McCLASKEY *et al.* *v.* BARR *et al.*

BARR *et al.* *v.* McCLASKEY *et al.*

(Circuit Court, S. D. Ohio, W. D. May 27, 1892.)

No. 3,984.

1. POWERS OF ATTORNEY TO CONVEY LAND—SCOPE OF AUTHORITY—MISDESCRIPTION SOURCE OF TITLE.
   In 1881 four persons brought suit against numerous occupants of a tract of land for partition, alleging that they were "the heirs at law of William Barr, Sr., deceased, and as such heirs at law were the owners in fee simple," etc. For the purpose of settling with any defendants willing to purchase their interest they each gave to a third person a power of attorney to convey "my interest as heir at law of my father, William Barr, who was the son of John Barr, who was the brother of William Barr, Sr.," in the land in controversy, "being the same premises owned during his life by William Barr, Sr., the granduncle of the constituents of this power of attorney." The attorney made conveyances to various defendants, generally by quitclaim deeds, which in some cases followed the language of the power of attorney in describing the source of title. It appeared, however, that plaintiffs derived no interest in the land as heirs of their father, William Barr, but that they did derive by inheritance an interest through Jane Barr, in whom the title vested on the death of William Barr, Sr. *Held* that, as the powers of attorney and deeds were given for conveying the interest in litigation, they were effectual to pass any interest derived from William Barr, Sr., by representative heirship, notwithstanding the misdescription as to the immediate scource of title.
2. SAME.
   At the time of giving the power of attorney, and at the date of the deeds made by the attorney, plaintiffs also had an interest in the land, derived from a devise to them by Robert Barr, a brother of William Barr, Sr. But this interest was then unknown to them, was not involved in the litigation, and the will, which was executed in another state, had not been admitted to record in the county where the lands were situated, as required by the local statutes. *Held*, that this interest did not pass by virtue of the power of attorney and the quitclaim deeds.
3. SAME—REVOCATION BY DEATH.
   A power of attorney to convey lands is immediately revoked by the death of the principal, and deeds subsequently made by the attorney are null. *Ish* v. *Crane*, 8 Ohio St. 521, distinguished.

In Equity. Bill for partition of lands. For former decisions, see 38 Fed. Rep. 165; 40 Fed. Rep. 559; 42 Fed. Rep. 609; 45 Fed. Rep. 151; 47 Fed. Rep. 154; 48 Fed. Rep. 130.

C. W. Cowan, *Henry T. Fay*, and *Howard Ferris*, for complainants.

Samuel T. Crawford and *W. S. Thurstin*, for cross complainants.

Stephens, *Lincoln & Smith*, and *Bateman & Harper*, for respondents.

JACKSON, Circuit Judge. The questions now before the court for determination in the above causes arise under the cross bill, and relate chiefly to the proper construction of the powers of attorney given in 1881 and 1882, by Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed, to Ozra J. Dodds and Irvine B. Wright, and to the effect and operation of the releases which said attorneys in fact executed to the several cross defendants under and by virtue of said powers. Cross complainants do not attack or attempt to set aside and vacate said releases for fraud or want of consideration. They claim that said powers of attorney did not authorize any release of the interests in the land which their present suit seeks to recover; that said powers of attorney only authorized their agent to release such interest in the land as they inherited as heirs

at law of their father, William Barr; and that the interests they are seeking to recover in the present suit as heirs of Mary Jane Barr and as devisees under the will of Robert Barr, deceased, were not embraced in said power of attorney, nor released by their said agent in the attempted execution thereof. They further claim, in respect to the releases executed by the said attorney in fact Irvine B. Wright after May 18, 1883, that the same are void as to the heirs of Martha Reed, who departed this life on said date.

Cross complainants first move to suppress the power of attorney and releases made thereunder. This motion is denied. Said power of attorney and the releases executed thereunder are relevant and competent evidence in behalf of cross defendants, and no valid reason or ground for excluding these documents is presented.

