

of the situation when the latter was assured of the safety of the bank.

The plaintiff, when called to engage in shoveling under the overhanging bank, noticed its appearance, and inquired of the foreman as to its safety. It does not appear that the plaintiff had any other knowledge of this particular overhang than that he gained when thus called to go to work underneath the same. The foreman had previously been upon the bank, endeavoring to throw it down. When appealed to by the plaintiff, he again went upon the top of the bank, evidently for the purpose of examining it, and he then repeated the assurance of safety accompanied with the order to proceed with the loading of the cars. It certainly cannot be said as a matter of law that the plaintiff was not justified in giving some weight to and placing some reliance upon assurances thus given and repeated. There were other facts to be weighed in connection with the assurances given by the foreman, upon the question of contributory negligence on part of plaintiff,—such as the composition of the bank, the character of the overhanging crust, the fact that it had remained in its then condition since the previous day, and that it had resisted the efforts of the foreman to throw it down. Under these circumstances, we think the questions of the assumption of the risk and of contributory negligence on part of plaintiff were for the jury, and not for the court, and that it was error to withdraw them from the jury.

The judgment is therefore reversed, and the case is remanded to the circuit court, with instructions to grant a new trial.

UNION PAC. RY. CO. v. CALLAGHAN.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 248.

1. MASTER AND SERVANT—VICE PRINCIPAL—CONDUCTOR OF REPAIR TRAIN AND SECTION FOREMAN.

The conductor of a repair train on the main line of a railroad is a vice principal with respect to the section foreman of a branch line who is injured by the conductor's negligence while riding on the repair train under orders from the railway superintendent to take all his section hands and assist in repairing the main line. *Railroad Co. v. Ross*, 5 Sup. Ct. Rep. 184, 112 U. S. 377, followed.

2. SAME—CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT—BURDEN OF PROOF.

A master is liable for an injury to his servant, caused by the master's negligence and the concurrent negligence of a fellow servant, but the burden is on the plaintiff to show that the master's negligence is the proximate cause of the injury.

3. NEGLIGENCE—PROXIMATE CAUSE—NEARNESS IN TIME AND PLACE.

The proximate cause of an injury is not necessarily or generally the act or omission nearest in time or place.

4. SAME—EVIDENCE—QUESTION FOR JURY.

Under the rules of a railway company, in case of an extraordinary storm, trains were required to stop before crossing bridges and other points liable to damage, until a man had been sent forward to inspect

them. Conductors were required to make careful inquiry at all stopping places, and, when thought advisable, to make extra stops, to ascertain the extent and severity of storms, taking no risk. The conductor and engineer of a train sent out to repair a railroad after a heavy storm knew of the dangerous condition of the roadbed. A section foreman signaled the train to stop, in order to give information of the dangerous condition of a bridge, and the engineer slowed down, whereupon the conductor signaled him to go ahead, and the train proceeded at 15 miles an hour, without receiving the section foreman's information, ran upon the bridge, disregarding a danger signal placed thereon, and broke it down, injuring plaintiff, who was riding on the train. *Held*, that it could not be said as a matter of law that the engineer's negligence in disregarding the danger signal interrupted the sequence between the negligence of the conductor in ordering the train ahead without obtaining the section foreman's information and the injury complained of, and that the court properly left to the jury the question whether the conductor's negligence was the proximate cause of the injury.

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

At Law. Action by James Callaghan against the Union Pacific Railway Company for personal injuries. Judgment was given for plaintiff. Defendant brings error. Affirmed.

Statement by SANBORN, Circuit Judge:

