

1949

John D. Marshall v. The Ogden Union Railway and Depot Company : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: 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.

Rawlings, Wallace, Black & Roberts; Dwight L. King; Wayne L. Black; Counsel for Plaintiff and Appellant;

Recommended Citation

Brief of Appellant, *Marshall v. Ogden Union Railway and Depot Co.*, No. 7407 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1209

This Brief of Appellant 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.

Case No. 7407

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

JOHN D. MARSHALL,

Plaintiff and Appellant,

vs.

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY, a cor-
poration,

Defendant and Respondent.

FILED

NOV 12 1910

CLERK, SUPREME COURT, UTAH

BRIEF OF APPELLANT

On appeal from the District Court of the
Second Judicial District, in and for
Weber County, State of Utah.
Honorable John A. Hendricks, and
L. Leland Larson, Presiding.

RAWLINGS, WALLACE
BLACK & ROBERTS
DWIGHT L. KING
WAYNE L. BLACK

*Counsel for
Plaintiff and Appellant.*

INDEX TO BRIEF

SUBJECT INDEX	Page
STATEMENT OF THE CASE.....	1
A. PRELIMINARY STATEMENT	1
B. THE FACTS	3
ASSIGNMENT OF ERRORS.....	15
SUMMARY OF ARGUMENT.....	15
ARGUMENT	16
POINT I. DEFENDANT FAILED TO SHOW DUE DILIGENCE IN DISCOVERING SO-CALLED NEWLY DISCOVERED EVIDENCE BEFORE AND DURING TRIAL AND INASMUCH AS SUCH NEWLY DISCOVERED EVIDENCE WAS FOR IMPEACHMENT PURPOSES ONLY AND DOES NOT APPEAR TO BE OF SUFFICIENT MATERIALITY TO HAVE AFFECTED THE VERDICT, THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL ON THAT BASIS. (Assignment of Error No. 1)	16
POINT II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 7. (Assignment of Error No. 3)....	42
POINT III. THERE WAS NO EVIDENTIARY BASIS FOR THE SUBMISSION OF THE ISSUE OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE TO THE JURY. (Assignment of Errors No. 2, 3 and 5).....	46
POINT IV. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE ISSUE OF LAST CLEAR CHANCE TO THE JURY. (Assignment of Errors No. 2 and 5).....	53
CONCLUSION	60

TEXTS CITED

Hayne, New Trial and Appeal, Vol. 2, Sec. 289.....	17
39 Am. Jur., Sec. 156, p. 163.....	28

INDEX—(Continued)

	Page
39 Am. Jur., Sec. 161, p. 168.....	29
39 Am. Jur., Sec. 163, p. 170.....	29
39 Am. Jur., Sec. 167, p. 173.....	35

CASES CITED

Arthur v. Parish (Ore.), 47 P. 2d 682.....	23
Badboy v. Brown, 66 Mont. 307, 213 P. 246.....	18
Baumgarten v. Hoffman, 9 Utah 338, 34 P. 294.....	40
Beck v. Sirota (Cal.), 109 P. 2d 419.....	51
Belt v. Morris (Okla.), 34 P. 2d 581.....	21
Bowers et ux. v. Foster et ux. (Wash.), 278 P. 1072.....	51
Davies v. Mann, 10 M & W 548 (1842).....	53, 55
George G. Leavitt Co. v. Couturier (Utah, July 12, 1933), 23 P. 2d 1101	33
Girdner v. Union Oil Company of California, (decided Aug. 9, 1932), 13 P. 2d 915.....	53
Greenwood v. Summers, et al. (Cal.), 149 P. 2d 35.....	50
Hechler et al. v. McDonnell (Cal.), 109 P. 2d 426.....	52
Hinton v. Peterson, et al., (Mont.), 169 P. 2d 333.....	18
Hydraulic Cement Block Co. v. Christensen, 38 Utah 525, 114 P. 524	30
Klopenstine v. Hays, 20 Utah 45, 57 P. 712.....	28
McCulloch v. Horton (Mont.), 56 P. 2d, 1344.....	49
Mathews v. Daly West Mining Co., 27 Utah 193, 75 P. 722....	47
Mazzotta v. Los Angeles Ry. Corp., et al. (Cal.), 145 P. 2d 662	22
Michigan City v. Werner (Ind. Dec. 1916), 114 N.E. 636, 186 Ind. 149.....	55
Moser v. Zion's Co-Op. Mercantile Inst. et al. (Utah), 197 P. 2d 136.....	17
Mourning v. Harrison (Kan., Nov. 8, 1941), 154 Kan. 242, 118 P. 2d 558.....	33
Pandolfo et al. v. Jackson et al. (Cal. Mar. 2, 1936), 55 P. 2d 550	37
Pinello v. Taylor (Cal.), 17 P. 2d 1039.....	51
Rath v. Bankston, et al. (Cal. Oct. 17, 1929), 281 P. 1081....	32
Rothman v. Rumback (Ariz.), 96 P. 2d 755.....	23

INDEX (Continued)

	Page
Russell v. Margo (Okla.), 67 P. 2d 22.....	21
Rydalch v. Anderson (Jan. 6, 1910), 37 Utah 99, 107 P. 25..30, 35	35
Saltas v. Affleck et al., 105 P. 2d 176.....	27
Salt Lake Inv. Co. v. Stoult, 54 Utah 100, 180 P. 182.....	31
Sawyer v. Nelson et ux. (Cal. July 15, 1931), 1 P. 2d 1068....	37
Sharpensteen v. Sanguinetti (Ariz.), 262 P. 609.....	19
Snell v. Cisler (Jan. 1876), 1 Utah 298.....	30
Sovereign Camp, Woodmen of The World, v. Thiebaud, 65 Kan. 332, 69 P. 348.....	23
Teakle v. San Pedro, L. A. & S. L. R. Co., (decided May 9, 1907), 32 Utah 276, 90 P. 402.....	56
Tucson Rapid Transit Co. v. Rubiaz (Ariz. Feb. 2, 1920), 21 Ariz. 221, 187 P. 568.....	36
Turner v. Stevens, 8 Utah 75, 30 P. 24.....	39
Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105, 148 P. 951.....	36
Waer v. Waer et al., (Cal. June 17, 1922), 189 Cal. 178, 207 P. 891.....	37
Warshauer Sheep & Wool Co. v. Rio Grande State Bank, (Colo. Apr. 18, 1927), 256 P. 21.....	41
White v. Kansas City Public Service Co., (Kan. Jan. 28, 1933), 18 P. 2d 156.....	37
Wood v. Akridge (Utah, Oct. 19, 1934), 36 P. 2d 804	40

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN D. MARSHALL,

Plaintiff and Appellant,

vs.

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY, a corporation,

Defendant and Respondent.

Case No.
7407

BRIEF OF APPELLANT

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

The parties will be designated as in the trial court.

All italics are ours.

All record citations of testimony refer to the second trial transcript unless otherwise designated.

John D. Marshall, an employee of the Southern Pacific Railroad Company, was injured in defendant's passenger depot at Ogden, Weber County, Utah, at

approximately 9:00 o'clock a.m., on the 19th day of June, 1947, while in the course of his employment as a chair car porter for the Southern Pacific Railroad Company.

This action was commenced in the Second Judicial District, in and for Weber County, State of Utah, on March 1st, 1948. The case was first tried before the Honorable John A. Hendricks on the 1st and 2nd days of July, 1948, the jury returning a verdict in the sum of \$8,500.00, in favor of the plaintiff. Defendant filed a motion for new trial and said Judge, after the motion had been argued by respective counsel, entered an order granting said motion. (R. 038).

The case was tried a second time before the Honorable L. Leland Larson, on the 23rd and 24th days of February, 1949, the jury returning a verdict of No Cause for Action in favor of the defendant and against the plaintiff. Thereafter plaintiff moved for a new trial and plaintiff's motion was on the 22nd day of April, 1949, denied by said judge (R. 144).

Plaintiff hereby appeals from the order of Judge Hendricks granting defendant's motion for a new trial and also from certain errors committed by the Honorable L. Leland Larson, Judge, during the progress of the second trial of the case.

The facts as herein set forth and discussed are those presented at the second trial. They are substantially the same as were presented at the first trial.

B. THE FACTS

John D. Marshall, a resident of San Francisco, California, was injured at approximately 9:00 o'clock a.m., on the 19th day of June, 1947 at the Depot of the defendant company in Ogden, Utah, while in the course of his employment as a chair car porter for the Southern Pacific Railroad Company. At the time of his injuries he was 30 years of age. He had been employed by the Southern Pacific Railroad Company approximately five years, during which time he had worked as a chair car porter (R. 6). His duties as a chair car porter were generally assisting passengers on and off trains, handling luggage and keeping the car, to which he was assigned, clean (R. 6). Prior to his employment with the Southern Pacific Railroad Company plaintiff had worked at various odd jobs, all involving general manual labor (R. 6, 7). During the month of June, 1947, and when injured, plaintiff was working on trains operating between Oakland, California and Ogden, Utah (R. 7, 8).

The tracks in the Ogden Union Depot extend in a general northerly-southerly direction. Track No. 7 is immediately to the east of Track No. 8, etc. Passengers approaching trains on said tracks pass through an underpath rampway onto the platforms between the tracks and usually proceed north to where the passenger trains are stationed (R. 8). Between Tracks No. 7 and No. 8 is a cement platform approximately 18 feet in width. Extending down the center of the platform are certain posts known as "umbrella posts" which support a can-

opy over the platform for protection in inclement weather (R. 9).

At its depot in Ogden the defendant customarily uses four-wheeled trucks in handling freight. These trucks were described by plaintiff as being approximately six or eight feet in length, three feet in width, two and one-half or three feet in height. They have four metal wheels and a tongue in front which can be attached to a small three-wheeled jitney used in pulling them from place to place within the depot (R. 10). Plaintiff's Exhibit "A" is a photograph of such a truck and jitney.

On the morning he was injured plaintiff approached his train at approximately 8:30 o'clock a.m. At that time the train was on Track No. 8, facing north and plaintiff's chair car was four or five cars south of the head end of of the train.

One of the umbrella posts was south of the north entrance to plaintiff's chair car. Standing with its south end against the post and on a slight northwest diagonal was one of the four-wheeled trucks heretofore described. The distance between the side of the chair car and the umbrella post was nine feet as measured by the plaintiff shortly before the second trial (R. 22). The truck's width was approximately three feet. Therefore, there was at least seven or eight feet of space between the east side of the coach and the truck within which a vehicle could pass.

As to the occurrence of the accident, there is a sharp dispute in the testimony. For the convenience of the

court we present herewith the various versions as related by the respective witnesses.

Marshall testified that he approached his car, checked to see if it was clean, placed the step box down next to the north entrance to his chair car and took a position eight or ten inches south of the step box, with his back to the east side of the car. He testified that he was at all times before the accident looking toward the south for two small unescorted boys who were to ride in his car that morning (R. 11-14); and that the first time he saw the jitney and four-wheeled truck was when Miller, the operator, drove past him (R. 15); that as the jitney went past him he stepped back against the side of his chair car; that the truck being drawn by the jitney was carrying several trash boxes (R. 22).

He further testified that at the time the jitney drove past him it was proceeding faster than a person could walk (R. 23), and that after the truck struck him he fell to the platform (R. 20). Marshall's testimony regarding the occurrence of the accident is as follows (R. 14):

“Q. All right. I want you to now relate to the jury just *a little* what happened.

A. I was standing there waiting for these two little kids, and when I know anything, this jitney came by and I stepped back. It was too late for me to go anyway but that. The truck Mr. Miller was hauling hit the corner of the other truck and it hit me here (indicating), and put me against the train here (indicating).

Q. At the time you first realized that the jitney tractor was traveling along the platform, where was the front end of the tractor?

A. It was passed by.

Q. You became aware of its presence as it passed by?

A. Yes, sir.

Q. And at that time what did you do?

A. Stepped back."

Marshall testified clearly that there was plenty of room for the jitney and truck to have passed between him and the standing truck. His testimony in that regard is as follows (R. 30):

"Q. Mr. Marshall, one other matter; I want to ask you this question: Was there space enough between the sides of the cars located on track No. 8 and the protruding northwest corner of the standing four-wheel truck, was there space enough between there and between where your body was located and the northwest corner of the four-wheeled truck of the jitney and the other truck to have passed at the time this accident happened?

A. There was plenty of room."

And on cross-examination (R. 31):

"Q. Mr. Marshall, there was plenty of room if the trucks hadn't cornered?

A. Plenty of room, sir."

Hamilton, a brakeman for the Southern Pacific Railroad Company and the only disinterested witness, testified that he was checking the numbers of the cars when he observed Marshall standing a short distance south of the step box at the north entrance of his chair car and that Marshall appeared to be looking toward the south (R. 62); that he observed the jitney and truck proceeding in a southerly direction; that he looked away and was just going to take down the number of a coach when he heard something bang and saw Marshall fall (R. 63). He was unable to form an estimate as to the speed at which the jitney and truck were proceeding as he observed them traveling south and past the ladies coach. He testified in regard to the movement of the vehicle as follows (R. 67):

“Q. About how far was the jitney and the four-wheeled truck from the point of impact when you last saw it up there, before the impact?

A. I saw him coming by the baggage car, and after that I saw it coming by the ladies coach. I was checking there and I didn't notice it any more until it hit.

Q. About how long after you saw it by the ladies coach was it that you heard the impact?

A. Oh, about as fast as I could walk, about three miles an hour, maybe.”

This testimony clearly indicates that the tractor and four-wheeled truck did not stop in its progress toward the south before the actual impact. Hamilton saw Mar-

shall fall to the platform after he heard the bang occasioned by the impact (R. 63).

Hamilton was never asked whether or not there was sufficient and adequate space for the jitney and four-wheeled truck to have passed between where Marshall was standing and the truck located next to the umbrella post.

LeRoy Miller, who had been employed by defendant company for approximately four and one-half years and was the operator of the jitney and truck at the time of the accident, testified on behalf of defendant. He stated that he had been picking up rubbish boxes during the course of the morning; that immediately before the accident he was proceeding in a southerly direction along the platform and saw Marshall working near the coaches on Train No. 23; that Marshall was standing south of his foot box but that his foot box was opposite the south entrance to the ladies coach; that Marshall was "between the couplings" (R. 106). He testified that he stopped and told Marshall to "kinda step out" and that Marshall stepped back and he started forward, and that as he started forward Marshall was standing still; that the front corner of his truck struck the corner of the standing truck causing his truck to swing around and strike the car (R. 106). He testified that the jitney and truck was just barely moving at the time the accident occurred, but that nevertheless the truck slid sideways on its wheels across the platform and struck the side of the ladies chair car with a bang causing a dent in the car (R. 14-16).

He further stated that as he went around Marshall he started to pull out to keep from hitting Marshall and that he never did look at the truck to his left during the forward movement of the jitney and four-wheeled truck. His testimony in regard to his own conduct as he proceeded past Marshall is interesting and is set forth herein as follows (R. 116):

“Q. Weren’t you watching the car?

A. No, I was watching Marshall.

Q. Didn’t you ever watch the truck?

A. No, I never looked at the truck.

Q. You could see that car?

A. I didn’t pay any attention.

Q. You could have seen if you had looked?

A. I didn’t look at it. My wagon wasn’t two feet from that wagon, I came up to put the box on.

Q. If you had looked over to the east, you could have seen that car, couldn’t you?

A. I could have. There wasn’t nothing between me, but I wasn’t paying any attention.

Q. You thought you could get by Mr. Marshall?

A. I asked him to move his foot box and move to the east.

Q. He didn’t move, did he?

A. He says he had plenty of room, and I went on and caught the end of the wagon and it swung around and hit the car, and I asked him, did it hit you in the stomach?

Miller never testified directly as to whether or not there was sufficient and adequate space for him to have passed between Marshall and the standing truck in the middle of the platform next to the umbrella post. However, his proceeding as he did clearly indicates he was of the opinion that there was sufficient and adequate space. His testimony that he swung out without looking toward the east clearly indicates that his swinging out was the thing which caused the impact of the vehicles and the resulting accident (R. 116). The only inference that can be drawn from Miller's testimony is that there was actually sufficient space for him to have passed had he kept a lookout on both sides of his vehicle rather than on merely one.

Kenneth Malan, a car washer and witness called by defendant, testified that he was washing the head end of Train No. 23 at the time the accident took place; that he was about in the middle of Marshall's car (R. 92). He saw Marshall just before the accident standing just south of his step box which was located at the north entrance of his chair car. In this regard Malan clearly supports the testimony of Marshall and Hamilton. He further testified that Miller stopped two or three feet north of where Marshall was standing; that Miller and Marshall had a conversation and that thereafter the truck and trailer proceeded on to the south (R. 93, 94); that the moving truck struck the corner of the standing truck throwing the rear end of the moving truck on a diagonal to the west and toward Marshall (R. 95); that at the time of the accident the speed of the tractor was

approximately that of a man walking very slowly (R. 102). However, he admits that the truck skidded sideways across the platform and that the rear end of the truck struck either Marshall or the chair car (R. 95); that after the accident Marshall squeezed himself out from between the truck and the chair car, walked around and leaned on the wagon; that a brakeman walked over and asked Marshall how he felt and stated that he ought to go sit down and rest (R. 96, 97). Malan assumed that he was struck by the truck as he saw him double up, make his way over and lean against the other truck (R. 98).

Malan testified that after Miller started forward with the jitney and truck he, Malan, moved up against the car in anticipation of the movement of the vehicle past him. That that was the manner in which he always handled this situation; that he never stepped to the other side of the platform when a jitney and truck were proceeding past him (R. 101, 102). He felt there was plenty of room for the jitney and truck to move past if he stepped up beside the car (R. 101).

Louis Stegge also testified for defendant. He was by occupation a car man and at the time of the accident was working on a car to the north of where the accident occurred. He never was closer than twenty feet from where the accident occurred (R. 126). A reading of his testimony indicates that Stegge wasn't sure whether Marshall was standing south of the south entrance to the ladies car or south of the north entrance to Marshall's

chair car (R. 132, 133). It seems unbelievable that Marshall would have been standing at the south entrance of the ladies car inasmuch as he had no duties to perform with regard to the ladies car. Marshall testified that the south end of the ladies car was a blind end and that there were no entrances located there whatsoever (R. 135).

Stegge testified that Miller stopped a short distance north of where Marshall was standing; that a conversation occurred between Miller and Marshall; that he saw Marshall signify by movement of his hand to come ahead and that the jitney and truck proceeded ahead about four or five feet when the standing truck and the moving truck cornered causing the moving truck to swing diagonally to the west. He admitted that Marshall was standing still as the vehicles proceeded past him, with his back to the east side of the coach (R. 127). Stegge wasn't asked whether or not there was sufficient and adequate room for the jitney and truck to have passed between the standing truck and Marshall. Therefore, his testimony must be considered as neutral in this regard, casting no inferences one way or the other.

Plaintiff remained at the place where the accident happened for a short time and then made his way to the trainmaster's office (R. 21). Thereafter, he went to the office of the company doctor, which is located on Washington Boulevard, and from there was sent to St. Benedict's Hospital, where he remained for two days (R. 21). He then returned to Oakland by train, spent one night at home and the next day reported to

the Southern Pacific Hospital (R. 24). He was at the hospital continuously for approximately one week and thereafter remained as an out patient. The total period of his hospitalization at the Southern Pacific General Hospital was forty-four days (R. 25). During that period he was unable to work (R. 25, 26). In May of 1948 plaintiff was again hospitalized for a period of six days. He had mistakenly testified at the previous trial that he was hospitalized on this occasion for two weeks. During the six days of his hospitalization he underwent treatment and general observation. At the time of trial he was still experiencing pain in his back (R. 26-28).

Plaintiff was earning approximately \$218.00 per month at the time of his injury as a salary and in addition was making between \$15.00 and \$30.00 per month in tips (R. 29).

Doctor Fisher, a regularly licensed physician, and specialist in orthopedic surgery, testified by deposition on behalf of the plaintiff. He examined plaintiff on December 20, 1947. The examination revealed muscle spasm in the lower area of plaintiff's back and that he was suffering from sub-acute low back strain and a contusion of the lower abdomen together with a mild Schmorl's disease of the spine. Schmorl's disease is not caused by trauma, but prolongs the healing period (R. 83-84). His opinion was stated as follows (R. 84):

"A. Yes, I feel if you are going to get this man well, I don't think that he is going to get well probably unless he shifts to some type of work where he wouldn't have to do heavy

lifting for some considerable *period* of time, I would say at least six months and probably more, possibly more."

The jury was warranted in finding according to plaintiff's testimony that he was standing against his car and looking to the south; that Miller drove the jitney and truck to and beyond his position at an excessive rate of speed without keeping a lookout, cornered the standing vehicle and caused the accident. The jury was also warranted in finding from defendant's evidence that Miller approached Marshall and stopped; that a conversation occurred; that Marshall took a position back against the coach and that Miller proceeded beyond him, cornered with the standing vehicle causing the accident. It was uncontroverted that Marshall, after the vehicle had once started past him, never moved from the position he had taken and was at all times observed and observable by Miller. It is uncontroverted that the truck cornered with the standing truck, skidded sideways across the platform and toward and into the plaintiff. It is uncontroverted that Miller, as he proceeded past plaintiff, was not keeping any lookout whatsoever to the east but was looking solely in the direction of Marshall who was standing against the coach. It was uncontroverted that there was *plenty of room for the jitney and truck to have passed between the plaintiff and the standing truck had defendant operated the jitney and truck in an efficient manner*; that Marshall could have done

nothing further to avoid the accident once the jitney passed him, and that the cause of the accident was the cornering of the vehicles.

ASSIGNMENT OF ERRORS

1. The court erred in granting defendant's motion for new trial (R. 038).

2. The court erred in refusing to give Plaintiff's Requested Instruction No. 3 (second trial) (R. 042).

3. The court erred in giving Instruction No. 7 (second trial) (R. 063, 064).

4. The court erred in giving Instruction No. 11 (second trial) (R. 066).

5. The court erred in refusing to grant plaintiff's motion for a new trial following the second trial (R. 078).

SUMMARY OF ARGUMENT

POINT I.

DEFENDANT FAILED TO SHOW DUE DILIGENCE IN DISCOVERING SO-CALLED NEWLY DISCOVERED EVIDENCE BEFORE AND DURING TRIAL AND INASMUCH AS SUCH NEWLY DISCOVERED EVIDENCE WAS FOR IMPEACHMENT PURPOSES ONLY AND DOES NOT APPEAR TO BE OF SUFFICIENT MATERIALITY TO HAVE AFFECTED THE VERDICT, THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL ON THAT BASIS. (Assignment of Error No. 1).

POINT II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 7. (Assignment of Error No. 3).

POINT III.

THERE WAS NO EVIDENTIARY BASIS FOR THE SUBMISSION OF THE ISSUE OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE TO THE JURY. (Assignment of Errors No. 2, 3 and 5).

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE ISSUE OF LAST CLEAR CHANCE TO THE JURY. (Assignment of Errors No. 2 and 5).

ARGUMENT

POINT I.

DEFENDANT FAILED TO SHOW DUE DILIGENCE IN DISCOVERING SO-CALLED NEWLY DISCOVERED EVIDENCE BEFORE AND DURING TRIAL AND INASMUCH AS SUCH NEWLY DISCOVERED EVIDENCE WAS FOR IMPEACHMENT PURPOSES ONLY AND DOES NOT APPEAR TO BE OF SUFFICIENT MATERIALITY TO HAVE AFFECTED THE VERDICT, THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL ON THAT BASIS. (Assignment of Error No. 1).

We recognize the law to be well settled that the granting or denying of a motion for new trial is largely within the discretionary powers of the trial court. See

Moser v. Zion's Co-Op. Mercantile Inst. et al., (Utah) 197 P. 2d 136.

However, appellate courts have traditionally exercised a supervisory control over the discretionary powers as exercised by trial courts and have on numerous occasions reversed the rulings of trial courts in granting motions for new trial. It is manifestly clear that the discretionary power of trial courts is not a mental discretion giving effect to the will of the judge, but is a legal discretion to be exercised in conformity with the spirit of the law.

In *Hayne, New Trial and Appeal*, vol. 2, Sec. 289, the author discusses the discretionary power of the trial court in granting or refusing to grant a motion for new trial and states as follows:

“* * * This is not always easy to determine, but the task is greatly simplified when it is remembered that the discretion referred to is legal and never arbitrary. There must be a legal ground or excuse for every act of the court, and not a mere arbitrary exercise of power by the will of the individual who happens to occupy the position of judge. Not only must there be a legal ground or excuse in support of the exercise of discretionary power, but there must be some fact or reason against the same, otherwise there would be no basis for an exercise of discretion. Moreover, the discretion of the court must always be exercised in behalf of justice and fair dealing in the abstract, and manifestly must not be contrary to the principles of justice or productive of hardship and inconvenience. If this should be

the case, there would be, in the language of the authorities, an abuse of discretion, and the appellate court would reverse the judgment or order. This is not a very precise rule; but, when interpreted by the light of the circumstances of each case, it is of practical value, and prevails in all courts where the common law is the rule of decision."

We herein cite and discuss a number of cases in which appellate courts have set aside orders granting motions for new trial as abuses of legal discretion.

In *Hinton v. Peterson, et al.*, (Mont.) 169 P. 2d 333, 334, the appellate court concluded from the facts that the court's action in granting the new trial was based upon the view of the court that the evidence was insufficient to support the verdict, and stated:

"* * * The court disagreed with the jury on the issue of the terms of the contract of employment. The court accepted defendants' version of it while the jury accepted that of plaintiff."

The case was remanded back to the trial court with instructions to set aside the ruling granting a new trial and to reinstate the verdict. The court cited the following quotation from *Badboy v. Brown*, 66 Mont. 307, 213 P. 246, 247 with approval:

"* * * 'While it is the general rule, frequently enunciated by this court, that the granting or refusing of a motion for a new trial rests in the sound legal discretion of the trial court, yet this

discretion is not so unrestricted as to permit the trial court to act arbitrarily, or without substantial basis. Legal discretion must always be guided and controlled by legal principles. *Montana O. P. Co. v. Boston & M. C. C. & S. M. Co.*, 22 Mont. 159, 56 P. 120. This court will not, as a rule, interfere with the discretion vested in the trial court in granting or refusing a new trial; but when it appears, as it does in this case, that such discretion has been exercised without any sufficient or substantial reason, then it must be controlled. *Holland v. Huston*, 20 Mont. 84, 49 P. 390. Here the abuse of discretion on the part of the trial court in granting to the defendant Brown a new trial is manifest, for there is no evidence or basis in the record for the court's order. 'Under the statute, the amount of the verdict must of necessity rest in the sound discretion of the jury. The parties are entitled to a verdict from the jury, and it is only in rare instances that the court is justified in interfering, unless the record discloses that the elements of passion and prejudice have influenced the minds of the jurors in arriving at the result.' *Hollenback v. Stone & Webster Eng. Corp.*, 46 Mont. 559, 129 P. 1058. The jury having fixed the amount of plaintiffs' damages based on evidence warranting the verdict, and there being nothing in the record to indicate passion and prejudice, or warranting a reduction of the amount of the verdict, the trial court was clearly in error.' "

In *Sharpensteen v. Sanguinetti* (Ariz.) 262 P. 609, 610, the appellate court reviewing the grounds upon

which a motion for new trial had been granted, discussed the facts as follows:

“The affidavit of newly discovered evidence is not sufficient. It simply shows that affiant, ‘acting for and on behalf of defendant’ had made discovery of what he calls evidence. So far as this affidavit is concerned, the defendant and his attorney may have known of such alleged evidence at the time of and before the trial. *A proper and sufficient affidavit should have negated such possibility.*”

And, in overruling the trial court’s order granting a new trial stated at p. 611:

“It is of course the law that the granting of a new trial is largely in the discretion of the trial court, and that the reviewing court will not disturb the ruling except for an abuse of that discretion. What is meant by discretion in that connection is a legal discretion, one based upon reason and law. *If the showing for a new trial is insufficient both in form and substance, as the one here appears to be, it may be said that there is no discretion to be exercised.* The rule that should guide the trial judge in passing upon a motion for new trial is very well stated in *Sovereign Camp, etc., v. Thiebaud*, 65 Kan. 332, 69 P. 348, as follows:

“*‘The discretion of district courts in the matter of granting or refusing new trials is a legal, not a capricious, one. It must be warranted by law, and guided by established precedent. It may not be exercised simply because the judge might wish the verdict to*

be otherwise. The test and warrant for its use is, Has the applicant therefor shown a legal reason for its existence?' "