On the other questions arising under said power of attorney and the releases executed by Irvine B. Wright as attorney in fact, and in respect to the circumstances and conditions attendant upon and surrounding the parties at the date or dates of their execution, there are no disputes or controverted facts or issues. The material facts are that in July, 1881, Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed commenced four several suits in the court of common pleas of Hamilton county, Ohio, against many of the then occupants and claimants of the land in controversy, alleging that William Barr, Sr., died seised of the fee in said land, and that each of them, respectively, was "the heir at law to the estate of William Barr, Sr., deceased, and as such heirs at law were the owners in fee simple" of an undivided interest therein which they respectively sought to have declared and set apart to them. The attorneys representing said plaintiffs were to be paid a contingent fee as compensation for their services, based upon what might be secured by compromise of their claim, or might be recovered in the suit. After the suit was commenced said plaintiffs executed first to said Ozra J. Dodds in 1881, and, after his death, to Irvine B. Wright, in 1881 and 1882, power of attorney "to bargain, sell, and convey in fee simple, by deed of special or general warranty, for such price in cash or upon such terms of credit and to such person or persons as he shall think fit, my interest as heir at law of my father, William Barr, who was the son of John Barr, who was the brother and heir at law of William Barr, Sr., deceased, in and to the whole or any part of" the land in controversy, (describing the same,) "being the same premises owned during his life by Wm. Barr, Sr., the granduncle of the constituent of this power of attorney." The several powers of attorney are in substantially the same form. During 1881, 1882, and 1883 the attorney in fact under said power made releases of all the right, title, and interest of the several constituents of said powers in the land in controversy, generally by quit-claim conveyances, which in some cases followed the language of the power of attorney in the use of the words "as heirs at law of my father, William Barr, who was the son of John Barr, who was the brother and heir at law of Wm. Barr, Sr., deceased," etc., and in other cases omitted those words.

When the aforesaid suit was commenced, and when said powers of attorney were executed by Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed, they, nor either of them, had or held any right, title, or interest in said tract of land, either as heirs at law of their father, William Barr, or of their granduncle, William Barr, Sr., the latter being in his lifetime the fee-simple owner of the land. It is shown by the decree entered in the original cause November 17, 1891, to which reference is here made, that upon the death of William Barr, Sr., the title to said land was vested in Mary Jane Barr, subject to a life estate of Maria Bigelow therein; and that upon the death of said Mary Jane Barr on November 27, 1821, (the life estate of said Maria Bigelow being still outstanding,) the title to said lands became vested, subject to said life estate, in the brothers and sisters of said William Barr, Sr., or in the heirs of such brothers and sisters. Without going through the entire line of succession, the makers of said powers of attorney held an interest in the land which was derived or inherited from said Mary Jane Barr, and, in addition thereto, the said Robert and Samuel Barr had an interest therein as devisees of their uncle, Robert Barr, who was a brother of William Barr, Sr., the said Robert Barr having died testate on September 14, 1822, in Pennsylvania. His will was probated and recorded in Hamilton county, in February, 1884. Mrs. Martha Reed (*nee* Barr) died on May 18, 1883. Irvine B. Wright, after her death, executed some five or more releases of her interest in the land to different parties. From this general outline of the material facts bearing upon the questions presented for determination the conclusions of the court are as follows, viz.:

1. That all releases and conveyances made and executed by Irvine B. Wright as agent or attorney in fact after the death of Martha Reed on May 18, 1883, are void as to her heirs, and do not operate in any way to cut off the interest of such heirs in and to the parcels of land covered by or embraced in the releases made after her death. There is nothing in the evidence to take the case out of the general rule that the death of the principal is a revocation of the agency or power of attorney by operation of law, whether the fact of the principal's death be known to the agent or not when executing the supposed power. No act or acts of Mrs. Reed's heirs are established which estop them from claiming and insisting upon the benefit of this general rule. The present case is not controlled by the decision of the Ohio court of appeals in *Ish* v. *Crane*, 8 Ohio St. 520. There the guardian of the heirs had demanded and received a portion of the purchase money in this behalf. The heirs do not appear to have disaffirmed their guardian's act in so doing. The transaction was a matter *in pais*, and not by deed. Neither was it one, says the court, which of necessity had to be done in the name of the principal. In the present case there is nothing in the way of subsequent receipt of all or a portion of the considerations for the releases made after Mrs. Reed's death by her heirs. The transaction was not *in pais*. It was by deed, and had necessarily to be done in the name of the principal. The case of *Ish* v. *Crane* does not apply, and, if it did, we should feel disclined to follow its authority on the question of estoppel.

