No. 2372

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

CHARLES HARMAN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

Messrs. MAURY, TEMPLEMAN & DAVIES, of Butte, Montana,

Attorneys for Plaintiff and Defendant in Error.

Messrs. VEAZEY & VEAZEY and W. L. CLIFT, of Great Falls, Montana,

Attorneys for Defendant and Plaintiff in Error. [1*]

In the District Court of the United States, District of Montana.

No. 306.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on February 21st, 1913, the plaintiff filed his complaint herein, as follows, to wit: [2]

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*Page-number appearing at foot of page of original certified Record.

In the District Court of the United States, District of Montana.

AT LAW.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains, and for a cause of action, alleges:

1. That plaintiff at all times herein mentioned was and now is a citizen and resident of the State of Montana.

2. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and a citizen of said State.

3. That the amount involved in this controversy, exclusive of costs and interest, is more than Three Thousand ($3,000.00) Dollars.

4. That the defendant is a railroad corporation and engaged in conducting a general railroad business in Montana, and particularly in Jefferson County thereof, and through the town of Basin therein; that the railroad track of the defendant used by it for conducting its general railroad business in said county and town runs through a tunnel at a point about two miles in an easterly [3] direction

from the said town of Basin; that for a period of about six (6) months prior to the 28th day of November, and on said date, Bates & Rogers, contractors, were engaged by the defendant, and in behalf of the defendant were repairing said tunnel, and said contractors had in their employment continuously in prosecuting said repairs during said time about sixty (60) men; that said town of Basin was at all of said times the headquarters and the railroad depot of and for said contractors from which such contractors secured all of the supplies and materials used by them in prosecuting said repairs of said tunnel; that the only practical way and route from said tunnel to said town of Basin was over defendant's railroad track which ran from said tunnel to said town of Basin, and during all of the times herein mentioned said contractors and all of the men employed by them were constantly and continuously using and traveling over the defendant's railroad track between the aforesaid tunnel and the town of Basin for the purpose of securing supplies and material for prosecuting said repairs at said tunnel, and for their own benefit and convenience, with the full consent, acquiescence and knowledge of the defendant.

5. That on the 28th day of November, 1912, the plaintiff, who had prior to said date been an employee of said contractors and working on said tunnel, left the employment of said contractors and started to Basin over the railroad track of the defendant; that at a distance of approximately one-half mile from Basin, while the plaintiff was traveling over the defendant's railway track, and traveling

through a sharp curve and an obscure place, the defendant carelessly and negligently operated one of its engines over [4] its said track at said place, and carelessly and negligently failed to blow the whistle and ring the bell on its engine in approaching said obscure place, and did carelessly and negligently drive and run its said engine and train into and against the plaintiff and caused him grievous bodily injury as hereinafter set out.

6. That at the time of said accident and injuries to the plaintiff, the defendant, by the exercise of ordinary care on its part, should have known and did know that this plaintiff was traveling over the said track of the defendant, and that he was liable to be injured by it unless the defendant exercised ordinary care on its part to avoid injury to him.

7. That at the time of the said accident and injuries to the plaintiff, the plaintiff was exercising all due care and caution on his part, and was wholly and entirely unaware of the approach of said train in time to avoid said accident and collision to him.

8. That as a result of said accident and injuries to the plaintiff, the plaintiff's left leg was crushed and broken, plaintiff's back was severely sprained and injured; plaintiff received severe injuries about the head and right arm; that plaintiff, as a result of said accident, was rendered unconscious and has been ever since said accident and now is under the care and attention of a physician and surgeon; his said injuries are permanent in character and have caused him to suffer great physical and mental pain and anguish; that at the time of said accident and

injuries, plaintiff was a strong, healthy, able-bodied man, earning and capable of earning Four ($4.00) Dollars per day; that as a result of said accident and injuries his earning capacity has been completely destroyed to the present time, and for a long time in the future.

9. That it was necessary for plaintiff to expend [5] for medical and surgical care and nursing for the said injuries the sum of Three Hundred ($300.00) Dollars; the same is a reasonable sum for the same, and plaintiff has paid the same. There will be further expense hereafter for medical and surgical treatment and nursing, but plaintiff is at this time unable to say how much.

10. That by reason of said accident and injuries, the plaintiff has been damaged by the defendant in the sum of Ten Thousand Three Hundred ($10,300.00) Dollars.

WHEREFORE plaintiff demands judgment against the defendant for the sum of Ten Thousand Three Hundred ($10,300.00) Dollars and costs of suit.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Plaintiff. [6]

United States of America,
State of Montana,
County of Silver Bow,—ss.

Charles Harman, being first duly sworn, deposes and says: I am the plaintiff in the above and foregoing complaint named; I have read the same and

know the contents thereof; that the same is true of my own knowledge.

CHARLES HARMAN.

Subscribed and sworn to before me this 19th day of February, 1913.

[Seal] A. C. McDANIEL,

Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Dec. 10th, 1915.

Filed Feb. 21, 1913. Geo. W. Sproule, Clerk. [7]

Thereafter, on February 21, 1913, Summons was duly issued herein as follows, to wit: [8]

[Summons.]

UNITED STATES OF AMERICA.

District Court of the United States, District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the city of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting, to the Above-named Defendant, Great Northern Railway Company, a Corporation.

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana, this 21st day of February, in the year of our Lord one thousand nine hundred and 13, and of our Independence the 137.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk. [9]

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within summons on the 24th day of February, 1913, and personally served the same on the 24th day of February, 1913, on Great Northern Railway Company, a corporation, by delivery to, and leaving with, I. Parker Veazey, Jr., Attorney for said defendant named therein personally, at Great Falls, County of Cascade, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Clerk of U. S. District Court attached thereto.

Dated this 24th day of February, 1913.

WILLIAM LINDSAY,
U. S. Marshal.
By Jas. A. Gillan,
Deputy.

[Endorsed]: No. 306. U. S. District Court, District of Montana. Charles Harman vs. Great Nor. Ry. Co. Summons. Maury, Templeman and Davies, Butte, Mont., Plaintiff's Attorneys. Filed Feb. 24th, 1913. Geo. W. Sproule, Clerk. By ————, Deputy Clerk. [10]

Thereafter, on May 19, 1913, Answer was duly filed herein, as follows, to wit: [11]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Answer.

Comes now Great Northern Railway Company, defendant in the above-entitled cause, and for its answer to the complaint filed in said action, admits, alleges, and denies, as follows:

I.

For its first separate answer to said complaint, defendant admits, alleges and denies, as follows, to wit:

1. Save as hereinafter specifically admitted or denied, defendant denies each and every allegation, matter, and thing in said complaint contained.

2. Denies that it has, and alleges that it has not, any knowledge or information sufficient to form a belief as to plaintiff's citizenship or residence.

3. Admits that it is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and is engaged in operating a line of railroad in and through the county of Jefferson and town of Basin, in the State of Montana, which line of railroad extends through a tunnel situated about two miles easterly or northeasterly from said town of Basin; which tunnel was during the fall of 1912 being repaired and relined by the Bates & Rogers Construction Company under contract with defendant railway company. Defendant also admits that [12] plaintiff was employed by said Bates & Rogers Construction Company prior to November 28, 1912, in connection with said work of repairing and relining said tunnel.

4. Defendant further admits that plaintiff left the employment of said Bates & Rogers Construction Company on the 28th of November, 1912, and alleges that he thereupon, together with another former employee of said construction company, wrongfully took and appropriated a certain hand-car belonging to defendant, and wrongfully, unlawfully, and without authority or permission of said defendant, placed same on defendant's track, and plaintiff, together with said former employee of said construction company, boarded said hand-car and propelled same on

and along defendant's track from said tunnel toward the said town of Basin. Defendant further alleges that while said car was being wrongfully, carelessly, and recklessly run and operated along defendant's said track by said plaintiff and said former employee of said construction company, and while said hand-car was wrongfully upon said track, the same was struck by one of defendant's passenger trains, which was being carefully, cautiously, and properly operated on and along said track, and said hand-car was thrown from said track and against the plaintiff.

5. Defendant further admits that plaintiff received some personal injuries as a result of said accident and collision, but denies that it has, and alleges that it has not, knowledge or information sufficient to form a belief as to the extent of such injuries; and defendant, therefore, leaves the plaintiff to make such proof thereof as he may be advised.

6. Defendant denies that said train and engine were carelessly or negligently operated, or that proper signals were not given by bell and whistle of said train's approach; and further denies that defendant had any notice, knowledge, or information that plaintiff was traveling on and over said track, or could by the exercise of ordinary care have known or ascertained that plaintiff was on said track and exposed to danger of collision with said train, [13] or could by the exercise of care and caution have discovered plaintiff on said track in time to avert the accident which resulted from the collision between said train and said hand-car.

II.

For its second separate defense to said complaint, defendant admits, alleges, and denies as follows:

1. Alleges that if it was in any respect negligent in any of the matters set forth in said complaint, then and in that event the damage sustained by plaintiff, to whatever extent the same exists or has existed, was due to, and caused by, plaintiff's own contributing fault and carelessness, as hereinafter set forth and otherwise; and that plaintiff's own fault and carelessness and his failure at all times and places set forth in the complaint to exercise such reasonable care and caution, for his own safety, as the average reasonably prudent person, under all the circumstances then and there existing, could, should, and ordinarily would have exercised, as hereinafter set forth and otherwise, was a proximate cause of, and contributed to cause, his said damage.

2. That in the exercise of such reasonable and ordinary care and caution, for his own safety, as the average reasonably prudent person in his situation, under all the circumstances existing at the time and place mentioned in the complaint, should, could, and ordinarily would have exercised, plaintiff should have known and appreciated, and, in fact, actually well knew and appreciated, that trains and cars might be run and operated along said track at any time, and that the train which struck said hand-car was due to pass along and over said track at the exact time it did in fact do so.

3. Alleges that as plaintiff and the former employee of said construction company, hereinabove re-

ferred to, were propelling said hand-car along said track, as hereinabove alleged, they saw, [14] heard, or discovered the train which collided with said hand-car, approaching, and immediately alighted from said car and endeavored to remove said car from said track. Defendant further alleges that after plaintiff saw, heard, or discovered said train approaching, he had sufficient and ample time to leave said car and track and reach a place of safety before said train came in contact with said car; but, notwithstanding the close proximity of said train, which, as plaintiff well knew, was moving rapidly towards him, he carelessly, negligently, and recklessly remained on said track, or dangerously close to same, until said train struck said hand-car and threw said car from said track and against the plaintiff, causing the injuries complained of in this action.

4. Defendant further alleges that, in the exercise of such reasonable care and caution as the average reasonably prudent man, under all the circumstances then and there existing, could, would, and should, and ordinarily would have exercised, plaintiff should and would have proceeded from said tunnel to said town of Basin by some road, route, or way other than defendant's said railroad track, such other road, route, or way being then and there available to him; and should not have attempted to proceed along said railroad track with said hand-car when he knew, or in the exercise of ordinary care should have known, that defendant's trains might be operated along said track at any time; and defendant further alleges that, in the exercise of such reasonable care and cau-

tion as the average reasonably prudent person, under all the circumstances then and there existing, could and should and ordinarily would have exercised, plaintiff would and should have left said car and said track when he saw, heard, or knew said train was approaching, and gone to a place of safety, then and there readily available to him; and that his unnecessary, unauthorized, wrongful, careless, negligent, and reckless failure and refusal to leave said track after seeing, hearing, or [15] discovering said approaching train, was a proximate cause of the injuries sustained by him.

WHEREFORE, having fully answered, defendant prays that it be dismissed hence with its costs and disbursements herein.

VEAZEY & VEAZEY, and
W. L. CLIFT,
Attorneys for Defendant. [16]

State of Montana,
County of Cascade,—ss.

W. L. Clift, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant, Great Northern Railway Company, in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information, and belief. That affiant makes this affidavit of verification for and on behalf of defendant, Great Northern Railway Company, for the reason that defendant is a corporation and none of the officers of said corporation are within the

county of Cascade, State of Montana, where affiant resides.

(Signed) W. L. CLIFT.

Subscribed and sworn to before me this 17th day of May, 1913.

[Notarial Seal] (Signed) R. B. NOONAN,
Notary Public for the State of Montana, Residing at Great Falls, Cascade County, Montana.

My commission expires Nov. 18, 1915.

Filed May 19, 1913. Geo. W. Sproule, Clerk.
[17]

Thereafter, on May 24, 1913, Reply was duly filed herein as follows, to wit:

In the District Court of the United States in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Reply.

Comes now Charles Harman, plaintiff herein, and for his reply to the answer of the defendant on file herein, admits, denies and alleges as follows, to wit:

1.

For his reply to the first separate answer of the defendant to plaintiff's complaint, admits that the plaintiff, at the time he left the employment of Bates

& Rogers Construction Company, together with another former employee of said Construction Company, placed a certain hand-car on defendant's track, and plaintiff, together with said former employee of said Construction Company, propelled said hand-car on and along defendant's track from the said tunnel mentioned in plaintiff's complaint towards said town of Basin; and that while said hand-car was being run and operated along defendant's said track by this plaintiff and a former employee of said Construction Company, and while said hand-car was upon said track, the same was struck by one of defendant's passenger trains, and that said hand-car was thrown from said track and against the plaintiff. And denies each and every other allegation [18] and all other allegations contained in paragraph 4 thereof.

2.

Plaintiff, for his reply to the second separate defense of the defendant set out in its answer on file herein, denies generally each and every allegation and all allegations therein contained.

3.

Plaintiff for his reply to the answer of defendant, denies generally each and every allegation and all allegations therein contained except the allegations hereinbefore specifically admitted or denied.

Wherefore plaintiff having fully replied to the answer of defendant on file herein, demands judgment in accordance with the prayer of his complaint.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Plaintiff.

United States of America,
State of Montana,
County of Silver Bow,—ss.

J. O. Davies, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff, Charles Harman, in the above-entitled action; that he has read the above and foregoing reply and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief; that affiant makes this affidavit of verification for and on behalf of the plaintiff, Charles Harman, for the reason that said plaintiff is absent from and is not now present within the County of Silver Bow, State of Montana, the place where affiant resides.

J. O. DAVIES.

Subscribed and sworn to before me this 23d day of May, 1913.

[Seal] A. C. McDANIEL,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Dec. 10, 1915.

Filed May 24, 1913. Geo. W. Sproule, Clerk.

[19]

Thereafter, on July 15, 1913, the Verdict of the jury was duly filed and entered herein, as follows, to wit:

In the District Court of the United States, Ninth Circuit, District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Verdict.

We, the jury in this case, find our verdict in favor of Charles Harman and against defendant, and we assess Harman's damages at the sum of Fifteen Hundred (1500) Dollars.

J. FRANK REDPATH,
Foreman of the Jury.

Filed and entered July 15, 1913. Geo. W. Sproule, Clerk. [20]

Thereafter, on July 18, 1913, Judgment was duly entered herein, as follows, to wit: [21]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Judgment.

BE IT REMEMBERED, that this cause came on regularly for trial before the Court on the 12th day of July, 1913. Plaintiff was represented by Maury, Templeman & Davies, Attorneys at Law. The defendant was represented by Messrs. Veazey and Veazey, Attorneys at Law. A jury of twelve good and lawful persons was regularly sworn and empaneled to try the case. Witnesses were sworn and testified on behalf of the plaintiff. Witnesses were sworn and testified on behalf of the defendant. Counsel for the respective parties argued the cause to the jury. Thereupon the Court instructs the jury as to the law, and thereupon the jury retire in the custody of sworn bailiffs to consider of their verdict, and subsequently return into open court and say, after title of court and cause.

"We, the jury in this case find our verdict in favor of Charles Harman and against the defendant Great Northern Railway Company, and we assess Harman's damages at the sum of $1500.00." [22]

The jury each and all answered that such was their verdict.

Wherefore, by reason of the law and the premises, it is ORDERED, ADJUDGED AND DECREED that Charles Harman have and recover of and from Great Northern Railway Company, a Corporation, the sum of Fifteen Hundred ($1500) Dollars, together with interest thereon at eight (8%) per cent per annum from the date of the said verdict, to wit,

July 15th, 1913, and recover its costs of suit hereby taxed at Fifty and 50/100 Dollars.

Filed and entered this 18th day of July, 1913.

GEO. W. SPROULE,
Clerk. [23]

United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 18th day of July, A. D. 1913.

GEO. W. SPROULE,
Clerk.

By ————————,
Deputy Clerk.

Filed and entered July 18, 1913. Geo. W. Sproule, Clerk. [24]

And thereafter, on September 25, 1913, Bill of Exceptions was duly settled and allowed and filed herein, being in the words and figures following, to wit: [25]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That at a stated term, to wit, the April term of the above-entitled court sitting at Helena, this cause came on regularly for trial upon the complaint of the plaintiff, the answer of the defendant thereto, and the reply of the plaintiff to said answer, before the United States District Court for the District of Montana, on the 12th day of July, 1913, the Hon. George M. Bourquin, the Judge thereof presiding. H. Lowndes Maury, Esq., of the firm of Messrs. Maury & Templeman, appeared as attorney for the plaintiff, and H. C. Hopkins, Esq., and Messrs. Veazy & Veazy, as attorneys for the defendant. A jury of twelve persons was duly and regularly impaneled and sworn to try said cause, whereupon the following proceedings, and none other, were had, and the following evidence, and none other, was introduced, to wit:

[Testimony of Charles Harman, in His Own Behalf.]

CHARLES HARMAN, the plaintiff in the above-entitled cause, being first duly sworn in his own behalf, testified as follows:

Direct Examination.

My name is Charles P. Harman. I was born in Augusta County, Virginia, and am forty-five years of age. I first came to Montana about the 15th of July of last year, 1912. I came here with the intention of taking up a homestead, buying land, and getting work on the railroad, that is on railroad construction or anything in that line. I have been

(Testimony of Charles Harman.)

following railroad construction ever since 1889 and [26] 1890. For thirteen months I was a volunteer in the United States Army—a volunteer in the Spanish-American War. I have helped in railroad construction work and in operating railroad equipment. I have operated steam shovels and donkeys and worked on bridges and on the track doing surfacing work. I have worked in operation of locomotives. I worked for the Chesapeake & Ohio as fireman on one occasion for four months. I have handled locomotives and have handled them successfully on the hills.

I claim that I am a citizen of Montana and claim that I was a citizen of Montana on the 20th of February, 1913, and I was such citizen at that time. I came here with the expectation of making Montana my permanent home. I first went to work when I came to Montana at Highgate for the Bates-Rogers Construction Company, building snowsheds. At that time I worked in the capacity of a carpenter, building snowsheds on the Great Northern Railroad. I stayed there working about four and one-half months. They then sent me to Basin to this tunnel job. They spoke of sending me to a tunnel in another direction, but I said I wanted to move my wife out here and get fixed for the winter, and I asked them how long probably the job would last. I understood this job would last four or five months, and that was my very reason for going to this tunnel job, because it was a lengthy job; and with land being opened down here, I would have an opportunity to in-

(Testimony of Charles Harman.)

vestigate and enter land and at the same time have my family here with me at this tunnel job. I worked at this tunnel job at Basin about two weeks and was working as a carpenter. I was getting three dollars and a half a day. I have been working ever since 1889 and 1890, working for railroad companies from time to time generally. That was my line of work. I started out at fifty dollars per month a long time ago. In recent years I have gotten from one hundred fifty to two hundred dollars a month and board. When we left the tunnel on the morning of November 28th we started [27*—2†] out on a hand-car. We had expected to go on a work train. Other than the hand-car there was no other means of transportation to get my tool-box and baggage and bed-roll down to Basin, down to the station, and I didn't feel justified in throwing them away. I had to have some means of transportation and that was the only available means I had. I did not take the county road because I would have had to have gone through the creeks—the creeks across the county road.

I was fairly familiar with this portion of the track of the Great Northern Railroad between the tunnel and Basin. That track was a general thoroughfare. Everybody that went from the town of Basin to the tunnel, or from the tunnel to the town of Basin used the railroad track. During the two weeks that I was there from forty to sixty men were working at that

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

(Testimony of Charles Harman.)

tunnel. They were divided into night and day shifts. The night men would be using the track as a thoroughfare more or less in the daytime, and the day men would use it at night. Emergency supplies were procured from Basin for the tunnel by being brought back on this hand-car. This had been going on ever since I had been there. I was working inside on the tunnel and several times I noticed them using the hand-car bringing emergency supplies from Basin to the tunnel. That was within the two weeks that I was there. All along the line of the Great Northern Railway from Basin up to and within four or five miles of Butte, there was general repair work going on in the tunnels and this had been going on all fall and winter.

The railroad follows the creek-beds, and consequently it is necessarily a very crooked railroad, because it follows the creek to a certain extent, and the points of the hills jut out into the valley, and in order to avoid the heavy cuts, they use the curvature to lessen the cost of the road, and of course therefore the road is crooked.

After I and another man had started away with the hand-car, it was astounding to me when the fact was put to me that we and the [28—3] oncoming train were liable to meet. I didn't expect to meet a train until evening; I didn't expect to meet any more trains. In fact, I understood him to say that there would not be any more trains. We did not see any evidence of a train at all, and didn't hear any train. I first saw the train when it was within four or five

(Testimony of Charles Harman.)

hundred feet of the hand-car we were pushing; the train was then coming from a curved track. We were on a curve also. The place from which the train came was on a curve and necessarily obscure.

Q. What is the general custom among railroad engineers and people operating trains in the United States, as to making signals at obscure places?

Mr. VEAZEY.—We object to that as wholly immaterial; customs elsewhere cannot be binding on the defendant railroad company, and it hasn't been shown that there was any duty owing by the defendant railroad company to the plaintiff, and the conditions where the alleged customs are supposed to have existed are not shown to have been similar to the conditions existing here.

Which said objection was by the Court overruled. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

A. Sound the whistle.

On this occasion no whistle was sounded. My hearing is fairly good. It is as good as an ordinary man's hearing for loud noises. There was no noise there whatever to attract my attention from a signal if a signal had been given. We were traveling on the ground, pushing the hand-car along over the rails. It made practically no noise at all. I have been accustomed to hearing whistles long enough away to get a hand-car in the clear and get a load off of a hand-car, where the load consisted of poles. When we first saw the train coming we took our bag-

(Testimony of Charles Harman.)

gage and tool-box off the hand-car, and endeavored to get the hand-car off the track in the clear. When [29—4] I first saw the engine it was about four hundred feet away. I would say the grade of the track was about a two per cent grade, downgrade from Basin to the tunnel. It was what I would call a slight grade.

I have had considerable experience stopping and starting trains and engines. I have used air-brakes and am familiar with their use. I worked on machinery for six months and I have used air-brakes on steam engines, on donkey engines and such as that from time to time ever since I began work. I have an idea of the use of air-brakes on freight trains. I have handled air-brakes when I was a fireman. I have a knowledge of the approximate distance within which a train of the kind which struck the hand-car may be stopped. There were five or six coaches on that train. If there weren't more than six coaches with one engine on that grade, according to my experience, that train could be stopped in less than a train length. I have seen them stop a heavy train within ten or fifteen feet, going twenty-five or thirty miles an hour. The train which struck our hand-car was going about twenty miles, I dare say, when the train struck the hand-car when I was injured. I hadn't observed any checking of the speed of this train which struck the hand-car.

The hand-car, during the two weeks that I had been there, had been used for transporting stuff of Bates and Rogers, and anyone else in connection

(Testimony of Charles Harman.)

with the work, from one end of that tunnel to the other, and from Basin to the other end of the tunnel. I intended, when I might get to Basin to take our stuff off and bring the hand-car back to the tunnel.

I cannot say that I have seen the engineer on that locomotive to know him since. I saw him on the engine, but I didn't have time to take any more notice of him. I saw and heard the train coming, and it was in sight, and I was occupied in getting the hand-car and stuff off the track. I didn't have time enough to get into the clear myself and avoid the train. I suppose I could have gotten into the clear myself, if I had left the hand-car on the track. [30—5]

Q. Why did you not leave the hand-car on the track?

Mr. VEAZEY.—That might have a bearing solely on the issue of contributory negligence, but as regards any feature of the case that this man was trying to save his property, or to protect the train, which he had thus imperiled by his own act, we object to that question upon the ground that it seeks to elicit testimony not within the issues, with regard to negligence of the defendant, raised in the pleadings in this case.

Which objection was by the Court overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

A. I thought of getting into very serious trouble if I left the hand-car on the track and thereby wrecked the train.

(Testimony of Charles Harman.)

If I had left the hand-car on the track, the effect would have been nothing other than wrecking the train, provided the engineer didn't stop. I cannot say what part of the engine struck the hand-car. When the hand-car was struck we must have had the car off on the other side of the rail. In fact, we had all our baggage off. When the car was struck I would say it was on the outside of the rail, probably within a foot or two of the rail, about at the end of the ties. When the car was struck I was endeavoring to get the car shoved over a little further, so that it would clear good. It would take about three feet and a half or four feet—distance from the rail for the hand-car to have cleared the train. Three feet and a half would clear, I should think, with this small engine, or possibly four feet.

The proper place for an engineer in his cab, when his engine is in motion is on his box with his hand on the lever and his head out of the window. His side of the cab is the right-hand side and he looks ahead.

Looking at exhibit 7, the train which I have referred to [31—6] was coming from Basin and towards the bottom of the picture. The train was coming around behind the trees here from the left-hand side of the photograph, and to the bottom towards the point "X." We were putting the hand-car off on my right-hand side as I was looking towards the train. I was looking towards the train and pushing the hand-car towards the train. We were trying to put the hand-car on the side that the fireman is on. An ordinary passenger-car is sixty

(Testimony of Charles Harman.)

feet long. There were five or six cars on that train. I can't say that I ever got a sight of the whole train.

After I was struck I woke up at the hospital at Boulder. I found I had my leg broke. It was in a metal cast and bandaged up, and I found that I had a leg broke and was scarred up generally around the face and my right arm was hurt considerably, and my right shoulder was also hurt, and my back was hurt. I was at Boulder ten days. I was six weeks to the day with a weight attached to my leg. After leaving Boulder I went to the St. James Hospital in Butte, and after I left there I went over to my room and I was there ten days before I attempted to get up at all, and then after about a week I hobbled around in the room before I got out. Then I got a pair of crutches and hobbled up the street for a block or two, and continued with them for several weeks until along about the 7th of March, and then I went down to Glasgow on crutches. There I walked a block or two at a time. That was about as far as I could get. I was planning to go from Glasgow to look up land. I have not been able to follow my occupation at all since I have been hurt. I am not now able to do any hard work with that leg in that condition. It gives me a griping pain continuously in the muscles, and from time to time, in exercising my leg I can feel a kind of grating together in the bones of my leg, as though ends of bones were grating together, to the extent that at some times it almost makes me sick at the stomach. Before the train struck the car my condition of health was good.

(Testimony of Charles Harman.)

My habits as to being sober, couldn't have been better. I am not a drinking man, and have [32—7] never been a drinking man.

Cross-examination.

I was getting three dollars and a half a day from the Bates-Rogers Company for the days that I worked. I was with them nearly five months and lost only one hour of time. I had been down there at this work near Basin two weeks. They worked two shifts a day. One shift worked from seven o'clock in the morning until six in the evening. I worked on that shift, which was the day shift. I don't know the hours of the night shift. They worked ten hours. That work brought me principally inside the tunnel, but also outside. I worked in the tunnel as a carpenter. On the Basin side of the tunnel, outside of the tunnel, on one occasion we put up a coffer-dam for them to concrete the top of it, and put in a bracing along on the inside to brace it. The first day I was there we put in a floor at the other end of the tunnel, and some small buildings outside of the tunnel. Substantially, my work brought me all through the tunnel and a little at either end of the tunnel. I remember the place east of the tunnel about four hundred feet, where the railroad track crosses the county road overhead. I put in a bed for the trestle there to dump cars on.

Prior to working for Bates & Rogers I had worked in a mine in British Columbia for three dollars and seventy-five cents a day for about a month. Before that I was on my uncle's ranch in Washing-

(Testimony of Charles Harman.)

ton for a month just visiting. Before that I had some teams at work in Washington, D. C., working on my own account. I got one hundred and fifty to two hundred dollars a month working as a civil engineer part of the time in South America, and part of the time in the United States. As a civil engineer I got only seventy-five dollars a month while working in Georgia, and later one hundred and fifty dollars a month. During the last five years, beginning with 1907, I have earned on an average more than three dollars a day.

I couldn't say whether the county road I have referred to [33—8] extends from the road crossing under the bridge along the creek all the way to Basin—I never followed it up. You can see it from the track, yes, sir.

I contemplated first taking a work train to Basin before I used the push-car, but we missed that work train. It never occurred to me to take a livery team because I had nothing with which to pay for a livery team. I didn't have any discussion with any one in regard to getting a livery team. I never discussed with anyone getting a livery team. Somebody might have mentioned it to me after we got started but there was no discussion about it at first. The only reason why I didn't have a livery team was because I didn't have the money with me to pay for a livery team. I had with me a certificate of deposit for a thousand dollars. I was going to Basin to catch a train to Woodville in the direction of Butte.

The work train came there at the tunnel every

(Testimony of Charles Harman.)

day with supplies. The only teams I saw taking stuff from Basin were ranch teams going by. Material was delivered at the tunnel by this work train. When this work train wasn't delivering it they went to Basin and got it on the hand-car. This hand-car was being used as a push-car, a car which you shove along, ahead of you.

