

a parallel road, who has not used, is not using, and does not intend to use it; and hence he does not fall within the class of those for whom such a statute imposes upon railroad companies the duty of giving a warning of the approach of their trains to the crossing. Our conclusion is that a statute which requires railroad companies to give a warning signal of the approach of trains to their crossing of a road or street imposes no duty to give such warning to those who have not lately used, who are not using, and who do not intend to use the crossing, and such parties cannot recover of the railroad companies for a failure to give the warning. The purpose of such a statute is to warn those who have lately used, those who are using, and those who are about to use the crossing. It imposes a duty upon the railroad company to give to these persons the statutory warning, and a failure to give it is a neglect of duty to them, for which they alone may recover if injury results. These views are supported by the great weight of authority. *Pike v. Railroad Co.*, 39 Fed. 754; *Bell v. Railroad Co.*, 72 Mo. 50, 58; *Evans v. Railroad Co.*, 62 Mo. 49, 57, 58; *Rohback v. Railroad Co.*, 43 Mo. 187; *Elwood v. Railway Co.*, 4 Hun, 808; *O'Donnell v. Railway Co.*, 6 R. I. 211, 216; *Railway Co. v. Feathers*, 10 Lea, 103, 105; *Railway Co. v. Payne*, 29 Kan. 166, opinion by Judge Horton, concurred in by Mr. Justice Brewer; *Railway Co. v. Pierce*, 33 Kan. 61, 64, 5 Pac. 378; *Clark v. Railway Co.* (Kan. Sup.) 11 Pac. 134, 136; *Gorris v. Scott*, L. R. 9 Exch. 125.

It is assigned as error that the court below refused to permit the plaintiff to testify whether or not there was any fence along the track of the railroad company at the place of the accident. It is not claimed that there is any statute in the state of North Dakota requiring a railway company to fence its track, and we are unable to perceive how the fact that it was or was not fenced could affect the right of the plaintiff to recover under the undisputed facts of this case.

It is assigned as error that the court permitted the witness Moulton to testify upon cross-examination "how the crossing opposite his slaughterhouse came to be put in." There was no error in this ruling. He had testified in chief that he knew who put the crossing in, and when it was put in, and it was certainly fair cross-examination to ask him how it came to be put in.

The judgment below must be affirmed, and it is so ordered.

BURKE et al. v. ANDERSON.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1895.)

No. 194.

MASTER AND SERVANT—LIABILITY OF MASTER—USE OF EXPLOSIVES.

One M. was a contractor, engaged in making a roadbed for a railroad, and one J. had sole charge of the work for him as general manager and superintendent. The work was carried on by blasting the frozen ground with dynamite and other explosives, and afterwards breaking it up with picks, J. having personal charge of the blasting. Plaintiff, a common laborer, unfamiliar with the use of explosives, was hired by J., and set to work, digging with a pick, at a spot where the blasting had been done the

day before, without warning of possible danger. Plaintiff was injured by an explosion caused by striking with his pick a piece of dynamite remaining from the blast, which was found to have been negligently conducted. *Held*, that as M. had created the risk due to the presence of explosives for his own purposes, and was bound not only to exercise the utmost care and every available precaution against possible injury to the workmen, but to give them warning of the risk, and as plaintiff was ignorant of the risk when he undertook the work of digging, M. was liable to plaintiff for the injury suffered.

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

This was an action by T. Knut Anderson against Matthew C. Burke and John Burke for personal injuries. The plaintiff recovered judgment in the circuit court. Defendants bring error. Affirmed.

This action is founded upon alleged negligence of the defendants, who are the plaintiffs in error, whereby the plaintiff below sustained serious personal injuries from an explosion of dynamite or some other explosive material, alleged to have been left in the ground by the defendants after blasting operations, and at a place where they set the defendant at work without warning or knowledge of the danger; the explosion resulting, as inferred, by a blow struck with the pick used by the plaintiff, in excavating, under the direction of the defendants. Matthew C. Burke was a contractor, engaged in making the roadbed for a railroad near West Duluth, Minn., in the winter of 1893. His codefendant, John Burke, had sole charge of the work for him, or, as stated in their joint answer, "was general manager and superintendent of said work, and had charge of said work under and for" Matthew C. Burke. The plaintiff was "a common laboring man," 39 years of age, and had commenced work for the defendants, as such, only three days before the accident. The ground was frozen, and it was found necessary to use explosives in breaking it up preparatory to the work of excavation. Holes were drilled down to the proposed line of grade, charged with either dynamite or black powder, or both, and fired by a fuse or by a battery according to circumstances. The plaintiff was employed in digging, and had no part in or connection with the blasting, and it appears that he had never before worked where dynamite was used, and had no acquaintance with its use. The blasting operations were conducted by John Burke, assisted by a man called the "Frenchman"; and, on the afternoon before the accident, they had blasted in advance of the workmen at the place where the injury occurred. On the following morning, February 17th, the plaintiff was sent by John Burke, with other laborers, and without any warning or knowledge of danger, to excavate the ground as it was left after blasting, the plaintiff working with a pick. Within a few moments after commencing work, and while striking with his pick into the bank, an explosion occurred, of dynamite or some explosive which had been left in the ground, and the plaintiff was seriously injured in his eyes, face, and arms.

