jury a violation of the rule which did not involve negligence would not relieve the company from responsibility; that he might violate the rule strictly construed, and not be negligent; and that stepping between the cars when going at the rate of two miles an hour would not be negligence. It may be well, in considering the separate parts of the entire paragraph, to refer to certain rules, now well settled and no longer the subject of question. It is, for example, recognized that a duty rests upon a railroad company, in the operation of a complex and dangerous business, to make rules and regulations for the government of its servants and employés. Railroad Co. v. Camp, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952; Railway Co. v. Dye, 16 C. C. A. 604, 70 Fed. 24; Wood, Mast. & Serv. § 403; 3 Wood, Ry. Law, § 382; Reagan v. Railway Co., 93 Mo. 348, 6 S. W. 371.

And, a company being under a duty to make reasonable rules, it needs hardly to be said that there no longer exists any question of its right and power to do so; and that a servant accepting employment with knowledge of such rules, and especially when his attention is directed thereto, is under obligation to fully conform to such rules when and so long as they are really maintained in force, and that a servant or employé failing or refusing to observe such rules takes upon himself the risk of the consequences of such disobedience, and is, as matter of law, guilty of negligence which defeats his right to hold the master liable for an injury of which such negligence is the proximate cause. Russell v. Railroad Co., 47 Fed. 204; Brooks v. Railroad Co., 47 Fed. 687; Railroad Co. v. Reesman, 19 U. S. App. 596, 9 C. C. A. 20, and 60 Fed. 370; Railway Co. v. Dye, 16 C. C. A. 604, 70 Fed. 24; Railroad Co. v. Finley, 25 U. S. App. 16, 12 C. C. A. 595, and 63 Fed. 228; Gleason v. Railway Co., 19 C. C. A. 636, 73 Fed. 647, and 43 U. S. App. 101; Railway Co. v. Wilson, 88 Tenn. 316, 12 S. W. 720; Railroad v. Reagan, 96 Tenn. 128, 33 S. W. 1050.

If negligence of the servant in violating a reasonable rule is either the sole proximate cause of an injury, or if without being the sole proximate cause the servant's negligence concur with that of the master in producing the injury, the master is exonerated from liability, and the servant is without remedy. Railway Co. v. Hoedling's Adm'r, 10 U. S. App. 422, 3 C. C. A. 429, and 53 Fed. 61; Railroad Co. v. Howe, 6 U. S. App. 172, 3 C. C. A. 121, and 52 Fed. 362.

The doctrine that the master operating a complicated and dangerous business may and must make reasonable rules for the guidance and safety of the employés, that the employé must yield obedience, and takes upon himself the consequences of disobedience, is a doctrine that is eminently wise, and founded upon the highest considerations of justice and humanity. The master's right to protect himself from heavy pecuniary liability in the operation of a large business is most important. His duty, by suitable regulations, such as are suggested by experience, to protect as far as may be the servant from risk of injury to himself as well as injury from a fellow servant, for which the master is not pecuniarily liable, and for which there is practically no remedy, is a duty justly imposed by law. And the still higher considerations of the preservation of human life, and the

prevention of serious physical maiming and disability with the attendant suffering and the impairment of usefulness, furnish the fullest support and sanction to the doctrine. And the law knows no such incongruity as holding the master to the duty of making, with the right of making, without at the same time requiring from the servant full conformity to the regulations. Notwithstanding that these views are now no longer open to question, the circuit judge, in the paragraph referred to, instructed the jury in effect that the contract conferred no right and imposed no obligation beyond or different from the law applicable to the case in the absence of any contract. It was declared not important whether the servant knew rule 112 and violated it. In the third sentence it is fully implied that the servant might violate the rule without such violation involving negligence. The jury was further told that the rule might be violated, and the servant not be negligent, provided he stepped in between the cars when moving at a rate of two miles an hour. The instruction was erroneous in each one of these particulars. To say that it was not vital whether the servant knew of and violated the rule was contrary to the well-settled law as declared in the cases referred to. The rule in its terms forbids the servant to go between the cars for the purpose of uncoupling them when moving at any rate of speed, and the statement, as well as the implication, that the servant might violate the rule without being negligent, provided the rate of speed was not rapid, was clearly to abrogate the rule, and substitute the judgment of the servant therefor, as was said by the supreme court of Iowa in Deeds v. Railroad Co., 74 Iowa, 154, 37 N. W. 124. We have said that apparently the instructions of the learned judge proceeded upon the theory that the contract, if in force, did not make the case different from what it would be if treated as controlled by the law in the absence of any contract. If such was the view entertained, there was error in this. In the ordinary case of this character, the questions of negligence and contributory negligence, as known to the common law, are questions of fact for the jury. In such a case, whether the servant's mode of performing his duties is negligent, as well as whether such negligence is the proximate cause of the injury, are both questions of fact to be submitted to the jury under all the circumstances of the particular case; whereas, in a case like this, with a rule in force, the violation of the rule by the servant is as matter of law negligence, as has often been declared, and the only question left open and to be submitted to the jury, as one of fact, is whether or not such negligence was the proximate cause of the injury, or concurred with the negligence of the master in producing the injury. Applying this general rule to the case in hand, the evidence that rule 112 was in force is undisputed, as this record comes to us, and the jury should have been instructed that its violation by the defendant in error was, as matter of law, negligence, and that if such negligence was the sole proximate cause of the injury, or concurred with that of the master as the proximate cause of the injury, the plaintiff in error was without remedy. What was said in the former opinion of this court in this case will be applicable and fully sufficient for any question that may arise on

another trial in regard to the proximate cause of the injury, and we refer to that case without repeating what is there said.

