

1949

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

C. G. Parsons; Wm. M. McCrea; A. D. Moffat; Calvin A. Behle; Attorneys for Respondent;

---

## Recommended Citation

Brief of Respondent, *Andersen v. Bingham and Garfield Railway Co.*, No. 7356 (Utah Supreme Court, 1949).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1139](https://digitalcommons.law.byu.edu/uofu_sc1/1139)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

Case No. 7356

---

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 RESPONDENT

---

**FILED**

AUG 19 1949

J. C. PARSONS,  
WM. M. McCREA,  
A. D. MOFFAT,

CALVIN A. BEHLE,

CLERK, SUPREME COURT, UTAH *Attorneys for Respondent.*

---

PRINTED IN U. S. A.—JOE R. BROWN PTG. CO., SALT LAKE CITY

# INDEX

	<i>Page</i>
I. STATEMENT OF FACTS .....	1-5
II. STATEMENT OF POINTS .....	5
III. ARGUMENT .....	5-22

## Point

1. The jury was fairly and properly instructed (if the case was to go to the jury) and plaintiff's motion for a new trial was correctly denied.....	5-11
2. The Court erred in denying defendant's motion for a directed verdict.....	12-22
IV. CONCLUSION .....	22-23

## Texts

Restatement of Torts, Vol. II, Ch. 17, § 480, Cited and quoted .....	21
45 U. S. C. A., § 1, Federal Safety Appliance Act, Cited and quoted .....	7-8

## Cases Cited

Atchison, Topeka & Santa Fe Ry. v. Taylor, (C.C.A. 8) 1912, 196 F. 878, Cited .....	21
Baltimore & Ohio R. Co. v. Goodman, 275 U. S. 66, 72 L. ed. 167, Cited and quoted .....	15

# INDEX (Continued)

	<i>Page</i>
Clark v. Union Pacific R. Co., 70 Utah 29, 257 P. 1050, Cited .....	14
Denver City Tramway v. Cobb, (C.C.A. 8) 1908, 164 F. 41, Cited .....	21
Drummond v. Union Pacific R. Co., 177 P. 2d 903, ... Utah..., Cited and quoted .....	13
Earle v. Salt Lake & Utah R. Corp., 109 Utah 111, 165 P. 2d 877, Cited .....	11
Fairport, P. & E. Co. v. Meredith, 292 U. S. 589, 78 L. ed. 1446, Cited and quoted .....	14
Gogo v. Continental Casualty Co., 109 Uah 122, 165 P. 2d 882, Cited .....	11
Graham v. Johnson, ... Utah ..., 166 P. 2d 230, Cited .....	11
Illinois Central R. Co. v. Nelson, (C.C.A. 8) 1909, 173 F. 915, Cited .....	21
Martin v. Sheffield, ... Utah ..., 189 P. 2d 127, Cited .....	11
Nabrotzky v. Salt Lake & Uah RR., 103 Utah 274, 135 P. 2d 115, Cited .....	14
Nuttall v. Denver & Rio Grande RR., 98 Utah 383, 99 P. 2d 15, Cited .....	14

# INDEX (Continued)

	<i>Page</i>
Pippy v. Oregon Short Line R. Co., 79 Utah 425, 11 P. 2d 305, Cited .....	15
Pollett v. Denver & Rio Grande, 82 Utah 505, 25 P. 2d 963, Cited .....	14
Shortino v. Salt Lake & Utah RR., 52 Utah 476, 174 P. 860, Cited .....	14
St. Louis & San Francisco R. Co. v. Summers, (C.C.A. 8) 1909, 173 F. 358, Cited .....	20
Van Cleave v. Lynch, 106 Utah 149, 166 P. 2d 244,- Cited .....	11
Van Wagoner v. Union Pacific R. Co., ... Utah ...,; 86 P. 2d 293, Cited .....	19
Quoted .....	19, 20, 21

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.*

Case No.  
7356

---

### BRIEF OF RESPONDENT

---

#### I.

#### STATEMENT OF FACTS

To the end that the facts of this case as presented to the jury may be fully and fairly stated to the court, respondent supplements the statement contained in Appellant's Brief as follows:

1. At the time of the accident it was dark, with the sky clear and the highway smooth, level and concrete

surfaced. (R. 130) The silhouette failure (p. 3) has no factual basis here. The darkness was described as “pitch”. (R. 258) Appellant’s view of the crossing and approaching train was unobstructed. (Ex. 3 and 4)

2. Appellant incorrectly cites the record (p. 3) as establishing that plaintiff’s failure to observe the train as he approached the crossing was an illusion from an engine headlight. This statement is as factually speculative as the equally possible theories that appellant was in a condition unable to observe or act prudently under the circumstances, was driving too fast, was not looking, etc.

