

1949

Othello Hickman v. Union Pacific Railroad Company : Brief of Respondent

Utah Supreme Court

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In the

Supreme Court of the State of Utah

OTHELLO HICKMAN,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COM-
PANY, a corporation,
Defendant and Respondent.

Case No.
7303

BRIEF OF RESPONDENT

FILED

Jul 18 1949

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July 1, 1949.

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In the
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OTHELLO HICKMAN,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COM-
PANY, a corporation,
Defendant and Respondent.

} Case No.
7303

BRIEF OF RESPONDENT

STATEMENT OF CASE

This action was filed in the Third Judicial District Court at Salt Lake City, Utah by the plaintiff, a resident of Cache County, Utah, seeking to recover damages from the defendant as a result of injuries sustained by him when he drove his 1941 Buick Sedan automobile into the side of one of defendant's freight trains, specifically a beet car, which was being backed across Highway 91 about two miles southwest from Logan in Cache County, Utah.

At the conclusion of the evidence and after both parties had rested, the defendant made a motion to the court requesting an order directing the jury to return a verdict in

favor of the defendant, no cause of action. The motion for directed verdict was denied by the court and the matter submitted to the jury which returned a general verdict in favor of the defendant and against the plaintiff, no cause of action. From the judgment on that verdict the plaintiff has appealed.

STATEMENT OF FACTS

The statement of the facts recited by appellant in his brief is in the main correct, but in some instances the appellant has misstated certain facts and in a great many instances in giving the facts appellant has not stated the complete facts with respect to various subjects but has stated only portions of the testimony favorable to appellant or as given by appellant himself or one or two of his witnesses, and has ignored or disregarded other competent testimony by which the jury could have found the facts to be much different than as stated by appellant in his brief. For that reason respondent will in this statement of facts include some measure of argument and point out some additional facts or points where the facts differ from those as stated by the plaintiff.

At the outset, we must remind the appellant that the entire facts in the case must be considered and not just those that may be favorable to plaintiff, and not just those which plaintiff or his witnesses may have testified to. The jury is and was at liberty to believe testimony given by defendant's witnesses just as much as it was at liberty to believe plaintiff's witnesses. Also, the jury was entitled to receive instruction with respect to evidence submitted by defendant

and testified to by defendant's witnesses even though that testimony may have been in conflict with and contrary to that which plaintiff himself or his witnesses may have testified to.

The accident occurred on October 30, 1947 at 6:55 P. M. (Tr. 167) on U. S. Highway 91, at a point approximately two miles southwesterly from Logan. The highway at the point of the accident runs in a general northeasterly-southwesterly direction, and the defendant's spur track crosses the highway at grade at approximately right angles (Tr. 112). The highway is level and paved with concrete 22 feet in width. In addition to the concrete there is a shoulder on each side, and in the vicinity of the accident this shoulder is eight feet wide on each side of the concrete (Tr. 112). The highway runs straight for over a mile in each direction from the crossing. There is a railroad crossbuck sign on each side of the railroad track, said crossbuck sign being in each instance on the righthand side of the highway and the near side of the track for approaching highway traffic. There is no flasher light or other protection at the crossing except the two crossbuck signs (See Exhibit 2).

Appellant states that the track was not in regular use, but that is contrary to other testimony, the evidence being that the track was used throughout the year in the shipping of lime rock to and from the beet dump, and that during the beet season there was movement every day (Tr. 381). The accident occurred during the beet season and the beet switching movement involved was one where the railroad company was switching eight empty beet cars in for loading sugar

beets at the beet dump nearby. The plaintiff was well acquainted with the crossing and its location.

The plaintiff with Melvin Squires, his partner in business, was traveling along this highway toward Logan, and approximately three-tenths of a mile before reaching the spur track they passed a highway patrolman's car facing the opposite direction. The plaintiff testified that upon passing the highway patrolman he looked at his speedometer and it "showed just short of 50 miles an hour" (Tr. 228). Defendant's witness Turley, who was located on the train in such a position that he saw a broadside view of the approach of plaintiff's car, stated that plaintiff was going 60 miles an hour (Tr. 378). At any rate, as plaintiff passed the highway patrolman he watched in his rear vision mirror and saw that the officer turned to follow him (Tr. 281, 282). Whether it was because plaintiff was watching the officer's car in his rear vision mirror or otherwise, plaintiff did not see defendant's train entering upon the highway as soon as his passenger did. The passenger, Mr. Squires, first saw the train out in the field and then in the highway and said to plaintiff: "There is a train" (Tr. 305, 306). The plaintiff did not see the train until after Squires yelled to him: "There is a train coming on the highway!" (Tr. 284). The plaintiff testified that "this car was about half-way into my lane of traffic, or a little more, when I first observed it." In other words, the freight car had proceeded more than half the distance over the 11 feet of the right half of the pavement before plaintiff saw it and had come over the 8 foot shoulder of the road and was about six feet onto the pavement at the time Squires called plaintiff's attention to it (Tr. 324).

After plaintiff put on his brakes, all four wheels skidded for a distance of 85 feet before his car collided with the train (Tr. 163) (Exhibit C). The plaintiff did not turn his car to either the right or the left but drove straight into the freight car and struck the freight car eight feet back from the forward end of the car in the direction it was moving (Tr. 336). The railroad car traveled 10 feet after the impact and in said 10 feet was brought to a complete stop (Tr. 337), and at the time the freight car came to such complete stop it had extended over and "was stopped just a little off the pavement, to the north" (Tr. 202. See also Exhibit B).

At the time plaintiff's automobile was approaching the crossing going toward Logan, one Mrs. Afton Archibald of Wellsville was driving her automobile in the opposite direction coming from Logan. She also stated that she was going about 50 miles an hour (Tr. 208). At the time the two automobiles were approaching the crossing, defendant's rear brakeman, or flagman, Frank E. Belnap, was on the highway at the crossing waving a light attempting to warn approaching traffic (Tr. 359). Mrs. Archibald saw brakeman Belnap's light when she was over 500 feet away and said that it appeared to be a flashlight waving up and down, and she "imagined" that he was waving it up and down in front of him (Tr. 188, 189). Mrs. Archibald did not see the outline of Belnap's body until the lights of the plaintiff's car shone on him (Tr. 197), but she had seen his flashlight before that time. The plaintiff never did see the brakeman or his light, although Mr. Squires, who was plaintiff's passenger, saw the brakeman just shortly before the impact (Tr. 306).

Appellant at page 3 of his brief states that this flagman Belnap was standing on the west side of the pavement "facing" in the direction of Mrs. Archibald. That is not a correct statement of the facts in the record. The plaintiff's evidence does not show what direction Belnap was facing. Belnap testified he was watching plaintiff's car approach and attempting to flag it down. Even in her statement that Belnap was swinging the light up and down Mrs. Archibald stated she just "imagined" that it was in front of him (Tr. 189) ; then at one place she stated, "the fellow with the flashlight turned in my direction" (Tr. 190) ; and upon counsel's trying to get her to be more specific, inferring that she could see him facing her, counsel asked: "You say he turned from your direction and ran across the spur track, to the south side of the spur track," and her only answer was: "He ran toward the car coming from the other direction." Even when she turned off the highway her lights did not enable her to see directly which way the brakeman was facing because as she turned off the road he was running toward the other car and "he had moved" (Tr. 200, 201). The only time she observed him sufficiently to even tell that it was the form of a man at the side of the road was about the time that she heard the screeching of the brakes of plaintiff's car, at which time she was approximately 40 feet from the track, and as she turned off the road the brakeman ran toward the other car (Tr. 198, 200, 201).

Mrs. Archibald had seen plaintiff's car coming from the opposite direction when she was over 500 feet from the spur track (Tr. 189, 190). Plaintiff saw Mrs. Archibald's car approaching, but its lights were not extra bright. The plain-

tiff dimmed the lights on his automobile either before or just at the time he passed the policeman's car and then left them on dim from there on (Tr. 282). With his lights on dim plaintiff could see an object in front of him on the highway only 75 or 100 feet (Tr. 285); nevertheless, he continued to drive at a speed "just short of 50 miles an hour" and did not slow down at all until Mr. Squires yelled, "There is a train" (Tr. 286).

On page 4 counsel states that at the time of the impact the railroad car was not half-way across the concrete pavement. Mrs. Archibald did so testify, but there is other competent evidence in the record from which the jury could believe that Mrs. Archibald was mistaken. Mr. Hickman testified that the freight car was more than half-way on his side of the pavement when he first saw it. The Hickman car struck the freight car eight feet from the end thereof. The freight car traveled only 10 feet after the impact before it came to rest (Tr. 337), and when it came to rest it had covered the other half of the highway completely and was just off the northwest edge of the highway (Tr. 202. See Exhibit B).

Plaintiff repeats several times that it was a dark night and the moon had not come up. It is true that officer Reese so testified, but here again plaintiff disregards other competent evidence which the jury was entitled to believe. The conductor testified that the moon was shining bright at the time of the accident (Tr. 349). Rear brakeman Belnap testified the same (Tr. 363), as did also head brakeman Turley (Tr. 378). A United States Weather Bureau Report, which

was introduced as Exhibit 9, giving the weather at Logan, Utah, certified that the moon rose there at 6:07 P. M. From 5:00 to 6:00 the sky was partly cloudy—not over 50 per cent. Between 6:00 and 7:00 this 50 per cent cloudiness was clearing up, and from 7:00 to 8:00 P. M. the sky was entirely clear. Thus, with the sky entirely clear by 7:00 P. M., there could be very few clouds in the sky five minutes earlier when the accident happened, the accident happening at 6:55 (Tr. 167), and at 6:55, the time of the accident, in addition to the sky's being clear, the moon had been up for 48 minutes, and the moon rising at that time in the evening would be practically, if not absolutely, a full moon. At any rate, it was sufficient that plaintiff's passenger Squires was able to see the cars of the train out through the field as well as on the highway (Tr. 305).

The defendant's train crew had already made some switching movement over and back across this highway taking some loaded cars out, and was at the time switching some empty cars back into the beet dump for the next day's loading. As they approached the highway they brought the train to a complete stop right at the edge of a canal bridge at the southeast edge of the highway, stopping the train before crossing the bridge (Tr. 356). The brakeman walked to the center of the highway, let two cars pass, and at the time he gave the engineer a signal to proceed across the highway, there was no car in sight in either direction except a highway patrolman's car which was southwest of the crossing upwards of half a mile, facing toward Wells-ville away from the crossing (Tr. 368-370). The brakeman gave the engineer a signal and the engineer started the

train slowly across the highway. By measurement on the map, Exhibit 1, it will be seen that it is approximately 60 feet from the south edge of this canal bridge to the center of the highway. Exhibit 3 shows the bridge very definitely and the approach from that bridge to the highway. At the moment of impact the train was not proceeding faster than two miles an hour (Tr. 352, 367). Mrs. Archibald, plaintiff's own witness, testified that when she saw the freight car moving over the highway it was just barely creeping along (Tr. 207). The plaintiff Hickman testified that when his lights were on bright or high beam they would show the full width of the road from fence to fence. In other words, had he had his lights on high beam he would have been able to see not only the telephone poles shown at the righthand side of the road in the picture, Exhibit 2, but would have been able to see the bridges across the canal and the full width of the road right of way from fence to fence (Tr. 294).

ARGUMENT

At the outset, we wish to call to the attention of the court and counsel the rule that on such an appeal as this, where a matter has been submitted to a jury, the verdict of the jury must be sustained if there is any competent evidence in the record to sustain it, and in order to find that evidence we are not bound to take—as plaintiff and appellant has done—merely evidence favorable to plaintiff or produced by his witnesses, but must take all of the evidence whether from plaintiff's witnesses on either direct or cross-examination, or from defendant's witnesses on direct or

cross-examination, or from other testimony, including photographs and other evidence such as the map, Exhibit 1, and the weather report, Exhibit 9. The rule is rather uniformly and universally recognized and is well stated in the case of *Crawford v. Southern Pacific Co.*, 45 P. 2d 183, 184, where the California Appellant Court stated:

“In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.”

The following cases confirm the application of the foregoing rule within the State of Utah:

Horsley v. Robinson, . . . Utah . . ., 186 P. 2d 592.

Ercanbrack v. Ellison, 103 Utah 138, 134 P. 2d 177.

Jensen v. Logan City, 96 Utah 53, 83 P. 2d 311.

Lym v. Thompson, . . . Utah . . ., 184 P. 2d 667.

Sine v. Salt Lake Transportation Co., 106 Utah 289, 147 P. 2d 875.

Appellant uses a considerable portion of his brief arguing with respect to what the defendant should have done under its common law duty and whether it should have put

out flares or other lights. He overlooks the fact that even if it had been determined that the defendant was negligent, still the jury may have determined that the plaintiff was guilty of contributory negligence and may have held as they did on that account. We have no way of knowing now whether the jury determined that both plaintiff and defendant were negligent or whether the jury concluded that plaintiff alone was negligent. The appellant in his brief did not say very much upon the question as to whether or not the facts in the record would sustain a finding of contributory negligence on the part of the plaintiff, even on the basis of an assumption that defendant was negligent.

In examining the evidence in this case to see if there is any substantial competent evidence to sustain the jury's verdict, there are a few definite physical facts which, when applied to other evidence, compel the unescapable conclusion that regardless of whether or not the defendant was negligent in any respect, the plaintiff was nevertheless guilty of contributory negligence.

The Utah statutes in force at the time of this accident provided:

“57-7-113. Restrictions as to Speed—Reasonable Under Conditions—Maximums.

“(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all

persons to use due care.

“* * *

“(c) The driver of every vehicle shall, consistent with the requirements of subdivision (a) of this section, drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.”

These provisions of statute apply whether the vehicle is being operated in the daytime or the nighttime, and by such statute a driver who is approaching a railway grade crossing is put in the same class as one approaching an intersection or one approaching and going around a curve or a hill crest, and in spite of the State maximum speed limits, the law requires such a driver to drive at “an appropriate reduced speed” at such times and places.

Section 57-7-179, Utah Code Annotated, 1943, sets forth lighting equipment required on vehicles on the highway “at any time from a half hour after sunset to a half hour before sunrise.” In the Uniform Act Regulating Traffic on Highways when it was enacted in 1941, this section with respect to lights after sunset and before sunrise was designated as Section 102. Section 57-7-197, Utah Code Annotated, 1943, referring thereto, provides in part:

“(a) Whenever a motor vehicle is being operated on a roadway or shoulder adjacent thereto during the time specified in Section 102, the driver shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to

reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirement and limitations:”

Then follows the provision that when a vehicle approaches within 500 feet of another vehicle, the lights should be dimmed by the driver.

In the case at bar the plaintiff Hickman testified that when he passed the highway patrolman, who was at least three-tenths of a mile from the crossing in question—or something in excess of 1500 feet—he dimmed his lights. He continued to drive toward the crossing without reducing his speed in any manner whatsoever, and according to his testimony, he continued just under the limit of 50 miles an hour (Tr. 282, 286). He had seen Mrs. Archibald’s car coming, and she was at least as far away from the crossing as he was at the time he passed the officer because both were going at about the same rate of speed and Mrs. Archibald slowed down and brought her car to a stop on the opposite side of the crossing just prior to the impact. Therefore, at the time plaintiff dimmed his lights Mrs. Archibald was at least 1500 feet or more beyond the crossing—or in other words, there was something in excess of 3000 feet separating the two automobiles—and Mr. Hickman testified that the lights of Mrs. Archibald’s car were not extra bright (Tr. 282).

The statute above quoted, Section 57-7-197, requires the operator of a motor vehicle to “use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance

in advance of the vehicle * * *” The only exception authorizes and requires the driver to use the low beam or dimmer when within 500 feet of an oncoming vehicle. Had the plaintiff been maintaining a proper lookout ahead instead of continuing at his fast rate of speed while observing in the rear view mirror to see if the officer was following him, and had he used the high beam or bright lights on his car inasmuch as he continued at the high rate of speed, he would have been able to see anything on the road ahead of him for “the full width of the road from fence to fence” (Tr. 294), and we must assume in absence of evidence to the contrary that his lights on such high beam would have revealed persons or vehicles at least 350 feet ahead of him as required by Section 57-7-196.

Under these circumstances it is interesting to note what a perusal of the pictures in evidence will show as to the view, and what the map, defendant’s Exhibit 1, will show. Had the plaintiff used the high beam or bright lights as he should have done, continuing at the rate of speed he was going, he would have been able to see the defendant’s train from the moment it started across the canal bridge 60 feet from the center of the pavement, assuming of course that he was close enough so that his bright lights would show far enough ahead. Clearly he could have done so at any time after he was within 350 feet. The freight train started from a complete stop at such point of the bridge, and in traveling the 60 feet plus until it got over the center of the highway, it did not move over two miles an hour. During that same time the plaintiff’s automobile was traveling approximately 50 miles an hour on his own testimony, or 25 times as fast

as the train. At two miles an hour the train would go approximately three feet per second and it would thus take it 20 seconds to move the 60 feet to the center of the roadway. The plaintiff at 50 miles an hour would move 73.33 feet per second and thus in 20 seconds would go approximately 1467 feet, or considerably in excess of a quarter of a mile. Of course we would not expect the plaintiff to see the defendant's train as it started over this canal bridge and approached the highway when he was a quarter of a mile away, but at some point after the time the defendant passed the highway patrolman's car — if he had been maintaining a proper lookout ahead and not spending too much time looking through his rear view mirror, and if he had had lights which would show or reveal persons or vehicles "at a safe distance in advance of the vehicle" he was driving—he could not have avoided seeing the defendant's train in time to bring his vehicle to a stop, disregarding any question of flagman or signals from any member of the train crew.

Approaching the question from another view, the evidence shows that the plaintiff's car traveled almost in a direct line in the center of his lane of traffic. (See pictures, Exhibits C and D.) By Exhibit D it is shown that the rear wheels skidded slightly toward the side of the road, the skid marks showing that those wheels did not come as close to the track as the front wheels, which proceeded in a straight line. The plaintiff's lane of travel or half of the pavement was 11 feet in width, and some high point on the front of his car—apparently the radiator ornament—struck the floor sill and side of the beet car. This point of impact was eight feet from the end of the beet car (Tr. 337). Therefore, in order for

plaintiff's automobile to strike the beet car at such point, the front or end of the beet car, from a standpoint of physical fact, had to be some two or three feet over the center line of the pavement. This is further confirmed by the fact that by measurement it was determined that the beet car traveled just 10 feet after the impact and when it came to rest was some little distance over the north or northwesterly half of the pavement (Tr. 203). That north half of the pavement being 11 feet wide and the beet car extending some distance beyond and having traveled only 10 feet from the point of impact, it is a demonstrated physical fact that the front end of such beet car was at least two feet or more over and to the northwest of the center line of the highway at the moment of impact.

It was determined by the highway patrolman from the damage done and other evidence at the scene of the accident that the speed of the plaintiff's car at the moment of impact was still 30 miles an hour (Tr. 165). Mrs. Archibald estimated that such speed at the moment of impact was at least 40 miles an hour (Tr. 210). The plaintiff's brother, the morning after the accident, stepped off the distance of the skid marks, and then a month or so later actually measured the skid marks, and at such time, a month later, by actual measurement he measured the skid marks at 83 feet, and he stated, "the skid marks are still visible today" (Tr. 148). On the night of the accident the highway patrolman measured these skid marks and found that the longest one was 85 feet (Tr. 163), and that all four of the wheels had skidded and left visible marks upon the pavement.

The plaintiff produced an engineer, Professor Harold S. Carter, and upon putting a hypothetical question to him asked what rate of speed a car would have been going at the beginning of an 83-foot skid mark assuming that the speed of the car at the end of the 83-foot skid mark was 30 miles an hour. Professor Carter stated that assuming the speed was 30 miles at the moment of impact after skidding for 83 feet, the speed at the moment of inception of the skid would have been 50 miles an hour (Tr. 248). He further stated that if the plaintiff's car was going 40 miles an hour at the moment of the impact, then the speed at the inception of the skid would have been 57½ miles an hour (Tr. 250). It is rather interesting to note that when it was called to Professor Carter's attention that the skid marks were 85 feet instead of 83 feet, and the speed at the moment of impact was 30 miles per hour, he still tried to assist plaintiff in trying to say that it would not make much difference but finally admitted that 85 feet of skid marks would indicate a speed of 51 miles per hour. His answer was: "That two feet does not make much difference. The 85 feet would represent 51 miles an hour, to be specific" (Tr. 256).

Considering the testimony of Mrs. Archibald, who estimated the speed at the time of the impact to be 40 miles an hour, and that of head brakeman Turley, who estimated the speed of plaintiff's car as it came along the highway to be 60 miles an hour, plus this admission of Professor Carter that 85 feet of skid marks would indicate at least 51 miles an hour, there was ample evidence from which the jury could conclude that plaintiff was exceeding the speed limit of 50 miles an hour.

For the purpose of further argument let us admit that plaintiff's speed at the moment of the inception of the skid was 50 miles an hour and at the moment of impact 30 miles an hour. Plaintiff would have been traveling an average speed of 40 miles an hour over the last 85 feet, and approximately 50 miles an hour for some distance prior to the inception of the skidding of his car. At the moment of impact the defendant's freight car was some 12 to 14 feet from the southeasterly edge of the pavement, Mr. Squires testifying that it was at least six feet on the pavement when he yelled, Mr. Hickman saying it was half or more over his lane, and the measurement on the car indicating that the point of impact was at least eight feet back from the forward end. Assuming for purpose of argument that the front of the car was therefore 13 feet from the southeast edge of the pavement, we would then have the following situation: the freight car had traveled over this 13 feet of pavement, plus eight feet of shoulder, at the rate of two miles an hour; at two miles an hour or 2.9 feet per second it would take slightly in excess of seven seconds for the freight car to travel this 21 feet; at an average of 40 miles an hour, which is 58.67 feet per second, it would take plaintiff's automobile 1.44 seconds to go the 85 feet through which the car skidded, and in the remaining time out of the seven seconds or in the other 5.56 seconds when plaintiff's car was going 50 miles an hour, plaintiff's automobile would have traveled over 407 feet. Therefore, taking the evidence in the light most favorable to plaintiff rather than as we are required to on this appeal, most favorable to the view that would uphold the verdict, the plaintiff in his automobile traveled over 492

feet while the defendant's freight car was traveling the distance of 21 feet over the 8-foot shoulder and 13 feet of pavement to the point it had reached at the moment of impact. This disregards the additional distance of 40 feet traveled by the beet car from the canal bridge during which plaintiff should have seen the freight car approaching from the opposite side of the canal bridge had his lights shown from fence to fence as he said they would have done on high beam, the only difficulty being that plaintiff would have been so much farther down the highway that he would not have been close enough to see the freight car crossing the canal bridge no matter how far ahead his light may have shown. Nevertheless, while the freight car was traveling the 21 feet over the shoulder and pavement to the point of impact, plaintiff's automobile traveled over 492 feet. Plaintiff's witness Professor Carter in response to a question as to the distance necessary to bring an automobile to a stop from 50 miles an hour answered that it would take 128 feet to bring the automobile to a stop without skidding the wheels (Tr. 248). The testimony also shows from Mr. Hickman himself that an automobile would travel 55 feet during the reaction time or thinking time necessary before one can apply the brakes after seeing an object ahead when traveling at 50 miles an hour (Tr. 288). Thus at 50 miles an hour, if plaintiff had seen the train, he could have reacted and brought his automobile to a stop in 183 feet.

Assuming again the most favorable conclusion from the record in favor of plaintiff, that during the last 85 feet he traveled an average of 40 miles an hour and approximately 50 miles an hour prior to that time, plaintiff would cover

the distance of 183 feet in 2.85 seconds. (At 40 miles an hour it would take 1.44 seconds to go 85 feet and at 50 miles an hour it would take 1.41 seconds to go the remaining 98 feet.) In other words, at the speed plaintiff was traveling under his own testimony, when combined with that of his expert Professor Carter, allowing reaction time and stopping time, he could have brought his automobile to a stop in 183 feet, and at the speed he was traveling he covered that distance in 2.85 seconds. In 2.85 seconds defendant's train, going at two miles an hour, would travel approximately 8.38 feet. The fact that the plaintiff's automobile struck the freight car eight feet from the end thereof shows that the end of this freight car was directly in front of the plaintiff in the center of his lane of travel at approximately the moment when plaintiff was 183 feet away, at a time when had plaintiff seen it he could have brought his vehicle to a stop and avoided the accident.

We do not mean to hold plaintiff to mathematical exactness, but during the time that the defendant's freight car was proceeding over the south half of the pavement, five or six feet thereof, in addition to the time that the freight car was proceeding over eight feet of shoulder, plaintiff should have seen the freight car and brought his automobile to a stop or slowed it down so that he could bring it to a stop. Again we repeat, the end of the freight car was at least in the middle of plaintiff's lane of traffic, directly ahead of him, at a time when if he had looked and seen it he could have brought his automobile to a stop under his own testimony and under that of his expert Mr. Carter. Prior to that time the freight car had traveled over at least $5\frac{1}{2}$ feet of

the pavement, and with the freight car going two miles an hour and plaintiff's automobile going 50 miles an hour during the time the freight car was traveling over that 5½ feet, plaintiff's automobile would have been traveling over an additional 137.5 feet. In other words, taking the figures and the speeds which are most favorable to plaintiff, the plaintiff traveled over a distance in excess of 320 feet in his approach to the crossing after the moment the freight car entered upon the actual pavement. If we add to that the distance of eight feet of shoulder, the plaintiff at 25 times the speed of the defendant's freight car would travel an additional 200 feet, or at the moment the freight car entered upon the shoulder adjoining the pavement, the plaintiff was considerably in excess of 500 feet away. If the jury believed brakeman Turley's testimony that plaintiff was traveling 60 miles an hour, this distance would be much greater.

These are mathematical calculations based upon the evidence in the light most favorable to plaintiff, and in view of them it is inconceivable how any conclusion could have been reached but that the plaintiff either failed to look or failed to heed what he saw, or was driving at such an exorbitant rate of speed that his vehicle was hurtling into the night far beyond the range of any safe vision which he had. Squires confirms Turley in indicating that plaintiff's speed was in excess of 50 miles an hour where he states that he took the plaintiff Hickman and his attorney to the scene of the accident, pointed out the approximate point where he had yelled to Hickman, and then with his car at 50 miles per hour demonstrated to them that he could stop before reaching the track (Tr. 315, 316).

From these facts the jury was warranted in believing that the defendant's freight car was upon and occupying the highway for much more than ample time for plaintiff to have seen it and stopped had he been keeping a proper lookout with his auto under control.

This case on these facts is not new as far as this court is concerned but is very similar to the case of *Haarstrich v. Oregon Short Line R. Co.*, 70 Utah 552, 262 P. 100. In that case it was a guest in the car rather than the driver who was plaintiff, and it was determined that the driver's negligence could not be imputed to the plaintiff. This court however held that in spite of any claimed negligence on behalf of the defendant the negligence of the driver of the automobile was the sole, proximate cause of the accident, and while the court did not directly so find, it seriously questioned whether or not the defendant could have been charged with negligence at all. In that case the defendant railroad company was backing a gondola car across the highway. The gondola car was black and dark—the one in the case at bar was similar to the gondola except that it was red, and different from the usual gondola had high beet-rack sides (See Exhibit B). In that case it was claimed by the plaintiff that “suddenly and without any previous warning, whistle, bell, or other signal, defendant negligently and carelessly” backed a string of cars over the highway. It was also alleged “that there was neither switchman, brakeman, nor light on the said gondola car, and no flagman at said crossing, and when the front end of said car entered Beck street and crossing the said automobile was so close that in spite of every effort on the part of the driver of said auto-

mobile to stop or swerve out of the path of said gondola car, the said automobile collided therewith, * * *.”

In that case the driver of the car did attempt to turn with the train to try and avoid the collision. In the case at bar the plaintiff made no attempt whatsoever to turn in spite of the fact that a roadway entered the highway from the north with a wide graveled approach at a 45-degree angle (See Exhibits 1, 2 and 3). The only explanation that the plaintiff in this case made concerning his failure to turn one way or the other was: “I did not know how far I was from the track *and I thought I could stop*” (Tr. 295). (Italics ours.)

In the Haarstrich case it was determined that the gondola car was moving five or six miles an hour and the automobile in which plaintiff was riding 25 or 30. Thus it was determined that the automobile was traveling five times as fast as the freight car. In the case at bar there is no escape from the testimony other than to conclude that the plaintiff’s automobile was traveling 20 to 25 times as fast as the freight car. In the Haarstrich case the automobile struck the gondola 26 feet behind the front end thereof, whereas in the case at bar the plaintiff’s automobile struck the beet car eight feet from the front, but by comparing the speeds of the freight cars and the vehicles involved, the eight feet in the case at bar would be comparable to five times that amount when comparing it with the Haarstrich case.

Apparently in the Haarstrich case, just as in the case at bar, it was the guest and not the driver who saw the train first and yelled, “There is a train.”

In the Haarstrich case this court said, after referring to speeds and distances :

“* * * The decisive question therefore is, At what point on the highway was the automobile when the defendant's car entered upon the paved highway? * * *”

Inasmuch as the automobile was traveling five times the speed of the freight car, it was determined that the automobile was 210 feet from the crossing at the time the freight car entered upon the pavement. In the case at bar the measurements and other testimony show that the defendant's beet car had traveled at least 13 feet over the pavement at the point of impact, and even had the plaintiff's automobile been going only 40 miles an hour for the entire distance, that would have been 20 times the speed of two miles an hour which the freight car was traveling, and on that basis during the time the freight car traveled the 13 feet the plaintiff's car would travel 260 feet. If we take the 50-mile an hour figure, the plaintiff's car was going 25 times the speed of the freight car, and while the freight car was going the 13 feet over the pavement, plaintiff's automobile would go 325 feet. If we take brakeman Turley's testimony that plaintiff's automobile was going 60 miles an hour or 30 times the speed of the freight car, and the jury was entitled to and may have believed that testimony, then plaintiff's automobile was 390 feet from the crossing when defendant's beet car entered upon the pavement. And in all of this, plaintiff's own evidence shows that at 50 miles an hour—the speed he claimed to have been traveling—his automobile could have been brought to a stop in 128 feet plus such time as

was necessary for reaction, which he estimated to be 55 feet. There is no escape from the conclusion from these facts that the defendant's car was upon the highway during the time when plaintiff was traveling at least double the distance which would have been necessary to react and bring his automobile to a stop. The conclusion of this court in the Haarstrich case is very applicable wherein the court said :

“* * * In view of the indubitable facts disclosed by the evidence, it is wholly immaterial whether the defendant strictly complied with the law as to warnings and signals. Its failure in that regard, if there was a failure, which is very doubtful, had nothing whatever to do with the accident and was in no sense the proximate cause of plaintiff's injury.
* * *

The Haarstrich case is so comparable in its facts to the case at bar that in the opinion of respondent it should be controlling. There are other things, however, which in respondent's opinion have an additional bearing upon the question of the plaintiff's negligence and we think they should be pointed out to the court, disregarding for the time being any question of the defendant's negligence.

The plaintiff himself testified, “This car was about half-way into my lane of traffic, or a little more, when I first observed it” (Tr. 229). Therefore, the freight car had traveled for at least six feet over the pavement before the plaintiff ever saw it. During this time plaintiff had been traveling 25 times as fast as the freight car had. What had he been doing? Had he been looking in his rear view mirror watch-

ing the highway patrolman, or what else had he been doing that had prevented him from seeing the freight car? At 25 times the speed the freight car was traveling, the plaintiff had thus traveled 150 feet after the freight car entered upon the pavement before plaintiff saw the freight car. What was the reason plaintiff had not seen the approaching freight car while traveling over that six feet of pavement or over the adjoining eight feet of shoulder? Was it because plaintiff dimmed his lights 1500 feet away and then continued at 50 miles an hour while, according to his own testimony, his lights on dim would not show an object more than 75 or 100 feet ahead of him on the highway, and when there was no approaching vehicle closer than 3,000 feet away? This admission on the part of the plaintiff that he traveled the 1500 feet to the crossing with his lights on dim without reducing his speed from 50 miles an hour is astounding. At 50 miles an hour an object travels 73.33 feet a second, and it takes three-quarters of a second or 55 feet for a person to react when he sees something, and yet in spite of that fact and in spite of the fact that it would take 128 feet to stop his vehicle at such speed, plaintiff continued at 50 miles an hour with his lights on low beam clear up to the point of the collision.

Cache County is a well known dairy section. There are a lot of cattle and horses in the county and in the vicinity where this accident occurred (Tr. 288). There were homes in the vicinity and at least two side roads approaching and intersecting Highway 91 from each direction in the immediate vicinity of the crossing (Tr. 289, Exhibit 1). If a person or an animal had been on the road, the plaintiff would

not have been able to stop and would have hit it just as he did the train. The attitude of the plaintiff is shown by the plaintiff's response to a question asked of him as to whether or not he would have hit a person if the person had been on the road. His answer was, "They would be able to see my lights," and he would depend upon their seeing his lights and getting out of his way (Tr. 293). The conclusion is inescapable that the plaintiff was not driving his automobile as a reasonable man would have done, and when there was no necessity under the statute to dim his lights, he dimmed them and continued at a high rate of speed, and contrary to statute, he did not, as Section 57-7-197 requires, use a distribution of light or composite beam directed high enough and of sufficient intensity to reveal persons and vehicles a sufficient distance in advance of his automobile.

Another case decided by this court that can be given application under the facts of this case is that of *Dalley v. Mid-Western Dairy Products Co.*, 80 Utah 331, 15 P. 2d 309. The evidence in that case showed that the plaintiff's automobile was equipped with good lights and four-wheel brakes in good condition. His lights would disclose ordinary objects about 100 feet ahead and 10 feet to the side of the road. The traveled portion of the road was about 20 feet wide, smooth and level. The plaintiff drove his automobile into the rear of a truck parked on the righthand side of the roadway with no lights. Plaintiff was traveling about 25 miles an hour and did not see the truck until he was within 15 or 20 feet of it. Had he seen the truck sooner he could have turned out to miss it or could have stopped. The road over which he was traveling was straight for a mile or more before he reached

the place where the truck was standing, and was also straight for a mile beyond where the truck was standing, just as was true in the case at bar. The highway over which he was traveling was much frequented; he was aware that there may be persons walking or riding on horseback or in horse-drawn vehicles along the highway. He claimed to have been keeping a lookout ahead but nevertheless did not see the truck until he was 15 or 20 feet from it.

This court sustained the trial court in granting a motion of nonsuit and dismissing plaintiff's complaint, and in doing so stated :

"In this jurisdiction the doctrine is established 'that it is negligence as matter of law for a person to drive and automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him.' In the case of *Nikoleropoulos v. Ramsey*, 61 Utah 465, 214 P. 304, the language just quoted is said to be a correct statement of the law and that the refusal of the trial court to so instruct the jury was prejudicial error. In the case of *O'Brien v. Alston*, 61 Utah 368, 213 P. 791, 792, it is said :

" 'But entirely apart from any statutory requirements, the law requires that, if a person desires to operate his automobile on the public streets or highways after dark, he must see to it that it is equipped with proper, suitable, and sufficient lights, so that the operator may discover any objects or obstructions that may be encountered on the highway. The law in that regard is clearly and tersely stated in *Serfas v. Lehigh, etc., Ry. Co.*, 270 Pa. 306, 113 A. 370, 14 A. L. R. 791, where the court, in speaking of

the duty of the operator of an automobile to have the same equipped with proper lights, said:

“ ‘ “* * * It is the duty of a chauffeur traveling by night to have such a headlight as will enable him to see in advance the face of the highway and to discover grade crossings, or other obstacles in his path, in time for his own safety, and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision.’ ”

“ ‘In the case of *Lauson v. Fon du Lac*, (Wis.) 123 N. W. 629, the law is stated in the headnote as follows:

“ ‘ “Independent of any statute, it is negligence to run an automobile on a highway at night without sufficient lights to enable the driver to see objects ahead of him in time to avoid them.” ’ ”

(Numerous similar cases cited.)

The plaintiff had testified that he was keeping a lookout ahead, but the court determined that physical facts showed otherwise. The court stated:

“* * * As plaintiff approached the place where the truck was standing on the night in question, the highway was straight and level for a distance of at least a mile. The truck was directly in front of him and in his course of travel. According to his testimony he was keeping a constant lookout ahead. If he was not keeping a lookout ahead, he was guilty of negligence in failing to do so. There was nothing to obstruct his view. It was an ordinary, clear, quiet summer night with no moon. So far as appears there was nothing to divert his attention from the road in front of him. * * * In such case it must inevitably follow that plaintiff did not keep a lookout ahead, or, if he did, he either did not heed what he saw or he could not see the truck because his lights were not such as were prescribed by

law. No matter which horn of the dilemma is taken, the result is the same, viz., plaintiff was negligent. Had plaintiff seen the truck 50 or more feet before he reached the place where it was parked, he could, according to his testimony, have avoided the accident. It follows that his failure to discover the truck sooner was a proximate cause of the accident and resulting injury. * * *

“What we conceive to be the weight of authority is in accord with the rule which prevails in this jurisdiction. The rule is also well established in this in common with other jurisdictions, that where the evidence relied upon by the plaintiff to establish some material issue of his alleged cause of action is inherently impossible of being true in the light of facts which are established beyond controversy, then and in such case it becomes the duty of the court to take the cause from the jury and deny plaintiff the relief prayed. *Wilkinson v. Oregon Short Line R. Co.*, 35 Utah 110, 99 P. 466; *Oswald v. Utah Light & Ry. Co.*, 39 Utah 245, 117 P. 46; *Lawrence v. Denver & R. G. R. Co.*, 52 Utah 414, 174 P. 817; *O'Brien v. Alston*, supra; *McCarthy v. Bangor & Aroostook R. Co.*, 112 Me. 1, 90 A. 490, L. R. A. 1915B, 140.”

This *Dalley v. Mid-Western* case has been cited and discussed in a number of cases in this court since it was originally given. In *Hansen v. Clyde*, 89 Utah 31, 56 P. 2d 1366, Justice Wolfe in a dissenting opinion questioned the *Dalley v. Mid-Western* decision and said:

“* * * When the point decided in that case directly comes before this court in some future case, I hope to pay my respects to it. * * *”

However, in that dissenting opinion Justice Wolfe referred to the fact and made the basis of his distinction the

fact that in the case of *Nikoleropoulos v. Ramsey*, 61 Utah 465, 214 P. 304, the man struck was lawfully and rightfully on the highway, while in the Dalley case it was a violation of the law to have the truck as it was left on the highway. He said:

“* * * I think the traveler should be given the benefit of some presumption that others have not wrongfully obstructed the highway. Be that as it may, at this juncture the state of the law in this jurisdiction is that Bosone was negligent. * * *”

Bosone had turned onto a new strip of highway and then swerved to miss an unlighted barricade which defendants had erected, and in swerving to the other side Bosone collided with the plaintiff.

In this Hickman case now before the court the railroad company was not wrongfully upon the highway. It was not violating any law in crossing the highway but had an absolute right to proceed over the highway as it was doing. Hickman was well acquainted with the crossing, knew it was there, and was bound to anticipate that trains or cars might be on the crossing.

There is testimony in the case at bar from the plaintiff and from some of his witnesses that they did not hear any whistle or bell. However, the testimony of the train crew is very definite that the whistle was sounded as the movement started over the highway and that the bell was ringing continuously. It is not likely that the plaintiff did hear the whistle as given nor that he would have heard the ringing bell. The train had traveled over 60 feet after it started into

this highway before the collision, and at the time the train started, when the whistle was sounded, plaintiff would have been too far away to hear it anyway, and at the speed he was traveling, with the hum of his tires and the roar of his motor, as testified to by brakeman Belnap (Tr. 358, 359), it is very unlikely that he would have heard a bell regardless of how much it was rung on the engine eight car lengths away from the highway.

Plaintiff may contend that the defendant was not lawfully on the highway, but before starting across the highway the train was brought to a complete stop, and the rear brakeman, as well as other members of the crew, gave convincing testimony that no automobiles were then in sight. The rear brakeman himself was on the highway flagging approaching traffic, and according to his testimony, was doing all he could to warn the plaintiff and flag him down. The roar of the motor and the hum of plaintiff's tires called Belnap's attention to the approach of the car to such an extent that in his efforts to flag he did not even know of the approach of Mrs. Archibald (Tr. 358). If the jury believed this testimony—which they were entitled to believe—there can be no possible doubt but what the railroad company had an absolute right to proceed as it was proceeding, and it was not violating any law whatsoever in doing so and was not guilty of negligence under the circumstances.

Justice Wolfe in a concurring opinion in *Bullock v. Luke*, 98 Utah 501, 98 P. 2d 350, again questions the *Dalley v. Mid-Western* case and refers to his opinion in *Hansen v. Clyde*, and also to the distinction in situations where the stage has been set (as he says referring to the *Dalley* case), and where

the situation is a rapidly changing one. In the case at bar the situation was a changing one; however, with respect to the freight car was not changing rapidly. In the Bullock case Justice Wolfe stated another illustration as "where one enters the intersection definitely with the right-of-way and with due care in relation to any other also exercising due care and assumes his right-of-way to his injury. He should be allowed to recover." It is very definite that the train of the defendant in this case entered the intersection "definitely with the right-of-way and with due care in relation to any other also exercising due care." The defendant should be entitled to recover here in the sense that the claim of the plaintiff should not prevail.

In the case at bar it is demonstrated that anyone else entering the intersection "also exercising due care" had nothing to fear. Mrs. Archibald was approaching this crossing at the same rate of speed the plaintiff was. Mrs. Archibald saw the flagman's lantern (Tr. 197) and saw the train in time to bring her vehicle to a stop and to avoid any collision with it, and Mrs. Archibald saw the outline of the train or the approaching car because plaintiff's lights shown upon it (Tr. 190½, 207), and also saw brakeman Belnap because plaintiff's lights shone upon him (Tr. 197). Thus plaintiff's lights would include some spread of the highway even though he testified that on dim, as he was traveling, they would show only 75 to 100 feet ahead.

In the Bullock case Justice Wolfe went on to say:

"In this case Bullock was driving per se negligently; that is, in relation to another exercising due care. His driving would have been negligent if Luke

had been nowhere near, although it might then have resulted in no harm. * * *"

In this Hickman case it would have been negligence for Hickman to drive as he did even if the train had been nowhere around or if the beet car struck had instead been a person or an animal.

In the case of *Nielsen v. Watanabe*, 90 Utah 401, 62 P. 2d 117, where the question was raised on demurrer, the plaintiff had collided with a parked truck immediately after being blinded by the lights of another car. This court said of the Dalley case and other similar cases :

"* * * None of the cited cases are controlling of the case at hand. The complaint here questioned is silent as to whether the highway near where the truck was parked is straight or crooked, level, or otherwise. If the truck could not, because of some obstruction, be seen as plaintiff and her husband approached it prior to the time they were blinded, and if plaintiff's husband was driving at a lawful rate of speed an automobile properly equipped with lights and brakes without any reason to believe the headlights of another automobile would suddenly or unexpectedly blind him; that while so blinded the collision occurred without time for him to reduce his speed or stop his automobile, the rule announced in the cases relied upon by defendant and heretofore cited in this opinion would not apply. Under such circumstances it may not be said that plaintiff's husband was, as a matter of law, guilty of contributory negligence. * * *"

On the other hand, if one is momentarily blinded and does have time to reduce his speed or stop and fails to do so,

then he can be held guilty of negligence as a matter of law. What then would be the rule with respect to a man who is not blinded by the lights of an approaching automobile but who, when an automobile is 3000 or more feet away from him, dims his lights so he can see only 75 to 100 feet ahead of him and then without slackening speed, hurtles through the night at a speed of 50 miles an hour or more into collision with something that had he not had his lights on dim or had he slackened his speed when he dimmed his lights, he would have seen in ample time to have brought his car to a stop without any difficulty. Respondent earnestly contends that under such a situation such a driver should be held contributorily negligent as a matter of law. In the case at bar, however, in spite of a motion for directed verdict, the court submitted the matter to a jury, and the jury, either on the basis of sole negligence on the part of the plaintiff or at least on the basis of contributory negligence, decided against him.

In spite of the questions that have been raised with respect to the *Dalley v. Mid-Western* case, it has not as yet been overruled but some of these distinctions have been pointed out.

In the case of *Moss v. Christensen-Gardner, Inc.*, 98 Utah 253, 98 P. 2d 363, this court refers to and quotes from the *Watanabe* case and also refers to the rule of the *Dalley* case. The rule of the *Dalley* case was not changed there. It was not overruled but distinguished from the facts set up in the *Moss* case.

In *Olson v. Denver & R. G. W. R. Co.*, 98 Utah 208, 98 P. 2d 944, which involved running into a caboose standing across a city street in Price, the trial court had given judg-

ment for the plaintiff. This court reversed the trial court, citing both the Haarstrich case and the Dalley case, as well as the Ramsey case. This court in citing the Dalley and Ramsey cases said:

“* * * While a railroad company is not excused from exercising reasonable care to prevent collisions and while many conditions may exist which should put them on notice that motorists might be endangered and therefore enjoin on them the positive duty to give warning, *yet when they are using their right-of-ways in a careful and lawful manner they have a right to presume that motorists on crossing streets will proceed carefully and lawfully and will drive with their cars in such control as to be able to stop within the distance at which they can see objects ahead.* * * * We hold in conformance with what appears to us to be the great weight of authority that the presence of a train on a track itself furnishes a warning to motorists, unless conditions exist which should cause the train crew to realize that motorists might not see the cars, in which event some additional warning may be required to satisfy the standard of due care.” (Italics ours.)

In this Hickman case there was competent evidence from which the jury could conclude that the night was a bright moonlight night, the sky was clear and the moon had been up for approximately an hour (Exhibit 9). The train crew stopped the train movement as it came to the edge of the highway right-of-way and then proceeded very slowly, evidently having in mind that at the slow speed an approaching vehicle could more than likely pass around the end of the car if it was coming too fast to stop, and if not, and if the cars had proceeded far enough across the highway to

block it, then any approaching vehicle with proper lights, driving at a proper rate of speed, should be able to see the cars upon the highway. This was not all. The rear brakeman stopped the movement and let some approaching automobiles go by so that when he started the movement across there was not an automobile in sight upon a straight street extending over a mile in either direction (Tr. 356, 357). That was not all. The brakeman stood on the highway—it matters not whether the center or the edge—and waved his lantern, and from the testimony of brakeman Belnap the jury had competent evidence, if it chose to believe it, from which it could conclude that the brakeman did all he could in waving the lantern so that approaching vehicles from either direction could see it (Tr. 361). Brakeman Belnap continued to wave such lantern until, as he said, “I got out of his way and kept from getting killed” (Tr. 363).

The most recent case in which the *Dalley v. Mid-Western Dairy* case has been referred to is the case of *Horsley v. Robinson*, . . . Utah . . ., 186 P. 2d 592. In that case the defendant's bus was being operated on a highway at such a speed that it could not be stopped when an automobile skidded in front of it. Referring to the *Nikoleropoulos v. Ramsey* case, the court said:

“* * * We held that defendant was negligent as a matter of law, no matter how dark and stormy the night or how bad the visibility, if he drove at such a rate of speed that he was unable to avoid running plaintiff down within the distance plaintiff could be seen walking ahead of defendant's car on the highway. To the same effect see: *Dalley v. Mid-Western Dairy Products Co.*, 80 Utah 331,

15 P. 2d 309; *Haarstrich v. Oregon Short Line R. Co.*, 70 Utah 552, 262 P. 100; *O'Brien v. Alston*, 61 Utah 368, 213 P. 791."

This court further stated in the case of *Horsley v. Robinson*:

"The *Nikoleropoulos v. Ramsey* case is in substance a holding that it is negligence to operate a vehicle on the highway at any time without having it under sufficient control so that others using the highway will not be unreasonably endangered thereby, regardless of how slow it is required to travel to accomplish that end. If that is the rule where visibility is involved, it follows that the same rule applies where the lack of control which endangers others is the result of slippery roads and stormy conditions. * * *

If that is the rule where visibility is involved, then the rule should be directly applicable to this *Hickman* case where on a man's own testimony he dimmed his lights contrary to statute when there was no necessity to do so and continued traveling at a speed of 50 miles an hour when with such dimmed lights he could only see 75 to 100 feet ahead of him, and neither turned his lights back to high beam nor slackened the speed of his car until it was too late to avoid a collision with defendant's train, which had completely covered his side of the highway and a portion of the other side.

Under the *Haarstrich* case, and under the *Dalley* case as it has been discussed and referred to in these other cases, the plaintiff, *Othello Hickman*, should have been held guilty of negligence as a matter of law on his own testimony. Clearly when the matter was submitted to a jury and a jury

decided against him, there is more than substantial evidence in this record to sustain the verdict of the jury and the judgment based thereon.

In addition to the foregoing cases, we wish to call the court's attention to the following cases decided in this court, all of which would have some bearing upon the issues herein and would assist this court in determining whether or not from the evidence introduced at the trial there was sufficient to warrant a jury in finding that the plaintiff was guilty of contributory negligence:

Nabrotsky v. Salt Lake & Utah R. Co., 103 Utah 274, 135 P. 2d 115.

Nuttall v. Denver & R. G. W. R. Co., 98 Utah 383, 99 P. 2d 15.

Drummond v. Union Pacific R. Co., . . . Utah . . . , 177 P. 2d 903.

Van Wagoner v. Union Pacific R. Co., . . . Utah . . . , 186 P. 2d 293.

Similar cases from other jurisdictions upon the same subject matter are very numerous, but we cite the following as a few which may be of some assistance to the court:

Sailors v. Lowden, (Neb.) 299 N. W. 510.

Shepard v. Thompson, (Kan.) 109 P. 2d 126.

Louisville & N. R. Co. v. Reynolds, (Ky.) 202 S. W. 2d 997.

Fleming v. Loch, (Okla.) 195 P. 2d 942.

Kurn v. Jones, (Okla.) 101 P. 2d 242.

Kennedy v. Laramee, (Vt.) 61 A. 2d 547.

Jones v. Pennsylvania R. Co., (Del.) 61 A. 2d 691.

Chicago, B. & Q. R. Co. v. Ruan Transportation Corp., (8th Circuit Iowa) 171 F. 2d 781.

Evans v. Georgia Northern R. Co., (Ga.) 52 S. E. 2d 28.

Cleveland, C. C. & St. L. Ry. Co. v. Gillespie, (Ind.) 173 N. E. 708.

Schrader v. N. Y. C. & St. L. R. Co., (N. Y.) 172 N. E. 272.

Doty v. Southern Pacific, (Ariz.) 129 P. 2d 991.

With respect to the question of defendant's negligence, we would like to refer the court to the complaint. In paragraph II of the complaint, page 1 of the transcript, the plaintiff charges the defendant with negligence "in that it failed to keep a careful or any lookout for automobiles crossing said track, in failing to observe Plaintiff's said automobile and in failing to have any light on said train; that Defendant was further careless and negligent in the operation of said locomotive and train in not causing the bell upon said locomotive to be rung, or its whistle or siren blown, or to give any other signal or warning of the presence or approach of said locomotive train and cars at any point within sight or hearing of said crossing."

There is testimony from the defendant's witnesses which cannot be disputed that the bell was being rung continuously. The fact the plaintiff and his witnesses did not hear it would not be controlling because the testimony does not show that any of such witnesses were in a position to have heard the bell, and lack of whistle or bell could not have been in any way a proximate cause of the accident involved in this case.

It is charged that the defendant “failed to keep a careful or any lookout.” There is no evidence of failure to keep or maintain any lookout. On the contrary, the only evidence in the case indicates that there was a careful lookout kept and maintained by all the members of the crew. They stopped at the edge of the highway to let approaching traffic go by, and as the movement started no car was in sight in either direction. The flagman Belnap observed plaintiff’s car coming and tried to flag him. The head brakeman observed the car and watched it, estimating the speed as it traveled broadside to his view to be 60 miles an hour. The engineer saw and observed the approaching automobile. All of the testimony indicates that a careful lookout was kept.

With respect to this question of lookout, we would like to refer the court to the case of *Van Wagoner v. Union Pacific R. Co.*, . . . Utah . . . , 186 P. 2d 293, where it was claimed that a proper lookout was not maintained, and wherein this court held that the only direct evidence in this case indicated that the train crew was keeping a proper lookout.

This leaves the charges of negligence in plaintiff’s complaint as being only “failing to have any light on said train * * * or to give any other signal or warning of the presence or approach of said locomotive train and cars at any point within sight or hearing of said crossing.”

The law does not require that defendant have lights on its freight trains. However, if there is no light, and if circumstances and conditions are such as would require more

than statutory warnings, the matter may be submitted to a jury for a jury to determine if the railroad company should have done something more than it did do to warn approaching travelers and give them protection at the crossing. In this case there was competent testimony which the jury could have believed that a flagman was on the crossing with his brakeman's lantern doing all he could to warn approaching traffic, and particularly the plaintiff. Thus, from the evidence in this case on this question of the failure to do something more, there was ample evidence from which the jury could have believed that the defendant railroad company did attempt to give warning and did all that was reasonably necessary of it, and the jury from such evidence could thus have found that the defendant was not negligent in any respect.

REPLY TO APPELLANT'S ARGUMENT UNDER SPECIFIC ASSIGNMENTS OF ERROR

ASSIGNMENTS 1 AND 2 CONCERNING ADMISSIBILITY OF PHOTOGRAPHS.

In his assignments of errors Nos. 1 and 2, appellant complains that the court erred in admitting over plaintiff's objection the pictures introduced as defendant's Exhibits 2, 3, 4, 5 and 6, and in refusing to strike the photographs from the record after their admission.

The witness Benny Degn, a photographer produced by plaintiff himself, admitted that the Exhibits 2, 3, 4, 5 and 6 were a fair representation of the surrounding territory and approach to the crossing at the time of the accident (Tr. 130-134). Plaintiff's brother, V. L. Hickman, admitted

the same with respect to Exhibit 2 (Tr. 146). The defendant produced M. E. Goodnow, who had been up to the scene of the accident shortly after it occurred, and he likewise stated that the pictures fairly reflected the view one could see at the time of the accident (Tr. 382).

Wigmore, Third Edition, Vol. III, Sec. 792, page 178:

“A photograph, like a map or diagram, is a witness’ pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words. Its use for this purpose is sanctioned beyond question.”

And again in subparagraph (3) of Sec. 792, page 185:

“The objection that a photograph may be so made as to misrepresent the object is genuinely directed against its testimonial soundness; but it is of no validity. It is true that a photograph can be deliberately so taken as to convey the most false impression of the object. But so also can any witness lie in his words. * * * If a qualified observer is found to say, ‘This photograph represents the fact as I saw it,’ there is no more reason to exclude it than if he had said, ‘The following words represent the fact as I saw it,’ which is always in effect the tenor of a witness’ oath. * * *”

The question of admissibility of such photographs was passed upon favorably by this court in a rather early case. The case of *Dederichs v. Salt Lake City R. Co.*, 14 Utah 137, 46 P. 656, involved a collision between an electric traction car and a horse and wagon. The matter was tried twice and came to this court on appeal twice. On the second trial the defendant offered in evidence three photographs showing

the surroundings and locality where the accident had occurred. These photographs had been taken three and one-half years after the accident, but the plaintiff testified that there was no difference in the conditions existing at the time the pictures were taken from those surrounding the accident at the time it happened "and that the situation was the same as shown on the photographs that it was at the time of the accident. * * * These photographs exhibited the surface condition of the streets, buildings, trees, cars, railroad track, poles, and distances * * *". The trial court on objection refused to admit the photographs in evidence and the case was appealed on this ground alone and reversed by this court. This court held such photographs to be admissible on the basis that they had been verified by the testimony of witnesses to be a correct representation of the locality of the accident. In that connection this court stated:

"If any difference had arisen concerning the photographs being taken at a different season of the year, it could have been explained. * * *"

The same ruling was made by this court in the case of *Johnson v. Union Pacific R. Co.*, 35 Utah 285, 100 P. 390.

Counsel has not found many cases where the matter has been raised before this court. However, the question has been raised numerous times in other jurisdictions. A recent Montana case, *Pilgeram v. Haas*, (Mont.) 167 P. 2d 339, involved a highway collision between plaintiff's automobile and defendant's large truck-trailer combination. The trial court there admitted in evidence photographs of the vicinity where the collision occurred, and on appeal this was charged

as error. The Montana Supreme Court held the photographs were properly admitted, stating with respect to the witness who identified the photographs:

“* * * He further testified that although he did not take the photograph it was nevertheless a correct representation of the surface of the highway at and near the place of the collision in the evening of the 25th day of May, 1942. Where the nature or condition of a place becomes a matter of controversy in a civil action, photographs of the place shown to be true representations of it at the time in question are generally admissible in evidence. Photographs may be proved to be correct representations by witnesses other than the person who took them. * * *”

In the case at bar plaintiff complains that one of the witnesses testified that at the time of the accident brush along the track was high. If plaintiff had contended that because of high brush along the railroad right-of-way out in the field he was unable to see the train, then plaintiff might have some reason to complain, or at least show by his own testimony that conditions were different than shown in the photographs, but plaintiff never contended that any high brush or weeds out in the field prevented him from seeing the train. He never saw the train out in the field at all although his passenger Mr. Squires did, and the weeds and brush did not prevent Mr. Squires from seeing the train out in the field. Any weeds or brush could have no effect upon the view plaintiff would have had after the train started over the canal bridge, nor after the train started over the shoulder of the highway, nor at any time after the car started over the pavement, and the car had proceeded

over eight feet of the shoulder of the highway and six feet of pavement while plaintiff was going 350 feet in his automobile before plaintiff ever saw the car at all.

We think the above cases sufficiently answer assignments of error Nos. 1 and 2, but for the court's convenience we refer also to the following cases :

Mason v. Allen, (Ore.) 195 P. 2d 717.

Barone v. Jones, (Cal.) 176 P. 2d 392, 177 P. 2d 30.

Hisaw v. Atchison, T. & S. F. Ry. Co., (Okla.) 169 P. 2d 281.

PLAINTIFF'S ASSIGNMENTS OF ERROR NOS. 3 AND 4 WITH REFERENCE TO THE COURT'S INSTRUCTIONS NOS. 7 AND 9.

Appellant complains of the latter portion of instruction No. 7, but we would like to refer the court to the first paragraph of instruction No. 7, which in the opinion of respondent places a greater burden upon the railroad company than is provided by law. At any rate, in the first paragraph of No. 7 the court sets forth responsibilities of the defendant railroad company for the exercise of due care and instructs the jury that a failure to keep the train under control and anticipate the presence of others or to otherwise fail to exercise due care is negligence. The full last paragraph of instruction No. 7 reads :

“You are instructed that when a railroad company is using its right-of-way in a careful and lawful manner the employees in charge of its trains have a right to presume that motorists approaching on

streets or highways which cross the railroad track will proceed carefully and lawfully, and the railroad company's employees have a right to presume that motorists on the highway will drive with their cars under such control as to be able to stop within the distance at which they can see objects ahead."

