

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This is the third time that the question of the distribution of the fund growing out of the assignment made by Smith & French to Johnson Thompson, in trust for their creditors, has been before the court. The previous cases are reported (4 U. S. App. 217, 1 C. C. A. 304, 49 Fed. 406, and 12 U. S. App. 232, 5 C. C. A. 398, 56 Fed. 7), to which we refer for a full statement of the case. When the case was last here, we tried to make it plain that every creditor of Smith & French had a right to participate in the fund arising from the trust property, in proportion to the amount of his debt, upon contributing his proportion of the expense of establishing and enforcing the trust. We intended this rule should be applied without reference to any previous erroneous orders which had been made in the case by the lower court touching the rights of creditors to participate in the trust fund; but the lower court seems not to have so understood our order, which was not as specific as it ought to have been, and debarred the appellants, Baer, Seasongood & Co., who were bona fide creditors of Smith & French, and who proved their debt, from participating in the distribution, on account of some previous erroneous order of that court denying them this right. We are not disposed to go into a history of the details of the litigation growing out of the distribution of this trust fund to those entitled, or to go into any technical discussion of the effect of the proceedings that have been had in the court below from time to time. It is enough to say that the fund arising from the property conveyed to Thompson by Smith & French in trust for their creditors must, after paying costs and fees, including such attorney fees as the court has allowed or may allow to the parties who established the trust and were instrumental in bringing the fund into court, be distributed pro rata among all the creditors of Smith & French, and that no creditor is to be barred of his right to participate in such distribution by any erroneous direction or order of the lower court heretofore made, excluding him therefrom. The order and decree of the United States court in the Indian Territory is reversed, with directions to take such proceedings in the case as are not inconsistent with this opinion.

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BERRY v. LAKE ERIE & W. R. CO.

(Circuit Court, D. Indiana. November 1, 1895.)

No. 9,277.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ACTION FOR PERSONAL INJURIES—PLEADING.

In actions for personal injuries, brought in the federal courts, plaintiff is not required to plead or prove freedom from contributory negligence. Such negligence is matter of defense to be averred and proved by defendant.

This was an action at law, brought by Pearlle Berry, by her next friend, against the Lake Erie & Western Railroad Company, to recover damages for personal injuries.

Duncan, Smith & Hornbrook, for plaintiff.

W. E. Hackedorn, J. B. Cockrum, and Miller, Winter & Elam, for defendant.

BAKER, District Judge. The plaintiff, an infant of seven years of age, by her next friend, has filed her complaint in two paragraphs for the recovery of damages for personal injuries alleged to have been sustained by her by reason of the negligence of the defendant. To each paragraph of this complaint the defendant has interposed a demurrer for want of facts. The defects pointed out in argument are that the first paragraph fails to show the plaintiff's freedom from contributory negligence, and that the second paragraph fails to show that the parents of the plaintiff were free from fault contributing to the injury. It is too firmly settled by repeated decisions of the federal courts to be longer open to question here that in actions for personal injuries the plaintiff is not required, in order to make out his case, to prove freedom from contributory negligence. The burden of showing the plaintiff's contributory negligence rests upon the defendant, unless it affirmatively appears in the case made by the plaintiff. *Hough v. Railroad Co.*, 100 U. S. 213, 225; *Railroad Co. v. Gladmon*, 15 Wall. 401, 407; *Coasting Co. v. Tolson*, 139 U. S. 551, 557, 558, 11 Sup. Ct. 653, and cases there cited. The plaintiff not being required to prove his freedom from contributory negligence, he is under no obligation to aver it. The allegations of his complaint need be no broader than the proofs required to support it. Negligence of the plaintiff contributing to the injury is matter of defense, to be averred and proved by the defendant. Perhaps, if the plaintiff has chosen to allege in his complaint his freedom from contributory negligence, and the defendant has met this allegation by a general denial, an issue is formed on this question which must be tried, although no affirmative answer setting up contributory negligence is pleaded. See cases, *supra*, and also *Knaresborough v. Mining Co.*, Fed. Cas. No. 7,874, 3 Sawy. 446; *Holmes v. Railway Co.*, 5 Fed. 75, 85, 86; *Conroy v. Construction Co.*, 23 Fed. 71, 72; *Watkins v. Railroad Co.*, 38 Fed. 711-713. The demurrer is overruled.

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MINNESOTA TITLE INSURANCE & TRUST CO. v. DREXEL et al.

(Circuit Court of Appeals, Eighth Circuit. September 16, 1895.)

No. 580.

TITLE INSURANCE—INTERPRETATION OF POLICY.

The M. Title Insurance Co. issued to D., the holder of a mortgage on certain real estate, a policy insuring him, to an amount named, against loss sustained through defects in the title to such real estate, or liens or incumbrances thereon, existing at the date of the policy. Conditions annexed to the policy provided that no right of action upon it