3. Plaintiff specifically abandoned (R. 343(a)) all of his negligence allegations with the exception of the alleged defective brakes; yet in his brief (p. 3) he reiterated that there were no lights or automatic safety devices at the crossing; **that no flagman** was there stationed; and that there were no lights on the lead car of the train. The crossing protection was in every respect standard, and the court without objection so instructed. (R. 86)

4. Plaintiff incorrectly cites the record as establishing his speed at 31 to 40 miles per hour. (p. 3). The cited pages, plus pages 172 and 182 of the record, indicate plaintiff’s speed varied from a minimum sufficient to pass *another* car which itself was going 31 miles per hour (R. 172) up to 45 miles per hour. (R. 182)

5. On page 4 of his brief plaintiff cites page 226 of the record for the fact that “At the time Paddock gave the washout signal the leading end of the leading

car was about three car lengths from the railroad crossing". But Engineer Colby guessed this distance at one car length. (R. 279) Trainman Chipman said there was not time to stop the train. (R. 232) Colby said likewise (R. 293-4); and Trainman Hyland (R. 309) and Paddock, who was in charge of the train crew (R. 317, 320) said the washout was given 10 to 15 feet from the highway pavement—approximately 36 feet or one standard car length from the point of impact.

6. On page 7 of appellant's brief the fact is stated that "the leakage in this train was unusual". Omitted is Engineer Colby's statement that the leakage—normally present in railroad airbrake operations—was "the type of leakage we have been contending with and working with on that particular job ever since I have been running engines out there". (R. 291)

7. On page 8 and the first full paragraph of page 9 of his brief appear improperly in the statement of facts unfounded argument that will be met hereafter. But it should be noted that the medical prognosis was that plaintiff's recovery eventually would be, or in any event might be complete. (R. 198, 200-201, 203-5, 209-213, 216-217, 220-221); not that Andersen has actually suffered "permanent injury".

8. Omitted material facts are the following:

(a) When plaintiff's peril was ascertained, the train could not have been stopped in time to avoid the collision. This is uncontroverted, coming from Colby (R. 294), Paddock (R. 319), Hyland (R. 304) and Chipman (R. 232). While Colby on the basis of his



own estimates at first felt that there might have been a possibility for plaintiff to complete his end run around the train (R. 294), this guess was later qualified when he stated that the distances given by the men at the front end of the train should be governing rather than his own guesses. (R. 280)

(b) The defendant railroad took the following action to warn plaintiff: standard reflectorized railroad cross buck and advance warning signs were within Andersen's vision, one 21 feet west of the crossing and the other 417 feet to the west (R. 28 and Ex. 3 and 4); three trainmen were on the lead car equipped with and using standard lanterns to warn oncoming traffic. (R. 304) The engine bell was ringing and the usual crossing whistle signal was given by the engineer. (R. 273) As shown by Exhibits 3 and 4 the view was unobstructed and there were no unusual crossing conditions.

(c) The actual halt of the train was entirely normal according to most of the witnesses. (R. 320) Things happened "on split second schedule" (R. 232); except for the physical distances on Exhibits 3 and 4, estimates of other distances were only rough approximations. (R. 257)

(d) Plaintiff applied his own motor vehicle brakes to the extent that tire marks 28 inches long were left on the pavement 72 feet west of the point of impact (R. 189); then he apparently released the brakes and decided to end-run the train. (R. 317)

(e) Defendant's engine was modern and in "excellent" condition (R. 271); all 15 of the cars were

equipped with standard airbrakes, 5 of the 6 loaded cars and 3 of the 9 empties with the more recent AB type of brake, and one loaded and 6 empties with the standard K-2 type. (Ex. 11 and R. 331) No defect in these brakes was ever located (R. 332, 124); after the accident the train was operated as before except for the damaged lead car. (R. 333)

(f) These cars were likewise equipped with hand brakes which were never used as the train was under control and the engineer felt no need for hand brakes. (R. 277)

## II.

### STATEMENT OF POINTS

1. The jury was fairly and properly instructed (if the case was to go to the jury) and plaintiff's motion for a new trial was correctly denied.