On the 18th day of August, 1890, a repair train operated by the Union Pacific Railway Company, the plaintiff in error, hereafter called the defendant, fell through a defective bridge, and James Callaghan, the defendant in error, hereafter called the plaintiff, who was riding upon it, was injured. He sued the defendant for negligence in the operation of this train, and recovered judgment upon the verdict of a jury, and it is to reverse this judgment that this writ of error was sued out. The train was running from the city of Trinidad to the town of Trincheras, in the state of Colorado. It consisted of five flat cars, loaded with timbers to be used in repairing bridges on the road over which it was running, three box cars, and a caboose. Heavy storms had prevailed during the week preceding the accident, had caused extensive washouts, and had damaged the roadbed and bridges, so that none but repair trains had passed over this railroad between Trinidad and Trincheras for three days. The plaintiff was section foreman on a branch railroad which extends from Trinidad to Sopris. On August 17th he was ordered by defendant's superintendent to take all the men on his section, and assist in repairing the main road between Trinidad and Trincheras. He boarded the repair train, which was in charge of one De Remer, at Trinidad, and at 5 P. M. on that day the train left that place for Trincheras. It proceeded slowly through the night. The track foreman and De Remer walked with a lantern in front of the train a large portion of the night. Before morning they found one bridge washed out and another rendered dangerous by floods, and repaired them. The bridge where the accident occurred was about one-half mile north of Trincheras and three miles south of Adair, which was a station on this railroad. Fifteen feet of the bank on each side of this bridge had been washed away, so that it was not safe for trains to go over it. The section foreman of the section in which the bridge was situated had discovered its condition the day before the accident, and had caused the usual danger signal—a red flag—to be placed in the space between the rails about 700 feet north of the bridge. When this repair train reached Adair it was running about 15 miles an hour. The foreman of this section was at the station of Adair. He signaled the train to stop, and if it had stopped he would have informed the men in charge of it of the condition of the bridge, and of the danger from it. The engineer saw his signal, responded to it, and slackened the speed of the train to about four miles an hour, when the conductor signaled him to go ahead, and he went on before the section foreman could give any information to the men upon the train.

One of the rules of the defendant is: "In case of an extraordinary rain storm or high water, trains must be brought to a stop, and a man sent out to examine bridges, trestles, culverts, and other points liable to damage, before passing over. Conductors will make careful inquiry at all stopping places, and, when thought advisable, make extra stops, to ascertain the extent and severity of storms, taking no risk."

The bridge was visible and its condition apparent for about 900 feet north of it on the railroad, but the engineer apparently saw neither the flag nor the damage to the bridge, but drove his train upon it, and the car on which the plaintiff was riding went through it, and injured him.

The court charged the jury that, if the plaintiff's injury was caused by the negligence of the engineer alone, he could not recover, because the latter was his fellow servant; but if the negligence of the conductor in refusing to stop at Adair, or in failing to stop the train before entering upon the bridge, contributed to the injury, the defendant was liable for the damages. All the errors assigned may be fairly said to relate to the last clause of this instruction.

Willard Teller, (H. M. Orahood, E. B. Morgan, and J. M. Thurston, on the brief,) for plaintiff in error.

W. H. Bryant, (C. S. Thomas and Bryant & Lee, on the brief,) for defendant in error.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SANBORN, Circuit Judge, (after stating the facts.) Under the decision of the supreme court in *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, it must be held that, so far as this plaintiff was concerned, the conductor of this train was the defendant's vice principal, and that the railway company was liable for any damage to the plaintiff caused by his negligence.

It is also well settled that a master is liable for an injury to a servant which is caused by his own negligence and the concurrent negligence of a fellow servant. *Railway Co. v. Cummings*, 106 U. S. 700, 702, 1 Sup. Ct. Rep. 493; *Harriman v. Railway Co.*, 45 Ohio St. 11, 32, 12 N. E. Rep. 451; *Lane v. Atlantic Works*, 111 Mass. 136; *Griffin v. Railroad Co.*, 148 Mass. 143, 145, 19 N. E. Rep. 166; *Cayzer v. Taylor*, 10 Gray, 274; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Railroad Co.*, 73 N. Y. 38; *Cone v. Railroad Co.*, 81 N. Y. 206.

But in every such case the negligence of the master must be the proximate cause of the injury, and the burden is on the plaintiff to prove such acts of carelessness on his part as constitute the immediate cause of the accident. No act contributes to an injury, in the legal acceptance of that term, unless it is a proximate cause of that injury,—unless it is near to it in the order of causation. *Jacobus v. Railway Co.*, 20 Minn. 125, 134, (Gil. 110.)

The court below carefully instructed the jury that the plaintiff could recover only in case they found (1) that the conductor failed to exercise ordinary care in refusing to permit the train to stop when signaled at Adair, or in failing to stop it before it entered upon the bridge, and (2) that this negligence was the cause of the injury; but that, in case they found both of these issues against the defendant, they might render a verdict for the plaintiff. The

contention of the defendant is that it conclusively appears from the evidence that the accident was not the natural and probable consequence of the negligence of the conductor, but that the subsequent carelessness of the engineer, who failed to see the danger signal on the track or the damage to the bridge, and failed to stop his train before he drove upon it, was an independent intervening cause which the conductor could not have anticipated, and from which the accident in reality resulted. They urge that the conductor's order to proceed at Adair was only a direction to the engineer to proceed slowly and carefully, to stop before passing any bridges or trestles, so that a man could be sent out to examine them, and generally to proceed carefully according to the rules of the company; and they insist that the conductor could not have anticipated that the engineer would commit a breach of his duty, violate the rule in evidence, and dash upon the bridge without stopping to examine it. This argument is persuasive, and worthy of consideration.

In *Railway Co. v. Elliott*, 55 Fed. Rep. 949, we had occasion to consider the rule of law here invoked, and there said:

"An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable; nor is an injury that is not the natural consequence of the negligence complained of, and that would not have resulted from it but for the interposition of some new independent cause that could not have been anticipated."

The questions in this case then are, was it so clear that the accident could not have been reasonably anticipated from the conductor's violation of the rule, or was it so clear that the accident was the result of a cause independent of the conductor's negligence, and subsequently intervening, that the court should have withdrawn these questions from the jury? for it was the province of the jury to determine these questions if they were doubtful. If there was evidence in the case from which reasonable men might fairly conclude that the negligence of this conductor was the proximate cause of the injury, the court properly submitted these questions to the decision of the jury.

In *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. * * * In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

In considering these questions it must also be borne in mind that the proximate cause is not always nor generally the act or omission nearest in time or place to the effect it produces. In the sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the mov-

ing cause, and yet subordinate to and often themselves influenced if not produced by it. Thus a defect in the construction of a boiler of an engine may long exist without harm, and yet finally be the proximate cause of an explosion, to which the negligence of an engineer, the climate, and many other incidental causes nearer by years to the effect may contribute. Cases illustrating this proposition are *Railroad Co. v. Kellogg*, supra; *Insurance Co. v. Boon*, 95 U. S. 117, 130; *Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 Car. & P. 190, 192; *Clark v. Chambers*, 3 Q. B. Div. 327; *Pastene v. Adams*, 49 Cal. 87.

Again, an effect is usually the result of many causes, some proximate, others remote. The rule by which the former are to be separated from the latter is admitted by all to be difficult of application, and the best that can be done is to carefully apply it to the circumstances of each case as it arises.

Bearing in mind the rules and consideration to which we have thus briefly adverted, let us now consider whether or not reasonable men might fairly conclude under all the facts and circumstances of this case that the negligence of this conductor was the proximate cause of the disaster. The train came into Adair at 5 o'clock in the morning, at a speed of 15 miles an hour. Extraordinary storms and floods had caused the destruction of bridges and parts of the roadbed from Trinidad to Trinchera. The force of men upon this train had found and repaired two dangerous bridges during the night before. The conductor and engineer knew the dangerous condition of the road, and had been moving over it during the night behind two pedestrians, who carried lanterns. The defective bridge was three miles south of Adair, and between that place and the next station. The foreman of the section, who was aware of the defect and danger, signaled the train to stop, so that he might tell the men in charge of it of the danger ahead, the engineer slackened his speed to four miles an hour, when the conductor ordered him to go on; he increased his speed; the conductor did not countermand his order; the engineer continued to obey it, ran upon the bridge, and it fell. The conductor must have known where that bridge was. What, then, was the natural and probable consequence of running by the station where the section foreman was waiting to give information, and upon such a bridge, without inquiry or examination, after the the disastrous floods and washouts, of which he was aware? It was disaster, destruction of property, and of life. It seems to us that these were the results the conductor might reasonably have anticipated from his acts. They were the results he ought to have anticipated, the results that a reasonably prudent man would have anticipated. Indeed, the managers of the defendant corporation who established its rules did anticipate these very results as the natural and probable consequence of such a course of action. It was because they anticipated them that they prohibited this course of action, and enacted the rule that conductors should make inquiries at all stopping places, and take no risk; and that

trains should be brought to a stop, and a man sent out to examine each bridge and trestle before passing over it in cases of such storms and floods as this in question.

But it is urged that the negligence of the conductor was not in fact the proximate cause of the accident, but that it resulted from an independent intervening cause, viz. the failure of the engineer to see the danger signal, and to stop the train himself at the bridge. There are several answers to this proposition:

First. We are unable to say from this evidence that the negligence of the engineer was an independent cause. It may have been dependent upon the negligence of the conductor; it may have been induced or caused by the latter. The conductor directed the movements of this train. The duty of the engineer was to obey his orders. When he undertook to stop at the signal of the section foreman, that the conductor might make inquiries that he was required to make by the rule as to the road before them, the engineer was ordered to proceed. He had been running his train 15 miles an hour, but had slackened its speed to 4 miles an hour when he received this order. He may have inferred, and probably did infer, that the conductor had in some way learned that there was no more danger ahead; that the rule in evidence no longer applied to this train; and hence that there was no need to stop to inquire, and that he could safely rush on at the speed that he had been making; and thus the action of the conductor may have lulled him into the fatal security that induced his carelessness.

Second. The negligence of the engineer was not an intervening cause that interrupted or turned aside the natural sequence of events, or prevented the natural and probable effect of the conductor's negligence. It simply failed to interpose the engineer's care to prevent this probable result, and left the natural sequence of events to flow on undisturbed to the fatal effect. It may be true that, if the engineer had seen and obeyed the danger signal on the track, or had seen the damage to the bridge, and had stopped the train, the accident would not have happened; but his failure was but the concurring or succeeding negligence of a servant, which permitted the conductor's breach of duty to work out undisturbed the disastrous result of which it was the primary and efficient cause. Moreover, we are unwilling to say that this conductor ought not to have anticipated the negligence of the engineer. He had ordered him to assist him in his own breach of duty, in disobeying the rule of the company requiring him to stop at Adair, and inquire; and we are unable to say but that he ought to have foreseen that this order would be taken by the engineer as a communication that the rule in evidence was no longer applicable to their train. However this may be, the negligence of this engineer did not so break the sequence of events between the negligence of the conductor and the accident as to relieve the defendant.

The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause

which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated. The concurrent or succeeding negligence of a fellow servant or a third person which does not break the sequence of events is not such a cause, and constitutes no defense for the original wrongdoer, although, in the absence of the concurrent or succeeding negligence, the accident would not have happened. *Martin v. Iron Works*, 31 Minn. 407, 410, 18 N. W. Rep. 109; *Burrows v. Coke Co.*, L. R. 5 Exch. 67; *Ricker v. Freeman*, 50 N. H. 420.

We have now stated the reasons which have led us to the conclusion that the court below submitted the questions at issue to the jury under proper instructions. For the same reasons we are of the opinion that there was no error in its refusal of the defendant's requests.

It is claimed in the argument that the negligence of the conductor was not properly pleaded, but the complaint states "that the said accident resulted and was caused entirely by the negligence, carelessness, and recklessness of the said officers of the said company, together with the conductor and engineer in charge of the train on which plaintiff was riding," and no objection was made to the introduction of any of the evidence on which the verdict was based. In view of these facts, we think the pleading is now sufficient, and the judgment below is affirmed, with costs.

ST. LOUIS & S. F. RY. CO. v. FARR.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 237.

1. COSTS—SUIT IN FORMA PAUPERIS—ARKANSAS STATUTE IN FORCE IN INDIAN TERRITORY—NONRESIDENT PLAINTIFF.

Under Act May 2, 1890, § 31, (26 Stat. 94.) putting in force in the Indian Territory the statutes of Arkansas, and Mansf. Dig. Ark. §§ 1053-1061, providing that every poor person, not being able to sue, may be permitted to bring his action without liability for costs or fees, the privilege of suing in forma pauperis under order of court is granted to every poor person in the jurisdiction of the United States, and not merely to poor persons resident in the Indian Territory.

2. SAME—PRACTICE—MOTION TO DISMISS—TIME OF MAKING.

Under the statutes of Arkansas, extended to the Indian Territory by Act May 2, 1890, § 31, (26 Stat. 94.) allowing poor persons to sue in forma pauperis, under order of court, (Mansf. Dig. Ark. §§ 1053-1061.) and requiring a nonresident plaintiff to file a bond to secure costs, (section 1036.) under penalty of having his action dismissed, (section 1037.) a motion to set aside an order allowing a nonresident to sue in forma pauperis should not be granted, when made on the eve of trial, more than four months after such order was made, and after more than 20 depositions have been taken in the cause.

3. EVIDENCE—EXPERT TESTIMONY—LATENT DEFECT.

In an action for personal injuries caused by a defect in the welding of a brake staff on a freight car, where the broken staff is not produced in

court, and there is no testimony as to its appearance before the accident, but plaintiff introduces evidence as to the appearance of the fracture, tending to prove that the defect would have been discovered by a proper inspection, the opinion of an expert machinist, who examined the fractured parts at the time of the break, as to the possibility of discovering the defect by inspection before the fracture, together with his reasons therefor, is admissible in evidence.