2. That, with the above exceptions, the releases executed must be held to have released and conveyed to the several grantees therein all the right, title, and interest in and to said land, which Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed inherited or derived by heirship or legal and representative succession of Mary Jane Barr. Said parties in their respective suits in the court of common pleas of Hamilton county claimed their several interests in the land as heirs at law of William Barr, Sr., deceased, the original owner and holder thereof. The power of attorney was manifestly executed with the intention to authorize and empower their attorney in fact to sell and convey such interest as they had acquired by direct or representative heirship from or under William Barr, Sr. Both sides so understood the transaction. The law presumes that the constituents of said power intended that the execution of the power or conveyance made under and in pursuance thereof would pass such inherited interest in said estate as they possessed, or such as they were then asserting through the courts. Read in the light of surrounding circumstances, the expressions in the power of attorney "as heir at law of my father, William Barr, who was the son of John Barr, who was a brother and heir at law of William Barr, Sr., deceased," taken in connection with the further statement or recital following the description of the land, "being the same premises owned during his life by Wm. Barr, Sr., the granduncle of the constituents of this power of attorney," cannot properly be construed as limiting or restricting the authority or power to sell only such interest as they might have in fact directly inherited from their father, William Barr. Instead of being limitations and restrictions upon the power conferred, or descriptive of the right, title, and interest on which the power was to operate, the language employed should, upon well-settled principles, be regarded as a recital of the source of their title and interest, in order to give the instrument effect, and prevent its operating as a fraud upon those dealing with the agent. The intention was clear to vest their agent with power to sell, convey, or release some interest. It is well settled that a misdescription as to the source or origin of their title or interest will not and should not defeat a conveyance made in execution of the power. In *Dolton* v. *Cain*, 14 Wall. 474, the power of attorney authorized the agent to sell lands in Illinois "which Mr. and Madam Jacquemast at present own, and in which the said constituents have interests." The husband and wife were not owners of any lands or interests in lands. The husband alone had an interest in land, which the agent disposed of. It was contended that the power of attorney did not authorize the sale of any land or interests owned by either, but only of such as were owned by them jointly, in support of which *Dodge* v. *Hopkins*, 14 Wis. 630, was cited. But the supreme court rules otherwise, holding that it was sufficient to authorize the sale of the husband's interest. The case of *Hathaway* v. *Juneau*, 15 Wis. 262, is, however, more directly in point. It was this: Ellen F. Juneau executed to Hathaway, upon property described as "all her interest as one of the heirs of Solomon Juneau, deceased, in and to lots 7 and 8," etc., the interest which she had in the lots descendant to her as the heir of Josette

and not of Solomon Juneau. It was held by the supreme court of Wisconsin that the erroneous statement as to the origin or source of title in no way affected or invalidated the mortgage, which covered her inherited interest in the lots. It is the duty of the court to so construe instruments as to carry out the intention of parties executing them, if no legal obstacle exists; and in giving effect to the intention of the parties executing and acting upon written instruments it is proper to consider all their parts in the light of the surrounding circumstances and the situation of the parties. The court may also look to the practical construction which the parties themselves have placed upon the instrument. In the present case the power of attorney would be not only inoperative, but prove a fraud upon those dealing with the agent, if the construction counsel for cross complainants place upon the terms of the instrument should be adopted. The words therein employed, "as heir at law of my father, Wm. Barr, who was the son of John Barr, who was a brother and heir at law of Wm. Barr, Sr., deceased, who was the granduncle of the constituents" of the powers, and the original owner of the premises in which their interests were claimed, should, as contended for cross-defendants, be treated as descriptive of the pedigree of the parties executing or making the power of attorney, and of the source or origin of their title to the interests intended to be disposed of. To effectuate the clear intent to confer authority to sell their inherited interest derived from William Barr, Sr., as the original origin or source of title, the erroneous statement that they inherited such interest as heirs at law of their father, William Barr, will be discarded. Sufficient remains to authorize a sale of such inherited interest as they acquired through or under Mary Jane Barr, and that interest, under the releases executed by their agent, has been extinguished, except as to Mrs. Reed's heirs, in respect to releases and conveyances made after May 18, 1883, as indicated in the first conclusion above.