2. The Court erred in denying defendant's motion for a directed verdict.

## III.

### ARGUMENT

#### Point 1.

1. The jury was fairly and properly instructed (if the case was to go to the jury) and plaintiff's motion for a new trial was correctly denied.

Defendant's first point is the reverse of plaintiff's single point under which he has consolidated his four assignments of error. We submit that the jury was properly and fairly charged if indeed the case was to go to the jury.

(a) At the outset we must meet a sub-argument of plaintiff—that the defendant had violated the Federal Safety Appliance Act.

On page 11 of plaintiff's brief is quoted the pertinent language of the Act; the text of the absolute duty (not absolute *liability* as plaintiff argues on page 15) is that the engineer must be able to control the speed of the train "without requiring brakemen to use the common handbrake for that purpose." It is therefore an absolute duty, *but qualified by the above words*, that Congress has substituted for the common law duty of reasonable care. Thus qualified, we have no quarrel with plaintiff's statements and citations under this sub-point, pages 11 to 17. Conceding, too, that as argued on page 17, "the test of compliance lies in the performance of the appliance" and assuming that if Colby's testimony is to be believed, the brakes on all 15 cars of the train did not go into emergency, how does this establish a violation of the Act?

Colby said that even though the leakage was great, he had control of his train and never felt the need for hand brakes. (R. 277) Obviously this was so, for no one has ever contended that any equipment was defective or failed to function on the engine; and the 5 of 6 loaded cars and 3 of the 9 empties which had the AB

type of brake would function insofar as emergency was concerned, regardless of leakage or prior brake service applications. (R. 260, 336-340.)

The only possible failure short of ideal operation would be in the 5 empty sand gondola cars, the one empty flat car, and the loaded tank car next to the engine which had the less-efficient-as-to-emergency, *but still standard*, K-2 type of brake. (Ex. 11, R. 258-260, 335.)

As Colby said, there are thousands of these K-2 type brakes in operation as standard equipment on the various railroad trunk lines (R. 258); yet upon analysis his complaint and that of plaintiff is that this standard equipment—lacking the emergency reservoir feature of the more modern AB type—*operated just as it was designed to do*. According to Colby some probably didn't go into emergency when Colby "big-holed" on top of the many service, lap, and leakage applications of braking power. (R. 252):

Q. Now, what happened when you big-holed the brakes?

A. Well, the train began slowing down.

Q. Did you get an emergency application?

A. Not throughout the train, no.

Q. You didn't go into emergency throughout the train?

A. The train didn't.

Even so, the statutory test of the Federal Safety Appliance Act—"that the engineer on the locomotive drawing such train can control its speed without requir-

ing brakemen to use the common hand brake for that purpose," was met. (R. 276) :

- Q. The brakes apparently operated properly, on each of those applications you obtained the necessary braking power, right?
- A. Yes, I got too much when I held it on lap, then I got too much braking power and had to release it.
- Q. You didn't notice anything that led you to feel you should stop that train because you were not having proper braking, did you?
- A. Not in that short distance.
- Q. Not in that short distance.
- Q. So you kept proceeding; is that right?
- A. Yes, sir, I kept proceeding.
- Q. And your brakes controlled that train so that your speed gradually decreased; is that correct?
- A. Well, it would decrease, then I would gain.
- Q. Then you would speed up a little?
- A. Then I would speed up a little.
- Q. Then brake again?
- A. Then start to pick up.
- Q. Then brake again?
- A. Then start to pick up.
- Q. At no time did you feel it necessary to signal for hand brakes, did you?
- A. No, because—
- Q. At any time—

MR. BLACK: Let him answer the question.

MR. BEHLE: He said "No".

THE COURT: Well, he said "because" something; I think perhaps he should be permitted to explain his answer, if it is responsive to your question.

A. At the lower end of this run, or grade, the grade is not as steep; therefore, I knew I could stop the train down there.

Q. That's right; it says from 2 per cent down to 1.85, and gradually flattens off, in the forepart of Exhibit 2, is that right?

A. Yes.

Q. But, in spite of the fact that you knew the grade was getting less, did you feel any need for asking for hand brakes?

A. No.

Defendant accordingly submits that there was no evidence of violation of the Federal Safety Appliance Act—the only one of the complaint's ten original allegations of negligence ever a serious factor in this case.

---

(b) Plaintiff's next sub-point—pages 17 to 24—is that the Last Clear Chance Doctrine was here fairly applicable.

If the case was to go to the jury at all, defendant so concedes. This despite argument on fallacious premises set forth on page 18 of appellant's brief which will be covered later, including attention to the very heart of plaintiff's case delineated on page 19—"a split second would have saved plaintiff harmless."



(c) Thus we come, plaintiff's brief page 24, to the single point of plaintiff's appeal—that the jury was improperly instructed.

We have no quarrel with the cited authorities (pp. 25 to 31) as those cases and authorities are applied to their own facts. Interesting, however, is the omission from those authorities of the Drummond and Van Wagoner cases, the two recent leading cases of this court involving railroad crossing accidents.

Diametrically opposed to plaintiff's contention that instructing on both the law of contributory negligence and the Last Clear Chance Doctrine is error, we would have thought the contrary elementary in negligence cases. The jury in its deliberations in a last clear chance must, as we see it, as a rule make three determinations and be instructed accordingly; (1) Was the defendant negligent at all? If not, there is no liability; if so, the next question arises; (2) Was plaintiff negligent? If not, there is liability on the part of defendant; if so, there is presented the final question; (3) Did defendant have and fail to use the last clear chance? If this is answered in the negative, plaintiff cannot prevail; if so, defendant is liable.

Thus we conceive it a non sequitur to say that “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.” The instructions *must* cover both simple negligence and contributory negligence as essential preliminaries to the

final application of the doctrine of the last clear chance.

And so the trial court instructed in a charge of twenty-two instructions (R. 74 to 95), including that of No. 21 wherein the jury was directed to consider the entire charge as a connected whole without undue reference to any one particular point. (R. 194) True, in Instruction No. 11 covering contributory negligence and plaintiff's duties as a driver, no specific mention is made of the Last Clear Chance Doctrine, which is covered by the very next instruction. But this court has often stated the impracticability of covering and reiterating all points and possibilities in each separate instruction.

Van Cleave v. Lynch,  
106 Utah 159, 166 P. 2d 244.

Earle v. Salt Lake & Utah R. Corp.,  
109 Utah 111, 165 P. 2d 877.

Gogo v. Continental Casualty Co.,  
109 Utah 122, 165 P. 2d 882.

Graham v. Johnson,  
..... Utah ....., 166 P. 2d 230.

Martin v. Sheffield,  
..... Utah ....., 189 P. 2d 127.

And so we submit that the charge was proper and fairly presented the case to the jury, which without too much difficulty (R. 39) found the issues in favor of defendant and the evidence to establish either want of negligence on the part of defendant, that plaintiff's own delict was a proximate cause of his injuries, or probably both.



## Point 2.

### **2. The Court erred in denying defendant's motion for a directed verdict.**

Defendant, to sustain in any event the judgment below, submits that under the evidence in this case the court should have directed a verdict against plaintiff; the case should not have been submitted to the jury at all for decision on the merits. Under the evidence most favorable to plaintiff, and as a matter of law, his own actions and failures to act were a proximate cause of the accident; defendant was neither itself negligent; nor did it have the last clear chance to avoid the collision.

(a) Defendant's lack of negligence has been argued under Point 1(a) and need not be reiterated here.

(b) **Plaintiff's own negligence, though speculative in detail, nevertheless existed and persisted until the end.**

Having the duty as he approached the crossing to use ordinary care for his own safety, to use his senses of sight and hearing, to keep a lookout ahead, to keep his car under safe control, and to drive at a speed which was reasonable and prudent under the existing conditions of darkness (including any illusive mountain shadows), Lloyd Andersen nevertheless heeded not the reflectorized warning signs 417 feet and 21 feet in advance of the crossing, heeded not the trainmen's warning lights and sounding bells and whistles. He plunged right on at a speed over 31 and probably at least 45 miles per hour in an attempt to "end-run" the defendant's train, despite its right of way.

This delict on plaintiff's part continued right up to the point of impact, whatever its motivation—excessive speed, improper lookout, or reckless driving when 72 feet away Andersen finally determined to beat the train. His conduct was black in contrast to the white of Davies' donkey tied in the road, Teakle thrown between the rails, Bunker fallen from the pilot, and the dumb child in the Thompson case.

Utah's most recent case on this point is *Drummond v. Union Pacific R. Co.*, 177 P.(2d) 903, ..... Utah ....., decided February 20, 1947. In view of this recent unanimous decision by the present Utah Supreme Court and its review of Utah law where railroad crossing accidents are concerned, we largely confine our authorities on this point to that case.

There, as here, plaintiff driver was familiar with the road; the crossing angle was approximately the same, although there the train approached from the driver's rear. The view was unobstructed in both cases, although for a much further distance in this case; there were no unusual crossing conditions such as protruding rails, multiplicity of tracks, etc., in either case. But here the facts are much stronger for the defendant: the train was moving at a much slower rate of speed; plaintiff was driving much faster; and there was no evidence as in the *Drummond* case that there were inadequate crossing signals or warnings.

A fortiori it seems plain that in this case, too, the trial court should have said as in the *Drummond* case:

“So, here, the facts peculiar to this case lead to the inescapable conclusion that plaintiff’s own acts and conduct were not in keeping with the care required of a traveler upon the highway about to go upon and across the tracks of a railroad. Had this plaintiff exercised such care, then the collision would have been avoided.”

For further Utah cases, where on facts more favorable to plaintiff than in this case recovery was denied plaintiff drivers *as a matter of law*, see:

Nabrotzky v. Salt Lake & Utah Railroad,  
103 Utah 274, 135 P.(2d) 115;

Nuttall v. Denver & Rio Grande Railroad,  
98 Utah 383, 99 P.(2d) 15;

Pollett v. Denver & Rio Grande,  
82 Utah 505, 25 P.(2d) 963;

Clark v. Union Pacific R. Co.,  
70 Utah 29, 257 P. 1050;

Shortino v. Salt Lake & Utah Railroad Co.,  
52 Utah 276, 174 P. 860.

Applying the same rule, the United States Supreme Court said in Fairport, P. & E. Co. v. Meredith, 292 U. S. 589, 78 L. ed. 1446, 1448, *involving this same Federal Safety Appliance Act*:

There is also evidence which fairly establishes that as respondent drew near the crossing the train was in plain view for a sufficient length of time to have enabled respondent, by the use of ordinary care, to see the train, stop and avoid the collision, and, therefore, that she was guilty of contributory negligence. Miller v. Union Pacific Railroad Co., 290 U. S. 227, 231, 54 S. Ct. 172, 78 L. ed. 285.

The facts are as different as could be imagined from *Pippy v. Oregon Short Line R. Co.*, 79 Utah 425, 11 P.(2d) 305, where, among other things, the defendant's train was proceeding at sixty miles per hour over an obstructed crossing consisting of many tracks and a badly rutted road, with plaintiff driving at from five to six miles per hour and testifying that the automatic signals did not work and that no whistle or bell was sounded. This is the only Utah case permitting recovery, and then by a three-two decision reversing the court below because of the extreme facts against the railroad.

As Mr. Justice Holmes said for the unanimous court in *Baltimore & Ohio R. Co. v. Goodman*, 275 U. S. 66, 72 L. ed. 167:

“If at the last moment Goodman (the driver) found himself in an emergency it was his own fault that he did not reduce his speed earlier and come to a stop.”

**(c) Here defendant had neither the last chance nor a clear chance to avoid the accident.**

Certainly if Paddock and Hyland were to be believed, 10 to 15 feet was no time within which, ascertaining plaintiff's peril, defendant could act to avoid the collision. Hyland, when he first saw the car, guessed that he could have stopped the train (R. 310) but was under no duty to do so in view of the train's right of way. And when he realized the plaintiff's danger—since for some reason Andersen had determined to end-run the train—it was too late to even kick the angle-cock. (R. 309)

Paddock, too, saw the automobile seem to reduce speed as if to stop; then when Andersen swerved to the other lane and kept proceeding it was too late for the train to stop, although he gave Engineer Colby the washout or emergency signal. (R. 317) His final statement to Mr. Black was that it never occurred that there might be a collision until the leading part of the train was 15 feet from the pavement. (R. 329) Then under all guesses and opinions it was too late to stop, since four to six car lengths was the most favorable guess to plaintiff as to the minimum stopping distance; and under Paddock's version the actual stop was normal. (R. 320)

