

1949

# Howard F. Coray v. Southern Pacific Company : Brief of Respondent

Utah Supreme Court

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Ray, Quinney & Nebeker; Attorneys for Defendant and Respondent;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

---

**HOWARD F. CORAY, Ancilliary Ad-  
ministrator of the Estate of Wil-  
liam Frank Lucus, Deceased,**

*Plaintiff and Appellant,*

**vs.**

**SOUTHERN PACIFIC COMPANY,  
a corporation,**

*Defendant and Respondent.*

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**BRIEF OF RESPONDENT**

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**FILED**

**DEC 31 1940**

**RAY, QUINNEY & NEBEKER**

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

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# INDEX

|   | Page |
|---|------|
| STATEMENT OF THE CASE.....  | 1    |
| STATEMENT OF FACTS.....   | 2    |
| ARGUMENT .....  | 6    |
| POINT I.  |      |
| A. THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT CONTRIBUTORY NEGLIGENCE WAS A DEFENSE AND PROPERLY SUBMITTED THE ISSUE OF SOLE PROXIMATE CAUSE..... | 6    |
| B. THE RULES OF DEFENDANT RELATING TO THE OPERATION OF TRACK CARS WERE PROPERLY ADMITTED IN EVIDENCE UPON THE ISSUE OF SOLE PROXIMATE CAUSE.....      | 21   |
| C. INSTRUCTION NUMBER 16 PROPERLY TOLD THE JURY THAT IF THE SOLE CAUSE OF THE DEATH OF LUCUS WAS HIS OWN CONDUCT THE PLAINTIFF COULD NOT RECOVER..... | 33   |
| POINT II.   |      |
| THE COURT PROPERLY INSTRUCTED THE JURY REGARDING THE MEASURE OF DAMAGES.....  | 37   |
| CONCLUSION .....  | 47   |

## CASES CITED

|   |        |
|---|--------|
| Brady v. Southern Railway Company, 320 U. S. 476, 88 L. Ed. 239 .....                                   | 22, 32 |
| Chicago Great Western Railroad Company v. Schendel, 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614.....    | 11     |
| Comeenes v. Railroad Co., 37 U. 475, 109 P. 10.....   | 36     |
| Farnsworth v. Union Pacific Coal Co., 32 U. 112, 89 P. 74.....  | 35     |
| Johanna Frese, admx. v. Chicago Burlington and Quincy Railroad Company, 68 L. Ed. 131, 263 U. S. 1..... | 16     |
| Gilliam v. Southern Ry. Co., 93 S. E. 865.....  | 44     |
| Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 58 L. Ed. 838 .....                               | 9      |

# INDEX—(Continued)

|   | Page   |
|---|--------|
| Great Northern Ry. Co. v. Wiles, 60 L. Ed. 732, 240 U. S. 444....   | 24     |
| Hampton v. Wabash R. Co., 204 S. W. (2d) 708.....   | 30     |
| Helton v. Thompson, 36 N. E. (2d) 267, Appellate Court of<br>Illinois, 1941 .....                                 | 25, 28 |
| Anna Lang, admx. v. New York Central Railroad Company,<br>65 L. Ed. 729, 255 U. S. 455.....                       | 17     |
| Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, at 475,<br>24 L. Ed. 256, at 259.....                         | 22     |
| Palum v. Lehigh Valley R. Co., 165 F. (2d) 3.....   | 13     |
| Ryan v. Beaver County, 82 U. 27, 21 P. (2d) 858.....  | 35     |
| St. Louis & San Francisco Railroad Company v. Fannie M.<br>Conarty, admx., 59 L. Ed. 1290, 238 U. S. 242.....     | 18     |
| St. Louis, Iron Mountain & Southern Railway v. McWhirter,<br>57 L. Ed. 1179, 229 U. S. 265, 33 S. Ct. 858.....    | 20     |
| Scrimo v. Central R. R. of New Jersey, et al., 138 F. (2d) 761....  | 12     |
| Shortino v. Salt Lake & U. R. Co., 52 U. 476, 174 P. 860.....   | 34     |
| Spokane & Inland Empire Railroad Co. v. Campbell, 241 U. S.<br>497, 36 S. Ct. 683, 60 L. Ed. 1125.....            | 10     |
| Willis v. Penn. R. Co., 122 F. (2d) 248, (Certiorari denied 314,<br>U. S. 684, 62 S. Ct. 187, 86 L. Ed. 547)..... | 13     |

# IN THE SUPREME COURT

## of the

### STATE OF UTAH

---

HOWARD F. CORAY, Ancilliary Administrator of the Estate of William Frank Lucus, Deceased,

*Plaintiff and Appellant,*

vs.

SOUTHERN PACIFIC COMPANY,  
a corporation,

*Defendant and Respondent.*

Case No.  
7382

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### BRIEF OF RESPONDENT

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### STATEMENT OF THE CASE

The first trial of this case resulted in a directed verdict for defendant, which was affirmed by the Supreme court of Utah, and reversed by the Supreme Court of the United States. That court held the question of whether the death of Lucus was caused in whole or in part by the failure of the triple valve on the air line was a jury question. The second trial was before a jury which returned a verdict of no cause of action.

## STATEMENT OF FACTS

Appellant did not contend in the trial court that he was entitled to a directed verdict. He does not contend in this court that there is no testimony to support the verdict. The contention of Appellant's brief is there was error below in the instructions and failure to instruct, and in the introduction of evidence. Mr. Lucas, the deceased, was traveling east on a motor track car which he was operating and looking west when he ran into the rear end of a freight train which had stopped on the track. He was killed. The train had stopped because a nut on a valve in the air line had become disconnected. This caused the brakes on all the cars of the train to be applied, and stopped the train just the same as if the engineer had applied the brakes in emergency or full application. The train ran between thirty and forty car lengths before stopping after the brakes were applied. This would be from 1500 to 2000 feet. (Tr. 71). The brakes on the track car were in good condition, and would stop the car in 100 feet going thirty-five miles an hour. (Tr. 138). The deceased Lucas was going to deliver some pay checks to railroad employees who lived at various stations east of Lemay, the point where he placed the car on the track. Alvin Lynch another employee was going to relieve Lucas as signal maintainer at Lemay, and he was riding on the car at the time of the accident to become familiar with the territory. Lucas had no duties to perform except to operate the motor car. Lucas and Lynch were not talking to each

other. As the motor car approached the stopped train, it was going from ten to twenty-five miles an hour. (Tr. 22). It is undisputed that Lucas did not apply the brakes of the track car prior to the collision. Lucas and Lynch both knew the freight train was only three or four hundred yards ahead of them on the track. (Tr. 19). They placed the track car on the main track after waiting for the eastbound freight train to pull out ahead of them. The car was built for one man operation and Mr. Lucas was the operator. (Tr. 20).

The suit was brought on behalf of the widow of Frank Lucas, who was about ten years older than he. There were no children. Mr. Lucas brought a suit against Mrs. Lucas for divorce in Los Angeles, California, where the parties were then living, in August, 1942. Mrs. Lucas filed a cross-complaint for separate maintenance. A photostatic copy of her Cross-complaint is in the record as defendant's Exhibit 2. The court made an order on January 6, 1943, allowing Mrs. Lucas \$10.00 a week as support money. Mrs. Lucas never saw or heard from him again during his life. He was killed in May, 1944, in western Utah. He never paid anything on the support money. Further facts in regard to defendant's claim that Mrs. Lucas lost nothing by the death of her husband are stated in connection with the argument on that point.