3. That the interests in the land which Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed, or either of them, acquired as the devisee or devisees of Robert Barr, deceased, were not covered by or included in said power of attorney, nor were they released by the conveyances which the agent, Wright, executed under and in pursuance of the authority conferred by said powers. The interests which the constituents of said owners, as devisees, had under said will were not involved in the suits instituted in 1881. They were not intended to be, nor is there any language employed which requires that this interest should be included in the powers of sale. It is shown by S. A. Miller, John D. Gallagher, George F. Meyers, and Irvine B. Wright, the attorney in fact, that during the period of said transactions they knew of no such interest. No purchaser is shown to have dealt with the agent in respect to that interest. While that interest may have vested in 1822, upon the death of the testator, the evidence of the devisees' title under the will was not perfected until 1884,—long after the releases were executed. Until the probate and record of the will in Hamilton county, Ohio, the constituents of the power, or those of them having such interest as the

devisees of Robert Barr, deceased, could not have enforced any rights as such. They made no attempt to do so. Their contract with their attorneys did not relate to this interest, nor did said attorneys know of or undertake to represent or to recover that interest. It is manifest that the constituents of the several powers supposed they were each dealing with the same interest inherited as heirs. They did not have a common interest as devisees, and it is not to be presumed that those of them who did have such interest as devisee or devisees would have dealt with such interest on a footing of equality with the others who had no such interest, or that the latter would have included in their power interests in which they had no concern. The court has, by construction of the power, reached the conclusion that their interests as heirs of Mary Jane Barr, deceased, were properly released. The grounds upon which that construction rested could hardly be so extended as to include a separate and distinct interest in some of the constituents of the powers derived from another and different source, not by descent, but by devise. While the language employed in the powers of attorney is descriptive of pedigree and the origin and source of title, it also indicates the interests or estate on which the power was to operate, viz., such interest in the property as had descended directly or by representation from William Barr, Sr. The case comes to this: that when the powers were executed some of the constituents thereof had two separate and distinct interests. They all execute the powers to sell the interest they hold in common as heirs. Those of them having the additional interest as devisees are sought to be concluded as to such separate interest under the powers and conveyances which extinguished the common interest. Such an intention is not presumed. It must be clearly established. There is nothing in the present case to warrant the court in holding that the interests derived under the will of Robert Barr, deceased, were intended to be included in the power of sale, or that said interests were actually conveyed or have been extinguished. Counsel for cross defendants place most reliance upon the statements of Robert Barr, Samuel Barr, and Jane Chapman in relation to the will of Robert Barr, deceased, and as to the time they first learned of its provisions. These statements fall far short of establishing that the interests derived by that will were intended to be or were included in the powers of sale. On the contrary they tend to establish just the reverse. Cross defendants rest chiefly upon the proposition that the power of attorney and conveyances cover such devised interests. We think this cannot be maintained under the facts of this case, either upon principle or authority. In *Munds* v. *Cassidey*, 98 N. C. 558, 4 S. E. Rep. 353, 355, the converse of the present case was presented. It was this: A vendor conveyed "all the right, title, and interest derived by the will of the late J. C. in and to the undivided property, of whatever nature, situated in blocks 99 and 165" in a certain city. It was held that the conveyances did not pass the interest in said lots which had descended to the vendor as heir at law. The principle announced in *Burwell* v. *Snow*, 107 N. C. 82, 11 S. E. Rep. 1090, is generally to the same effect. It is also substantially laid down in

Brown v. *Jackson*, 3 Wheat. 449, and *Hanrick* v. *Patrick*, 119 U. S. 175, 7 Sup. Ct. Rep. 147. Our conclusion on this branch of the case is that the interests which the constituents of the powers of attorney had inherited directly or by legal representations from Mary Jane Barr fully satisfied the authority to sell or make releases; and that the interests derived by devise under the will of Robert Barr, deceased, were not included therein, and have not been extinguished or released; and that such devisees, or those succeeding to their rights, are entitled to a decree for such interest or interests. The costs of the cross suit will be divided between the cross complainants and the cross defendants holding and claiming the interests decreed the cross complainants.

NORTHERN PAC. R. CO. v. NICKELS.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1892.)

