UNITED STATES REPORTS.

COURT OF APPEALS, NEW YORK.

ANNA ECKERT, ADMINISTRATRIX, &c., v. THE LONG ISLAND R. R. Co.

What would be negligence for the purpose of saving property would not be for the purpose of saving human life.

1. *Held*, that a person voluntarily placing himself, for the protection of property merely, in a position of danger, is negligent, so as to preclude his recovery for any injury so received, but that it is otherwise when such an exposure is for the purpose of saving human life, and it is for the jury to say in such cases whether the conduct of the party injured is to be deemed rash and reckless.
2. The plaintiff's intestate seeing a small child on the track of the defendants' railroad, and a train swiftly approaching, so that the child would be almost instantly crushed, unless an immediate effort was made to save it, and in the sudden exigency of the occasion, wishing to save the child, and succeeding, lost his own life by being run over by the train.

Held that his voluntarily exposing himself to the danger for the purpose of saving the child's life was not, as a matter of law, negligence on his part, precluding a recovery.

[*Chicago Legal News*, Sept. 9th, 1871.]

Appeal from the judgment of the late general term of the Supreme Court, in the second judicial district, affirming a judgment for the plaintiff in the city court of Brooklyn, upon a verdict of a jury. Action in the city court of Brooklyn, by the plaintiff, as administratrix of her husband, Henry Eckert, deceased, to recover damages for the death of the intestate, caused as alleged by the negligence of the defendants, their servants and agents, in the conduct and running of a train of cars over their road. The case, as made by the plaintiff, was that the deceased received an injury from a locomotive engine of the defendants, which resulted in his death, on the 26th day of November, 1867, under the following circumstances:

He was standing in the afternoon of the day named, in conversation with another person, about fifty feet from the defendants' track, in East New York, as a train of cars was coming in from Jamaica, at a rate of speed estimated by the plaintiff's witnesses at from twelve to twenty miles per hour. The plaintiff's witnesses heard no signal either from the whistle or the bell upon the engine. The engine was constructed to run either way without turning, and it was then running backward, with the cow-catcher next the train it was drawing, and nothing in front to remove obstacles from the track. The claim of the plaintiff was that the evidence authorized the jury to find that the speed of the train was improper and negligent in that particular place, it being a thickly populated neighborhood, and one of the stations of the road.

The evidence on the part of the plaintiff also showed that a child three or four years old was sitting or standing upon the track of the defendants' road as the train of cars was approaching, and was liable to be run over if not removed, and the deceased, seeing the danger of the child, ran to it, and, seizing it, threw it clear of the track on the side opposite to that from which he came; but continuing across the track himself was struck by the step or some part of the locomotive or tender, thrown down, and received injuries from which he died the same night.

The evidence on the part of the defendant tended to prove that the cars were being run at a very moderate speed, not over seven or eight miles per hour, that the signals required by law were given, and that the child was not on the track over which the cars were passing, but on a side track near the main track.

So far as there was any conflict of evidence or question of fact, the questions were submitted to the jury. At the close of the plaintiff's case, the counsel for the defendants moved for a nonsuit, upon the ground that it appeared that the negligence of the deceased had contributed to the injury, the motion was denied and an exception taken. After the evidence was all in, the judge was requested by the counsel for the defendants to charge the jury, in different forms, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover. All the requests were refused and exceptions taken, and the question whether the negligence of the intestate contributed to the accident was submitted to the jury. The jury found a verdict for the plaintiff, and judgment entered thereon was affirmed, on appeal, by the Supreme Court, and from the latter judgment the defendant has appealed to this court.

Aaron J. Vanderpoel for appellant.

George G. Reynolds for respondent.

GROVER, J.—The important question in this cases arises upon the exception taken by the defendants' counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fall and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere