that the only presumption or inference that the law could indulge would be in defendant's favor on these points, to wit, that the message was delivered to the Birmingham office by plaintiff, or some one by him duly authorized, and was promptly transmitted to the Ft. Payne office, as was defendant's duty to do. Suppose that its receipt at the Ft. Payne office and the presumptions arising therefrom was all the evidence as to the time and delivery of the message to defendant for transmission; what would it tend to prove? Would it tend, in the slightest degree, to prove that defendant had had, several hours before, a telephone communication from plaintiff or his agent by which the message was delivered to plaintiff for transmission? The question answers itself. Suppose we take the other end of the propositions. What presumptions or inferences of fact arise against defendant from the fact that plaintiff asked Mr. Stillwell to telephone to defendant and that the said Stillwell picked up the receiver of the telephone, called a number not shown to be defendant's number and spoke into the telephone certain words? There is no presumption or inference of law, arising from such facts, that said message ever went further than into the receiver of Mr. Stillwell's phone. The presumptions and inferences arising from the two matters proven in no way connect the one with the other, but, on the contrary, tend to disprove, rather than prove, any such connection.

For the foregoing reasons, we think the evidence as to the telephone transaction should have been ruled out, when plaintiff failed to introduce evidence tending to show that, at the time Mr. Stillwell was talking into his phone, it was connected with the office of defendant, and that he was speaking to some one in that office.

The authority which counsel for appellant relies upon as authority for sustaining the action of the lower court in admitting said evidence and refusing to rule it out is the case of Western Union Telegraph Co. v. Rowell, 153 Ala. 295, 45 South. 80, decided by this court—Justice Denson writing the opinion. The facts in the case cited, as stated in the opinion of the court, were that Rowell, the plaintiff, called over the phone for connection with the Western Union Telegraph Company of Montgomery, and had a conversation with the person who answered the phone after connection was given. The plaintiff did not know who the person was who talked with him over the phone. The plaintiff in that case did the phoning for himself, and was testifying for himself as to the connection with the Western Union Telegraph Company, and the conversation had by him with the person at the other phone, which had been connected by the central phone office with the phone into which he was speaking. We fully agree with the opinion of the court in that case, but it is entirely different from the case sub judice in the legal principles involved. In that case the person who did the telephoning was the witness. In this case a bystander is the witness. In that case the person doing the telephoning asked the central office to connect him with the Western Union Telegraph Company's office, and connection was given presumably with that office, and the witness knew that some one came to the phone and answered the call. In this case a bystander testifies that Mr. Stillwell called for connection with a certain number; and it is not shown what that number was, nor that it was the number of the defendant company. In that case it was shown that some one answered the phone. In this case it is not shown that any one answered the phone. If the plaintiff in this case, who was testifying for himself, had any information that Mr. Stillwell's phone was connected with the Western Union Telegraph Company's office, it was because Mr. Stillwell told him so, and it was mere hearsay and was inadmissible. That case was, in no sense, an authority for the ruling in this case.

For the foregoing reasons, we think that the case should be reversed and remanded.

(125 La. 236)

No. 17,590.

LEE et al. v. NEW ORLEANS GREAT NORTHERN R. CO.

(Supreme Court of Louisiana. Jan. 3, 1910. Rehearing Denied Jan. 31, 1910.)

CARRIERS (§§ 266, 276*)—APPEAL AND ERROR (§ 1002*) — SEPARATE ACCOMMODATIONS — "COLORED RACE"—EVIDENCE—REVIEW.

Act No. 111, p. 152, of 1890, requires railroad companies to provide equal, but separate, accommodations for "the white and colored races," and makes it a misdemeanor for any train officer to assign a passenger to a coach or compartment other than the one set aside for persons of his race.

Where plaintiff sued for damages on the ground that two of his children, born of white parents, had been unlawfully assigned by the conductor of defendant's train to a coach set apart for colored persons, *held*, that the burden of proof was on the plaintiff to establish that his children belonged to the white race, and that, under the statute, any person who has any appreciable mixture of negro blood belongs to the "colored" race; and *held*, further, that a judgment rendered in favor of the defendant on conflicting evidence as to the status of plaintiff's children would not be disturbed, when not clearly against the preponderance of the evidence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 266, 276;* Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*

For other definitions, see Words and Phrases, vol. 2, pp. 1262-1275.]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas M. Burns, Judge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Action by Sam Lee and others against the New Orleans Great Northern Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Thos. M. Bankston, Hypolite Mixon, and Prentiss B. Carter, for appellants. Benj. M. Miller and Lindsay McDougall, for appellee.

LAND, J. Sam Lee and his wife sued for $15,000 damages, in behalf of themselves and their minor daughters, Edith and Belle, aged, respectively, 16 and 14 years. The cause of action, briefly stated, is that said minors, being white children born of white parents, while passengers on one of defendant's trains and seated in a coach set apart exclusively for white people, were illegally and wrongfully ordered by the conductor of said train to leave said coach and go into the coach set apart exclusively for negroes, and that on their refusal so to do the said conductor ejected them from said train at a station some eight miles distant from their destination, to the great mortification and humiliation of the petitioners.

The defendant, first excepting that the said Edith and Belle are not the legitimate children of the plaintiff, answered that they were colored persons, and that the conductor, so believing, requested them to leave the white coach and to go into the car reserved for negro passengers, which the said girls did without objection, and that they voluntarily left the train at Ramsey, without being required or requested to do so by the said conductor or any other employé of defendant.

On the prayer of the plaintiffs the case was first tried before a jury, which failing to agree, a mistrial was entered. Thereupon counsel for plaintiffs waived trial by jury, and by consent the case was tried before the court.

Plaintiffs have appealed from a judgment in favor of the defendant.

The trial judge found as a matter of fact that the two girls were "colored," or, in other words, of African descent, on the maternal side.

Act No. 111, p. 152, of 1890, requires railway companies to provide equal, but separate, accommodations for the "white and colored races," and train officers to assign each passenger to the coach or compartment used for the race to which such passenger belongs. The same statute makes it a misdemeanor for any passenger to insist on going into a coach or compartment to which by race he does not belong, and for any train officer to insist on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, and further provides that, should any passenger refuse to occupy the coach or compartment to which he is assigned, the railway officer shall have power to refuse to carry such passenger on his train.

The word "colored," as used in the statute, is a term specifically applied in the United States to negroes or persons having an admixture of negro blood. See Webster's Int. Dict. verb. The same word is often applied to black people, Africans or their descendants, mixed or unmixed, and to persons who have any appreciable mixture of African blood. 7 Cyc. 400, 401.

One hundred years ago, in the territory of Orleans, the term "persons of color" was used to designate people who were neither white nor black. In Adelle v. Beauregard, 1 Mart. (La.) 184, decided in 1810, the Superior Court said:

> "Persons of color may have descended from Indians on both sides, from a white parent, or mulatto parents in possession of freedom."

In that case the court held that the plaintiff, being a person of color, was presumed to be free, and that in case of blacks the presumption was that they were slaves. During the régime of slavery all free persons of African descent were styled "free people of color" or "free colored persons." Civ. Code 1825, arts. 95, 2261; Act No. 308 of 1855. Article 95 of the Code of 1825 interdicted marriage between free persons and slaves, and between free white persons and free people of color. The first restriction fell with the abolition of slavery, and the second was repealed by the Civil Code of 1870.

But by Act No. 54, p. 63, of 1894, marriages between white persons and persons of color were again prohibited.

By Act No. 87 of 1908 concubinage between a person of the Caucasian or white race and a person of the negro or black race was made a felony.

Act No. 111 of 1890 draws a sharp line of distinction, without a margin, between the white and colored races in the matter of separate accommodations on railroad trains. Ever since the first settlement of Louisiana all persons with any appreciable degree of negro blood have been considered as colored; that is to say, as belonging to the African race. Many free persons of color owned slaves and other property. But between that class of people, however light in color, and the whites, the color line was strictly drawn, both socially and politically. The lawmaker never applied the term "colored" to slaves, but since emancipation that term has been used as synonymous with negro. Among slaves the word "negro" or "nigger" was considered as a term of reproach, and they usually spoke of themselves as "colored." This nomenclature has survived, and has become a popular term, embracing all persons of negro blood.

The plaintiff's cause of action is based on the allegation that his two daughters are white children born of white parents. The evidence adduced on the first trial failed to satisfy three-fourths of a jury of the vicinage of the truth of the allegation. The sec-

ond trial before the court resulted in a judgment that plaintiff's children were colored persons.

The plaintiff, Sam Lee, is undoubtedly a white man. He was married to Adaline Baham before a justice of the peace in February, 1889. At that time marriages between whites and persons of color were lawful, and it results that, in any view of the case, the children of such marriage are legitimate.

The solution of the question of color depends on the status of Norah, Nory, or Abraham Baham, the father of Mrs. Lee, who died some 20 or 25 years ago. It is admitted that Norah Baham was of mixed blood, but whether he was of Indian or African descent is the contested issue of fact in the case.

No useful purpose would be subserved by recapitulating the conflicting evidence adduced on this issue in the court below. Suffice it to say that the finding of the trial judge is sustained by the testimony of a number of witnesses who knew Norah Baham before and after the late Civil War. It is true that there is much counter testimony; but it is not sufficient to justify us in reversing the judgment as clearly erroneous on a pure question of fact.

The petition charges the defendant company with the violation of a penal statute, and the burden of proof was on the plaintiff to establish the essential facts necessary for a recovery of the damages claimed, to wit, that his children belonged to the white race, and were unlawfully assigned to a coach or compartment set apart for colored persons. One who charges another with a culpable breach of duty must prove the fact, though it involves a negative. 1 Hennen's Digest, pp. 495–497. On the question of race there is no legal presumption either way. The issue was one purely of fact, to be determined not only by evidence of the admixture of negro blood, but by evidence of reputation, of social reception, and of the exercise of the privileges of a white man. White v. Tax Collector, 3 Rich. Law (S. C.) 136.

Judgment affirmed.

(125 La. 241)

No. 17,528.

BUSBEY v. HAMITER-BUSBEY MILL & ELEVATOR CO., Limited.

(Supreme Court of Louisiana. Nov. 29, 1909. Rehearing Denied Jan. 17, 1910.)

1. MASTER AND SERVANT (§ 247*)—INJURY TO SERVANT—NEGLIGENCE OF SERVANT—PROXIMATE CAUSE OF INJURY.

Failure on the part of the plaintiff to exercise due caution in removing an obstruction from dangerous machinery is the proximate cause of the accident; and, as the plaintiff thereby contributes to his misfortune by his own negligence and want of care, he is not entitled to damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795–800; Dec. Dig. § 247.*]

2. MASTER AND SERVANT (§ 247*)—ACTIONABLE NEGLIGENCE — PROXIMATE CAUSE OF INJURY.

The negligence of a defendant when it is not the proximate cause, or the concurrent cause, but is merely a remote cause, will not support an action for damages against him; for, in order to render a defendant liable, his negligence must be such as proximately contributed to the injury. In the instant case the absence of a shaker or screen was not the proximate cause of the accident, for the manner in which plaintiff performed his work was the proximate cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795–800; Dec. Dig. § 247.*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; A. J. Murff, Judge.

Action by Frank B. Busbey against the Hamiter-Busbey Mill & Elevator Company, Limited. Judgment for plaintiff, and defendant appeals. Reversed.

Wise, Randolph & Rendall, for appellant. Hall & Jack, for appellee.

BREAUX, C. J. Plaintiff brought this suit to recover damages in the sum of $10,000.

The jury allowed him $8,750.

Judgment was accordingly rendered.

Plaintiff is 24 years of age, fairly intelligent, and was in the employ of the defendant company.

While engaged as the miller, his hand was caught by the rollers of a chopmill of the defendant. Before the machinery could be stopped, his hand was badly crushed. It had to be amputated.

Plaintiff as the miller had charge of the mill.

His complaint is that the defendant was negligent in not having a shaker or sifter in the mill, or, in its absence, in not having a guard or protecting cover over the live rollers.

Defendant runs a gristmill, and manufactures chops and corn meal.

On the day of the accident plaintiff had been in the employ of the defendant as miller about 10 days. He avers that he had had no previous experience, and that he was not aware of the defects and dangers in operating the mill in the absence of a shaker.

The defense sets out that its machinery in this mill was manufactured by a large and responsible factory, and that everything was in complete running order.

The defendant also sets out that plaintiff had experience as an operator of mills; that, if there were defects, they were apparent and he made no objection; that he thereby voluntarily assumed all risks; that the accident was caused by plaintiff's fault; that he undertook to remove the obstruction, and was not careful; that there were other and safer methods of removing it to which he should have resorted.

There was originally a "shaker" in the