As I was going there along over that track we kept a view up the track quite a little way to the best of our ability, to see if anything was coming. We saw the engine just as it was rounding the curve and coming into view. To the best of our ability we were keeping a constant lookout as we operated the hand-car, to see whether there were any trains. I didn't hear any whistle before the train came in sight. I would say most emphatically that the engineer didn't give a stock whistle. Before the car was struck we had taken our baggage and tools off the car and had the hand-car off and was getting it out of the way. We had thrown the other things off the hand-car—the baggage and my tool-box and bedding. The bedding and baggage was done up in a bundle. We had on the car my dress-suit case and his [34—9] canvas bag and a roll of bedding and the tool-box. The canvas bag was one of those little mail bags. I think the train was going about twenty miles an hour—sixteen or twenty miles an hour when it struck the car.

The general country around there is mountainous country, but there is considerable level space on either side of the track, where there are trees and

(Testimony of Charles Harman.)

brush growing, coming around the curve. The walls of the mountains are not right close down to the track where the accident occurred. The grade of the mountain starts going up shortly after you leave the track. It would be called a hilly country rather than a mountainous country, except for the altitude.

I was dismissed by Bates & Rogers the day before the morning that I used the push-car. I had worked an hour and a half the morning of the day before. As we were operating this push-car, both of us were back of it, shoving it ahead. There was no one ahead of us pulling it.

My ears have never been treated. I have not had any accident to them to any extensive extent, outside of cold that you encounter living in tents. That might have affected my hearing in the ticking of a watch, but it never has affected my hearing any loud noises. Unfortunately, I worked on the G. & Q. and the Y. T. & Q. railroads. The water in the river near those railroads came down about a three and a half per cent grade and made such a noise that to hear yourself talk at all you almost had to holler, and it is a fault of mine that at times I got to talking louder than I do at other times. That accounts for my talking loud during this trial.

As I kept doing this work of getting my stuff off the hand-car, I cannot say that I kept looking at the engine to see how near it was to me. After it had come in sight I was unconscious of looking at the engine. I didn't want to get hurt, and at the same time my whole mind was concentrated in getting the

(Testimony of Charles Harman.)

hand-car in the clear.

Q. Did you look at the engine at any time after it came [35—10] in sight?

A. No more than looking that way.

I never lost a clean look at the engine from the time it came in sight. I had both the engine and the car in view at the same time. I say that a train of six cars or heavier, going twenty miles an hour, ordinarily can be stopped in a train length. I said that on one occasion I remembered seeing a train of six cars or heavier that was stopped in almost say ten feet, going twenty miles an hour, by the use of the brake. I was watching it at the time. A good man would stop such a train going twenty miles an hour in a train-length by the use of the reverse lever and the throttle and the air-brake.

I have had injuries before this. On one occasion I was driving a cart with a horse weighing about fourteen or fifteen hundred pounds, and the horse turned the cart over and caught my leg between the shaft and the horse and mashed it black and blue in a jelly. That was the right leg. It was the left leg which was injured by this collision between the hand-car and the train. The other injuries which I have received before this accident consisted in getting my fingers caught and my arm shot. My right leg is all right now. I would say that my hearing may be described by saying that I can hear loud noises as well as anybody else, but as regards soft noises I might not do so well.

(Testimony of Charles Harman.)

Redirect Examination.

I heard Mr. Veazey talking very plainly, yes, sir; every word he was saying, yes, sir.

Q. His voice is modulated and he is low-toned of voice? A. Ask that over again.

Q. Is his voice modulated low?

A. No, he is talking rather a little above the ordinary low tone of voice.

I have worked a day or two since the accident. I moved a [36—11] stove for a lady and got two men to go with me and move the stove. I also worked for a day and a half putting up sheeting on a building, but after the building was sheeted I wasn't needed any more. That was about May, I think.

I had this thousand dollar certificate of deposit at the time of the accident and I have got somewhere about three hundred dollars of it now. I paid my hospital expenses down there at Boulder and paid my hospital bill at St. James Hospital, and I had my wife's expenses and my children's expenses and my board and supplies. My wife came out from Staunton, Virginia, expressly to take care of me. I wired her that I was scared because they were talking about sending me to Warm Springs. I think the expenses at St. James Hospital were twelve dollars and a half a week. I think the expenses at the hospital at Boulder were twenty-six or thirty dollars. Dr. McGin of Butte doctored my leg after I arrived at St. James Hospital in Butte. I haven't paid his bill yet and don't know what it is. There

(Testimony of Charles Harman.)

was no stock whistle given before the car was struck.

Recross-examination.

I didn't hear any whistle. I took the hand-car off on my right-hand side as I was looking towards the engine. I was trying to shove it on my right-hand side as I was looking towards the engine. The other man was helping me and endeavoring to get the hand-car off the track. I couldn't say whether he had left the track before I had. He was on one side of the car and I was on the other. There was no way for the hand-car to be shoved against him. The train hit the car and shoved it against me and I was on the side, so that if the train hit the car, it would be shoved against me. My companion was on the left-hand side facing the engine, and all he had to do was to step off and give them a clear passage. I was on the right-hand side away from the track. I either had to run across there by the hand-car in front of the engine, or run away from the car or run [37—12] to the right of the car. I probably ran away from the car and then the engine struck the hand-car, threw it against me and knocked me down. I wasn't working on the car in the center of the track when the engine hit me, but was away from the track, handling the right-hand rear end of the car away from the track, and he was handling the left rear end of the car nearest to the track. I would say that I had pulled the car away off from the track far enough to get the car clear of the rail. I was on the right-hand side of the car,

(Testimony of Charles Harman.)

and he was on the left-hand side, and the train was coming towards us, coming in our faces. I was on the right-hand side, pushing the right-hand edge of the car, and he was on the left-hand side, pushing the left-hand edge of the car. We had gotten the stuff off and had gotten the car off on to the side of the embankment. I won't say just exactly how far the left-hand side was clear of the ties, but evidently not far enough to miss the engine or it wouldn't have been struck. The other man evidently stepped back, because he didn't get hurt. I didn't see the man on the left-hand side of the track. On the way along the track this man had cautioned me about helping him get the hand-car off if the occasion arose. I couldn't have gotten the car off as far as we did if he had gotten off some distance ahead of me. As soon as the train came in sight, both of us got the stuff off and got the hand-car away. I couldn't have done anything with the hand-car myself.

I would say that curvature was about six degrees. The engine when I first saw it was on the same curve with us. The train was coming downgrade, and we were going upgrade.

[Testimony of P. B. Foley, for Plaintiff.]

P. B. FOLEY, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct Examination.

In my work as claim agent for the defendant railway company, I have examined the place of the acci-

(Testimony of P. B. Foley.)

dent set forth in the complaint. [38—13] The place which was pointed out to me as the scene of the accident on exhibit 7 was about midway between this telegraph pole and this point of rock here—possibly a little nearer to the rock. The rock is the big rock on the left-hand side of the track looking west. That would be looking from the hand-car, if it was on the track, towards the approaching engine—looking west towards the approaching train. When that photograph, exhibit 7, was taken the camera was pointed towards the oncoming train looking west. That point was pointed out by the engineer. The size of an object in a photograph is the inverse to the square of the distance from the camera. As the distance from the camera increases, the object becomes less in size, and that is proportioned with the inverse of the square of the distance from the camera.

[Stipulations Concerning Certain Exhibits.]

Thereupon it was stipulated and agreed by and between the parties that exhibit 3 is a correct plat of the railroad track of the defendant from the town of Basin to and beyond tunnel seven. On this plat, the location of the curve referred to in the evidence is shown near the center of section sixteen, and is shown by an arc of 4° C.

It was further stipulated that exhibit 4 is a photograph taken by the defendant with the camera standing forty-five feet west of bridge 123, looking east;

That exhibit 5 is a photograph taken by the defendant with the camera standing two hundred and

(Testimony of William C. Riddell.)

fifty-four feet east of bridge 123, looking east;

That exhibit 6 is a photograph taken by the defendant with the camera, standing fifteen hundred and eighteen feet east of bridge 123, looking east;

That exhibit 7 is a photograph taken with a camera, standing forty-three feet east of telegraph pole 973, looking west;

That exhibit 8 is a photograph taken with a camera, standing four hundred ninety-five feet west of bridge 122 looking east, and showing bridge 122; **[39—14]**

That exhibit 9 is a photograph taken with the camera standing two hundred twenty feet east of bridge 122, looking west, showing bridge 122, and the curve around which the train in question proceeded, and the public road to the right.

[Testimony of William C. Riddell, for Plaintiff.]

WILLIAM C. RIDDELL, being first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

I am a physician and surgeon of about twenty-three years' practice in surgical experience in Montana in a large number of cases, some of them for the Great Northern Railway. I examined the left leg of the plaintiff in this case in the region of the thigh yesterday. I find what appears to be the result of a splintered fracture at the lower end of the thigh bone, about four inches above the knee. The leg now appears to be strong. There is an enlargement of the bone at that point, which is undoubtedly

(Testimony of William C. Riddell.)

due to what we call callous, which is a collection of foreign matter, which has not all been absorbed yet. There is apparently over an inch of shortening in the injured leg. I took a skiagraph of the splintered bone. A skiagraph is simply a shadow of the solid portions of the bone. It may be bone and it may be metal, and when an object is examined upon a plate or a paper, it takes an impression of it. It differs from a photograph in that a photograph is a negative. A skiagraph is what we call a positive or a simple shadow. An X-ray will penetrate the soft tissues of the body, but it won't penetrate bone as readily. It won't penetrate metal as readily as bone. Consequently metal will make a darker shadow than a bone will. The document which you hand me is a skiagraph of the lower end of Mr. Harman's thigh bone. The same is true of the second paper. One is taken in one position and the other resting in another position.

Whereupon said photographs were marked Plaintiff's Exhibits 1 and 2, and were offered and received in evidence without objection. [40—15]

In Plaintiff's Exhibit 1 the knee is marked with a "K." The thigh bone is the largest bone in the body. No part of the leg between the knee and the ankle is shown in these photographs.

In a complicated fracture of the thigh bone in a man forty-four years of age, I would expect a good result would follow. There would be a shortening of not more than an inch—perhaps a little more, without any angular or rotary displacement. I

(Testimony of William C. Riddell.)

should judge this was a good result in this case, judging from the case originally. It looks to me like a very bad fracture to start with, but of course I don't know anything about that. As a general rule, the liability in case of a fracture, for a leg to gain its prior strength, decreases with the age of the patient. The liability of the loss of strength increases with age. A broken thigh in a man fifty-five or fifty-six years of age is very much more apt to result in permanent disability than in one of twenty. In this case, this man has a very good alignment. The leg is in good shape, in good condition as far as the swing is concerned from side to side. There is some disability of the posture backwards, which causes the knee to go back further than it ought to. As he stands on it his knee will go back, and that undoubtedly will be a source of weakness. The weakness in the knee will never be repaired. The bone will probably get as strong as it ever was. There will be a tendency for this limp which exists there to get less. These fractures of a thigh all require from eight to twelve months before the callous will be absorbed. He probably will have, as I say, permanently more or less weakness in that knee, and is very liable, in a man of his age, to have more or less discomfort, and the limb will get tired quickly, and he will have more or less discomfort after long use, and more or less pain. I don't think to-day, he is able to follow such a life as general work, like civil engineering or general construction work, working in construction gangs. I think he will be able to do

(Testimony of William C. Riddell.)

work which requires hard working and heavy work, standing on his feet, but this will be at the expense of considerable discomfort and pain. The limb is going to be as strong as it ever was, [41—16] but it is almost invariable in these cases that you get more or less deformity, and where you get this backward displacement, and the bending back of the knee, he is very apt to be lame.

Cross-examination.

Fractures of the thigh bone do not necessarily result in a shortening of the bone. In children we get sometimes perfect anatomical results. In adults it is rare that we get perfect anatomical results. Probably in ninety per cent of the cases we do not get perfect anatomical results. As the leg is now, I don't think it would give him pain if he didn't walk very far. I think if he walked three or four blocks he would be tired. He would probably have a tired feeling in the leg and in the muscles. How much pain he would have, I couldn't tell. The only physical manifestation of his injury at the present time is a little enlargement of the bone, due to the callous matter not having been absorbed yet, and this shortening of the leg and this displacement backward of the knee more than it ought to be. If a man is forty-five years of age and yields nicely to treatment, and does not resist his doctors and is quiet in the hospital, his chances for recovery from an injury of this sort would ordinarily be good, so that there would be no substantial injury. I wouldn't say that I would expect him to come out of

(Testimony of William C. Riddell.)

it, however, without some shortening. You never know how much shortening there is going to be. If this man in the hospital, immediately after the injury, tore off the bandages and kicked his feet around, in spite of the protests of the doctors, it would lessen the chances of a good recovery. If he did this in this case, his present recovery would indicate that he would come within the ten per cent of adults that get good results. A man can do a whole lot of work sometimes, even in his condition. The muscles will improve up to a certain point. As to the distance that he would be able to walk, the personal equation comes in there. You cannot tell how far he could walk. I saw him three times—Wednesday evening, Thursday morning and yesterday morning. **[42—17]**

Redirect Examination.

There are better ways of controlling pain than by strapping down. Anesthetics or narcotics can be used. I think he had excellent surgical treatment. I should say it was a very excellent result, judging from my knowledge of conditions that existed at the time of the fracture. It looked to me as if it was a very bad fracture, and they got very good results.

[Testimony of Oliver Whitehead, for Plaintiff.]

OLIVER WHITEHEAD, being first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

At about the hour of nine o'clock in the morning

(Testimony of Oliver Whitehead.)

of November 18th, 1912, I was engineer of passenger train No. 238 from Butte to Great Falls on the Great Northern Railway. The general direction in which the train was running was east. I was locomotive engineer, on the right-hand side of the cab, looking the way the engine was going. I was looking forward during the entire time the engine was running. My eye was on the track ahead as far as the eye would reach. For the first half mile out of Basin east, the track is almost in a straight line. Then you come into curves, and it is mostly curves from there to Boulder. I know where the tunnel is east of Basin. On passenger and freight trains I have been running on that track as an engineer about eighteen years.

I couldn't say just exactly when the work of relining the tunnel was commenced. I think it was in May or June, 1912, about six months before November 28th, I should judge. I don't know what crew of men they had doing the work. The town of Basin is the nearest town west of the tunnel, and the nearest point east is Fuller. Fuller is very near a mile east of the tunnel. I would pass there pretty nearly every day—one day going east, and the next day going west.

I have indicated on Plaintiff's Exhibit 7 with a "C," the point where I would say the push-car was after the accident, right about where I have marked a "C." I took the hand-car with me a-ways [43—18] before it went off into the ditch. I would say I struck the hand-car around here somewhere, where

(Testimony of Oliver Whitehead.)

I have put an "S." After the hand-car had been thrown clear it was lying on the right-hand side as you look east, and the man was on the right-hand side as you look east also, right in here close to that rock, within a few feet of the point which you marked "M." The man was about six feet from the track when he was struck, if I remember rightly. He was by the car. He was just knocked down probably four or five feet—no greater distance.

Cross-examination.

We left Basin late, possibly four minutes late. We were running, I should judge, thirty to thirty-five miles an hour. When I came to this curve I set four, possibly five pounds of air, or what is known among engine men, as a service application, to brace the train for the curve, that is, to make the train ride easy. I was looking ahead as I was going around this curve. In operating a train it is very seldom that I take my eyes off of the track. I would do it to work injectors, but not to set the air. I would set the air by sound. When I blow the whistle, I don't take my eyes off the track, but keep my eyes up the track and blow the whistle without taking my eyes off the track. When I got into the curve just after bracing the train for the curve, I looked ahead as I got a view around the curve and I saw that there were two men throwing baggage off the push-car, and the push-car was crosswise of the track, so that if the two wheels had been lifted up it would have rolled off into the ditch. It would have rolled off on my right-hand side, not on the

(Testimony of Oliver Whitehead.)

fireman's side. As I came around the curve, when I first saw these men, they were throwing this stuff off. There were four coaches to that train. I saw the men as soon as I could see them.

Redirect Examination.

I saw them as soon as I could see them; that is, as soon as they were visible across the curve from where I was on the track. [44—19]

The foregoing exhibits, numbered one to nine, both inclusive, were offered and received in evidence without objection, and are, and each of them is, by this reference, made a part of this Bill of Exceptions.

The foregoing sets forth all of the evidence introduced by the plaintiff.

Thereupon the plaintiff rested.

Thereupon, at the close of the plaintiff's case, the defendant moved the Court for a judgment of nonsuit and dismissal, upon the merits, as follows:

[Motion for Judgment of Nonsuit and Dismissal.]

Now, at the close of the plaintiff's case, comes the defendant, Great Northern Railway Company, and moves the Court for a judgment of nonsuit and dismissal, pursuant to the rules of the Court, upon the merits, for the reasons and upon the grounds following:

1. The facts disclosed by the evidence introduced by the plaintiff do not constitute facts sufficient to constitute a cause of action in favor of the plaintiff or against the defendant.

2. The facts disclosed by the evidence introduced

by the plaintiff show that the plaintiff was guilty of negligence on his own part, contributing proximately to cause his injury and damage.

3. According to the uncontradicted evidence the plaintiff was using the car referred to in the testimony, without right, along the defendant's track, and was a trespasser upon defendant's track in the use of the said push-car. The evidences does not show any consent or knowledge on the part of the railway company relating to the use of this car, or any authority from the railway company to use this car, but at most the evidence discloses merely a statement on the part of the plaintiff that during the two weeks that he was there, he saw these push-cars used for some purpose, but there is no evidence of any authority on the part of anyone representing the railway company, authorizing the use of this push-car, and no custom has been shown, and if one had been shown, it would have been an unlawful custom, which, [45—20] therefore, could not have increased the duties imposed by law upon the railway company, for, according to his own testimony, it would be a custom to use the track in a manner that would imperil the safety of trains. The most, therefore, which could be contended, would be a duty on the part of the railway company to the plaintiff not wilfully or wantonly to injure him, and not to fail to exercise reasonable care to avoid injuring him, after discovering his presence and peril, but the uncontradicted evidence shows that the defendant did not wilfully or wantonly injure the plaintiff, and no act of negligence or failure to use care after

discovering his presence and peril has been shown; in this regard, as regards the speed of the train, the only testimony is by the plaintiff to the effect that when he was looking up the track at the train, he did not see it check its speed, but manifestly a person in that situation could not tell whether or not there had been any change in the speed of the train; another ground of negligence relates to the whistling, but the proof shows that the man knew of the approach of the train when it was five hundred feet away, so that there was no necessity of giving him any further warning, for, as the only object of the whistle would be to give a warning of the approach of the train, knowledge otherwise gained by the plaintiff would dispense with the necessity of giving him any warning. Moreover, the uncontradicted evidence shows that the engineer, on looking out, saw the plaintiff at the first opportunity, and the evidence does not show that he, thereafter, omitted to do anything which could have avoided an injury to the plaintiff. The whole case developed by the plaintiff shows merely that the engineer saw the plaintiff at the first opportunity, and thereafter struck the car, which car struck the plaintiff.

4. According to the uncontradicted evidence, the plaintiff was using the push-car without right along the defendant's track, and was a trespasser upon the defendant's track in the use of the push-car, and in the use of the push-car, he himself admits that he was necessarily imperiling the safety of any train which might proceed over [46—21] that track. In taking that course, therefore, of trespassing upon

the defendant's property, and voluntarily and knowingly imperiling, as he says, the safety of trains, the law does not throw around him a protection while he is engaged in that unlawful act, nor impose upon the defendant any duty of care towards him, but imposes at most only the duty not wilfully or wantonly to injure him, and the proof does not show any wilful or wanton injury.

5. The uncontradicted evidences discloses that it was the plaintiff's own contributing fault and carelessness which contributed proximately to cause the injury. In the first place, he was guilty of contributory negligence in using the track at all, in that the use of the track by him was unnecessary, and he knew that if a train came around the curve while he was operating the push-car in the manner he did operate it, the train and the push-car might collide, and the train and the push-car might both be wrecked, imperiling the safety of the train and the passengers. He did not have any flag out, as would be required by employees, and cannot, in trespassing be excused for using less care for his own safety and the safety of the passengers, than would be required by an employee rightfully on the track. In the second place, the evidence shows that he stood on the track, with knowledge of the approach of the oncoming train. In so far as he seeks to excuse this by showing that he was engaged in trying to save the train, this act on his part would be simply an act done by him to avoid the consequences of his own negligence, and to avoid a cause of action arising against him in favor of any persons on the train to

(Testimony of H. C. Ward.)

recover damages sustained by them in the event of a derailment, and acts of his, thus performed to avoid the consequences of his own negligence, cannot constitute a cause of action in his favor, or impose a duty of care to him on the part of the railway company, or excuse or weaken his contributory negligence in the use of the track at all, as a cause of his injury. [47—22]

The COURT.—I think the main question here is whether there was any opportunity on the part of the railway company to avoid the injury, after the plaintiff was first discovered in a position of peril on the track. The motion is denied.

To which ruling of the Court, in overruling said motion, the defendant by its counsel then and there duly excepted; which said exception was then and there duly noted and allowed. [48—23]

[Testimony of H. C. Ward, for Defendant.]

H. C. WARD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I reside in Boulder and know the plaintiff in this action. He was brought to the hospital at Boulder on a stretcher, with a broken leg. I helped attend him and bandage him and make him as comfortable as possible. I think his leg was dressed right away—perhaps within an hour after his arrival. He was at the hospital about twelve days. His leg was dressed while he was there at least once a day, and part of the time more than once a day. The occasion of dressing it so often was that he removed

(Testimony of H. C. Ward.)

the bandages himself. I believe he assigned as the reason the pain he was suffering in his leg. At times he seemed to stand pain first rate. I was with him all the time. I talked to him, but I never finally succeeded in getting him to stop removing the bandages. I remember a conversation with him there at Boulder, in which he said that the man who came with him on the push-car wanted to get a rig, and he didn't want to get one, for the reason that it would cost too much. He said it would cost two or three dollars, something like that.

Cross-examination.

I don't remember whether he said he had any money. I don't think he did say that. I think he had some cash with him when he came to Boulder. I don't remember the amount. To my notion the man was insane. I have seen a good many insane men. According to my best judgment he was insane, and he certainly acted like an insane man, but at times he appeared to become all right, and at other times he appeared perfectly insane. In fact, it was decided among those people there that the best thing to do with him was to send him to an insane asylum. I took him to Butte and left him in the St. James Hospital. He didn't make any particular talk while on his trip to Butte. When his leg was being set he said it pained a whole lot, but he didn't make any particular outcry. I wouldn't attempt to say exactly how many times the leg was dressed, but somewhere in [49—24] the neighborhood of five or six times while he was there. He

(Testimony of H. C. Ward.)
had me pretty well convinced all the time that he was insane from the very first moment he got there. The county commissioners declined to send him to the Insane Asylum at Warm Springs.

[Testimony of S. McPherson, for Defendant.]

S. McPHERSON, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am a passenger conductor on the Great Northern Railway, and was conductor on Train No. 238 out of Butte on November 28th, 1912, from Butte through Basin to Great Falls. I recall the accident to the plaintiff in this case. I have been a freight or passenger conductor for about twenty-three years. When an engineer is running a passenger train, say twenty-five miles an hour, and he comes to a curve, he makes an application of air. I cannot tell exactly what he would set, but he would set enough to straighten his train out, and to relieve the train from giving a jerk or preventing it from hitting the outside rail. It is what we call an application to stiffen the train out. That is done by setting the air on every car on the train. That has the effect of straightening the train out; taking all the slack out of it so that you don't get a jerk. If you don't do that in approaching a curve the wheels will hit the outside rail and bat back and forth from one rail to the other.

That morning at the scene of the accident it was a

(Testimony of S. McPherson.)

snowy, sleety morning. I can't tell very well how fast we were going as we went into that curve. I think we left Basin about three minutes late. I think we were due out of there at 8:47. I didn't notice particularly any car after the accident, but I picked the man up. The car wasn't a hand-car—it was what we call a push-car. The man was on the engineer's side—that would be the right-hand side, looking east; that is, in the direction of Great Falls. That was where I found him. I didn't pay any particular attention to the [50—25] hand-car and just wanted to get the man picked up and get him in the baggage-car and move on.

I was working my train out of Basin and was taking up my transportation, and as soon as the train stopped I looked ahead and couldn't see anything, and then I looked back at the rear and saw my flagman going back, and I looked back and saw a man lying on the ground and another man trying to hold him up. I picked up the injured man and put him in the baggage-car and took him to Boulder, and I phoned from the tunnel for a doctor to be at the depot at Boulder, and at Boulder I got the baggage wagon there to take him to the hospital. Railroad employees are strictly prohibited from using push-cars; the only way you can get hold of one is to get an order from the Superintendent or the Chief Train Dispatcher to put it on the track, and then the man using it must always work with a flag. If he is on a level track he wouldn't go back so far with his flag, but if he is on a mountain, you have got to

(Testimony of S. McPherson.)

go back a mile or two miles and a half, just according to the direction you have got to go. This is the rule in using a push-car. A push-car is a good bit heavier than a hand-car. A push-car is quite a heavy car and it will take two pretty good men to put a push-car on. If the railroad company would catch one of its section men shoving a hand-car around a curve without having a flag out for protection, they would discharge him.

Cross-examination.

After the train stopped I looked back to see if my flagman had gone back. I should judge that the injured man was then half a car-length or more to the rear of my train, and about six to ten feet from the track. I couldn't state from what point on the train I looked back. I couldn't tell you the exact distance the man was from the rear of the train. It would probably be a car-length—somewhere along there. I don't notice those things. I wanted to get my flagman back and protect my train. It was a sleety day, snowing. [51—26] I don't remember that it was sleeting in Butte when I left. I don't remember whether it was sleeting in Helena when I got there. I don't remember whether there were the same weather conditions throughout that trip. I don't remember that it was Thanksgiving Day. I do remember getting off and that it was snowing. It was snowing at Basin and it was snowing when we picked the man up who was injured.

I don't remember the rocks shown in these pictures. That picture looks like the curve, but I can't

(Testimony of S. McPherson.)

recognize where I picked up the man. I can't say that he was picked up about here between this telegraph pole and that rock, or closer to that rock. My brakeman, Bert Gillis, and the express messenger helped me pick the man up. I couldn't say whether the engineer helped me or not. The engineer backed up to where the man was lying. I couldn't say that the baggage-car was backed up right opposite him. We aim to get back as quickly as we can. I don't know that the man's leg was broken. I put a quilt on him, but in looking at him and when we lifted him I thought I heard his bones grind, and I put something up to keep the weight off his knee. I can't tell you anything more about it.

Redirect Examination.

I should think the train stopped about a train-length west of bridge 122.

Recross-examination.

I cannot identify those photographs. There is a whole lot of those tracks that look alike. Those photographs don't help me.

[Testimony of Oliver Whitehead, for Defendant.]

OLIVER WHITEHEAD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

We left Basin about four minutes late on Train No. 238 on the morning in question. The train was running at a speed of about thirty-five or forty miles an hour, and I came to this curve and I braced the

(Testimony of Oliver Whitehead.)

train. I did what they call bracing the train for a curve [52—27] and looked ahead—looked across the curve. It was snowing at the time and I saw a couple of men there with a push-car crosswise of the track, unloading the baggage. In bracing the train I set four or five pounds of air, and brought the brake-shoes up snugly to the wheels, to tighten the coaches and to brace the train so that they will ride smoothly. If I hadn't braced the train, the train would run into the curve and throw itself back and forth. By applying four or five pounds of air you brace the train, causing it to ride easy.

I was looking across the curve and I saw two men trying to throw off, or throwing off grips from a push-car. The car was straddling the rail and I just turned the handle of the air-brake right back the rest of the way and threw the air into the train, applying all the power I could get. We were then about seventeen rail-lengths from where he was. A rail is about thirty feet, I think. I have tried to check those measurements up recently on the ground with you last Sunday, checking the distance up by rail-lengths. After I had set the air to brace my train, I didn't thereafter release it. Then when I saw the man I did all I could to stop the train. I couldn't get an emergency application of the air under those conditions. I just got the full braking power with the air in the condition it is in after a service application has been made. It is pretty hard to explain why you can't get an emergency brake after putting on four or five pounds of air.

(Testimony of Oliver Whitehead.)

