

exercised the most extraordinary diligence, and had gone to meet him with the telegram, it is barely possible, but hardly probable, that Ross would have escaped his pursuers. We have discussed these questions in deference to counsel, who earnestly pressed them orally and by brief, but it is not necessary to rest our decision thereon, for under the undisputed facts in the case the telegraph company was not guilty of negligence in not delivering the message of warning in question. Robert C. Ross, the person to whom the message was addressed, was not a resident of the town of Stevenson, nor was he in fact in the town of Stevenson at the time the message was received at the Stevenson office. As the message was directed to no particular street or locality within the delivery limits of the town, it was the duty of the telegraph company to deliver a written copy to Ross promptly on his calling at the telegraph office, and, failing Ross' early call at the office, to deliver such written copy to him by messenger within a reasonable time after the agents of the company should be informed that Ross was to be found at some locality in the town of Stevenson. Ross arrived in the town of Stevenson soon after the message reached the Stevenson office, and was evidently proceeding directly to that office when he was waylaid, shot, and killed without there intervening sufficient time in which the telegraph company could have delivered a copy of the message to him, even if the company was charged with notice of his arrival in town as soon as he came in sight of the telegraph office. Conceding that the message sufficiently notified the company of the importance of speedy delivery, still the company was not charged with the duty of sending out messengers with copies of the message to watch for the arrival of Ross; and, unless charged with such duty, it is clear it was guilty of no negligence. On this ground alone the trial judge was warranted in directing a verdict for the telegraph company, and on this ground the judgment of the circuit court must be affirmed.

LOUISVILLE & N. R. CO. v. JOHNSON.

(Circuit Court of Appeals, Seventh Circuit. July 1, 1897.)

No. 366.

1. MASTER AND SERVANT—UNSAFE PREMISES—INSTRUCTIONS.

In an action by a railway brakeman for injuries suffered in uncoupling cars through an alleged defect in the track, an instruction that defendant "undertook to furnish plaintiff a reasonably safe place to work" is erroneous; defendant's true obligation being to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish a reasonably safe place to work and to keep it in reasonably safe repair.

2. TRIAL—CORRECTING ERRONEOUS INSTRUCTIONS.

When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake.

3. NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

When negligence, if established as alleged or asserted, clearly contributed to the injury, it should not be left to the jury to say whether that negligence was the proximate cause of the injury.

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

J. M. Hamill, for plaintiff in error.

Ross Graham and G. V. Menzies, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The appellee, Frank Johnson, recovered judgment against the appellant, the Louisville & Nashville Railroad Company, for an injury to his left foot, suffered while uncoupling cars in a moving freight train at the crossing of the railroad track and Third street, in Carmi, Ill. The crossing was made of boards laid lengthwise between the rails of the track, and appellee's foot was caught in the space or crevice between one of the rails and the adjacent board, and was held there until run upon by the wheels of the forward truck of the car behind him, which was moving slowly, and came to a stop, it was testified, "within eight feet." The negligence charged against the appellant consisted in the undue width of the crevice in which the foot was caught. On the other hand, it was contended that the railroad company was free from fault, and that the appellee was guilty of negligence contributory to the injury, because, in violation of a known rule of the company, he placed his foot between the rails when the cars to be uncoupled were in motion. The evidence shows, and it seems to be agreed, that a space of 2½ inches between the rails of a track and adjacent boards of a street crossing is necessary to give room for the flanges of passing car wheels, and the evidence tends to show that by reason of wear or other cause, perhaps defective construction, the width of the place where the appellee's foot was caught was 3 or 3½ inches. Error is assigned upon the admission of evidence, and upon the giving and refusing of instructions.

In respect to the duty of the railroad company the court erroneously instructed that the company "undertook to furnish the plaintiff a reasonably safe place to work," and to maintain the same. The instruction in full appears in the margin.¹ The rule is well settled, and as early as 1894, in *Railroad Co. v. Meyers*, 24 U. S. App. 295, 11 C. C. A. 439, and 63 Fed. 793, had been declared by this court, that "the master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair." See, also, same case

¹ "By this contract or arrangement, however, the railroad company, on the other side, undertook to furnish the plaintiff a reasonably safe place to work where he could carry on the business for which he was employed, braking, with reasonable safety. The company did not become an insurer that the plaintiff would not be injured at any of the places where he was called upon to work, but it did say to him in effect, and that was its undertaking, that a reasonably safe place would be furnished to do his work. But if, while exercising reasonable care, his injury was brought about by the failure of the company to provide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case."

