HALL *v.* UNION PAC. RY. CO.

Circuit Court, D. Colorado. June 18, 1883.

NEGLIGENCE—WHETHER A QUESTION OF LAW OR FACT—VISIBLE AND OBVIOUS DANGER—CONTRIBUTORY NEGLIGENCE.

Under the circumstances of this case, whether the railroad company was guilty of negligence in allowing a telegraph pole to remain so near to its track that an employe, while in the discharge of his duty, was injured by colliding therewith, is a question for the jury, and the demurrer should be overruled.

HALLETT, J., *(orally.)* The case of Hall against the Union Pacific Railway Company is an action for injuries received by the plaintiff while in the service of the company. He avers that he was a fireman on one of the locomotive engines used on the defendant's road, and that upon one occasion, while engaged in the performance of his duties, it became necessary to take notice of one of the boxes of the tender or engine, which had become heated. He was instructed to do this by the engineer. In leaning out of the car for that purpose he came in contact with a telegraph pole which stood within 12 inches of the car. The negligence alleged against the company is in allowing the pole to remain in that position so near to the road. Upon that question there are conflicting authorities, as is usual in a case of this kind. In some cases precisely the same—one, at least, as to the nature of the obstruction, except that the pole was a little further from the track than this one—the company was held liable for allowing the obstruction to remain there. In other cases in point it is held that such an obstruction, being a visible and obvious danger, the servant must take care of himself. My judgment inclines to the opinion, as to this particular obstruction, it is a question for the jury to determine whether the

company was negligent in permitting it to remain so near the track.

The demurrer will be overruled.