

treatment," of course, must have such meaning as that it shall not be inconsistent with and defeat the general terms, scope, and purpose of the policy. It would not do, certainly, to say that if a man received a bodily injury which clearly came within the terms of the policy, and died while under medical or surgical treatment for the injury so received, he could not recover. Very clearly, it does not mean this; but it has some meaning, or it would not be in the policy. In this case the surgeon, desiring to alleviate pain while replacing the hemorrhoids, administered chloroform, and the patient—in part, at least, according to the plaintiff's petition—died from the chloroform. How could there be a case that comes more clearly within the language of this exception, in the sense in which it must have been used? It need not necessarily, it seems to me, be malpractice or carelessness on the part of the physician or surgeon; but certainly, to come within this exception, the medical or surgical treatment must be the proximate cause of death. If this is not true of this case, it seems difficult to imagine a case to which the exception would apply. So that considering the right to recover of the company under the general terms of the policy, or under either of the exceptions just referred to, I am clear that there is no liability. This case is controlled fully by the case of *Bayless v. Insurance Co.*, supra. If there could be no recovery in that case (and I am not prepared to question its correctness), certainly there can be none in this. Indeed, the facts here do not make as strong a case as that. In taking unintentionally an overdose of opium, there is something of an accident, if not the kind of accident covered by the policy. Here there is nothing accidental either in the cause or means, whatever. The administration of the chloroform was in the usual, ordinary and proper manner. If, therefore, Judge Benedict was right in the *Bayless Case*, there is certainly no ground for recovery here. The demurrer must be sustained.

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COBLEIGH v. GRAND TRUNK RY.

(Circuit Court, D. Vermont. June 27, 1896.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY.

Plaintiff, approaching a crossing near a station, heard a whistle beyond the station, and, when about 200 feet from the crossing, stopped, as he testified, and looked for the train, until he concluded that it had stopped at the station, which at the time was obscured by snow. Believing that he could easily pass before the train could start up, and reach the crossing or the whistling post, where he might expect a signal, he drove on without looking further, and was struck by a fast train which had not stopped at the station or whistled at the whistling post. *Held*, that the question of contributory negligence was for the jury, and the court could not set aside a verdict for plaintiff.

This was an action by Wayne Cobleigh against the Grand Trunk Railway to recover damages for personal injuries received at a crossing of defendant's road. The case was heard on a motion by defendant for a new trial.

C. A. Hight and A. A. Strout, for the motion.  
Elisha May, opposed.

WHEELER, District Judge. The plaintiff was driving his two-horse team, not afraid of trains, on a squally day in the fall, along a highway, towards, and, in fair weather, in plain sight of, the defendant's road and station at Stratford Hollow, N. H., about a third of a mile away, and heard a station whistle beyond, as of a train approaching. He soon reached a turn from the station, in the highway, about 200 feet, which he estimates at about 100 feet from the crossing, and, according to his evidence, stopped there, and looked for the train, till he concluded it had stopped at the station, which was at the time somewhat obscured by driving snow. He thought he could easily pass the crossing before the train could start up, and reach it; and the whistling post, at which he might expect the train would give signals if it came, was between the station and the crossing. Relying upon his conclusion, without looking further for a train, he drove along onto the crossing, and was struck by a fast train, which had not stopped at the station, nor, as has been found, given any signals for the crossing, and was seriously injured. The jury, upon instructions to find for the defendant if the signals were in fact given, or there was contributory negligence, have found for the plaintiff; and the defendant has moved to set aside the verdict, as contrary to the instructions, and against the evidence, upon the issue, well made by the pleadings, as to contributory negligence. The argument in support of the motion rests upon the assumption that, upon the evidence, the existence of contributory negligence was so clear that the jury could not, without passion or prejudice, find but for the defendant.