And in *Belt v. Morris* (Okla.), 34 P. 2d 581, 584, the court stated:

"* * * The 'discretion' spoken of in the authorities is a legal discretion; a discretion to be exercised in discerning the course prescribed by the law, according to principles ascertained by adjudged cases. 'Judicial power, as contradistinguished from the power of the law, has no existence,' it was said by Chief Justice Marshall in *Osborn et al. v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204, 234. Courts are the mere instruments of the law, and can will nothing. *Judicial power is not exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law. To one coming within the rule announced, a new trial should be given as a matter of right, not merely as a result of the exercise of the court's will. So, on the other hand, where the court grants a new trial, but in doing so disregards the rules of law controlling the exercise of the power, its action presents a question of law reviewable on appeal.'* "

In *Russell v. Margo* (Okla.), 67 P. 2d 22, 26, the court stated:

"In the case of *Spruce v. Chicago, R. & P. R. Co.*, 139 Okl. 123, 281 P. 586, 589, this court said: 'The courts everywhere recognize the right of an appellate court to review the action of a trial court in sustaining motions for new trials where

there has been an abuse of discretion or arbitrary action. Otherwise the complete right of appeal could be denied in most instances, and in fact all instances. For example, the court could repeatedly in the same cause set aside the verdict of the jury and grant a new trial on the insufficiency of the evidence, and thereby deprive the party who obtained the verdict of the benefit of a complete right of appeal. In other words, *to vest in the trial courts absolute discretion as to questions of fact or mixed questions of law and fact would be an absolute barrier between the aggrieved litigant and the Supreme Court.*'

"We agree with the holding of the court in the above case, and where the issue is properly presented on appeal, this court will review the entire record to determine whether or not the trial court in granting a motion for new trial has abused its discretion, acted arbitrarily, or erred on some unmingled question of law."

In *Mazzotta v. Los Angeles Ry. Corp., et al.* (Cal.), 145 P. 2d 662, 666, the trial court granted a motion for new trial and the appellate court reversed that order and stated the governing principles of an appellate court in considering whether or not the granting of a motion for new trial was within the discretionary power of the trial court or beyond its discretion in the following language:

"* * * While, as respondent asserts, courts have often held that judicial discretion is broad and inclusive, nevertheless it is a legal discretion, and must be exercised in consonance with fixed legal principles. *Judicial discretion is neither capricious nor arbitrary. As was said in Bailey*

v. Taaffe, 29 Cal. 422, 424, 'It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' The phrase 'judicial discretion' implies the use of discriminating judgment within the bounds of reason and bridled by legal principles, the application of which will tend to promote justice and equity. In the light of what has just been said, we now proceed to a consideration of the instructions given, and the giving of which, respondent urges, entitles him to a new trial."

See also the following interesting cases:

Sovereign Camp, Woodmen of The World, v. Thiebaud, 65 Kan. 332, 69 P. 348; *Rothman v. Rumbach* (Ariz.), 96 P. 2d 755; *Arthur v. Parish* (Ore.), 47 P. 2d 682.

This case was tried before Judge Hendricks on July 1st and 2nd, 1948. During the trial plaintiff testified regarding his hospitalization as follows (R. 18, 19, first trial):

"Q. Now, have you missed any work since going back to work the second time?

A. Yes. I missed a couple of weeks here not long ago. I was in the hospital on the 25th of last month.

Q. That would be May 25th?

A. Yes.

Q. How long were you in the hospital on that occasion?

A. Two weeks.

Q. Were you continuously in the hospital during that two weeks?

A. Yes, I was in there for two weeks.

Q. Were you an 'out' patient or in there all that time?

A. In the hospital—no—no out patient.

Q. What were you in the hospital for, Mr. Marshall?

A. My injury.

Q. The condition of your back?

A. Yes.

Q. Were you receiving treatments of any kind during that two weeks?

A. Well, I was taking the same treatments.

Q. Those heating-pad treatments?

A. Yes.

Q. You were not, of course, able to work during that two weeks?

A. No, I wasn't.

Q. Now, in addition to that two weeks have you missed any other work?

A. No, I didn't miss any other."

At the conclusion of the case and after a verdict had been rendered in favor of plaintiff, counsel for defendant filed a motion for new trial. Thereafter, he filed affidavits in support of said motion. The primary ground contended for by defendant in its motion for new

trial was "newly discovered evidence material to the defendant which it could not with reasonable diligence have discovered and produced at the trial." (R. 147, first transcript). Thereafter, affidavits by Dr. Russell J. Merritt, of the Southern Pacific Hospital, in San Francisco, California, and of M. J. Bronson, counsel for the defendant, were duly filed in support of defendant's motion. Counter-affidavits on behalf of plaintiff were also filed. John D. Marshall filed an affidavit as did Wayne L. Black, counsel for John D. Marshall, and Robert Asch, who is Assistant Business Manager of the Southern Pacific Hospital, at San Francisco, California. These affidavits are a part of the record. (R. 151-160). Generally they are to the effect that Marshall was hospitalized from the 21st day of May, 1948 to the 27th day of May, 1948, at which time he was discharged. Plaintiff's affidavit indicates that he was honestly mistaken as to the length of time he was hospitalized but that after the case had been tried and after he had been requested to check the records of the hospital he discovered that he was hospitalized one week rather than two weeks.

The affidavit of Mr. M. J. Bronson, counsel for defendant, was to the effect that on May 15th, 1948, he was at San Francisco, California and investigated the hospital records to determine the length of plaintiff's hospitalization; that this was the only investigation

regarding plaintiff's hospitalization that he made until after the trial had been completed, and up until the time plaintiff testified at the trial Mr. Bronson did not know that plaintiff was hospitalized in May of 1948. (R. 153, 154).

The affidavit of Mr. Wayne L. Black, counsel for the plaintiff, reveals that he called Mr. Bronson by telephone on the 24th day of May, 1948 and notified him that this case could not be tried on May 26th, 1948 for the reason that plaintiff was at the time hospitalized in the Southern Pacific General Hospital. Mr. Black's affidavit further reveals that on or about the 25th day of June, 1948 he discussed this case with Mr. Miles E. Goodnow, General Claim Agent of defendant, and notified Mr. Goodnow of plaintiff's hospitalization during May of 1948 and that Mr. Goodnow, ever since that date, was well aware of plaintiff's hospitalization in the Southern Pacific General Hospital (R. 157-159). Of course, it was within the discretion of the trial court to determine the facts as revealed by the affidavits. It is true, however, that defendant's affidavits did not controvert the fact that Mr. Goodnow was notified before trial of plaintiff's hospitalization.

The sole ground argued by counsel for defendant in its motion for new trial was that of the so-called newly discovered evidence. There was no argument made that the verdict was contrary to law or excessive. Judge

Hendricks followed the suggestion of this court in *Saltas v. Affleck et al.*, 105 P. 2d 176, 178, and set forth clearly and specifically his reasons for granting the motion. His order reads as follows (R. 038) :

“After studying the affidavits and transcribed testimony of the plaintiff, and taking into consideration the emphasis that Plaintiff’s Counsel put on the defendant’s confinement for two weeks in the hospital, the Court is of the opinion that the jury was influenced to the extent that they undoubtedly allowed excessive special damages, and also probably caused to award general damages in excess of what they would have awarded had they known the facts about his stay in the hospital in May.

“It is therefore ORDERED, that a new trial be granted.

“Dated this 28th day of August, 1948.

John A. Hendricks
District Judge”

The facts concerning the so-called newly discovered evidence being largely uncontroverted, it became a clear question of law whether the motion for new trial should have been granted. If the guiding principles of law laid down by this court were disregarded by the trial court in its ruling it follows as a necessary conclusion that the trial court abused its legal discretion.

The general rule of law governing the trial court in granting or denying a motion for new trial is set forth

in *Klopenstine v. Hays*, 20 Utah 45, 57 P. 712, 714, where the court stated:

“* * * ‘It is well settled that, to entitle a defeated party to a new trial on the ground of newly-discovered evidence, it must appear, (1) that he used reasonable diligence to discover and produce *at the former trial* the newly-discovered evidence, and that his failure to do so was not the result of his own negligence; (2) that the newly-discovered evidence is not simply cumulative; (3) that such evidence is not sufficient if it simply be to impeach an adverse witness; (4) it must be material to the issues, and so important as to satisfy the court, by reasonable inference, that the verdict or judgment would have been different had the newly-discovered evidence been introduced on the former trial; (5) that the defeated party had no opportunity to make the defense, or was prevented from doing so by unavoidable accident, or the fraud or improper conduct of the other party, without fault on his part.’”

In at least three particulars the trial court violated established principle in granting defendant’s motion for new trial.

(a) *The trial court abused its discretion when it held in effect that defendant had exercised due diligence in endeavoring to ascertain the so-called newly discovered evidence prior to and at the time of the trial.*

Governing principles regarding defendant’s duty of diligence are stated in the following citations:

39 *Am. Jur. Sec.* 156, p. 163:

“* * * *The rule to be deduced from the cases is that where newly discovered evidence is of such*

conclusive nature, or of such decisive or preponderating character, that it would with reasonable certainty have changed the verdict or materially reduced the recovery, a new trial should be granted if it is satisfactorily shown why the evidence was not discovered and produced at the time of the trial."

39 *Am. Jur. Sec. 161, p. 168 and Sec. 163, p. 170:*

"Sec. 161.—What Constitutes Diligence in Procuring Evidence.—The question as to whether or not the party's failure to produce the newly discovered evidence at the trial was attributable to negligence or want of diligence is to be resolved, of course, in view of the circumstances of the case. Very evidently, if it is to be concluded that he possessed, prior to the trial, no means of knowing that the evidence was obtainable, he is not chargeable with lack of diligence. On the other hand, *the application for a new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto.*

* * * * *

"Sec. 163.—Proof of Exercise of Diligence.—Proof that the applicant has not been guilty of negligence or want of diligence must be presented by the supporting affidavits. *The facts which disclose the exercise of diligence must be set forth;* an averment of diligence in general terms is not sufficient. It has been said that the affidavit must be characterized by a greater degree of certainty than is required in a pleading, and that the averments thereof must negative

every circumstance from which negligence can be inferred.”

In *Rydalch v. Anderson* (Jan. 6, 1910), 37 Utah 99, 107 P. 25, 31 this court laid down the rule regarding defendant’s duty of diligence.

“* * * Counsel thus knew at the trial what respondent’s testimony was. If they did not think it was true, and were surprised by it, they should then have applied to the court to postpone further trial of the case until they could obtain the testimony contradictory of respondent’s statement. The question of counsel’s diligence in ascertaining whether there was any such evidence, and in procuring it, would then have been presented to and considered by the trial court.”

And in *Snell v. Cisler* (Jan. 1876), 1 Utah 298, 303, the court stated:

“The Defendant’s affidavit, so far from showing any grounds for a new trial, shows a lack of diligence upon his part which is inexcusable. If a party omits to procure evidence on the trial, which with ordinary diligence he might have procured in relation to the material issue in the case, his motion for a new trial ought to be denied.”

See also *Hydraulic Cement Block Co. v. Christensen*, 38 Utah 525, 114 P. 524, 526, where the court stated:

“* * * Courts cannot grant new trials merely because a defeated party, after an adverse deci-

sion, makes a showing that upon a second trial he can produce additional evidence in support of his contentions which will probably turn the decision in his favor. He must use due diligence to produce his evidence when the case comes on for trial, and, unless he does so, the court is powerless to help him. In this case there is no showing whatever that the plaintiff used any diligence to produce the alleged newly discovered evidence at the trial. The court, therefore, committed no error in overruling the motion for that reason."

And *Salt Lake Inv. Co. v. Stoult*, 54 Utah 100, 180 P. 182, 184, where the court said:

"* * * But assuming, further, that defendant was justified in believing that inasmuch as the trial was had in Salt Lake City, and the bank was also situated there, he might apply at any time, even on the eve of the trial, and procure the information desired, nevertheless when appellant found at the trial that the books and records of the bank were inaccessible for the reasons stated, no motion was made for a continuance, and the trial court had no opportunity to afford relief even if it had been so inclined. Appellant elected to stand upon the proposition that it was the duty of the plaintiff to produce the records, and went to trial without the evidence which in the nature of the case he must have known was in existence and could easily be discovered.

"Many of the authorities above cited treat the failure of a party to seasonably apply for a continuance under such circumstances as fatal to an application for a new trial.

"However, much the court might desire to see litigants in cases before it obtain every farth-

ing to which they are entitled, yet it cannot ignore fundamental rules of practice established by statute and recognized by general law in order to achieve its conception of even-handed justice in a particular case."

In *Rath v. Bankston, et al* (Cal. Oct. 17, 1929), 281 P. 1081, 1086, judgment was for defendants and plaintiff appealed urging that the trial court should have granted a new trial on the basis of newly discovered evidence. Affidavits revealed that plaintiff had discovered witnesses who would testify that the truck and trailer involved could have been backed to the curb and hence that the testimony of defendants' witness to the effect that such movement was impossible was false. The appellate court, in supporting the trial court's ruling denying the motion for new trial, stated:

"* * * The fact that Case swore falsely (assuming such to be the fact merely for argument's sake) would not justify the contention that appellant was taken by surprise by his testimony. There is nothing to show that she was led to believe that his testimony would be other than it was, or that she did not have ample time to prepare to meet every issue of fact relevant to the cause. As said in *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, 971, 13 L.R.A. 336, 25 Am. St. Rep. 159, *a litigant at the trial 'must be prepared to meet and expose perjury then and there.'* The testimony of Case was given on May 21, 1926, and it would seem that appellant had ample time to make any inquiries as to its probable truth or falsity, as well as any actual test on the ground between that time and May 24 when she rested her case. Moreover,

the affidavits on motion for new trial show that the 'test' was actually made on May 25, 1926, and as we have noted, when the case was reopened on May 27, the record shows no offer of this testimony by appellant."

Mourning v. Harrison (Kan., Nov. 8, 1941), 154 Kan. 242, 118 P. 2d 558, 559:

"In the early case of *Smith v. Williams*, 11 Kan. 104, 106, it was stated: 'The motion was based on the ground of newly-discovered evidence. While the rules by which motions of this kind must be determined are well settled, and clearly defined, yet in the application of these rules much must be left to the discretion of the trial court. *When a case has been once fairly submitted to a jury, the verdict ought not to be disturbed, and the successful party put to the labor, the expense, and the hazard of another trial for any light or trivial reasons, or upon the mere possibility of a different verdict.*' "

See also *George G. Leavitt Co. v. Couturier* (Utah, July 12, 1933), 23 P. 2d 1101.

In the case at bar defendant's only claim of due diligence is that Mr. Bronson examined the Southern Pacific General Hospital records on the 15th day of May, 1948. Defendant's affidavits do not negative plaintiff's counsel's sworn statement that Claim Agent Goodnow was informed on June 24th, 1948, a week before trial, that plaintiff claimed to have been hospitalized at the Southern Pacific General Hospital during the latter part of May, 1948. In spite of this fact no effort was made by

defense counsel to check on plaintiff's hospitalization until after an adverse verdict. Defendant's affidavits rather than showing the exercise of due diligence, show a lack of diligence of the grossest sort. If counsel considered the hospitalization issue to be so vital to his case why didn't he make a telephone call during or before the trial? Why didn't he bring this matter to the attention of the trial court? Why didn't he move for a continuance? The facts were always easily and readily accessible. Why should plaintiff be saddled with the onerous burden of a new trial because of opposing counsel's inattention to his case? If defendant had exercised that diligence before or during the trial which it exercised after an adverse verdict, it is hardly disputable that his so-called newly discovered evidence would have been fully revealed.

We feel entirely justified in stating our contention that the trial court acted arbitrarily and capriciously when it granted a motion for new trial on the ground of newly discovered evidence without requiring defendant to show as a necessary condition precedent the exercise of due diligence before and during the trial.

(b) The trial court abused its discretion when it granted defendant's motion for new trial on the basis of so-called newly discovered evidence which was offered and ultimately used for the sole purpose of impeachment.

39 *Am. Jur. Sec. 167*, p. 173, states the rule regarding newly discovered impeachment evidence:

“Sec. 167. Impeaching Evidence; Testimony Contradicting Witness.—It is well settled that a new trial will not be granted upon the ground of newly discovered evidence where it appears that such new evidence can have no other effect than to discredit the testimony of a witness at the original trial, contradict a witness’s statements, or impeach a witness, unless the testimony of the witness who is sought to be impeached was so important to the issue, *and the evidence impeaching the witness so strong and convincing, that a different result must necessarily follow.*”

In *Rydalch v. Anderson*, *supra*, the court, speaking of newly discovered evidence, stated:

“* * * *Is it of that character for which a new trial should have been granted? We think not. The evidence, in all of its bearings, is at most only contradictory of what respondent said, and that, too, upon a collateral matter.* Again, assuming that it was not merely contradictory, it still remains a fact that it did not have great, if any, bearing upon the real issue, which issue was: Did the original owners establish and acquiesce in a boundary line between the Kimball and Rydalch lands? These facts, as we have pointed out, are not even seriously disputed by the evidence. The legal effect of the evidence of the Oregon witness, therefore, would simply be an attack upon the credibility of the respondent as a witness. If all that respondent said with regard to what some of the Kimball heirs stated to him at or immediately preceding the time he bought the land were en-

tirely ignored, the findings and judgment should still be the same.”

Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105, 148 P. 951, 954, discusses newly discovered impeachment testimony:

“The appellant further contends that its motion for a new trial should have been granted upon the ground of newly discovered evidence. The two items of newly discovered evidence upon which the appellant relied were, first, a written statement of one of the plaintiff’s main witnesses as to the circumstances of the accident, made a day or two after its occurrence, which varied in certain material respects from his testimony given at the trial, and which the defendant claims it could have used for the purpose of impeachment of such witness, had this written statement been in its possession at the time his testimony was given. *It is a well-established rule, however, that newly discovered evidence, which is simply impeaching or cumulative in character, is insufficient to support a motion for a new trial.* People v. Goldenson, 76 Cal. 328, 19 Pac. 161.”

Tucson Rapid Transit Co. v. Rubiaz (Ariz. Feb. 2, 1920) 21 Ariz. 221, 187 P. 568, 572:

“The affidavits of witnesses which, appellant claims will furnish material evidence on another trial, were presented with the motion. The purport of the evidence which, it is claimed, will be forthcoming at a new trial, is that the plaintiff was suffering from an active case of tuberculosis for a long time prior to and continuing up to the time of the accident involved. Assuming that the showing of diligence made is sufficient, yet such

testimony would not preclude a recovery, as we have seen above. Moreover, the evidence promised could be of no service to establish any material fact other than the condition of plaintiff's health at the time of the accident, and thereby reduce the resultant injuries to that of aggravation of her diseased condition. The instruction of the court permitted the jury to determine plaintiff's damages arising from aggravation of the disease. *Additional testimony of the physical condition of the plaintiff does not call for a new trial.* Testimony of witnesses which serves to contradict the testimony of the plaintiff, if such is the nature and purpose of the newly discovered evidence, is not of much materiality to the case as to require a new trial. The trial court committed no reversible error in refusing a new trial upon the alleged ground of material evidence newly discovered."