No. 49.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—COUPLING CARS—DISREGARD OF RULE.
   The mere disregard by an employe of a rule of a railroad company in relation to the coupling of cars, when, with the knowledge and acquiescence of the division superintendent of the road, such employe, and others coming under the rule, have constantly and without exception disregarded it, is not such negligence on the employe's part as will absolutely defeat his recovery for an injury caused by the negligence of the company.
2. SAME—DISREGARD OF RULE—ACQUIESCENCE BY COMPANY.
   Evidence is admissible in such case to show that the rule had been disregarded with the knowledge and acquiescence of the division superintendent, even where the employe had signed a paper which set out the rule, and which contained a notice that all rules of the company would be violated at the risk of the employe, and that all such violations, whether habitual or otherwise, were not consented to or acquiesced in by the company.
3. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.
   A switchman undertook on a dark night, in accordance with the order of the yard master, to couple a moving freight car propelled by an engine with defective cylinders. He carried his lantern on one arm, and, when the moving car was about eight feet distant from the stationary car, he stepped in between the rails, grasped the link attached to the moving car, and walked back towards the stationary car until he came within about 18 inches of it, when the defective cylinders of the engine emitted such unusual volumes of steam that he could not see anything. He immediately dropped the link, and started to escape. As he did so, he raised his arm, and the deadwoods caught and crushed his wrist. He saw the double deadwoods on the moving car as he stepped in front of it, but, owing to the darkness, could not see them on the stationary car, and did not know that there were double deadwoods on that car until they caught his wrist. *Held*, that the facts did not so clearly prove contributory negligence on the part of the switchman that it was the duty of the court below to give the jury a peremptory instruction in favor of the defendant.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by H. W. Nickels against the Northern Pacific Railroad Company for personal injuries. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Tilden R. Selmes, for plaintiff in error.

F. D. Larrabee, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. H. W. Nickels, who was the plaintiff below, brought an action against the Northern Pacific Railroad Company for personal injury, which he alleged was caused by the corporation's negligence. The defendant corporation denied its negligence, pleaded that the plaintiff, Nickels, had been guilty of negligence that contributed to his injury, and that he had agreed to be bound by, and had then violated, the rule of the company set forth below. The plaintiff had been an employe of the defendant from June 26, 1889, until December 16, 1889, when he was injured, and during this time had served, sometimes as brakeman and at other times as switchman, in the yard at Glendive. On the 12th day of November, 1889, he signed and delivered to the defendant a writing entitled a "personal record," consisting principally of questions and answers relative to his age, residence, former occupations, and general qualifications for the position of brakeman, from which the following is an extract:

"(13) Have you read and do you understand the following abstract from the Book of Rules of the Northern Pacific Railroad Company? Yes. 'Caution as to personal safety. (25) Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employes are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links, and coupling apparatus. * * * Coupling by hand is strictly prohibited. Use for guiding the link a stick or pin. Each person having to make couplings is required to provide a proper implement for the purpose above specified. * * * All will be held responsible.' (14) Do you agree to comply with all the requirements of the foregoing rule in case you enter into the company's employ? Yes. (15) You are notified that, if you or any other employe chooses to violate the requirements of any other rules contained in the Book of Rules of the Northern Pacific R. R. Company, you do so solely at your own risk. The company expects you and all other employes to comply strictly with all its rules and regulations, and does not and will not in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employe of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes."

Over the objection of the defendant, the court below permitted the plaintiff and others, who had been employed as brakemen by the defendant, to testify that none of the employes of that corporation engaged in coupling cars had, so far as their knowledge extended, ever used a stick or pin in coupling them; that those engaged in this work at Glendive, where the accident happened, had constantly coupled the cars without its use, and that the division superintendent of the corporation, whose office was in the upper story of the depot, in the center of this yard at Glendive, had frequently seen the employes thus coupling without sticks, and made no complaint or objection; and upon this subject the court charged the jury that it was a question of fact for them to determine from all the evidence whether this rule, requiring the use of a

stick or pin in coupling the cars, was in force at the time of the accident, and that if they found it was not in force, the plaintiff could not be deemed guilty of contributory negligence because he failed to comply with this rule.