Because appellant claims there was reversible error in the instructions, it is important to learn what the court told the jury.



Instruction No. 2 told the jury that the defendant was operating a freight train containing a defective car in that the triple union nut became disconnected and allowed the air pressure to escape and set the brakes and forced the train to come to an abrupt and sudden stop. That William Frank Lucas, who was following the train on a motor car, did not observe the freight train had stopped, and as a result the motor car crashed into the rear end of the freight train, and Lucas received fatal injuries from which he died. The court told the jury that the defendant claims the negligence of Lucas was "*the sole proximate cause*" of his death.

In Instruction No. 5 the court told the jury that,

"The defendant was guilty of a violation of the Federal Safety Appliance Act, and if you find by a preponderance of the evidence that such violation *proximately caused, in whole or in part*, the death of William Frank Lucas, then you should return a verdict in favor of the plaintiff and against the defendant and award to plaintiff damages as in these instructions set forth.

"You are instructed that under the provisions of the Federal Safety Appliance Act if a violation of such act by a common carrier by rail in inter-state commerce contributes to the death of one of its employees then such employee *cannot be held to have been guilty of contributory negligence.*"



The last paragraph of the foregoing Instruction No. 5 is an exact copy of the first paragraph of appellant's requested Instruction No. 4. The first paragraph of the foregoing Instruction No. 5 is a copy of a portion of the last paragraph of appellant's requested Instruction No. 3. (Tr. 208).

The jury was instructed that the parties to the action were engaged in interstate commerce, and plaintiff's right to recover based on the federal statutes and the statutes of Utah relating to Workmen's Compensation do not apply.

The appellant's requested Instruction No. 10 (Tr. 208) asked for the usual and standard instruction on the measure of damages which Mrs. Lucus sustained as a result of the death of her husband. That request was given as Instruction No. 11.

Appellant assigns as error the refusal of the court to give his requested Instruction No. 11, which reads as follows:

“You are instructed that the marriage relation creates a right on the part of the wife to be supported by her husband and this right may be legally enforced by her so long as the marriage relation exists, and if the said Edith B. Lucus is entitled to recover damages under these instructions she cannot be deprived of that right by a plea on the part of defendant that her husband had not fulfilled the duties he owed to her.

“In this connection you are instructed that if you find that plaintiff is entitled to recover

damages in this case then in determining the loss of pecuniary benefits mentioned in Instruction No..... (Here insert the number of the Court's instruction which corresponds with plaintiff's requested Instruction No. 10.) You may take into consideration not only such voluntary contributions as William Frank Lucas may reasonably have been expected to make to Edith B. Lucas during her lifetime but also such contributions as she may reasonably have been expected to secure through the enforcement of her legal right to support from her husband."

Appellant objects to the giving of Instruction No. 9, which reads as follows:

"You are instructed that the mere fact that Edith Lucas was the legal wife of Frank Lucas at the time of his death is not sufficient evidence to prove that the plaintiff is entitled to recover any damages for his death in this action. If you believe from all the evidence in the case that the deceased would not have made any further money contributions to Edith Lucas or would not have supported her in the future if he had not died, then your verdict should be for the defendant."

## ARGUMENT

A. THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT CONTRIBUTORY NEGLIGENCE WAS A DEFENSE AND PROPERLY SUBMITTED THE ISSUE OF SOLE PROXIMATE CAUSE.

At page 39 of appellant's brief, it is said:

"The contention of defendant that an issue of sole proximate cause is made is pure and

simple subterfuge and made for the purpose of breathing life into a defense which has been expressly eliminated not only by the Federal Congress but the Supreme Court of the United States in this very case."

Let us pause at the outset to ask, if there was no issue of sole proximate cause in the case, what was the issue for the jury? There was no dispute that the train stopped, because of a failure of the air line which caused an emergency stop. Appellant requested the court to submit to the jury the issue of sole proximate cause in his request No. 3. The issue there requested by appellant is that if the stopping of the train "*proximately caused in whole or in part*" the death of Lucas, then the verdict should be in favor of the plaintiff. One may not object on appeal to a ruling of the trial court that was invited by the appellant.

In his summary of the Argument appellant at page 6 of the brief states:

"The court prejudicially instructed the jury that if deceased was guilty of contributory negligence his negligence was a complete bar to recovery." (Assignment of Errors 1, 2, and 3).

This assertion is not supported by the record. In Instruction No. 16 the jury was told that if Lucas chose an unsafe position on the motor car when a safe position was equally available to him, he was negligent and if such negligence was the "sole proximate cause" of deceased's injuries, then the verdict should be for

defendant. That instruction further told the jury that the burden was on defendant to prove that the negligence of Lucus, if any, was the sole proximate cause of his death. To attempt to say this instruction told the jury that if deceased was guilty of contributory negligence, his contributory negligence was a complete bar to recovery is a bald misconstruction of the language used.

To show further how far appellant has departed from the facts of the record in this regard, it is necessary to refer to the last paragraph of Instruction No. 5 which we again quote:

“You are instructed that under the provisions of the Federal Safety Appliance Act if a violation of such act by a common carrier by rail in inter-state commerce contributes to the death of one of its employees then such employee cannot be held to have been guilty of contributory negligence.”

The court in Instruction No. 5 as requested in appellant's request No. 3 instructed the jury that defendant was guilty of a violation of the federal law and also that if a violation of such act contributes to the death of one of its employees then such employee “*cannot be held to have been guilty of contributory negligence.*” The instruction was the verbatim product of appellant's request designed and worded and intended to make it clear to the jury that contributory negligence was no defense. But in spite of the fact that the court told the jury as requested by appellant that contributory negligence was no defense, we find appellant's brief in the

summary erroneously telling this court that the trial court instructed the jury that contributory negligence “was a complete bar to recovery.” Even without the aid of the well-known rule that the instructions must be considered together, there is no basis in fact for the assertion of the summary.

The cases from the Supreme Court of the United States relied on by appellant do not hold there was any error in the instructions to the jury or in the admission of evidence in the Coray case.

*Grand Trunk Western Ry. Co. v. Lindsay*, 233 U.S. 42, 58 L. Ed. 838 (1914), the plaintiff below obtained a verdict in the trial court which was affirmed in the Seventh Circuit Court of appeals, and also in the Supreme Court. The Railway Company moved for a directed verdict which was denied and it appealed in both upper courts. The assignment of error considered by the Supreme Court was the refusal to direct the verdict for defendant below. It appeared that Lindsay was hurt while trying to couple two cars, one of which had a defective coupler. The trial court had told the jury that if Lindsay had done something carelessly which had proximately *contributed* to the accident, he could not recover. The Supreme Court quotes with approval from the decision of the Circuit Court that,

“It is only when plaintiff’s act is the sole cause — when defendant’s act is no part of the causation — that defendant is free from liability under the act.”

We submit that in the Coray case the jury was not instructed that contributory negligence was a defense. They were told directly to the contrary. In the Lindsay case the jury had found that the negligence of the railroad in having the defective car in use was one of the causes of the accident. The jury in the Coray case found that the negligence of the railroad in having the defective air line in the train was not one of the causes of the accident.

The jury in the Coray case was not told that contributory negligence was a complete or any defense.

*Spokane & Inland Empire Railroad Co. v. Campbell*, 241 U.S. 497, 36 S. Ct. 683, 60 L. Ed. 1125, the plaintiff below (Campbell) obtained a verdict which was affirmed on appeal. The Supreme Court held the jury must have found that the defective air brakes were "a proximate cause of the collision." The employee had left Coeur d'Alene westbound in violation of his orders. He collided with a train on the same track moving eastbound. There was evidence that he saw the approaching train, and if the air brakes had worked, he could have stopped his train in time to have avoided the collision. The court held that where "plaintiff's contributory negligence and the defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, it is plain that the Employer's Liability Act requires the former to be disregarded."

The rule of the Campbell case was apparently embodied in appellant's request No. 4, and was given in

Instruction No. 5 in which the jury was told that if a violation of the Safety Appliance Law contributes to the death, then the employee cannot be held guilty of contributory negligence. We are unable to see anything in the Campbell case which shows error in the instruction in the Coray case. The jury in the Campbell case held for the plaintiff, and the jury in the Coray case held for the defendant. The instructions of the trial court in the latter case do not conflict with the law of the Campbell case. The defendant's contention in the Campbell case to which the Supreme Court devoted its attention was that it was entitled to judgment notwithstanding the general verdict for Campbell. The jury found specially that the violation of his orders by Campbell when he left Coeur d'Alene was the proximate cause of the accident, but also returned a general verdict for the plaintiff. The Supreme Court said "the jury must have found that the defective air brakes were a proximate cause of the collision." The jury in the Coray case must have found that the failure of the air line on the train did *not* cause "*in whole or in part*" the death of Lucus. The rule of law announced in the Campbell case was correctly embodied in the instructions to the jury in the Coray case.

*Chicago Great Western Railroad Company v. Schendel*, 267 U.S. 287, 45 S. Ct. 303, 69 L. Ed. 614. The employee was killed while working on a car with a defective drawbar. He was between two cars to disengage a connecting chain used because of the defective drawbar. The engineer was not told he had gone between the cars.



The engine was disconnected and the car adjacent to the employee moved and caused his death. The jury returned a verdict for the plaintiff. The defendant contended that the car had come to rest on the sidetrack and had ceased to be "used" as contemplated by the act. The court held the use of the defective car had not ended. No instruction to the jury is discussed. It is significant that the trial court permitted the defendant to prove the violation of the safety rule, which provided that employees should advise the engineer when they were going between or under cars. Appellant presumably relies upon the Schendel case to show that the contributory negligence of the employee did not prevent the case from going to the jury. Neither did contributory negligence prevent the Coray case from going to the jury. The jury was told the plaintiff could not be held to have been guilty of contributory negligence if a violation of the act contributes to the death. The jury found, by its general verdict for defendant, that the violation of the act did not contribute to the death.

*Scrimo v. Central R.R. of New Jersey, et al*, 138 F. (2d) 761. In the Scrimo case the court below admitted in evidence the safety rules of the company just as they were admitted in the Coray case. The deceased was engaged in a switching operation and was found dead under the wheels of a car on which there was a defective coupling device, warranting the inference that deceased stumbled when attempting to jiggle the lock pin of the defective coupling. The rule that contributory negligence is not a defense if violation of the Safety

Appliance Act contributes to the death stated in the Scrimo case is the rule which the court gave in its instructions in the Coray case.

*Palum v. Lehigh Valley R. Co.*, 165 F. (2d) 3. Here the plaintiff employee obtained a verdict which was affirmed on appeal. He was a fireman hit by a low bridge while going on top of the tender to measure the water. The court held that the question of whether the plaintiff's negligence was the sole cause of his injuries was a jury question. There was enough evidence of negligence of the defendant in using the fireman on a part of the line he had never been over before to support submission to the jury under the "recent decisions" of the Supreme Court of the United States. We find difficulty in seeing the relevancy of this Palum case to the case at bar. No question of the propriety of instructions was involved. If the trial court in the Coray case had granted a directed verdict for the defendant as in the prior trial, the Palum case is authority for the contention that it should go to the jury.

The Palum case contains the following discussion of the case of *Willis v. Penn. R. Co.*, 122 F.(2d) 248, (Certiorari denied 314, U.S. 684, 62 S. Ct. 187, 86 L. Ed. 547.).

"The defendant argues that the decision of this court in *Willis v. Pennsylvania R. Co.* should have controlled the trial judge in the case at bar and that it required the direction of a verdict for the defendant on the ground that plaintiff's conduct in leaving the cab in disregard

of the rule and failing to observe the low bridge in time to prevent being hit was the sole cause of his injury. But *Willis v. Pennsylvania R. Co.* may be distinguished on the ground that the only duty of the plaintiff there was to watch and if he had watched the injury to him would not have happened. Here a duty of the plaintiff was to see that there was sufficient water in the boiler and it was in attending to the performance of that very duty, albeit with negligence in one aspect thereof, that he sustained the injury. It is not certain that if he had notified the engineer that he was going to leave the cab in order to sound the tank that he would have been warned against the low bridge for it is entirely possible that the engineer would have expected him to look out for himself and to watch for such a danger as he encountered. What the plaintiff seems to have done was to have failed to be watchful enough for obstacles as well as to have forgotten to notify the engineer that he was going to leave the cab. We think the inadvertent neglect to observe the rule, while probably an act of contributory negligence to be considered by the jury in reduction of his damages, was not a bar to his claim."

We believe the *Palum* case shows there was a question of sole proximate cause in the *Coray* case, because it is undisputed from the record that *Lucus* like *Willis* had no duty other than to watch as he rode along the track on the motor car. He was going to deliver pay checks to employees east of *Lemay*.

In the *Willis* case (*supra*) three signal maintainers were working on a switch in the classification yard. There was a long standing custom, with which all em-

ployees were familiar, for switching to be continued while track repair work was being performed and for the repair gang to protect themselves by having one of their number act as lookout and give warning of approaching cars. Willis was acting as lookout when a moving car hit and killed him. The Circuit Court of Appeals for the Second Circuit held that Willis' neglect of his duty to act as watchman was the "sole cause" of his own death, and that even since the recent amendment of 45 U.S.C.A. Section 54 excluding assumption of risk as a defense, an employee cannot recover for injuries resulting solely from his own fault. The Willis case held the trial court properly directed the verdict for the defendant.

If the question of "sole cause" in the Willis case was one of law, it is obvious that the question of "sole cause" in the Coray case was one of fact in view of the decision of the Supreme Court of the United States. In fact, that is what the U.S. Court held as shown by the Quotation from the opinion in appellant's brief at page 25. The last sentence reads:

"The *jury could have found* that decedent's death *resulted* from any or all of the foregoing circumstances."

This means the Supreme Court held there was a jury question of causation. The jury in the case, under proper instructions, held the death resulted solely from the negligence of Lucas.