In the case at bar it would seem that whether plaintiff's condition a year after his injury called for one or two weeks hospitalization was not of sufficient materiality to call for a new trial.

See also *Waer v. Waer et al.*, (Cal. June 17, 1922), 189 Cal. 178, 207 P. 891; *Sawyer v. Nelson et ux.*, (Cal. July 15, 1931) 1 P. 2d 1068; *White v. Kansas City Public Service Co.*, (Kan. Jan. 28, 1933), 18 P. 2d 156, and *Pandolfo et al v. Jackson et al.* (Cal. Mar. 2, 1936), 55 P. 2d 550, 552, where the court said:

"* * * Moreover, it has been said in this respect that after defeat a motion for new trial upon the grounds mentioned is regarded with distrust and disfavor, and that such proffered newly

discovered evidence is looked upon with suspicion."

The trial court in this case made the following erroneous statement in its order granting the motion for new trial (R. 038):

"* * * the Court is of the opinion that the jury was influenced to the extent that they undoubtedly allowed excessive special damages."

Plaintiff testified at the trial, repeated in his counter-affidavit after defendant's motion for new trial, and testified again at the second trial that he was actually unable to work during May of 1948 for a period of two weeks. No claim was made by plaintiff for his medical expenses. Whether he was in the hospital one week or two weeks did not and could not have had any effect on plaintiff's special damages. Defendant contends that the fact plaintiff was hospitalized one week rather than two weeks has a direct bearing on whether or not plaintiff was permanently injured. This contention seems to be hardly plausible in view of the bulk of testimony regarding plaintiff's injuries and after effects. The true purpose of the evidence was to impeach plaintiff's credibility. Of that there can be no reasonable doubt. This is further borne out by the fact that at the second trial there were no witnesses offered by defendant whatsoever regarding the period of plaintiff's hospitalization or the treatment which he received at the hospital. Cross-examination questions were asked and that was the full

sum and substance of the important newly discovered evidence.

We submit that said evidence, being simply impeaching in character, was not a legally sufficient reason for the trial court to exercise its discretion in granting defendant's motion for new trial.

(c) *The trial court acted arbitrarily and capriciously in holding that the so-called newly discovered evidence would be decisive upon another trial or would seriously affect the result.*

Plaintiff was hospitalized and treated for a period of one week during the latter part of May, 1948 at the Southern Pacific General Hospital in San Francisco, California. He testified at the trial that he was hospitalized for approximately two weeks. His affidavit reveals that he was honestly mistaken as to the length of his hospitalization. Can it truly be said that the newly discovered evidence was so strong and convincing that with its introduction a different result would necessarily follow? Can it be stated with integrity that whether plaintiff was hospitalized one week or two weeks for treatment a year after his accident made a vital issue in this case? We submit that the trial judge who so held acted arbitrarily and capriciously.

In *Turner v. Stevens*, 8 Utah 75, 30 P. 24, 25, the court stated:

“The defendant also insists that a new trial should have been ordered on the ground of newly

discovered evidence. *We are disposed to believe that the newly discovered evidence would not be decisive upon another trial*, and therefore we do not feel authorized to order a new trial on account of it."

In *Baumgarten v. Hoffman*, 9 Utah 338, 34 P. 294, the court discussed the rule contended for herein:

"The testimony offered on the trial was conflicting. The jury found the issues for the plaintiff. There was sufficient evidence to justify the verdict, and the judgment should not be disturbed on that ground. Nor do we think the newly-discovered evidence was of such a nature as to *seriously affect the result* if it had been known at the time, and admitted. The facts stated in the affidavit of Quinn are not inconsistent with those stated in the affidavit of Baumgarten, and the latter clearly explains the former, and tends to sustain the testimony given on the trial where respondent claims a loss of \$20 because of the failure of the appellant to complete his contract and pay for the goods ordered. *A new trial should not be granted upon the ground of newly-discovered evidence unless such evidence is very clear and satisfactory and likely to seriously affect the result if admitted.* People v. Sackett, 14 Mich. 325; Tiernan v. Trewick, 2 Utah, 393; Hopkins v. Ogden City, 5 Utah, 390, 16 Pac. Rep. 596."

Wood v. Akridge (Utah, Oct. 19, 1934) 36 P. 2d 804, 808:

"A motion for a new trial was made by defendant based on affidavits indicating newly dis-

covered evidence. Counter affidavits were filed on behalf of plaintiff wherein some of the allegations in appellant's affidavits were admitted, some were denied, and others explained. Had all this testimony been before the court at the trial, the decision of the court would have been the same. There was no error in denying a new trial."

Warshauer Sheep & Wool Co. v. Rio Grande State Bank, (Colo. Apr. 18, 1927), 256 P. 21, 22:

"To justify the granting of a new trial on the ground of newly discovered evidence, it must appear, among other things, that such evidence makes it *probable that a different verdict would result on a new trial*. *Walsmith v. Hudson*, 77 Colo. 326, 328, 236 P. 783; *Eachus v. People*, 77 Colo. 445, 450, 236 P. 1009, and cases there cited."

Plaintiff testified that he was hospitalized for two weeks whereas in truth and in fact he was hospitalized for only one week. No special damage issue is involved. Can it be honestly contended that the jury's verdict would have been different had the testimony been that plaintiff was hospitalized one week rather than two weeks? Is it so inconceivable that plaintiff, an uneducated colored man, could have been honestly mistaken as to the duration of his hospitalization? Were our trial courts allowed to grant new trials for such light and trivial reasons where would there be an end to litigation? What reliance could litigants place upon their right of

trial by jury? What would happen to their constitutional right of appeal?

POINT II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 7. (Assignment of Error No. 3).

Instruction No. 7 is herein set forth for the convenience of the court (R. 063):

“You are instructed that where one may perform a duty in either of two ways, one safe and the other dangerous, and with full knowledge that one method of performing the duty is safe and the other dangerous and with full opportunity to make a choice as to which method he shall adopt, voluntarily chooses the dangerous method, such conduct on his part constitutes negligence.

“Therefore, if you find from a preponderance of the evidence in this case that the plaintiff, John D. Marshall, was warned of the approach of the jitney tractor and that he could have stepped onto the chair car or could have stepped over to the east with equal ease or could have stepped to any other position which was safe, but voluntarily chose to remain in a dangerous position knowing the same to be dangerous, then he is guilty of negligence, and if such negligence proximately contributed to cause the accident and any injuries he claims to have suffered he cannot

recover and you must return a verdict for the defendant 'no cause of action.' ''

It is a well known principal of law that where an instruction which is correct as an abstract principal of law, nevertheless is not supported or warranted by evidence presented in the case, then the instruction is improper and reversible error.

The question naturally arises therefore as to what dangerous position plaintiff voluntarily assumed. If there was no evidence of such dangerous position, then, of course, the instruction is erroneous. There was nine feet of distance between the side of the chair car and the umbrella posts running parallel thereto along the platform. The four-wheeled truck, which was standing on the platform, was approximately three feet in width, and its south end was against an umbrella post. It was on a slight diagonal. Plaintiff was standing with his back against the chair car at the time the accident occurred. Therefore, he occupied only a few inches of space. Marshall testified that there was plenty of room for the jitney and four-wheeled truck to have passed between him and the standing four-wheeled truck (R. 30, 31). Malan testified positively that there was plenty of room for the jitney and four-wheeled truck to proceed along the platform to the south and past where Marshall was standing (R. 101, 102).

Into what danger did Marshall place himself when he chose to remain in his position next to the chair car rather than move to some other position, assuming, of course, that the defendant's evidence is to be believed? There is simply no answer to that question. There is no evidence nor inference deducible from evidence, that it was or would be dangerous for plaintiff to remain next to the chair car. If that be true, the instruction which authorized the jury to determine that plaintiff voluntarily chose to remain in a dangerous position was erroneous because entirely unsupported by the evidence. Plaintiff's only danger resulted from the manner in which Miller operated and manipulated the jitney and four-wheeled truck as he proceeded in a southerly direction to and beyond plaintiff. Plaintiff remained stationary from the time Miller approached until the accident occurred. Therefore, his actions, if they contributed to the accident at all, must have been in remaining next to the chair car. He could not have been negligent in taking a dangerous position unless there was something in the general situation that would lead a reasonably prudent person under the circumstances to believe there was danger in the position which he assumed. There is no such evidence. The sole and only cause of plaintiff's injuries was the manner in which Miller operated the jitney. If Miller had proceeded in a proper manner there was space for him to have passed beyond where plaintiff was standing. He chose to swing the jitney-tractor and four-wheeled truck to his left and at the same time failed to keep a lookout to his left to determine whether or not

such movement could be made in safety. His evidence is interesting in this regard (R. 116):

“Q. Weren’t you watching the car?

A. No, I was watching Marshall.

Q. Didn’t you ever watch the truck?

A. No, I never looked at the truck.

Q. You could see that car?

A. I didn’t pay any attention.

Q. You could have seen if you had looked?

A. I didn’t look at it. My wagon wasn’t two feet from that wagon, I came up to put the box on.

Q. If you had looked over to the east, you could have seen that car, couldn’t you?

A. I could have. There wasn’t nothing between me, but I wasn’t paying any attention.

Q. You thought you could get by Mr. Marshall?

A. I asked him to move his foot box and move to the east.

Q. He didn’t move, did he?

A. He says he had plenty of room, and I went on and caught the end of the wagon and it swung around and hit the car, and I asked him, did it hit you in the stomach?”

