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Lloyd C. Andersen v. Bingham and Garfield Railway Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LLOYD C. ANDERSEN,
Plaintiff and Appellant,

vs.

BINGHAM AND GARFIELD RAIL-
WAY COMPANY, a corporation,
Defendant and Respondent.

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

HONORABLE J. ALLAN CROCKETT, *Judge*

FILED
JUL 23 1949

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& ROBERTS,

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LLOYD C. ANDERSEN,

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vs.

BINGHAM AND GARFIELD RAIL-
WAY COMPANY, a corporation,

Defendant and Respondent.

Case No.
7356

BRIEF OF APPELLANT

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT.

The parties will be referred to as in the Court below.

All italics are ours.

The event, out of which this action arose, took place and occurred at approximately 9:00 o'clock p.m., on the 23rd day of May, 1947, at the point where defendant's railroad track crosses U. S. Highway No. 50. The high-

way extends in a general easterly-westerly direction and the railroad tracks run parallel with the highway and to the south thereof for approximately one-fourth of a mile. The track circles to the northwest and crosses U. S. Highway No. 50 a short distance north of Garfield, Utah (R. 116, 117).

The ridge of mountains to the south of the tracks has the effect of casting a dark shadow over equipment moving along the tracks at night and removing any silhouetting against the sky which might reveal the presence of a train or other equipment on the tracks (R. 136).

Lloyd C. Andersen, a young man 23 years of age, was driving his 1935 Plymouth Sedan in an easterly direction on U. S. Highway No. 50 from Tooele, Utah, where he was employed as a Supply Clerk at the Deseret Chemical Warfare Depot toward Salt Lake City (R. 140, 141).

At the time he left Tooele it was dark and he was required to use the headlights on his automobile. His last memory of the trip toward Salt Lake City was that he stopped at the junction of Tooele Highway and U. S. Highway No. 50 and then proceeded in an easterly direction along U. S. Highway No. 50. (R. 144, 145). His 1935 automobile was in good condition prior to the accident (R. 169).

Defendant's train, consisting of fifteen gondola type cars, being shoved in front of a Diesel engine, was approaching the crossing traveling in a westerly and northwesterly direction. There were no lights on the leading car except lanterns carried by three members

of the train crew. The engineer was on the right-hand side of the engine as it approached the crossing. As defendant's train approached the crossing it was traveling at a speed of between seven and ten miles per hour (Exhibit 11 - R. 223, 250).

It was a dark night and the engine's headlight cast a strong beam of light over the tops of the low gondola cars toward the west along the foot of the mountains, as the train proceeded toward the crossing. The illusion thus created was that the headlight was at the front of the train and probably accounts for plaintiff's failure to observe the cars as he approached the crossing (R. 129, 175).

At the time of the accident there were no lights or automatic safety devices at the crossing; no flagman was stationed there. The only warning to eastbound traffic was a standard reflectorized cross-buck warning sign and a standard warning sign located approximately 417 feet to the west of the crossing.

As the train neared the crossing three members of the crew, riding on the leading car, observed the approach of plaintiff's automobile. The position of the men on the car is shown on Exhibit 7. After the men saw plaintiff's automobile approaching, Paddock, the engine foreman, in charge of the crew at the time, climbed to the top of the leading car. (R. 225).

As plaintiff's automobile approached the crossing it was traveling at a speed of between thirty-one and forty miles per hour (R. 172, 173, 184).

Two of the trainmen waived their lanterns back and forth endeavoring to attract plaintiff's attention. Thereafter, Paddock gave the engineer a "washout" signal (R. 225, 226). *At the time Paddock gave the washout signal the leading end of the leading car was about three car lengths from the railroad crossing* (R. 226). A car length is approximately thirty-five feet (R. 256).

As plaintiff's automobile approached the crossing it appeared to the men on the leading car as though he hesitated and then tried to go around the car (R. 230).

Neither witness Doty nor his wife, who were following plaintiff in their automobile, saw switchmen's lanterns on the front end of the train or were aware of the presence of the train at the crossing until they saw the lights on plaintiff's automobile go up in the air and then saw the railroad cars proceeding across the crossing (R. 174, 179, 187).

Paddock apparently was concerned over whether plaintiff would observe the train sometime before the accident occurred because when the leading car was still a considerable distance from the crossing he went high on the leading car in order to be in a position to give a washout signal if necessary (R. 325, 326).

Engineer Colby testified that as he approached the crossing and the leading car started around the curve he saw an automobile's headlights approaching from the west, traveling east, and that as he came closer to the crossing he observed the men on the leading car trying to attract the driver's attention. *He slowed the*

train down somewhat and then attempted to bighole the train. Shortly after he bigholed the train he received a washout signal from the leading end (R. 251, 252). It was engineer Colby's opinion that the train as made up on that evening and on that track and under the identical circumstances at the time could have been stopped within about four car lengths had it gone into an emergency application of the automatic air brake system at the time he attempted to bighole the train (R. 255). It will be recalled that at the time Paddock gave the washout signal the leading end of the leading car was three car lengths from the crossing and that engineer Colby had bigholed the train before he saw the washout signal given. It would have taken less than one second for every brake on the train to have been placed in emergency application had the brakes been operating properly (R. 245). The train, however, traveled three car lengths before reaching the intersection, thirty feet across the intersection and two hundred ten feet beyond before coming to a stop. The train traveled approximately nine and one-half car lengths after the brakes were applied and for two hundred seventeen feet of that distance was shoving the automobile sideways along the tracks and the leading trucks of the leading car were derailed and bumping along the ties (R. 327). If the brakes had responded properly the train would have been completely stopped in four to six car lengths (R. 255, 327).

The automobile was demolished by the impact (R. 120 - Exhibit 7). The front trucks derailed at the point of collision (R. 229). When plaintiff's automobile came

to rest after the accident it was 217 feet from a point midway in the westbound lane of traffic on U. S. Highway No. 50 which appeared to be the point of collision (R. 119, 128 - Exhibit 53).

When Doty approached the automobile and the train after they had come to rest, the frame of the automobile was up against the leading car (R. 176). The automobile had been struck on the right front side approximately in the vicinity of the front door (Exhibit 8).

The train had two braking systems, the independent air brake system which controlled the braking mechanisms of the locomotive itself and the automatic brake system which operated the brakes on the entire train. Both brakes were operated by air (R. 238). The automatic air brakes were set by releasing air pressure in the brake line (R. 242). An emergency application of air in the automatic brake line permits all of the air to escape immediately from the train into the atmosphere which would cause the brakes to set on every car (R. 244). Throughout a long train it would not take over a second to apply every brake in the train by an emergency application. On a train consisting of 10 cars and an engine it would take considerably less than one second to actuate the entire braking system on the train (R. 245). If the pressure in the automatic air brake system were too low, it would be impossible for the engineer to throw the brakes of the train into emergency application even though he released all of the air (R. 245).