The Supreme Court in *Johanna Frese, admx. v. Chicago Burlington and Quincy Railroad Company*, 68 L. Ed. 131, 263 U.S. 1, held plaintiff could not recover for an injury due “primarily” to the failure of the deceased to act. Frese was the engineer on a Burlington train which collided with a Wabash train at a crossing of the tracks on the same level. A statute of Illinois made it the duty of the engineer to stop within 800 feet and positively ascertain that the way is clear. The Wabash train was approaching, (after both trains had stopped for the crossing) from the Burlington fireman’s side of the engine and the plaintiff alleged negligence of the fireman. The court pointed out the statute made it the personal duty of the engineer to ascertain that it was safe to resume the course.

“\* \* \* Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employer’s Liability Act (April 22, 1908, chap. 149, Sec. 3, 35 Stat. at L. 65, 66, Comp. Stat. Sec. 8659, 8 Fed. Stat. Anno. 2d ed. p. 1339) to hold that he could recover for an injury primarily due to his failure to act as required on the ground that possibly the injury might have been prevented if his subordinate had done more. See *Great Northern R. Co. v. Wiles*, 240 (4) U.S. 444, 448. 60 L. Ed. 732, 734, 36 Sup. Ct. Rep. 406.\* \* \*”

While that case did not involve a violation of the Safety Appliance Act, the legal principle holding it was

proper to direct a verdict below for the defendant on the ground the negligence of the engineer was the sole proximate cause of his death clearly proves it was proper for the court in the Coray case to submit the issue of causation to the jury.

In *Anna Lang, admx. v. New York Central Railroad Company*, 65 L. Ed. 729, 255 U.S. 455, the action was under the Safety Appliance Act. The defendant had a defective car loaded with iron on the siding at the station in Silver Creek, New York. The drawbar, the draft timber, and the coupling apparatus on the westerly end of this car were gone. This condition was known to the plaintiff's intestate prior to the accident. During a switching movement involving connecting three cars on the track where the crippled car stood, plaintiff's intestate was on one of these three cars for the purpose of setting the brakes and so placing them on this siding as not to come into contact with the crippled car. He went to the east end of the easterly car (on top) and his foot was resting on a small platform at the end of the car which is below the brake wheel. For some reason he did not stop the three cars moving on this track before coming into contact with the crippled car. The cars collided and owing to the absence of coupler attached on the crippled car, intestate's leg was caught between the ends of the two cars and he was so injured that he died. It was not the intention of any of the crew to disturb or couple or to move the crippled car. The defendant railroad contended and the Court held, that the proximate cause of the accident was the failure of the



deceased to stop the cars before they came into collision with the defective car, and that the absence of the coupler and drawbar was not a proximate cause or a concurring cause.

“It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car, and to set the brakes upon it ‘so as not to come into contact with the crippled car,’ to quote again from the trial court. That duty he failed to perform, and if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the court of appeals answered: ‘Still the collision was not the proximate result of the defect.’ Or, in other words, and as expressed in effect in the Conarty Case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law, ‘but only had they been complied with, it (the collision) would not have resulted in the injury to the deceased.’ ”

In *St. Louis & San Francisco Railroad Company v. Fannie M. Conarty, admx.*, 59 L. Ed. 1290, 238 U.S. 242, it appeared that the deceased was killed in a collision between a switch engine and a loaded freight car having no coupling or drawbar at one end, these having been pulled out while the car was in transit. The car was about to be placed on an isolated track for repair. The deceased and two companions were standing on the foot board on the front of the switch engine, and when the car was observed, his companions stepped to the ground on either side of the track, while he remained



on the footboard and was caught between the engine and the car at the end from which the coupler and drawbar was missing. These appliances had they been in place would have kept the engine and the body of the car sufficiently apart to have prevented the injury. The deceased and his companions were not intending to and did not attempt to couple the defective car to the engine or handle it in any way. The court said that the principal question in the case was whether at the time he was injured the deceased was within the *class* of persons for whose benefit the Safety Appliance Act required automatic couplers and drawbars. The court points out that the purpose of the act relating to drawbars and automatic couplers is to enable the car to be coupled or uncoupled "without the necessity of men going between the ends of the cars."

"\* \* \* Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.'

"We are of the opinion that the deceased, who was not (251) endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the state erred in concluding that

the safety appliance acts required it to hold otherwise.”

The Lang and Conarty cases arose under the Safety Appliance Act. They held the question of causation was one of law for the Court and resolved the question against the plaintiffs. It is the law of the Coray case that the question of causation is for the jury. Each of these cases supports our claim that the instructions of the trial court on causation were correct.

In *St. Louis, Iron Mountain & Southern Railway v. McWhirter*, 57 L. Ed. 1179, 229 U.S. 265, 33 S. Ct. 858, the deceased employee was killed by a slowly moving engine from which he dismounted to run ahead along the track to open the switch. He fell on the track. The accident happened five minutes after the sixteen hours which employees are permitted to work under federal law had expired. The court of appeals held that the death of deceased must in part be attributed to the violation of the hours of service act. The Supreme Court of the United States reversed the case and held there was no proof of proximate cause:

“... It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. . . .”

B. THE RULES OF DEFENDANT RELATING TO THE OPERATION OF TRACK CARS WERE PROPERLY ADMITTED IN EVIDENCE UPON THE ISSUE OF SOLE PROXIMATE CAUSE.

Appellant assigns error upon the ruling of the court permitting the defendant below to introduce in evidence the rules of the railroad company relating to the operation of track cars. These rules are numbered 1112 to 1119, and 1120, and are found at page 136 of the transcript of the testimony. Rule 1112, provides that track cars when following a moving train shall remain not less than 400 feet to the rear of the same, and shall not stop within 200 feet of standing trains. Rule 1119, provides that track cars shall not be operated at a speed in excess of 15 m.p.h. Rule 1120, provides that operators of track cars must bear in mind that approaching trains may immediately enter a block even though that block is not occupied at the time, and that lineups obtained from train dispatchers cannot always be depended upon by reason of conditions unexpectedly changing.

The appellant tried the case below on the theory that the issue in the case upon the question of liability was one of sole proximate cause. That is the rule announced by the cases. All that the Supreme Court of the United States did in its decision in the Coray case was to put the question of proximate cause in the hands of the jury, and held that the trial court in the first trial was in error when it directed the verdict, and held that the question of causation was one of law ra-

ther than one of fact. We refer again to the language of that court in which it said:

“The jury could have found that decedent’s death resulted from any or all of the foregoing circumstances.”

It perhaps would not be useful to devote space to general definitions of the rule of proximate cause. As shown by the cases from the Supreme Court of the United States, in order for an act to be the proximate cause of an injury, it must appear that the injury was a *natural* and *probable* consequence of the negligence or wrongful act, and it ought to have been *foreseen in the light of attending circumstances*. This is the rule which is quoted with approval by the Supreme Court of the United States in *Brady vs. Southern Railway Company*, 320 U. S. 476, 88 L. Ed. 239. The rule is quoted from an earlier case of *Milwaukee & St. P. R. Co. vs. Kellogg*, 94 U. S. 469, at 475, 24 L. Ed. 256, at 259:

“But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

“Events too remote to require reasonable pre-vision need not be anticipated. . . .”

It is obvious that the rules of the company relating to speed of track cars and the distance they must remain behind moving trains are facts which the jury is entitled to consider in determining whether the running into the rear end of the stopped train was so unusual and so contrary to the results which would normally and naturally follow from an emergency stop of a train when the airline became disconnected that the stopping was not the proximate cause of the death of Mr. Lucas. If such testimony is not admissible to prove that the death of Lucas was not an event reasonably to be foreseen or anticipated because the train stopped on the track, it would likewise appear that all testimony with respect to the facts relating to the accident itself would be immaterial. Certainly, there is equal reason for the court to hold that the jury was entitled to have before them the rules of the company relating to the operation of track cars, as they were entitled to the testimony of the train crew respecting the speed at which the track car was moving, or the testimony of Mr. Lynch who was riding on the track car relating to all of the events which he described. That testimony was introduced by the plaintiff. These rules were not introduced for the purpose of showing contributory negligence or concurring negligence of Lucas, but to support an inference by the jury that the conduct of Lucas in running into the rear end of the train in broad daylight on a straight track was the sole proximate cause of his death. The rules themselves merely state the human law of self-preservation. The jury was told specifically that



in this case contributory negligence was no defense and that the burden was on the defendant to prove that the negligence, if any, of Wm. Frank Lucus was the sole proximate cause of his death. The trial court gave to the jury instructions which state these issues upon proximate cause and contributory negligence in the language requested by the defendant. In view of those instructions the jury must be assumed to have understood the purpose of the rules was upon the issue of sole proximate cause.

The Supreme Court in *Great Northern Ry. Co. v. Wiles*, 60 L. Ed. 732, 240 U. S. 444, held there could be no recovery for the death of a brakeman on the caboose of a train which broke in two because the drawbar pulled out and stopped the train instantly. Another train following ran into the caboose because the deceased failed to perform his duty to immediately put out signals to protect the stopped train as required by *rule*. The Minnesota court held the doctrine of *res ipsa loquitur* applied from the pulling out of the drawbar and submitted the case to the jury on the theory of comparative negligence.

“There is no room for the application of the rule of comparative negligence established by the employer’s liability act of April 22, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier’s *rules* required, remained in the caboose and was killed there when a passenger train, which

he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run.”

The failure of the drawbar in the Wiles case which permitted the train to break in two and come to an emergency stop was a violation of the Safety Appliance Act just as was involved in the Coray case. The defendant introduced in evidence the rules of the railroad company which required the deceased flagman under the circumstances must immediately go back with stop signals to warn approaching trains. The Supreme Court held that the violation of the rules was the sole proximate cause of the death of the flagman and that he could not recover.

*Helton v. Thompson*, 36 N.E. (2d) 267, Appellate Court of Illinois, 1941. The facts and holding of the court are reflected in the headnotes.

“Evidence *held* to establish that brakeman, in violation of dispatcher’s orders and without informing engineer or fireman, caused fireman and engineer to back train onto short and dangerous switch track rather than on track intended, causing train to be upset, and hence that brakeman’s negligence was the sole and efficient cause of his death, precluding recovery therefor from railroad. Federal Employer’s Liability Act. §§1-9, 45 U.S.C.A. §§51-59.

“In actions in state court against interstate railroad for death of employee, decisions under the Federal Employer’s Liability Act are con-



trolling. Federal Employer's Liability Act §§1-9, 45 U.S.C.A. §§51-59.

“Under Federal Employer's Liability Act, if sole proximate cause of plaintiff's injury or death resulted from his own conduct, it bars recovery. Federal Employer's Liability Act. §§ 1-9, 45 U.S. C.A. §§51-59.

“The rule that contributory negligence is no defense where negligence of injured railroad employee and some other employee combine to cause injury is inapplicable where injured employee violated company's orders and thus created a dangerous situation for which he was solely responsible and for which there was no plausible explanation. Federal Employers' Liability Act §§1-9, 45 U. S. C. A. §§51-59.”

In the body of the opinion, the court stated and held:

“The administrator and his counsel argue that the fireman and engineer were negligent in not slowing the train down more when Probert gave the slow signal by means of the lighted fusee, and in not stopping the train immediately when the ‘washout’ or emergency signal was given immediately preceding the accident. While there may be some dispute as to the facts on this phase of the case decisions under the Federal Employers Liability Act, which are controlling in cases of this kind, are consistently to the effect that if the sole proximate cause of plaintiff's injury or death resulted from his own conduct, it bars recovery. In *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, 36 S. Ct. 406, 408, 60 L. Ed. 732, a drawbar on a freight train came apart, and the train, while stopped, was hit by a following passenger train. Wiles was the rear brakeman on

the freight train, and it was his duty when it stopped to go back and flag, which he failed to do, staying in the caboose where he was killed by the collision. The court denied recovery, saying: 'There is no justification for a comparison of negligences or the apportioning of their effect. \* \* \* Wiles knew them (the rules), and he was prompted to the performance of the duty they enjoined \* \* \* by signals \* \* \*. He disregarded both. \* \* \* He brought death to himself and to the conductor of his train.' In *Davis v. Kennedy*, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212, an engineer was killed in a collision of his train with another, west of a point known as Shops. The other train had the right of way, and the crew of Kennedy's train had instructions never to pass Shops unless they knew as a fact that the other train had passed it. Kennedy ran his train past and beyond Shops and the collision occurred. Negligence of the other members of the crew was alleged but recovery was denied, and Mr. Justice Holmes, in commenting on the circumstances, said (266 U. S. at pages 148, 149, 45 S. Ct. at page 33, 69 L. Ed. 212): 'It seems to us a perversion of the statute (the Employers Liability Act) to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.' In *Unadilla Valley R. Co. v. Caldine*, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, a conductor who had printed orders that his train was to pass the other at Bridgeport, instead of waiting at Bridgeport, directed his train to proceed, resulting in a collision in which Caldine, the conductor, was killed. Certain facts showing unusual conduct on the part of other employees were adduced in evidence, but the court

reversed judgment for plaintiff, saying (278 U. S. at page 142, 49 S. Ct. at page 91, 73 L. Ed. 224): 'He cannot hold the Company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts.'

"It is clear from the record that Probert's negligence was the primary and in fact the sole and efficient cause of his death, and under the consistent rulings of the federal courts, many of which are cited in defendant's brief, recovery is barred under the act. *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601; *Southern Railway Co. v. Gray*, 241 U. S. 333, 36 S. Ct. 558, 60 L. Ed. 1030; *Southern Railroad Co. v. Youngblood*, Adm'x, 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124; *Frese v. Chicago, B. & Q. R. Co.*, 263 U. S. 1, 3, 44 S. Ct. 1, 68 L. Ed. 131."

The dispatcher's orders in *Helton v. Thompson* are quite similar to the rules relating to track cars in the *Lucas* case. The deceased Probert in the *Helton* case had received orders from the dispatcher to throw the switch and let the freight train back into the east passing track. Instead of doing this, he threw the switch and attempted to put the train on to the house track. The accident occurred at four o'clock in the morning, and the fireman and the engineer were nearly one-third of a mile from where Probert was stationed. Probert first gave a stop signal, and then a back signal which the fireman gave to the engineer who acted upon it, and proceeded in a backward motion. The next was a slow signal, and finally a stop signal was given, followed by an emergency

signal called "washout," which means stop at once. Probert had been standing on top of the rear car and when the fireman went back to the rear of the train, he found this car had tipped over the embankment, and Probert was found dead lying on the ground. It was at this time that the engineer learned for the first time that Probert had directed the train into the house track, instead of into the east passing track. There was a judgment on a verdict in favor of the plaintiff below, which was reversed on appeal, the court holding that the trial court should have granted a directed verdict in favor of the defendant.