On the 13th day of December, 1889, plaintiff commenced to work as a switchman in the railroad yard at Glendive, under the direction of the yard master, with an engine that was so defective that unusually large volumes of steam constantly escaped from its cylinders and enveloped the engine and some of the cars. On the next day, and again on the succeeding day, he notified the yard master of this defect, and the danger from it, and protested against working with it. The yard master communicated the notice and complaint to the master mechanic, and requested the plaintiff to continue at his work, promising on one day that he would see if he could get the engine repaired, and on the next day that they should have a new engine very soon. About 9 o'clock in the evening of December 16th, as the yard master's crew was making up a freight train, he directed the plaintiff to couple a car that this defective engine was moving back, about as fast as a man would walk, to a stationary car it was approaching. Both these cars were furnished with double deadwoods, that is, cast-iron projections, 8 inches square, about 8 inches above the draw-bar, and about 18 inches distant from it on each side thereof, so constructed that, as soon as the drawbars of the approaching cars touched, the double deadwoods would strike each other. The night was dark. Plaintiff carried his lantern on one arm, and, when the moving car was about 8 feet distant from the stationary car, he stepped in between the rails, grasped the link attached to the moving car, and walked back towards the stationary car, until he came within about 18 inches of it, when the defective cylinders of the engine emitted such unusual volumes of steam that he could not see anything. He immediately dropped the link, and started to escape. As he did so, he raised his arm, and the deadwoods caught and crushed his wrist. Plaintiff knew that foreign freight cars sometimes had double deadwoods, and that it was his duty to look out for them. He saw them on the moving car as he stepped in front of it, and looked for them on the stationary car, but, owing to the darkness, could not see them when he stepped in and started towards them, and did not see them before the steam blinded him, and did not know there were double deadwoods on that car until they caught his wrist. Cars with double deadwoods can be safely coupled, if there is nothing to obscure the light so that the switchman can see their location, by reaching under them with the right hand to guide the link, and over them with the left hand to drop the pin; but it is far less difficult and less dangerous to couple cars with single deadwoods. The freight cars of the Northern Pacific Railroad Company and of western roads generally are provided with single deadwoods.

On this state of facts defendant's counsel requested the court to instruct the jury to return a verdict for the defendant. This request was refused, plaintiff had a verdict, and this refusal is assigned as error.

It was the duty of the defendant railroad company to use ordinary care to supply its employes with reasonably safe machinery and appliances with which to operate its railroad, and to use due diligence in keeping the machinery furnished in proper repair. There is ample and convincing evidence to sustain the conclusion, to which the jury must have arrived, that the corporation failed in the performance of this duty, and that its culpable negligence in continuing in service this defective engine, after repeated notices of its defects and warnings of the dangers of its use, resulted in the emission from its cylinders of the unusual volumes of steam that enveloped and blinded the plaintiff at the critical instant when the cars came together, and caused the loss of his hand. Indeed, this was conceded on the argument, and the only questions for consideration have reference to the alleged contributory negligence of the plaintiff. Here two questions are presented:

"*First.* Is the mere disregard by an employe of a certain rule of a railroad company such negligence on the part of such employe as will absolutely defeat his recovery for an injury caused by the negligence of the corporation, when, with the knowledge and acquiescence of the superintendent in sole charge of the operation of a great division of a railroad comprising hundreds of miles, such employe, and all others to whom the rule applies, have, prior to the accident, constantly and without exception disregarded it?

"*Second.* Do the facts of this case so clearly prove contributory negligence on the part of the plaintiff that it was the duty of the court below to give the jury a peremptory instruction in favor of the defendant?"

1. Regarding the first question, it must be borne in mind that the plaintiff had acted as brakeman and switchman on defendant's railroad for about six months when this accident happened; that he had constantly disregarded this rule; that he had never used a stick or pin to couple cars; that all the other employes with whom he was associated had constantly disregarded it; that the evidence is that no witness ever saw any one obey the rule or use a stick or pin to couple cars on this railroad in a single instance; that during several weeks this plaintiff had been thus coupling cars without a stick in the railroad yard at Glendive, where he was injured, immediately under the eye of Mr. Marsh, the superintendent of the Yellowstone Division of this railroad, who "was the only officer having control of the operation of that part of the road" upon which the plaintiff was working at Glendive; that the office of this superintendent was in the upper story of the depot building, which stands in the center of the railroad yard at Glendive; and that this superintendent had repeatedly seen these employes coupling cars without sticks or pins to guide the links. Here was competent evidence of the knowledge and acquiescence of this division superintendent, who had sole control of the operation of that part of this road, in the complete disregard of the rule. That his knowledge and acquiescence were the knowledge and acquiescence of the defendant company cannot admit of doubt, for he was the only officer in control of the operation of the road on that great division. The court below submitted the evidence of these facts to the jury as tending to show that this rule was not really in force at the time of the accident, with instructions to the effect that, if they found it was not in