Before the accident occurred, as Engineer Colby proceeded along the foot of the mountain on a descending grade toward the crossing, he was required to use some braking power to keep from going too fast (R. 249). As he proceeded along he observed the guage in the engine and noted that the air pressure in the automatic brake system continued to lower indicating leakage in the system (R. 249). He also observed that he could not leave the automatic air brake in lap or neutral position very long or it would reduce the train line pressure too much and that the leakage on this train was unusual. He kept fighting the loss of air and leakage all the way down the hill by putting the locomotive in neutral and opening the throttle to speed up the compressors and make pressure faster (R. 281, 282). This procedure would not have been necessary if the usual and normal amount of leakage had been present (R. 282). As a matter of fact, the independent air brake system actuating the engine brakes played a large part in the operation of the train on the evening of the accident (R. 281). According to the Air Brake Pocket Handbook the brake pipe leakage should not have exceeded five pounds per minute (R. 287). On this particular train the leakage was much greater than the five pounds per minute authorized by the pocket handbook (R. 295).

When Engineer Colby attempted to bighole the train he did not get an emergency application throughout the train (R. 252). He never did get an emergency application (R. 254). He was certain that the train did

not go into emergency because the train line gauge did not immediately go to zero but dropped down gradually (R. 283). The reason he didn't get an emergency application throughout the train was that the pressure in the system was too low (R. 245).

When we consider that a fraction of a second would have given plaintiff sufficient time to have passed across the intersection to safety and that the defective brakes caused the train to be moved $9\frac{1}{2}$ car lengths, 217 feet of that distance shoving an automobile sideways before it, and with the front trucks of the leading car derailed, and that the train in engineer Colby's opinion could have been stopped within four car lengths had an emergency application been obtained, it is clear that the cause of this accident was the defective brakes of the train.

Plaintiff was very seriously injured. He was unconscious in the hospital for seven days following the accident (R. 146). He suffered a severe concussion of the brain and a double compound fracture of his left leg (R. 147). He had a Zimmer splint, consisting of four quarter inch pins and a device holding the pins in fixed position on his leg for approximately five days after which the bone slipped necessitating replacement of the splint with a spica cast covering his body from the breast down over the right leg and half way down on the left leg (R. 148). This cast remained in place for approximately one month and three weeks and thereafter another cast was placed on his body and

legs. The total time that his body and legs were in casts was three and a half months (R. 150). He was hospitalized for five months and three weeks and after leaving the hospital was on crutches for two months and on a cane for an additional three months (R. 152). At the time of the trial, more than one and one half years after the accident, the cords and muscles in his right leg were tied up and grown to the flesh so that he could not flex his leg in a normal manner (R. 153). He suffered permanent injury to his right leg and permanent injury to the brain substance resulting from the serious concussion which he had received (R. 203, 212).

We submit that a grave miscarriage of justice was perpetrated when the jury returned a no cause of action verdict and that the jury's verdict can only have resulted from confusing, misleading and erroneous instructions by the trial court as will be hereinafter discussed.

ASSIGNMENT OF ERRORS

1. The Court erred in giving Instruction No. 11.
2. The Court erred in giving Instruction No. 15.
3. The Court erred in refusing to give plaintiff's requested Instruction No. 3.
4. The Court erred in overruling plaintiff's motion for a new trial.

SUMMARY OF ARGUMENT

POINT I.

WHERE THE DOCTRINE OF LAST CLEAR CHANCE IS PRESENTED AS AN ISSUE FOR THE JURY IT IS CLEARLY ERRONEOUS FOR THE COURT TO INSTRUCT THAT IF THE NEGLIGENCE OF PLAINTIFF CONTRIBUTED TO CAUSE HIS OWN INJURY HE CANNOT RECOVER. (Assignment of Errors 1, 2, 3 and 4).

ARGUMENT

POINT I.

WHERE THE DOCTRINE OF LAST CLEAR CHANCE IS PRESENTED AS AN ISSUE FOR THE JURY IT IS CLEARLY ERRONEOUS FOR THE COURT TO INSTRUCT THAT IF THE NEGLIGENCE OF PLAINTIFF CONTRIBUTED TO CAUSE HIS OWN INJURY HE CANNOT RECOVER. (Assignment of Errors 1, 2, 3 and 4).

(a) *Defendant was clearly negligent in its violation of the Federal Safety Appliance Act.*

The ground of negligence relied upon by the plaintiff in submission of this case to the jury is set forth in plaintiff's complaint as follows (R. 5):

“(e) That prior to the time of the occurrence of the grievance, as herein set forth, the

Congress of the United States of America passed a law which was in full force and effect at said time, to wit: 45 U.S.C.A. 1, which provides as follows:

‘It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.’

That in violation of said law, defendant, at the time and place aforesaid, negligently, recklessly and carelessly operated in interstate commerce the said engine and string of fifteen gondola cars equipped with brakes that would not, and could not, retard or control the speed of said train when operated by the engineer in the usual and ordinary manner, and that because of the inefficiency and inadequacy of said brakes the engineer was unable to retard or decrease the speed of the train or bring it to a stop when to do so would have averted the accident with resultant injuries to plaintiff as herein alleged.”

This case was originally removed to the United States District Court for the District of Utah, Central Division, because of the allegation heretofore set forth (R. 16, 17, 18, 24). Thereafter, the case was tried in the United States District Court for the District of

Utah, Central Division, and a verdict returned in plaintiff's favor. Plaintiff, however, being dissatisfied with the verdict, appealed to the United States Court of Appeals for the Tenth Circuit on the ground and for the reason that the case was wrongfully removed to the Federal Court. The United States Court of Appeals for the Tenth Circuit at *109 Fed. (2d) 328* reversed the judgment with directions to remand the case to the state court, and stated as follows:

“The allegations in the complaint charging as an element of negligence failure on the part of the defendant to comply with the exactions of the Safety Appliance Act merely tendered the issue of fact whether the train was operated without brakes being in operative condition as required by the Act. The complaint did not present any issue or controversy in respect to the validity, construction, or effect of the Act. It did not set forth any right or immunity which would be supported if the Act be given one construction or effect and defeated if given another. While the pertinent provisions of the Act lurked in the background as creating a duty the breach of which constituted negligence, the right of action available and the incidents of such right of action sprang from the law of Utah. It did not arise under the laws of the United States. *Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Poplar*, supra; *Moore v. Chesapeake & Ohio Railway Co.*, supra; *Gilvray v. Cuyahoya Valley Railway Co.*, supra; *Fairport, Painesville & Eastern Railroad Co. v. Meredith*, supra; *Tipton v. Atchison, Topeka & Santa Fe Railway Co.*, supra. Therefore, the cause was not removable.”