The reasoning applied by appellant in an attempt to show that the trial court committed error in permitting the rules of the company relating to track cars to be introduced as evidence would lead to some very strange conclusions. Since the rules are instructions of a superior to an employee, appellant would apparently take the position that it would be *immaterial* to prove that Lucas took the track car out in direct violation of specific orders. That again under appellant's theory would merely be contributory negligence and would have no bearing upon sole proximate cause. Or presumably if Lynch, who was riding with Lucas on the track car, had observed the train after it went into an emergency stop and shouted at Lucas telling him the train had stopped and imploring him to stop the track car, and if Lucas had looked at the stopped train and then failed to apply the brakes, I suppose it could be contented that his conduct in refusing to stop the track car even though he observed the

train ahead of him was nothing more than contributory negligence, and the facts in that regard should not be admitted in evidence. The illustrations used differ in degree but not in principle from the facts at bar. Under the law of this case, it was the function of the jury to decide whether under all the facts and circumstances relevant and material to the question of proximate cause, the negligence of Lucus was the sole proximate cause. The cases from the Supreme Court of the United States which have ruled that the conduct in those cases of the employee was the sole proximate cause as a matter of law of the injury or death involved are not overruled so far as the issue here involved is concerned. The Supreme Court of the United States has not held that the conduct of Lucus is merely contributory negligence. All the Supreme Court has held is that the question of causation is for the jury. The same evidence which proves the facts, and including the rules of the company relating to the conduct of the employee, are admissible and material whether the issue is one of law or one of fact.

The Supreme Court of Missouri is frequently called upon to decide cases under the Federal Employers' Liability Act. *Hampton v. Wabash R. Co.*, 204 S. W. (2d) 708 decided by that court on September 8, 1947, contains a lucid discussion of the legal principals involved in the Lucus case. Plaintiff's husband was killed by defendant's passenger train. He was in charge of an extra gang engaged in repairing the track in a deep cut on a long curve. The banks of the cut were covered with trees.

The deceased and his nine men were working in the cut about 975 feet from its west end when they were run down by the defendant's eastbound train going seventy-five miles an hour. He had placed a "slow board" at the side of the track about a mile west of where they were working. Under the rules, this indicated that the track one mile distant from the board was in condition for a speed of not more than ten miles an hour except for first class trains which did not have to reduce speed. The train involved in the accident was a first class train. The train was late. It normally went east through the cut a little before one o'clock.

Under defendant's rules enginemen must sound the whistle approaching curves, and when the view is restricted by weather or other unusual conditions. There was evidence that it was the practice to sound the whistle all the way around curves in cuts for the protection of men who might be working on the curve. There was evidence that the train involved did not sound a warning. Plaintiff charged that the written rules and custom were violated by defendant.

Defendant's track supervisor had verbally instructed deceased not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles. This instruction was violated by deceased, and defendant contends it was the primary and sole negligence, and that it was entitled to a directed verdict.



The court held that the negligence of the deceased “did not preclude a finding by the jury that his death was in part due to the negligence of the railroad’s servants.”

This Hampton case shows the propriety of the admission of the rules. The court held the negligence of the defendant’s servants other than the plaintiff’s deceased husband was “a link in an unbroken chain of reasonably foreseeable events.” *Brady v. Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 237, 88 L. Ed. 239. The rules of the defendant, Southern Pacific Company, in the Coray case were properly introduced to enable the jury to determine whether the failure of the triple valve was a link in an unbroken chain of reasonably foreseeable events. The question of proximate cause is not eliminated in the case, because a violation of the safety appliance law is involved.

The court quoted the rule as follows:

“We find in 35 Am. Jur., Master and Servant, Sec. 407, the doctrine drawn from these United States Supreme Court cases stated as follows: ‘In accord with the well-settled rule that there can be no recovery under the Federal Employers’ Liability Act where the negligence of the employee is the sole proximate cause of the injury, it is very generally held that where a violation of a *regulation* or *instruction* promulgated by the employer is the sole proximate cause of the injury, there can be no recovery under the Federal Employers’ Liability Act.’ ”



C. INSTRUCTION NUMBER 16 PROPERLY TOLD THE JURY THAT IF THE SOLE CAUSE OF THE DEATH OF LUCUS WAS HIS OWN CONDUCT THE PLAINTIFF COULD NOT RECOVER.

Appellant assigns error because the court gave Instruction No. 16 which is set out at page 210 of the record. The appellant's exception to this instruction is found at page 145 of the Bill of Exceptions, and follows:

"The plaintiff excepts to instruction number 16 and each and every part and portion thereof on the ground and for the reason that under said instruction the issue of contributory negligence was in fact submitted to the jury contrary to the Federal Safety Appliance Act and Federal Employers Liability Act."

The exception to the instruction is general rather than specific. It does not point out or specify the part of the instruction to which objection is made to say that each and every part is objectionable. It adds nothing to a general exception to Instruction No. 16 to say that each and every part is objectionable. The reason for the exception does not specify the language to which objection is made. It is clearly established that in order for such an exception to raise any question for review in this court, the entire instruction must be erroneous. If the instruction contains separate paragraphs or propositions which correctly state the law applicable to the case, the instruction is to be upheld in this court because the exception brings before this court only one question, to wit:

Was any “part or portion” of the instruction properly given by the trial court?

The last paragraph of Instruction No. 16 reads:

“The burden is upon defendant to prove from a preponderance of the evidence that the negligence, if any, of William Frank Lucus was the sole proximate cause of his death.”

There can be no question upon the correctness of this part of the instruction so that under the rule relating to general exceptions the assignment of error of appellant on this point must be overruled.

In *Shortino v. Salt Lake & U. R. Co.*, 52 U. 476, 174 P. 860, this court said:

“Counsel for defendant excepted to twenty of the thirty-five paragraphs. The exception invariably read as follows: ‘Defendant excepts to instruction No. ....,’ stating the number of the paragraph excepted to. We have repeatedly held—indeed, we have so often decided it that it has become elementary—that unless the entire paragraph is vulnerable such an exception presents nothing for review. As before stated, each paragraph of the court’s charge, with perhaps one or two exceptions, contained more than one legal proposition. A general exception to the whole paragraph, therefore, may refer to any one of several propositions contained in the paragraph. The purpose of taking an exception to an instruction is to direct the trial court’s attention to the legal proposition which it is contended is faulty. The fault may lie in an omission, or in a word, a

phrase, or sentence, or in several sentences. While no reason need be assigned for the exception, yet if an alleged faulty statement of law consists in a word, phrase, or sentence, or in a series of sentences, the exception should be limited to such word, phrase, sentence, or sentences, so that the trial court may examine them, and, if possible, correct the error. If, therefore, an exception is to the whole paragraph, it is a matter of mere conjecture what portion of the same is intended to be excepted to. Nor does such a general exception present anything to this court for review unless the whole paragraph excepted to is faulty, which is seldom the case. In view, therefore, of the general nature of the exceptions, we cannot review the many errors assigned relating to the instructions.”

