

TEXAS & P. RY. CO. v. EASON.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1899.)

No. 780.

1. RAILROADS—INJURY TO PERSON ON TRACK—FAILURE TO GIVE SIGNALS.

The purpose of train signals, by bell or whistle, is to warn persons of the approach of the train, and the purpose of stopping a hand car proceeding on the track to look and listen, or of sending a flagman forward, is the same, and a failure to observe either of such precautions cannot be held the cause of an injury by a train to one who knew of its approach in time to have avoided the injury.

2. MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY OF MASTER.

A railroad company cannot be held liable for an injury to a section man, who, with others, was trying to lift a hand car from the track in front of an approaching train, and was struck by the train, merely because the foreman did not expressly direct him to let go of the hand car and save himself, when it does not appear that the men were acting by order of the foreman in attempting to remove the hand car.

3. TRIAL—DIRECTION OF VERDICT.

When the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, it is the duty of the court to direct a verdict for the defendant.

4. APPEAL—REVIEW—REFUSAL TO DIRECT VERDICT.

While the direction of a verdict is a matter resting in the legal discretion of the trial court, its action in refusing to direct a verdict is subject to review, where the evidence is before the appellate court.

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

T. J. Freeman, for plaintiff in error.

Thos. D. Ross and H. M. Chapman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PAR-LANGE, District Judge.

McCORMICK, Circuit Judge. J. D. Eason, the defendant in error, sued the Texas & Pacific Railway Company, the plaintiff in error, to recover damages for injuries alleged to have been inflicted on him by the railway company through the negligence of its employés. He alleged that on the 30th of September, 1896, he, with others, was engaged as a section hand in repairing the defendant's track from Brazos station eastward a distance of several miles, and in the work he was under the direction and control of the defendant's foreman, William Wooten; that the foreman commanded him and the other section hands to board a hand car for the purpose of conveying them to the place of work, and that the foreman carelessly, recklessly, and with gross negligence caused the hand car to be propelled along the defendant's track, and around the sharp curves thereon, at a rapid rate of speed; that at a point about two miles east from Brazos station, and when the car was rounding a sharp curve on the track, the foreman sighted the defendant's west-bound train, which was approaching the car at a rapid rate of speed, and he commanded the plaintiff to stop the hand car; that, when the hand car was stopped, the foreman jumped off, and carelessly, recklessly, and without regard for the safety of the

plaintiff, commanded him and others to lift the car from the track; that the plaintiff, not seeing the near approach of the train, and not realizing any danger, as no bell had been rung nor whistle sounded, and relying on the section foreman to warn him in time to avoid danger, in obedience to the command of the foreman, was struggling with the hand car in an attempt, with others, to clear the track, when without warning from the servants of the defendant on the train, or from the section foreman, the plaintiff was struck by the defendant's engine and by the hand car with which said engine collided, and was thereby knocked a distance of 32 feet, and wounded, bruised, and injured severely; that the defendant's servants conducted, managed, and propelled the train in a reckless, careless, and negligent manner, and failed to ring the bell or blow the whistle at a public crossing, which was about 100 yards from the place of collision, and propelled the train around the sharp curve without sounding the whistle or ringing the bell, at a rate of speed equal to 12 miles an hour; that the foreman caused the hand car to be propelled at a rapid rate of speed along the track around the sharp curves, and failed to send forward a flagman on approaching the sharp curves, as was the custom on the road, and failed to stop the hand car on approaching the curve, and listen for the approaching train, which could and would have been heard had the hand car been stopped; that the foreman had theretofore admonished the plaintiff for his haste in what he termed unnecessary hurry in lifting the hand car from the track to avoid collision with a train, and on many such occasions had told the plaintiff not to be in fear, as he would always have ample time to get the hand car off the track; and that by these and other expressions and conduct of the foreman the plaintiff, who was inexperienced, had been induced and persuaded to trust to the guidance of the foreman, who was an old railroad hand, with much experience; and that the said careless, reckless, and grossly negligent acts and omissions of the foreman caused the collision of the hand car with the train, and caused the plaintiff's injuries, to his great damage, for which he prayed judgment. The defendant submitted a general demurrer, and pleaded the general issue, and that the plaintiff was guilty of contributory negligence, which proximately caused his injury, in this: that he saw, or might have seen, the approaching engine in time to have gotten out of its way, but he negligently failed to do so. The case was submitted to a jury, and there was a verdict and judgment for the plaintiff.

When the proof was all in, the defendant requested the court to charge the jury to return a verdict for the defendant, which request was refused, and this ruling is assigned as the first ground of error for which the judgment of the circuit court is sought to be reversed.

The plaintiff, on the witness stand, testified as follows:

"On the morning this injury occurred, the foreman commanded us to go to work, and we got on a hand car at Brazos station. Our work was east of Brazos station. We went between one and two miles, when we came to a sharp curve, and were running along. The foreman bid me throw on brakes, and I did so. He did not say what for, but just called for brakes. I put on the brakes, and before I got off the car—there were two men behind me—I turned my head, and saw them pick up the end of the car, and start

around, and I supposed there was something up then. I got off, and took hold. I think I helped get the car off. We got it around—about half around. That is about all I know. I never knew whether we got the car off. I cannot state the reason. I don't know myself. I never knew anything for about four days afterwards. That was on Wednesday, and it was about Sunday before I knew anything. The accident occurred about a mile and a half east of Brazos. The cut is just a little limestone cut about six or ten feet deep. As well as I can guess, it is about one hundred and fifty yards long. The road curves to the south going east. As well as I can guess, it is about one hundred and fifty yards—may be a little further—from the point where it begins to curve and turns south back to where it changes and starts east again. From the east end of that curve the track is straight for something like half a mile. Then it curves north through another cut. There is a public crossing at the east end of the cut. The hand car had gotten something near one-third of the way in that cut when it collided with the train. The whole length of the cut is about one hundred and fifty yards, and I suppose we were fifty yards in the cut, to the best of my recollection. I was on the south-east corner of the car when we left Brazos, and was in the same place when the brake signal was given by the foreman. I was on the front of the car, on the south side of that end. The foreman was on the northeast corner. There were four of us in all. The other two men were at the hind wheels. I was at the brake. We did not stop when we approached this curve. No one was sent forward to see whether or not a train was approaching from the direction in which we were going. I heard no whistle or bell from a train. An approaching train could be seen sooner from the northeast side of the car than from the position occupied by me. The curve was south. The command to put on brakes was given this way: 'Sh-e-e-e-e-e!' It was understood that that was a call for brakes. That was his way of calling for brakes. The best I can tell, the hand car went about half a length of a rail before it stopped after I applied the brakes. We cannot stop a hand car very readily when it is loaded and under headway. We had on that car that morning a lot of tools, and a keg of water, besides the men. The car had not entirely stopped when I saw these men take hold of it at the rear end. Mr. Wood and Mr. Hooper were the men who were with us, and took hold of the rear end. The foreman went back, and took hold with them. I got off then, and took hold of the corner I was on, to help them off with it. When they took hold of the rear end of the car we moved it north. We just got the car around square across the track when the collision occurred. We got the rear wheels off. That threw the front end south. The wheels were about the center of the track. It rolled until the wheels got against the north rails. I was at the northeast [southeast] corner of the car when it started, and when it got square that threw me on the west [southwest] corner. I was trying to help them get the car off. I didn't think of any danger. Didn't know there was any danger near. I don't remember that the foreman gave me any instructions that there was a train coming. It sort of seems like he remarked, 'Let's get her off, boys; yonder comes a train.' It sort of runs in my mind that he said that. I expected him, if there was any danger, to give me warning. I thought that if it was anyways close he would tell us. There is another cut there. It is called 'Nigger Hill.' It is about a half mile from this cut where I was hurt. I had been in the employ of the company about seven months, in the capacity of section hand, under this same foreman. Generally, when there was a train approaching, when we would go to take the hand car off, he would caution us not to get in a hurry,—'Don't be too fast; you have plenty of time.' He spoke it very abruptly. He seemed like he got mad because we got in a hurry. He would tell us not to be too fast; that there was plenty of time. They were on the north side, and I was between the rails, assisting in taking off the car. If he had warned me, I could have jumped back off the track out of the way. No warning was given, that I heard, at all. The foreman was very abrupt, and if a man didn't do to suit him he talked very abrupt, and threatened to 'fire' him. If that hand car had been stopped before entering that cut, we could have heard a train approaching. There was no precaution taken to see whether there was a train approaching or not. I don't know exactly what time we

left Brazos that morning, but from what they told me I suppose it was about 6:30, probably a little later. I think it was earlier than the usual hour. I don't know the time myself; I was on his orders; but from what they told me it was ahead of time. That was a freight train. I don't know at what rate of speed they were running. The whistle could have been heard at that road crossing very distinctly, and the bell could by a person not on the hand car. If the hand car is loaded with tools, it makes a racket,—the shovels, picks, and bars jolt, and make a racket." Being asked, "What were the regulations about sending some one of your men ahead around these curves to see whether there was a train approaching or not?" The plaintiff said: "We listened to see if there was one coming. If the wind was still, we could hear a train a mile. It depended on how high the wind was blowing as to how far we could hear a train. We could hear one far enough, even in the cut, to get a car off the track before it got there. There was no other precaution taken to ascertain whether there was a train coming or not, that I know of. We did not stop the car the morning of this accident."

On cross-examination the witness said:

"I cannot tell the rate of speed the hand car was going the morning I was hurt. We were just going at a moderate gait. I don't know how many miles an hour; I never timed it. The nearest I ever came to getting the speed was once we run seven miles in thirty minutes. We were running very fast. The morning of the accident I suppose we were running four or five miles an hour. At the east end of the curve is a public crossing. I call it a public crossing. It was where wagons and buggies cross. It was not a county road, that I know of. It was a settlement road, where everybody on the south side crossed. It was in Palo Pinto county. I never did see the engine that struck me. I had my attention called to the brake, and I was trying to get the car off. The foreman called for brakes, of course, and I put on brakes. He called for brakes this way: 'Sh-e-e-e-e.' I understood what that meant. I understood it was for brakes. I had no idea what it was for. I didn't look to see if there was any danger. I didn't know what he was stopping for at that moment. I saw the men on the rear end of the car get off, and pick up the back end of the car, and start around. I had an idea that there was a train coming. I was on the south side of the track, and couldn't see as far up the track as they could,—as the men on the north side could. There were two men on the west end of the car, but they were nearer the center than I was. I was right on the edge. I had no warning of the approaching train, except, it seems like, as he started back towards the end, he said, 'Let's take her off; yonder comes a train.' I wouldn't say positively, but it just seems like a dream now. Q. Are you testifying from facts or dreams? I just testify the way it seems to me. Yes, sir; I have thought of that before I come here to-day. It was after he called for brakes that he said that, 'Let's take her off.' It was after he got off, and started back, he said that. The other men got out of the way of the engine. We were not engaged long in trying to get the car off the track. If I hadn't taken the time to get the car off, it wouldn't have taken more than a second or two to jump off on the south side. I did not see anything at all to indicate danger. I didn't look up to see a train or an engine. I was watching my foot to keep it on the brake. Sometimes you have to place your foot in a particular way to keep it on. The brake lever is narrow, and you have to watch what you are doing, or your foot will slip off sometimes. I turn my foot crossways with the hollow of my foot on it. I could not look up and down, too. That would be impossible. It looks that way to me. I never did see that train at all. Never have seen it. Since then I have seen what they told me was the same train. I had my foot on the brake. I had been pulling the car. I didn't stand. At that time I didn't know that that was a place of danger. I knew there was danger, of course, but I didn't know the train was so close. I supposed it was coming, from the actions of the other men, but I didn't know it was so close. I couldn't look ahead and attend to my business too. I had been setting the brake for some time. It [the hand car] had only one brake. * * * I had sense enough to know an engine when I saw it coming down the road ahead of me. I could have

gotten out of the way if I had known it was close to me. I didn't have time to investigate anything. * * * I had been in the service of the company about seven months that time. I had worked for them twice before that,—about six months one time, and something over three months another time. Altogether, I had been in the service of the company about sixteen months. I was nothing like an expert. I was just a common section hand. Yes, I had met freight trains before during my sixteen months' service. I met trains several times, but we always got the hand car off in time. Never did get a hand car struck before, when I was with them. I did not say the section boss always stopped the car, and sent a man ahead, until that time. I said he sometimes stopped and listened, and sometimes he would not. I knew sometimes he didn't stop. Certainly, we took the risk if he didn't stop and listen to see if there was a train coming. I knew there was a train somewhere on the way, but didn't know how far or how near. I knew it was somewhere west of Ft. Worth."

On redirect examination the plaintiff said:

"When we were trying to get the hand car off the track, I thought sure the foreman would warn me if there was any danger. I was right on the south edge of the car, and I put my foot on the brake, and stopped the car. There was just room enough to stand on the car and work the lever. I don't know the width of a hand car. I never measured one. The side of the car is inside the wheels. The car is about the width of the track. From the position I was in, I couldn't see a train in the cut more than seventy-five yards if I had looked. I might have seen the smoke at that distance if I had looked, but I couldn't have seen the train. In taking the hand car off, it is necessary to have some one at the front end. It makes it lighter on them. If the foreman had given me warning, I could have gotten off,—could have stepped right back off the track. There was no warning given me that I heard. The other men were on the north side of the track, and at the end of the car, and I was at the southwest corner of the car. I don't know how far I was knocked. I don't know how many times the foreman had told me, when he went to take a hand car off the track for a train to pass, not to be in too great a hurry; that we had plenty of time. He told me that several times."

Recross-examined, he said:

"I never did measure that cut to see how deep it is. I suppose it is between six and ten feet. It is highest near the center of the cut, as well as I remember. I suppose the bed of the hand car is twelve or eighteen inches above the track. I was standing on the top of the hand car. I am something over five feet; I don't remember. That would make me six or seven feet above the track. I don't know how high a smokestack is above the ground."

Again, on redirect examination:

"It is generally downgrade all through the cut, and on down to the bridge. The bridge is about a half mile, I suppose. It is gradual downgrade to the west. It is not a steep grade. The downgrade begins about half a mile east of the cut. From half a mile east of where we were, down to the bridge, is downgrade. We were going upgrade, and the train was going downgrade."

H. B. Hooper, one of the section hands who was on the car, testified:

"It was in a short curve where the accident occurred. The track curves to the southeast; and if a man was standing up on the hand car he could see the smokestack of a train about five hundred feet. It was very seldom that the section boss sent a flagman. Sometimes he did, and sometimes he didn't. We left the depot at 6:50, and went at the rate of six miles an hour. Don't remember that the foreman gave any orders as to going fast or slow. Don't know what speed of a train was directed by the company around a curve. Don't know what speed the train makes, but not so fast as on a

straight track. The train was stopping before I noticed how fast it was going. I heard neither bell nor whistle. There is a public crossing a short distance east of where the accident occurred. I didn't hear bell nor whistle at the crossing. My idea at the time was that the engine was about two hundred feet from the hand car when I first saw it. Wooten, the foreman, whistled for brakes. This was his usual signal. The plaintiff was helping to get the hand car off the track. The foreman was helping to get the car off, too. No orders were given to Eason to desist from his attempt to get the car off before he was hurt, except I called, "Look out!" * * * We stopped as quick as we could when we saw the train coming, and tried to get the car off. Don't know what part of the car Eason was at when hit. Can't say what position he was in with reference to the car, nor what he was doing with his hands. The hand car was going east; the locomotive going west. A train can be seen about five hundred feet east and a mile west from the place of the accident. The bank on the south of the curve prevented the train from being seen. If we had stopped to listen, we could have gotten out of the way,—could have heard the train. I didn't hear it until I saw it. I got out of the way. I was not hurt. Don't know what hindered Eason from getting out of the way. Don't know what orders are given about running trains."

A. Wood, the other section hand who was on the hand car at the time of the accident, testified:

"The accident occurred about a mile and a quarter east of the station or depot at Brazos. We were working on the section as section hands. William Wooten was the foreman. We started to work that morning at 6:50 a. m., from the depot. Did not use the section house. At the place of the accident the track was curved, and in a cut. After leaving the curve a few hundred yards, the track is straight. Don't know just how far a train can be seen east from the place of the accident. There were no precautions usually taken by the foreman to avoid collision with defendant's locomotives. We left the depot at 6:50 a. m., and were going about five or six miles an hour. The foreman gave no orders as to speed. Don't know the company's orders as to speed of trains at this point, nor what speed they ordinarily make. The train ran its length and two rails before it stopped, after striking the hand car. I don't remember of hearing either bell or whistle. There is a crossing just east of the place where the accident occurred. Didn't hear any bell or whistle there. I think I saw the engine three hundred feet before it struck the hand car. There were no orders given in reference to the hand car, that I remember. The foreman was trying to get the car off, and I was helping. Eason was trying to get the car off the track. The foreman was helping. I didn't hear any orders to Eason to desist from getting the car off the track just before the accident. * * * We could have heard the train if we had stopped and listened at the right time. I got out of the way. I was not hurt. I was at the end of the car that was off the track, and Eason at the end between the rails. When the foreman saw the train, he gave Eason signal to put on brakes of the hand car. I saw the train. You could see a train west a mile and a quarter. I don't know how far east one could be seen. The curve and cut would prevent a train from being seen from the east. I don't know about the train orders at that or any other point."

I. M. Dean, a witness for the defendant, testified:

"I am an engineer of the Texas & Pacific Railway Company. Have been a locomotive engineer for fourteen years. I went to work for the T. & P. in 1882. I was on the engine that hurt this plaintiff. I was going west. It was a freight train. I think we had about twenty cars; some empty and some loaded. My best recollection is that we had about twenty cars in that train. We never know on the front end what the cars are loaded with. We were going downgrade for about two miles,—a mile and a half or two miles. It was a rather sharp curve. I don't know the degrees. I suppose I was eight or nine hundred feet when I saw him first. That is a rough guess. I suppose I saw the other section hands. No, I didn't give any signals for

that curve. I didn't ring the bell for that curve. I whistled for the crossing, and the brakeman was ringing the bell. That was the first thing that had my attention. I don't know how far I was from the crossing when I whistled. The brakeman reached up and pulled the bell cord, and looked at me, and I looked out the window, and saw the hand car. The brakeman kept ringing the bell until we hit the car. I did what I thought was right to stop the train. I was afraid the hand car might strip the engine and throw the rods through the cab, and that is very dangerous. I didn't call for brakes. I set the air. I didn't have air brakes on all the cars. I don't know how many cars had air. They [the persons on the hand car] must have seen me first, for they were taking the car off the track when I saw them. When I leaned out of the window, they were taking the car off the track, or trying to. The pilot struck it. He was a little nearer the north rail than the center of the track. He was between the center and the north rail. His side was to me—his right side. He had his face to the north. Pickens was my brakeman. I don't know where he is. I think he is on the road. He is running a train now. I am sure he rang the bell, and I whistled for the crossing. I was sitting there, looking straight ahead, and he pulled the bell cord, and looked at me, and I knew there was something. I could not possibly have stopped that train before I struck him. I think the caboose stopped about where the man lay. I didn't get out of the cab until we got to Brazos. I saw them take him, and put him on the caboose. I don't know what rate of speed we were running. I don't think over fifteen or sixteen miles an hour. I couldn't have stopped the train any sooner than I did."

On cross-examination he said:

"I sounded the whistle, and the brakeman rang the bell. I don't know the distance from that cut. It is quite a way from the crossing. It must have been between a quarter and a half mile. I whistled just after I came around the curve at the top of the hill. I had just passed out of the curve when I sounded the whistle. The time-card says, 'Give the signal at eighty rods from a crossing.' I guess I was over eighty rods. I had to lean out of my cab window to see this hand car. I think we were further than four or five hundred feet from it when I first saw it. I was a little excited. The car stood across the track, and it was liable to ditch the engine. I thought my life was in danger. I never thought for a minute about the section men being struck. I thought I might run into the hand car, and that there was danger of a derailment. I thought they would get off. I have seen cars taken off much nearer that that, and no one hurt. I didn't blow the whistle again. I set the brake, and was trying to stop. I first made an ordinary application of the air, and then I applied the emergency air. I was on the north side of the cab. The nearer I got, the plainer I could see. The front of the engine did not obstruct my view. He was trying to get the car off the track. He was in a stooping position. The other men stepped off just before I struck him. I didn't see anything in the world to keep him from stepping off the same as the other men did,—he wasn't fastened there. I don't think I can stand in front of a train and tell the speed it is coming at. I could tell whether it was coming fast or not. I don't know how far I missed the section boss,—not much. He got off. I guess I was forty or fifty feet from him when he got off. I was not running fifteen miles an hour when I struck him. I don't think I was running over ten miles. That would be about fourteen feet every second. The train ran about its length after it struck the hand car. I didn't get off the engine. I saw them put him in the car. The bell was ringing, and I was afraid that if I sounded the whistle they might get off the track, and leave the car there. I didn't want to endanger my life. I don't think the car was ever moved after I saw it. I was certainly interested in getting that car off of there. I wouldn't like to see any man hurt. They knew I was coming. That is the reason they were taking the car off the track. The bell was ringing. This accident occurred two minutes after seven o'clock. I looked at my watch as soon as we stopped. We are supposed to look out for hand cars at all times. It was my understanding that that was about the time they usually went to work. I supposed the whistle was sounded enough for the curve. I sounded the whistle back half a mile.

I don't know why I didn't sound it again when I came near that curve. We can't sound a whistle for every curve in the road. It would take all the steam we have. We have plenty of such curves as that. Yes, sir; it is usual for us to keep a lookout for section gangs, and they keep a lookout for us. I think they saw the engine long before I saw them."

On redirect examination:

"I don't know how high an engine is from the track. I suppose fifteen feet to the top of the smokestack. It is quite a little distance. We have no instruction in the world about looking out for section men. We are supposed to look out for hand cars. We have no instruction to look out for men walking the track. The time-card says they are supposed to look out for us. The time-card provides that bridge and section men are to look out for trains."

Recross-examination:

"This was a dewy morning, as well as I remember. The sun was just rising."

The foregoing embraces all of the testimony that was offered on the issue as to the defendant's negligence. The plaintiff testified that he knew before the hand car started that the train was coming, and that the foreman signaled him to apply the brakes in time for him to stop the car and get off to the ground, which he did in ample time to step off the track, and keep out of the way of the train. While he says that he did not see the train himself, he says that he knew from the signal for brakes, and the action of others on the hand car, that the train was there. The other section men who were on the hand car, and whom he called as witnesses, testified that they saw the train. One of them (Wood) said: "I think I saw the engine three hundred feet before it struck the hand car. There were no orders given in reference to the hand car, that I remember." The other (Hooper) said: "My idea at the time was that the engine was about two hundred feet from the hand car when I first saw it." This witness also says: "No orders were given to Eason to desist from his attempt to get the car off before he was hurt, except I called 'Look out!'" The purpose of giving signals, by bell or whistle, of the approach of a train is to warn persons leaving the track or on it, or about to get on it, of the fact that the train is approaching; the purpose of stopping a hand car, that those on it may listen and hear the noise of an approaching train, and the purpose of sending a flagman forward at cuts and curves, which seem to require such precaution, is to warn those on the hand car that the train is coming. But persons who know that the train is coming, and who see it in time to get off the track, or who know it is there in time to get off the track, have the best warning, and do not need and could not be benefited by any kind or amount of previous warning. The testimony of one's own senses in their normal condition is the best evidence of such a fact. Therefore this testimony of the plaintiff, and the undisputed testimony of the witnesses he called, takes wholly from our consideration in this case any question as to the alleged negligence of the servants of the defendant who were in charge of the train, and of the negligence of the section foreman prior and up to the time when he and the section hands who were with him got off the hand car and on the

ground in time to get themselves off the track before the train reached the spot where the hand car was stopped.

The only remaining question is, was the section foreman negligent in not giving the plaintiff an express order to desist from his effort to assist in getting the hand car off the track, and to get himself out of the way? The plaintiff, in his testimony, does not claim that the section boss gave him any direct order to assist in getting the hand car out of the way. He says only, "It seems to me like a dream that I heard the boss say, 'Let's get her off, boys; yonder comes a train.'" It was the duty of the "boys" and of the foreman to "get her off" if they could with safety to themselves. That was, doubtless, the first idea in the mind of the plaintiff, and the inspiration of his "dream"; for the other section hands who were not struck do not testify to having heard it, and they doubtless would have so testified if they had heard it. Wood says expressly that no orders were given, that he remembers. They all did attempt to take the car off. The other three let go, and stepped out of the way in time to escape injury. The plaintiff failed to do this, and was badly hurt. He had been in the service of the railroad for periods aggregating 16 months. Immediately before this time he had been engaged on this section of the road, and under this section foreman, for a period of seven months. For some time previously it had been a part of his work to set the brakes on the hand car. He did that duty well on this occasion. After hearing the foreman signal, he stopped the hand car almost immediately, before it advanced more than half the length of a rail. He was 36 years old. He says that he was tolerably stout and healthy. He says further: "If the foreman had given me warning, I could have gotten off. I could have stepped right back off the track." And again: "If I hadn't taken time to get the car off, it wouldn't have taken me more than a second or two to jump off on the south side." The manner and direction in which the hand car was moved made it easier for those who were at the rear end to keep themselves clear of the track than it was for the plaintiff, who was at the front end. But it is clear, from his own testimony, that there would have been no difficulty in his getting out of the way of the train, if he had tried to do so. His personal conditions and the time and opportunity were ample for this purpose.

It thus appears that the only negligence he can impute to the defendant company is the failure of the foreman to direct him expressly to let the hand car go, and to get himself out of the way. We think the obligation of the company does not go to the extent of requiring it to furnish that degree of attention to the safety of its employes. Their safety would not be promoted by substituting the judgment of the foreman for the judgment of each individual under him as to the time and means of escaping a manifest peril. Such a rule would be utterly impracticable, and therefore it cannot be required that the defendant should in that manner guard its employes against those dangers of which the employe can equally or better take notice, and can best guard himself. In some instances, where

the master, or an agent of a corporation who stands in the place of a master, gives an express order to an employé to do an act that requires him to incur imminent hazard, the servant will be justified in submitting to the authority of the master, because he is presumed to have superior experience and judgment, as well as to occupy a superior position; and, as between the servant and the master touching the duty of the one and the liability of the other, the servant may yield his own judgment to that of his superior. In such a case the habit of obedience to orders—so necessary for the efficient conduct of all important operations—naturally checks the instant exercise of individual judgment in the employé. *Railway Co. v. Duvall*, 12 Tex. Civ. App. 348, 35 S. W. 699. In this case there is no evidence tending to show the giving of such a command, expressly or by implication. The conditions are not made more favorable for the plaintiff's claim by reason of the fact—conceding it fully to be a fact—that the foreman had on previous occasions, when taking a hand car off out of the way of an approaching train, cautioned the hands not to get in a hurry, not to be too fast, that they had plenty of time, even though he spoke it "abruptly, and seemed like he got mad because the hands got in a hurry," and had, as the plaintiff says in his petition, admonished the plaintiff for his haste, and for what the foreman termed unnecessary hurry in lifting the hand car from the track, or had on many such occasions told the plaintiff not to be in fear, as he would always have ample time to get the hand car off the track. Such admonitions were both wise and kind, even if, in the exigency in which they were given, they were accompanied with an emphasis of manner which the plaintiff calls abrupt. The agitation of fear disturbs the judgment, and unnecessary and improper "hurry does not make haste." The giving of such admonitions to the section hands did not express or imply a command, or even advice, to them to wait for the word from the foreman before looking out for their own safety. On the contrary, it assumes that on all such occasions each person must take care for himself; and on this occasion the foreman had a right to presume that the plaintiff, who had full knowledge that the train was there, and the danger impending, would look to his own safety, and get out of the way in time to escape injury. We conclude that there is no proof in this case from which a jury of reasonable men, properly instructed, could find, by inference or otherwise, that the injury received by the plaintiff was caused, directly or proximately, by the negligence of the defendant or of its servants.

We do not discuss here any question touching the doctrine of fellow servants, either as matter of general law or as affected by the local statute, because, for all the purposes of this case and of our present argument, it may be conceded that the section foreman, in all of his relations to the plaintiff's injury, represented fully the defendant; so to speak, was the defendant. Still, in our view of the law, there is in this case no evidence tending to show on the part of the foreman any negligence that was the direct or proximate cause of the injury to the plaintiff.

It has been said by the supreme court that:

"Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge,—not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." *Commissioners v. Clark*, 94 U. S. 278.

In a later case the supreme court say:

"It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. And it has recently been decided by the house of lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred." *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322.

In each of the cases just cited the trial judge had withdrawn issues from the jury by a peremptory instruction, and his action was affirmed by the supreme court.

In *Southern Pac. Co. v. Burke*, 23 U. S. App. 1, 9 C. C. A. 229, and 60 Fed. 704, we remarked that the language bearing on this subject, so often cited with emphasis, is found in opinions affirming the ruling of the trial judge, or reversing his decision when he had improperly withdrawn the case from the jury; that of the great number of cases in which the question had been raised before the supreme court we then found only two which had been reversed, in which the trial judge had refused to withdraw the case from the jury. These two were *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, and *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433. Further on in our opinion we noticed at considerable length the reasons which, in our judgment, should induce trial judges to indulge in the exercise of a liberal discretion in deciding before verdict that the proof in the case on trial will support only one conclusion, and directing the jury to find accordingly; and that, while this discretion is a legal one, and is the subject of review, appellate courts ought, as far as may be, to sustain its exercise.

In *Railroad Co. v. Thomas*, 23 U. S. App. 37, 9 C. C. A. 29, and 60 Fed. 379, we used this language:

"We are constrained to hold that the provision of our constitution which gives parties to an action at law the right to a trial by jury embraces even parties who bring actions at law against railroad corporations, and that the persistent effort to push precedents to the point of requiring trial judges to decide as questions of law the issues most commonly joined in cases where the recovery for personal injuries is sought should not be encouraged."

In *Railway Co. v. Patton*, 23 U. S. App. 319, 9 C. C. A. 487, and 61 Fed. 259, we used this language:

"The exception to the charge of the court and to the refusal of the requested charge having served to bring up in the bill of exceptions a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous, and must be reversed."

In *Southern Pac. Co. v. Johnson's Adm'x*, 44 U. S. App. 1, 16 C. C. A. 317, and 69 Fed. 559, in which Mr. Justice McKenna (then senior circuit judge) presided, and concurred in the judgment, the case was reversed upon the ground of the insufficiency of the evidence as contained in the bill of exceptions to justify the court in submitting the case to the jury at all; the circuit court of appeals for the Ninth circuit saying:

"We think, upon the evidence as presented in the record, that the judge should have instructed the jury to find a verdict for the defendant. The judgment of the circuit court is therefore reversed."

In *Southern Pac. Co. v. Burke*, *supra*, the senior circuit judge, in a dissenting opinion, said:

"I do not understand that my views of the law in regard to the respective provinces of the trial judge and the jury are at all out of accord with those of the supreme court, or that I differ with my associates in this court except with regard to the application of the conceded rules on the subject. What I insist upon is that where, under the law, the duty of the trial judge is to direct a verdict, this court, in reviewing the case properly shown by the record, should meet the full measure of its responsibilities, and that in such a case it is not sufficient to fall back on the trial judge's opinion as conclusive that reasonable men may fairly differ as to the effect of the undisputed evidence in the case; and in this connection it is proper to say that the observations of the court as to the frequency of personal injury suits, the skill and acumen with which each side is presented, the what used to be called champerty prevailing at the bar, and the general surroundings on the trial of such cases,—all, it is intimated, creating an atmosphere of prejudice above which the trial judge may not always rise,—instead of being an argument in favor of giving great weight to the ruling of the trial judge, who is frequently called upon to act on the spur of the moment, without sufficient opportunity to analyze and fully weigh the testimony, rather point the other way, and really furnish a strong reason, if one is necessary, why this court should look well into every properly presented case of complaint, and see that the trial judge neither trenches on the legitimate province of the jury, nor mistakes nor neglects nor abdicates his duty as judge to the prejudice of the parties."

Though this language is in a dissenting opinion, the conclusion which it announced does not differ from the views entertained by the court as then constituted, and that conclusion has always been concurred in by this court.

We deem it unnecessary to notice any of the questions raised by the other assignment of error. The views we have already expressed will indicate to the circuit court the action proper to be taken on such questions as will probably arise on a new trial. Holding that the trial judge should have instructed the jury to return a verdict for the defendant, the judgment of the circuit court is reversed, and the cause is remanded to that court, with direction to award the defendant a new trial.

FIRST NAT. BANK OF CHICAGO v. MITCHELL et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 35.

GUARANTY BY MARRIED WOMAN—VALIDITY—CONFLICT OF LAWS.

Where a married woman in Connecticut executed and delivered to her husband, there, a guaranty, to enable him to obtain credit from plaintiff, in Illinois, to whom the husband sent it by mail, the contract is to be governed by the Illinois law, and is therefore binding on her, though she was incapacitated from making it by the laws of Connecticut.

Lacombe, Circuit Judge, dissenting.

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

Wm. C. Case and Percy S. Bryant, for plaintiff in error.

Theodore Maltbie and Frank L. Hungerford, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This action was tried in the court below (84 Fed. 90) without the intervention of a jury, and, upon the facts set forth in the stipulation of the parties and found by the court, there should have been a judgment for the plaintiff for the sum indemnified by the guaranty signed by the defendant H. Drusilla Mitchell, if she, being a married woman, was competent to make the contract. In deciding adversely to the plaintiff the court below followed the decision of the supreme court of Connecticut in Freeman's Appeal, 68 Conn. 533, 37 Atl. 420, upon the same facts, in a suit brought by the plaintiff subsequent to the present action to establish the guaranty as a demand against the estate of the defendant in insolvency.

The question in the case is whether a guaranty payable in the state of Illinois, and delivered to the plaintiff there, signed by a married woman, at her domicile, in Connecticut, to enable her husband to procure credit with the plaintiff, delivered by her to her husband, and sent by him by mail to the plaintiff, is a valid contract; she being disqualified by the law of Connecticut from making a contract as surety, and authorized to do so by the laws of Illinois. In other words, the question is whether the incapacity to contract by the law of the state of a person's domicile attaches to his contractual act in another state, where the disability has been removed. This question has been much considered by commentators upon private international law, and has encountered the divergence of opinion which so frequently characterizes their essays. We shall not undertake to rehearse their views or summarize their conclusions, or to discuss the question upon principle. It has been considered and decided in respect to the incapacity of coverture and minority several times by the courts of this country, and uniformly with the same result, except in Freeman's Appeal. The previous authorities are collated in Milliken v. Pratt, 125 Mass. 374, and the opinion delivered is such a complete exposition of them that other references are un-

necessary. That judgment determines the precise question presented in this case. In that case the plaintiffs sued, in Massachusetts, a married woman, domiciled there, who had signed a guaranty for her husband, intended to be used by him to obtain credit with the plaintiffs at Portland, Me. She delivered it to her husband at their home in Massachusetts, and he mailed it there to the plaintiffs, in Portland; and the plaintiffs received it at Portland shortly after. By the law of Massachusetts at the time, a married woman was incapacitated to make such a contract. By the law of Maine, she was not. The court decided that the contract was made in Maine, and controlled by the law of that state; that, as regarded the capacity of the defendant, its validity depended upon the law of that state; and that, as the law of Maine authorized a married woman to bind herself by such a contract, it was a valid contract, and the plaintiffs were entitled to recover.

A case exactly coincident in its facts with the present case, and with *Milliken v. Pratt*, is *Bell v. Packard*, 69 Me. 105, except that, instead of signing a guaranty, the defendant in that case signed a note as surety for her husband. The court decided that the note was a Maine contract, and obligatory upon the defendant.

These adjudications proceed upon the considerations that the instrument was not effective for any purpose until delivered to the party for whose benefit it was prepared, that the place where it became operative was the place where the contract was made, and that the disqualification of the married woman in the state of her domicile did not accompany her in making a contract in a state where the disqualification had been removed. They are a consistent and logical application of that fundamental and most important rule of private international law, that a contract valid by the law of the place where it is made is valid everywhere.

In *Bowles v. Field*, 78 Fed. 742, a married woman domiciled in Indiana went to Ohio, and there executed notes as surety for her husband; she being incapacitated from making such contracts by the law of her domicile, but not by the law of Ohio. The court held the contracts valid, affirming the general proposition that the contract of a married woman, valid by the law of the place where it is made, is valid and binding upon her, notwithstanding that by the law of her domicile she is incapacitated from making such a contract.

These judgments meet our approval, and, upon their authority, we are of the opinion that the court below should have adjudged in favor of the plaintiff.

In *Freeman's Appeal* the court conceded that the guaranty was a contract made in Illinois. It based the decision upon the ground that the defendant could not constitute her husband her agent in Connecticut to deliver the instrument. The court used this language:

"Had Mrs. Mitchell been within the state of Illinois when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that state as to subject her to its laws, in respect to acts done within its jurisdiction. But, as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law

of Connecticut which must determine as to the authority of the agent; and so as to the validity of the obligation which he, as such, undertook to impose upon her by delivery in Chicago of the paper signed by her in Bristol."

Inasmuch as the only "agency constituted in Connecticut," or the only necessary agency, was the intrusting her husband with a letter for deposit in the mail, we think the reasoning of the learned court to be ingenious, rather than convincing. The interposition of such an agency was not regarded of sufficient importance to require comment in *Milliken v. Pratt* or *Bell v. Packard*.

It is to be observed that the state court did not consider the contract one which ought not to be enforced, because violative of the policy of the state. Indeed, by the statute of 1877 (Gen. St. Conn. § 2796) as to women subsequently married, the disability to make such a contract no longer exists.

We are extremely reluctant to differ with the supreme court of Connecticut in a case involving the same facts, between substantially the same parties, not only because the opinion of that learned tribunal is always entitled to great consideration, but also because it is, in a sense, unseemly that there should be diverse judgments under such circumstances between a federal court sitting in that state and the highest court of the state. But the case is one which concerns the rights of a citizen of Illinois, acquired before the decision of the state court; and its decision depends, not upon the construction of local laws, but upon the application of the principles of general jurisprudence. In such cases the federal courts are in duty bound to exercise their own independent judgment.

In view of the decision of the supreme court of Connecticut, we should be glad to certify the question which we have thus considered to the supreme court for its instructions; but we do not feel authorized to do so, especially as that tribunal, under the power to issue a certiorari, can review our judgment, if it sees fit.

The judgment is reversed, with instructions to the court below to render a judgment for the plaintiff for the amount due by the terms of the guaranty.

LACOMBE, Circuit Judge, dissents.

SWIFT & CO. v. SHORT.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1899.)

No. 1,081.

1. WITNESSES—DISAGREEMENT—IMPEACHMENT.

While a litigant may not impeach the general character of his own witnesses, yet this rule does not prevent him from showing the verity of any fact which he wishes to establish. When witnesses called in his behalf disagree as to a particular fact, the testimony of neither is conclusive; and this, though the party to the suit be one of the witnesses.

2. INJURY—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, who was ordered to take charge of defendant's dynamo department, was injured by the detachment of a defective brake on one of

the dynamos. He testified that he was ignorant of that kind of machinery, and had no knowledge of the defect, while defendant's witnesses testified that he knew of the defect, and superintended its repair on the day of the injury, and that he was told by the machinist that it had not been properly repaired. *Held*, that the case was properly submitted to the jury on the issue of defendant's contributory negligence.

3. SAME—RESPONDEAT SUPERIOR.

Where plaintiff, superintendent of defendant's dynamo department, was injured because of the defective repair of the machinery by other machinists in defendant's employ, which repair was neither done by plaintiff nor under his supervision, the rule of respondeat superior applies, and plaintiff is entitled to recover.

4. SAME—INSTRUCTIONS—HARMLESS ERROR.

In an action for injuries received by a superintendent of defendant's dynamo department, by the detachment of part of the machinery, the court instructed the jury that if it was plaintiff's duty to attend to keeping the machinery in a safe condition, or if he had knowledge before the injury that it was unsafe or dangerous, "and was at the same time conscious of his ignorance of that kind of machinery, how to operate and repair it," and yet elected to run it, or to repair it, and take the hazard of injury, he could not recover. *Held* that, the charge as a whole not being misleading, the clause quoted in that instruction, if erroneous, was harmless.

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

O. H. Dean (William Warner, James Gibson, W. D. McLeod, and Hale Holden, on the brief), for plaintiff in error.

Frank P. Walsh (F. F. Rozzelle and William P. Borland, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for personal injuries which was brought by Walter C. Short, the defendant in error, against Swift & Co., a corporation, the plaintiff in error, the injuries complained of having been sustained while Short was an employé of the defendant company. The evidence showed, without substantial contradiction, that while the plaintiff below was in temporary charge of the dynamo room in the defendant company's packing-house plant located at Kansas City, Kan., during the absence of the regular foreman, an iron shoe, which formed a part of a friction clutch, flew off from a rapidly revolving wheel, to which it was attached for the purpose of serving as a brake to the wheel, striking the plaintiff in the head, and inflicting severe injuries; that, for two or three days prior to the accident, there had been a crack in the shoe, or in one of the arms by which it was held in place, which fact was known to those persons in the defendant's service whose duty it was to cause the same to be repaired; that on the day of the accident, and prior thereto, an attempt had been made to remedy the defect in the clutch, by wiring it so as to hold the shoe securely in place, which work had not been properly done; and that, shortly thereafter, one of the shoes which formed a part of the clutch flew off, with the result heretofore stated. There was a controversy before the jury as to whether the defective wiring last referred to was done by the plaintiff himself or under his direction, or whether it was done by other employés in the defendant's service, without the plaintiff's knowledge.

The plaintiff testified in his own favor, and in substance, that he had been ordered to take charge of the dynamo room on the day of the accident, during the temporary absence of the regular foreman; that he took charge thereof, in pursuance of such order, in the afternoon of that day; that shortly after assuming charge of the same, and while standing in line with the wheel to which the clutch was attached, which was then in rapid revolution, the shoe flew off, and inflicted the injuries complained of; that, previously to the injury, he had not assisted in wiring the clutch, and was not aware of any insecurity in the machinery of which he had been appointed to take charge. On the other hand, the defendant company offered evidence which tended to show that the plaintiff took charge of the dynamo room some time during the forenoon of the day of the accident, instead of during the afternoon; that he was advised, at the time of assuming charge of the room, that the fastenings of the clutch were insecure; that he was directed to stop the machinery at noon, and examine the clutch; that he did so, and, finding the shoe insecure, tried to fasten it with wire; that the wiring was not done in such a way as to render the shoe secure, and that he was advised of that fact by the machinists who assisted in the operation, and who worked under his directions.

As the issue of fact last explained was the only one concerning which there was any serious conflict in the testimony, and as the verdict was in favor of the plaintiff, we are satisfied that the jury found that the plaintiff did not assist in wiring the clutch, and was not responsible for its condition at the time of the accident. It is contended, however, that the trial court should have directed a verdict against the plaintiff because of his contributory negligence, or voluntary assumption of a known risk, and that an error was committed in refusing such an instruction. The sole basis for this contention seems to be that the plaintiff was concluded on this issue by the evidence of certain of his own witnesses. It is not denied that the plaintiff's own testimony, if credible, exculpated him from all blame; but it is said, in substance, that inasmuch as two of his witnesses—one of them being the foreman of the dynamo room, whom the plaintiff had temporarily superseded on the day of the accident—made some statements while on the stand which are in apparent conflict with some of the plaintiff's statements, and which also tended to corroborate the evidence of the defendant's witnesses, therefore the plaintiff's evidence which showed that he was free from all blame should have been disregarded, and treated by the trial court as wholly undeserving of credit. Concerning this claim, it is sufficient to say that we are not aware of any such rule of evidence as counsel for the defendant company have invoked. A litigant may not introduce testimony for the purpose of showing that the general character for truth and veracity of one of his own witnesses is bad, but this rule does not go to the extent of preventing him from showing the verity of any particular fact or transaction which he wishes to establish. He may call witnesses to prove a particular fact, although their evidence with relation thereto contradicts the testimony of other witnesses who have previously testified in his favor with

reference to the same transaction. Moreover, under some circumstances, where a party has been deceived by one of his witnesses, who has given testimony which was unexpected, the better view is that the party so deceived may impeach the witness to the extent of showing that the statements made by him on the witness stand are contrary to those made by him before the trial or before he was sworn. Phil. & A. Ev. pp. 904, 905; Greenl. Ev. (15th Ed.) §§ 443, 444, and cases there cited; *Melhuish v. Collier*, 15 Q. B. 878; *Hemingway v. Garth*, 51 Ala. 530. In short, when witnesses called in behalf of either party disagree among themselves as to a particular fact or transaction, the testimony of neither is to be accepted as absolutely conclusive; and this rule applies as well where a party to the suit is one of the witnesses, and has testified in his own favor. In all such cases it is the province of the jury to determine, in the light of all the facts and circumstances as developed by the proof, who is most worthy of credence. In the present case, the accident had occurred several years before the trial, and it is not surprising that the recollection of the witnesses varied somewhat as to the details of the occurrence. None of the witnesses can be said to have agreed exactly in their statements as to time, place, and circumstance, when their statements are viewed critically; and yet, when all the evidence is considered, and due allowance is made for the length of time that had elapsed since the accident, it is easy to reach a rational conclusion upon the issues involved in the case, without being compelled to reject the testimony of any witness as entirely false or untrustworthy. The case was one for the jury upon the issue of contributory negligence, and no fault can be found with the trial court for submitting the case to the jury. It would have erred had it acted differently.