If the train line and auxiliaries are charged perfectly equal, then when you apply the brake with full force you bring it into the emergency. There is a cylinder valve in the triple valve that brings the air out of the train line into the brake cylinder, as well as the air out of the auxiliary reservoir just under each car, into the brake cylinder. Each car has its own braking power, but if you have thrown off four or five pounds, you can't get an emergency effect until after you have thrown the engineer's valve into full release again. It would be necessary to throw the engineer's valve into full release again and keep it there until the auxiliary [53—28] and the train line pressure is again equalized, and then, if you made another application you can get an emergency application, but if you have made a four or five pound application, you disturb and displace the emergency application, so that you can't get the emergency application until you have first released the brakes and recharged the air. Before you can get an emergency application after setting four or five pounds, you will have to put your engineer's valve in full release, and it would probably take four seconds to recharge the air. I should say as I entered that curve I was going thirty-five or forty miles an hour. Assuming that the train was going thirty-five or forty miles an hour down a one per cent grade, and that the train contained four cars, I think it would probably take fourteen hundred feet to stop the train by an emergency application. As regards the condition of the rails, it was

(Testimony of Oliver Whitehead.)

snowy and wet. There was a heavy snow and a wind from the south. With a wet rail and with wet brake-shoes, you can't get as good braking pressure. Under those conditions the wheels don't bear on the brake and the brake-shoes don't wrap on the wheels so hard as when there isn't any snow there. When about four or five rail-lengths from the man I gave a long stock whistle—just rip, rip, rip, rip (pulling with his arm); it is an alarm for stock. The man was then in the middle of the track. Then as we drifted down again I yelled at him like an Indian to get off the track—to get out of the way, yelled just as loud as I could holler. I did all I could and sat there and observed. He seemed startled, and when I came up a little closer to him I yelled at him again, and he runs around on the east side of the car. I was going east. The car was straddle of the track, and he runs around on the east side of the car and the pilot comes around and hits the car against him. There was no way I could have avoided striking the car. If he had run on the west side of the car, which he could have done quite as easy, he would have been in the clear and the car would not have been thrown against him. I think the engine stopped just at the west end of bridge 122. An engine carries with it a speedometer to [54—29] indicate the speed at which it is going from time to time, and a tape in the engine records the speed from time to time. I produce here that part of the tape which shows the speed of the engine as it left Basin and thereafter. I have marked with the letters "Bs" the stop that

(Testimony of Oliver Whitehead.)

was made at Basin. I have marked the point where we left at Butte. The next station from Butte to the east is nine miles and the tape shows the stop at Woodville. You count nine quadrangles. Woodville I have marked with a "W." The next stop is Trask about four miles to the east, but we didn't stop there. The next stop that morning was Elk Park. nine miles. We sometimes stop at Wilder. Evidently we didn't that morning. That (the next stop) is eight miles. The tape shows we didn't stop at Wilder that morning. We stopped at Bernice, which I have marked "B," which is eight miles further. Then we run down here four quadrangles, or four miles, to Basin, which I have marked "Bs." Leaving Basin the maximum speed which we reached before we stopped was forty-five miles an hour. The bottom line on the tape represents zero. The next line represents a speed of five miles an hour, and the next, ten miles an hour, and the next, fifteen miles an hour, the next, twenty. The space between each heavy line represents an increase in speed of ten miles an hour, and the space between each dotted line and the next heavy line represents five miles an hour. In approaching that curve we were going almost forty-five miles an hour, and I lost about four miles an hour according to this tape, in going around that curve. You see it goes right down here from the dotted line for forty-five miles an hour pretty near to the heavy line for forty miles an hour. You see the tape shows that when I made an application for this curve it reduced the speed about four miles

(Testimony of Oliver Whitehead.)

an hour, and when I saw this man and a car I gave her all of it, and it shows it came right down to a stop.

Whereupon said tape was marked Defendant's Exhibit 10. This exhibit 10 is the tape used on the engine that left Great Falls on Train No. 235 on November 27th, and returned from Butte to Great Falls as the engine on Train 238 on November 28th. And the same was marked exhibit 10 and was offered and received in evidence, and is by this reference made a part of this bill of exceptions. **[55—30]**

You have now extracted or torn from the tape only that part relating to the road from Butte to some point beyond Basin, including the scene of the accident.

There was nothing that I could have done that I did not do to avoid injuring this man. The other man came back west of the car and was about twelve feet from the track, I should judge. He left the car about the time I hollered at them. I had no knowledge of any use of these tracks by push-cars. That is the first push-car with baggage on it that I saw during the time they were working there.

Cross-examination.

I never saw any push-cars on that track with anything else on them. I never saw any push-cars with supplies for contractors on them. I don't know as to the number of men used in relining the tunnels on that line. I know they were working on the tunnels during the summer and fall of 1912, but I know nothing about the number of men working. I know

(Testimony of Oliver Whitehead.)

they were working at the tunnel relining it. I should say we struck the car about half a mile from the tunnel. I do not know that men got off at Basin to go to that tunnel. I know we stopped several times each way at that tunnel to deliver laborers with baggage and bedding at Tunnel No. 7 at the east end. I should judge we ran twelve or fifteen rail-lengths after we struck the car. I think I could have stopped quicker after striking the car, but everything was in the clear and I wanted to take the charge off the train in stopping, so I released and made a second application to stop. I released just after striking the man, and the train was slowing at the time, and I just released for about two seconds—enough to get a partial or full release.

If that train was going thirty-five miles an hour down a one per cent grade with that engine in that condition that morning, I think it would take in the neighborhood of fourteen hundred feet to stop it with four cars. We had four cars that morning. I released and recharged the train after hitting the man to avoid the jar on [56—31] the train, and ran somewhere in the neighborhood of three hundred and sixty feet beyond the man, and I ran some five hundred and ten feet before I got to him. That would make it that I stopped in nine hundred and seventy feet after I first saw the man, and in making that stop I had made a partial release after seeing the man. In connection with my statement that it would take fourteen hundred feet to stop the train, you must remember that I had slowed on this curve

(Testimony of Oliver Whitehead.)

when I made the application to brace the train. I had slowed the train down about five miles an hour—the speed tape shows about four. The speed sheet shows that I was running about forty-five miles an hour before I came to this curve. Then I took some of the momentum out of the train with the application of the air-brake and thereby reduced it to forty miles an hour, according to the speed-sheet. I should say I was going about thirty-five miles an hour, but the speed-sheet would be more accurate, if it is an absolutely correct machine. I couldn't say that it is a correct machine. This tunnel is about two miles from Basin. The speed-sheet shows that we stopped about two miles from Basin. The speed-sheet shows that starting up from Basin I speeded up to forty-five miles an hour. That would be about a mile and a half out of Basin, or a mile and three-quarters east of Basin, and when I seen these men with the car the speed-sheet shows that I lost four miles an hour for the curve gradually, and then when I saw these men with the car it comes right down to a stop. In making the stop the speed-sheet gives me right close to a quarter of a mile. I have marked the point of the stop with an "X."

It was snowing that day. If I remember right, it was snowing when we left Butte. I do not think it was snowing in Helena. It wasn't a light freezing snow, but a wet heavy snow, just a fresh snowfall. When I commenced to holler to the men I should judge I was about sixty or seventy feet from them. Harmon could have got-

(Testimony of Oliver Whitehead.)

ten out of the way if he hadn't held on to the car too long. He wasn't struck [57—32] by the engine. He wasn't holding the push-car when he got hurt. He just simply ran right around the east side of the push-car. I don't know how close he walked to the push-car. He ran in front of the push-car on the east side, as I was going east. He just seemed to be standing there saying something to the other man. It looked to me as though he was talking to the other man to get him to help him off with the car. He was gesticulating to him. I don't know what he said. The other man had gone to a point of safety, and Harmon was still standing in the middle of the track throwing off the baggage. He seemed to be simply standing there when I yelled to him to get out of the way. I yelled at him like an Indian. He did not then have the car off the track. The car was straddle of the track, crosswise of the track. After the car was hit it was all on the right-hand side, looking in the direction we were going. When we stopped I think Harmon was just a little behind the rear car of the train. In other words, it seemed that we had just about completely passed the man, when the train stopped. It is not a fact that a train going about thirty-five miles an hour on that trip could have been stopped by using an emergency application in three hundred and ninety feet, and I didn't have the emergency. After making this application to brace the train, I couldn't get the emergency without recharging the air pressure in the auxiliary reservoir and in the train line, which are

(Testimony of Oliver Whitehead.)

separated by triple valves, and when you reduce the pressure in the train line, the triple valve so operates so as to allow the air to come out of the auxiliary in each coach and in the brake cylinder. But in making a sudden stop you just pull the engineer's valve back quickly, make a quick strong application, and you get what you call an emergency. Then you get the air pressure out of the train line as well as out of the auxiliary reservoir directly into the brake cylinder. An emergency application just shakes the train all up and everybody on it. This was not done in this instance, for the reason that after making the application to slow for the curve, I couldn't [58—33] get the emergency application. I understand the construction of air-brakes fairly well. The brake works by a throwing off of the pressure in the train line. When you take the pressure out of the train line, it throws the auxiliary air pressure into the brake cylinders and sets the brakes. If there were no air set in the train line the brakes would all be set. There is air stored in each auxiliary reservoir under each car, and it is the escape of this air from each auxiliary reservoir into the brake cylinder, caused by the reduction in the pressure of the air in the train line, which causes the brakes to set. The air-brakes were in good condition that day. There is no use in reversing the engine. I could have reversed the engine. By reversing the engine that would have added to the distance in which the train would have stopped. You understand that a modern engine is equipped with a high-power brake,

(Testimony of Oliver Whitehead.)

and when you throw on the air and pull your reverse lever back, you are going to lock the wheels, and they are going to slip. They don't turn, they slide, and in place of getting a large area surface to rub on the driver-brake, you get just a little point on the driver and that skids along on the rail, and on a wet rail especially no good could be accomplished by reversing the engine. Yes, sir, it also hurts the wheels on the engine. This is not what is called dynamiting a train. Dynamiting a train is the emergency application of the air-brake. There is no man, running one of these modern engines, equipped with high-power driving brakes, that does not know that if you reverse the engine it would be useless and would result practically in a loss of the braking power on the brakes of the engine. I don't think, with that train going thirty-five miles an hour, on a one per cent grade, and with everything in good condition, it could be stopped inside of four hundred feet, no, sir. I think the grade there is more than a one per cent grade. I don't know what it is. I should judge I was sixty or sixty-five feet possibly, maybe ninety feet from the man, I wouldn't say for certain, when I blew the stock whistle. I was watching him [59—34] and seeing the outcome of the affair. Possibly I was ninety to one hundred feet, maybe a little more, maybe one hundred and twenty feet when I first blew the stock whistle. If I could have had the emergency application under perfect conditions, of course it would set everybody up in the train, but by an emergency application under perfect condi-

(Testimony of Oliver Whitehead.)

tions, it is hard to say within what distance the train could be stopped. I have never had to do it and therefore I don't know. I have never seen it done, and I have never been on a passenger train when the emergency was applied. If we should apply the full emergency and shake everybody up in the train I should judge, on a one per cent grade, under those conditions, and assuming that you could get the emergency application, and that the wheels in the train didn't slide, that you ought to stop in possibly eight hundred or nine hundred feet. That is my minimum supposition. In my own case I have never seen it done, and have never been on a train when it was done, but you couldn't stop a train in less than eight or nine hundred feet.

Redirect Examination.

Other than the stock whistle and my yelling at the man like an Indian to get off the track when I was three or four train-lengths from him, I gave him no further warning.

[Testimony of E. L. Morris, for Defendant.]

E. L. MORRIS, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am an express messenger in the service of the Great Northern Express Company, and was express messenger on Train No. 238 running past Basin on the morning of November 28th of last year. I know the plaintiff by sight. I remember the train coming in contact with a push-car on that day, east of Basin.

(Testimony of E. L. Morris.)

We were leaving Basin almost on time and came down to a curve, I presume a mile east of Basin. I heard the engine whistle a stock whistle, which consists [60—35] of several short blasts; it is for cattle or something on the track. As soon as the whistle was blown I went to the door, and the engineer had struck the push-car before I got there. I think the stock whistle was blown about two train-lengths before the car was struck. I didn't see the push-car. I saw the man after he was hurt. When I looked out the door of my car all I saw was a broken push-car. I can't say for sure the exact distance that that whistle was blown before the car was hit. I judge it in this way. There was a curve there and the stock whistle was blown around the curve. I couldn't say just the exact distance, but I presume from the time he whistled to the time I got to the door, the engineer ran two train-lengths at least. The train stopped near the west end of the bridge. The weather that day was a kind of sleety, snowy morning, and the wind was blowing.

Cross-examination.

I helped pick the man up. We had to back up to get him. I think we backed up two train-lengths. We had a buffet-car, day coach, smoker, baggage-car and engine and tender. Those cars are sixty or seventy feet long. I couldn't tell from those pictures where the man was lying. I recognize bridge 122 in these photos. We did not cross bridge 122 to pick the man up. I think we backed about two train-lengths, in the neighborhood of twice the length of the train, I

(Testimony of E. L. Morris.)

couldn't say exactly. By train-length, I do not include the length of the engine. They backed up to the man so that my baggage-car door was opposite to him. Yes, sir, when the train stopped I would say that the rear coach was about a quarter of a train-length from the man, something like three hundred and sixty or two hundred and forty feet, yes, sir. The man was found on my right-hand side as I looked out. I looked out on the right-hand side of the car as we were going east, and the man was on the same side of the track that I was looking from. The hand-car was on the same side. I cannot tell from the pictures where the man was found. I do not recall that telegraph pole shown in exhibit 7. I cannot tell from that photograph [61—36] where the train was coming from. This occurred about nine o'clock in the morning, something like that. It had been storming in Butte when we left that day. I don't remember whether it was snowing or sleeting in Helena. I couldn't say whether it was freezing weather or very cold. There was no chinook blowing.

Recross-examination.

When I looked out I looked back and I was looking out of the right-hand side door of the car as we were going east.

[Testimony of Bert Gillis, for Defendant.]

BERT GILLIS, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I remember the accident to the plaintiff at Basin

(Testimony of Bert Gillis.)

on November 28th last year. I was then head brakeman on Passenger Train No. 238. We were going about thirty—thirty-five or forty miles an hour before we hit the curve around which the man was hurt. It was snowing a little all that day, and was snowing at the time of the accident. The first thing I noticed I heard a cattle whistle blowing and I started to the front door to see what it was and we were almost stopped when I got out of the door, and I got in the vestibule and got out when we stopped, and when we stopped we were about to bridge 122. I did not see the car or the man until after the accident. The car and the man were on the right-hand side of the track as you go east.

Cross-examination.

The train had gone about one or two train-lengths past the man when it stopped. I would say it was closer to two train-lengths than one. The rear end of the last coach was about a train-length from the man. The engine had passed about two train-lengths. I have not seen those photographs. I am familiar with the country shown in these photographs. I don't remember that rock there. I remember that curve, but I don't remember exactly how long it is. The man was [62—37] found back from the bridge. I cannot tell on the photographs just where the man was found. I think the train was going thirty-five or forty miles an hour when the stock whistle was blown. I know when the stock whistle was blown he began to slow down a little. He was then going about thirty miles an hour.

(Testimony of Bert Gillis.)

I was in the smoker, about two cars back from the engine. I should say the train ran three or four train-lengths after the stock whistle was blown, something over eight or nine hundred feet—something like five train-lengths, about eleven hundred feet after the stock whistle was blown.

[Testimony of Fred Melvin, for Defendant.]

FRED MELVIN, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

On the 28th of November last I was a flagman on Butte Division on Passenger Train No. 238. I remember the accident happening by the collision of a push-car after the train left Basin on that day. I heard the stock whistle blown, and I got out on the platform and saw there was somebody hurt, but I didn't see them until we passed. I think we had passed them before we got out or had time to get out. It was a snowing, sleety day, quite a storm. The engine stopped somewhere east of the bridge. Yes, sir, I think it was east of the bridge. This fact was impressed on my mind because I remember that I went through the bridge when I went back from the head end of the buffet-car, which was at the rear of the train, to give them the signal to back up. I think I then went between the bridge and the buffet-car. I saw the injured man as we backed past him. He was on the right-hand side as you go east.

Cross-examination.

I heard the stock whistle. I should say the train

(Testimony of Fred Melvin.)

ran ten telegraph poles after the stock whistle; I don't know the distance between telegraph poles. I should judge there was about seventy-five feet between them. I should say the train stopped about three or four train-lengths from where the man was lying. I would not say it [63—38] was more than three, possibly three. That is, the engine was three train-lengths away, according to my judgment. I couldn't say how long the stock whistle blew; it was a good stock whistle, several blasts. I do not know just where the hand-car was. I think there were pieces of it lying around there, as we went by. It was broken up pretty bad. I didn't see it before it was broken. I don't know whether all the pieces were on one side of the track. It was broken up pretty bad.

[Testimony of Robert L. Coburn, for Defendant.]

ROBERT L. COBURN, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

On the 28th of November last I was a locomotive fireman in the employ of the defendant on passenger train No. 238, and remember the accident to the plaintiff shortly after leaving Basin on that day. As I left Basin I rang the bell as we pulled out of Basin. I ordinarily rode the seat box and would watch the track ahead, and whenever I would have to put in a fire I would always try to do this when I would get on a right-hand curve, where the engineer could see ahead, and I would then get down and put in a fire,

(Testimony of Robert L. Coburn.)

because on a right-hand curve the engineer can see ahead and I can't, so I aim to put in a fire always on leaving Basin on this first right-hand curve. Just as we went around the right-hand curve, before we came in sight of that push-car, I was putting in a fire. I stopped putting in a fire, because I heard the engineer put his brake valve in what is known as the big hole, and he started blowing the stock whistle. By putting the brake valve into the big hole I mean that he is trying to make a stop as quickly as possible. I then got up on the seat box and looked out of the cab window ahead. I seen this fellow working on the hand-car. I cannot say for sure whether he was throwing baggage off or whether he was putting the hand-car off. He had been putting the hand-car off, because it was partly off on the right-hand side. I remember that after the stock whistle was blown and before [64—39] the car was struck, the engineer yelled at the man that he was in danger. I do not remember what he said. I think he said either, "Lookout," or "Get away from the track," but I know he yelled at him. I was sitting on the box ringing the bell. The car was thrown on the right-hand side as you go east. That would be the engineer's side, and the man was on the right-hand side. There was a light snow and a little wind blowing. We stopped just before we got to the bridge. The depot at Basin is probably ten car-lengths from bridge 125, the bridge west of Basin.

Cross-examination.

The first thing that attracted my attention was

(Testimony of Robert L. Coburn.)

when I heard the engineer applying the air-brake. I could see he was trying to make as quick a stop as possible. I would say the train probably stopped in five or six hundred feet after that. After he hit the hand-car he released a little and then made a stop. I would say that the stock whistle was blown when he was between four and five hundred feet from the car. He had set the brakes before he blew the stock whistle. Just as quick as he could set the brakes he whistled. Of course it doesn't take any time to place the brake valve in the quick stop. You just move the brake valve is all. I heard the air and I could tell he was stopping and then I heard the whistle. It would be any way eight or ten seconds. Now, let's see; I guess it would not be that much either. No, it wouldn't be that much. He just set the brake and reached up and whistled. It didn't take any more time than to do that—set the brakes and whistle. It was done as quickly as a man could do it. The brake valve would be a little handier to set than the whistle would be to blow, because the whistle is out on the side a little bit and he reaches up for it. The engineer didn't shut off steam—he didn't have any steam on at the time. He was rolling down hill. Where a train will roll, there is no use to use steam.

Whereupon it was stipulated between the parties that neither of the parties had been able to find the man who was with the plaintiff [**65—40**] at the time of his injury, and that each had used reasonable efforts to locate him.

[Testimony of Dr. I. A. Leighton, for Defendant.]

Dr. I. A. LEIGHTON, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am a physician residing at Boulder. I have been practicing medicine there for a little over twenty-eight years. I remember a man coming to Boulder on the 28th day of November last who had been injured near Basin. He was the plaintiff in this case. He was in Dr. Ward's Hospital under my charge, if my memory serves me correctly, about eleven days. The injury was a fracture of the lower third of the left femur; no other injuries to speak of. He claimed some injury to his back, but I could find none. He claimed some injury to his right shoulder, but I could find none. There were some small bruises on the hand and on the arm and also on the face, but they were very slight. I reduced the fracture and put it in splints and made him as comfortable as possible in the hospital, with a good nurse. With a fracture such as he sustained, if he was a good patient and had good careful treatment, he ought to have pretty fair use of his leg in five or six weeks ordinarily, and there would be no permanent injury resulting from that fracture if everything was looked after properly. I cannot say how many times I had to put on splints and dresses. He would deliberately tear the bandages off. I couldn't state how often, but he tore the bandages off a good many times, and so often that we called aside our regular nurse, Mrs. Ward,

(Testimony of Dr. I. A. Leighton.)

and called in Dr. Ward's brother, in order to try and persuade him to watch over him so that he would let the dressings alone and let the splints alone, so that we could keep the fractures in their proper places. He assigned no reason for tearing off those bandages. He begged my pardon every time I would go there. He complained of pain in his back and also a pain in his shoulder. He did not complain of the pain in his leg as a reason for taking off the bandages. He didn't stand pain very **[66—41]** well—that is, he complained a great deal. He was under my care about eleven days; it might have been ten or twelve days. I don't recall the exact number of times that I reset the leg, but it was several times. It was a daily occurrence—sometimes two or three times a day. He did not complain much of pain in re-setting his leg. Of course I gave him an anesthetic the first time, but none after that. After that he stood the pain of re-setting very well.

Cross-examination.

The man was not unconscious when I first saw him. He was then at the hospital. He seemed to be all right, because he answered all the questions I asked him and told me where he was from and answered all my questions. Dr. Ward, the railway's surgeon was in the west and I was looking after his work for him. I am not the company's surgeon. The leg was set by me daily, with the exception of the first time, when I of course gave him an anesthetic. He stood the pain of re-setting the leg well.

(Testimony of Dr. I. A. Leighton.)

Redirect Examination.

If he had responded properly to treatment and had been a good patient and let this dressing and the splints alone on the limb, I don't believe he would have had any shortening, if there is any. I think he would have had a good leg.

[Testimony of Dr. A. L. Ward, for Defendant.]

Dr. A. L. WARD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am a physician and surgeon residing at Boulder —have been such for thirteen years. I remember seeing the plaintiff in this case at my hospital in Boulder about the 7th of December. I saw him with Dr. Leighton. I know he tore the bandages off his leg and behaved badly as a patient. That happened every day while I was there. I saw him for four days. We dismissed him from the hospital. I should say a man of his age, forty-five years, in good health, would recover from [67—42] a fracture of the femur in seven or eight weeks. A fracture of the femur would not necessarily result in a shortening of the bone. If this man had properly responded to treatment, considering the injury which he received, there would not necessarily have been a shortening of his leg. He stood pain very well. He made no complaint to me of pain as the cause for removing his bandages.

Cross-examination.

Dr. Leighton and myself suggested that there

(Testimony of Dr. A. L. Ward.)

should be an insanity commission on this man to determine whether he should be sent to the Insane Asylum or not. I regarded him as an insane man, and so did Dr. Leighton. He certainly acted to me like an insane man. I have had experience with insane people. He seemed to me to be insane. I think he was insane. Dr. Leighton and I reported to the Court that we considered him insane, but the Chairman of the Board of County Commissioners, who sat in the case, after talking with him, did not feel justified in confining him. We thought he was insane and so reported. He was tearing the bandages off his leg and during the days and nights that he was in the hospital he would oftentimes shout at the top of his voice. He didn't groan, but he simply talked about something not relating to his injury. He would shout at the top of his voice, and when in conversation he would talk at the top of his voice and shout at us, using profane language. He did not do this continuously, but just at times. He was apparently insane then, with lucid intervals. That is the way it seemed to me. I never kept track of these insane intervals. Sometimes these insane intervals would last for an hour and sometimes a shorter time.

The chances of a full recovery of a fracture of the thigh grow less as the age of the patient increases. A young man of twenty or thirty, other things being equal, has a better chance of recovery than a man of forty or fifty. In a child the recovery is usually absolutely complete and in a shorter period of time. In a man of fifty or sixty years of age, the recovery

(Testimony of Dr. A. L. Ward.)

is very often as complete, but it requires a longer time. Between sixty or seventy years of age they do recover. The bones unite at any age if properly cared for and the [68—43] conditions are good. I had never seen the man before I started treating him. I have never seen him since until to-day or yesterday.

[Testimony of A. B. Ford, for Defendant.]

A. B. FORD, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am master mechanic for the Great Northern Railway Company at Great Falls, and as such have charge of the locomotive engines there for that company for the Butte Division. I have been such master mechanic for eleven years. I understand the use of air-brakes and the means employed in stopping engines and trains. I ran an engine for four years. My work brings me in contact with the working apparatus of things of that sort. I have charge of maintaining them and of instructing the engineers in the handling of the brakes. I am required to be familiar with the brake mechanism and the principles of air-brakes. You lose your brake power when you reverse the engine with the brakes set, for the reason that only a small part of the driver rests on the rail, while the brake-shoe that comes in solid contact with the tire is fourteen inches long. When the engine is reversed and the wheels are locked they will slide, and you would probably have only about three-

(Testimony of A. B. Ford.)

quarters of an inch working surface represented by that part of the tire of the wheels resting on the rail. Hence, reversing the engine would reduce the brakeing power of the train. This book is a standard textbook on air-brake maintenance and operation. This book shows on page 26, section three, paragraph 32, in regard to the reversing of engines:

> 32. REVERSING THE ENGINE.—No matter how poor the driver—and tender-brakes are, if they are applied, the engine should NEVER BE REVERSED with the expectation of making a shorter stop than could be made with the brakes alone; reversing the engine under such conditions may cause the brake to lock and slide the drivers, in which case the retarding power of the engine is practically lost. It was proved by actual trial in the Galton-Westinghouse tests in England, and, later, in tests made by Mr. Thomas, Jr., Assistant General Manager of the N. C. & St. L. R. R., that a stop cannot be made in as short a distance with the driver brakes set and the engine reversed as when the brakes alone are used.

The principle of air-brakes is the greater pressure governing the less. There are three pressures of air on a train in connection with the brakes—the train line pressure, the auxiliary reservoir pressure and the main reservoir pressure. When the pump [69—44] starts it pumps air direct to the main reservoir, and the air from the main reservoir goes to the train line and from the train line into the auxiliary reservoir. When all the pressures are on, you

(Testimony of A. B. Ford.)

will have at least seventy pounds in your train line and seventy pounds in your main reservoir and seventy pounds in your auxiliary reservoir; the pressure will be equal. In order to set the brakes you have got to reduce your train line pressure. You do this by exhausting the air in the train line pressure through the engineer's brake valve. That reduces the pressure on one side of your triple valve and this causes the triple valve to operate and the air flows into the brake cylinder and equalizes at whatever pressure is desired. The effect of the air-brake auxiliary reservoir flowing into the brake cylinder is to set the brakes. It is the releasing of the air in the train line that gets the air from the auxiliary reservoir to flow into the brake cylinder, and it is that pressure in the brake cylinder which sets the brakes. (Witness then shows by means of diagrams the physical impossibility of obtaining an emergency application of the air-brake after any service application has once been made until the brake is released, as hereinafter stated, and that, as a matter of mechanics, such emergency could not be obtained.)

There is an air cushion between the piston which gives the emergency and the other piston in the valve. When you reduce the pressure in the train line suddenly this will cause air from the auxiliary reservoir to force the last piston back suddenly, and as the last piston mentioned is forced back suddenly, it causes the first piston, or what may be called the emergency piston, to move back also, opening up other reservoirs and giving the emergency pressure in the brake

(Testimony of A. B. Ford.)

cylinder. But if the air in the train line is slowly released, or is not released to the full extent suddenly, this causes the piston which has been referred to as the piston last mentioned, to move backwards slowly, and the pressure of that piston against the air cushion between the two pistons causes the air in that cushion to escape out of a port in the emergency piston, so that said last [70—45] piston moves up flush with the emergency piston, and the emergency piston cannot reach back far enough to give the emergency effect. When, however, the air in the train line is reduced suddenly to the full extent before any application has been made, the air in what is called the air cushion between the two pistons can not escape through this port fast enough, and hence the last piston never gets flush with the emergency piston, but moves the emergency piston by reason of the air cushion between the two. You can't get an emergency application after a service application has been made, or even started, because the two pistons are then flush together, and it is therefore impossible to open the emergency valve.

The system used by the Great Northern Railway Company is the New York Air-brake System. It is mechanically impossible, with the New York air-brake, to make an emergency application of the air-brake after five pounds, or any application of the air has been made, such as is made when approaching a curve. It is mechanically impossible to do this until you release or re-charge the train line and auxiliary reservoir again, and equalize the pressure. To re-

(Testimony of A. B. Ford.)

charge the train line would probably take ten seconds; to equalize the pressure would take six or seven seconds. It sometimes varies on account of the ports being gummed, or something like that. The flow of air is not quite as free sometimes as at others. But it would take four or five seconds anyway to equalize the air and around ten seconds to re-charge. To do this it would be necessary for the engineer to place his valve in full release and release his brakes. He would move his engineer's valve to what we call the release position. In that position all the ports are open, ready for re-charging. The air will then escape from the brake cylinder and will release the brakes, and the air will flow back through the main reservoir to the auxiliary reservoir. The engineer would then leave his valve in that condition for five or six seconds, and then make whatever application he wanted. He would handle just one lever. One lever does all the work. [71—46]

Q. Calling your attention to this Westinghouse Air-brake book, will you state what that shows as regards the distance within which it is possible to stop trains by the application of the emergency air-brake.

Cross-examination by Plaintiff as to Competency.

The Westinghouse and the New York air-brakes show practically the same braking power. They work on the principle that the brake is set by the reduction of the air. The construction of the Westinghouse and the New York brakes are different, but the principles get the same results.

(Testimony of A. B. Ford.)

Direct Examination (Continued).