In *Ryan v. Beaver County*, 82 U. 27, 21 P. (2d) 858, the court quotes with approval from the earlier Utah case of *Farnsworth v. Union Pacific Coal Co.*, 32 U. 112, 89 P. 74, as follows:

“ ‘It is no longer an open question in this court, as it has often been held in common with most courts, that in taking exceptions the portion that is excepted to must be pointed out. A mere exception to an instruction is an exception in solido to the whole instruction, and, unless the whole instruction is bad, the exception is unavailing for the purpose of having any particular part reviewed and passed upon by this court.’ ”

There was no prejudicial error in Instruction No. 16. It told the jury that if the negligence of Lucas was the sole proximate cause of his death, then the verdict

must be for defendant, no cause of action. The instruction contains three sentences. The first told the jury that where an employee has two ways of performing an act, the one safe and the other dangerous, he owes a duty to pursue the safe method, and any departure will prevent recovery if he is injured. The next two sentences told the jury that such conduct prevented recovery if it was the sole proximate cause, and that the burden of proof on the question of sole proximate cause was on the defendant. As pointed out elsewhere in this brief, the jury had been told that contributory negligence was no defense, and that the defendant was guilty of a violation of the Safety Appliance Act, and that if such violation proximately caused in whole or in part the death of Lucas, the verdict should be in favor of the plaintiff. Assuming, as we must on this appeal, that the jury construed the instructions together as an integrated whole, they could not have been misled by anything stated in No. 16.

In *Comeenes v. Railroad Co.*, 37 U. 475, 109 P. 10, this court held:

“It will thus be observed that the court, while it did not charge the jury on the question of contributory negligence in the instruction complained of, nevertheless did give other instructions in which it carefully guarded the rights of the defendant, so far as they were involved in that issue. It is a familiar rule of law that all the instructions must be read and considered together, and if, as a whole, they contain a correct statement of the law applicable to the issues in a case, the court can-

not be convicted of error because the law applicable to the different questions involved is separately stated. In such case the instructions supplement each other, and if, when read and considered as a series they contain a correct statement of the law, it is sufficient.”

## POINT II.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING THE MEASURE OF DAMAGES.

Appellant states on page 40 of his brief:

“The evidence presented on the dependency and reasonable expectation of Mrs. Lucas for support from Frank Lucas demonstrated beyond any possible doubt that Frank Lucas did not at the time of his death intend to voluntarily support Mrs. Lucas. Reference to defendant’s Exhibit ‘2’ will demonstrate that Mrs. Lucas did not believe that she could voluntarily get support from Frank Lucas. However, Mrs. Lucas had an adjudication of her right to support from Frank Lucas and that adjudication by the California Court continued in force to the date of Frank Lucas’ death. \* \* \* ”

Apparently, appellant agrees with defendant that the expectation or right to be supported had become dissolved or had been replaced by a court judgment. The voluntary basis had disappeared. The statement that “Frank Lucas did not at the time of his death intend to voluntarily support Mrs. Lucas” is fully concurred in by appellee. We would go further and assert that the testi-

mony would support a finding by the jury that Frank Lucas did not intend to pay Mrs. Lucas any of the \$10.00 a week ordered by the court as support money. He left Los Angeles for western Utah a short time after this order was signed by the court, on January 6, 1943. He was killed on May 24, 1944. He did not write or communicate with Mrs. Lucas in that interval of time. (Tr. 88-89) She exhausted all the means at her command to learn where he was without success. The jury could find that he did not intend to pay her any money after January 6, 1943, but also that he was determined that her efforts if any to force him legally to pay her support money should not succeed. In her cross complaint for separate maintenance filed in the Superior Court for Los Angeles County, she had alleged:

“V. That, although defendant has been a good and loving wife to the plaintiff, plaintiff has been guilty of extreme cruelty in his treatment of defendant, causing her great mental pain, suffering and anguish.

“VI. That plaintiff deserted and abandoned defendant more than a year prior to the commencement of his action and lived separate and apart from the defendant against the will and wishes of the defendant; that during all of said time said plaintiff did not contribute anything to the support of defendant and did not supply her with the necessities of life; that during the entire married life of the parties the defendant has been forced to work to earn her livelihood and necessities of life; that plaintiff has always earned more than enough money to support de-



fendant but has failed, neglected and refused so to do; all of which has been due to no fault of the defendant.”

“V. That plaintiff squanders his money on liquor, in bars and on friends and acquaintances with whom he associates with at public drinking places, constantly drinking to excess.

“VI. That defendant has pleaded and begged plaintiff to give up his disreputable friends, to cease patronizing public bars and to return home and live with defendant; that plaintiff has persistently refused to do so; that due to his excessive drinking, plaintiff has become, in the past, involved in several grievous difficulties, from which defendant was able to extricate him only after great and costly effort; that due to plaintiff’s conduct, defendant worries about him and is in constant dread that he will again become involved in difficulties; that her worry has been so great that it has affected her health and she cannot sleep or rest properly, has lost her appetite and is almost physically exhausted; that she is in need of medical attention and cannot afford to pay for it; that she fears that she may have to quit her job because of her health; that unless she receive financial aid from plaintiff she will suffer to a great extent.”

She made “every effort possible” to get in touch with him after January 6, 1943, which was the day they had the hearing before the Judge, and she was granted \$10.00 a week commencing February 1, 1943.

Plaintiff’s request No. 11 is not a correct statement of any legal principle which would furnish a guide for

the jury. The first sentence told them the marriage relation creates a right on the part of the wife to be supported by her husband, and this right may be legally enforced by her so long as the marriage relation exists. Mrs. Lucas at the time of trial or at any other time since January 6, 1943, did not have the right to be supported by her husband. That right had been merged into a decree in a divorce proceeding allowing her \$10.00 a week until the further order of the court. The statement above might be proper in the normal relation of husband and wife living together if the husband is able to earn enough to support the wife and the wife is dependent. But the trial court very properly refused to instruct the jury that Mrs. Lucas had the right to "support." Her "right" was limited to \$10.00 a week.

The second clause told the jury that if Edith B. Lucas is entitled to recover damages she can not be deprived of that right by a plea on the part of defendant that her husband had not fulfilled the duties he owed to her. This instruction if given would have led the jury to set up some standard of support which Lucas should have furnished his wife and based their verdict for damages on that standard without regard to whether Lucas had actually supported Mrs. Lucas. The request told the jury in effect that they should disregard the evidence in the record that Lucas had "failed" and "refused" to support Mrs. Lucas during the entire married life of the parties. This uncontradicted record of non-support should be ignored, and they should base their

verdict upon the "duty" of the husband to "*support.*" The instruction told the jury to disregard the evidence of past performance and require the defendant to fulfill the duty of support which Lucas did not discharge during his life. If the request means anything, that is what it means.