It is furthermore insisted in the brief that, in any event, the plaintiff should not have recovered, because the defective wiring of the shoe, if not done by direction of the plaintiff himself, was at least done by his fellow servants, and that the defendant cannot be held responsible to the plaintiff for their negligence. The conclusive answer to this suggestion is that, if the wiring was done by other persons in the defendant's employ, and was neither done by the plaintiff nor under his supervision, then, in the matter of making such repairs, such other servants were performing a personal duty which the master owed to the plaintiff, and the rule of respondeat superior applies. *Balch v. Haas*, 36 U. S. App. 698, 701, 20 C. C. A. 151, and 73 Fed. 974; *Minneapolis v. Lundin*, 19 U. S. App. 247, 249, 7 C. C. A. 344, and 58 Fed. 525; *Railroad Co. v. Keegan*, 160 U. S. 259, 264, 16 Sup. Ct. 269.

This brings us to the final contention that there was error in the court's charge. That part of the charge in which the error is supposed to inhere was as follows:

"Testimony has been introduced tending to show that it was the duty of the plaintiff himself, after he became temporary foreman in that department [the dynamo department], in place of Powers, to attend to keeping the machinery in a reasonably safe condition, and that he knew personally, and had been advised before the injury, of the defective condition of the clutch on the pulley which afterwards injured him, and was advised by different persons of skill and experience in the repairing of such machinery that it was unsafe and dan-

gerous. And he, himself, has testified, in substance, that he was not skilled in machinery of that kind, or in the repairing or running of the same. Now, if you believe it to be true that it was his duty, after becoming foreman, to attend to keeping the machinery safe, or that he knew before he was hurt, either personally or from information, that it was in a broken and defective condition, and was advised by others having skill and experience in such matters that it was unsafe and dangerous, *and was at the same time conscious of his ignorance of that kind of machinery, how to operate and repair it,* and yet, notwithstanding, elected to run it, or to repair it and run it, and take the risk and hazard of injury, then he should not recover. This is true, gentlemen, without reference to whether the defendant was negligent in not keeping the machinery in a reasonably safe condition. For, if the master failed in that regard, plaintiff cannot complain, and recover, unless he has been injured by reason of that failure. He cannot, in other words, with a knowledge of the fact that the master has been negligent, and after being warned of danger by reason thereof, voluntarily go on and take the chances of injury, and then be heard to say that he would not have been injured if the defendant had not been negligent. Under such conditions, the law holds him to have assumed the risk, and discharges the master from liability."

The court, in its charge, before giving the aforesaid instruction, had recited the substance of the plaintiff's evidence as given on the trial, saying that he had testified that he was ignorant of the condition of the clutch prior to the accident; that no one had informed him prior thereto that it was cracked and had been bound with wire; that he had taken charge of the dynamo room recently, and had only been in the room a short time when the accident occurred, and that he was engaged in repairing a belt, the machinery being in operation, when he was struck and injured. After thus reciting the plaintiff's evidence in substance, the court instructed the jury that if the plaintiff's statements were true, and if the defendant company knew, or by the exercise of reasonable care could have known, of the defective condition of the clutch when it placed the plaintiff in charge of the dynamo room, then the plaintiff should recover. In no part of the charge, however, was any permission or direction given to the jury to return a verdict for the plaintiff unless they found and believed that the plaintiff was in fact ignorant of the condition of the clutch, and ignorant of the fact that it had been wired, up to the moment of the accident. The portion of the charge above quoted of which error is predicated is taken from that part of the charge which presented the defendant's view of the case, and was intended to state the defense on which it chiefly relied; the objectionable part of it being that clause which we have italicized. The trial court's attention was not called to the objectionable clause, nor was it excepted to at the time. If there was an error in the charge, in the respect above indicated, which was saved in such a way that it can be reviewed, then it was only saved by an exception to the refusal of the court to give two instructions that were asked by the defendant, which instructions embodied the substance of that portion of the charge above quoted, omitting only the objectionable clause which is in italics. We are of the opinion that, if there was error in the charge in the respect complained of, and if it was saved in a manner which renders it reviewable, it must be regarded as immaterial, and not of sufficient moment to justify a reversal. As we have before remarked, under the instructions given for the plaintiff, upon

whom rested the burden of the proof, and who was bound to make out his case on the lines indicated by the trial court, the jury were plainly instructed that he would only be entitled to a verdict in the event that they believed his statement that he was ignorant of the condition of the clutch when he took charge of the dynamo room, and was ignorant of the fact that it had been bound up with wire. It must be presumed, in support of the judgment, that the jury obeyed this instruction, and found the facts as therein stated to be true; in which event, as a matter of course, it is immaterial that the court, in stating the facts which would support the plea of contributory negligence, imposed upon the defendant the duty of showing, among other things, that the plaintiff was "conscious of his ignorance of that kind of machinery, and how to operate and repair it." The clause of the charge which has been criticised was probably due to inadvertence, and the court's attention should have been called to it at the time, if counsel regarded it as of any importance, and intended to rely upon the alleged error. We are unable to see, however, that it could possibly have done any harm; and, when a charge as a whole is not misleading, it is not a sufficient ground for reversal that some of the language found therein was not so nicely chosen as to defy criticism. *Railway Co. v. Burr* (Cir. Ct. App. 3d Cir.) 91 Fed. 351. The judgment below is therefore affirmed.

JAMES B. CLOW & SONS v. BOLTZ.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 610.

1. MASTER AND SERVANT—DANGEROUS PLACE TO WORK—RECIPROCAL DUTIES.

An employé has a right to presume, when directed to work in a particular place, that reasonable care has been exercised by the employer to see that such place is safe, and is not negligent in relying on such presumption, unless a danger is obvious and should be known to a reasonably prudent employé; and for that reason the degree of care required of the employer is greater than that required of the employé, and the employer may be chargeable with negligence in failing to ascertain a danger, where the employé is not.

2. SAME—ACTION BY SERVANT FOR INJURIES—ASSUMPTION OF RISK.

Where the manner of using a machine with which an employé was required to work, and by which he was injured, appeared, in the light of facts disclosed after the injury, on the trial of an action by the employé for damages, to have been obviously dangerous, but the question of its safety had been called to the attention of the employer, who continued the use, and the machine had been so operated for some time without injury to any one, the question of whether the employé, who was a common laborer, had assumed the risk, was one for the jury.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This was a suit at law for damages for personal injury. The plaintiff was employed by the defendant, a corporation engaged in the manufacture of cast-iron pipe. The pipe is made by pouring the molten metal into a mold. The mold is made by sinking a hole deep into the ground, lining it properly, and then inserting in this hole a heavy core. The core is removable. It is