Nor did Colby testify to the contrary. He big-holed momentarily before Paddock's washout; the day after the accident he estimated the lead car to be but one car length from the crossing. (R. 279) At the trial he left that distance to Paddock, Hyland and Chipman on the train's front end. (R. 280) Even with every brake in emergency he could not have stopped the train before the point of impact. (R. 293)

- A. No, I couldn't have stopped short of the crossing, if they had all went in emergency.
- Q. What you told me, if the brakes stopped, as you hoped they would, the plaintiff might have had a better chance to get around the front of the train, because you would have slowed down a little more; is that it?
- A. Well, that is due to the fact that the emergency is much quicker than a service; you get your full brake power much quicker.

- Q. Well, if you had all the emergency that you could have desired, isn't it a fact the train wouldn't have stopped by the crossing, but it might have slowed down sufficiently so the plaintiff might have completed running around the front end of the train; isn't that right?
- A. There is a possibility, yes; I believe I made that statement before.
- Q. And you didn't have a clear opportunity or wouldn't have had a clear opportunity to have stopped that train without it going into the crossing; is that right?
- A. No, not under those procedures.
- Q. And that is necessarily so because you are not sure exactly how far the front end was from the crossing; isn't that right?
- A. No, I wasn't sure until they got around the curve far enough that I could see the switchman's light and see the lights of the head car shining down the highway.
- Q. You would rather leave the exact distance as to how far that said train was from the crossing to the men who were there?
- A. Yes, as to when I received the washout signal, you could determine then as to how far I was from it when I used emergency, because it was momentarily after I went to the emergency position when I got the washout.

Chipman guessed most favorably for plaintiff, and his testimony therefore must be used in testing the correctness of the court's ruling. In contrast to Paddock and Hyland, he thought the washout signal and big-hole



emergency brake application were given when the end of the lead car was about three car lengths away. (R. 226) *But he, too, said the distance was insufficient to stop short of the collision* (R. 226):

Q. About how far was the lead end of the car, the leading car, from the intersection from the highway itself, at the time when you saw that washout signal given?

A. Well, around about three cars; we was right there by those poles, I am pretty sure, in there.

Q. You say three car lengths to the south and east, or to the south of the crossing?

A. Yes, up towards the mountain.

Q. Now, was the train able to stop short of the collision?

A. No.

It was Colby—who had abrogated his own guesses as to distance to Paddock, Chipman and Hyland (R. 293-294) — who interjected the testimony supporting plaintiff's theory in this case: "Plaintiff may have had a better chance to get around the front of the train" if every brake had gone into emergency, as they were not designed to do. (R. 293)

But Paddock, Chipman and Hyland unanimously scotched that hope. While plaintiff argues on page 19 of his brief "a split second would have saved the plaintiff harmless", the three men who were there in effect said "The time was too short, even by a hair".

As in the case of contributory negligence on the

part of plaintiff drivers, the present Utah Supreme Court by unanimous decision has but recently declared the Utah law on the last clear chance doctrine and specifically where railroad crossing accidents are involved.

In the case of *Van Wagoner v. Union Pacific R. Co.*, ..... Utah ....., 186 P.(2d) 293, decided November 3, 1947, the court quoted extensively from the Restatement of the Law of Torts and from *Graham v. Johnson*, 166 P.(2d) 230, 235, 109 Utah 365, dealing with the Last Clear Chance Doctrine as applied to automobile intersection cases. It concluded:

“The opportunity to avoid the accident must not be a possibility; it must be a clear opportunity. Not even by speculation could the jury reach a verdict on the theory that the train crew had time to appreciate that deceased was negligent and that by reasonable means they could have avoided the resulting collision. When, as in this jurisdiction, a train has the preferred right of way, its operator is entitled to assume the driver of a car will yield to this preferment, and if the doctrine of last clear chance is to be invoked, it must clearly appear that time permitted the train crew to appreciate the deceased’s predicament, and to give warnings sufficiently early enough for the deceased to extricate himself, or the time element was sufficient to permit the crew to bring the train to a stop. No such showing was made here.”