The Safety Appliance Act clearly imposes a duty on carriers by railroad in interstate commerce for the protection of travelers on the public highways.

In the case of *Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, 54 S. Ct. 826, 828, (decided June 4, 1934), it was contended that the Federal Safety Appliance Act was intended only for the protection of railroad employees and passengers and that its protection did not extend to travelers upon public highways. The Supreme Court of the United States held that Congress, by the enactment of the Federal Safety Appliance Act, provided protection to travelers upon public highways as well as to railroad employees and passengers. The Court stated:

“* * * To confine the beneficial effect of these provisions to employees and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statute imposing the duty as including all of them.”

See also *Brady v. Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 58 S. Ct. 426.

The Safety Appliance Act imposes an absolute and continuing duty on interstate carriers by railroad to maintain the automatic air brake systems on trains in proper and efficient condition.

Roberts' Federal Liabilities of Carriers, Vol. 2 (2d Ed.) discusses the absolute character of the carriers duty in maintaining safe and efficient brake systems on their trains and locomotives:

“Sec. 597. *Tests of compliance with Act.* The statute requires, not only that a train be equipped with the prescribed minimum percentage of power-braked cars, but also that all power-braked cars in the train which are associated together with such minimum ‘shall have their brakes so used and operated.’ * * * The test of compliance with the requirement that the power-braked cars of the train ‘shall have their brakes so used and operated’ seems, under the authorities, to be whether the train-brake system as a whole was capable of efficient use and operation at the time in question. Equipment of the train with a power-brake system conforming to the standard set by the Act is not enough. *It must also meet and respond to the test of actual use. It must give the engineer efficient control of the train.*” (Italics ours.)

“Sec. 656. *Duty under Safety Appliance Act.* Whatever grounds there may have been for entertaining a contrary view, it is now settled that the Federal Safety Appliance Act imposes an *absolute and unqualified duty*, upon the carriers subject to its terms, to provide and maintain the equipment specified by its provisions and by the orders of the Interstate Commerce Commission promulgated by its authority. As to the installation and maintenance of the equipment required by the act and these orders, an absolute duty rests upon the carrier, and neither ignorance of the fact of non-compliance, nor bona fide and diligent efforts to

prevent it, will exonerate the carrier from responsibility for the consequences of the default.

“ ‘The Congress,’ said the national Supreme Court in a pioneer case construing this statute, ‘not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that ‘no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.’ There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance. *The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.*’ ”

The absolute liability created by the Safety Appliance Act is sufficiently established by evidence which proves that the equipment challenged has performed in an inefficient manner. See *Didinger v. Pennsylvania R. Co.*, 39 F. (2d) 798, (6 C.C.A., Apr. 7, 1930); *Lehigh Valley R. Co. v. Howell*, 6 F. (2d) 784; *Anderson v. Chesapeake & O. R. Co.*, 186 N. E. 185, certiorari denied, 54 S. Ct. 93, 78 L. Ed. 583.

In the case of *Spokane & I.E.R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683, the United States Supreme Court interpreted Sections 1 and 9 of the Federal Safety Appliance Act as imposing upon a railroad a mandatory and absolute duty of maintaining the air brakes on interstate trains in a state of proper

repair so that they can be efficiently operated. In that case the plaintiff, an engineer, was injured when the air brakes on the train he was operating did not hold and a head-on collision with another train resulted. The pertinent portions of the Court's opinion are as follows:

"It is insisted that there was no evidence that the provision of the Safety Appliance Act respecting train brakes was violated. It is of course settled that if the equipment was in fact defective or out of repair, the question whether this was attributable to the company's negligence is immaterial. *St. Louis & C. Ry. v. Taylor*, 210 U. S. 281, 294 (21 Am. Neg. Rep. 464); *Chicago & C. Ry. v. United States*, 220 U. S. 559, 575; *Tex. & Pac. Ry. v. Rigsby*, ante, pp. 33, 43. Hence the argument is that, according to all of the evidence, the equipment was not defective or out of repair. It appeared without dispute that it consisted of the Westinghouse standard automatic air brake, such as is in general use throughout the country upon passenger trains. A witness in defendant's employ testified that shortly before Campbell took the train out from Coeur d'Alene on the trip in question he inspected the air brakes and found them in perfect order. But there was much evidence besides that of Campbell himself to the effect that when he applied the emergency the brakes took hold and then leaked off so as to release the brakes. The jury was warranted in finding from the testimony as a whole that Campbell properly applied the air when 600 feet or more from the place where the collision occurred, and that the brakes refused to work. Expert witnesses called by defendant testified in effect that the train could have been stopped inside of 300 feet if the

brakes had been in proper order. The air brake equipment was wrecked in the collision, so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some defect or want of repair in the valves or packing."

As has been clearly demonstrated by the authorities cited, the test of compliance lies in the performance of the appliance. The existence of negligence in the sense of failure to use care is immaterial and the principle of *res ipsa loquitur* applies. There can be no doubt of the failure of the brakes in defendant's train to function in a normal, proper and efficient manner. Had the brakes gone into emergency when the engineer made the "bighole" application, the train would have stopped within four car lengths (R. 255). However, the brakes, due to their inefficiency, did not go into emergency and consequently the engineer was unable to stop the train in less than nine and a half car lengths. It was the engineer's opinion that the reason the train brakes failed and did not go into emergency was that the air had leaked out of the brake line due to an excessive number of leaks in the train system.

The evidence is clear and undisputed that the Federal Safety Appliance Act was violated; that this violation rendered an emergency application of brakes in the train impossible and that this negligent act was the direct cause of plaintiff's injuries, damage and loss.

(b) *The doctrine of last clear chance was clearly applicable in this case.*

Plaintiff was traveling along an unlighted highway on a dark night. Defendant was shoving fifteen cars along the base of an abrupt range of mountains. The dark silhouette of the mountains enshrouded the track and tended to conceal the train as it approached the crossing. The unlighted gondola cars on the front end of the train circled away from the mountain toward the crossing; the light beams from the headlight of the locomotive were thrown westerly along the base of the mountains. There were no flashing lights or other warning devices, no flagman at the crossing. Unquestionably the illusion existed that the engine was at the head of the train.

Defendant's negligence in moving upon and over its tracks a train equipped with inefficient and inadequate air brakes continued up to and including the very moment of the occurrence. The engineer had adequate and sufficient time within which to have avoided the accident had the brakes performed properly and efficiently.

It will be recalled that the train could have been stopped within four car lengths had it gone into an emergency application of the air brake system at the time Colby attempted to "bighole" the train (R. 255). Paddock gave the "washout" signal at a time when the leading car was three car lengths from the crossing and the engineer had "bigholed" the train before the washout signal was given. It would have taken less than one second for every brake in the train to have been placed in emergency application had the air brakes oper-

ated properly. The train, however, traveled nine and a half instead of four car lengths and carried an automobile sideways down the tracks a distance of 217 feet at a time when the leading trucks of the leading gondola car were derailed. When it is recalled that the automobile was struck on its side by the front end of the leading gondola car and that a split second would have saved the plaintiff harmless, there can be little question but that defendant's continuing neglect in moving a train equipped with inefficient and inadequate air brakes along its track was superimposed upon the condition into which plaintiff had placed himself and became the primary efficient cause of his injuries.

In the case of *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281, 52 P. 92, 93 (decided Feb. 19, 1898), it appeared that decedent, a deaf and dumb mute minor child, 15 years of age, was crossing the tracks of the defendant on an angle with his back toward defendant's approaching car; that the operator observed the boy, rang the bell and then, observing that the bell did not attract his attention, attempted to stop the car, but failed and the car struck the boy, carrying him a distance of about 58 feet before stopping. The evidence was that the rear brake of the car was loose, and kicked off; that the brakes on the car were not in good condition and had not been in good condition for some time; that electric shocks from the brakes were frequent, and that when the operator of the car turned off the power, intending to reverse the car, an electric shock from the brakes prevented his doing so until after the accident

had occurred. The operator of the car testified that if the brakes had been in good repair he could have stopped by reversing in about eight feet. The trial court submitted the case to the jury on the basis of the doctrine of last clear chance. This ruling was affirmed on appeal in the following language:

“ * * * If the defendant knowingly placed in operation upon the public street a defective car, that could not be controlled because the appliances provided for that purpose were out of repair, and the injury complained of was occasioned by such defective brakes and appliances, *and the motorman was unable to avoid the effect of the contributory negligence of the deceased, because of such defects*, then it would properly be said that the defendant's negligence was the proximate cause of the injury.”

In the case of *Teakle v. San Pedro, L. A. & S. L. R. Co.*, (decided May 9, 1907), 32 Utah 276, 90 P. 402, 408, 409, decedent, a licensee on defendant's railroad track, stepped in front of a backing train, consisting of an engine, tender, mail car, and baggage car. He was struck by the baggage car and thrown between the rails. No part of the train injured him until he was struck by the firebox of the engine, which rolled, dragged and crushed him to death. The brakeman on the end of the baggage car gave signals to the engineer to stop as soon as decedent was struck, but was unable to attract the engineer's attention. Another witness ran along the track on the fireman's side of the train and attempted to attract his attention, but was unable to do so. There

was evidence that decedent was alive until struck by the firebox, and that had the brakes been applied immediately after decedent was first struck, the train could have been stopped before the firebox reached him. The trial court directed a verdict in favor of defendant, and the Supreme Court of Utah reversed on the ground that the case should have been submitted to the jury under the doctrine of last clear chance. The Court stated:

“ * * * This court, in harmony with the great weight of authority, seems to be committed to the rule (when the injured or deceased person was not a trespasser) that the defendant's act of negligence will be regarded as the sole proximate cause of the injury, *not only when relating to a breach of duty occurring after the consequences of contributory negligence have been discovered, but also when, in the exercise of ordinary care, such consequences could have been discovered, if a breach of duty intervened or continued after the commission of the contributory negligence. While the breach of duty must be subsequent to the commission of the contributory negligence, yet such breach of duty may be before, as well as after, the discovery of the peril.* This principle of law has often been illustrated by cases where the owner of stock was guilty of negligence in permitting it to stray upon the railroad track, and where the liability of the company was made to depend, not only upon the question of whether the train operatives could have avoided the injury after the animal was discovered on or near the track, but also whether, in the exercise of ordinary care, the train operatives could or ought to have discovered it in

time to have avoided the injury. So also in cases where one was guilty of negligence in the first instance in going upon the track and by reason of being caught in a frog, or was otherwise rendered unable to escape, and where the railroad company was held liable, not only for an omission of duty on the part of the train operatives after discovering the peril, but also for an omission of duty in not discovering it. In such cases the contributory negligence is deemed the remote, and the defendant's negligence the proximate cause of the injury. Such is the principle of law which seems to have been announced by this court in the case of *Hall v. Railway Co.*, 13 Utah, 243, 44 Pac. 1046, 57 Am. St. Rep. 726, and in the case of *Shaw v. City R. R. Co.*, 21 Utah 77, 59 Pac. 552, and is the principle of law stated in the instruction which this court approved, and which was involved in the question decided by the court, in the case of *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281, 52 Pac. 92, 40 L.R.A. 172, 67 Am. St. Rep. 621, and is well illustrated in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 557, 11 Sup. Ct. 653, 35 L. Ed. 270, and in *Grand Truck Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485."

In *Bunker v. Union Pac. R. Co.*, (decided Mar. 15, 1911), 38 Utah 575, 114 P. 764, 775, plaintiff, an employee of defendant railroad company, brought action to recover for injuries alleged to have resulted from the neglect of the railroad company in failing to have and maintain efficient brakes on the engine of the train. The jury found the issues in favor of the defendant and the

plaintiff appealed, citing as error, among other things, the failure to instruct adequately on the doctrine of last clear chance. The appellate court affirmed, holding that the jury had been sufficiently instructed on the doctrine, but also holding that the doctrine was applicable. Mr. Justice Straup, in his special concurrence, stated:

“ * * * On the other hand, it is and was contended by appellant that the braking appliances were defective, and that there is sufficient evidence to justify a finding to that effect; and though the plaintiff was guilty of negligence in going upon or falling from the pilot, still there is sufficient evidence to show that immediately after he fell the head brakeman gave to the engineer a stop signal which was seen by the engineer, who immediately attempted to stop the train, but was, on account of the defective appliances, unable to do so until the train had traveled a distance of 80 to 100 feet; and that the serious injury to the appellant — the mangling of his arm, requiring its amputation — was caused at the place where his arm was wedged in between the rails by the wheels of the engine or cars there running over it, or by being wedged between the rails. I think there is sufficient evidence to support such a theory of the appellant, and, had such facts been found in his favor, I think he would have been entitled to recover. *Thompson v. Rapid Transit Co.*, 16 Utah 281, 52 Pac. 92, 40 L.R.A. 172, 67 Am. St. Rep. 621; *Teakle v. S., P. L. A. & S. L. R. Co.*, 32 Utah 276, 90 Pac. 402, 10 L.R.A. (N.S.) 486.”

See also *Pilmer v. Boise Traction Co.*, (decided Feb. 19, 1908), 14 Idaho 327, 94 P. 432, 438, where the Court stated:

“ * * * The negligence of the deceased, if the jury should find that there was such negligence, becomes remote if it should be found that the motorman could have prevented the accident by having his car under proper control at said street crossing, or by lowering the fender on the car he could have prevented the serious consequences of the accident. The street car company owes a duty to the pedestrian, and must run its cars with due care in order to avoid doing him injury. While we regard rapid transit as indispensable in this rushing age, we do not esteem it of greater value than life and limb, and it must be conducted with due care for the rights of others. Justice and humanity will not countenance the doctrine that a street railway company may, without liability, run down and maim or kill a human being who may have carelessly placed himself, unconsciously or otherwise, in a position to be injured or killed, simply because he was careless or negligent in placing himself in such position.”

It is true that the trial court endeavored to submit the issue of last clear chance to the jury in Instruction No. 12. However, as will be hereinafter pointed out the effect of Instruction No. 12 was completely minimized and rendered to no avail because of instructions on contributory negligence given by the trial court.

(c) *The trial court committed reversible error when it instructed the jury that contributory negligence on*

the part of the plaintiff would be a complete bar to his recovery. (Assignment of Errors No. 1, 2, 3 and 4).

This case was tried and submitted on the doctrine of the last clear chance. It is a well-established principle of law that contributory negligence is immaterial where the last clear chance doctrine is applicable. *Vol. 38 Am. Jur. p. 900, par. 215 of Title Negligence*, states the principle as follows:

“The doctrine of last clear chance, otherwise known as the doctrine of discovered peril, as the doctrine of supervening negligence, and, less frequently, as the humanitarian doctrine, stated broadly, is that the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant by exercising reasonable care and prudence might have avoided injurious consequences to the plaintiff notwithstanding the plaintiff’s negligence. *The practical import of the doctrine is that a negligent defendant is held liable to a negligent plaintiff, or even to a plaintiff who has been grossly negligent in placing himself in peril*, if the defendant, aware of the plaintiff’s peril, or, according to some but not all authorities, although unaware of the plaintiff’s peril, reasonably in the exercise of due care should have been aware of it, had in fact a later opportunity than the plaintiff to avoid an accident. As the doctrine usually is stated, a person who has the last clear chance or opportunity of avoiding an accident, notwithstanding the negligent acts of his opponent or the negligence of a third person which is imputed to his opponent, is con-

sidered in law solely responsible for the consequences of the accident.”

In other words, a negligent defendant is held liable to a negligent plaintiff where the defendant has the last clear chance of avoiding accidental injury to the plaintiff.

In the leading Utah case of *Graham v. Johnson et al.*, Utah, 166 P. (2d) 230, 235, the following fact situation was presented: Plaintiff, age 13, was playing football in the street with two playmates, age 14 and 12. Defendant drove her automobile along the street where plaintiff and his playmates were playing and observed them at play. Shortly after driving along the street she returned and drove past them again. On the second occasion of her driving past them she saw the plaintiff standing near the center of the street with his back to her car. Just before she reached the position where plaintiff was standing, one of his playmates shouted, “Gary, look out.” Upon hearing the shout plaintiff started to run at an angle in front of the car driven by defendant and was injured. The trial court at the conclusion of the case directed a verdict for the defendant on the theory that plaintiff was guilty of contributory negligence as a matter of law, and that the doctrine of last clear chance was not applicable. The Supreme Court on appeal reversed and remanded for a new trial.

“What we have really been considering is a rather unique application of the so-called last

clear chance doctrine. Our discussion has dealt with a negligent omission of Darlene in not timely sounding her horn — an omission actuated by a worthy motive but which the jury could nevertheless find to be negligence. It has also been conceded that the boys were negligent in that they were in violation of the ordinance against playing in the street which ordinance was designed for their protection as well as for the expedition of traffic. Why then in this case does not the negligence of plaintiff bar recovery even though Darlene was negligent? The reason lies in the fact that in this situation the so-called humanitarian doctrine of last clear chance applies.

* * * * *

“In Chapter 17, Secs. 479 and 480 of Vol. II, Restatement of Torts, the last clear chance doctrine is stated in regard to two situations. Sec. 479 dealt with a situation where a plaintiff has been negligent in getting himself in a situation from which he cannot extricate himself or in getting himself in a condition where he cannot by alertness avoid the danger in which defendant subsequently puts him, example being when a man goes to sleep on a railroad track or gets his foot caught in a frog. In either case the point has been passed where he could by alertness avoid the danger of the oncoming train. *Sec. 480 deals with the situation where the plaintiff was inattentive but had the ability, had he been alert, to avoid the oncoming danger to which the defendant was subjecting him. But in both cases the liability of the defendant arose because he failed to take the opportunity which he alone had timely to avoid doing the plaintiff harm even though the plaintiff was negligent in get-*

ting himself in a position where he was helpless or because he was so inattentive that he was not alert to the approaching danger over which defendant had control. And in both cases to hold the defendant liable it must plainly appear to the jury that defendant knew or reasonably should have known of plaintiff's helpless peril or of his inattention and after such realization or after he reasonably, had he been conducting himself with the vigilance required of him, should have known it, 'is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.' In the clear chance doctrine the plaintiff's negligence has become in a sense fixed and realizable and on to this state of things defendant approaches on to the negligent plaintiff with and in control of the danger.'"

The Supreme Court granted rehearing at the instance of defendant to clarify its opinion and in a supplementary opinion at 172 P. (2) 668, discussing the doctrine of last clear chance and its relationship to plaintiff's negligence stated:

*" * * * The situation must be such that plaintiff is in a position of peril from defendant's operation either because plaintiff is inattentive or unaware of danger and thus negligent, or because he cannot extricate himself from a position of peril into which his negligence projected him.*

"To revert to the instant case: Darlene was cognizant of Gary's inattention and his unawareness that she was approaching. He was negligent in being where he was. She had ample opportunity to warn him and put him on attention. To do this timely the jury could find was a duty

which she owed to the plaintiff even in spite of his negligence and due to his situation. The jury could find that she omitted to perform her duty. What must she anticipate as a natural consequence of her omission? She must anticipate that if she is seemingly placing Gary in increasing peril someone may be reasonably inspired automatically to warn him and that in response to the stimulus of that warning, he would or might naturally seek safety by running. What might be called the automatic chain stems from her omission timely to sound a warning. Nothing in this automatic chain is an independent superseding cause. The situation we are exposing is one where the chain of consequences due to failure to do that which the clear chance dictates, is automatic or semi-automatic — a causation chain as in the well known ‘Squibb’ case, stemming from the act of negligence of the defendant which was an omission to do what a prudent person would have done to avoid the accident when there was a clear opportunity to do so. That omission may have been defendant’s only act of negligence but it is on one level and the plaintiff’s on another level. The plaintiff’s negligence was continuing but static. The defendant, who was controlling and operating the agency of approaching danger, had the clear chance to avoid the effect of the other’s negligence and did not do so. That was her negligence and it came after the plaintiff’s negligence had become known and fixed.”

It is to be noted that this court in the *Graham* case recognizes clearly that the doctrine of last clear chance is applicable either where plaintiff is in a position of peril because he is inattentive, or unaware of danger

and thus negligent, or where he cannot extricate himself from a position of peril into which his negligence has projected him. In the former situation plaintiff's negligence is continuing right to the point of the accident, but the defendant, who is controlling and operating the agency of approaching danger, has the clear chance to avoid the effect of the others negligence and does not do so.

In the case of *Locke v. Puget Sound International Ry. & Power Co.*, 100 Wash. 432, 171 P. 242, L.R.A. 1919D 1119, it appeared that plaintiff was riding a tricycle in a diagonal direction along a highway across certain streetcar tracks and that the streetcar was approaching from his rear. Plaintiff's negligence was continuing up to the point of the accident. The court, in holding that plaintiff's negligence under these circumstances was not a bar to his recovery, stated:

“But the continued movement of a person toward a place of danger after a warning sound is notice that he is unaware of his peril, and is enough to break the reciprocal balance of duty, and, if it can be said that he had the time to do so, puts upon the motorman the positive duty of avoiding an accident.”

In the case of *Harrington et al. v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 P. 15, it appeared that deceased was killed in a collision with a streetcar while he was riding in a bicycle race as part of a Fourth of July celebration. At the time of his injury he was violating a city ordinance limiting the speed of bicycles *and was*

found as a matter of law to be guilty of contributory negligence. As he and other participants in the bicycle race were approaching the intersection, the evidence indicated that the motorman observed the concourse of vehicles approaching. He also observed quite a number of individuals witnessing the bicycle race.

“Ordinarily, the person operating the car has the right to assume that the one so approaching is able to and will care for himself, by taking all necessary precautions to observe the approach of the car, and that he will not place himself on the track at such a time as to be injured thereby. But no such assumption could be held to be justified under the peculiar circumstances already stated.”

In the *Harrington* case it is clear and indisputable that the plaintiff was guilty of contributory negligence which continued right to the point of the accident. However, because of his inattention and because the motorman was in possession and control of the instrumentality of danger and had the last clear opportunity of avoiding the accident plaintiff's negligence was not a bar to his recovery.

In this case the trial court in Instruction No. 4 defined contributory negligence as follows:

“b. ‘Contributory negligence’ means that a person injured has proximately contributed to such injury by his want of ordinary care, so that except for such want of ordinary care on his part the injury would not have resulted;”

In Instruction No. 9 the trial court instructed the jury in part as follows:

“If you should find that the brakes were defective, still, in order to reach a verdict for plaintiff, you must, in addition, find from a preponderance of the evidence that the defendant had the last clear chance to avoid the accident. By this is meant not just a possibility; it must have been a clear opportunity.”

By this language the jury is clearly instructed that only where the defendant had the last clear chance to have avoided injury to the plaintiff would plaintiff be able to recover.

The Court, in Instruction No. 11, instructed the jury in part as follows:

“If you find from a preponderance of the evidence that the plaintiff failed to conform to any of the aforementioned duties which the law imposes upon him, that would constitute negligence on his part, and, if he was thus negligent, and you further find from a preponderance of the evidence that such negligence proximately caused, or contributed to cause his own injury, then he can not recover.”

In Instruction No. 11 no mention is made of the last clear chance theory of liability whatsoever. The jury is not instructed that even should they find plaintiff negligent he would be entitled to recover if the defendant had the last clear chance to have avoided the accident had it not been for the condition of the train's

brakes. The jury is told in explicit, uncompromising language that contributory negligence on the part of plaintiff would defeat his recovery. There is no room in such language for an exception if the last clear chance doctrine applies. Of course, in Instruction No. 12 the court instructs the jury in part upon the doctrine of last clear chance.

“Even though an injured party, through his own negligence, placed himself in a position of peril, he may, nevertheless, recover if the one who injured him discovers, or by the exercise of ordinary care, should have discovered him and have avoided the injury.

“Although you may find from the evidence that plaintiff was negligent as he approached said crossing, if you find from a preponderance of the evidence that the air-brakes were defective, and that the defendant, by using ordinary care under the circumstances, could have discovered plaintiff’s peril and avoided the collision if the air-brakes had not been defective, then, under those circumstances, negligence on the part of the plaintiff would not bar his right to recover in this case.”

But who is to say which instruction was followed by the jury? Instruction No. 11 where it is said that negligence on the part of plaintiff is a complete bar to his recovery, or Instruction No. 12 where plaintiff’s negligence is said not to be a complete bar where the last clear chance situation exists? Again in Instruction No. 15 the court in uncompromising, positive and unequivocal language sets forth the proposition that negligence

on the part of the plaintiff would bar his recovery. Again no reference whatsoever is made to a situation where his contributory negligence would not bar recovery, i.e., the last clear chance situation.

“If you find from a preponderance of the evidence that the defendant was negligent, and that the plaintiff was also negligent, and that the negligence of the plaintiff proximately caused or contributed to cause his own injury and damage, then the plaintiff cannot recover. In other words, if both parties were guilty of negligent conduct, and the negligence of the plaintiff himself caused or contributed to cause his own injury, then he can not recover, even though the defendant may have been guilty of negligence which also proximately contributed to the injury to such plaintiff.

“The law does not permit the jury to weigh the degree of negligence of the parties, where the negligence of both plaintiff and defendant concur to cause the injury.”