force, its disregard by the plaintiff might not be contributory negligence; but that if they found it was in force, and the plaintiff's disregard of it contributed to his injury, he could not recover. There are some decisions in the books holding that the habitual and customary disregard of such a rule as that in question by brakemen and switchmen is not sufficient to prove a waiver or abandonment of the rule by the corporation, where it was not proved that the officer of the corporation in charge of its enforcement knew of or acquiesced in its disregard. But in the case at bar the utter and total disregard of this rule was proved to be known to the very officer who, if any one was, must have been charged with the enforcement of this rule on his division of this railroad. The disregard or violation of the rule was not merely habitual,—customary,—it was complete. The evidence of the witnesses is that none of them ever saw one instance in which the rule was complied with on the defendant's railroad. To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce without complaint or objection in the complete disregard of it, by the plaintiff and all its other employes associated with him, on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury were authorized to believe from the long-continued acquiescence of the defendant in the disregard of this rule that it had been abandoned,—that it was not in force. The evidence of such abandonment was competent and ample, and the ruling and charge of the court below on this subject were right. *Barry* v. *Railway Co.*, 98 Mo. 62, 11 S. W. Rep. 308; *Smith* v. *Railway Co.*, 18 Fed. Rep. 304; *Schaub* v. *Railway Co.*, (Mo. Sup.) 16 S. W. Rep. 924.

But defendant's counsel contends that evidence of the waiver or abandonment of this rule was not competent or material, because by the writing he signed on November 12, 1889, he had agreed to comply with this rule, and that he would take upon himself alone all risk of its violation. There is some doubt whether this writing, under the evidence in this case, rises to the dignity of a solemn contract, made for a valuable consideration. It is styled "personal record," and consists very largely of questions and answers relative to the qualifications of plaintiff to serve as a brakeman. It is dated November 12, 1889, and is alleged to have been made in consideration of the employment of plaintiff by defendant at a subsequent date, but the evidence discloses the fact that he was employed by defendant June 26, 1889, more than four months before this paper was signed, and that he remained in defendant's service continually from that date until he was injured; so that it would seem that this writing could not be successfully claimed to be proof of anything more than notice to the plaintiff of the existence of the rule in this particular case. But if it was a contract, it is clear that

it could not bar the plaintiff from proving a waiver or abandonment of the rule. This writing was prepared by the defendant. All the plaintiff had to do with it was to answer the questions and sign his name. It contained in it these words:

"The company expects you and all other employes to comply strictly with all its rules and regulations, and does not, and will not in any case, acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employe of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes."

There are at least two parties to every contract, and this provision was a representation and a contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules. The plaintiff signed the contract and proceeded with his service. He must have immediately discovered that if there really was any rule about the use of sticks and pins in coupling cars it was constantly violated on this railroad; that the defendant knew of this violation, and acquiesced in it. This uniform and constant acquiescence of the defendant in the violation of this rule, if such a rule was really in existence, was a violation of the contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules, and relieved plaintiff from further compliance therewith; and if, on the other hand, the rule was not really in force, if it had been waived or abandoned, the utter disregard of the rule, and defendant's acquiescence therein, were competent evidence of the abandonment. In either case the plaintiff had a right to rely on the conduct of the defendant, and to introduce his evidence in this behalf.

2. The second question for determination is, did the evidence so clearly prove that the plaintiff was guilty of contributory negligence that the court below should have given a peremptory instruction in favor of the defendant? It was plaintiff's duty to exercise reasonable care, commensurate with the dangerous character of his occupation, to protect himself from injury. He could not recklessly expose himself to a known danger, and then recover from the defendant for an injury to which such exposure contributed. The contention of defendant's counsel is that it was the duty of the plaintiff, in the exercise of ordinary care, to examine the stationary car, and know whether there were double deadwoods on it, before he stepped in between the rails to make the coupling; that the plaintiff testified that the first step in coupling cars was to set the pin, and the pin was in the stationary car; that, if plaintiff had first stepped to the stationary car and set the pin, he would have discovered the double deadwoods on that car, and would not have been injured; that in stepping in between the rails and grasping the link of the moving car when it was eight feet distant from the stationary car he was not in the act of coupling the cars or in the line of his duty, but was carelessly exposing himself to injury; and that by this unnecessary and reckless exposure he contributed to his own injury. It is a general rule that, if reasonable and fair-minded men of

ordinary intelligence may differ as to the conclusion to be drawn from a given state of facts, the question of negligence is for the jury to determine from the facts and all the surrounding circumstances. Can it be said that fair-minded men of ordinary intelligence would agree that there was any want of reasonable care on plaintiff's part in stepping in front of the moving car and grasping the link to guide it into the slot when it was only eight feet distant from the stationary car, and the plaintiff had been directed by his superior, the yard master, to make the coupling under the circumstances of this case? Cars cannot be coupled when both are stationary; they cannot be coupled after the moving car strikes the stationary car, save by a renewed endeavor. At some time while one of the cars is moving the link must be seized and guided. This car was moving four miles an hour, and would traverse the space of eight feet in less than two seconds.