Appellant also complains in assignment of error No. 4 that the latter portion of instruction No. 9 was error. However, we should read instruction No. 9 as a whole, which is as follows :

"You are instructed that where a train crew is engaged in a switching movement, such as is involved in this case, the laws of Utah do not require the train crew to put out flares on a highway when crossing such highway at night, nor do they require cars in such train to be lighted or carry any lights upon them. Reasonable care, however, is required and it is for you to determine from all of the facts and circumstances, whether the defendant used reasonable care in the efforts of its employees at the highway crossing as the train moved into the crossing. After the cars of such a train are upon and occupying or passing over a highway the presence of such train or cars lawfully upon such highway is a sufficient warning to approaching travelers and such travelers on the highway are bound to see such train of cars on the highway in time to stop and to avoid colliding therewith."

It will be noted that in both instruction No. 7 and instruction No. 9 the court prefaces the particular wording complained of by appellant with an instruction that "when a railroad company is using its right-of-way in a careful and lawful manner" * * * "the presence of such train

or cars lawfully upon such highway is a sufficient warning to approaching travelers * * *

Appellant states that the foregoing instructions when read together "assume that the train was on the crossing all the time while the plaintiff was a sufficient distance away from the crossing to have looked and stopped before colliding with the defendant's train. They also assume that the railroad cars were lawfully upon the highway." Counsel overlooks the other portions of both of the instructions mentioned which state that the defendant was to use reasonable care as the train moved into the crossing and that if the defendant failed to exercise such care in the operation of the train at the time of the accident, such failure was negligence. These statements are included in the identical instructions of which plaintiff complains and the instructions when read as a whole do not assume anything. There was evidence in the record from which the jury could have found the facts in accordance with defendant's theory that the train was on the highway for sufficient time for plaintiff to have seen it and stopped therefore it was proper for the court to instruct the jury as it did.

We would like to point out to counsel that in the instructions given by a court, the court is required to instruct not only upon any theory of the case which a plaintiff may have but also upon a defendant's theory of the case, assuming proper requests for such instructions are given. Any litigant is entitled to have his theory of the case submitted to the jury. This principle is so well recognized that it would seem to be unnecessary to cite authority with respect thereto.

However, we do call the court's attention to the following cases: *McDonald v. Union Pacific R. Co.*, 109 Utah 493, 167 P. 2d 685; *Pratt v. Utah Light & Traction Co.*, 57 Utah 7, 169 P. 868; *Morgan v. Bingham Stage Line Co.*, 75 Utah 87, 283 P. 160; and *Morrison v. Perry*, 104 Utah 151, 140 P. 2d 772.

The instructions as given did not assume the facts to be one way or the other, but such instructions did allow the jury to determine what the facts were with respect to the matters referred to. It was for the jury to determine whether the defendant used reasonable care in entering upon the highway with its train, and also for the jury to determine whether such train or car was upon the highway for sufficient length of time that the plaintiff should have seen it in time to have brought his automobile to a stop to avoid colliding therewith. The evidence from the plaintiff himself, as well as that from other witnesses, was ample to form a basis from which the jury could determine that the particular car which plaintiff ran into was upon the highway for a sufficient length of time for plaintiff to have seen it and stopped. The defendant's theory of the case was and is that defendant's beet car had entered upon the paved portion of the highway and had been upon such highway for a sufficient length of time that had plaintiff been driving at a reasonable rate of speed with his automobile under proper control and with proper lights, plaintiff would have seen the freight car in plenty of time to have brought his automobile to a stop. That being the case, the employees of the railroad company were entitled to assume that plaintiff would have his car under control and would be able to stop within the distance at which he could see objects ahead. This being

defendant's theory, the defendant was entitled to have the case presented to the jury upon that theory and the jury was entitled to be instructed with respect thereto. If plaintiff takes issue with the law as stated in instruction No. 7, we will merely repeat the quotation given hereinabove from *Olson v. Denver & R. G. W. R. Co.*, 98 Utah 208, 98 P. 2d 944, with respect to railroads at such crossings, that "when they are using their right-of-ways in a careful and lawful manner they have a right to presume that motorists on crossing streets will proceed carefully and lawfully and will drive with their cars in such control as to be able to stop within the distance at which they can see objects ahead."

Instruction No. 7 uses that language almost verbatim and specifically prefaces it with the words, "when a railroad company is using its right-of-way in a careful and lawful manner."

In answer to plaintiff's argument on page 10 of his brief that "there is no evidence in the record that defendant's train was occupying or passing over the highway before plaintiff applied his brakes," we merely refer to the physical facts and measurements and the argument with respect thereto as already given earlier in this brief. Those facts as well as plaintiff's own testimony give overwhelming evidence that defendant's train was occupying and passing over the highway for a considerable time before plaintiff applied his brakes.

Plaintiff cited the case of *Earle v. Salt Lake & Utah R. Corp.*, 109 Utah 111, 165 P. 2d 877. That case did not involve the driver of the car. The question there was solely one

as to whether the guests riding in the car were guilty of contributory negligence as a matter of law, and the court held that with respect to such guests the question of their contributory negligence was for the jury; as also the question as to whether or not the negligence of the driver was the sole proximate cause was held for the jury. In that case it was assumed that the driver himself was negligent, but whatever he did or what he may have seen at the time of the accident was not in evidence. He did not even appear at the trial. In that Earle case at page 881 this court held:

“* * * The duty of a driver to see a train that is approaching a crossing but not in the intersection is not as great as it is to see a train which is on the crossing all the time while he travels an ample distance to see and stop. * * *”

The physical facts and measurements already referred to herein show that the beet car was on the paved portion of the highway during a time that plaintiff traveled over twice the distance necessary for him to have brought his automobile to a stop.

Respondent has no quarrel with the law as cited by appellant to the effect that where there is no evidence an instruction, even though it may be abstractly correct, should not be given, and the cases referred to by counsel—all of them—directly state that there was no evidence on the point upon which the instruction was given. In this case there is ample evidence, which the jury was entitled to believe and was entitled to be instructed upon, showing that the freight car was on the highway in front of the plaintiff in ample

time for plaintiff to have seen it and brought his automobile to a stop. Therefore, there was evidence in this case to which the instructions directly applied and evidence upon which the jury was entitled to be instructed under defendant's theory of the case.

With reference to the cases cited by appellant on pages 12 and 13, we call the court's attention to the fact that only a few of those cases involved personal injuries, and of those that did, there is not one wherein the driver of the vehicle was the plaintiff, so except for the admitted rule that there must be evidence in a case to warrant instructions, the cases are not in point in any manner, and in most of those cases the courts found that there was no evidence either showing or tending to show the matters covered by the instructions. That is not the case here.

In addition to the cases here cited, we wish to refer the court to the Haarstrich case, the Dalley case, and other cases cited earlier in this brief.

We submit that the court did not err in giving instructions 7 and 9 as complained of by plaintiff.

PLAINTIFF'S ASSIGNMENT OF ERROR NO. 5 CONCERNING COURT'S INSTRUCTION NO. 18.

In his argument with respect to instruction No. 18 appellant quibbles over the use of words. Respondent feels that questioning the use of the word "that" in the beginning of each subparagraph of instruction No. 18 amounts to useless quibbling. The court in that instruction says that IF the jury found plaintiff to be contributorily negligent, the

jury must find that one or more of the other matters were true. That is merely another way of stating, "You cannot find the plaintiff guilty of contributory negligence unless you find that the plaintiff did so and so or failed to do so and so." The prefacing of the whole instruction by the words "if you find" submitted the matter to the jury for the jury's determination and did not suggest that the jury should or should not so find, but told the jury that it could not so find the plaintiff to be contributorily negligent unless it found that one or more of the matters stated in the subparagraphs were true.

With respect to plaintiff's argument on subparagraph (a), we are very much surprised at plaintiff's insistence that the jury must believe a certain matter to be true because plaintiff's witness so testified even though other witnesses may have testified to the contrary. Appellant states that the "evidence clearly showed * * * that the employee did not turn his light in the direction from which plaintiff was approaching until after plaintiff had applied his brakes." Appellant forgets that defendant's witness Belnap is entitled to be considered by the jury and that such witness testified that he never even saw Mrs. Archibald approach because he was focusing his attention on the plaintiff, but nevertheless was swinging his lantern in a horizontal position so that it could be seen from each direction, and as the plaintiff approached closer he even ran in plaintiff's direction. Again we repeat the jury was entitled to believe the witness Belnap, and if the jury did believe the witness Belnap then they were entitled to find exactly as was stated in subparagraph (a).

With respect to subparagraphs (d) and (e), appellant complains that the jury may have found that plaintiff was exceeding the speed limit and appellant states: "Yet the evidence in the record shows that he was driving between 45 and 50 miles per hour, a legal rate of speed." *Again we must inform appellant that he cannot ignore evidence that is not favorable to him.* The plaintiff's own witness, Mr. Carter, by his testimony gave sufficient basis for the jury to find that the plaintiff was going at least 51 miles an hour—even if he was going only 30 miles an hour at the point of impact and not 40 as testified to by Mrs. Archibald. The witness Turley, who observed the approach of plaintiff's car with a broadside view, testified that plaintiff was going 60 miles an hour. AGAIN WE MUST REMIND PLAINTIFF THE JURY WAS ENTITLED TO BELIEVE THE WITNESS TURLEY, AND IF THE JURY DID SO, THERE IS NO REASON WHY THIS COURT SHOULD OVERRULE THEM IN THE MATTER.

With respect to subparagraph (g), plaintiff contends that such paragraph assumes that the train was plainly visible to plaintiff. Subparagraph (g) does not so assume, but there was evidence in the record as shown by the mathematical calculations given earlier in this brief, from which the jury could believe that the train was plainly visible to the plaintiff for a sufficient time that he could have stopped, and the jury was entitled to find that as a fact, and in instruction No. 18 they were told, if you find that such was a fact then plaintiff was contributorily negligent.

