

to make demand, it is sufficient to say that he seems to have undertaken to represent the railroad company in the matter, and made no question whatever as to his authority to act in the premises. He was the general freight agent of the company, and from this designation it would seem that he had general supervision over all its freight business, and really appears to have been the proper person, of all others, upon whom demand should have been made. If not, he at least should have referred the representative of the intervenor to some one else who had authority to act in the matter. The exceptions must be overruled, and the report of the master be confirmed.

CHICAGO, R. I. & P. RY. CO. v. SUTTON.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 429.

CONCURRENT NEGLIGENCE.

One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence.

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

This was an action by Fred. Sutton against the Chicago, Rock Island & Pacific Railway Company to recover damages for personal injuries.

W. F. Evans (M. A. Low and J. E. Dolman, on the brief), for plaintiff in error.

Thomas P. Fenlon, Jr. (T. P. Fenlon, on the brief), for defendant in error.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. On October 23, 1892, while Fred Sutton, the defendant in error, was performing his duties as a brakeman on one of the trains of the Chicago, Burlington & Quincy Railroad Company at a railroad crossing near Reynolds, in the state of Nebraska, an engine and train of cars of the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, collided with the train of the Burlington Company, and injured him. He sued the Rock Island Company for damages for this injury, which he alleged was caused by its negligence. That company denied any negligence on its part, and alleged that the negligence of the Burlington Company caused the injury, and that the defendant in error was guilty of contributory negligence. There was no evidence of any contributory negligence on the part of the defendant in error upon the trial, and the court, without objection, so charged the jury. The question whether or not the Rock Island Company was guilty of negligence that was the proximate cause of the injury was submitted to the jury under instructions to which

no objection is made, and the jury found that it was, and returned a verdict for the defendant in error.

Complaint is made of but a single supposed error in the trial of this case. It is in effect that the court below refused to charge the jury that, under a certain statute of the state of Nebraska, the conductor and engineer of the Burlington train were negligent in running it upon the crossing without stopping it as they approached, and that it did charge the jury that these employés were permitted to run the train over the crossing without stopping it if the signals the company there maintained indicated no danger in so crossing. But whether this instruction was right or wrong is entirely immaterial to the decision of this case. The only defenses the Rock Island Company had were that it was not guilty of any negligence that was the proximate cause of the injury, and that the negligence of the defendant in error contributed to it. If the injury was not caused by the negligence of the Rock Island Company, it was entirely immaterial in this suit whose negligence did cause it. If the negligence of the Rock Island Company was the proximate cause of the injury, it was equally immaterial that the negligence of a third party contributed to it. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury. In the case at bar it is conceded that the defendant in error was guilty of no contributory negligence. The verdict of the jury established the fact that the negligence of the Rock Island Company was the proximate cause of the injury. That the negligence of the Burlington Company, or of any other third party, contributed to this injury, can in no way affect the result in this action, and hence it is not important to determine whether the charge of the court as to the negligence of the Burlington Company was right or wrong. If it was right it could have done no harm, and if it was wrong it was error without prejudice. *Railway Co. v. Cummings*, 106 U. S. 700, 702, 1 Sup. Ct. 493; *Railway Co. v. Callaghan*, 6 C. C. A. 205, 206, 56 Fed. 988; *Harriman v. Railway Co.*, 45 Ohio St. 11, 32, 12 N. E. 451; *Lane v. Atlantic Works*, 111 Mass. 136; *Griffin v. Railroad Co.*, 148 Mass. 143, 145, 19 N. E. 166; *Cayzer v. Taylor*, 10 Gray, 274; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Railroad Co.*, 73 N. Y. 38; *Cone v. Railroad Co.*, 81 N. Y. 206. The judgment must be affirmed, with costs, and it is so ordered.

CHICAGO, R. I. & P. RY. CO. v. CAULFIELD.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 415.

1. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—DEGREE OF CARE REQUIRED.

A locomotive engineer, approaching a place where a footpath crosses the track, is bound to exercise only ordinary care and watchfulness to discover and warn people and avoid injuring them; and an instruction which requires "all the care possible,"—the "highest possible care,"—and the amount of watchfulness necessary to discover a person on the track, is erroneous.

2. APPEAL—PREJUDICIAL ERROR—ERRONEOUS CHARGE.

It is sufficient to warrant a reversal that the charge was erroneous; that it may have misled the jury; and that it does not affirmatively appear that the misdirection was harmless. *Railroad Co. v. McClurg*, 8 C. C. A. 322, 59 Fed. 800.

3. DAMAGES FOR PERSONAL INJURIES—MENTAL SUFFERING.

Mental suffering induced by plaintiff's crippled condition, such as feelings of mortification because he is not sound in body and limb, cannot be considered in fixing the damages.

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

This was an action by John J. Caulfield, by his next friend, Michael J. Caulfield, against the Chicago, Rock Island & Pacific Railway Company, to recover damages for personal injuries. Verdict and judgment were rendered for plaintiff, and defendant brought the case on error to this court.

Stephen S. Brown (J. E. Dolman, on the brief), for plaintiff in error.

C. A. Mosman and James C. Davis, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for personal injuries, which originated in the city of St. Joseph, Mo. The action was brought by John J. Caulfield, the defendant in error, against the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, in the circuit court for Buchanan county, state of Missouri, from whence it was removed to the United States circuit court for the western district of Missouri. It was tried in the latter court, and resulted in a verdict and judgment against the railway company. The errors that have been assigned relate to the instructions that were given by the trial court. A brief statement of the circumstances under which the injuries were sustained is essential to a correct understanding of the questions that we have to determine.

The accident occurred in a railroad yard in the city of St. Joseph, which appears to have been used in common by several railroad companies, about 6 o'clock p. m., on the evening of the 29th day of May, 1890. At that hour, one of the defendant company's engineers, who had charge of a switch engine, was taking the engine