The plaintiff asserts negligence on the part of the defendants (1) in failure to cause the explosion or withdrawal of the entire charge used in the blasting before commencing the work of picking and digging; (2) in failure to examine sufficiently the blasting holes after the explosion, before ordering the commencement of work; (3) in ordering and placing the plaintiff to pick in the bottom of the unexploded hole, without warning him of the danger to be apprehended in the work. On the part of the defendant it is claimed that the injury to the plaintiff was the result of unavoidable accident, and not due to negligence of any person; that, after the holes were drilled, they were all "squibbed" by exploding a small charge of dynamite at the bottom, to make a chamber for the blasting charge, then loaded with dynamite and black powder, connected with the battery, and fired; that the appearance of the ground indicated that there was complete discharge of the explosives, but "in fact a part of a stick of dynamite, for some reason, failed to explode, and was among the dirt" into which the plaintiff struck his pick. Instructions

were requested in behalf of the defendant Matthew C. Burke (1) directing verdict in his favor, upon the theory that no negligence was shown against him; (2) directing that he is not liable "for anything that the defendant John Burke did or failed to do in connection with the work of charging or unloading or scraping the same out, if the jury find the holes in question were scraped out as claimed by plaintiff." Error is assigned upon the refusal of the court to so instruct, and also upon the following portion of the instructions given to the jury: "If the accident came to the plaintiff, and he sustained this substantial damage, which he has testified to, through the fault of John Burke in the management of that work, without fault on the part of the plaintiff, then I have no reason to doubt that not only John Burke would be liable, but that his codefendant, Matthew Burke, would also be liable." A verdict was rendered in favor of the plaintiff for \$4,000. Sundry errors are assigned upon rulings admitting testimony in behalf of the plaintiff tending to show (1) attempt and failure to fire the other holes with a battery; (2) that the battery had missed fire before the accident; (3) that sticks of unexploded dynamite had been left by their blasting operations previous to the occasion in controversy; (4) that in the blasting in question it was attempted to fire with a battery, but the two lower holes did not explode; (5) that the battery had missed fire on previous occasions. Error is further assigned upon a ruling which excluded the defendant John Burke from answering whether or not, from what he knew of the explosion and the appearance of the ground, "he had then or has now any doubt but that all those holes exploded."

William G. Challis and Draper, Davis & Hollister, for plaintiffs in error.

T. M. Thorsen and John Jenswold, Jr., for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after stating the facts as above, delivered the opinion of the court.

The question in this case upon which the liability of the principal defendant, Matthew C. Burke, depends, is this: What is the rule of care to be applied to an employer of labor who uses explosives or other dangerous means in the prosecution of the work in which the laborer is engaged? Matthew C. Burke was the employer, as contractor for the excavation and construction of the bed for a railroad in the winter season, and dynamite and other explosives were used for blasting the frozen ground, in advance of the laborers who were engaged in excavating. He was not personally attending to the operations, but they were supervised and managed by his codefendant, John Burke, whom he employed for that purpose, who personally conducted the advance blasting (assisted by a special workman), and also personally directed the force of laborers in the work of excavation which followed. The plaintiff below was a common laborer in this force, had entered upon the work only three days before, and had no experience with the use of dynamite, or work where it was used. The blasting was completed on the previous day, and the plaintiff had no part therein; but he was sent by John Burke to work in the ground where the explosives had been used, and there received his injury, apparently caused by some portion of the explosives which had been left unexploded through the blasting operation. The liability of Matthew C. Burke is asserted on the doctrine of respondeat superior,