Again, defendant's counsel bases his contention that plaintiff was negligent and out of the line of his duty in stepping in and grasping the link before he set the pin upon his testimony that the first thing to do in coupling a car is to set the pin. That statement, however, cannot be held to so conclusively prove that it was negligence to seize the link before setting the pin as to authorize a court to take this question of negligence from the jury on that account. Indeed, the entire testimony of this witness shows that this statement of his was not sufficient to conclusively prove that any prescribed order of handling link and pin was the only careful or the safest method of handling them in coupling the cars. At another time, while testifying, he said:

"Coupling cars, generally you take the link of the moving car. * * * When you leave a car, you leave the pin standing up in the hole, and when you come to make the coupling you take this link, and you place the pin in the other car so it will fall, and then when this link comes in there you raise it up, and direct it this way into the slot of the other drawbar, and when the cars come together the pin falls into the link."

But perhaps the most conclusive answer to defendant's counsel is that, if plaintiff had first stepped to the stationary car and set the pin, and then waited for the coming car, while he would have discovered the double deadwoods on the stationary car, the blinding steam would in all human probability have obscured his vision before the moving car came near enough for him to discover the double deadwoods on that car, and he would have suffered the same, or a much more serious, injury.

Under the evidence in this case no court would be authorized to declare the plaintiff guilty of negligence that contributed to his injury, and the judgment is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. MEALER.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1892.)

1. MASTER AND SERVANT—PERSONAL INJURIES—PROXIMATE CAUSE—RAILWAY SWITCHMAN.
A yard switchman in uncoupling cars was walking or running with the train, for the purpose of lifting the pin, when he stumbled over a piece of coke on the track, and his arm was thrown between the deadwoods and injured. *Held*, that the stumbling was the proximate cause of the injury, and evidence as to the defective condition of the drawbar was immaterial.

2. SAME—FELLOW SERVANTS.
As it was the duty of the section men to remove coal or coke from the tracks, there can be no recovery for their negligence in failing to do so, since they and the switchman were coservants.

3. SAME—DUTY TO INSTRUCT SWITCHMAN.
The switchman testified that he was about 22 years old, had been employed as such for three weeks, had known the tracks in the yard for three months, and knew all that was necessary to enable him to couple and uncouple cars. It was conceded that at the time of the injury he was uncoupling cars in a necessary and proper manner. *Held*, that it was not necessary for the defendant to show that it had instructed, or offered to instruct, the plaintiff how to couple and uncouple cars.

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

Action by Charles Mealer against the Cincinnati, New Orleans & Texas Pacific Railway Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Lewis Shepherd and *Edward Calston*, for plaintiff.

Fred L. Mansfield and *T. M. Burkett*, for defendant.

Before JACKSON, Circuit Judge, and SAGE and SWAN, District Judges.

SAGE, District Judge. Upon the trial of this case the following facts appeared in evidence: On the 28th of October, 1890, the defendant in error, Mealer, was a switchman in the employment of the railway company, plaintiff in error, in its yard at Oakdale, Tenn. Shortly after nightfall a through freight train from the north arrived, and was taken charge of by the night yard master. While it was yet moving, he directed Mealer to cut off the caboose and one car. Mealer went between the cars, which, it is shown by the evidence and is conceded, was necessary and proper, and, finding that the coupling pin was pushed back under the draft timbers, so that he could not pull it out, held to the pin, running along (in another part of his testimony he said "walking") and keeping pace with the motion of the train, was expecting the engine to slack ahead a little, so that the pin would be released from under the end sill, and could be lifted out. Just then the forward car "surged ahead and right back again," and, according to his own testimony, which is the only evidence giving the particulars of the accident, he struck his foot against a piece of coke or coal on the track, and, stumbling, partially fell. That threw his arm down between the deadwoods, there being nothing on the car to hold to. At the same time the rear