that the entrance into Nebraska was so sudden that neither the automobile nor the street car, which had undoubtedly been unperceived by the driver of the automobile before entering Nebraska, could avoid a collision. There is no claim on the part of the plaintiff that the motorman saw or, with the exercise of care, could have seen the automobile before it entered Nebraska a sufficient length of time to have avoided the accident even if he were not permitted to indulge the presumption that the automobile driver would use reasonable diligence in entering Nebraska; and, while it is contended by the plaintiff, as showing the motorman's negligence, that the street car was running at an excessive rate of speed for some time before the accident, we find the preponderance of the evidence to be with the trial court in deciding that that contention is not sustained.

It has been frequently held that, while it is true that a company operating a street railway does not have an exclusive or paramount right to the use of the part of the street occupied by its tracks, as against other vehicles or as against pedestrians, as a matter of necessity, however, from the fact that street cars can travel only upon the tracks, they have, in a qualified sense, a paramount right of way in that vehicles traversing the street upon which the tracks are laid must give way to cars which they meet or by which they are overtaken; and the same is true as regards pedestrians. (O'Neil vs. Dry Dock etc. R. Co., 129 N. Y., 125; Buhrens vs. Dry Dock etc. R. Co., 125 N. Y., 702; Adolph vs. Contra] Park etc. R. Co., 76 N. Y., 530; Hegan vs. Eighth Ave. R. Co., 15 N. Y., 380; Bailey vs. Market Street C. Ry. Co., 110 Cal., 320; Moore vs. Kansas City etc. Rapid Transit Ry. Co., 126 Mo., 265; Buttelli vs. Jersey City etc. Elec. Ry. Co., 59 N. J. L., 302; Orange and Newark Horse R. R. Co. vs. Ward, 47 N. J. L., 660; North Hudson County Ry. Co. vs. Isley, 49 N. J. L., 468; Jersey City etc. Ry. Co. vs. Jersey City etc. Horse Ry. Co., 20 N. J. Eq., 61; Chicago West Div. Ry. Co. vs. Bert, 69 Ill., 388; North Chicago St. Ry. Co. vs. Smadraff, 189 Ill., 155; North Chicago Elec. Ry. Co. vs. Peuser, 190 Ill., 67; Flewelling vs. Lewiston etc. Horse R. Co., 89 Me., 585; Hot Springs' St. Ry. Co. vs. Johnson, 64 Ark., 420; Warner vs. People's St. Ry. Co., 141 Pa. St., 615.) It has also been held that, for the purpose of crossing a street upon which a street railway is operated, other vehicles have an equal right with the street cars to the use of the street, especially where the streets intersect (McClain vs. Brooklyn City Ry. Co., 116 N. Y., 459; Clark vs. Bennett, 123 Cal., 275; Nashville etc. Ry. Co. vs. Norman, 108 Term., 324; see cases already cited); and a driver of a vehicle approaching the line of a street railway company has the right of way if, proceeding at a rate of speed which under the circumstances is reasonable, he can reach the point of crossing in time to, go safely on the tracks in advance of an approaching car, the latter being sufficiently distant to be checked and, if need be, stopped before it reaches him. (Buhrens vs. Dry Dock etc. R. Co., 53 Hun., 571, affirmed, 125 N. Y., 702; New Jersey Elec. Ry. Co. vs. Miller, 59 N. J. L., 423; Earle vs. Consolidated Traction Co., 64 N. J. L., 573.) It may be stated as a general rule that it is the duty of persons operating street cars to use reasonable or ordinary care, or the care which an ordinarily or reasonably prudent man would use, to avoid injury to other persons using the street. The standard of ordinary care is not, however, absolute, but varies according to the circumstances and according to the possible or probable danger which may arise. (Kestner vs. Pittsburgh etc. Traction Co., 158 Pa. St., 422; Farley vs. Wilmington & N. C. Elec. R. Co., 3 Penn. [Del.], 581; Citizens' St. Ry. Co. vs. Steen, 42 Ark., 321.) Thus greater care is required in the operation of heavy cars traveling at high rates of speed than would be required in the operation of lighter cars traveling at slower rates of speed and more quickly stopped. So a higher degree of care is required in the operation of cars in the more crowded streets of a city than in the less frequented streets, or in the open or suburban parts (Liddy vs. St. Louis R. R. Co., 40 Mo., 506.) A greater care is required at street crossings where pedestrians and vehicles may be expected than at other points (McClain vs. Brooklyn City Ry. Co., supra; Heucke vs. Milwaukee City Ry. Co., 69 Wis., 401; Stafford vs. Chippewa Valley Elec. R. R. Co., 110 Wis., 331; Strutzel vs. St. Paul City Ry. Co., 47 Minn., 643; Watson vs. Minneapolis St. Ry. Co., 53 Minn., 551; West Chicago St. Ry. Co. vs. Petters, 196 Ill., 298; Winters vs. Kansas City Cable Ry. Co., 99 Mo., 509; Highland Ave. etc. R. R. Co. vs. Sampson, 112 Ala., 425; Bass' Admr. vs. Norfolk Ry. etc. Co., 100 Va., 1); and greater care is also to be used to avoid injuries to children in the street than the law demands for the protection of adults. (U. S. vs. Clemente, 24 Phil. Rep., 178; U. S. vs. Knight, 26 Phil. Rep., 216; 27 Am. & Eng. Encyc. of Law, pp. 57-60.)

The general rule respecting the relative rights and duties of street car companies and persons and vehicles to the use of the streets may perhaps be stated more explicitly in another way. The driver of an ordinary vehicle is bound to be watchful at all points in a crowded city street, elsewhere as well as at a crossing. At the intersection of two streets the driver of a vehicle or a pedestrian has the right to cross the tracks of a street railway notwithstanding a car is in sight provided there is reasonable opportunity so to do, and if, for that purpose, it is necessary for the person having charge of the motive power of the street car to check its speed or even to entirely stop the car for a short period, it is his duty to do so and the person crossing the track has the right, without being necessarily

chargeable with contributory negligence, to assume that that duty will be performed. The rights of the driver of the vehicle or the pedestrian and of the person in charge of the motive power of the car under these circumstances are reciprocal (Nellis, *Street Surface Railroads*, page 298, sec. 9); and the driver of a vehicle has the right of way at a crossing if, proceeding at a rate of speed which, under the circumstances of time and locality, is reasonable, he reaches the point of crossing in time to go safely upon the tracks in advance of an approaching car—the latter being sufficiently distant to be checked and, if need be, stopped before it reaches him. (*Daggett vs. North Jersey St. Ry. Co.*, 75 N. J. L., 630.) But, on the other hand, it has been held that, if a street car going at a reasonable rate of speed will reach the crossing first, it has the right of way. (*Knickerbocker Ice Co. vs. Benedix*, 206 111., 362.) The rule, in more general terms, has also been stated to be that, at the crossing of an intersecting street, a street railroad company has no right to the use of the street occupied by its track superior or paramount to the rights of the traveler going over such intersecting street to cross the track, but that their rights and duties as to the crossing are equal, except in so far as the right of way is given to the one or the other by statute or ordinance. (*Demarest vs. Forty-second St. etc. R. Co.*, 104 N. Y. App. Div., 503; same case, 93 N. Y. Suppl., 663; *Cushing vs. Metropolitan St. R. Co.*, 92 N. Y. App. Div., 510; same case, 87 N. Y. Suppl., 314.) But the right of each must be exercised with due regard to the right of the other, and in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other, and so as to avoid inflicting or receiving injury. (*Cole vs. Central Ry. Co.*, 103 111. App., 160; *Omaha St. Ry. Co. vs. Cameron*, 43 Neb., 297; *Hergert vs. Union Ry. Co.*, 49 N. Y. Suppl., 307; *Savannah Elec. Co. vs. Elarbee*, 6 Ga. App., 137; *Pilmer vs. Boise Traction Co.*, 14 Idaho, 327; same case 15 L. R. A., N. S., 254; *Kennedy vs. Third Ave. R. Co.*, 52 N. Y. Suppl., 551.) Each person is presumed to know of the danger incident to the crossing of street car tracks either as pedestrians or in vehicles and on each is incumbent the duty to exercise such care to avoid injuries as a reasonably prudent person would use under the circumstances. (*Birmingham Ry. L. & P. Co. vs. Oldham*, 141 Ala., 195.) Where a person nears a street crossing toward which a car is approaching, the duty is on the party to stop and avoid a collision who can most easily and readily adjust himself to the exigencies of the case; and, where such person can do so more readily, the motorman has a right to presume that such duty will be performed. (*Helber vs. Spokane St. Ry. Co.*, 22 Wash., 319.) Section 844 of the ordinances of the city of Manila is as follows:

"Right of way over tracks.—The cars of all street railways shall at all times, except as hereinafter in this section provided, be entitled to the track, and the driver of every vehicle upon the track or by the side thereof shall turn such vehicle out when any car approaches, so as to leave the track unobstructed for the passage of such street car: Provided, That the United States mail service and all apparatus and conveyance of the Are department and police department, going to and at fires, and ambulances of the Bureau of Health, shall have the right of way over the street cars on all street-car tracks. All such vehicles shall be provided with gongs."

The other sections of the ordinances pertinent are as follows:

"Sec. 391. It shall be unlawful for any street car to be driven at a greater speed than twelve miles per hour within the corporate limits of said city; but on the streets within the Walled City, the Escolta and Calles Rosario, Binondo and Nozaleda the maximum speed shall be six miles per hour."

"Sec. 394. Prevention of injury to persons and property.—The conductors, motormen, and employees of any street railway company shall use all reasonable care and diligence to prevent injury to persons and property, and, on the appearance of danger to any person, or any property on or near the track, the said car shall be stopped. All proper care should be used by such conductors, mot or men, and employees to prevent injury to teams, wagons, carriages, and other vehicles.

"Sec. 395. Running foul of persons and vehicles; orders of police.—No person having the control of a street railway car shall negligently allow it to go against or run foul of any person, vehicle, or other thing whatsoever, nor shall any such person fail to stop his car at any place in a street when directed by a police officer.

"Sec. 396. Watch for teams, persons, etc., striking gongs.—No person having the control of a street railway car shall fail to keep a vigilant watch for all teams, carriages, and persons, especially children and aged people, nor shall such person fail to strike a gong several times in quick succession, reducing the speed of the car at the same time, on approaching any team, carriage, or person on or about to cross the track.

"Sec. 397. Gong, rung, when.—Every street railway car shall be provided with a gong. It shall be the duty of every motorman or other person operating a street railway car to cause such gong to be struck or rung at least eighteen meters before said car shall approach any street crossing within the corporate limits of said city, and said gong shall be struck or rung at intervals of not more than two seconds until said car shall have crossed the center line of the intersecting street."

"Motor vehicles turning into another street to the left shall turn the corner as near the left hand curb as possible." (Ordinance No. 130, sec. 6.)

We do not believe that these ordinances materially alter the general rule relative to the rights and duties of street cars and of other vehicles and pedestrians, except where it provides that certain acts alone shall constitute due care and diligence in a particular case. All that the ordinances seem to require, except where provision is made as to certain specified acts, is the use of reasonable care and diligence. That is the import of the provision which requires that "all proper care" must be used to prevent injury to persons, teams, wagons, carriages and other vehicles. The requirement that every person having the control of a street railway car must keep a vigilant watch for all teams, carriages and persons, and especially children and aged people, and that he shall strike the gong several times in quick succession and reduce the speed of his car on approaching any team, carriage or person upon or about to cross the track, embodies the general rule that a motorman must be particularly vigilant where the circumstances of the case demand it and that he is required to meet every situation presented to him with the care and diligence with which it would be met by an ordinarily careful and prudent person under similar circumstances.

It would seem from the evidence in the case that the motorman of the street car which caused the damage was exercising ordinary care and diligence in the handling of his car. It appears from the testimony of passengers as well as himself, that just prior to the accident he was proceeding at a moderate rate of speed and that his gong was being struck substantially in accordance with that provision of the ordinances which requires the continuous ringing of the gong from the time the street car reaches a point 18 meters from the center of an intersecting street until the center of the intersecting street shall have been passed. In the case at bar it appears that the collision occurred about 30 feet from the intersection of Arquiza and Nebraska and that the gong was rung before the collision occurred.

The judgment appealed from is affirmed, with costs against the appellant. So ordered.

Arellano, C.J., Johnson, Carson, and Araullo, JJ., concur.

Judgment affirmed.

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