4. DAMAGES — PERSONAL INJURIES — PROXIMATE CAUSE — ABSCESS ONE YEAR AFTER A FALL.

In an action for personal injuries suffered by plaintiff in falling from a freight car, the injuries alleged in the complaint were the crushing of the left leg, necessitating amputation, and bruises on his right hip. Plaintiff testified that his health was good before the accident, and that he recovered and was in good health until nine months after it, when he began to feel a soreness in his right hip, which after three months developed into an abscess. *Held*, that this testimony, on request of defendant, should have been withdrawn from the jury, since there was no evidence or presumption that the abscess was caused by the fall.

5. SAME—MEASURE OF DAMAGES—PROBABLE EARNINGS AND EXPECTATION OF LIFE.

In an action for personal injuries, plaintiff's attorney, in his argument to the jury, said that the life tables proved that plaintiff would probably live 40 years, and that the jury should take plaintiff's yearly earnings, and multiply by 40 to get the correct amount of damages; that, considering the past and future sufferings, this method could work no injustice. *Held*, that the overruling of objections to this argument, as an unfair and misleading one, was reversible error, although the judge charged the jury that if they found for plaintiff they should allow such a sum as would compensate him for past and future loss by reason of his injuries, but that they must consider his power to earn money in new employments.

In Error to the United States Court in the Indian Territory.

At Law. Action by James D. Farr against the St. Louis & San Francisco Railway Company for personal injuries received by plaintiff while in defendant's service. Verdict and judgment were given for plaintiff. Defendant brings error. Reversed.

Statement by SANBORN, Circuit Judge:

On June 20, 1891, James D. Farr, the defendant in error, hereafter called the plaintiff, was thrown from the top of a freight car, and injured, by the breaking of a brake staff with which he was trying to set a brake on a car in one of the trains of the St. Louis & San Francisco Railway Company, the plaintiff in error, hereafter called the defendant. He was a brakeman in the employment of the defendant, and was performing his duty as such when he was injured. The brake staff broke at the point where the staff proper was welded onto that portion of the brake staff known as the "barrel." There was a defect in this welding to such an extent that the staff had only about one-third of the strength of a sound staff of its size. This brake staff was on a freight car owned by the Atchison, Topeka & Santa Fe Railroad Company. This car was passing over defendant's railroad. The plaintiff insisted that a proper inspection would have developed the defect, and have prevented the accident, while the defendant claimed that this defect was latent; that it carefully inspected the car, and did not discover it; and that it could not have been discovered before the accident, by any reasonable inspection. Upon this question the evidence was conflicting. One of the plaintiff's witnesses testified that he examined the ends of the staff after it was broken; that "about one-third of the rod was a fresh break broken right square across, and the rest looked to be an old break. The fresh break seemed to be right square across, and the old break seemed to be slanting;" that the new break seemed to be all together, and the old break seemed to be all

together; and that he did not see any fresh break or shell around the outer surface of the staff. On the other hand, one of the defendant's witnesses, a machinist of 20 years' experience, testified that he saw the ends of the broken staff; that it was broken about one-third of the way across, nearly square, and then broken diagonally up the staff; that the square break was bright, and the diagonal break was of a dull, dead color, except a thin portion around the edge of this break, and that this thin portion was a bright, fresh break; that the portion which was of a dull color was not a fresh break, but a flaw in the iron caused by a defective weld, and that the thin portion around the edge of this defective weld was evidently caused by a perfect swaging of the iron while hot at the time it was welded, and that this swaging would have effectually concealed the defect from the eye. He further testified that when the weld is made in such a staff, even if there is a flaw caused by a piece of dirt or sulphur or some foreign substance getting between the two parts welded, the blacksmith always swages both parts of the iron,—that is, he hammers both portions while they are yet hot with a tool so constructed as to bring the iron to its proper size and form,—and when thus swaged it is impossible to tell by inspection whether the weld extends clear across the iron or not.

There was a verdict and judgment for the plaintiff, and this writ of error was sued out to reverse the judgment.

