CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
v. DIXON.

4-6506 156 S. W. 2d 209

Opinion delivered December 1, 1941.

1. MASTER AND SERVANT—PERSONAL INJURIES.—An employe who at the close of the day's work was directed by the master's foreman to report for duty the following morning 45 minutes earlier than others, and to use a team of mules in hauling piles, cannot hold the master liable for injuries sustained when timbers such servant pried loose with a stick rolled and injured him, none of the master's agents or servants having been present when the transaction occurred, and there having been no instructions by the foreman relating to the manner of handling the piles.
2. MASTER AND SERVANT—WARNING OF DANGER.—A man 44 years of age who had worked out-of-doors for many years, who had handled lumber and was familiar with objects ordinarily seen, need not be warned by a foreman that logs stacked on sloping ground one above the other will roll if that which supports them is removed.
3. MASTER AND SERVANT.—While sufficient help ought to be supplied to facilitate work requiring lifting or moving where the thing to be lifted or moved is heavy, yet, if the danger is obvious and the servant is not immediately influenced by supervision of a superior, but selects his own method of operation, the master is not liable if injury results, there being no concealed dangers.

Appeal from Logan Circuit Court, Southern District; *J. O. Kincannon,* Judge; reversed.

Thos. S. Buzbee and *A. S. Buzbee,* for appellant.

Paul X. Williams, for appellee.

GRIFFIN SMITH, C. J. The appeal is from a judgment for $200 on appellee's complaint alleging personal injuries.

Appellee had been "off-bearing" at a sawmill operated by Frank Nichols, and he sometimes handled lumber. In October, 1940, he was employed by Rock Island to assist in repairing a bridge. Nichols allowed appellee to use his team. Wooden piles were utilized in the construction, twenty or more having been placed near the railway.

When appellee finished his first day's work he was told by appellant's foreman to report the next morning 45 minutes ahead of regular time and to move any of the piles that were "ready." Three units (presumably those that had been creosoted, or in other respects made ready) were in the stack. Appellee "hooked" the mules to one, but could not move it; whereupon he decided to detach some of the timbers that were higher in the stack and roll them to a more convenient position. In explaining this transaction he said: "I got up there and flipped one out, and the one behind me knocked me down and rolled over me, and the one behind me pinned me down."

In describing the place where the work was done, appellee said: "The timbers were lying in rotation from the end of the [railroad cross-ties] down a thirty-foot dump to the level ground, . . . singled out. There were not any of them doubled, and that meant when you started one rolling they all rolled."

From other parts of appellee's testimony it appears that he walked or climbed to the top of the "dump." While standing "on the second piling from the top of the stack" he used a stick to pry the third piling from its position, in order that it might roll to a lower level.

None of appellant's agents or employes was present when the incident occurred. It is insisted that appellee was unfamiliar with the work he was called upon to do; that ordinarily four men were used in moving the timbers,

but during the preceding day only two workers were assigned to the task. Insistence is that such operations were dangerous, and a warning should have been given.

While it is true sufficient help ought to have been supplied, it is conceded that appellee was expected to use a team of mules. He was not expressly instructed to perform any task as to which there were concealed dangers. On the contrary, he was asked to report ahead of other employes and move units that were "prepared." If it be argued that the only "prepared" pilings were those appellee undertook to move, the answer is that the foreman's orders were too general to have been construed by a person of ordinary understanding and prudence as a command to produce a certain result in spite of the obvious peril involved.

Appellee is forty-four years of age. He has been an out-of-doors man, and is bound to have known that weight will manifest itself through motion if support is removed. What happened is that appellee miscalculated and in doing so he was injured. But can it be said that appellant contributed in any way to the result? Appellee's comment that "when you started one rolling they all rolled" shows cause and effect.

There should have been an instructed verdict for the defendant. The judgment is reversed, and the cause is dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.