If you have four cars on a level track and seventy pounds of air in the train line, you could probably stop a four car train with an emergency application somewhere around seven hundred feet. That would depend on weather conditions and the condition of the rail. I am assuming perfect conditions to stop within seven hundred feet. Imperfect conditions would increase the length of the stop, and wet rails will increase the length of the stop. A dry rail gives you the best braking efficiency. Down grade would increase the length of the stop.

The speed recorder has always been found very accurate. We keep a specialist who looks after that particular item for the Butte Division. He checks off the tapes daily. A tape is put on which will last for the round trip from Great Falls to Butte and return. We put on a four hundred mile tape and it lasts for the round trip. This specialist removes the tape and if it doesn't correspond to the milage for the district, then he checks up to find if there is anything wrong with these speed recorders. This is done each trip. For those speed recorders we use a very high-grade oil. The system of the Boyer speed recorder which we use is similar to a centrifugal pump. The revolving of the wheel moves the air up and moves the cylinders, which move a pencil up, which represents the speed at which [72—47] the engine is going. The oil is very high grade and expensive. The oil will not freeze above sixty degrees below zero. We have never made tests to see whether

(Testimony of A. B. Ford.)

it will freeze below sixty degrees below zero, but it is guaranteed that it will not freeze above sixty degrees below zero.

Cross-examination.

This train in question, going forty miles an hour, couldn't have been stopped within seven hundred feet. It certainly couldn't have been stopped in a train-length. I have made tests on those matters. If you had made a service application in approaching a curve and had reduced your speed by five miles, why you could put the emergency brake into the emergency position, but you wouldn't get the emergency feature. You would have to release and equalize the pressures and then apply the brake to the emergency point, before you could get the emergency feature. This would probably take five or six seconds. When a train comes into a depot or station it is very rare that anything but a service application is used. You can increase a service application from a five point reduction to any reduction.

Redirect Examination.

When I say that you can increase a service application, you can do so until you get full service application, but a service application doesn't include the emergency pressure.

Defendant rests.

Rebuttal.

[Testimony of Charles P. Harman, for Plaintiff (Recalled in Rebuttal).]

CHARLES P. HARMAN, being recalled, testified in rebuttal in his own behalf, as follows:

Direct Examination.

The morning in question was a cold day, a little snow was falling; practically no sleet or snow was on the track—the track was dry. [73—48]

[Testimony of Albert E. Lynes, for Plaintiff (in Rebuttal).]

ALBERT E. LYNES, being first duly sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination.

I have been a locomotive engineer and know the track of the Great Northern Railway Company between Basin and the tunnel east of Basin. I worked on the Great Northern between Clancy and Butte for about four years as locomotive engineer. I know the type of engine used on the Great Northern numbered 1000 to 1007, but I have never run engines of that type. I have never run their passenger trains from Butte to Helena, but I have fired on them. I have had experience with New York air-brakes. If an engineer was running with a passenger train of four cars and a tender, going down a one per cent grade, forty miles an hour, on a dry track, and the engineer's valve was in running position, and the air pumped to its full capacity,

(Testimony of Albert E. Lynes.)

and he got an emergency application of the air-brake, he could stop that train in between two and three hundred feet. With a full service application it ought to be stopped in not to exceed four hundred feet. If the engineer on coming around the curve referred to in the testimony reduced his speed by a service application from forty miles an hour to thirty-five miles an hour, there would be no delay incident to getting a full service application of the air-brakes. It would simply mean moving the same valve or lever further on into the full service application. If an engineer has made a reduction of the air by service application, it would take him four seconds to recharge. It would not exceed four seconds. It would take about three seconds to recharge the train and have a full application. By use of the emergency application the train should be stopped in two hundred feet. I have seen the train of the Great Northern Railroad that runs from Butte to Great Falls stopped, and my statement applies to that train. The grade east of Basin, I think, is about one per cent.

Cross-examination.

It is true that with the New York air-brake you can't get an emergency application after giving a service application. The [**74—49**] Westinghouse tests show that a train going forty or fifty miles an hour can be stopped in less distance than two hundred feet by the application of the emergency brake, with four cars. (Producing tables and referring to them.) That is shown in test num-

(Testimony of Albert E. Lynes.)

ber nine. The train ran four hundred fourteen feet in thirteen seconds of time, going forty miles an hour. Here is another test where the train was running forty miles an hour; that train ran three hundred fifty-eight feet. That was a train of fifty freight-cars. That was on a grade of fifty feet to the mile downhill. That is a grade of half of one per cent. The track was straight. The cars were empty. These tests were made in October, November and December, 1887. That is made by the Westinghouse quick action automatic brake. I have never myself been called on to make any such stop as that. I have never tried to. I have never been called on to use the emergency brake. I have never been called on to stop as quickly as possible, or to make anything other than ordinary stops. I have only made ordinary stops. I was in an accident on the Northern Pacific, in which the matter came up as to how quickly I could have stopped my train, but the brakes refused to work at that time. I think I ran eight hundred feet. On that occasion I made an emergency application, but the brakes failed to work. I was then going twenty-five miles an hour, and I didn't stop until eight hundred feet, and two engines were pushing behind on the train. I was in an accident on the Great Northern. I broke up some cars at Clancy, because I didn't stop in time. I have stopped a train myself when it was going forty-five miles an hour in less distance than two hundred feet, when I was firing and going down a two per cent grade. I did this on the occasion of

(Testimony of Albert E. Lynes.)

a collision when Engineer Maze was killed. The trains stopped by the collision. The trains came together all right on that occasion but they were practically stopped before they came together. We could have stopped within three hundred feet. I have never myself seen the sight, when a train going forty-five miles an hour has been stopped within three hundred feet simply by the brakes. I don't know anything about the **[75—50]** tables in this Westinghouse book, other than what is stated in the book.

Redirect Examination.

I wasn't responsible for those collisions as to which I was examined. I had several collisions on the Great Northern in Butte, but I haven't been examined as regards those. I was blameless in each one, except for that one at Clancy. I took the responsibility there on my own account, and got a job afterwards on the Northern Pacific, which knew of my record about that collision.

Recross-examination.

These tests in these tables set forth on page 194 are not tests made under ideal conditions to ascertain the maximum mechanical efficiency of brakes. The tests were made with varying trains in workable condition. They took ordinary passenger trains, and didn't get the brakes into the maximum efficiency. It states that in the tests. That is found in statement in paragraph number eight, beginning with the words "Emergency at twenty miles per hour," and ending with the words, "brak-

(Testimony of Albert E. Lynes.)

ing power was used." Table ten is the only one that shows any tests as regards passenger equipment. Table ten shows the difference between passenger and freight trains. Table ten shows a passenger train going forty-three miles an hour, and it stopped in seven hundred and sixty-seven feet. It took twenty-two seconds to make the stop. That is marked "passenger train only—compare with freight train in test number nine." The tests I refer to in table number nine were freight trains going at forty miles an hour, but the one in column ten was a passenger train only. The train that was running forty-three miles an hour and was stopped in seven hundred sixty-seven feet was a passenger train only. In the next experiment one was a passenger train and the other a freight. The freight train stopped in three hundred nineteen feet, and the passenger train in five hundred forty-seven feet. The next was a freight and passenger train—the freight going at forty-five miles an hour and being stopped in four hundred ninety-five feet, and the passenger train in twelve hundred four feet. In the next set another [**76—51**] freight train was stopped in four hundred ninety-four feet, and the passenger train in eight hundred ninety feet. They can stop a passenger train quicker than they can a freight. I think the first train mentioned is the passenger train. It so states in paragraph ten. You can stop a passenger train quicker than a freight train. That is my judgment, but I can't point out in the table here anything that shows that.

(Testimony of Albert E. Lynes.)

I can't point out in the table whether the figure 319 refers to a freight or a passenger train, or whether the figures 547 refer to a freight or passenger train. I can't tell which of the figures in table ten refer to a freight and which refer to a passenger train. I can't explain why it is that in column ten, in the five hundred forty-seven feet test, if it was a freight train, it shows that the freight train took a longer time than it did in column nine. I couldn't say whether that table ten always shows a report on a passenger train first and next on a freight train. I don't know which is referred to there. I can't say anything about that table, except what the book says.

The table referred to and all explanations thereof, referred to by the witness, read as follows: **[77—52]**

[Table of Automatic Brake Tests.]

Westinghouse Quick-Action Automatic Brake.

Summary of Results of Tests, With 50 Car Train, in October, November and December, 1887.

Place of Test.	Down-grades Feet Per Mile.	FIRST. Miles Speed.	FIRST. Feet Distance.	FIRST. Seconds Time.	SECOND. Miles Speed.	SECOND. Feet Distance.	SECOND. Seconds Time.
St. Paul	13.6	19	172	7	36	490	15
Chicago level head wind		22	184	10	37	480	15
St. Louis	52.8	20	176	11	36	507	18
Cincinnati	50.0	25	284	12	35	542	17
Cleveland	40.0	26	265	12	43	718	20
Buffalo	32.20	21	214	12	40	679	19
Albany	35.0	20	158	10	36	560	18
Boston	40.0	19	123	10	32	406	16
New York	53.0	23	203	12	41	674	20
Philadelphia	44.0	23	264	14	36	593	19
Washington	52.0	19	159	10	42	694	21
Pittsburgh	47.0	20	194	11	40	649	21

	FOURTH.			SIXTH.		
St. Paul	20 37	200 583	.. ..	..	...	..
Chicago	20 34	162 470	11 15	19	1200	62
St. Louis	35	502	17	21	2115	128
Cincinnati	37	573	17	21	1925	75
Cleveland	38	336	17	23	1686	65
Buffalo	39	648	19	20	1000	48
Albany	37	580	19	20	1342	60
Boston	34	483	17	21	1035	54
New York	41	672	20	21	2137	85
Philadelphia	36	579	18	18	1889	75
Washington	42	718	21	20	1643	67
Pittsburgh	40	673	30	20	1720	72

Place of Test.	SEVENTH. Miles Speed.	Feet Distance Apart.	EIGHTH. Miles Speed.	Feet Distance.	Seconds Time.	NINTH. Miles Speed.	Feet Distance.	Seconds Time.
St. Paul	25	100	20	109	..	37	327	..
Chicago	20	59	20	120	6	33	272	11
St. Louis	23	61	20	109	6	38	377	11
Cincinnati	22	32	20	102	6	41	425	12
Cleveland	25	45	20	96	6	40	375	11
Buffalo	.....	59	20	93	6	40	414	13
Albany	.....	180	19	78	5	40	358	12
Boston	22	62	20	111	8	..	...	..
New York	....	43	22	91	6	..	...	..
Philadelphia	22	35	20	87	6	..	...	..
Washington	23	58	21	81	6	40	359	11
Pittsburgh	....	...	20	95	6	..	...	..

	TENTH. Miles Speed.	Feet Distance.	Seconds Time.
Cleveland	43	767	22*
Boston	38	319 547	12 17
New York	45	495 1204	13 27
Philadelphia	49	647 932	19 23
Pittsburgh	45	494 890	14

*Passenger train only. Compare with freight trains in test No. 9 Third Test—In all cases the brakes went fully on within two seconds.

Fifth Test—The brakes were released in all cases in four seconds.

DESCRIPTION OF TESTS.

1. Emergency stops, train*ing* running at *twenty miles per hour.

2. Emergency stops, train running at *forty miles per hour.

3. Applying brakes while train was standing still, to show rapidity of application.

4. Emergency stops, train running at *forty miles per hour.

5. Service stops and time of release. Exhibition of smoothness of ordinary stop and time of release.

6. Hand-brake stops at *twenty miles per hour with five brakemen at their posts. At Buffalo there were seven brakemen.

7. Breaking train in two.

8. Emergency at *twenty miles per hour, the brake leverage having been increased to give the quickest stop possible. In the seven previous tests the usual safe braking power was used.

9. Emergency stop, at *forty miles per hour same leverage as test 8.

10. A train of twenty freight cars and a train of twelve ordinary passenger coaches, run along beside each other on parallel tracks, each being about the same weight and length of trains, and the brakes applied at the same time. This shows the relative stopping power of the old and the new brake.

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*Speed attempted; actual speeds attained are given in statement and as read from speed gauge on engine. Fractions of miles and seconds are omitted. Two engines were used in making tests at St. Paul, and one in other tests. [80—55]

(Testimony of Albert E. Lynes.)

The table on page 194 will be of interest, as it shows how quickly air-brake trains can be stopped when fitted with the Westinghouse quick-action brake.

The train consisted of fifty Pennsylvania 60,000 capacity box-cars whose light weight was 30,000 pounds each. [81—56]

Thereupon the defendant moved the Court to strike out the testimony of the witness as regards the tables in question, upon the ground that his examination had shown that he could not explain the tables.

Which motion was by the Court overruled. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

Redirect Examination.

You can stop a passenger train much quicker than you can a freight. These tests were made in 1887. The efficiency since then has been increased a great deal.

Plaintiff rests.

Sur-rebuttal.

[Testimony of A. B. Ford, for Defendant (in Sur-rebuttal).]

A. B. FORD, being first duly sworn as a witness in behalf of the defendant, in sur-rebuttal, testified as follows:

Direct Examination.

The tables used by the witness Lynes are Westing-

(Testimony of A. B. Ford.)

house tables referring to freight trains, light weight thirty thousand pound cars. There were fifty cars. There were no passenger trains in the ninth column, which is the test to which Mr. Lynes referred in drawing his conclusions as to the distance within which passenger trains could be stopped. In this table the only single passenger train test referred to is one running forty-three miles an hour, which was stopped in seven hundred sixty-seven feet.

I produce here the book, which gives the test made for power by the Westinghouse brake, made by the same company. This is a standard text-book. The test referred to was made on October 1st and 2nd, 1894, near Scranton, Pennsylvania, descending a grade nearly twenty-nine feet to the mile—the weather being fair and the rails dry. The train was [82—57] made up of a locomotive and fifty freight-cars of a total capacity of five hundred and sixty-four thousand pounds. The test taken was with brake equipment of an ordinary kind—ordinary quick action automatic brakes. This book which I have, setting forth this test, is a standard text-book. It says in paragraph 35, section four, page 29, as follows:

35. The tests referred to were made on October 1 and 2, 1894, near Ship Road, Pennsylvania, on a descending grade of 29 feet to the mile, the weather being fair and the rails dry. The train was made up of a locomotive and six Pennsylvania Railroad passenger cars, the total weight of the train being 564,-

000 pounds. The train was fitted throughout with the high-speed brake equipment before the test began, and no alterations were made during the test. The brakes were converted from ordinary quick action at 70 pounds to high speed at a much higher pressure, and back again, by simply cutting in the proper pump governor and feed-valve, so that the same apparatus was used in all the tests. A correct speed recorder was used for measuring and recording the speed of the train, and the brakes were applied at a certain spot by means of a trip arrangement (connected to the train pipe) coming in contact with an obstruction that was fastened to one of the ties. This fixed the exact spot at which the brakes were applied, and enabled the length of the stop to be accurately measured.

The tests on the first day were made at a speed as near 45 miles per hour as possible, two tests being made with the ordinary quick-action automatic brake, and three with the high-speed brake cut in. The train-pipe pressure in the first two tests was 71 and 69 pounds, respectively, while in the last three tests it was 100, 104, and 100 pounds respectively.

[Table of Automatic Brake Tests.]

RESULTS OF BRAKE TESTS.

First Day.

Train-pipe Pressure Pounds.	Actual Speed in Miles Per Hour.	Length of Stop in Feet.	Corresponding Length of Stop at 45 Miles Per Hour.	Average Length of Stop at 45 Miles Per Hour.
71	47¾	776	694)	
69	45½	697	683)	688
100	46¾	584	567)	
104	46¼	610	580)	567
100	47	601	555)	

Second Day.

Train-pipe Pressure Pounds.	Actual Speed in Miles Per Hour.	Length of Stop in Feet.	Corresponding Length of Stop at 60 Miles Per Hour.	Average Length of Stop at 60 Miles Per Hour.
68	60¾	1697	1,658)	
71	61½	1634	1,558)	1,622
71	58¾	1584	1,649)	
100	61¼	1372	1,319)	
104	61½	1361	1,299)	1,296
105	61½	1330	1,269)	
108	58¼	1125	1,189)	
109	64¼	1202	1,155)	1,172

[83—58]

On the second day, the tests were made at a speed as near 60 miles per hour as possible, three tests being made with a train-pipe pressure of about 70 pounds, and five with pressure of about 100 pounds. The observations taken during the tests are given in the preceding table.

EXPLANATION OF TABLE.—Column 1 gives the train-pipe pressure used in each test; column 2 gives the actual speed of the train at the time the emergency application took place; column 3, the actual distance in feet the train traveled after the emergency application was made; column 4, the distance in feet the train would have traveled had it been running at the speed indicated (45 the first day, 60 the second), instead of at the actual speed as

(Testimony of A. B. Ford.)

given in column 2; column 5 gives the averages of the distances marked with brackets in column 4.

From column 5 it will be seen that, at a speed of 45 miles per hour, the high-speed brakes will stop a train in about 120 feet less space than the ordinary quick-action brake, while, at 60 miles per hour, it will stop the train in about 450 or 326 feet less distance, depending on whether the train-line pressure used is greater or less than 105 pounds.

The tables show that with a train-pipe pressure of seventy-one pounds, and actual speed in miles per hour of forty-seven and three-quarters miles, the length of stop was seven hundred seventy-six feet. At forty-five miles per hour, the length of stop was six hundred ninety-four feet. In a second test with sixty-nine pounds train pressure, running at forty-five and a half miles per hour, the length of stop was six hundred ninety-seven feet. At forty-five miles an hour, the length of stop was six hundred eighty-three feet, making an average of six hundred eighty-eight feet. These tests were made with an ordinary quick-action automatic brake, of the Westinghouse Company, similar to the New York brake. I have never made any of these tests myself, but I have had instructions as to how to make them. When these tests are made you put everything up to the standard. You renew all brake-shoes. The object of the test is to see what it is possible to do. As to comparing the distance within which passenger trains or freight trains could be stopped, and comparing a loaded passenger train of four cars, with a freight train of fifty light cars, that would depend on the

(Testimony of A. B. Ford.)

grade. If it was practically a level grade, fifty cars would stop much quicker, for the reason that each car has independent braking power, and there is no great resistance to overcome. The fifty cars would stop quicker if they were light weight [84—59] cars. Coaches weigh from fifty thousand pounds up. Our sleepers each weigh about forty-five—close to fifty thousand pounds.

Cross-examination.

Down grade there is momentum to overcome. The stop which I say in this table was made in seven hundred seventy-six feet was about a six-tenths grade. In that test there were fifty sixty-thousand capacity freight-cars, the light weight of the cars being thirty thousand pounds. The weight of the train on a downgrade, to a certain extent, has something to do with the stopping power. A chair car would weigh about forty-five thousand pounds. The day coach would probably go better than thirty thousand pounds. A smoking-car would be about the same; perhaps they would weigh thirty-seven thousand pounds apiece. The entire weight of the train would be one hundred fifty thousand pounds. In the test to which I referred there were fifty freight-cars; those were fifty light box-cars, thirty thousand pounds each. The freight-train was ten times as heavy as the passenger train, yes, sir.

Defendant rests.

The foregoing is all the testimony introduced in the trial in the above-entitled cause. [85—60]

Thereupon at the close of all the evidence in the case the defendant moved for judgment as follows:

[Motion for Judgment of Nonsuit, etc.]

Comes now the defendant, Great Northern Railway Company, at the close of all the evidence in the case and moves the Court for a judgment of nonsuit and dismissal on the merits upon the grounds following:

1st. The evidence does not disclose facts sufficient to establish a cause of action in favor of the plaintiff and against the defendant.

2d. The evidence does not disclose the violation of any legal duty owing by the defendant to the plaintiff.

3d. The evidence discloses that the plaintiff was guilty of contributory negligence, proximately causing his injury.

4th. The uncontradicted evidence discloses that the plaintiff was a trespasser upon the defendant's track, and that the engineer did everything in his power, at the time he discovered the plaintiff upon the said track, to avoid injuring him.

5th. The uncontradicted evidence shows that the plaintiff and the defendant were both present, each in possession of their faculties, and that the plaintiff was guilty of contributory negligence; in the first place, in coming on the track; and in the second place, in unnecessarily remaining on the track, and in leaving the track upon the side, or in the direction, in which the car would be thrown, rather than the side where it would not be thrown.

6th. The uncontradicted evidence shows that the plaintiff was not only a trespasser, but was engaged

in acts involving moral turpitude, and stated by him to be dangerous to persons properly using the track, and to be dangerous to trains passing on the same; and hence the law does not throw about him, nor impose upon the defendant, any duty to exercise reasonable care to avoid injuring him, while so engaged, or engaged in avoiding the consequences to others of his said unlawful acts, so involving moral turpitude. [86—61]

Which said motion was by the Court overruled. To which ruling of the Court defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Instructions Requested by Defendant.

Thereupon the defendant requested the Court to give the said defendant's requested instructions as follows, to wit:

No. 1. You are instructed to return a verdict for defendant.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 2. You are instructed that under the evidence, the engineer did all in his power, or at least exercised reasonable care in the matter of checking the speed of the train, and you cannot find him negligent in this regard.

Which said instruction the Court refused to give.

To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 3. You are instructed that the evidence conclusively establishes that defendant's engineer, under its air-brake system, could not get an emergency application of the brake after making the service application without releasing and recharging.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows: [87—62]

No. 4. You are instructed that under the evidence, it was not the duty of the engineer to reverse his engine.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 5. The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the de-

fendant were negligent, and that the negligence of each contributed up to cause the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury, then he cannot recover.

Which said instruction the Court refused to give as tendered but modified the same as set forth in the court's charge. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 6. Where both plaintiff and defendant are present, and plaintiff is in possession of his mental faculties and is or continues to be negligent, then such negligence continues as a proximate cause of his injury as long as he continues to be present and in possession of his faculties and he cannot recover.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its [88—63] counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the court give its requested instruction as follows:

No. 7. If you find that plaintiff was guilty of any negligence, and that such negligence or any carelessness, or other act on his part threatened injury to

persons on the train as it approached, and plaintiff remained on the track to avoid the consequences to others of his said negligence and carelessness, then you are instructed that under such circumstances his said negligence and carelessness continues as a cause of the accident, even though he acted reasonably in trying to avoid the consequences thereof, and he cannot recover.

Which said instruction the court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 8. If you find that plaintiff's act in using the push-car, referred to in the evidence, was an act likely to result in the derailment of an engine or train approaching the same, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and it would be his duty, as soon as he learned of the approach of a train to exercise reasonable care to attempt to get the car off the track or in a situation where it could not imperil the train and thus to avoid the threatened consequences, if any, of his said act. Such action on plaintiff's part would thus constitute action done by him in discharging a duty resting upon him to others and arising by reason of his alleged wrongful conduct, and for any injury sustained by him while thus engaged in removing or undoing the said effects of his said unlawful conduct, if any, defend-

ant would not be liable under the evidence in this case. [89—64]

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 9. If you find from the evidence that plaintiff's act in using the push-car referred to in the evidence was an act likely to result in the derailment of the engine or train, or of any engine or train proceeding on the track, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and the railway company would owe him no duty of care and would owe to him no duty other than not wilfully and intentionally to injure him, and your verdict must be for the defendant.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No 10. The law does not impose a duty upon defendant to exercise care not to injure unintentionally a person who is trespassing on its railroad track without right, and engaged thereon in an undertaking which may result in damage to defendant if

such undertaking was not only unlawful, but constituted at least a moral wrong which might result in serious consequences. Thus a contractor engaged in erecting a building is not liable for carelessness on the part of his employees resulting in injury to a person who has gone on the premises with the intention of blowing up the building, or with the intention of removing explosives therefrom which he had previously placed there for the purpose of blowing up the building, for the law will not create a duty of care for the protection of one [90—65] so engaged in doing a criminal or unlawful act or in trying to undo the consequences thereof.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 11. If you find that plaintiff remained on the track and endeavored to remove the hand-car from the track in order to prevent the derailment of the approaching train, and that his conduct in this respect under all the circumstances was reasonable, nevertheless, he cannot recover if the hand-car being on the track was the consequence of his own wrong, if any. In other words, a person engaged in protecting life, limb or property cannot recover merely because at the very time he was in peril, he was acting under the perils then existing, and to avert which he was engaged, when the necessity for his

so doing is caused by his own negligence; that is to say, a person cannot escape the consequences of his own anterior negligence merely because at the time he was injured, he was engaged in trying to avoid the consequences to others of such negligence, and in so doing, was acting reasonably, or without negligence; in such case, his anterior negligence would continue as a cause and would bar a recovery.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested that the Court give its requested instruction as follows:

No. 12. You are instructed that if a person has two or more ways of accomplishing any purpose, one of which is dangerous, and **[91—66]** the other of which is safe or less dangerous, and he unnecessarily and negligently selects the dangerous or more dangerous way, and his injury is caused in part by the choice of ways so made by him, then he is guilty of contributory negligence, and cannot recover.

Which said instruction the Court refused to give. To the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed. **[92—67]**

THEREUPON the case was argued to the jury by counsel for the respective parties, and at the close of the argument the Court gave to the jury its charge as follows:

Instructions.

GENTLEMEN OF THE JURY:

The plaintiff in this action was seriously injured, it is very apparent, on the right of way of the defendant; and, to recover for those injuries, he brings this action. He founds his action upon the theory that he had a right to be where he was, at the time he was, and under the circumstances; but the Court is compelled to say that he could not recover on that theory, and is not entitled to the benefit of the rules of law that would apply to that situation, had it been proven; but that, on the contrary, as the evidence discloses, he was there at that time and place as a trespasser upon the track of the railway company, which brings into play other rules of law under which he may or may not be entitled to recover, depending upon how you view the evidence under the law, or the rules of law that the Court will declare to you.

It seems that he was working for railroad contractors at the tunnel of the defendant, and that the cause of action is founded upon the proposition that, of course, he had a right to a way out of there whenever he quit work, and that this way over the railroad track up to Basin was the only practical way—virtually the only way. But it seems from the evidence that there was a county road along there, which the plaintiff says he would not take, because he would have to wade across a creek, or that he assumed that he would, because he saw one place where the road crossed the water, and that he saw

the road from different places along there, at least saw the road from the track. I don't think he says he saw it from the tunnel. He says that supplies had been taken from Basin to the tunnel. But that would not justify the plaintiff in believing that he had a right to go on there with his push-car, to take his baggage after he quit work. He also said **[93—68]** he did not expect a train; although he was told that there was liable to be a train, and he left the tunnel about the time this particular train was due to come from Basin to the tunnel. He says he saw no evidences of a train as he left the tunnel. Under the circumstances, he had no right to go there, and was, therefore, what is termed in law a trespasser.

Under such circumstances the law with reference to trespassers is this: That the railroad company is not obliged to foresee that trespassers will be on its track. Its public business is the transportation of the mails and passengers and freight, and it has the right to use its track for that purpose. So that trespassers up to a certain point must look out for themselves.

A railroad company owes no active duty to keep a lookout for trespassers upon its tracks. Such trespassers go upon its tracks at their own peril as against their presence not being discovered. A railroad company owes no duty of care to a trespasser other than not wilfully or wantonly to injure him or not negligently to bring force to bear against him after not only his presence but his peril is discovered.

You are instructed that at least until plaintiff's presence was discovered, defendant was entitled to

run its train at any high rate of speed it saw fit, and plaintiff cannot complain of the speed of the train prior to the time when he was first seen.

You are instructed that, under the uncontradicted evidence in the case, the plaintiff saw the engine approaching just as it came in sight around the curve, and no negligence can be charged against the defendant company in the matter of whistling, or not whistling, as the case may be. In considering, therefore, whether or not the defendant was negligent, you will disregard any alleged failure to whistle, and you can find a verdict against the defendant only if you find from the evidence that it was negligent in some other particular than in the alleged failure to whistle. **[94—69]**

A railroad train, on a railroad track, has its signal as a warning to the trespasser, or to anyone who stands in its way; and the whistle, of course, is intended for no other purpose, but he who is conscious of the fact that a railroad train is ahead of him, and coming on the track towards him, has, in that, a signal as good as any whistle would furnish him.

As regards giving warnings of the approach of trains, you are instructed that even where such a duty exists (and there was no duty to signal any trespassers, until at least they were in sight), that duty is dispensed with when the person injured in any manner acquires the information which would be given by the bell or whistle. If, therefore, you find that at any time the plaintiff saw the train approaching, it would be unnecessary after that for defendant to give warning of the approach of the train

and to advise plaintiff, by whistle or otherwise, of what he had himself ascertained. In other words, a plaintiff's knowledge, however acquired, dispenses with the necessity of any one giving him the same knowledge by bell or whistle or otherwise.

The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent and that the negligence of each contributed upon to and caused the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury at the time of the injury, then he cannot recover.

The rule of law as stated by the Court is: That the railroad need not be watchful for trespassers; but when a trespasser is discovered, when his peril is discovered, then the railroad company—which **[95—70]** means the engineer under these circumstances must exercise reasonable care to avoid injuring him. Now, observe that not always is it necessary for the engineer to commence taking precautions, the moment he sees a trespasser. That is not required. The engineer generally has a right to assume that a trespasser on the track is in possession of his natural faculties and that the instinct of self-preservation will warn him to remove himself from the track in time to avoid collision with the

train. To illustrate: If the engineer sees a man walking on a track several hundred feet ahead of him, he does not need to warn him to take precautions, because he has a right to assume that the man will get out of the way. That happens hundreds and thousands of times every day; and no trespasser has any right to go on there to the detriment of others; but if he would see a man five hundred or a thousand feet away caught in the middle of a long trestle, it would be apparent at once, and it would be obvious to the engineer, that that man was in peril and he should look out to see that he would not run over him, and take great precaution to avoid injuring him.