That a person should, before crossing a railroad, look out for trains, and that the omission of doing so is, ordinarily, so contributory to being hit as to prevent a recovery for that, is now elementary. Here the plaintiff, if believed, did look and listen for the train before crossing, but was mistaken in supposing it had stopped at the station. In going on, his view would be from it, and towards the railroad, in the other direction, where he should also look. If it had stopped, as he supposed, he would not need to look for it further, for it could not possibly reach the crossing before he could easily pass it; and if it had not, and the signals should be given, he could easily avoid it. Whether the plaintiff's testimony should be believed was for the jury; and, if believed, here was a fair question, not whether he looked out at all for the train he had heard, but whether he looked out enough for it. He was mistaken in supposing it had stopped; whether justifiably or not depended upon the length of time, and the care with which, he waited to see, under the surrounding circumstances. This raised a question of fact, or a mixed question of law and fact, which might be found either way, and could not be taken from the jury, nor now be re-examined, without violating article 7 of the amendments to the constitution of the United States. This motion must therefore be overruled. Motion denied, and judgment on verdict.

## BLANCHARD v. COMMERCIAL BANK OF TACOMA.

(Circuit Court of Appeals, Ninth Circuit. June 8, 1896.)

No. 217.

## 1. EVIDENCE—BOOKS INTRODUCED BY OPPOSITE PARTY.

When the books of a bank are offered in evidence by one party to a suit, the other party is entitled to avail himself of any part of the evidence contained therein, such as the state of a particular account.

## 2. SAME—BANK BOOKS—EXPERT EVIDENCE.

In an action to recover a sum alleged to have been loaned to a bank, the receiver thereof claimed that the loan was to the president of the bank personally. He also contended that the bank's books should not be considered as evidence that the loan was to the bank, because they were not properly kept, and he offered to show by expert testimony what would have been the proper method of entering the transaction if the loan had been made to the bank. *Held*, that this evidence was properly excluded, as it did not appear that there was any such ambiguity in the account as to require expert evidence in relation thereto.

## 3. REVIEW ON ERROR—SPECIAL FINDINGS.

Where a jury is waived, and the court makes special and general findings, an appellate court is not required to weigh the evidence and determine the preponderance thereof, but will only consider whether the pleadings and special findings are adequate to support the judgment. *Walker v. Miller*, 8 C. C. A. 331, 59 Fed. 870, followed.

## 4. BANKS AND BANKING—MONEY BORROWED FOR BANK BY PRESIDENT—LIABILITY OF RECEIVER.

The receiver of an insolvent national bank is liable for money borrowed by the president of the bank without special authority, when it appears that the bank actually received the money and appropriated it to its own use. *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, distinguished.

## In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

This cause was tried before the court without a jury. The findings of fact are as follows: "(1) That the plaintiff, the Commercial Bank of Tacoma, is, and at all times in the complaint herein mentioned was, a corporation duly organized and doing business under and by virtue of the laws of the state of Washington, and engaged in a general banking business in the city of Tacoma, state of Washington, and that the said plaintiff is, and at all times mentioned in the plaintiff's complaint has been, a resident of the state of Washington. (2) That the First National Bank of Whatcom at all times mentioned in the complaint was, and now is, a national banking association, incorporated, organized, and existing under and by virtue of the laws of the United States of America relating to national banks, having its banking house and office, and doing business as a national bank, in the city of New Whatcom, state and district of Washington. (3) That on the 22d day of June, 1893, the said First National Bank of Whatcom became and was, and still is, insolvent; that thereafter such proceedings were duly and legally had and taken that on, to wit, the 27th day of June, 1893, the defendant, George B. Blanchard, was duly and legally appointed receiver of the said First National Bank of Whatcom, and thereafter duly qualified as such, and entered upon the discharge of his duties as such, and ever since has been, and now is, the duly and legally appointed, qualified, and acting receiver of the said First National Bank of Whatcom; that, as such receiver of said bank, the said George B. Blanchard at all times mentioned in the plaintiff's complaint has been, and is, entitled and subject to be sued, as such receiver, in this court. (4) That on or about the ——th day of February, 1892, in the city of Tacoma, Washington, while the said First National Bank of Whatcom was engaged in its banking business, the plaintiff loaned to the said First