This request No. 11 is in conflict with appellant's request No. 10. Request No. 10 was given as instruction No. 11 as requested. In it the jury was properly instructed that the measure of damages was "*the loss of pecuniary benefits which she might reasonably have expected to receive from the said deceased during her lifetime if the said deceased had not been killed.*" And in another paragraph of the same instruction requested by appellant, the measure is stated as "*the present cash value of the estimated future contributions toward her support which she could reasonably have expected from the deceased during her lifetime had he not been killed.*"

Reasonable expectation of future pecuniary support or contributions is entirely different from telling the jury to decide what the deceased owed as a duty and then disregard his past record of non-support and give a verdict imposing the non-performed duty of Lucas on the Southern Pacific Company.

Appellant's request No. 11 told the jury that in determining the loss of pecuniary benefits, they may take into consideration not only such voluntary contributions as Lucas may reasonably have been expected to make, but also such contributions as she may reasonably have

been expected to secure through the enforcement of her legal right to *support* from the husband.

In view of the fact that Instruction No. 10 spoke of "pecuniary benefits" and "estimated future contributions" it included in its general terms both "voluntary" and "involuntary" contributions. Instruction No. 10 covered the field fully and correctly.

There was no evidence in the record from which the jury could find specifically that Mrs. Lucas would obtain "involuntary" contributions from Lucas through the enforcement of her legal right to support. Her right to "support" had been exchanged by court order for \$10.00 a week. She exhausted her means of learning where he was shortly after January 6, 1943, when he left Los Angeles. She never heard from him after that date. She discontinued her search. A finding she would have located him and forced him to support her would have been contrary to all the evidence in the record on the point. Mrs. Lucas did not testify she had any intention of putting the law on Lucas and forcing him to pay her the \$10.00 a week. At page 88 of the transcript, she said she made every effort possible to get in touch with her husband. She was very much distressed. "I didn't know where he was and was worried about him." She inquired at the draft board, and the navy recruiting office and his former employer, and wrote to him at his mother's home, but the letter came back. She thought eventually her husband would return to her. She maintained the home and thought if he had been alive he

would be there with her today. She was positive he would return to her some day.

If this testimony is entitled to any weight, it proves she was not going to enforce her legal rights to \$10.00 a week, but she was going to maintain the home with full assurance he would return some day (before trial) and voluntarily resume the marriage relation and voluntarily contribute. While the testimony on this question on involuntary contributions is very meager, it proves Mrs. Lucas had no intention of forcing Lucas to pay. She is the only person who knew her own mind, and the record shows it was her intention to rest on her "positive" conviction he would return to live with her.

Appellant objects to Instruction No. 9, which provided:

“ ‘You are instructed that the mere fact that Edith Lucas was the legal wife of Frank Lucas at the time of his death is not sufficient evidence to prove that plaintiff is entitled to recover any damages for his death in this action. If you believe from all the evidence in the case, that the deceased would not have made any further money contributions to Edith Lucas or would not have supported her in the future if he had not died, then your verdict should be for the defendant.’ ”

This instruction was just the converse of Instruction No. 11 that the measure of damages was the reasonable expectation of future contributions. It follows as a logical and necessary corollary from the rule of damages in appellant's request No. 10 given as Instruction No. 11.



Appellant does not refer us to any law, which holds that the mere fact that Edith Lucus was the legal wife of Frank Lucus entitled plaintiff to recover damages for his death. Neither are we referred to any law which holds that it was error to instruct the jury that if they believed the deceased would not have made any further money contributions to Mrs. Lucus if he lived, their verdict should be for the defendant. The cases cited by appellant hold that defendant is not entitled to a directed verdict on the question of damages where a wife or a wife and minor child are plaintiffs even though there was a failure of support prior to death. But it is unnecessary to decide whether the plaintiff below made a jury issue upon damages. The issue of damages was submitted to the jury under the instruction drawn and requested by appellant that the measure of damage was the present cash value of estimated future contributions toward her support which she could have reasonably expected from the deceased had he not been killed. This includes all contributions, voluntary and involuntary.

Appellant relies upon *Gilliam v. Southern Ry. Co.*, 93 S.E. 865 (So. Carolina, 1917). We believe that case is authority supporting the refusal of the trial court in the Coray case to give the plaintiff's requested instruction on involuntary contributions. Plaintiff had judgment below for the death of Whit McBride who left a wife and minor child. He married the woman sixteen or eighteen years before, and after living with her about a year he abandoned her and his child. There was no evidence



that he afterwards contributed anything to the support of either of them, nor was there any evidence that he did not. There was evidence that after he abandoned her, his wife lived in the house with another man and that she had another child. The defendant moved for a directed verdict which was denied and there was a verdict for plaintiff, and an appeal by defendant. The court held that the motion for directed verdict on the ground that the woman and child sustained no actual pecuniary loss by the death of McBride was properly denied, because *prima facie* and presumptively the widow and minor unmarried child of deceased had a legal pecuniary interest in the continuance of his life. The portion of the opinion quoted in appellant's brief holds that the defendant in the Coray case was not entitled to a directed verdict on the question of damages. Since the issue of damages was submitted to the jury, we submit that the quotation, while interesting and instructive is beside any real issue in this case. But note the following language of the case :

“It follows, however, that, although the technical right may exist, yet the deprivation of it may cause very little, or, possibly, no actual financial loss, for it may be shown from the relation, circumstances, and relative condition of deceased and the surviving relatives for whose benefit the action is brought that no actual pecuniary loss, present or prospective, resulted to them from his death; and it is well settled that it is only for such loss that recovery may be had. *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *American R. Co. v. Didrickson*, 227 U. S. 145, 33 Sup. Ct.

224, 57 L. Ed. 456; Gulf, etc., R. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785; St. Louis, etc., Ry. Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160, or as in the McGinnis case, it may appear that some of them sustained such loss while others did not. Therefore, in view of the evidence tending to show that the wife had forfeited her right of support, the court should have given defendant's first request, to wit:

'I charge you the measure of damages is the amount which will compensate the surviving beneficiaries for the actual pecuniary loss, and the jury should apportion the amount among them according to the loss of each.'

"In this connection, we consider the assignment of error in charging plaintiff's fourth request, to wit:

'That the law of this state imposes upon a man the duty of supporting his wife and children, and in the absence of other proof it will be presumed that everybody obeys the law of the land until the contrary appears.'

"While that is a sound proposition of law, and is applicable when there is no evidence upon the question whether the duty has been performed, or when the evidence upon that issue is conflicting, yet, in view of the undisputed evidence in this case that deceased had not supported his wife and child, this instruction might have been misleading, for the jury might have understood it as authorizing an award of damages for the loss of support, presumed to have been furnished, when, in fact, it had not been furnished. Under the evidence, recovery, if at all, should have been limited to the prospective loss which

the widow and daughter actually sustained by reason of the deprivation of their right of support as heretofore explained."

## CONCLUSION

Plaintiff had a fair trial and the jury returned a verdict of no cause of action. The verdict is supported by the testimony in the record on the ground that the failure of the air line and the stopping of the train was not the proximate cause of the death of Lucas. The verdict also finds support in the testimony that Mrs. Lucas sustained no pecuniary loss when Mr. Lucas was killed. Reading all the instructions together, the jury was properly instructed and there was no error in the admission of testimony.

The judgment below upon the verdict should be affirmed.

Respectfully submitted,

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Respondent.*