L. F. Parker, (E. D. Kenna, on the brief,) for plaintiff in error.

George A. Grace, (Thomas S. Osborne, on the brief,) for defendant in error.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

1. A nonresident of the Indian Territory, who has a cause of action for a personal injury, but has not the means to sue, may be permitted to sue, or to prosecute an action already commenced, in forma pauperis, in the United States court in that Territory, and he is not required to give security for costs under the laws there in force. Sections 1053 to 1061, inclusive, of Mansfield's Digest of the Laws of Arkansas, provide that every poor person not able to sue, and having such a cause of action as that set forth in the complaint in this case, may, by order of the court, be permitted to bring or prosecute his action without liability to his attorney, or to the officers of the court, for costs or fees. Section 1036 of Mansfield's Digest provides that a plaintiff who is a nonresident of the state of Arkansas shall file a bond to secure the costs of the action, and section 1037 provides that:

"An action in which a bond for costs is required by the last section, and has not been given, shall be dismissed on the motion of the defendant at any time before judgment unless in a reasonable time to be allowed by the court after the motion is made therefor the bond is filed securing all past and future costs; and the action shall not be dismissed or abated if a bond for costs is given in such time as the court may allow."

By the act of congress of May 2, 1890, (26 Stat. 94, c. 182, § 31,) these provisions of the statutes of Arkansas were extended over, and put in force in, the Indian Territory. This action was commenced July 23, 1891. The plaintiff filed a petition in the court below for leave to sue as a poor person, September 2, 1891. This

petition was granted, and the defendant was allowed to file its answer by an order of the court made September 3, 1891. The answer was filed on that day. The action was continued over the term September 24, 1891. The defendant moved to set aside the order allowing the plaintiff to sue as a poor person, January 26, 1892. That motion was denied February 8, 1892, and this denial is the first error assigned.

The defendant has no valid ground of complaint here, for two reasons:

First. The act of congress which put the Arkansas statutes in force in the Indian Territory provided, in effect, that the court below might permit any poor person who was unable to pay the costs of a suit to prosecute it in forma pauperis. It will not do to say that this statute applies only to residents of the Indian Territory, because the statute itself declares that "every poor person" shall have this privilege, and because congress, which was legislating for the entire nation, must be presumed to have granted this privilege to all the poor persons within its jurisdiction; that is to say, to all within the United States. *Heckman v. Mackey*, 32 Fed. Rep. 574; *Miller's Adm'r v. Norfolk & W. R. Co.*, 47 Fed. Rep. 264, 267.

Second. The motion came too late. The order allowing the plaintiff to sue as a poor person was made in September, 1891. In that month the action was continued. In January, 1892, after more than 20 depositions had been taken, and after more than four months had elapsed since the original order was made, and when the trial was imminent, the defendant, for the first time, moved to set aside this order. This unexplained delay, after full notice of the nonresidence of the plaintiff, which was given by the complaint, was a waiver of any right the defendant had in this matter. The fair construction of the statutes of Arkansas we have referred to is that the action of the nonresident who will not give security for costs must be dismissed unless he is a poor person, unable to pay them. When he is adjudged to be such a poor person, the statute provides that the court shall appoint his attorney, who must serve without compensation. It would be a manifest injustice to permit the defendant to impose upon the plaintiff's attorney all the labor of preparing for a trial, where so many depositions were taken, only to dismiss the case on the eve of the trial on a ground of which it must have been aware when the original order was made. *Wallace v. Collins*, 5 Ark. 41, 47; *Swift v. Stine*, (Wash.) 19 Pac. Rep. 63.

2. Where the question is whether or not a defective weld of an iron staff, which caused its break, could be discovered by inspection before it broke, a competent expert, who saw one of the broken pieces, may testify to the appearance of the broken end, and give his opinion upon the question. *J. A. Headrick* was a machinist of 20 years' experience. He examined one end of the broken staff immediately after the accident. He testified that the break was caused by a defective weld; that the most natural cause for this defect would be that some dirt or coal or sulphur got between the

two parts, and prevented the fiber of one piece of the iron from joining perfectly with that of the other, and that in his opinion this was the cause of the defect in this staff; that such a defect as this can exist in any brake staff, or any other weld, without any indication on the surface of the iron of any weakness or defect therein; that he could see on this staff where the weld was perfect, and where it was defective, as he saw it but a short time after it was broken. Then followed, in his deposition, the following statement, which was stricken out by the court on the plaintiff's motion:

"And in my judgment such a defect as this could not have been discovered by inspection, as the iron had been well swaged; that is to say, the outside of the iron appeared smooth, and would indicate that the weld was perfect before it was broken."