Plaintiff remained in a position where he had no control over the instrumentalities causing the accident. Thereafter, Miller could have either traveled so slow as to prevent a skidding of his four-wheeled truck sideways

and against the car, or he could have kept a lookout to the east and determined with certainty whether or not the four-wheeled truck was clearing the standing truck, or he could have done both of these things. Plaintiff was entitled to rely upon Miller operating the jitney and four-wheeled truck in a careful and prudent manner.

The evidence in this case simply does not warrant Instruction No. 7. As a matter of law plaintiff did not voluntarily choose to remain in a dangerous position. His position in and of itself was not dangerous. Malan did not think it was dangerous and there was no evidence from which a jury could infer that it was dangerous. The only danger which could exist for plaintiff was danger created by the manner in which the jitney was operated. As will be discussed in detail under Point III, he was under no duty to anticipate danger which could only come to him through the negligent operation of the jitney and four-wheeled truck. We, therefore, submit for the reasons discussed herein and under Point III that plaintiff was seriously prejudiced by said instruction which was unwarranted under the facts of this case.

POINT III.

THERE WAS NO EVIDENTIARY BASIS FOR THE SUBMISSION OF THE ISSUE OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE TO THE JURY. (Assignment of Errors No. 2, 3 and 5).

Defendant had the burden of introducing evidence in support of its allegations of contributory negligence. It is plaintiff's contention that defendant failed to sus-

tain its burden and that there was no evidentiary basis for submission of the issue of contributory negligence to the jury.

As has been heretofore pointed out, even under defendant's evidence, plaintiff never once moved from his position after the jitney started past him. It is also clear that plaintiff had no other position to which he could retire in the event the moving truck were to skid sideways and into him. Even assuming that plaintiff motioned Miller to continue in his southward movement, the evidence is nevertheless undisputed that there was plenty of room for Miller to have passed by Marshall had he operated the jitney and truck in a careful and prudent manner. Marshall's conduct had come to rest. Miller's conduct was continuing. Marshall was in a position from which he could not extricate himself; Miller was in a position whereby he could have prevented the accident by the exercise of ordinary care. Furthermore, Marshall was entitled to assume that Miller would operate the jitney and truck in a careful and prudent manner. Marshall was under no obligation to anticipate that Miller would be negligent in operating the vehicle.

In *Mathews v. Daly West Mining Co.*, 27 Utah 193, 75 P. 722 (1904), plaintiff was an employee of an ore mill. The superintendent told him that he was going to shut the mill down for one-half hour and for plaintiff to look the mill over while it was down. In making his check plaintiff discovered a cap nearly off. He procured a candle and wrench and laid across a belt in order to

tighten the cap. While thus situated and engaged the mill was suddenly and unexpectedly started and plaintiff was injured. It was contended by defendant that the safe method of tightening the cap was for a workman to get down underneath and lie on his back while someone else held a candle and that he thus could have tightened the cap without being exposed to danger although the mill was in operation, or placed in operation while the task was being performed. The testimony indicated that the method suggested and the method being used by plaintiff were each safe as long as the mill was not in operation. It was proved that it was customary to give a warning when the mill was about to start. No such warning was given. Defendant contended that as plaintiff knew of a safe method in which to perform the work but chose a dangerous method he was guilty of contributory negligence. The court stated:

“They rely upon the well-settled rule of law that when the servant knows, or by the exercise of ordinary care can ascertain, that there are both safe and dangerous ways by which he can perform his duties, if he voluntarily chooses to pursue one of the ways that is dangerous, he assumes the natural and ordinary risk incident to the way he has chosen * * *”

and that

“It is also well settled that the negligence of the master is not among the risks so assumed by the servant. Therefore when the servant, in the discharge of his duties, is in a position which is, under the conditions which then exist, naturally

safe, but is suddenly made dangerous by the negligence of the master, and the injury to the servant is immediately caused thereby, the master is liable.”

In *McCulloch v. Horton*, (Mont.), 56 P. 2d 1344, 1346, action was brought by plaintiff for personal injuries sustained by him while on defendant’s premises through the alleged negligent operation of a truck by defendant. It appeared from the facts that plaintiff was standing near defendant’s garage door and that the defendant was backing a truck out of the garage. There was some evidence that he backed out unusually fast and some that he didn’t back out straight. At any rate the truck struck the side of the door frame and caused a portion of the truck to fall down and strike the plaintiff inflicting injuries.

Defendant contended that plaintiff was familiar with the operation of the truck and the fact that the portion of the truck which fell was sometimes not held in place by hooking chains and *that plaintiff could have occupied a position of greater safety and was therefore guilty of negligence*. The court overruled defendant’s contention in this regard and stated:

“Mere knowledge of the existence of an offending instrumentality at the place where an injury is suffered does not raise a legal presumption of contributory negligence, unless it further appears that the plaintiff had reason to apprehend danger. *Hughey v. Fergus County*, 98 Mont. 98, 37 P. (2d) 1035; *Mullins v. City of Butte*, 93 Mont. 601, 20 P. (2d) 626; *Neilson v. Missoula*

Creamery Co., 59 Mont. 270, 196 P. 357. The failure to anticipate negligence which results in injury is not negligence and will not defeat the action for the injury sustained. 20 R.C.L. 118; Central Railroad Co. v. De Busley (C.C.A.) 261 F. 561; Wagner v. Philadelphia Rapid Transit Co., 252 Pa. 354, 97 A. 471; North Bend Lumber Co. v. Seattle, 116 Wash. 500, 199 P. 988, 19 A.L.R. 415."

In *Greenwood v. Summers, et al.*, (Cal.) 149 P. 2d 35, 37, the court stated:

"In determining, in the present case, whether Misko exercised the care which a man of common prudence would have exercised, the trial court undoubtedly relied upon the law and the evidence. So far as the law is concerned, section 527 (a) of the Vehicle Code, St. 1935, p. 182, states it as follows: 'Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and, except when a roadway has been divided into traffic lanes, each driver shall give to the other at least one-half of the main traveled portion of the roadway whenever possible.' So far as the evidence is concerned, the court would have been warranted in finding that Summers violated this statute and trespassed on territory reserved for traffic going south. Misko, running generally at a distance of approximately two feet west of the center white line, in our opinion, might justly have considered that he was safe from a collision with northbound traffic. Under those circumstances, it is understandable that the trial court would fail to find him guilty of negligence. The general rule is that every person who is himself exercising ordinary care has a right to presume that every other person will perform his duty and

obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person. See *Harris v. Johnson*, 1916, 174 Cal. 55, 58, 161 P. 1155, L.R.A. 1917C, 477, Ann. Cas. 1918E, 560; *Pinello v. Taylor*, 1933, 128 Cal. App. 508, 512, 17 P. 2d 1039."

See also *Pinello v. Taylor* (Cal.) 17 P. 2d 1039, and *Bowers et ux v. Foster et ux.*, (Wash.) 278 P. 1072.

In *Beck v. Sirota* (Cal.) 109 P. 2d 419, 423, plaintiff was stationed on a scaffold working. An automobile underneath the scaffold being driven away by an employee of defendant, caught on an electric light cord hanging from the scaffold causing plaintiff to lose his position and fall. The court, in discussing contributory negligence, stated:

"* * * Plaintiff had a right to presume that the defendant and his agents would perform their duty by removing the machines in such a manner as would avoid injuring the cleaners. It is a general rule that every person has a right to presume that every other person has performed his duty and obeyed the law. In the absence of reasonable grounds to think otherwise, it is not negligence for him to assume that he is not exposed to danger which can come to him only from a violation of law or duty by such other person. *Robbiano v. Bovet*, 218 Cal. 589, at page 597, 24 P. 2d 466; *Harris v. Johnson*, 174 Cal. 55, at page 58, 161 P. 1155, L.R.A. 1917C, 477, Ann. Cas. 1918E, 560; *Moreno v. Los Angeles Transfer Co.*,

44 Cal. App. 551, 186 P. 800; *Medlin v. Spazier*, 23 Cal. App. 242, 137 P. 1078.”

In *Hechler et al v. McDonnell* (Cal.) 109 P. 2d 426, 428, plaintiff was sitting on a stool in a restaurant. While she was so located one of defendant’s employees mopped the platform around the stool. When plaintiff arose and stepped onto the platform she slipped and was injured. Again the court in discussing contributory negligence and plaintiff’s right to rely upon defendant refraining from negligence which would cause her to suffer injury, stated:

“* * * Even if plaintiff had given any thought to the platform before rising from the stool, she would have been justified in assuming that it had been mopped properly and in a manner that would not endanger her safety, and that appellant would not expose her to a danger that would come to her only through a violation of his duty to her. 20 R.C.L. 66; *De Verdi v. Weiss*, 16 Cal. App. 2d 439, 60 P. 2d 879; *Tuttle v. Crawford*, 8 Cal. 2d 126, 63 P. 2d 1128.”

Marshall was not guilty of contributory negligence for the following reasons: (1) there was no evidence from which a jury could find that the position which he assumed was dangerous; (2) after the jitney proceeded past Marshall, Miller had it within his power to prevent the accident and Marshall did not.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE ISSUE OF LAST CLEAR CHANCE TO THE JURY. (Assignment of Errors No. 2 and 5).

The doctrine of last clear chance is traceable to the celebrated case of *Davies v. Mann*, 10 M & W 548 (1842). In that case plaintiff, having hobbled his jack ass, turned it out to graze on a public highway, 8 yards wide. Here the ass remained, and was peacefully grazing on the side of the road, when defendant's wagon and horses, came down a slight descent, ran against and injured the ass. The driver of the wagon was careless in being some distance behind his horses while they were proceeding along the highway at a rapid pace. The court decided that as defendant might by proper care have avoided injuring the animal, he was liable for the consequences of his negligence even though plaintiff himself was guilty of negligence in hobbling the ass and turning it on a public highway.