So, in this case, if the engineer coming around the curve saw the man busy with a hand-car five hundred feet away, whenever he conceived, in his honest judgment, that this trespasser was not going to get out of the way, if in his judgment, it was a case where this plaintiff intended to stay there and struggle with this baggage and the hand-car, at the peril of his own life, until possibly the train had run into him, it would be the duty of the engineer to begin to take precautions as soon as it was apparent to him. In other words, the engineer, generally, is not required, himself, to take the precaution the moment he sees a trespasser, but only at the moment that it begins to be obvious to the engineer that the trespasser is not, himself, going to get out of the way and is going to be run over. But when it becomes obvious that there is something wrong, and that this trespasser on the track likely will not get out of the way, humanitarian reasons then make it

the duty of the engineer to take every [96—71] reasonable precaution to vigorously and actively save, if he can, the trespasser from being injured by the train. Of course, it must be borne in mind that the engineer's first duty on a passenger train is to the train and the passengers upon it. He must remember them and at the same time he must look out, as far as it is reasonable, to protect a trespasser. He is not obliged to bring a great deal of harm and to sacrifice passengers to save a trespasser; but he is obliged to take every reasonable precaution, under all the circumstances—all active precautionary measures that he can to protect the trespasser, after it is obvious to the engineer that his peril is imminent. He can wait until the last minute before he needs to take any precaution; and the Court means by the last minute that he can wait until it is obvious to his honest judgment that if he does not take precautions, the trespasser is likely to be hurt, and then is the time he must commence active measures for the trespasser's protection.

Another thing: The engineer's honest judgment is what determines whether or not he was negligent or not negligent. Mind you, the company's liability depends on whether or not the engineer was negligent or was not negligent. If the engineer was not negligent, although the accident happens and the trespasser is injured or killed, the company is not liable. If the engineer was negligent under the circumstances, then the company would be liable. But the engineer is entitled to exercise his honest judgment; and if he has done that and done all that his honest

judgment tells him, under the circumstances, he ought to do, then, though the trespasser is injured or killed, the company would not be liable, because, the trespasser has put himself in a position where the engineer must exercise judgment, and he must take the consequences of a mistake of judgment, if the engineer exercises it honestly and yet the trespasser is injured. For instance in this particular case, the evidence tends to show,—and there is some conflict that you are to determine—the evidence tends to show that the **[97—72]** moment the engineer came around the curve and saw this trespasser, he put on all the air he had, gave the service application, or a full service application. He tells you the reason why he did not put in the emergency, that it was not practicable under the conditions as they then existed, without first taking off all his air, which, of course, would increase the speed of the train, going downgrade, allowing the reservoirs or some of them and the train line, to be recharged and then reapply the air, and he told you the effect of the emergency brakes upon the passengers. Now, if the engineer, at that time and place, did what seemed to him honestly sufficient to save the trespasser, or did it after it became apparent to him that the trespasser required saving, and was not saving himself; if he did what in his honest judgment was sufficient, the defendant would not be liable. You must remember, in weighing the testimony and considering the situation, that, as we look back at a situation of that sort, we can always say that if he had done this other thing the man would have been

saved. But you must put yourself in the position of the engineer, or of a reasonable, prudent man at that time and place, and determine what he would do in the emergency presented to him and in the time that was given him to do it, to determine whether he exercised an honest judgment and did what, in his judgment, was honestly sufficient at the time; and take into consideration also the speed at which the train was coming around the curve. You will remember that event, that it was five hundred and ten feet that the engineer assumes, in nine seconds—less than nine seconds—at the speed he was going, he would be down on to the hand-car, if it was not taken out of the way. You will consider whether or not the engineer had the right to judge, or had the right to conclude, that the plaintiff was getting out of the way in time and getting his hand-car out of the way in time. A party in the position that this plaintiff was, in bringing himself there, was guilty of contributory negligence; but, up to that time, you can put that out of sight, because, while he put himself there by his negligence, **[98—73]** he was entitled to the rules of law governing the protection of trespassers, insofar as the law is applicable here.

If Harman remained with the hand-car in his attempt to remove the same from the track in a reasonable effort to avoid a probable disaster, if the car made disaster probable, to the approaching train and persons riding thereon; then it is relevant for you to consider this proposition of law; the law has so high a regard for human life that it will not impute negligence to an effort to preserve, unless made

under such circumstances as to constitute rashness and recklessness in the judgment of prudent persons.

But if you should consider that the engineer did not exercise an honest judgment and do all that was reasonably within his power to do, under the circumstances there disclosed, then you must consider whether this plaintiff was guilty of such rashness and recklessness in remaining upon the track in an honest endeavor to either remove his baggage or hand-car, or both, as to make himself guilty of negligence at the very moment he was struck by the engine and the hand-car; that is to say, if the plaintiff was guilty of conduct at that particular moment when he was struck, or immediately preceding it, that a prudent, reasonable man would not have done, under the circumstances, then no matter what the engineer's judgment was, or the engineer's failure was, if his negligence contributed to his own injury at that moment, why then, again, the plaintiff would not be entitled to recover.

But you have a right to consider, in weighing the plaintiff's conduct, this instruction that I have just given you, and that he says to you that he feared the wreckage of the passenger train, and hence he stayed with the hand-car in his efforts to remove it. Now, if that is what a prudent and a reasonable man, animated also by desire to save life would do, then the plaintiff would not be guilty of any neglect at that moment, depriving him of a right to recover, if the engineer of the defendant was guilty of negligence in seeking to reserve and protect him, and it caused the injury. **99—74]**

With respect to the question of negligence, the definition of negligence is as follows:

Negligence is the failure to exercise such care as the law requires should be exercised by one person for the benefit of another who has been injured by the former.

As regards negligence, before you can find defendant negligent towards plaintiff, you must first find whether under the Court's instructions the defendant owed any duty of care to plaintiff: (the Court has told you he did owe a duty to him after he was discovered in peril) and, if so, how much care the defendant owed. In this connection, it is not sufficient for a plaintiff to show that a defendant owed a duty of care to others than the plaintiff, and that if that duty had been discharged, the plaintiff would not have been injured.

This part of the instruction was perhaps framed in view of some abandoned proposition that has not arisen in the case.

The standard of care, where any care is required, is merely ordinary care, that is, such care and caution as the average reasonably prudent person, under all the circumstances, would ordinarily exercise. The test as to whether defendant was negligent is not whether defendant could have prevented the accident. The test is not even whether defendant exercised such care as the average reasonable prudent person should or even would exercise, but whether defendant exercised such care and caution as the average reasonably prudent person under all the circumstances would ordinarily exercise.

I have used in this charge several times the expression "ordinary care." The law required in such cases as this only ordinary care, but I charge you that ordinary care is measured by, must be equal to and varies with the danger of the general surrounding circumstances. As the danger of the force or instrument a man is using increases, so does the degree of care, which the law requires of the man using the force or instrument increase; to illustrate, the same conduct in a man handling a wagon with horses might be ordinary care but might be negligence in a [100—75] man driving an automobile or steam engine.

The plaintiff must prove his original cause set out in his complaint by a preponderance of the evidence (that is to say that he was injured through some act of negligence of defendant's servants, as alleged by him or as proven by all of the evidence, if it is proven, whether it be the evidence of plaintiff or defendant by any of the witnesses against themselves. The preponderance of the evidence is not determined by which side has the most witnesses testifying to any fact in dispute; you are at liberty, if it commends itself to you, to believe a less number or a single witness against a greater number, if from all of the testimony and circumstances shown by the testimony you are convinced that the less number or a single witness is entitled to greater credibility.

I will say to you, Gentlemen of the Jury, that you have heard all the evidence, and the Court does not propose to review it. It has been argued now by

counsel, and the testimony itself is very brief. There is some conflict in it; but you are to determine those conflicts.

In addition to the expressed facts that have been proven before you, by the direct statements of the witnesses, there are various inferences which can be drawn from the testimony, as reasonable men, and it is for you to draw them. Of course, there are some aspects of the evidence, if you follow it, from which you would infer one character of inferences; and if you follow the other aspect of the evidence it would justify a different inference, and it is for you to draw them.

(The remaining portion of the Court's instructions to the jury related only to the measure of damages and is omitted.)

[Objections and Exceptions to Instructions.]

Thereupon the defendant duly objected and excepted to the Court's said instructions as follows:

The defendant duly objected and excepted to all that part of the **[101—76]** instructions of the court imposing any duty of care on the part of the railway company, however slight, on the ground that at the time the plaintiff was injured he was guilty of an act involving moral turpitude and therefore no duty of care of any kind would, under the law, be accorded to him. Where the person is injured in an act involving moral turpitude the law will not throw about him a duty upon others to exercise care for his protection, especially when that act so involving moral turpitude involves risks to others or to the persons who might otherwise be required to

exercise care for his protection, and the same is true where a person is engaged in merely endeavoring to remove the consequence of acts of his involving moral turpitude.

Which said objections were overruled and defendant's exception thereto and defendant's exception to the giving of said portion of said instructions for the reasons stated were duly noted and allowed.

Defendant also duly objected and excepted to all that part of the charge of the Court on the matter of contributory negligence operating as a cause at the time of the injury upon the ground that in this instance both parties were present and in full possession of their faculties and therefore any negligence in the operation of the car, or whereby the plaintiff got upon the right of way, would continue as a cause of the accident, up to the moment of the accident.

Which said objection was by the Court overruled. To which ruling of the Court and to the giving of said portion of said instructions to the jury the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Said objections and exceptions to the instructions of the Court were duly made and taken, noted and allowed immediately after said instructions were given by the Court and before the Jury had retired to consider of its verdict.

Thereupon the Jury retired to consider of its verdict and thereafter returned into court with the request that the Court give further instructions on the issue of contributory negligence. **[102—77]**

[Further Instructions.]

Thereupon the Court instructed the Jury as follows:

If the peril of the plaintiff, when the defendant's engineer first saw him upon the track, was obvious to the average reasonable man; that is to say, if it was apparent then and there to the average reasonable man that the plaintiff's situation was such that he was likely to remain struggling with the hand-car and his baggage, until the last moment in an effort to remove them from the track, and the likelihood of being injured by the oncoming locomotive, reasonable care on the part of the engineer would demand that he immediately begin active and vigorous efforts to stop and to protect and avoid injuring the plaintiff. If this was the situation and the engineer failed therein, it would be, under the circumstances, negligence and for which, if the plaintiff's injury was entirely due thereto, the defendant would be liable to the plaintiff. In determining whether this was the situation you must bear in mind that there is evidence tending to show that as soon as the engineer saw the plaintiff on the track, he did begin efforts to bring the train to a stop to avoid a collision with the plaintiff. It is for you to say, under all the circumstances, whether this is true, whether these measures taken by the engineer were such, as, in his honest judgment would serve to protect the plaintiff. If so, then, for a mere mistake in his judgment, honestly exercised, no negligence could be imputed to him, and hence the defendant

would not be liable to the plaintiff for any injury that followed.

Further, the evidence also is, that as soon as the engine came in sight on the curve, the plaintiff observed it and that he began his efforts to remove the load from the car, and the car from the track. It is for you to determine whether therein he acted as a reasonably prudent man would act under the circumstances; whether there was, in the judgment of a reasonably prudent man such danger, or source of danger, to the oncoming train and its passenger that a humane purpose to save them therefrom would justify the average reasonable man in remaining upon the track, taking the hazard of injury to himself, in order to remove the **[103—78]** handcar and its baggage, to avoid the likelihood of damage to the oncoming passenger train and its passengers.

If you find that the plaintiff was not thus justified, but that on the contrary his conduct was imprudent to the extent of being rash and reckless, then the plaintiff would be guilty of contributory negligence proximately causing his injury, and it would deprive him of any right to recover, even though the defendant's engineer is found by you to also have been negligent.

Insofar as the plaintiff's final act in running around the push-car so that he was in a position to be struck by it, when the push-car was struck by the engine, this of itself does not necessarily show negligence. If the plaintiff was justified in his efforts to clear the track, to the extent that he would forget the instinct of self-preservation in obedience to a

humane impulse to protect the oncoming train and its passengers; and if, thereby, he remained upon the track until the last moment and then sought to escape, you must remember that he had very little time, if any, to think of the course he should take to protect himself, whether he should run, where he should place himself. That if still acting reasonably, he took the more dangerous way, that alone would not be contributory negligence, and would not deprive him of a right to recover, if otherwise entitled thereto, as I have instructed you.

[Objections and Exceptions to Further Instructions.]

To the giving of all that part of said further instructions to the effect that test for the jury in determining the issue of contributory negligence is as to whether or not the plaintiff was reckless or rash.

The defendant by its counsel then and there duly objected and excepted upon the grounds that the law precludes a recovery by the plaintiff not only if he was reckless or rash but even though if not reckless or rash he failed merely to exercise reasonable care for his own safety.

Which said objection was by the Court overruled. To which ruling of the Court defendant by its counsel then and there duly excepted, **[104—79]** which said exceptions were then and there duly noted and allowed.

Defendant also duly objected and excepted to all that part of said further instructions relating to contributory negligence on the grounds stated in the

general instructions to the general charge of the Court heretofore given and on the ground that any negligence of the plaintiff in this case continues as a cause of the accident up to the time of the accident since both parties were present and in possession of their faculties.

Which said objection was by the Court overruled. To which ruling of the Court defendant by its counsel then and there duly excepted and said exceptions were thereupon duly noted and allowed.

Said objections and exceptions were made and taken, noted and allowed before the Jury again retired to consider of their verdict.

Thereupon, the Jury returned again to consider of their verdict and thereafter returned into court with a verdict in favor of the plaintiff and against the defendant assessing the plaintiff's damages in the sum of Fifteen Hundred Dollars.

Thereafter by stipulations of the parties and by an order of the above-entitled court, duly given and made, the time within which defendant might prepare and serve its bill of exceptions was extended to and including September 1st, 1913. **[105—80]**

And now, therefore, in furtherance of justice and that right may be done, the defendant presents the foregoing as and for its Bill of Exceptions to the rulings made and proceedings had on the trial of the above-entitled cause and prays that the same may be settled and allowed and signed and certified by the

Judge of the above-entitled court, who tried said cause, as provided by law.

H. C. HOPKINS,
VEAZEY & VEAZEY,
Attorneys for Defendant.

Admission of Service of Bill of Exceptions.

Due personal service of the foregoing Bill of Exceptions made and admitted, and receipt of copy acknowledged, this 25th day of August, A. D. 1913.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Plaintiff.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated that the foregoing Bill of Exceptions is true and correct and that the same may be settled and allowed, and signed and certified, as defendant's Bill of Exceptions to the rulings made and proceedings had on the trial of the above-entitled cause.

Dated this 25th day of August, A. D. 1913.

MAURY, TEMPLEMAN and DAVIES,
Attorneys for Plaintiff. [106—81

In the District Court of the United States in and for the District of Montana.

CHARLES HARMAN,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Order Settling and Allowing Bill of Exceptions.

This cause coming on regularly before the Court on this 25th day of Sept. A. D. 1913, being a day of the April term, A. D. 1913, of said District Court, and being a day of the same term as that in which the judgment herein was rendered and entered, upon the application of the defendant for the settling and allowance of its proposed Bill of Exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of the Court, and the plaintiff, by his attorneys, having waived its right to proposed amendments thereto and having consented that the same may be now settled and allowed as presented.

IT IS NOW ORDERED that the foregoing Bill of Exceptions be and it is hereby settled and allowed as a true Bill of Exceptions in this cause as prayed, and the same is now certified accordingly by the undersigned, the presiding Judge of said court, who tried said cause, and it is ordered that the same be filed *nunc pro tunc* as of July 15th, A. D. 1913, and made a part of the record herein.

Done in open court this 25th day of Sept. A. D. 1913, and ordered entered as above.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

Filed Sept. 25, 1913. Geo. W. Sproule, Clerk.

[107]

And thereafter, on January 13, 1914, Assignment of Errors was duly filed herein, being as follows, to wit: [108]

In the District Court of the United States in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Assignment of Errors.

Comes now Great Northern Railway Company, the defendant in the above-entitled cause and, pursuant to its petition for a writ of error, filed herein, makes and files this its assignment of errors setting forth why the judgment herein should be reviewed on writ of error and reversed, and says that the Court was in error in the particulars following and that it the said defendant herein, plaintiff in error in the Circuit Court of Appeals, will rely upon the following errors in the prosecution of said writ, to wit.

I.

It was error in the Court to overrule the defendant's objection to the following question, as follows:

"Q. What is the general custom among railroad engineers and people operating trains in the United States, as to making signals at obscure places.

Mr. VEAZEY.—We object to that as wholly

immaterial; customs elsewhere cannot be binding on the defendant railroad company, and it hasn't been shown that there was any duty owing by the [109] defendant railroad company to the plaintiff, and the conditions where the alleged customs are supposed to have existed are not shown to have been similar to the conditions existing here."

Which said objection was by the Court overruled.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

II.

It was error in the Court to overrule defendant's objection to the following question, as follows:

"Q. Why did you not leave the hand-car on the track?

Mr. VEAZEY.—That might have a bearing solely on the issue of contributory negligence, but as regards any feature of the case that this man was trying to save his property, or to protect the train, which he had thus imperiled by his own act, we object to that question upon the ground that it seeks to elicit testimony not within the issues, with regard to negligence of the defendant, raised in the pleadings in this case."

Which objection was by the Court overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was then and there duly noted and allowed.

III.

It was error in the Court to overrule defendant's motion for a judgment of nonsuit and dismissal upon the merits at the close of plaintiff's case.

IV.

It was error in the Court to overrule defendant's motion for a judgment of nonsuit and dismissal on the merits, at the close of all the evidence. **[110]**

V.

The verdict is against law, in that the Court charged the jury that there could be no recovery by the plaintiff unless it was established by the evidence that the engineer failed to exercise an honest judgment, and that for an honest mistake in judgment on his part, there could be no recovery but the uncontradicted proof shows that the engineer did exercise an honest judgment, and that he made no mistake in his judgment, but that if any mistake was made it was an honest mistake.

VI.

It was error in the Court to refuse defendant's requested instruction No. 1, as follows:

"No. 1. You are instructed to return a verdict for defendant."

VII.

It was error in the Court to refuse defendant's requested instruction No. 2, as follows:

"No. 2. You are instructed that under the evidence, the engineer did all in his power, or at least exercised reasonable care in the matter of checking the speed of the train, and you cannot find him negligent in this regard."

VIII.

It was error in the Court to refuse defendant's requested instruction No. 3, as follows:

"No. 3. You are instructed that the evidence conclusively establishes that defendant's engineer, under its air-brake system, could not get an emergency application of the brake after making the service application without releasing and recharging." **[111]**

IX.

It was error in the court to refuse defendant's requested instruction No. 4, as follows:

"No. 4. You are instructed that under the evidence, it was not the duty of the engineer to reverse his engine."

X.

It was error in the court to refuse defendant's requested instruction No. 5, as follows:

"No. 5. The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent, and that the negligence of each contributed to cause the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury, then he cannot recover."

XI.

It was error in the court to refuse defendant's requested instruction No. 6, as follows:

"No. 6. Where both plaintiff and defendant are present, and plaintiff is in possession of his mental faculties and is or continues to be negligent, then such negligence continues as a proximate cause of his injury as long as he continues to be present and in possession of his faculties and he cannot recover."

XII.

It was error in the court to refuse defendant's requested instruction No. 7, as follows:

"No. 7. If you find that plaintiff was guilty of any [112] negligence, and that such negligence or any carelessness or other act on his part threatened injury to persons on the train as it approached, the plaintiff remained on the track to avoid the consequences to others of his said negligence and carelessness, then you are instructed that under such circumstances his said negligence and carelessness continues as a cause of the accident, even though he acted reasonably in trying to avoid the consequences thereof, and he cannot recover."

XIII.

It was error in the court to refuse defendant's requested instruction No. 8, as follows:

"No. 8. If you find that plaintiff's act in using the push-car, referred to in the evidence, was an act likely to result in the derailment of an engine or train approaching the same, then the act of the

plaintiff in using the same was under the evidence a wrong involving moral turpitude and it would be his duty, as soon as he learned of the approach of a train to exercise reasonable care to attempt to get the car off the track or in a situation where it could not imperil the train and thus to avoid the threatened consequences, if any, of his said act. Such action on plaintiff's part would thus constitute action done by him in discharging a duty resting upon him to others and arising by reason of his alleged wrongful conduct, and for any injury sustained by him while thus engaged in removing or undoing the said effects of his said unlawful conduct, if any, defendant would not be liable under the evidence in this case."

XIV.

It was error in the court to refuse defendant's requested instruction No. 9, as follows:

"No. 9. If you find from the evidence that plaintiff's act in using the push-car referred to in the evidence was an act likely to result in the derailment of the engine or train, or of [113] any engine or train proceeding on the track, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and the railway company would owe him no duty of care and would owe to him no duty other than not wilfully and intentionally to injure him, and your verdict must be for the defendant."

XV.

It was error in the court to refuse defendant's requested instruction No. 10, as follows:

"No. 10. The law does not impose a duty upon defendant to exercise care not to injure unintentionally a person who is trespassing on its railroad track without right, and engaged thereon in an undertaking which may result in damage to defendant if such undertaking was not only unlawful, but constituted at least a moral wrong which might result in serious consequences. Thus a contractor engaged in erecting a building is not liable for carelessness on the part of his employees resulting in injury to a person who has gone on the premises with the intention of blowing up the building, or with the intention of removing explosives therefrom which he had previously placed there for the purpose of blowing up the building, for the law will not create a duty of care for the protection of one so engaged in doing a criminal or unlawful act or in trying to undo the consequences thereof."

XVI.

It was error in the court to refuse defendant's requested instruction No. 11, as follows:

"No. 11. If you find that plaintiff remained on the track and endeavored to remove the hand-car from the track in order to prevent the derailment of the approaching train, and that his conduct in this respect under all the circumstances was reasonable, nevertheless, he cannot recover if the hand-car being on [114] the track was the consequence of his own wrong, if any. In other words, a person engaged in protecting life, limb or property cannot recover merely because at the very time he was in peril, he was acting under the

perils then existing, and to avert which he was engaged, when the necessity for his so doing is caused by his own negligence; that is to say, a person cannot escape the consequences of his own anterior negligence merely because at the time he was injured, he was engaged in trying to avoid the consequences to others of such negligence, and in so doing, was acting reasonably, or without negligence; in such case, his anterior negligence would continue as a cause and would bar a recovery."

XVII.

It was error in the court to refuse defendant's requested instruction No. 12, as follows:

"No. 12. You are instructed that if a person has two or more ways of accomplishing any purpose, one of which is dangerous, and the other of which is safe or less dangerous, and he unnecessarily and negligently selects the dangerous or more dangerous way, and his injury is caused in part by the choice of ways so made by him, then he is guilty of contributory negligence, and cannot recover."

XVIII.

It was error in the court to instruct the jury as follows:

To the effect that the plaintiff's negligence in using the hand-car at all, or in having the hand-car on the track where it was likely to derail the train, and whereby it would be necessary for him to remain on the track to save the train and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the

question as to whether or not he was guilty of contributory negligence must be determined by judging whether or not it was proper for him to [115] stay on the track to save the train, and that his negligence in having the hand-car on the track in the first place, or in attempting to use it, would not constitute contributory negligence, the Court's said instructions being as follows:

"The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent and that the negligence of each contributed up to and caused the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury at the time of the injury, then he cannot recover."

"A party in the position that this plaintiff was, in bringing himself there, was guilty of contributory negligence; but, up to that time, you can put that out of sight, because, while he put himself there by his negligence, he was entitled to the rules of law governing the protection of trespassers, in so far as the law is applicable here.

If Harman remained with the hand-car in his attempt to remove the same from the track in a reasonable effort to avoid a probable disaster, if the car made disaster possible, to the approaching

train and persons riding thereon; then it is relevant for you to consider this proposition of law: the law has so high a regard for human life that it will not impute negligence to an effort to preserve, unless made under such circumstances as to constitute rashness and recklessness in the judgment of prudent persons.

But if you should consider that the engineer did not exercise an honest judgment and do all that was reasonably within his power to do, under the circumstances there disclosed, then you must consider whether this plaintiff was guilty of such rashness and recklessness in remaining upon the track in an honest endeavor to either remove his baggage or hand-car, or both, as to make himself guilty of negligence at the very moment he was struck by the engine and the hand-car; that is to say, if the plaintiff was guilty of conduct at that particular moment when he was struck, or immediately preceding it, that a prudent, reasonable man would not have done, under the circumstances, then no matter what the engineer's judgment was, or the engineer's failure was, if his negligence contributed to his own injury at that moment why then, again, the plaintiff would not be entitled to recover.

But you have a right to consider in weighing the plaintiff's conduct, this instruction that I have just given you, and that he says to you that he feared the wreckage of the passenger train, and hence he stayed with the hand-car in his efforts to remove it. Now, if that is what a prudent and

a reasonable man, animated also by a desire to save life would do, then the plaintiff would not be guilty of any neglect at that moment, depriving him of a right to recover, if the engineer of the defendant was guilty of negligence in seeking to preserve and protect him, and it caused the injury." [116]

XIX.

It was error in the Court to charge the jury that the plaintiff to have been guilty of contributory negligence proximately causing his injury must have been guilty of some act of new negligence at the very time of the injury, irrespective of whether or not any antecedent negligence of his contributed to injury or was the cause of his remaining on the track, as set forth in the Court's instructions under assignment of error No. XVIII.

XX.

It was error in the Court to charge the jury that any duty of care was owing to the plaintiff while he was a trespasser engaged in acts involving moral turpitude, or the like, to cause a wrecking of the train or injuries to the persons on it.

XXI.

It was error in the Court to charge the jury that the plaintiff's negligence in having the hand-car on the track where it was likely to derail the train, and whereby it would be necessary for him to remain on the track to save the train, and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the question as to whether he was guilty of contributory neg-

ligence must be determined by judging whether or not it was proper for him to stay on the track to save the train as set forth in the Court's instructions under assignment of error No. XVIII.

XXII.

It was error in the Court to charge the jury that though the plaintiff knowingly used the track and push-car, knowing that the same might derail the approaching train, the defendant, under such circumstances, would owe to him the duty to exercise any degree of care to avoid injury to him. [117]

WHEREFORE THE DEFENDANT PRAYS that said petition for a writ of error be granted and that for the reasons aforesaid and for divers and sundry other reasons that the judgment entered herein on the 18th day of July, 1913, the same also having been suspended by the filing of defendant's petition for a new trial on the 22d day of August, 1913, and re-entered by the order denying the defendant a new trial made and entered herein on the 10th day of January, 1914, be reversed.

VEAZEY & VEAZEY,

Attorneys for Defendant, Great Northern Railway Company, Plaintiff in Error.

Filed Jan. 13, 1914. Geo. W. Sproule, Clerk. [118]

And thereafter, on January 13, 1914, Petition for Writ of Error was duly filed herein, being as follows, to wit: [119]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Petition for Writ of Error.

Great Northern Railway Company, the defendant in the above-entitled cause, conceiving itself aggrieved by the judgment rendered in the District Court of the United States, in and for the District of Montana, in said cause on the eighteenth day of July, A. D. 1913, and complaining that in the record and proceedings had in said cause, and also in the rendition of said judgment, manifest error hath happened, to the great damage of said defendant; as more fully appears from the Assignment of Errors, which is filed with this petition, comes now and petitions the above-entitled Court for an order allowing said defendant to prosecute a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such Writ of Error may issue in this behalf out of said Circuit Court of Appeals, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly au-

thenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and also that an Order may be made fixing the amount of security which said defendant shall give and furnish upon said [120] Writ of Error, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals, and for such other and further Order as to the Court may seem just.

VEAZEY & VEAZEY,
Attorneys for Defendant.

Great Falls, Montana, Jany. 13, 1914.

Filed Jan. 13, 1914. Geo. W. Sproule, Clerk. [121]

And thereafter, on January 13, 1913, Order Allowing Writ of Error was duly made and entered herein, being as follows, to wit: [122]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Order Allowing Writ of Error.

At a stated term, to wit, the Nov. term, A. D. 1913, of the District Court of the United States in and for

the District of Montana, held at the city of Helena, in the State and District of Montana, on the 13th day of January, A. D. 1914.

Present, the Hon. GEORGE M. BOURQUIN, District Judge.

This day came the defendant, by its attorneys, and filed herein and presented to the Court, and its Judge, the petition of said defendant praying for the allowance of a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and an Assignment of Errors setting forth the errors intended to be urged by said defendant, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow said Writ of Error, and it is ordered that a Writ of Error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered and entered herein on the eighteenth day of July, A. D. 1913, being a day of the [123] April term of said District Court, and that the amount of bond on said Writ of Error be and hereby is fixed at the sum of Thirty-five hundred ($3500.00) dollars, which said bond shall operate as a supersedeas bond, and that upon said defendant, Great Northern Railway Company, plaintiff in error, filing with the

Clerk of this court a good and sufficient bond in the said sum of Thirty-five hundred dollars, approved by this Court, or its Judge, execution on said judgment shall be, and hereby is, stayed and all further proceedings in this court shall be, and they hereby are, suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals.