In regard to the other errors assigned, we do not think that they are well taken, or that they require any discussion. For the errors indicated the judgment is reversed, and the case remanded, with a direction to set aside the verdict and order a new trial.

FIDELITY & CASUALTY CO. OF NEW YORK v. WILLEY et al.

(Circuit Court of Appeals, Third Circuit. April 12, 1897.)

No. 23, March Term, 1897.

INSURANCE—PREPAYMENT OF PREMIUM—CHARGE TO AGENT—RENEWAL RECEIPTS.

A provision in an accident policy that the same shall not take effect unless the premium is paid prior to an accident is waived, on a renewal of the policy, when, according to the usual course of dealing between the insurance company and its agent, the company transmits the renewal receipt to the agent, and charges him with the amount of the premium, and the agent then delivers it to the insured without exacting prepayment. 77 Fed. 961, affirmed.

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

De Lagnee Berier, for plaintiff in error.

George E. Shaw, for defendants in error.

Before DALLAS, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

BUTLER, District Judge. The suit is on a policy of insurance issued by the plaintiff in error to James Getty, Jr., insuring him against accident, for one year. Just before the expiration of this period the company forwarded a renewal receipt to its agent and charged him with the premium. He delivered the receipt to Getty, and thus extended the policy, on the latter's promise to pay at a future time. It was the habit of the company thus to forward policies and renewal receipts and charge premiums, to its agents, and it was the practice of this agent, Mr. Scott, to deliver policies and receipts without exacting prepayment of premiums due, where he had confidence in the assured. He had so dealt with Getty previously. The policy in suit contains the usual provision that it "shall not take effect unless the premium is paid previous to any accident under which claim is made"; and further that its terms cannot be waived or modified by an agent without the approval by the president or secretary of the company.

At the close of the testimony the company requested the court to charge as follows:

"(1) That the insured, James Getty, Jr., by accepting and retaining the policy of insurance, without objection, assented to all its terms and conditions; more particularly (a) he assented and agreed that the policy should not take effect unless the premium should be paid previous to any accident under which claim

might be made; and (b) he agreed that the terms of this policy could not be waived by any agent of the insurance company, and that any modification of the policy should not be valid unless indorsed thereon by the president or one of its secretaries.

"(2) The insured, James Getty, Jr., had knowledge, either actual or presumptive, that the agent of the defendant company, Mr. Scott, had no power to waive or modify any condition of the policy, including that provision of the policy which required prepayment of the premium before an accident.

"(3) The defendant's agent, Mr. Scott, could not bind his principal, the defendant, by waiving payment of the renewal premium when Getty, the insured, knew that he had no power to make such waiver.

"(4) It is immaterial whether Mr. Scott was a general agent or a subagent of the defendant company, so far as his right to waive any condition of the policy was concerned.

"(5) Where the contract of insurance expressly provides by its terms, the particular manner in which a condition of the contract may be waived or modified, no other attempted waiver will be permitted to modify the contract.

"(6) The mere delivery of the renewal receipt did not give the policy force, because, by its terms, it was expressly stipulated between the parties that it should not take effect unless the premium should be paid previous to an accident. The failure to pay the premium simply suspended the policy until the premium should be paid.

"(7) The possession by the plaintiff of the renewal receipt is merely presumptive evidence that the premium was paid, and is not binding upon the company, unless the jury find that the money was actually paid."

The court declined to charge as requested, but instructed the jury, inter alia, that:

"If you find from the evidence that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott, as its debtor, for the premiums on policies of insurance, and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of $50, named in the receipt, then, for the purpose of this case, that premium must be regarded as paid to the company, as between the company and Mr. Getty, or his personal representatives, or cash payment thereof must be deemed to have been waived and the nonpayment of the premium by Getty to Scott under the circumstances would constitute no defense to this suit."

While the court so charged it nevertheless reserved the legal question raised by the points, whether the plaintiff is entitled to recover under the facts.

The jury rendered a verdict for the plaintiff below, as follows:

"The jury find for the plaintiff in the sum of ten thousand, five hundred and seventy-three and $^{83}/_{100}$ dollars, subject to the opinion of the court upon the question of law reserved—whether the nonpayment by Mr. Getty of the renewal premium mentioned in the renewal receipt of June 7, 1895, (pro ut) constitutes a defense to this action upon the facts established by the verdict, namely, that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott as its debtor with the premiums on policies of the insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of $50 named therein; and Mr. Scott having delivered the renewal receipt to Mr. Getty without requiring cash payment of the premium."

The court subsequently ruled the reserved question against the company, and ordered judgment accordingly. To this ruling the company excepted,—as it had done to the admission of some testimony produced to prove payment,—and brought the case here,