Since the decision in *Davies v. Mann*, the doctrine of last clear chance has developed into a well-established and universally recognized principle and has been applied to numerous fact situations.

The generally accepted rule is well stated in *Girdner v. Union Oil Company of California*, (decided Aug. 9, 1932) 13 P. 2d 915, 917:

“* * * The apparent confusion which exists in some of the decisions upon the subject arises in the application of the law to the facts, but as

to the rule itself there is little or no confusion. It would be a strange case indeed, to say the least, that would declare it to be permissible to run down and injure one simply because he was in a position of peril of which he was unaware, without responding in damages for his willful act. Such, of course, is not the law. A defendant is never relieved of liability if he has it in his power to prevent the injury. This doctrine applies whether one is unaware of his peril by reason of his negligence, or when exercising ordinary care is so ignorant. In either situation the rule is the same. *A defendant is not privileged to injure another simply because he is negligently or otherwise in a position of danger. If he has the opportunity of avoiding the injury, he must at his peril exercise it.* The rule of the last clear chance means just what the words imply. A party who has the last chance to avoid the accident, notwithstanding the previous negligence of a plaintiff, is solely responsible. *Townsend v. Butterfield*, 168 Cal. 564, 143 P. 760; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 526, 74 P. 15, 63 L.R.A. 238, 98 Am. St. Rep. 85; *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36; *Berguin v. Pacific Elec. Ry. Co.*, 203 Cal. 116, 263 P. 220; *Darling v. Pacific Elec. Ry. Co.*, 197 Cal. 702, 242 P. 703; *Atkins v. Bouchet*, 86 Cal. App. 294, 260 P. 828; *O'Farrell v. Andrus*, 86 Cal. App. 474, 260 P. 957; *Smith et al. v. Los Angeles Ry.*, 105 Cal. App., 657, 288 P. 690."

Defendant's theory was that Miller stopped a short distance north of where plaintiff was standing, had a conversation with plaintiff and thereafter proceeded in a southerly direction past plaintiff at which time the

four-wheeled truck cornered with a standing truck and swung around striking plaintiff.

In view of defendant's evidence plaintiff requested an instruction on the doctrine of last clear chance in its Requested Instruction No. 3, which was refused by the trial court (R. 042). Under the facts as presented by defendant we submit that a jury could well have found, as in the old *Davies v. Mann* case, that plaintiff when he chose to remain alongside the coach and allow the jitney and truck to pass had effectively hobbled himself, and that thereafter, just as in the *Davies v. Mann* case, defendant drove along with its jitney and truck at an excessive rate of speed and without keeping a proper lookout, running against plaintiff and causing him to sustain his injuries. In other words, as the jitney passed where plaintiff was standing he then was placed in a position from which he could not extricate himself. We believe that every necessary prerequisite of the doctrine of last clear chance was present as a jury issue under the facts. We do not by this statement wish it to be understood that we are willing to assume that plaintiff was himself guilty of contributory negligence. We believe there was no evidence to justify such a finding. However, plaintiff's conduct had come to rest and he was in a position from which he could not extricate himself, or so the jury could find, when the jitney tractor started past him.

In the case of *Michigan City v. Werner* (Ind. Dec. 1916), 114 N.E. 636, 186 Ind. 149, the plaintiff was crossing a bridge when it was raised by the bridge tender. Defendant requested an instruction that the jury should

find for the defendant if plaintiff was negligent in entering upon the bridge in an attempt to cross it. This instruction was refused by the trial court for the reason that contributory negligence is not a defense where the last clear chance situation exists and that it is improper and erroneous for a court to instruct the jury that contributory negligence will bar recovery unless the jury is at the same time instructed that if the defendant had the last clear chance to have avoided the accident and injuries then plaintiff's negligence would not bar recovery and plaintiff would be entitled to a verdict. The court stated:

“Instruction No. 4, refused by the court, if given, would have been in conflict with instruction No. 7, which properly states the law. The instruction refused directed the jury, in effect, to find for the defendant if it appeared that the plaintiff was negligent in entering upon the bridge in an attempt to cross it. Under the doctrine of last clear chance, as stated in instruction No. 7, to the effect that if the injury to the plaintiff was immediately caused by the negligence of the bridge tender after he became aware of the dangerous situation of plaintiff and to his failure to use ordinary care to avoid injury to him, then the plaintiff was entitled to recover notwithstanding his prior negligence in entering upon the bridge.”

In *Teakle v. San Pedro, L. A. & S. L. R. Co.*, (decided May 9, 1907), 32 Utah 276, 90 P. 402, 408, decedent, a licensee on defendant's railroad track, stepped in front of a backing train, consisting of an engine, tender, mail

car, and baggage car. He was struck by the baggage car and thrown between the rails. No part of the train injured him until he was struck by the firebox of the engine, which rolled, dragged and crushed him to death. The brakeman on the end of the baggage car gave signals to the engineer to stop as soon as decedent was struck but was unable to attract the engineer's attention. Another witness ran along the track on the fireman's side of the train and attempted to attract his attention, but was unable to do so. There was evidence that decedent was alive until struck by the firebox, and that had the brakes been applied immediately after decedent was first struck, the train could have been stopped before the firebox reached him. The trial court directed a verdict in favor of defendant, and the Supreme Court of Utah reversed on the ground that the case should have been submitted to the jury under the doctrine of last clear chance, and stated:

“* * * This court, in harmony with the great weight of authority, seems to be committed to the rule (when the injured or deceased person was not a trespasser) that the defendant's act of negligence will be regarded as the sole proximate cause of the injury, not only when relating to a breach of duty occurring after the consequences of contributory negligence have been discovered, but also when, in the exercise of ordinary care, such consequences could have been discovered, if a breach of duty intervened or continued after the commission of the contributory negligence. While the breach of duty must be subsequent to the commission of the contributory negligence, yet such

breach of duty may be before, as well as after, the discovery of the peril. This principle of law has often been illustrated by cases where the owner of stock was guilty of negligence in permitting it to stray upon the railroad track, and where the liability of the company was made to depend, not only upon the question of whether the train operatives could have avoided the injury after the animal was discovered on or near the track, but also whether, in the exercise of ordinary care, the train operatives could or ought to have discovered it in time to have avoided the injury. So also in cases where one was guilty of negligence in the first instance in going upon the track and by reason of being caught in a frog, or was otherwise rendered unable to escape, and where the railroad company was held liable, not only for an omission of duty on the part of the train operatives after discovering the peril, but also for an omission of duty in not discovering it. In such cases the contributory negligence is deemed the remote, and the defendant's negligence the proximate cause of the injury. Such is the principle of law which seems to have been announced by this court in the case of *Hall v. Railway Co.*, 13 Utah 243, 44 Pac. 1046, 57 Am. St. Rep. 726, and in the case of *Shaw v. City R. R. Co.*, 21 Utah 77, 59 Pac. 552, and is the principle of law stated in the instruction which this court approved, and which was involved in the question decided by the court, in the case of *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281, 52 Pac. 92, 40 L.R.A. 172, 67 Am. St. Rep. 621, and is well illustrated in

Inland & Seaboard Coasting Co. v. Tolson, 139 U.S. 557, 11 Sup. Ct. 653, 35 L. Ed. 270, and in Grand Trunk Ry. Co. v. Ives, 144 U.S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485."

The court's error in refusing to instruct on the doctrine of last clear chance was rendered manifestly more prejudicial to plaintiff when Instruction No. 7 is considered in connection with this subject. The court not only refused to allow the jury to consider the doctrine of last clear chance, but instructed the jury that if Marshall chose to remain in a dangerous position knowing the same to be dangerous, then he was guilty of contributory negligence, and in such event was not entitled to recover. In other words, the court attacked plaintiff's position in both a negative and an affirmative manner, refusing to instruct on last clear chance and further eliminating the doctrine in its application to the facts by instructing that if plaintiff was contributorily negligent he could not recover.

Some jurisdictions have held that the doctrine of last clear chance applies only where plaintiff has placed himself, deliberately or otherwise, in a dangerous position. Defendant, however, is precluded from taking this position, for Instruction No. 7 allows the jury to find that plaintiff chose to remain in a dangerous position. If there was no evidence of a dangerous position, Instruction No. 7 is erroneous. If there was evidence of a dan-

gerous position, all doubt as to the applicability of the doctrine of last clear chance is relieved. In either event error was committed by the trial court which prejudicially affected plaintiff's rights under the law.

CONCLUSION

It is respectfully submitted that Judge Hendricks abused his legal discretion when he granted defendant's motion for a new trial for the following reasons:

1. Defendant was not required as a condition precedent to affirmatively show that it had exercised due diligence prior to and during the trial in discovering the so-called newly discovered evidence.

2. The so-called newly discovered evidence was offered and ultimately used for the sole purpose of impeachment.

3. Said evidence could not have seriously affected the results of the trial.

It is further submitted that the second trial court committed prejudicial error when it submitted the issue of contributory negligence and at the same time refused to submit the issue of last clear chance to the jury.

Plaintiff was denied his constitutionally guaranteed right of a fair and just trial by jury. We therefore respectfully submit that the jury's verdict at the conclusion

of the second trial and judgment thereon should be set aside, and also that the original verdict should be reinstated.

Respectfully submitted,

RAWLINGS, WALLACE, BLACK & ROBERTS

DWIGHT L. KING

WAYNE L. KING

Attorneys for Plaintiff and Appellant