on second appeal, 46 U. S. App. 226, 22 C. C. A. 268, and 76 Fed. 443. In this case the question whether the railroad company was chargeable with negligence was, to say the least, close, depending upon the inquiry whether the space between the rail and board had become, or perhaps was by construction, of such unnecessary width, as not to be reasonably safe, and whether the fact was so manifest and so long continued that in the exercise of due care the company ought to have discovered the defect in time to remove it. The error is emphasized by the terms in which the instruction concludes: "If, while exercising reasonable care, his injury was brought about by the failure of the company to provide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case." It was, therefore, the more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were not sufficient to prevent misunderstanding on the part of the jury. For instance, the jury were told that if they found that the defendant failed or neglected to keep its track at the place of the injury in a reasonably safe condition, and such condition was known to the defendant, or by the exercise of reasonable diligence could have been known to the defendant, etc., they should find the defendant guilty. In so far as this indicates that the defendant was bound only to ordinary diligence to discover defects caused by use it is perhaps sufficiently accurate; but the repeated and erroneous statement of the primary duty—to provide a safe working place—was left unmodified and unexplained. When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake.

Another trial being necessary, we assume that other questions, in so far as they are doubtful, will, to the extent practicable, be eliminated, and therefore do not deem it necessary to consider them now, further than to observe that the question of proximate cause does not seem to arise in the case, and should not have been left to the jury. The two questions in the case are simple. They are of negligence on the part of the railroad company and of contributory negligence on the part of the appellee. If the railroad company was negligent, it was because of its responsibility for the hole or crevice in which appellee's foot was caught. The hole caused the injury, and, if it was dangerously large because of the company's negligence, the company's liability is clear, unless avoided by the contributory negligence of the appellee. The appellee's negligence, if he was negligent at all, consisted in stepping across the rail. If he had kept his foot outside the rail, as warned to do by the rule of the company, it would not have been caught. If, therefore, he was guilty of negligence in stepping between the rails, that negligence, it is beyond dispute, contributed directly to the injury, and he is entitled to no relief against the company. Whether either party was guilty of negligence in the particular stated was a question for the jury upon all the pertinent evidence, and so the case should have been explained and submitted. When negligence, if established as alleged or asserted, clearly contributed

directly to the injury, it should not be left to the jury to say whether that negligence was a proximate cause of the injury.

The judgment below is reversed, and the cause remanded, with instruction to grant a new trial.

RANDLE v. BARNARD et al.

(Circuit Court of Appeals, Seventh Circuit. July 1, 1897.)

No. 317.

1. PARTNERSHIP—PARTICIPATION IN PROFITS OF LEASED PREMISES—LIABILITY FOR RENT.

An agreement by a party who loans money to, and becomes surety for, a lessee, stipulating for a share of the profits of the leased property, does not make him liable for unpaid rent, as a partner, though the contract provides that no subletting or assignment shall be made without his consent.

2. REVIEW ON ERROR—TRIAL TO COURT.

Where there is a special finding of facts, the appellate court will only consider whether, upon such facts, the judgment was correctly rendered.

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

Alex. W. Hope, for plaintiff in error.

Geo. W. Taussig, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The question presented in this case is whether the appellee George D. Barnard is liable in assumpsit to the appellant, Charles H. Randle, for rent stipulated in a lease made by the appellant to A. C. Ricksecker, it being alleged that Barnard and Ricksecker were partners in the transaction. Trial by jury was waived, and upon a special finding of facts judgment was given for the defendant. The substance of the finding is as follows: In 1892, Randle was erecting a hotel on Fortieth street, a short distance west of Cottage Grove avenue, in Chicago, and for \$100 gave an option for a lease to Ricksecker, who at the time stated that Barnard, a resident of St. Louis, Mo., was interested in the transaction. Later, on the 29th day of October, 1892, at Barnard's office in St. Louis, Randle and Ricksecker entered into a written agreement for a lease, to the effect that Randle should complete the hotel by May 1, 1893, and thereupon lease the same to Ricksecker for a term of 183 days from that date, for a stipulated rent, which Ricksecker agreed to pay in monthly installments in advance. At the same time Ricksecker and Barnard executed to Randle a penal bond in the sum of \$5,000, conditioned that Ricksecker should well and truly perform every provision of the agreement and in all things perform and carry out each and all of his undertakings contained therein, a copy of which agreement was attached to the bond, and likewise Randle executed a bond with security to Ricksecker, conditioned that he would faithfully perform the covenants and conditions of the agreement on his part. At the same