Done in open court this 13th day of January, A. D. 1914, and ordered entered as above.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

Filed and entered Jan. 13, 1914. Geo. W. Sproule, Clerk. [124]

And thereafter, on January 13, 1914, Bond on Writ of Error was approved and filed herein, being as follows, to wit: [125]

In the District Court of the United States, in and for the District of Montana.

CHARLES HARMAN,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That Great Northern Railway Company, by Veazey & Veazey, its attorneys, as principal, and National

Surety Company, a corporation, duly organized and incorporated under the laws of the State of New York (with the capital and assets provided for in an act of the Sixth Legislative Assembly of the State of Montana entitled "An Act to Permit Foreign Surety Companies to do Business in this State and Regulating the Method Thereof," for the purpose, among other things, of transacting business as a surety or undertakings of persons and corporations, and the acts supplemental thereto or amendatory thereof, which said corporation has complied with all the provisions of said act and acts), as surety, are held and firmly bound unto Charles Harman, the plaintiff in the above-entitled cause, his executors, administrators and assigns, in the penal sum of Thirty-five Hundred ($3500.00) Dollars, for the payment of which amount well and truly to be made to the said Charles Harman, his executors, administrators and assigns, the said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly, by these presents.

Dated this 13th day of January, A. D. 1914.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

WHEREAS, the above-named Great Northern Railway Company has **[126]** prosecuted, or is about to prosecute, a Writ of Error out of the United States Circuit Court of Appeals for the Ninth Circuit to have reviewed by said United States Circuit Court of Appeals, and to reverse the judgment in the above-entitled cause rendered and entered by the United States District Court for the

District of Montana on the eighteenth day of July, A. D. 1913, in favor of the plaintiff, Charles Harman, and against the defendant, Great Northern Railway Company.

NOW, THEREFORE, if the above-named Great Northern Railway Company, defendant in said cause and plaintiff in error, shall prosecute its said Writ of Error to effect and answer all damages and costs if it should fail to make its plea good, then this obligation shall be void, otherwise it shall remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY,

By VEAZEY & VEAZEY,

Its Attorneys.

NATIONAL SURETY COMPANY,

[Seal] By W. S. FRARY,

Its Duly Authorized Attorney in Fact.

The foregoing bond is hereby approved as to form and sufficiency and in all things, this 13th day of January, A. D. 1914.

GEO. M. BOURQUIN,

United States District Judge for the District of Montana.

Filed Jan. 13, 1914. Geo. W. Sproule, Clerk.

[127]

And thereafter, on January 13, 1914, a Writ of Error was duly issued herein, which is hereto annexed, and is in the words and figures following, to wit: [128]

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable the District Court of the United States, for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, or some of you, between Charles Harman, defendant in error and plaintiff in said District Court, and Great Northern Railway Company, plaintiff in error and defendant in said District Court, manifest error hath happened to the great damage of said defendant, and plaintiff in error, Great Northern Railway Company, as by its petition and Assignment of Errors appears, we, being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San

Francisco, in the State of California, within thirty days from the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, and the seal of the District Court of the United States for [129] the District of Montana, this 13th day of January, in the year of our Lord, one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal] GEO. W. SPROULE,
Clerk of the United States District Court for the District of Montana.

Due personal service of the foregoing Writ of Error made and admitted and receipt of copy acknowledged this 17 day of January, A. D. 1914.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Charles Harman, Plaintiff in Said District Court and Defendant in Error. [130]

Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said court, to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk. [131]

[Endorsed]: No. 306. In the District Court of the United States for the District of Montana. Chas. Harman vs. Great Nor. Ry. Co. Writ of Error. Copy Lodged with Clerk. Filed Jan. 13, 1914. Geo. W. Sproule, Clerk. [132]

And thereafter, on January 13, 1914, a Citation was duly issued herein, which is hereto annexed, and is in the words and figures following, to wit: [133]

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

Citation on Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Charles Harman, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, and at a session thereof, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein Great Northern Railway Company, defendant in said District Court, is plaintiff in error, and you, the said

Charles Harman, plaintiff in said District Court, are defendant in error, to show cause, if any there be, why the judgment rendered against said defendant, plaintiff in error, and in favor of said plaintiff, defendant in error, in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. GEORGE M. BOURQUIN, United States District Judge, for the District of Montana, this 13 day of January, A. D. 1914.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

Due personal service of the foregoing Citation made and admitted and receipt of copy acknowledged this 17 day of Jan. A. D. 1914.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Charles Harman, Plaintiff in Said District Court and Defendant in Error. [134]

[Endorsed]: No. 306. Charles Harman vs. Great Nor. Ry. Co. Citation. Filed Jan. 17, 1914. Geo. W. Sproule, Clerk. [135]

And thereafter, on January 24, 1914, an Order as to exhibits was duly made and entered herein, in the words and figures following, to wit: [136]

In the District Court of the United States in and for the District of Montana.

CHARLES HARMAN,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Order Directing Transmission of Original Exhibits.

It appearing to the undersigned, the presiding Judge of the above-entitled court, presiding in the above-entitled cause at the trial thereof, that it is proper that the original exhibits hereinafter described, used on the trial in the above-entitled cause, should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the writ of error sued out by the above-named defendant to have reviewed the judgment of the above-entitled court by the said Circuit Court of Appeals.

On motion of counsel for defendant, and pursuant to stipulation,

It is ordered that the Clerk of the above-entitled court transmit to said Circuit Court of Appeals the said original exhibits introduced in evidence, consisting of all photographs offered and received in evidence on the trial of the above-entitled cause and of the tape showing the speed of the engine referred to in the Bill of Exceptions as the engine of the train which caused plaintiff's injuries, so that he may

have the same in the said Circuit Court of Appeals with the transcript of the record in this cause. The said exhibits being more specifically identified by number as Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and Defendant's Exhibit 10.

Dated Jan. 24, 1914.

GEO. M. BOURQUIN,
District Judge for the District of Montana.

Filed and entered Jan. 24, 1914. Geo. W. Sproule, Clerk. [137]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 138 pages, numbered consecutively from 1 to 138, inclusive, is a true and correct transcript of the pleadings, process, verdict and judgment, and all other proceedings had in said cause, and the whole thereof, as appear from the original record and files of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause and transmit herewith original exhibits pursuant to order.

I further certify that the costs of the transcript of record amount to the sum of Thirty and 25/100 Dollars ($30.25), and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Helena, Montana, this 26th day of January, A. D. 1914.

[Seal] GEO. W. SPROULE,
Clerk. [138]

[Endorsed]: No. 2372. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. Charles Harman, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received and filed February 2, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

CHARLES HARMAN,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

I.

STATEMENT OF THE CASE.

(1)

Short Review of Nature of Action, and of Points to be discussed in the Brief.

This action was brought by the defendant in error, for convenience here designated as plaintiff, a stranger to the plaintiff in error, here designated as defendant railway company, to recover compensation for personal injuries received by him, by reason of a collision between a passenger train and a push car which he had appro-

priated wrongfully, unlawfully and with admitted knowledge on his part of the serious consequences to others which might thereby result, and which he was pushing around a curve, constituting, according to his complaint, an obscure place, into which, at the time, a regular passenger train was approaching at an admitted distance of less than five hundred feet, and at a speed of from thirty-five to forty-five miles an hour. He alleges in his complaint (Tr. p. 2-5) that his injuries were due to the negligence of the engineer in the operation of the train. These are in substance the facts alleged in the complaint which the plaintiff sought to prove at the trial, and upon the plaintiff's attempted proof of which the court allowed a recovery.

The answer (Tr. p. 8-13) denied negligence and set up contributory negligence, which latter affirmative defense was denied by the reply (Tr. p. 14-15).

The writ of error (Tr. p. 144-145) is sued out by the defendant railway company to review a judgment of the United States District Court for the District of Montana (Tr. p. 18-19) entered upon a verdict of the jury (Tr p 17)in favor of the plaintiff. The assignment of errors (Tr. p. 126-137) which accompanied the petition for the allowance of the writ (Tr. p. 138-139) sets forth the errors urged in the specification of errors in this brief, as such errors are re-grouped.

These errors are divided into five parts.

In the first group are assignments relating to exceptions taken by the defendant (Tr. p. 49, 100) to the action of the court in overruling (Tr. p. 49) the motion of the defendant for a judgment of non-suit and dismissal at the end of plaintiff's case (Tr. p. 45-49), and in overruling (Tr. p. 100) a similar motion after all the evidence had been introduced (Tr. p. 99-100), and to the exception (Tr. p. 100) to the refusal of the court to give an instruction to the jury directing a verdict for the defendant (Tr. p. 100).

The second group also relates to the issue of negligence, and presents for review the refusal of the court to withdraw from the jury certain theories of negligence advanced by the plaintiff, in that, for example, the court refused over defendant's exception (Tr. p. 102) an instruction advising the jury that the engineer could not, under the evidence, be found negligent in the matter of checking the speed of his train (Tr. p. 100); secondly, that the evidence conclusively rebutted plaintiff's theory that the engineer could have obtained an emergency application of the air brakes, and it was therefor error in the court to refuse over defendant's exception (Tr. p. 102) an instruction requested by defendant, advising the jury accordingly (Tr. p. 102); and third, that it was error in the court over defendant's exception (Tr. p. 101) to refuse to instruct

the jury, as requested, that, under the evidence, it was not the duty of the engineer, as advanced by the plaintiff, to reverse his engine (Tr. p. 101), the evidence showing beyond dispute that if this had been done, as contended by the plaintiff, the retarding power would have been diminished, rather than increased. The last error in this group is the assignment that the verdict is against law, in that the court charged the jury (Tr. p. 112 l. 15-p. 113 l. 8; p. 120 l.-p. 121 l 2), that there could be no recovery unless it was established by the evidence that the engineer failed to exercise an honest judgment, but the proof was uncontradicted that he did exercise at least an honest judgment.

The remaining specification of errors (Groups III, IV and V) relate to the law applicable to the facts in this case on the issue of negligence and contributory negligence under the admitted proof that the plaintiff, a stranger to the railway company, was a trespasser and unlawfully and recklessly, and without any excuse or right, appropriated and operated over a railroad track of a common carrier, an instrument dangerous to the life of the engineer and passengers on an approaching train.

Thus, specifications in group III relate to the refusal of the court to rule that the law of negligence has not yet been extended to such a case, and that in such a case the law would not throw

about the plaintiff a protecting duty to use care for his safety on the part of those whose safety he was so recklessly and indifferently imperiling, and that the defendant could not be held, except for a wilful or intentional injury to him. This group includes exceptions (Tr. p. 118 l. 20-p. 119 l. 8) to the court's charge (Tr. p. 110 l. 19-p. 112 l. 21) that any duty of care was owing to the plaintiff by the engineer.

Groups IV and V present for consideration the bearing of the same facts on the issue of contributory negligence, and to the exceptions to the refusal of the court to charge that the negligence of the plaintiff in using the car might be a cause of the accident (Tr. p. 102 l. 28-p. 104 l. 9; p. 105 l. 19-p. 106 l. 13), and to the charge of the court (Tr. p. 114 l. 18, p. 115; p. 110 l. 6-18) to the effect that such negligence positively could not be a cause of the accident, and that, conceding that such action on the pltaintiff's part was negligence, the jury should "put that out of sight," and consider as the test for plaintiff's contributory negligence merely whether he was guilty of some new act of negligence after the train came in sight, or "at the particular time he was struck," and that the test in this regard was whether, under the proof that he remained on the track in an effort to take the car off to save his baggage and prevent a derailment of the train, he acted reasonably, bearing in mind that the

law has such a regard for life and property that it would not impute negligence to an effort to save either, if the person acted reasonably in his said efforts.

These last three groups of specifications will be considered more carefully after the evidence has been reviewed, and the court thereby obtained a better insight into the nature of the case.

(2)

A Review of the Evidence in connection with the Specification of Errors.

The testimony at the trial, in so far as it is necessary to review the same in connection with the errors assigned, shows that the plaintiff, who had all his life, more or less, helped in railroad construction work, and was therefore reasonably familiar with the dangers incident to the operation of trains, and to the necessity of the track being free from obstructions (Tr. p. 21 l. 4-12; p. 29 l. 28-p. 30 l. 12), came to Montana to work as a carpenter for the Bates & Rogers Construction Company (Tr. p. 21, l. 13-23) in lining a tunnel of the defendant railway company near Basin, Montana, and was discharged from the employment of the Bates & Rogers Company at about eight-thirty in the morning of the day before the accident (Tr. p. 32, l. 7-9; p. 29, l. 9-12), and on the next day he intended to take the work train south about four miles to Basin, the nearest town, where he intended to take a passenger train

for Butte (Tr. p. 30 l. 17-19). He thus allowed the four passenger trains (two in each direction) of the day before, and the work trains of that day to go by, without any effort to take them, and he missed the work train on the morning in question. These trains all stopped regularly at the tunnel (Tr. p. 30 l. 31-p. 31 l. 1; p. 60 l. 4-7).

He had worked at the tunnel for two weeks (Tr. p. 22 l. 2-4), and a large part of the time was spent in work outside the tunnel on false work near a highway to Basin crossing under the tracks right at the tunnel (Tr. p. 29 l. 14-27), so he knew of the schedule time of trains and of the existence of the highway to Basin, which highway could be seen right from the tracks (Tr. p. 29 l. 24-27; p. 30 l. 11-16).

Having missed the work train, he and his companion appropriated a push car at the tunnel as a means of carrying their baggage to Basin (Tr. p. 22 l. 11-12). This is frequently termed in the evidence, for convenience, a hand car, but it was not an ordinary hand car, but technically a push car (Tr. p. 52 l. 6-7). It was such a heavy conveyance that its presence on the track would be very apt to derail an engine or train (Tr. p. 26 l. 29-p. 27 l. 3), and for this reason no one is allowed to have a push car on the track except by first telephoning to, and obtaining an order from, the dispatcher authorizing its use (Tr. p. 52 l. 24-p. 53 l. 9), and in approaching a curve, a rail-

way employe operating a push car would be required to have a flag far out ahead (Tr. p. 53 l. 6-9). It was operated, not by pump handles, but by the persons using the same walking on the ground and pushing it ahead of them. The plaintiff himself admitted that he recognized the possible enormity of the unlawfulness of his act in appropriating the car and operating it on the track, because he conceded that it would derail the train (Tr. p. 26 l. 29-p. 27 l. 3), and he says he remained on the track after the train came in sight in an effort to get the car off the track to prevent a derailment of the train, because, he says, he "thought he would get into very serious trouble," (Tr. p. 26 l. 29-31).

The baggage of himself and his companion consisted of a tool box and a roll of bedding in one roll, and a roll of bedding of the plaintiff and a suit case (Tr. p. 22 l. 16-17; p. 31 l. 17-26). This baggage was described as stuff which he "did not feel justified in throwing away" (Tr. p. 22, l. 16-17).

He knew that trains might come along at any moment, not only because of the time that he had worked there, all the time being employed on day shift from seven in the morning until six at night (Tr. p. 29 l. 8-12), but also because the train which struck him was running just about on time, not to exceed five minutes late (Tr. p. 44 l. 11; p. 52 l. 2-3; p. 54 l. 27-28; p. 66 l. 1), and he said

that, as he and his companion pushed the car ahead of them over the rails and up grade on the way to Basin, they kept a sharp and constant lookout for trains (Tr. p. 31 l. 7-13). The only excuse offered by the plaintiff for the enormity of his act in thus appropriating the push car, and recklessly operating it over the rails in the face of an onrushing scheduled passenger train, was that he wanted something to carry his baggage on, which he did not feel justified in throwing away (Tr. p. 22 l. 11-20).

It is true that he claimed that the stealing of the push car was the only available means he had of getting away from the tunnel to Basin (Tr. p. 22 l. 12-15), because he supposed that if he had taken the county road, which ran right up to the place where he was working, and follows the tracks (Tr. p. 30 l. 12-16; p. 29 l. 24-27), it might be necessary for him to ford creeks, though he had never examined the road at any time. He gave no excuse at all for not taking the trains already referred to on the day before. He admitted that ranch teams passed the place (Tr. p. 31 l. 1-3), and he said that the only reason he did not take a livery team was because he did not have the money with him to pay for a livery team (Tr. p. 30 l. 17-30), but he admitted that he was trying to get to Basin to get a train from there to Butte, and that he had a certificate of deposit with him for one thousand dollars (Tr. p. 30 l.

28-29; p. 50 l. 7-12), which was the certificate of deposit found upon him when he was afterwards received at the hospital.

It is unnecessary to review further the testimony negativing the theory sought to be developed by plaintiff's counsel, that the unlawful and reckless appropriation of the hand car was a necessary act,—in spite of the highway, in spite of the passenger trains and work trains of the day before, in spite of the work trains and other trains which would be stopping on the day in question, in spite of the ranch teams, and in spite of his ability to get a livery team through his certificate of deposit, for the court instructed the jury (Tr. p. 107 l. 1-p. 106 l. 14) that this theory of the case was not sustained—that the plaintiff had plenty of ways out, and that the appropriation and use of the push car was unlawful, and that the plaintiff was a trespasser.

The story of what occurred afterwards, and of the plaintiff's realization of the dangers to which he was subjecting others, is best told in the following abstract of his own words, taken from the record:

We were traveling on the ground, pushing the hand car along over the rails (Tr. p. 24, l. 25-27). As I was going there, along over that track, we kept a view up the track quite a little way to the best of our ability. To the best of our ability we were keeping a constant lookout as we operated the car to see whether there were any trains (Tr. p. 31, l. 8-14). On the way along the track this

man (that accompanied him) had cautioned me about helping him get the hand car off if the occasion arose. I could not have done anything with the hand car myself (Tr. p. 36, l. 12-15 and 18-20).

The railroad follows the creek beds, and consequently it is necessarily a very crooked railroad (Tr. p. 23, l. 16-17). The place from which the train came was on a curve and necessarily obscure (Tr. p. 23, l. 31 to p. 24, l. 4). I would say the curvature was about six degrees (Tr. p. 36, l. 21). The train was coming down grade and we were going up grade (Tr. p. 36, l. 23-24). I would say the grade of the track was about a two per cent grade from Basin to the tunnel (Tr. p. 25, l. 4-6).

We saw the engine just as it was rounding the curve and coming into view (Tr. p. 31, l. 10-12). I first saw the train when it was within four or five hundred feet of the hand car we were pushing. The train was then coming from a curved track. We were on a curved track also (Tr. p. 23). When I first saw the engine it was about four hundred feet away (Tr. p. 25, l. 2-4). It was astounding to me when the fact was put to me that we and the oncoming train were liable to meet (Tr. p. 23, l. 24-26). When we first saw the train coming we took our baggage and tool box off, and endeavored to get the hand car off (Tr. p. 24, l. 31 to p. 25, l. 2). I suppose I could have gotten into the clear myself if I had left the hand car on the track, but I thought of getting into very serious trouble if I left the car on the track and thereby wrecked the train. If I had left the car on the track the effect would have been nothing other than wrecking the train.

These statements having been made by the plaintiff himself, it is unnecessary to review the evidence of other witnesses in reference thereto.

(3)

Further Review of Transcript as to Errors in Last Three Groups in Specification arising under above Narrative of Nature of Case.

It appears from the brief review of the evidence showing the nature of the case that the plaintiff was a trespasser, pure and simple, and the court so charged. It further appears that in operating or appropriating the push car he had no excuse, and the court so charged and he was guilty of negligence, which negligence the court characterized as contributory negligence (Tr. p. 114 l. 18-20), but the court declined, as will now be shown, to allow this to bar the plaintiff's recovery, and, on the contrary, expressly charged the jury to "lay it aside" (Tr. p. 114 l. 18-24).

It also appears that the plaintiff's unlawful appropriation of the car was made with full knowledge of the perils to which he thereby subjected the engineer and the passengers upon the train, and that his conduct was not merely negligent, but involved moral turpitude or obliquity.

We will now exhibit more in detail the views of the law which we presented to the court for decision in the light of these facts.

First, we contended in requests for instructions to the jury on the issue of negligence (as well as on the motion for judgment) that, under these circumstances, for the benefit of a person so engaged, the law would not throw about the

plaintiff a protecting duty of care on the part of others, especially on the part of those who were imperiled by his unlawful conduct. It was not a question of intentional injury to the plaintiff. It was at most a matter of an alleged failure to use care, and we contended that, under such circumstances, while the law would not permit the plaintiff to be intentionally injured or punished by those whose very lives he threatened, the law certainly should not recognize a duty on their part to use care for his protection. By using the car at all, and by placing it on the track as an obstruction, barring the progress of the train, which had the absolute right to a necessarily unobstructed passage, the plaintiff was guilty of a very great wrong to the engineer and passengers, and if thereby the engineer or passengers had sustained injury, they would have had a cause of action against the plaintiff, not the plaintiff against them.

In so far, therefore, as the plaintiff remained on the track to remove the obstruction placed there by him, he was but undoing the consequences of his own wrongful act, and preventing the accrual of causes of action, both criminal and civil, against him. For unintentional injuries received by him while so engaged, he should not be permitted to recover.

By analogy, clearly the owner of a building in course of construction would not be liable for a

workman's mere negligence in dropping a heavy bar upon a plaintiff, whose presence in the building was unknown, if, at the time, the plaintiff, in repentance, had returned to the building to remove a bomb which he had placed there with the object of destroying the building. Clearly also, if a person, who had tied logs across a track with the intention of stopping a train so as to rob it, should, in repentance, return to the track, and receive injuries in endeavoring to remove the logs in the face of an oncoming train, he would not be permitted to recover, or seek to prove that the engineer of the train which he intended to rob perhaps failed to use all care to stop the train.

By its requested instructions numbered 8, 9 and 10 (Tr. p. 103-105) defendant presented to the court these views, that the law would not throw a protecting duty of care about a person so engaged in acts involving moral turpitude, but would, at most, let the burden rest where it fell, but each of these instructions was refused (Tr. p. 103-105), and the court, over objection by defendant (Tr. p. 118 l. 20-p. 119 l. 8), gave instructions to the jury that the defendant did owe a duty of care to the plaintiff (Tr. p. 110 l. 19-p. 112 l. 15). These errors constitute the basis for the third group of errors found in the specification of errors, in which specification the instructions referred to are, of course, set out at length.

Secondly, this matter of plaintiff's unlawful conduct also came up in connection with the issue of contributory negligence.

On this issue, in its requested instructions numbered 5, 6, 7 and 11 (Tr. 101-103; 105-106), the defendant presented to the court its view of the law of contributory negligence in the light of the facts already reviewed. The refusal of the court to give these requested instructions, and defendant's exceptions thereto. (Tr. p. 101-103; 105-106) constitutes the basis of the fourth group of errors specified, and the instructions given by the court on the subject, (see specification V A) and defendant's objections and exceptions thereto (Tr. p. 119 l. 9-17 to p. 122 l. 12-p. 123 l. 13) constitute the basis of the fifth group. These instructions, either requested or given, are set forth in full in the specification of errors. It is convenient here to merely summarize them.

We bear in mind that the court positively instructed the jury that, in using the hand car at all, and in its operation, the plaintiff was guilty of contributory negligence. By requested instruction numbered 5, accordingly, we asked the court to charge the jury that, if this negligence of the plaintiff contributed to cause the injury, the plaintiff could not recover, but the court refused this charge (Tr. p. 102 l. 9-14), and instructed the jury (Tr. p. 110 l. 6-18; p. 114 l. 18-p. 115) that recovery would be barred only as the negli-

gence of the plaintiff continued "up to" and caused the injury, and that they must consider only negligence of the plaintiff "at the time of the injury." The instruction given by the court is fully set forth under specification III A.

Again, as the court seemed to be of the opinion that this case was analogous of a person who had become unconscious on a railroad track and that the engineer had the last clear chance to avoid the injury, we called the court's attention to the distinguishing feature of this case, in that the plaintiff was at all times present and in full possession of his mental faculties and acting deliberately (Tr. p. 102 l. 15-22), but the court refused our requested instruction numbered 6 on this matter, bringing out this distinction, and our exception was duly preserved (Tr. p. 102 l. 22-27).

Again, the court was asked to rule in requested instructions numbered 7 and 11 (Tr. 102-103; 105-106), that, if the plaintiff was guilty of negligence in having the hand car on the track, and this negligence threatened or imperiled persons on the approaching train, so that it was necessary for him to remain on the track to remove the hand car, his own wrongful and unlawful appropriation and use of the hand car would be the cause of it being necessary for him to remain on the track, according to his theory, and would continue as the cause of his injury.

The court, however, refused all of these instructions, to which ruling the defendant took an exception (Tr. p. 103 l. 9-13; p. 106 l. 9-13), and instructed the jury as set forth in the errors assigned in the fifth group, that "the plaintiff was there as a trespasser upon the track of the railroad company (Tr. p. 107, l. 13-14). Under the circumstances he had no right to go there, and was, therefore, what is termed in law a trespasser" (Tr. p. 108, l. 12-14). The court then instructed the jury, that "this plaintiff, in bringing himself there, was guilty of contributory negligence, but up to that time, you can put that out of sight" (Tr. p. 114, l. 18-21), and that, before his negligence would bar a recovery, it must be negligence contributing "up to" and causing the injury, and must be negligence "at the time of the injury" (Tr. p. 110, l. 8-18), and that the question as to whether or not he was negligent would depend solely upon whether or not he was negligent in remaining on the track to remove the car or his property, and that, in this connection, the jury should remember that the law had such a high regard for life and property that negligence would not be imputed to one engaged in rescuing it, and that the test was merely whether the plaintiff was acting rashly and recklessly in remaining on the track to remove his baggage or the car "at the very moment he was struck by the engine," and that the test of negli-

gence was whether he was negligent "at the particular moment when he was struck"—whether "at that time" he was negligent.

It is not surprising that in the light of these instructions, the jury returned into court with the request that the court give them further instructions on the issue of contributory negligence (Tr. p. 119, l. 29-32), and the court repeated its instructions (Tr. p. 121) that it was for the jury to determine whether the plaintiff acted as a reasonably prudent man in endeavoring to remove the hand car or baggage, and that, if he was not justified in so acting, but, on the contrary, his conduct was imprudent to the extent of being rash and reckless, then the plaintiff would be guilty of contributory negligence. The defendant objected and excepted (Tr. p. 122-123) to these instructions, on the grounds heretofore urged, and also on the ground that it made the test of plaintiff's contributory negligence, whether he was reckless or rash, and not whether he merely failed to exercise ordinary care, but the court overruled these objections (Tr. p. 123).

(4)

More Detailed Review on Evidence as to Negligence on the part of the Engineer.

As regards the negligence charged in the operation of the train, the evidence showed that the train was going at a speed of from thirty-five to forty-five miles an hour (Tr. p. 54 l. 27-29); the

engineer estimated the speed at between thirty-five and forty miles an hour (Tr. p. 54 l. 27-29); and the speed tape carried on the engine showed a speed of forty-five miles an hour (Tr. p. 57-59; p. 82). The plaintiff did not estimate the speed at the time the engine appeared, but says that while he was struggling with the car, the other man got in the clear, and the train hit the car and shoved it against the plaintiff, breaking his leg. Under these circumstances, he estimated the speed at from sixteen to twenty miles an hour when the train went by him (Tr. p. 25; p. 33). He did not at any time get a good look at the train (Tr. p. 28 l. 2), and concentrated his attention on removing the push car (Tr. p. 32 bottom 233). He had no opportunity to judge the speed. All concede that the track was down grade and the plaintiff estimates the descent as a two per cent grade (Tr. p. 25 l. 4-7).

The photographs show the conditions and what a slight chance the engineer had to save himself, much less the plaintiff. Exhibit 7 shows a clear view of the scene of the accident. The train was coming from the west around the curve at the left hand side of the picture, and was being operated easterly towards the bottom of the picture (Tr. p. 27, l. 21-26). The place where the car was struck was about midway between a telegraph pole and a rock shown on the left hand side of the track as you look at the picture. The picture represents

Harman's view as he proceeded along the track (Tr. p. 37). This photograph should be compared with photograph 9, taken from a point further east. The view of the engineer is indicated by photograph 4 looking from the west at about bridge 123, long before the curve is reached. Then photograph 5 shows the engineer's view still further east, as he entered the curve, and photograph 6 shows the engineer's view when he was well into the curve (Tr. p. 37 and 38).