That portion of this statement which appears in italics was confined to a description of the appearance of the broken staff, and was proper evidence for the jury to consider in deciding the main question, whether or not a proper inspection would have brought the defect to light. The broken staff was not produced. No witness who examined it before it broke testified to its appearance then. The plaintiff's witnesses had properly testified to the appearance of the broken ends after the accident, and such testimony seems to have been the best the case permitted. Indeed, in the absence of eyewitnesses of the staff before the break, what could be more pertinent or persuasive to determine what the eye could then have seen than the description of that which the eye did see immediately after the break? Nothing, unless the opinion of an experienced man, skilled in the art of welding, would have been; and this brings us to a consideration of the first part of the rejected sentence, where this machinist expressed his opinion that the defect could not have been discovered before the break. The jury cannot be presumed to have been machinists or blacksmiths. We cannot suppose that they were familiar with the process of swaging, or its effect upon the appearance of an iron rod defectively welded. This was not a matter of common knowledge. It seems plain that the jury would not have been as competent as this experienced machinist to decide whether or not this defect could have been seen before the break, if they had examined the broken staff. They were wanting in the knowledge, skill, and experience that best fits men to determine this question,—the knowledge, skill, and experience that this witness had,—that of the machinist familiar with the process of welding, and its defects and dangers, patent and latent.

In 2 Tayl. Ev. § 1275, the law is thus stated:

"It may be laid down as a general rule that the opinion of a witness possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance."

The opinion of this witness came fairly within this rule, and it should have been received. *Krippner v. Biebl*, 28 Minn. 140, 142, 9 N. W. Rep. 671; *Davidson v. Railway Co.*, 34 Minn. 51, 55, 24 N. W. Rep. 324; *Railroad Co. v. Huntley*, 38 Mich. 537.

3. The damages recoverable for an injury are limited to its natural and probable consequences. There is no presumption that a personal injury, from which one recovers so as to enjoy good health, is the cause of an abscess, to which men who have never been injured are frequently subject, simply because that abscess makes its first appearance subsequent to the injury. Before a recovery can be permitted for such an abscess, convincing proof must be adduced that the injury was its proximate cause. There is no presumption that an abscess on the right hip, which first "hurt" nine months after, and which formed a year after, one received a fall that bruised his right hip and side, and necessitated the amputation of his left leg, was the result of that fall, where the victim of the injury recovered, and enjoyed moderately good health after his fall, and before the abscess began to gather. The plaintiff in this case was injured June 20, 1891. He testified that his health was as good as any one's before the accident; that after the accident his health was tolerably good, until he had a sort of sickness, in June, 1892; that he had a "kind of hurting in his right hip for two or three months, and then [in June, 1892] an abscess formed in his side, and he had to have an operation performed;" and that the operation cost him \$160. He further testified that when he fell, in June, 1891, he was bruised on his right side and on his left side, on his right shoulder and on his right hip. The testimony concerning the abscess was objected to when introduced, and at the close of the trial the court was requested to withdraw it from the consideration of the jury, on the ground that there was no evidence tending to show that it resulted from the injury sued for. No mention of this abscess was made in the complaint. The injuries there alleged were the crushing of the left leg, necessitating amputation, the bruises from the fall, and the consequent suffering. No witness testified that this abscess was caused, or that it might have been caused, by the fall of the year before, while the testimony of the plaintiff that "he had some kind of a hurting in his hip for two or three months, and then the abscess formed," is very persuasive proof that he had no soreness there for months prior to the gathering of the abscess. It tends strongly to show that his bruises had long been healed before this hurting commenced. It is common knowledge that boils, carbuncles, and abscesses are not generally caused by bruises, falls, or the amputation of limbs. Bruises generally heal without these tormentors; abscesses generally form without antecedent bruises; hence, in the absence of any evidence that an abscess was caused by a bruise or a fall, it can no more be said to be the natural or probable consequence thereof than could a fever, the diphtheria, pneumonia, or any other disease to which the injured and the uninjured are alike liable. As there was no evidence that the injury complained of here was the cause of the abscess, and no presumption to that effect, the evidence concerning it should not have been submitted to the jury.