Appellant says subparagraph (h) assumes that because the plaintiff did not expect the train to be on the track that

for that reason he failed to keep a proper lookout. Subparagraph (h) does not so assume, but the evidence shows that plaintiff's guest saw the train both in the field and on the highway before plaintiff did. It shows from plaintiff's own testimony that the freight car was more than half way on plaintiff's side of the pavement before plaintiff saw it, and it also shows that plaintiff had at least sometime during the progress toward the track been looking in his rear view mirror watching the approaching officer. From this evidence the jury was entitled to find, if they so believed, that the plaintiff was not keeping a proper lookout ahead. He knew of the presence and location of the railroad track. The fact that he did not expect the train to be there—taken into consideration with his looking into the rear view mirror, and other circumstances—formed a sufficient basis to allow the jury to find that he was not keeping a proper lookout ahead. As we stated hereinabove under the discussion with respect to plaintiff's assignments Nos. 3 and 4, the defendant is entitled to have its theory of the case submitted to the jury, and where there is evidence in the record, the jury is entitled to be instructed with respect to such evidence if they find such evidence to be true.

The jury was not in any manner instructed that they should find that any one of the subparagraphs (a) to (h) was true, but there was sufficient evidence which, if the jury chose to believe it, they could have believed that any one or all of such conditions were true, and as a preface to the entire instruction No. 18, instead of directing the jury to so find, the court said, IF YOU FIND that the plaintiff was contributorily negligent, then you must find that it was

because one or more of the following matters, which were amply covered by testimony in the record, were true.

Defendant submits that the court did not err in giving instruction No. 18.

APPELLANT'S ASSIGNMENT OF ERROR NO. 6
CONCERNING COURT'S REFUSAL TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 1.

In Instruction No. 1 as requested by plaintiff, the plaintiff asked the court to instruct the jury that if they found from the evidence that the defendant failed to exercise proper care "either in maintaining a lookout for approaching traffic or in a failure, if any, to give any signal or warning of the presence or approach of the train of cars attached to its said locomotive," then such failure would be negligence.

Respondent questions very much the propriety of giving an instruction which would have allowed the jury to find that the defendant failed "to give any signal" because such evidence as there is in the record in any way favorable to plaintiff concerning signals is only negative evidence, whereas the members of the train crew are very positive that a whistle was blown prior to the starting of the train across the highway, and the engine bell was rung continuously. Disregarding this question of failure to give a signal, however, the instruction would have allowed the jury to find that the defendant was negligent for failing to exercise care and caution "in maintaining a lookout for approaching traffic." The evidence in the record in this case did not

in any manner justify an instruction to the jury upon which they could have found that the defendant failed to exercise proper care with respect to maintaining a lookout or that would have authorized a jury to in any way find that the defendant did fail to maintain a lookout for approaching traffic.

A similar instruction was requested in the case of *Van Wagoner v. Union Pacific R. Co.*, . . . Utah . . . , 186 P. 2d 293, and in that case the appellant assigned error because the trial court refused to give the instruction. This court affirmed the trial court and with respect to such requested instruction stated :

“The next assignment advanced by appellants concerns the refusal of the trial court to instruct the jury on respondent’s alleged negligence arising out of the train crew’s failure to keep a proper lookout. If there is any substantial evidence in the record, the court should have submitted plaintiff’s theory to the jury, as this court, has held that there is a duty upon the railroad company to keep a proper lookout, particularly when approaching a public crossing.

“There was no direct evidence that the train crew was not keeping a proper lookout. On the contrary, the train crew testified to facts indicating a reasonable compliance with this requirement. * * *”

The court then goes on to discuss some of the evidence that may have had a bearing upon the question of lookout, and then concludes :

“* * * Under the facts and circumstances of this case, a failure to act in time to avoid a collision does not establish a failure to look.”

This court held in the Van Wagoner case that there was not sufficient evidence to warrant the court's giving instruction to the jury with respect to failure of the train crew to keep a proper lookout, yet we submit that the evidence in that case was no stronger in favor of the defendant upon the question of lookout than it is in the case at bar.

We think it is not necessary to cite any law upon the proposition that if any portion of a requested instruction is improper error cannot be assigned upon the refusal of the court to give the instruction as requested.

Respondent submits that with respect to the other matters contained in plaintiff's requested Instruction No. 1, they were all substantially covered by other instructions given by the court—in fact, in the opinion of respondent, the court went too far in the giving of some instructions. For instance, in Instruction No. 7 the court stated:

“It is a part of the duty of the operator of a railroad locomotive to keep his train always under reasonable control at crossings so as to avoid collision with other vehicles lawfully using the highway. He has no right to assume that the crossing is clear, but under all circumstances he must be vigilant and must anticipate and expect the presence of others, as the use and exercise of ordinary care dictates.”

The court then states that if defendant failed to use such care it was negligent. That instruction overlooks the fact that because of their difference in size and movement the law requires an automobile to yield the prior right of way to a train. That instruction would place upon the de-

fendant the burden of avoiding collision with other vehicles lawfully on the highway regardless of whether the operators of those vehicles were themselves exercising due care, and respondent submits that the court went further than was warranted either by the law or the evidence in that portion of Instruction No. 7.

Instruction No. 8 covered the question of whistle and bell completely in spite of the fact that respondent feels that a lack of whistle or bell under the circumstances in this case could not have been the proximate cause of the accident.

The court instructed the jury in Instruction No. 7, and again repeated it in No. 9, that the defendant was charged with the responsibility of exercising reasonable care, and that if defendant failed to do so, such failure would be negligence. In Instruction No. 12 the court instructed the jury that the plaintiff had a right to presume that the defendant before crossing the highway would exercise reasonable care for motor vehicles.

Defendant submits that the court did not err in refusing to give plaintiff's requested Instruction No. 1.

Plaintiff contended throughout the trial, and seems to be of the same opinion on this appeal, that defendant was negligent because it had no light on its rear freight car. In Instruction No. 1 as requested by plaintiff (the only requested instruction plaintiff complains about), he did not request the court to instruct the jury that defendant would have been negligent if there was no light on the beet car, it would have been error to give such an instruction had one been requested. However, in spite of the lack of request and

in spite of the fact that all of plaintiff's requested instructions were substantially covered if not directly given in the court's instructions, plaintiff continues to argue here that defendant was negligent for not having a light on the beet car. Plaintiff's counsel argued to that effect before the jury, and on page 22 of his brief cites an A. L. R. note which seems to indicate that such car should have had a light on it. The cases cited under the A. L. R. note do not support such a statement except in one or two instances, and in most if not all of such instances it will be found that there was a statute or city ordinance which required such a light.

The quoted statement from 52 C. J. 213, Section 1811, does not state the rule as requiring such lights but charges negligence if such cars are backed over a crossing "without proper lookouts, *or* without proper lights, *or* other signals or warnings * * *" (*Italics ours*).

In the case at bar there was ample evidence from which the jury could find not only proper lookout but other signals and warnings—by both bell and whistle and by the flagman on the crossing, whose lantern was seen at least at some stage of the occurrence by Mrs. Archibald, Mr. Squires and the patrolman as well as most of the other members of the train crew.

We acknowledge as good law the rule of the case of *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, that the giving of statutory signals may not exhaust the duty of the railroad company and that unusual conditions and circumstances surrounding the crossing may require the railroad company, in the exercise of due care, to do something in addition to

the giving of statutory signals. What that something additional should be has not been definitely set by law and it is left to the determination of the jury as to whether some additional warning should have been given, and whether what was done by the railroad company in attempting to give that additional warning complied with the railroad's duty in that respect if the jury should determine that the circumstances required such additional warning. Here the jury could have found that Belnap supplied that additional warning and could have found that plaintiff would have seen such warning if he had been driving at an appropriate speed with his car under control with a proper lookout ahead.

One thing which appellant did not mention in connection with the case of *Illinois Central R. Co. v. Davis*, 32 F. 2d 232, cited on page 27 of his brief, was that there the plaintiff contended the railroad company should have done more even to comply with statutory provisions. The court held that the questioned statute did not apply and reversed the trial court's judgment for plaintiff saying:

“Under the law there should have been a directed verdict for defendant.”

In the case of *Chesapeake & Ohio Ry. Co. v. Folkes*, 18 S. E. 2d 309, cited on page 28 of appellant's brief, plaintiff was a guest in the car and the question on appeal was whether the negligence of the driver was a matter of law the sole proximate cause of the accident, and the Virginia court held that that was a question for the jury to decide.

In the California case of *Peri v. Los Angeles Junction Ry.*, 137 P. 2d 441, the plaintiffs were passengers and it was

not in any way contended that they could be charged with contributory negligence. The sole question was with respect to the negligence of the defendant, or whether the negligence of the driver was the sole proximate cause. Had the driver in that case been the plaintiff the question would have been different. In that case there was a wigwag which was out of order. The wigwag was known to the driver, and he testified directly that he relied on it. Also, in that case there was fog limiting visibility to approximately 15 feet, and even a light could have been seen only 30 feet. Even then the court said that considering the slow speeds involved a whistle or bell could have avoided the accident.

In the case at bar there was no fog and no wigwag bell to be relied on by the plaintiff, and in spite of appellant's arguments to the contrary, there is ample evidence from which the jury could have concluded that it was a bright moonlight night, and in addition there was a flagman on the crossing waving a lantern.

In the Peri case the California court did not say that there should have been lights or flares but that under the circumstances there existing, considering the fog and the wigwag being out of order, the conditions required something in addition to the usual statutory signals, and it was for the jury to determine what that something was. The court stated :

“* * * It is only reasonable to say that the necessity, nature, character and extent of the warnings such as flagmen, flares, lights and signals, shifts with the circumstances of the particular case and is a question of fact in each case.”

In a subsequent California case, *Heintz v. Southern Pacific*, 147 P. 2d 621, wherein there was no question of fog or other unusual conditions, the California court distinguished the Peri case and refused to follow it and sustained a nonsuit against the driver of the automobile, who had been killed in the accident.

See also a more recent case, *Martindale v. Atchison, T. & S. F. Ry. Co.*, 201 P. 2d 48, wherein the California court again distinguishes and refuses to follow the Peri case and sustained judgments in favor of the defendant.

CONCLUSION

Respondent earnestly contends that the trial court did not commit error in any of the particulars charged by appellant and that under the Haarstrich case, as well as other Utah cases which involved accidents similar to the case at bar, the judgment of the trial court should be affirmed.

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