The engineer testified that just as he got to the curve, he put on four or five pounds of air to "brace" the train (Tr. p. 55 l. 1-12), the object being to draw the train together, so that it will cling to the outer rail. Without this application, which is called a service application, the train, in coming into the curve, will knock back and forth from one rail to the other, making the riding very rough. This operation serves to steady the train, and is the regular practice (Tr. p. 51 l. 12-27 p. 55 l. 1-12). After such an application is made, the brake mechanism has been so started into operation that thereafter it would be impossible, mechanically, (Tr. p. 56; p. 85 l. 24-26), to get an emergency application (Tr. p. 55 l. 25). The plaintiff sought at length to prove by cross-examination that an emergency application could have been maintained under the New York air brake system (Tr. p. 62 l. 24-p. 63), but the evidence was conclusive in this regard that it was

mechanically impossible after a service application (Tr. p. 79 l. 17-22; p. 78 l. 22; p. 79 l. 17). The plaintiff also contended that the engineer should have reversed his engine, but it was shown that this would retard, and not increase the efficiency of the stopping power (Tr. p. 63 l. 27-p. 64 l. 17; p. 77 l. 23-p. 78 l. 22; p. 78-81), and was forbidden in the standard text books as a less effective way of stopping the train (Tr. p. 78). The engineer testified that he was looking ahead as he was going around the curve, and when he got into the curve and got a view around the curve, he saw two men on the push car, crosswise of the track, throwing baggage off (Tr. p. 55 l. 12-19; p. 43-45). He saw them as soon as he could (Tr. p. 45 l. 3-4). He was then about five hundred feet away(Tr. p. 55 l. 17-19), and put the brake valve into the emergency position, but could not get an emergency pressure, and did all in his power to stop (Tr. p. 55 l. 22-28 p. 57 l. 14-15; p. 59 l. 1-3; l. 16-17; p. 71 l. 6-12; p. 72). Then he blew the stock whistle—rip, rip, rip, rip —and as he drifted down, yelled at the men "like an Indian" to get out of the way (Tr. p. 57 l. 6-16 p. 61 l. 29-31; p. 62 l. 14-16; p. 71 l. 6-23; p. 72). The engine, however, hit the car, and threw it against the plaintiff (Tr. p. 57 l. 17-19). After passing, the engineer released the air, (Tr. p. 60 l. 8-15) so as to avoid jarring the passengers, (16 u. 57 l. 6), and stopped slowly. The rail was a wet

rail (Tr. p. 56), which makes a stop harder. All concede that it was a snowy, sleety day (Tr. p. 66 l. 20-21 p. 51 l. 28-p. 52 l. 1; p. 53 l. 20-21; p. 55 l. 3; p. 61 l. 25-29 p. 69 l. 17-18 p. 68 l. 5-6 p. 71 l. 26-27). The plaintiff himself admitted this.

The foregoing facts, testified to in the main by the engineer, are practically undisputed. The remaining testimony was theoretical testimony as to what could be done.

The plaintiff contended that the train was not stopped as soon as possible, and the court submitted this issue to the jury, on the testimony of the plaintiff himself, and of a witness named Lynes, a discharged engineer, testifying as an alleged expert. The testimony offered on this point was not worthy of credence, and was evasive and meaningless. Thus, the plaintiff testified that the train, the speed of which he could not and did not estimate, should have been stopped in its length (Tr. p. 65, l. 16-19). He then added that he had seen heavy trains stopped within ten or fifteen feet, going twenty-five or thirty miles an hour (Tr. p. 25, l. 22-24). He estimated that a train going twenty miles an hour should be stopped by a good man in a train length, by the use of the *reverse lever* and the air brake (Tr. p. 33). The other witness for the plaintiff was the witness Lynes, formerly a railroad engineer, who testified that the train, under favorable conditions, running forty miles an hour, should have been

stopped in three hundred feet by the emergency application, and in not to exceed four hundred feet by the service application (Tr. p. 84-85). He then claimed that the Westinghouse tests showed that, by emergency applications of the Westinghouse brake, trains going forty miles an hour, could be stopped in less than two hundred feet (Tr. p. 85). He based this upon tables which he said existed. (Tr. p. 85-86). He produced the tables (Tr. p. 90-93), but was, however, unable to explain them. (Tr. p. 88). They, in fact, showed, in the only exclusive passenger train test, that it took seven hundred and sixty-seven feet to stop a train going forty-three miles an hour by the emergency application, and in other passenger tests it took from five hundred and forty-seven to eight hundred and ninety feet in which to stop a passenger train going from thirty-eight to forty-five miles an hour (Tr. p. 86-93), and in the Westinghouse tables produced by the defendant it took from five hundred sixty-seven to six hundred eighty-eight feet (Tr. p. 96; p. 93-99). All these are emergency applications, with the distance estimated from the very point when the application was made to the exact point of the stop.

In this case, it is conceded, however, that the maximum distance from the time when the engine first came around the curve to the point where the plaintiff was, was five hundred feet.

(Tr. p. 23 l. 31-p. 24 l. 4 p. 55 l. 12-19; p. 24 l. 31-p. 25 l. 4).

The witness Lynes admitted that he had never himself made the stops he testified to, or been called upon to make emergency stops (Tr. p. 86, l. 11-17). He had been an engineer in the service of the defendant company, but was dismissed because of several accidents—over three in number—in which collisions occurred, because he did not stop his train in time (Tr. p. 86), and later was nevertheless given another chance on the Northern Pacific, and was in another accident, when it was claimed that he did not stop his train in time, and was dismissed by that company (Tr. p. 86).

He was evasive in testifying in one instance that he had himself stopped a train going forty-five miles an hour in a less distance than two hundred feet, but later examination forced the absurd admission that the stop was caused by a collision (Tr. p. 86-87). He admitted that he had not himself seen emergency stops by trains, going forty-five miles an hour, stop in three hundred feet by the brakes (Tr. p. 87), and stated that he based his opinion upon the tables, and knew nothing about the tables, except what they contained in themselves (Tr. p. 87).

The defendant's engineer said that he had never made an emergency application, but placed the minimum distance within which a stop could be

made at nine hundred feet (Tr. p. 56 l. 26-p. 57; p. 60; p. 65 l. 1-l. 15). Defendant's master mechanic estimated the possible distance in which a stop was mechanically possible at seven hundred feet (Tr. p. 82 l. 1-12), with everything working well, and conditions favorable. All this related to emergency applications.

This evidence will be reviewed but slightly in the brief of the argument.

II.

SPECIFICATION OF ERRORS.

I A

It was error in the Court to overrule defendant's motion for a judgment of nonsuit and dismissal upon the merits at the close of plaintiff's case. (Tr. p. 45-49).

I B

It was error in the court to overrule defendant's motion for a judgment of nonsuit and dismissal on the merits, at the close of all the evidence. (Tr. p. 99-100).

I C

It was error in the court to refuse defendant's requested instruction No. 1, as follows. (Tr. p. 100):

"No. 1. You are instructed to return a verdict for defendant."

II A

It was error in the court to refuse defendant's

requested instruction No. 2, as follows. (Tr. p. 100):

"No. 2. You are instructed that under the evidence, the engineer did all in his power, or at least exercised reasonable care in the matter of checking the speed of the train, and you cannot find him negligent in this regard."

II B

It was error in the court to refuse defendant's requested instruction No. 3, as follows. (Tr. p. 101):

"No. 3. You are instructed that the evidence conclusively establishes that defendant's engineer, under its airbrake system, could not get an emergency application of the brake after making the service application without releasing and recharging."

II C

It was error in the court to refuse defendant's requested instruction No. 4, as follows. (Tr. p. 101):

"No. 4. You are instructed that under the evidence, it was not the duty of the engineer to reverse his engine."

II D

The verdict is against law, in that the court charged the jury that there could be no recovery by the plaintiff unless it was established by the evidence that the engineer failed to exercise an honest judgment, and that for an honest mistake in judgment on his part, there could be no recovery but the uncontradicted proof shows that the engineer did exercise an honest judgment,

and that he made no mistake in his judgment, but that if any mistake was made it was an honest mistake. (See instructions under Specification III D).

III A

It was error in the court to refuse defendant's requested instruction No. 8, as follows Tr. p. 103:

"No. 8. If you find that plaintiff's act in using the push-car, referred to in the evidence, was an act likely to result in the derailment of an engine or train approaching the same, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and it would be his duty, as soon as he learned of the approach of a train to exercise reasonable care to attempt to get the car off the track or in a situation where it could not imperil the train and thus to avoid the threatened consequences, if any, of his said act. Such action on plaintiff's part would thus constitute action done by him in discharging a duty resting upon him to others and arising by reason of his alleged wrongful conduct, and for any injury sustained by him while thus engaged in removing or undoing the said effects of his said unlawful conduct, if any, defendant would not be liable under the evidence in this case."

III B

It was error in the court to refuse defendant's requested instruction No. 9, as follows. (Tr. p 104):

"No. 9. If you find from the evidence that plaintiff's act in using the push-car referred to in the evidence was an act likely to result in the derailment of the engine or train, or of any engine

or train proceeding on the track, then the act of the plaintiff in using the same was under the evidence a wrong involving moral turpitude and the railway company would owe him no duty of care and would owe to him no duty other than not wilfully and intentionally to injure him, and your verdict must be for the defendant."

III C

It was error in the court to refuse defendant's requested instruction No. 10, as follows. (Tr. p. 104):

"No. 10. The law does not impose a duty upon defendant to exercise care not to injure unintentionally a person who is trespassing on its railroad track without right, and engaged therein in an undertaking which may result in damage to defendant if such undertaking was not only unlawful, but constituted at least a moral wrong which might result in serious consequences. Thus a contractor engaged in erecting a building is not liable for carelessness on the part of his employes resulting in injury to a person who has gone on the premises with the intention of blowing up the building, or with the intention of removing explosives therefrom which he had previously placed there for the purpose of blowing up the building, for the law will not create a duty of care for the protection of one so engaged in doing a criminal or unlawful act or in trying to undo the consequences thereof."

III D

It was error in the court to charge the jury that any duty of care was owing to the plaintiff while he was a trespasser engaged in acts involving moral turpitude, or likely to cause a wreck-

ing of the train or injuries to the persons on it. The said charge of the court is as follows (p 107-108; 110-113) is set forth in Specification V A.

III E

It was error in the court to charge the jury that, though the plaintiff knowingly used the track and push-car, knowing that the same might derail the approaching train, the defendant, under such circumstances, would owe to him the duty to exercise any degree of care to avoid injury to him, the said charge being set forth in Specification V A.

IV A

It was error in the court to refuse defendant's requested instruction No. 5, as follows (Tr. p 101):

"No. 5. The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent, and that the negligence of each contributed to cause the injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury, then he cannot recover."

IV B

It was error in the court to refuse defendant's requested instruction No. 6, as follows (Tr. p 102):

"No. 6. Where both plaintiff and defendant are present, and plaintiff is in possession of his mental faculties and is or continues to be negligent, then such negligence continues as a proximate cause of his injury as long as he continues to be present and in possession of his faculties and he cannot recover."

IV C

It was error in the court to refuse defendant's requested instruction No. 7, as follows (Tr. p 102-103):

"No. 7. If you find that plaintiff was guilty of any negligence, and that such negligence or any carelessness or other act on his part threatened injury to persons on the train as it approached, and the plaintiff remained on the track to avoid the consequences to others of his said negligence and carelessness, then you are instructed that under such circumstances his said negligence and carelessness continues as a cause of the accident, even though he acted reasonably in trying to avoid the consequences thereof, and he cannot recover."

IV D

It was error in the court to refuse defendant's requested instruction No. 11, as follows (Tr. p 105-106):

"No. 11. If you find that plaintiff remained on the track and endeavored to remove the hand-car from the track in order to prevent the derailment of the approaching train, and that his conduct in this respect under all the circumstances was reasonable, nevertheless, he cannot recover if the hand-car being on the track was the consequence of his own wrong, if any. In other words, a person engaged in protecting life, limb

or property cannot recover merely because at the very time he was in peril, he was acting under the perils then existing, and to avert which he was engaged, when the necessity for his so doing is caused by his own negligence; that is to say, a person cannot escape the consequences of his own anterior negligence merely because at the time he was injured, he was engaged in trying to avoid the consequences to others of such negligence, and in so doing, was acting reasonably, or without negligence; in such case, his anterior negligence would continue as a cause and would bar a recovery."

V A

It was error in the court to instruct the jury as follows: (Tr. p. 110; p. 114-115).

To the effect that the plaintiff's negligence in using the hand-car at all, or in having the hand-car on the track where it was likely to derail the train, and whereby it would be necessary for him to remain on the track to save the train and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the question as to whether or not he was guilty of contributory negligence must be determined by judging whether or not it was proper for him to stay on the track to save the train, and that his negligence in having the hand-car on the track in the first place, or in attempting to use it, would not constitute contributory negligence, the court's said instructions being as follows:

"The law does not attempt to weigh the misconduct of joint wrongdoers, if any, but in such case lets the damage rest where it falls. If you find from the evidence that both the plaintiff and the defendant were negligent and that the negligence of each contributed *up to* and caused the

injury, then the law does not permit you to apportion the damage, if any, caused, if at all, by the negligence of either, but requires you to return a verdict for the defendant. If, therefore, you find that the plaintiff was guilty of any negligence contributing proximately to cause his injury *at the time of the injury,* then he cannot recover."

"A party in the position that *this plaintiff was, in bringing himself there, was guilty of contributory negligence; but* up to that time, *you can put that out of sight,* because, while he put himself there by his negligence, he was entitled to the rules of law governing the proctection of trespassers, in so far as the law is applicable here.

"If Harman remained with the hand-car in his attempt to remove the same from the track in a reasonable effort to avoid a probable disaster, if the car made disaster possible, to the approaching train and persons riding thereon; then it is relevant for you to consider this proposition of law; the law has so high a regard for human life that it will not impute negligence to an effort to preserve, unless made under such circumstances as to constitue rashness and recklessness in the judgment of prudent persons.

"But if you should consider that the engineer did not exercise an honest judgment and do all that was reasonably within his power to do, under the circumstances there disclosed, then you must consider whether this plaintiff *was guilty of such rashness and recklessness in remaining upon the track* in an honest endeavor *to* either *remove his baggage* or hand-car, or both, as to make himself guilty of negligence *at the very moment he was struck by the engine* and the hand-car; that is to say, if the plaintiff was guilty of conduct *at that particular moment when he was struck,* or immediately preceding it, that a prudent, reason-

able man would not have done, under the circumstances, then no matter what the engineer's judgment was, or the engineer's failure was, if his negligence contributed to his own injury *at that moment* why then, again, the plaintiff would not be entitled to recover.

"But you have a right to consider in weighing the plaintiff's conduct, this instruction that I have just given you, and that he says to you that he feared the wreckage of the passenger train, and hence he stayed with the hand-car in his efforts to remove it. Now, if that is what a prudent and a reasonable man, animated also by a desire to save life would do, then the plaintiff would not be guilty of any neglect at that moment, depriving him of a right to recover, if the engineer of the defendant was guilty of negligence in seeking to preserve and protect him, and it caused the injury."

V B

It was error in the court to charge the jury that the plaintiff to have been guilty of contributory negligence proximately causing his injury must have been guilty of some act of new negligence at the very time of the injury, irrespective of whether or not any antecedent negligence of his contributed to injury or was the cause of his remaining on the track, as set forth in the court's instructions under Specification of error No. V A.

V C

It was error in the court to charge the jury that the plaintiff's negligence in having the hand-car on the track where it was likely to derail the

train, and whereby it would be necessary for him to remain on the track to save the train, and avoid the consequences of his own negligence, would not continue as a proximate cause of the accident; but that the question as to whether he was guilty of contributory negligence must be determined by judging whether or not it was proper for him to stay on the track to save the train as set forth in the court's instructions under Specification of error No. V A.

III

BRIEF OF ARGUMENT.

As already outlined, the brief of the argument will be divided into two parts, and each part into two subdivisions:

First, negligence on the part of the defendant, which raises the question (a) as to whether, under the assumption that there was any duty of care owing to the plaintiff, the evidence is sufficient to show a failure to exercise reasonable care; and (b) whether, as a matter of law, in the case of one wilfully appropriating a heavy instrument, such as a push car, and unlawfully obstructing the track in reckless indifference to the safety of trains operating over the track, with full knowledge also of the fact that thereby he is imperiling the lives of others—the engineer and passengers on the train—the law will recognize the

existence, of a duty to use care on the part of those, for whose safety, in the lawful use of the track, he himself, in its unlawful use, is so indifferent.

Secondly, contributory negligence on the part of the plaintiff, which involves (a) First: the instruction of the court to the effect that the plaintiff, in remaining on the track, must have been negligent to the extent of being reckless, and (b) the error of the court in ruling that plaintiff's negligence in using the car and in operating it without a flag ahead in advance of the curve, could not be considered as a contributing cause of the accident, but must be "laid aside," and his negligence, as a cause, judged from his actions at the very time of the injury. These will be considered in the order outlined above.

A

Negligence on the Part of the Defendant.

(a)

Is there any Evidence of a Failure to use Care?

The evidence on this matter has already been reviewed. The engineer testified as to the acts done by him. As already outlined, it is conceded that he had, at most, about five hundred feet in which to act, with his train going forty to forty-five miles an hour, in the open country, where he would naturally expect no obstruction on the track. He says, briefly, that he had already made a service application of the air brake, so that he could not thereafter get the emergency effect. He then says that, as soon as he saw the plaintiff, as

the engine and the push car both rounded the curve, he pushed the lever the remaining distance into the emergency position and got only the full braking power short of emergency (Tr. p. 54-55). The testimony as to the acts done by the engineer is unimpeached, and the testimony that it was mechanically impossible to stop the train was also practically undisputed. We bear in mind that the tables introduced by both parties showed actual distances from the points where the brakes were actually applied to the points where the stops were actually made, and represented emergency applications. The plaintiff's own tables relating to passenger trains showed that, in emergency applications on lesser grades, greater distance was required than was available in this instance.

As regards the opinion evidence, for the reasons set forth in the review thereof, the same is unworthy of credence. The witness sought to induce the jury to believe that short stops had been made by brakes, but was forced to admit that the stop was not caused by brakes, but by the impact of a collision.

It is not true that the truth of every statement of fact is for the jury's determination (See Escallier vs. Great Northern Ry. Co., 46 Mont. 238, 127 Pac. 458. We conceive that, where a witness has made preposterous statements to the effect that a train, going twenty miles an hour can be

stopped by brakes in ten feet, and where a witness has sought to create a false impression before a jury, and where he tries to qualify as an expert, when he has been dismissed from the service of two railway companies on the ground that he did not stop his engine in time, and has been in several wrecks, there is a limit beyond which it can not be claimed that his mere opinion can affect positive testimony as to what was done. The tables themselves, also, exhibiting what is mechanically possible, and the photographs of the locality, exonerate the engineer in this case, without any consideration of what would be a reasonable allowance of time consumed in the forming of a judgment and going into action, especially in view of the admitted fact that the air was charged with snow.

(b)

Plaintiff's Wrongful and Unlawful Conduct Involving Moral Turpitude, places him Beyond the law of mere Care, and no Duty of Care was Owing.

We contend that, as in this case the plaintiff was not merely a trespasser, and was guilty of no mere technically wrongful conduct, but as he had wilfully and unlawfully, and with full knowledge of its consequences, appropriated a railway appliance, dangerous to human life, and recklessly operated it over a railway track, in indiffer-

ence to the rights or safety of the engineer and passengers, the law would recognize, in the event of injury, a cause of action in favor of the engineer or passengers against him, by reason of his unlawful conduct, but not a cause of action by him against them, and it is strange in the extreme if the law of negligence (already reaching far beyond the limits at first supposed) will be extended to a case of such a character.

We appreciate that, where a person is guilty of a mere technical wrong, in no way, in a legal sense, connected with an injury received by him, the law might nevertheless recognize a right on his part to recover for injuries sustained by reason of negligence, since, in such a case, his technical violation of the law may be in no way the cause of, or connected with his injury, but all courts recognize the distinction between mere *prohibited wrongs*, and acts *inherently wrong*, and we take it that the statement could not be challenged that, *where plaintiff's conduct is not merely prohibited, but is inherently wrong, involving moral turpitude or obliquity, and his wrong is connected with his injury, then*, in such a case, *the issue need not be one of contributory negligence, but, on the contrary*, a preliminary question, as to whether *it is legally possible for there to be legal negligence* on the part of the defendant, arises. We maintain that, in such a case, it is not necessary to show that negligence on the

part of the plaintiff contributed to cause the injury, but *plaintiff's wrongful conduct,* (aside from wrongful conduct on his part exhibited by negligence) *is so connected with the injury that the law will not lend him its aid; as a transgressor of the law, he is not in a position to obtain relief at the hands of the law; to a person in his situation, while so engaged, the law will not throw about him a protecting duty of care,* and without a duty of care, there can, of course, be no negligence.

Out of the host of cases in which this principle is discussed, but which are not sufficiently similar, on other facts, to the instant case, to justify a collation of them, perhaps the principles are not more clearly stated than in

Newcomb v. Boston Proctective Department, 146 Mass. 596, where Justice Knowlton says:

"The question before us then is, whether or not the defendant was entitled to this instruction,—in other words, *whether, if the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him,* according to the view which the jury should take of his conduct as a whole, in its relation to the accident.

"As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, il-

legal conduct of a plaintiff directly contributing to the occurrence on which his action is founded, is an exception to this rule. Said illegality may be viewed in either of two aspects: *looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect* it wears a hostile garb and *an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law.* In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's violation of law has usually been discussed in connection with the subject of due care.

"No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. Hall v. Ripley, 119 Mass. 135; Banks v. Highland Street Railway, 136 Mass. 485; Tuttle v. Lawrence, 119 Mass. 276, 278; Lyons v. Desotelle, 124 Mass. 387; Heland v. Lowell, 3 Allen, 407; Steele v. Burkhardt, 104 Mass. 59; Damon v. Scituate, 119 Mass. 66; Marble v. Ross, 124 Mass. 44; Smith v. Boston & Maine Railroad, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering on the ground that *the Court will not lend its aid to one whose violation of law is the foundation of his claim.* Hall v. Corcoran, 107 Mass. 251.

"The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff's unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects his act was negligent or not, the Court could not properly permit him to recover. The instruction, therefore, should have been given."

We would also refer the court to the case of

Wallace v. Cannon, 38 Ga. 199

where it must be conceded that the court should, on the facts, have recognized the effect of a de facto government, but the principle laid down by the court is correct.

In considering cases where liability was recognized, in spite of the unlawful conduct on the part of the plaintiff, of an entirely different character than the conduct of the plaintiff in this case, we should bear in mind that here, in the language of those cases, it can not be said that "the plaintiff had no occasion to show that he was engaged in any unlawful pursuit." On the contrary, this was the basis of the plaintiff's whole case. It can not be said also that he "had not attempted to derive any assistance" from his illegal conduct, and, in view of the plaintiff's claim that he remained on the track to save the train from "serious consequences" of his unlawful conduct, this is particularly apt. Moreover, it cannot be said that "both parties equally par-

ticipated in the unlawful conduct," and that "it was the defendant, and not the plaintiff, who had occasion to invoke assistance," on the ground of unlawful conduct. In the language of these cases also, it can not be said that here, the plaintiff's unlawful conduct "did not contribute to, or was not connected with" the accident.

The principle is recognized in these exceptions also, that defendant participating "can not take advantage of its own wrong," and that defendant can not, as a defense, "assert *a separate and distinct wrongful act of another*, done, *not to himself nor to his injury*, and not connected with the wrong complained of." *Here the wrong* of the plaintiff *is not* distinct or *separable from the accident. It is not a wrong to others than the defendant; it was a wrong to the defendant and those in privity with the defendant*—its passengers and employes. And it was connected with the accident. Here again, in the language of the courts, which, in fact, denied liability in the cases before them, but recognized the principle for which we are here contending, it is true that *"a relation existed between the wrongful act or violation of the law on the part of the plaintiff, and the injury or accident of which he complains, here such as to have caused or helped to cause the injury, or accident*, in the natural or ordinary course of events, and *his unlawful conduct was naturally and ordinarily calculated to produce the injury, or*

was conduct from which the injury or accident might naturally and reasonably have been anticipated.

So clearly does this appear that *the plaintiff himself confesses* that, while operating the push car, his companion warned him to be prompt in the effort to remove the car should occasion arise, and the plaintiff himself states that *he found it necessary to keep a very sharp and constant lookout* for approaching trains as he went into the curve, *and* that *his first thought*, when he saw the train, *was that he was going to get into very serious trouble. Having escaped that very serious trouble*, which he himself anticipated was to follow from his wrongful act, *will the law now impose a duty of care on those, for whose safety he was so indifferent*, and will the law throw *about him*, while so engaged, *a protecting duty of care?*

We think not. We think that, in this case, it is not necessary to prove that plaintiff's wrongful conduct consisted in a failure to use care. We may rest the case on the proof that the plaintiff's wrongful conduct consisted of wilful and unlawful acts calculated to produce serious injury to the defendant and those in privity with it, and involved moral turpitude, and under such circumstances, his wrongful conduct prevents the impositon of a duty of care, as distinguished from a wilful wrong, on the part of those threatened by his wrongful conduct.

A

Contributory Negligence on the part of the Plaintiff.

(a)

Plaintiff's conduct need not have been reckless or rash to be Negligent.

As heretofore outlined the court instructed the jury that, if the jury found that the defendant was negligent, then plaintiff could recover, unless his remaining on the track to remove the car amounted to recklessness or rashness. Under the law, even under the assumption that plaintiff's negligence at the very time of the injury was the test, the test would be whether the plaintiff failed to exercise such reasonable care as the average reasonably prudent person would ordinarily exercise under all the circumstances, for this is the definition of negligence.

Birsch v. Citizens Electric Co. 36 Mont. 574, 93 Pac. 940.

This might be very far short of recklessness or rashness. The court by its instruction, therefore, required defendant to discharge too great a burden when the charge was given that plaintiff would not be negligent, unless his conduct was so negligent, or his want of care was so great, as to amount to rashness or recklessness.

(b)

Plaintiff's Conduct in Appropriating the Car and his Operation of it was Negligence continuing as a Cause of the Injury.

Let us bear in mind that *the court expressly charged the jury that the plaintiff,* in using the push car, and in operating it into the curved track, *was guilty of* negligence, which negligence the court (strangely enough in the light of its final decision) characterized as *contributory negligence. But* the court expressly charged the jury that *this contributory negligence should "be laid aside,"* and that the sole issue on negligence of the plaintiff should be the reasonableness of his conduct in remaining on the track in the face of the onrushing train to save life or property.

This was clearly error. The court was right in instructing the jury that, as a matter of law, the plaintiff's appropriation and use of the car was negligence, and that this negligence was contributory negligence, but the court should have gone further and instructed the jury that, if this negligence was the cause of his remaining on the track, then it would be a contributing cause of the accident, and the court should have directed a verdict for the defendant.

The general rule, that the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, and that one who attempts to rescue another from imminent

danger, if acting reasonably, is not guilty of contributory negligence, is not applicable where the person gets into such situation by reason of the negligence of the person attempting the rescue. In such a situation, the plaintiff is acting under a primary duty owing by himself, by reason of his wrongful conduct, and is thereby acting for his own benefit, and for the purpose of preventing the accrual of a cause of action against him.

In

29 Cyc., p. 524, sub. Negligence,

it is stated in reference to this rule:

"The rule is not applicable where the person gets into such situation by reason of the negligence of the person attempting the rescue. The rule exempting a person injured from the charge of contributory negligence because of an act done in an emergency applies where the emergency is caused by the negligent act of another. If such emergency is brought about by the person injured negligently placing himself in a positon of peril, he cannot recover."

We also refer the court to the following authorities:

N. Y. Trans. Co. v. O'Donnell, 159 Fed. 659; 86 C. C. A. 527.

Alt. & C. A. L. Ry Co. v. Leach, 17 S. E. 619; 91 Ga. 419.

DeMahy v. M. L. T. Ry. Co., 45 La. Ann. 1329; 14 Ga. 61.

Bothwell v. Boston Elev. R. Co., 102 N. E. 665.

West Chicago Etc. Ry. Co. v. Liderman, 187 Ill. 463; 58 N. E. 367 (dectum).

Dummer v. Milwaukee Elec. Ry. Co., 108 Wis. 589; 84 N. W. 853.

Smik v. N. & W. Ry. Co., 60 S. E. 56 at 58; 107 Va. 725.

Chatanooga Etc. Ry. Co. v. Cooper, 705 W. 72.

Berg v. Milwaukee, 53 N. W. 890.

If the court's view is correct, then, if a person negligently places an infant on a railroad track while a train is approaching, and does nothing more, he is liable for the death of the infant, but if he attempts to rescue the infant, he is not liable, because, by some mysterious process, as soon as he attempts to remove the infant, his negligence in placing the infant there ceases to operate as a legal cause. Logically carried out, the court's ruling would require that the engineer and the plaintiff would each be liable to the infant, if plaintiff did not attempt a rescue, but that the engineer would be liable also to the plaintiff for an injury sustained by the plaintiff if the plaintiff attempted rescue and such attempted rescue would not only relieve the plaintiff from liability to the infant, but create a liability in plaintiff's own favor.

Undoubtedly, if the train had been derailed by the push car, the passengers would have had a cause of action against the plaintiff, because his negligence would be a contributing cause of the collision. By what mysterious process does

his negligence cease to be a contributing cause when he himself is hurt or is suing?