In spite of allegations in the complaint that defendant’s train crew failed to observe and give proper warnings, the undisputed evidence in this case shows in contrast that here defendant’s train crew was keenly alert



and mindful of the hazard of the crossing. Every step possible was taken to warn the oncoming motor vehicle by way of whistle, bell, swinging signal lanterns, keeping the train under control at slow speed, all in addition to the standard crossing warning signals maintained by both the defendant and the State Road Commission.

With this testimony defendant submits that under Utah law the doctrine of the last clear chance should not have been applied to excuse plaintiff from his own negligence. The defendant had neither the last chance nor a clear chance; and the remarks of Mr. Justice Wolfe in his concurring opinion in the Van Wagoner case are particularly apt:

“A driver who drives in front of an oncoming engine or train with insufficient time to cross is hardly in position to say: ‘If you had made it smoother, I might or could have gotten clear by a hair’.”

The situation appears squarely governed by the Van Wagoner case and the Graham case:

“Where the situation is, to reasonable minds, so doubtful as to whether the second party had time to avoid it, the matter should not be given to the jury; otherwise, we are, as said in the case of *Thomas v. Sadleir*, 108 Utah 552, 162 P. (2d) 112, 115, in grave danger of permitting the one really at fault to shift the blame for the accident on the other by accentuation of the other’s duty to avoid the effect of the first one’s negligence’.”

See also application of the same rule to the facts in the cases of *St. Louis & San Francisco R. Co. v. Sum-*

mers, (C.C.A. 8) 1909, 173 F. 358; Illinois Central R. Co. v. Nelson, (C.C.A. 8) 1909, 173 F. 915; Denver City Tramway v. Cobb, (C.C.A. 8) 1908, 164 F. 41; and Atchison, Topeka & Santa Fe Ry. v. Taylor, (C.C.A. 8) 1912, 196 F. 878.

This court has said in the Van Wagoner case:

“When one party thrusts upon another the onus of avoiding an accident which was due entirely to the fact that the first party is in the fairly rapid process of placing himself in the path of a car driven by the second party, the court, before it permits the jury to determine whether the second party could have avoided the accident, must be reasonably sure that there was time enough for the jury to so find. \* \* \*

The opinion then quotes the following from Section 480, Chapter 17, Volume II, Restatement of Torts:

“A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant’s negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant (a) knew of the plaintiff’s situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and (c) thereafter is negligent in failing to utilize with reasonable care and competence *his then existing ability* to avoid harming the plaintiff.” (Italics ours.)

The Meredith case, *supra*, clearly says that the Federal Safety Appliance Act does not create such absolute liability as to preclude application of this prin-

ciple of Utah law, and the decision of the Tenth Circuit further emphasized this same point in this case. (109 Fed 2d 328)

#### IV.

### CONCLUSION

Counsel for plaintiff in this case were of counsel in the Drummond case; consequently here reliance was placed on the essential combination of the Federal Safety Appliance Act and the Last Clear Chance Doctrine to avoid the consequences of the Drummond case.

But when the undisputed and admitted facts were boiled down in the record before this court, we find:

1. Plaintiff failed to listen, look or stop, and under the doctrine of the Drummond case, continued negligently driving his automobile into the crossing.

2. Likewise defendant's negligence—if under the Federal Act indeed negligence it was—continued parallel with that of plaintiff until the time of impact.

3. There was *a bare possibility only* that with braking equipment of *unquestioned* condition, the accident might have been avoided. The court could not therefore “be reasonably sure that there was time enough for the jury” to hold that the railroad could have avoided the accident.

We have already adverted to the fact that the plaintiff has no explanation for his own course of conduct.

To paraphrase Mr. Justice Wolfe, plaintiff here says: "If you had only stopped a little bit sooner, I might or could have gotten clear by a hair." But this Court has said that to grant relief on this basis would be to permit "the one really at fault to shift the blame for the accident." This the Utah law prohibits; and Congress has not abrogated Utah's rule.

It is respectfully submitted that the judgment of the court below should be sustained. The jury was fairly and properly instructed and determined the issues contrary to plaintiff. This, though the same result should have been reached by granting defendant's motion for directed verdict.

Respectfully submitted,

C. C. PARSONS,

WM. M. McCREA,

A. D. MOFFAT,

CALVIN A. BEHLE,

*Attorneys for Respondent  
Bingham and Garfield Rail-  
way Company.*