Again we ask which instruction did the jury follow, Instruction 12 or Instruction No. 15? We submit that Instruction No. 11 and Instruction No. 15 completely and effectively abrogate and render to no avail the entire doctrine of the last clear chance.

The fundamental error into which the trial court has fallen is its assumption that if plaintiff's negligence continued and coincided in point of time with that of defendant, plaintiff could not recover. That is clearly

not the law under the fact situation presented by this case. In Instruction No. 15 the court has said:

“The law does not permit the jury to weigh the degree of negligence of the parties, where the negligence of both plaintiff and defendant concur to cause the injury.”

As the court said in the *Graham* case:

“That omission may have been defendant’s only act of negligence *but it is on one level and the plaintiff’s on another level. The plaintiff’s negligence was continuing but static. The defendant, who was controlling and operating the agency of approaching danger, had the clear chance to avoid the effect of the other’s negligence and did not do so.*”

The doctrine of last clear chance is sometimes spoken of as the humanitarian doctrine. That name was applied because of the very fact that plaintiff’s contributory negligence, even though it may have continued down to and coincided in point of time with defendant’s negligence, nevertheless would not preclude him from recovering where the defendant had the last clear opportunity of avoiding the accident and did not do so.

In Instruction No. 11 the violation of duty which the court states would bar plaintiff’s recovery was his failure to use his senses of sight and hearing and to keep a lookout ahead and to keep his car under safe control and to drive at a speed which was reasonable and prudent.

Any one or more of the acts of negligence set forth in the instruction acts as a complete bar to recovery. Instruction No. 15 generally states that contributory negligence will bar recovery. As has been pointed out, contributory negligence under the fact situation of this case would not and could not act as a bar to recovery if the jury believed that the plaintiff was in a position of peril because of inattention even though his inattention and consequent negligence continued right on to the point of collision.

In *Bisogno v. New York Rys. Co.* 194 App. Div. 316, 185 N. Y. Supp. 411, 412, there was evidence that a boy nine years old, playing on the street, was walking on the railroad track in plain sight of the motorman while the car was traveling at least 100 feet, and that the motorman did not slacken his speed or ring his bell, and that after the car hit the boy it proceeded 100 feet before it was stopped. With this evidence in mind at the close of the case the Court charged the jury in the following language:

“The Court: ‘I shall not charge it in that way. I will charge it in this way: That if the situation at the time of or just before the accident, as between the car and the boy, was such that the accident could have been avoided if the motorman had used reasonable care and diligence, then that would justify the jury in finding the defendant had been negligent. I will say further: One may put himself in a dangerous position, an imprudent position, with respect to another; but, if the danger can be avoided by reasonable diligence on the part of that other, it stands to

reason that he has no right to bring on the accident by failing to exercise that diligence.' ”

Thereafter, however, upon request of counsel for the defendant the Court made the following charge:

“ ‘Now, that there may be no mistake on the part of the jurors as to what your honor means, in response to the request made by plaintiff’s counsel, I understand your honor to charge that the negligence of the motorman can be established by the fact that the boy was in a place so dangerous, so far ahead of him, that with the exercise of reasonable care he could have stopped; but will your honor also charge the jury that that does not entitle the plaintiff to a verdict — that if both were negligent, both the boy and the motorman, there cannot be any recovery?’ ”

“ ‘The Court: I so charge.

“ ‘(Plaintiff’s Counsel): I except to that.’ ”

The Supreme Court of New York had squarely before it the same problem that is before this Court. There was an instruction on the doctrine of last clear chance and another instruction to the effect that contributory negligence would bar recovery on the part of the plaintiff. The trial court recognized the prejudice existing where two contrary and antagonistic instructions are given to the jury, one containing the doctrine of last clear chance, and the other contributory negligence as a bar to recovery, and stated:

“ ‘That was the last word to the jury, and completely annulled and wiped out and destroyed

the previously quoted charge, made at the request of the plaintiff's counsel. In other words, the case was finally submitted to the jury on the plain doctrine that contributory negligence would prevent a recovery. In my opinion that was error, and of such a character as requires reversal of this judgment. The doctrine of a last clear chance has been frequently applied in this state."

* * * * *

" * * * But, if he did negligently go upon the track so far ahead of this car as might have been found by the evidence that he did, the doctrine of the last clear chance to my mind is applicable, and that if, seeing him in that position, the motor-man had used ordinary care, the accident would not have occurred. That issue being presented by the evidence, the court having correctly charged the doctrine, and then upon the inducement of the defendant's attorney having destroyed it, an error of law is presented which we cannot overlook."

The New York Court of Appeals supported the Supreme Court of the State of New York and affirmed the *Bisogno* decision in 135 N. E. 947, 233 N. Y. 629. This opinion responds to logic and reason, for negligence on the part of the plaintiff will not under any circumstances preclude him from recovering damages if the defendant might, by the exercise of care on his part, have avoided the consequences of the negligence or carelessness on the part of the plaintiff. There may be mutual negligence, and yet one party have a right of action against the other if the other party had the

last clear chance to have avoided the accident. See *Mallard v. Ninth Avenue Railroad Co.*, 15 Daly, 376, 7 N. Y. Supp. 666, cited in the *Bisogno* case, and that, of course, is the very error into which the trial court fell in this case when it stated in Instruction No. 15 that if both parties were guilty of negligent conduct which contributed to cause plaintiff's injury then he could not recover.

In the case of *Michigan City v. Werner*, (Ind. dec. 1916) 114 N. E. 636, 186 Ind. 149, the plaintiff was crossing a bridge when it was raised by the bridge tender. Defendant requested an instruction that the jury should find for the defendant if plaintiff was negligent in entering upon the bridge in an attempt to cross it. This instruction was refused by the trial court for the reason that contributory negligence is not a defense where the last clear chance situation exists and that it is improper and erroneous for a court to instruct the jury that contributory negligence will bar recovery unless the jury is at the same time and as an explicit qualification of that instruction instructed that if the defendant had the last clear chance to have avoided the accident and injuries then plaintiff's negligence would not bar recovery and plaintiff would be entitled to a verdict. The Court stated:

“Instruction No. 4, refused by the court, if given, would have been in conflict with instruction No. 7, which properly states the law.

The instruction refused directed the jury, in effect, to find for the defendant if it appeared that the plaintiff was negligent in entering upon the bridge in an attempt to cross it. Under the doctrine of last clear chance, as stated in instruction No. 7, to the effect that if the injury to the plaintiff was immediately caused by the negligence of the bridge tender after he became aware of the dangerous situation of plaintiff and to his failure to use ordinary care to avoid injury to him, then the plaintiff was entitled to recover notwithstanding his prior negligence in entering upon the bridge."

