

shall be subject to proof of insurable interest, and shall be payable within ninety days after satisfactory proof." The assignment states that proof was brought within less than 90 days after the death of the assured. It is perhaps enough to say that the company repudiated all liability upon the policy, and refused to pay at all. This waived the stipulated delay, and authorized immediate suit. *Hochster v. De La Tour*, 2 El. & Bl. 678. But, aside from this, no such question was made below, and perhaps could not have been made after going to a jury upon a plea in abatement. "Where the plea in abatement is regularly put in, the plaintiff must reply to it or demur. If he reply, and an issue of fact be thereupon joined, and found for him, the judgment is peremptory quod recuperet." 1 Tidd, Prac. § 641. The reason stated is that, "the defendant choosing to put the whole weight of his cause on this issue, when he might have had a plea in chief, it is an admission that he had no other defense." 1 Bac. Abr. 31; 1 Archb. Pl. 225. This is the practice in Tennessee. *Bacon v. Parker*, 2 Tenn. 57; *Straus v. Weil*, 5 Cold. 126, 127; *Simpson v. Railway Co.*, 89 Tenn. 308, 15 S. W. 735.

The eighth assignment of error was that it was error to render final judgment against the defendant, and the judgment should have been respondeat ouster. This assignment was properly withdrawn by counsel for plaintiff in error, as it was manifestly bad.

The judgment must be affirmed.

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

(Circuit Court, D. Indiana. February 17, 1897.)

No. 9,281.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS DEFENSE—PLEADING.

Contributory negligence is a matter of defense, in the national courts, and an answer setting up the contributory negligence of the plaintiff, in an action for personal injuries alleged to have been caused by defendant's negligence, is not demurrable.

2. SAME—ANSWER—DEMURRER.

A paragraph in an answer, in an action for personal injuries alleged to have been caused by defendant's negligence, which sets up the negligence of one who was driving the vehicle in which the plaintiff was a passenger, such negligence not being imputable to the plaintiff, and also sets up plaintiff's own contributory negligence, which has already been fully pleaded, is demurrable, and may also be stricken out on motion as surplusage.

Holstein & Barrett and Emerson McGriff, for plaintiffs.

W. E. Hackedorn and John B. Cockrum, for defendants.

BAKER, District Judge. The plaintiff has interposed a demurrer to the second and third paragraphs of defendant's answer. The complaint, which is in four paragraphs, alleges that the plaintiff sustained serious and permanent injuries, without fault or negligence on her part, from the negligence of the defendant, while she was crossing its track on one of the principal streets of Portland, Ind. The first paragraph of answer is a general denial. The second par-

agraph is addressed to each paragraph of the complaint, and alleges that the plaintiff ought not to recover in this suit, because the negligence and want of ordinary care on the part of the plaintiff proximately contributed to cause the accident and injuries of which the plaintiff complains, and because the plaintiff did not, before entering upon the track, carefully look and listen for any train, cars, or locomotive that might be approaching, but, without the exercise of such care, or any care to avoid injury, entered upon said track, and received said injuries. Contributory negligence is a matter of defense in the national courts, and the facts stated in this paragraph show contributory negligence on the part of the plaintiff. This paragraph is therefore sufficient. *Berry v. Railroad Co.*, 70 Fed. 193.

The third paragraph of answer is addressed to each paragraph of the complaint. It sets up that the plaintiff, at the time she was approaching said crossing, and at the time she entered upon the same, was riding in a vehicle drawn by a horse or horses driven by one Frank Moore, to whose prudence and care or lack of the same she then and there negligently committed herself and her safety in the premises, without herself giving the matter of the safe crossing of said railroad any personal care or attention, although she was so situated that she might have done so; and that the said Frank Moore, driver as aforesaid, so in charge of said vehicle, did, without stopping or looking or listening for any approaching car or locomotive, or exercising any care in the premises to avoid injury, drive upon said track in a heedless and careless way, and thereby, and as the result thereof, said vehicle came in collision with said car or locomotive, and the plaintiff received the injuries of which she complains. In so far as this paragraph sets up the negligence of Frank Moore, it is immaterial, because it is settled by the decisions of the supreme court of this state and of the United States that the negligence of the driver is not imputable to the passenger riding with him. *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452; *Miller v. Railway Co.*, 128 Ind. 97, 27 N. E. 339; *Railway Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391. In so far as it charges negligence on the part of the plaintiff, it adds nothing to the allegations of her contributory negligence set out in the second paragraph of the answer. Whatever defense the defendant has growing out of the plaintiff's contributory negligence is fully stated in the second paragraph, and no new or material matter of defense is set up in the third paragraph. This latter paragraph of answer would have been stricken out on motion as surplusage, and in such case it is no error to eliminate it by sustaining a demurrer to it. The demurrer to the second paragraph of answer is overruled, to which ruling the plaintiff excepts; and the demurrer to the third paragraph of answer is sustained, to which ruling the defendant excepts.

GRAND TRUNK RY. CO. OF CANADA v. COBLEIGH.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

RAILROADS—ACCIDENT AT CROSSING—INSTRUCTIONS—DUTY TO LOOK AND LISTEN.

In an action against a railroad company for alleged negligence in running over the plaintiff while crossing its tracks at a highway crossing, the defendant is entitled to have the jury specifically instructed as to the duty of the plaintiff, under such circumstances, to look and listen for a train, before attempting to cross the track, especially when the plaintiff's own testimony suggests that he may have been negligent in this respect; and a general charge that the plaintiff was bound to act as a prudent man would do under the circumstances, leaving it for the jury to fix the standard of prudence, is not sufficient.

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

This was an action by Wayne Cobleigh against the Grand Trunk Railway Company of Canada to recover damages for personal injuries. The plaintiff recovered a verdict. A motion for a new trial was denied (75 Fed. 247), and the defendant now brings error to review the judgment against it.

A. A. Strout, R. N. Chamberlin, and C. A. Hight, for plaintiff in error.

Bates & May, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury.

The action was brought to recover damages for injuries sustained by the plaintiff by the alleged negligence of the defendant. While driving his team over the defendant's tracks where they intersected a public highway in the town of Stratford, N. H., he was struck by one of the defendant's trains. The negligence imputed was the failure of the defendant to sound the whistle and ring the bell upon the locomotive, as required by the statutes of the state. Error is assigned of the refusal of the trial judge to instruct the jury as requested in behalf of the defendant. The assignments of error present the single question whether the rulings of the trial judge in respect to the issue of the plaintiff's contributory negligence were correct.

It appeared upon the trial that the accident took place on a November day, about noon, when there was a snow storm. The general course of the defendant's railroad was substantially north and south, and that of the highway was substantially east and west, the intersection being at practically a right angle. The plaintiff was on his way from the nearest village to his home, which was about four miles beyond the crossing, proceeding westerly, driving a pair of horses harnessed to a farm wagon. Along the highway easterly of the crossing, for a distance of about 1,200 feet, there was an unobstructed view of the railway track to the southerly as far as the station house and beyond. The station house was