But the plaintiff's own testimony shows that his appropriation of the car contributed as a cause of his injury up to the very moment of the collision, and that "*a relation existed between plaintiff's negligence and the injury,* of which he complains, *such as to have caused, or helped to cause it in the natural or ordinary course of events,* and his negligence was naturally and ordinarily calculated to produce the injury, and was an act from which the injury or accident would naturally and reasonably have been anticipated." for the plaintiff himself testified that *he himself anticipated the collision,* and the necessity of a very prompt removal of the car from the track was the subject of discussion by him and his companion as they proceeded, and he himself stated that *his first thought* when he saw the train *was* that *he would get into very serious trouble.*

Moreover, it was the plaintiff's negligence which, in his opinion, made it necessary for him to remain on the track, and thus it continued as an operating cause of the injury to him as long as he remained on the track. If he had not remained on the track, and a derailment of the train had resulted, he would have been liable, and, therefore, he says he remained on the track to prevent "getting into very serious trouble"—to

prevent the accrual of a cause of action against him by reason of his negligence. If then, had the train been derailed by the collision, his negligence would have been a cause of the collision and injury to others, and the foundation of a cause of action against him, how does his negligence cease to be a cause of the collision and of the injury to him, merely because he says he endeavored to avoid a cause of action against himself?

But see how clearly his negligence in appropriating and operating the car continued as a cause of the accident! It would be admitted by all that, *for a person to remain on a track* in the face of an onrushing passenger train, whereby he sustained injury, *would be contributory negligence*—it would be gross negligence, negligence amounting to rashness and recklessness,—and the plaintiff could not recover. The *plaintiff then, to excuse this act of his, is compelled to seek aid from his previous illegal and negligent conduct. He accordingly* says that he remained on the track up to the very moment of the collision because, by reason of his wrongful and unlawful appropriation of the car, and his negligence in using it, and in the operation of it without a flag ahead around the curve, a collision was imminent, and *he says it became necessary for him to* corect or *avoid the certain and natural effect of that negligence.*

We thus find that, up to the very moment of the accident, he is appealing to his own unlawful

and reckless conduct as an excuse and as an assistance.

If he had not used the car, or if he had had a flag out ahead around the curve, the collision would have been avoided. But for his negligence the collision would have been avoided. Even if the engineer is deemed guilty of negligence, then the collision was caused by the negligence of each, and both defendant and the railway company might have been liable to the passengers. Could the court, in an action by the engineer or passengers against plaintiff to recover because of plaintiff's negligence, have directed a verdict for defendant on the ground that the defendant's (plaintiff's) negligence did not constitute a cause of the accident? Yet this is what the court did. *The court has directed the jury to return a verdict for the plaintiff on a matter of contributory negligence which was at least a question for the jury.* ..

By what process of reasoning, therefore, can plaintiff's negligence cease to be a cause of the injury to himself when he says that his negligence continued so far to operate as a cause of the collision up to the very moment of the collision, that, up to that moment he felt compelled to remain on the track to seek to diminish the disaster which would result from that collision. Is he not thereby admitting that up to the very moment of the collision he finds it necessary to seek aid

from his own negligent and unlawful conduct?

It seems that plaintiff is seeking to gain some comfort from the doctrine of the last clear chance, but this doctrine is not applicable here, since, before that doctrine can have any application, a plaintiff's negligence must have been so far anterior in point of time and attendant circumstances that it has ceased to act. But here the plaintiff's acts were done with full knowledge of the possible consequences; he was at all times, both in the appropriation and use of the car, and at the very moment of the collision, in full possession of his mental faculties, and as responsible an individual as anyone else, and, as an excuse for remaining on the track, he is compelled to admit that his negligence, both in point of time and attendant circumstances, continued as an operating (he says impelling) cause (not as a remote cause) of his injury up to the very moment of the injury. It is not at all similar to the case of a person who, by reason of his negligence, becomes helpless on a track, and is negligently run down by a defendant after discerning his peril and helplessness. Here the plaintiff would have been safe, but it was, according to his view, necessary for him to remain on the track to undo or change the possible consequences of his negligence: It may be that this would result in his avoiding civil and criminal liability for injury to others, and that to do this it was necessary that the in-

jury should be shifted to him. But, if the shifting of the injury to him was necessary, in order to enable him to escape criminal and civil liability to others, surely this is no reason for permitting him to shift the burden to defendant, caused by his negligence.

This court has heretofore called attention to the limits of the scope of the last clear chance doctrine:

N. P. Ry. Co. v. Jones, 144 Fed. 47 at 51 & 52.

We contend, inversely, that (1) the court was in error in charging the jury that the plaintiff could recover, unless his negligence amounted to recklessness or rashness; (2) that *the court was* clearly *in error in positively directing the jury that the plaintiff's wrongful conduct,* evidenced by his negligence in appropriating, or in the manner of operation of, the car, *could not be a cause of the accident,* and should be *"laid aside," and* that plaintiff's negligence must be judged from the condition of things at the moment of his injury, and by considering merely whether it was reasonable for him to remain on the track to save life or property from disaster, regardless of whether or not such disaster was superinduced by his own negligence.

But, whether or not the plaintiff's wrongful conduct be considered as evidencing negligence on his part, we take the position that the engineer was not shown to have been lacking in care, and

we earnestly urge that it is not necessary for defendant to show that it was not negligent, and, as it appears that plaintiff's acts were unlawful (negligently so or otherwise) and constituted wrongs involving moral turpitude, the preliminary question arises whether there can be *any legal duty of mere care* to one while so engaged.

We earnestly ask for a ruling:

FIRST, *where a person, wrongfully and unlawfully appropriates a push car or other property of a railway company, and wrongfully and unlawfully operates it over a railway track under such circumstances and conditions that his operation of the same would be negligence on the part of a railway employe, and he knows of the probable consequences of his acts* (as is evidenced by his declaration to companion that it would be necessary promptly to remove the car in the event that a train should approach, and by his declarations that he found it necessary in operating the car to keep a sharp and constant lookout for trains), *in such a case, in the event of a collision between a passenger train and such car or other obstruction placed by the plaintiff, whereby the same is thrown against plaintiff, and plaintiff injured, the plaintiff can not recover, for a mere want of care,* because *in such a case plaintiff's wrong* (whether negligent or otherwise) *is a wrong involving moral turpitude, and in the prosecution of that wrong he has placed himself*

beyond the pale of the law of care, and, being a transgressor of the law, he cannot seek aid of the law in any matter to which his transgression has contributed, or with which it is connected, and the law will not throw about him a protecting duty of care, or, in his lawless use of the track, impose such duty, for his benefit, upon others, lawfully using the track.

SECONDLY, in so far as the injured party remained on the track under the circumstances aforesaid, in the face of the oncoming train, for the purpose of removing the car or other obstruction from the track, so as to avoid a derailment of the train, *such action*, even if otherwise proper, *would not prevent his previous acts in the operation of the car from contributing as a cause of the accident*, and would not impose a liability on defendant if none would otherwise exist, since, in such case, *his prior negligence continues as a cause of the accident*, and the law will not excuse his remaining on the track, or protect him therein when *made necessary to remove the consequences of his own negligence*, or otherwise permit him *to secure any aid by an appeal to his own wrongful conduct.*

The judgment should be reversed, with directions sufficient to show that the defendant is entitled to judgment.

Respectfully submitted,

VEAZEY & VEAZEY,

Counsel for Plaintiff in Error.

United States

Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff in Error,

vs.

CHARLES HARMAN,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

For brevity, we call the plaintiff in error the "Company:" defendant in error "Harman."

We feel constrained to re-state the case. We are not satisfied with plaintiff's statement.

Somewhat like the classic of Marshall, C. J., concerning one of Pinckney's arguments:

> "Counsel, with the brush of an artist, has painted a wondrous picture. It chained the mind of us all by the precision of its lines of perspective and its happy choice

of colors; but we could find no resemblance between the record of the evidence and the argument of counsel."

Before making our statement of the case, it might be well to announce the proposition of law which the verdict answers to. This proposition is well described in a quotation of a jurist of North Carolina:

> "The case therein cited (Davies v. Mann, 10 Mees and W. 545), in which the plantiff's immortal donkey, by its death, established a great principle, and left a world known name, is regarded as the origin of the rule. The plaintiff fettered the front feet of his donkey and turned him in the highway to graze. The defendant's wagon coming down a slight descent at a 'smartish' pace, ran against the donkey and knocked it down, the wheels of the wagon passing over it. The poor brute meekly closed its wearied eyes and gave up the ghost; an apparently immortal spirit that has long since put Banquo's ghost to shame. From such an humble beginning arose the great doctrine of the last clear chance."
>
> Bogan v. Carolina Cent. (Douglas, J.) (N. C.) 55 L. R. A. 422.

The soundness of this doctrine of law has been many times affirmed by the supreme court of the state of Montana. A clear decision on the subject is found in Melzner, Adm'r. v. N. P. Ry. Co., 46 Mont. 162.

The court will pardon us if we do not voluntarily submit the brief with the foregoing allusions to the donkey to our client's perusal when it is seen in the record that the plaintiff was a lieutenant of a volunteer regiment in the late unpleasantness with Spain, and that he somewhat reluctantly admitted that he had been shot when vigorously cross-examined

by the learned counsel for the company as to whether he had ever received any injuries before that administered by the engineer.

STATEMENT OF THE CASE.

The merits of an appeal are often like the law of photography, explained in the record, page 37:

> "The size of an object in a photograph is in the inverse to the square of the distance from the camera."

Frequently the merits of an appeal are inversely proportionate to the length of the brief of the appellant.

Harman, a citizen of Montana, brought suit against the company, a citizen of the state of Minnesota for an amount in excess of three thousand dollars. 2R.

He alleges that the defendant, by and through one of its engineers, carelessly and negligently did drive and run its said engine into and against Harman and caused him grievous bodily injury. He alleges facts which, under the federal rule though not under the rule of our state supreme court, shows that he was not a trespasser, but was rightfully at the place; and also facts which made it the duty of the defendant not only not to injure him after discovering his peril, but also imposed upon the defendant the duty of a lookout, and of giving warning in obscure places.

> Cahill v. Chicago, Etc. Co., C. C. A. (7th) 74 Fed. 285.

The defendant in a separate defense pleads contributory negligence on the part of Harman. We mention this because we shall show hereafter in the brief that the plea of contributory negligence under the Montana rule admits the negligence of the defendant and that it was a proximate cause of the plaintiff's injuries.

The facts showing that Harman's presence should have been expected at the place where he was injured are as follows:

> "The track from the tunnel where he had been employed to Basin was a general thoroughfare. Everybody that went from the town of Basin to the tunnel or from the tunnel to the town of Basin used the railroad track. During the two weeks that I as there from forty to sixty men were working at that tunnel. They were divided into night and day shifts. The night men would be using the track as a thoroughfare more or less in the daytime, and the day men would use it at night. Emergency supplies were procured from Basin for the tunnel by being brought back on *this hand-car*. This had been going on ever since I had been there. (He was there two weeks.)
>
> "The road is crooked. It is necessarily a very crooked railroad. It follows the creek to a certain extent, and the point of the hills just out into the valley." 22R.

By reason of the foregoing testimony, we say that the lower court unduly limited the case to the doctrine of the last clear chance because the foregoing situation shows that there was a condition of repairing going on at this tunnel, and that the track was being used by these workmen so continuously that it was the duty of the engineer to look out for them.

(This is not the Montana rule, but it is the Federal rule, and it is a question of general law not covered by our statute of Montana. The federal nisi prius court in Montana has frequently refused to follow the narrow state court rule.)

> "I first saw the train when it was within four or five hundred feet of the hand-car we were pushing; the train was then coming from a curved track. We were on a

curve also. The place from which the train came was on a curve and necessarily obscure." R. 24.

"Q. What is the general custom among railroad engineers and people operating trains in the United States as to making signals at obscure places?"

(After objection overruled)

"A. Sound the whistle. On this occasion no whistle was sounded."

Witness follows with circumstances sustaining his averment of no whistle being sounded.

"When I first saw the engine it was about four hundred feet away. I would say the grade of the track is about a two per cent. grade, down grade from Basin to the tunnel. It was what I would call a slight grade.

"I have had considerable experience stopping and starting trains and engines. I have used air-brakes and am familiar with their use. I have used air-brakes on steam engines, on donkey engines and such as that from the time ever since I began to work."

(Witness testified elsewhere, R. 22, that he had been working for railroad companies since 1889 and 1890.)

"I have an idea of the use of air-brakes on freight trains. I have handled air-brakes when I was a fireman. I have a knowledge of the approximate distance within which a train of the kind which struck the hand-car may be stopped. There were five or six coaches on that train. If there weren't more than six coaches with one engine on that grade, according to my experience, that train could be stopped in less than a train length. I have seen them stop a heavy train within ten or fifteen feet, going twenty-five or thirty-miles on hour. (Up or down grade

not given.) The train which struck our hand-car was going about twenty miles, (an hour), I dare say, when the train struck the hand-car when I was injured. I hadn't observed any checking of the speed of this train which struck the hand-car." 25 R.

"The hand-car, during the two weeks that I had been there, had been used for transporting stuff of Bates and Rogers, (contractors for whom Harman was working), and anyone else in connection with the work, from one end of that tunnel to the other, and from Basin to the other end of the tunnel. I intended, when I might get to Basin to take our stuff off and bring the hand-car back to the tunnel."

"I saw and heard the train coming, and it was in sight, and I was occupied in getting the hand-car and stuff off the track. I didn't have time enough to get into the clear myself and avoid the train. I suppose I could have gotten into the clear myself, if I had left the hand-car on the track." R. 26.

"If I had left the hand-car on the track, the effect would have been nothing other than wrecking the train, provided the engineer didn't stop. When the hand-car was struck I was endeavoring to get the car shoved over a little further so that it would clear good." R. 27.

The injuries were serious. The verdict was excessively small—fifteen hundred dollars. A photograph was introduced. It should be in the clerk's hands of the appellate court. It is exhibit 7. It shows to the most casual observer of railroad trains that from the point marked as the first place where the engineer saw Harman to the point marked as the place of the

event is ample distance to stop a train going faster than anybody testifies that this one was going.

The engineer was placed on the stand by Harman, 43 R:

"I was locomotive engineer, on the right hand side of the cab, looking the way the engine was going. I was looking forward during the entire time the engine was running. My eye was on the track ahead as far as the eye would reach. For the first half mile out of Basin east the track is almost in a straight line. Then you come into curves, and it is mostly curves from there to Boulder. I know where the tunnel is east of Basin. On passenger and freight trains I have been running on that track as an engineer about eighteen years.

"I couldn't say just exactly when the work of relining the tunnel was commenced. I think it was in May or June, 1912, about six months before November 28th, I should judge. I would pass there pretty nearly every day, one day going east and the next going west. I have indicated on plaintiff's exhibit 7 with a "C" the point where I would say the push-car was after the accident. I would say I struck the hand-car around here some place where I have put an "S." R. 43, 44.

"We were running, I should judge, thirty to thirty-five miles an hour. I was looking ahead as I was going around this curve. When I got into the curve just after bracing the train for the curve, I looked ahead as I got a view around the curve and I saw that there were two men throwing baggage off the push-car, and the push-car was crosswise of the track. I saw the men as soon as I could see them." R. 44, 45.

"It was snowing at the time." 55 R.

"We were about seventeen rail lengths from where he was. A rail is about thirty feet, I think."

A. E. Lynes, a witness in rebuttal for the plaintiff, R. 84:

"I have been a locomotive engineer and know the track of the Great Northern Railway Company between Basin and the tunnel east of Basin. I worked on the Great Northern between Clancy and Butte for about four years as locomotive engineer. I know the type of engine used on the Great Northern numbered 1000 to 1007, (this was the type that Whitehead was on), but I have never run engines of that type. I have never run their passenger trains from Butte to Helena, but I have fired on them. I have had experience with New York air-brakes. If an engineer was running with a passenger train of four cars and a tender, going down a one per cent. grade, forty miles an hour, on a dry track, and the engineer's valve was in running position, and the air pumped to its full capacity, and he got an emergency application of the air-brake, he could stop that train in between two and three hundred feet. With a full service application it ought to be stopped in not to exceed four hundred feet. If the engineer on coming around the curve referred to in the testimony reduced his speed by a service application from forty miles an hour to thirty-five miles an hour, there would be no delay incident to getting a full service application of the air-brakes. It would simply mean moving the same valve or lever further on into the full service application. If an engineer has made a reduction of the air by service application it would take him four seconds to re-charge. It would not exceed four seconds. It would take about three seconds to re-charge the train and

have a full application. By use of the emergency application the train should be stopped in two hundred feet. I have seen the train of the Great Northern Railroad that runs from Butte to Great Falls stopped, and my statement applies to that train. The grade east of Basin, I think, is about one per cent." 84 and 85 R.

In view of the fact that counsel have gone to some length to speak of Lynes as a discharged servant, etc. (as if that was a disgrace and not an honor in many instances), we may quote Lynes' testimony as to certain collisions that he was in.

"I wasn't responsible for those collisions as to which I was examined. I had several collisions on the Great Northern in Butte * * * I was blameless in each one, except for that one at Clancy. I took the responsibility there on my own account and got a job afterwards on the Northern Pacific, which knew of my record about that collision." 87 R.

Further about the case:

"I have stopped a train myself when it was going forty-five miles an hour in less distance than two hundred feet, when I was firing and going down a two per cent. grade. I did this on the occasion of a collision when Engineer Maze was killed. The trains stopped by the collision. The trains came together all right on that occasion but they were practically stopped before they came together." 86 R.

ARGUMENT.

The law in this case is simple. It was a question of fact for the jury as to whether Whitehead proceeded negligently after discovering the peril of Harman, first moving his baggage off, and not at first as the engineer testified, moving the hand-car.

As to whether a hand-car or a push-car was used we are willing to yield the point to the very able and discriminating argument of counsel that it was a push-car and not a hand-car. We can conceive very little difference as to the merits of the case whether it was a flat-car, a push-car, hand-car, touring-car or horse-car.

A reading of the record will show that Harman was perfectly justified in using the only available method to get his goods away from the contracting camp. He did not have to abandon them. He did not have to ford any river to get away in November. He had a right to take the only means furnished by the company from the place of work on its premises to which it had invited him, through its contractors, to work for it on its tunnel. As for hiring a vehicle with a certificate of deposit for a thousand dollars that Harman happened to have, we might refer counsel to the story appearing in one of the magazines some years ago, of the man who was in a small rural town with a thousand dollar bill which he sought to have changed, and could buy nothing; was turned out of the hotel; and finally the bill was pronounced counterfeit because the merchant, never having seen a thousand dollar bill, announced to the populace that the United States government did not issue bills in that denomination. The possessor of the thousand dollar bill finally landed in the village station house and was put upon the "chain gang" as a vagrant.

From a fair view of the testimony as to the condition of the country, the argument of counsel that Harman was a trespasser on the defendant's premises after being discharged, and before he had time to get away by the only road out, is similar to an argument advanced some years ago by the learned counsel for a mining concern, who said, and apparently in

earnest, that a man discharged 2300 feet beneath the surface was a trespasser on the cage going up after his dismissal. In other words, these distinguished corporation counsel in their professional zeal grow so blunt to the rights of mankind that they overlook the obvious humanities in almost any case.

We notice an absence from the record of the opinion of Judge Bourquin on denying the motion for a new trial. We find no fault with this omission from the record as far as the error proceedings are concerned, except that by omitting it a good argument in our favor may be lost from the view of the court. We herewith append it:

> "Plaintiff trespassing on defendant's track by traveling thereon with a push car loaded with his tools and baggage, suddenly meeting defendant's passenger train, instead of stepping aside to safety as he easily might, lingered in strenuous endeavor to clear the track and was injured by the push car driven against him by the train.
>
> "This action for consequent damages was tried on the theory of the 'last clear chance' and defendant's negligent failure to meet the requirements thereof. There was a verdict for plaintiff and defendant moves for a new trial upon the ground, so far as argued, that (1) defendant was not negligent in that to plaintiff, a trespasser, whose act was wilful and gross negligence and of moral turpitude in that it imperiled the safety of defendant's employes and passengers, it owed no care and no duty save not to wilfully or wantonly injure him, and that in any event it conclusively appears that defendant's engineer from the moment he first saw plaintiff to the moment of the injury did all practicable to stop the train and avoid the injury, and (2) if defendant was negligent, plain-

tiff,s antecedent negligence was continued after he became conscious of his peril, by his efforts to clear the track when he easily might have escaped to safety, and this negligence contributed to his injury.

"That plaintiff's act was voluntary and gross negligence and imperiled the safety of defendant's trains and the lives of employes and passengers, is clear, but so to lesser extent is and does that of any trespasser upon tracks. The doctrine of the 'last clear chance' is not limited to any particular degree, if any there are, of negligence. Its protection extends to all negligent and trespassers, whether traveling along tracks or across them, alone or in or with any kind of conveyance. The duty by said doctrine imposed is in all cases the same—to exercises that degree of care and diligence which is reasonable in view of the circumstances to avoid injury to another whose peril is perceived and appreciated. This is the better rule, dictated by humanity, and it is the rule in Montana.

"Melzner vs. Ry. Co., 46 Mont. 182.

"That plaintiff was injured in performing his duty to avoid the possible consequences of his antecedent negligence, does not deprive him of his remedy as defendant contends. His antecedent negligence was but a condition and not the cause of the injury. It was defendant's failure to discharge its duty imposed by the 'last clear chance' doctrine that was the proximate cause of the injury. And for this reason, for the destruction of the push car, or the train had it occurred, defendant, contrary to its contention, has or would have no cause of action against plaintiff. It is familiar law that he who by reasonable care can preserve his property imperiled by the negligence of an-

other, has no right of action for injuries thereto due to his failure to exercise such care. His failure of his duty is the proximate cause of the injuries; the other's negligence is but a remote cause. Antecedent negligence is the foundation of the doctrine of 'last clear chance.' Without the former there is no occasion to apply the latter, and the former is material only in that it imposes the duty of the latter.

"There are cases that hold or tend to hold that he whose negligence exposes another to peril from the negligence of a third person, has no right of action against the third for injuries received in attempts to preserve the second from the peril.

"See Ry. Co. vs. Zartt, 64 Fed. 828.

"There are other to the contrary.

"See Donahue vs. Ry. Co., 83 Mo. 560.

"For other cases more or less in point, see 29 Cyc. 624; 53 L. R. A. 267.)

"The latter conform to the 'last clear chance' doctrine, and maintain the better rule.

"He who encounters danger to preserve the imperiled life of others, is animated by humanity and is discharging an obligation of the highest morality, it is the policy of the law to encourage. If therein he receives injuries proximately due to another's negligence, he has his remedy therefor against the latter, though his own antecedent negligence created the situation of peril.

"Whether or not the benefits of the 'Last clear chance' could be claimed by the outlaw seeking to wreck a train or in repentant mood attempting to remove obstructions placed by him for that purpose, as fancifully queried by

counsel, can well be left for answer until a case so improbable comes on for decision.

"And whether or not the engineer conformed to the requirements of the 'last clear chance,' was, despite his positive asseverations, a question for the jury. Taking into consideration the testimony of the engineer and all other witnesses, the distances involved, within what distance a stop could have been made, when and where efforts to stop were made, where the stop was made, the situation of plaintiff, and all circumstances and conditions in proof, there appears no reason to disturb the jury's conclusion.

"So likewise, was plaintiff's contributory negligence for the jury.

"It is true plaintiff could easily have escaped to safety had he ignored the possible consequences and abandoned the push car and its load.

"But that is not conclusive.

"The question is, under the circumstances what would the average man have done.

"Plaintiff's situation was like unto that of a trespassing teamster who crossing a track and stalling thereon, in the face of a subsequently discovered approaching train, overwhelmed by the possibilities of the situation, instead of leaping, struggles to clear the load, miscalculates, and fails to his own sacrifice. Whether or not he was guilty of contributory negligence, depriving him of the benefit of the 'last clear chance' rule, would present not a question of law but an issue of fact for the jury.

"Although antecedent negligence of him claiming the benefit of the 'last clear chance' creates the situation in-

voking the rule, there it and its consequences end.

"It can in no wise interfere with or affect the other's discharge of the duty the rule imposes. It can never be contributory negligence. Only subsequent negligence, concurrent in its nature, contributing to the injury complained of, can constitute contributory negligence.

"When the period of time and situation arrive invoking the rule of the 'last clear chance,' subsequent conduct alone fixes the duties and rights of the parties; and that without reference to what went before.

"The motion for a new trial is denied.

"January 9, 1914."

We will analyze such of the authorities of the company as we are able to find. Taking up first the case of Newcomb v. Boston, Etc., 146 Mass. 596, found also 16 N. E. 559, we quote from the opinion:

"The court rightly refused the instruction requested, that the plaintiff could not recover if, at the time of the accident, he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition, of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of the vehicle which has been struck by another may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately

produces or helps to produce a result as an efficient cause, and that which is a necessary condition or attendant circumstance of it."

Brevity prevents our quoting further interesting language from the opinion. There was no question of the doctrine of the "Last Clear Chance."

Wallace v. Cannon, 38 Ga. 199, seems entirely irrelevant.

Birsch v. Citizens Electric Co., 36 Mont. 574; 93 Pac. 940, cited by the company on page 44, is aptly in Harman's favor to the point that by pleading contributory negligence the company admits its own negligence, and that it is a proximate cause of the injury. Otherwise it has no relevancy. It was an action for injuries received by reason of an electric shock, defective insulation, etc.

Taking up the next authority cited by counsel—that on page 46, and the quotation, we have searched diligently for the last two-thirds of the paragraph in quotation marks. We find this portion: "The rule is not applicable where the person gets into such situation by reason of the negligence of the person attempting the rescue." This much of the quotation is readily found at 29 Cyc., page 524, as cited by the company. After diligently viewing the page and the context, we find that counsel has either bundled three or four sentences from the preceding two pages into one consistent paragraph and made a subsequent sentence and sub-head in the book precede language appearing at other pages, or else the remainder of the quotation must come from an old English report not available to us, but well known as "Veazy, Jr." On the very page of Cyc. to which the company refers we find this language:

"Notwithstanding the fact that an attempt to rescue one from imminent danger may not amount to contribu-

tory negligence no liability rests on defendant unless it has been negligent in placing such person in peril, *or in failing to avoid injury after discovering the peril.*"

Such of the authorities as have any relevancy that are cited on page 47 and that we could find, carefully hold to the distinction set forth in the last sentence of the quotation.

N. Y. Transfer Co. v. O'Donnell, 159 Fed. 659. Not based on negligence after discovery of peril. Verdict for the plaintiff below; reversed by reason of an error in instructions; remanded for new trial. Of course the court did not have in mind the law applying when one is attempting to save life or property, nor the doctrine of the "Last Clear Chance."

The case of Railway Co. v. Leach, 17 S. E. 619. The court in applying the law expressly states that there was no evidence to the effect that the operators of the train were guilty of negligence after discovering the peril of the men and the child on the bridge.

The next case cited by counsel, DeMahy v. M. L. T. Ry. Co., 45 La. Ann. 1329, we are unable to find. If counsel means the Louisiana reports we do not know how the Georgia case got in it, and if counsel means Lawyers Reports Annotated, it is not in the table of cases, and the volume 45 has not 1329 pages in it. 14 Ga. 61, where the case is also said to be, is not available to us. It would certainly be entitled to respect on account of its age if in point.

West Chicago Etc. Co. v. Liderman, 58 N. E. 367, is a case where plaintiff recovered and we cannot see how counsel could believe that the case helps their appeal. Counsel have claimed error in the instructions. We quote from this very case cited by counsel to show that the instructions are correct:

"The law has so high a regard for human life that it

will not impute negligence to an effort to preserve it unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs or in the mere protection of property knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such is to be regarded either rash or reckless."

The case of Dummer v. Milwaukee Etc. Co., cited by counsel is a case of ordinary negligence, and announces a well known elementary principle of law that contributory negligence is a defense to negligence. Not a few authorities could be cited to sustain that position.

The case of Smith's Adm'r. v. Norfolk, 60 S. E. 56, is a simple ordinary crossing accident case, with no issue except that of simple negligence. No element of negligence after peril discovered. It cannot possibly aid the court.

We found the volume containing the citation Chatanooga v. Cooper, "705 W. 72." It is 70 S. W. An examination of the case shows that counsel in citing this case to the court fails to perceive the difference between the law relative to a man acting in an emergency, and the law relative to a man acting to save life or property. And further, counsel fails to distinguish in his own mind the difference between the duty incumbent after a peril discovered and the duty before. There was no claim that the motorman in the Chatanooga case could have avoided the injury after the discovery of the decedent's peril.

The Berg v. Milwaukee case is a sidewalk accident and has nothing to do with the doctrine of the "Last Clear Chance." It announces that a man may not recover where he puts himself in a place of danger. If this rule were not subject to modification by the rule of law relative to discovered peril then it would have foreclosed from a recovery every plaintiff injured after peril discovered by the defendant. Its language taken without modification embraces every such case.

Counsel cannot find an opinion of a respectable court sustaining the writ of error. We shall not answer that portion of the argument going into the question of the credibility of the witnesses at any great length. There is no statute in Montana making a man incompetent as a witness because "he has been dismissed from the service of two railway companies." The writer rides on the Great Northern a great deal, and would dislike very much to see the fact of "being in several wrecks" made a disqualifying condition from giving testimony in court. Some other form of trial may or may not be better than that by a jury, but until another form is proven we should hold to the jury system.

The argument picks out adroitly several parts of instructions as being erroneous, but a reading of the court's charge will convince, that as an entirety it is fair to the defendant, though it unduly limited the plaintiff. We respectfully submit that the judgment should be affirmed.

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