4. The plaintiff's attorney, in his closing argument to the jury, told them that the life tables proved that the plaintiff would prob-

ably live 40 years; that in that time, at \$15 a month, he would earn \$7,200; at \$70 a month, \$33,600; at \$50 a month, \$24,000; at \$40 a month, \$19,200; and then he added:

"Now, gentlemen, any one of these figures are sustained by the evidence. It can not be simply guesswork. And then you take into consideration his sufferings; what he has suffered, and what he will hereafter suffer. You cannot be doing an injustice. You will find what amount he could earn in a month, and then multiply that by twelve, and that by forty, and then you get the correct amount of the damages."

To these remarks the defendant objected on the ground that this was an incorrect method of arriving at the measure of damages, and that the remarks were unfair, and tended to mislead the jury. The court overruled the objection, and remarked, "That is a fair argument." This was a manifest error. The present value of the earnings of 40 years to come, if absolutely assured, is much less than 50 per cent. of their amount, at any rate of interest that prevails in the Indian Territory; and when it is considered how uncertain these earnings are, how many chances of disability, disease, and disposition condition the probable earnings of a young man, the rule announced is absurd. Nor was the vice of this argument, or of the court's approval of it, anywhere extracted in the general charge. The judge contented himself with the harmless remark, upon this branch of the case, that if the jury found for the plaintiff they should allow such a sum as would compensate him for his pecuniary loss sustained, or that he would hereafter sustain, by reason of the disabilities caused by his injuries, but that they should not assume that he was entirely incapacitated because he could not perform the duties of a brakeman, but should consider his power to earn money in other stations in life. He nowhere condemned the vicious and misleading rule for measuring the plaintiff's pecuniary loss which the plaintiff's attorney had laid down, and he had approved. We repeat here what we had occasion to say in *Railway Co. v. Needham*, 52 Fed. Rep. 371, 377, 3 C. C. A. 129:

"General remarks of this character in the course of a charge, while they may tend to show that the court really entertains sound views of the law, do not extract the vice of an erroneous instruction, positive in its terms, which directs the jury to allow damages on a wrong basis."

Nor do these remarks of the attorney constitute a fair argument. The jury is sworn to determine the issues of the case according to the law and the evidence given them in court, and no argument is fair which misstates the evidence, or misleads the jury as to the law.

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

UNION PAC. RY. CO. v. JAMES.

(Circuit Court of Appeals, Eighth Circuit. June 26, 1893.)

No. 223.

1. EVIDENCE—WEIGHT AND CONCLUSIVENESS—WITHDRAWAL OF QUESTION FROM JURY.

Where there is positive and direct testimony on one side of an issue, the mere fact that a larger number of witnesses testify positively and directly on the other side is not sufficient to justify the court in determining the issue, and withdrawing it from the consideration of the jury.

2. MASTER AND SERVANT—UNSAFE APPLIANCES — MASTER CHARGED WITH NOTICE.

An employer who fails to exercise ordinary care in providing reasonably safe appliances is charged with knowledge of any defect therein whereby an employe is injured.

3. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action against a railway company for personal injuries sustained by a brakeman while coupling cars, when the plaintiff's case, as set forth in the pleadings, rests wholly upon an allegation that the injury was caused by his foot being caught in a frog which had never been properly blocked, an instruction that the issue was whether the frog was blocked at the time of the injury is not reversible error when it appears that the court, in connection with this statement, further instructed the jury that there could be no recovery if the frog had originally been blocked, and had become defective through use or by accident; particularly when defendant's whole evidence and argument attempted to prove that the frog was properly blocked at the time of the injury.

4. SAME—COURT DECIDING QUESTION PROPER FOR JURY.

In an action for personal injuries against a railway company, brought by a brakeman who claims to have been injured while coupling cars by having his foot crushed while caught in a defective frog, it is not reversible error for the court to assume that the maintaining of such a frog was negligence per se, when defendant has taken no exception thereto, although the question was one which might properly have been submitted to the jury.

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

At Law. Action by Granville J. James against the Union Pacific Railway Company for personal injuries. Verdict and judgment were given for plaintiff. Defendant brings error. Affirmed.

John M. Thurston and John N. Baldwin, for plaintiff in error.

Francis A. Brogan, (Harle & McCabe, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. The defendant in error, while in the employ of the Union Pacific Railway Company as a brakeman, sustained an injury to his left foot and leg which necessitated amputation, in consequence of which injury he brought an action against the railway company in the circuit court for the southern district of Iowa, and recovered a verdict in the sum of \$7,500. The material allegations contained in his petition or complaint were as follows: That in the discharge of his duty as a brakeman on one of the defend-