In *64 C. J. Sec. 600*, it is stated:

"It is proper to refuse, and error to give conflicting and contradictory instructions, since a charge containing two distinct propositions conflicting with each other tends so to confuse the jury as to prevent their rendition of an intelligent verdict, the jury cannot be required to determine what part of a contradictory charge is correct, or left to reconcile conflicting principles of law; it ordinarily cannot be determined from the verdict which rule was adopted by the jury, the court is left in doubt and uncertainty as to the facts actually found by the jury as a basis for its verdict, and where instructions are inconsistent with, or contradict, each other, it is usually impossible to say whether the jury were controlled by the one or the other."

We submit that the court's instructions on last clear chance and on contributory negligence were conflicting and irreconcilable.

Courts have held under many circumstances that giving of conflicting instructions constitutes reversible error.

In *Atlantic Co. et al. v. Roberts*, 179 Va. 669, 20 S. E. (2d) 520, it appeared that the fact situation warranted an instruction on unavoidable accident. One of the instructions was to the effect that if plaintiff was free from fault the jury could find the issues in favor of plaintiff and against the defendant. The court held that the giving of the instruction under the facts of this particular case without qualifying it by setting forth the unavoidable accident situation was reversible error. The Court stated:

“Instruction No. 3 is erroneous in that it makes no reference to an unavoidable accident, but would allow recovery if the jury simply found the plaintiff free of fault. This instruction is thus in conflict with and vitiates instruction “G”, given on behalf of the defendants, which is in the following language:

“ ‘The court instructs the jury that if you believe from the evidence that the plaintiff was injured as a result of an unavoidable accident, then your verdict must be for the defendant.’ ”

We believe the situation presented by the *Roberts* case is clearly analagous to the case at bar. Here the fact situation presented a jury question on last clear chance. To instruct that contributory negligence was a bar to recovery without qualifying said instruction by pre-

sentencing the last clear chance situation as an exception was clearly erroneous.

In Kuether v. Kansas City Light & Power Co., (Mo.) 276 S. W. 105, 109, the court held that instructing the jury in a situation where the doctrine of *res ipsa loquitur* was properly applicable that they had no right to presume negligence if the evidence did not preponderate in favor of the plaintiff, would have been reversible error. The Court stated:

“Defendant directs another charge of error against the action of the court in refusing defendant’s proffered instruction D5, where it was sought to tell the jury that they have ‘no right to presume negligence, and, if the evidence does not preponderate in favor of plaintiff, then your verdict should be for the defendant.’ This is contradictory of, and in conflict with, plaintiff’s instructions 1 and 2, which we hold properly included the doctrine of *res ipsa loquitur*. The instruction of defendant was properly refused.”

See also *Oettinger v. Stewart*, (Cal. 1943), 137 P. (2) 852.

In *Thomas v. Stott* (Mo.) 114 S. W. (2d) 142, 144, a situation is presented which is the reverse of the case at bar. The court found that there was a fact situation presented in which the jury could find that plaintiff’s negligence was the sole negligence in the case and held that instructing the jury that contributory negligence does not defeat recovery under the humanitarian doctrine without also instructing that the sole negligence

of the plaintiff would defeat recovery was error. The Court stated:

“While contributory negligence does not defeat recovery under the humanitarian doctrine, still the doctrine is now well established that sole negligence of plaintiff may defeat recovery. It follows that if there be substantial evidence that a plaintiff’s injury be caused by plaintiff’s sole negligence, then defendant is entitled to an instruction submitting the question of sole negligence of plaintiff. *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. 2d 373. We conclude that the evidence given by the defendant in this case justifies the giving of instruction F’.

“As to instruction No. 1, the same conforms in substance to instructions that have been approved. However, as the question of sole negligence is involved in this case, we conclude that the instruction presents reversible error in that it permits the jury to find for plaintiff regardless of the fact of whether or not her negligence was the sole cause of her injury. Instruction No. 1, we conclude, is in error, also, for the reason that it is in conflict with a proper instruction given on behalf of defendant.”

Other cases where it has been held that instructions were conflicting and therefore prejudicial are herein cited for the convenience of the court: *Westberg v. Willde* (Cal.) 85 P. (2d) 507; *Morrison v. Perry* (Utah, 1943) 140 P. (2d) 772; *Alcamisi v. Market St. Ry. Co.*, 67 Cal. App. 710, 228 P. 410; *Hageman v. Arnold* (Mont.) 254 P. 1070; *Skelton v. Great Northern Ry Co.*, (Mont.) 100 P. (2d) 929.

We recognize the doctrine that the instructions as given by the court are to be considered and read as a whole. However, where two instructions are apparently conflicting and are not related one to the other by reference, as in the case at bar, what was said in the case of *John O'Brien Boiler Works Co. v. Sievert et al*, 256 S. W. 555, 557 is clearly applicable.

“ * * * The plaintiff's instruction declares one rule of law and exacts a verdict upon it; the defendant's instruction declares a different rule of law squarely in conflict with that declared in plaintiff's instruction, and exacts a verdict upon it. The conflict arises upon the essentials of plaintiff's cause of action. The instruction given for plaintiff erroneously declares the law of plaintiff's case, and is so drawn as to exclude elements essential to the recovery the instruction exacts. Such an instruction is not, and cannot be, cured of its infirmity by an instruction given for defendant correctly declaring the law.”

CONCLUSION

We submit in conclusion that Lloyd C. Andersen was entitled to have the issue of last clear chance clearly and correctly submitted to the jury.

His negligence, if any, was that of inattention and oblivion to approaching danger. This negligence coincided in point of time with that of the defendant in maintaining unsafe and inadequate braking equipment on its train, but was on a different level. See *Graham* case.

The Court's Instructions No. 11 and No. 15 placed squarely before the jury the proposition that plaintiff's contributory negligence would preclude his recovery. In neither instruction was mention made of the doctrine of last clear chance. Even though the jury believed that had the train's brakes operated properly the accident could clearly have been avoided, under Instructions No. 11 and No. 15 they were directed to return a verdict against plaintiff if he was himself negligent.

The instructions on last clear chance and contributory negligence were clearly contradictory and conflicting and the entire doctrine of last clear chance was thereby annulled, wiped out and destroyed.

We, therefore, respectfully submit that this case, should be remanded to the trial court for a new trial.

Respectfully submitted,

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