

1950

Mona C. Hudson v. Union Pacific Railroad Company : Brief of Respondent

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.

Bryan P. Leverich; M. J. Bronson; A. U. Miner; Howard F. Coray; D. A. Alsup; Counsel for Defendant and Respondent;

Recommended Citation

Brief of Respondent, *Hudson v. Union Pacific Railroad Co.*, No. 7449 (Utah Supreme Court, 1950).
https://digitalcommons.law.byu.edu/uofu_sc1/1263

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

In the
Supreme Court of the State of Utah

MONA C. HUDSON,
Plaintiff and Appellant,

vs.

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

Case No.
7449

BRIEF OF RESPONDENT

BRYAN P. LEVERICH
M. J. BRONSON
A. U. MINER
HOWARD F. CORAY
D. A. ALSUP

*Counsel for Defendant
and Respondent*

404 Union Pacific Bldg.
Salt Lake City, Utah

FILED
OCT 18 1950

Clerk, Supreme Court, Utah

I N D E X

	Page
STATEMENT OF CASE	1
STATEMENT OF FACTS	2
ARGUMENT	18
POINT I. THERE WAS NO EVIDENCE FROM WHICH A JURY COULD HAVE DETERMINED THAT THE DEFENDANT WAS NEGLIGENT OR THAT ANY NEGLIGENCE ON THE PART OF THE DEFENDANT WAS IN ANY WAY A PROXIMATE CAUSE OF THE ACCIDENT. (Appellant's Point I and Point II)	18
POINT II. THE APPELLANT WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. (Appellant's Point III)	38
POINT III. THE DOCTRINE OF LAST CLEAR CHANCE IS NOT APPLICABLE TO THE FACTS OF THE CASE AT BAR	58

STATUTES CITED

Section 77-0-14, Utah Code Annotated 1943	30
--	-----------

TEXTS CITED

162 A. L. R., page 9	27
20 Am. Jur., Evidence, Sec. 187	34
38 Am. Jur., Negligence, Sec. 285	32
38 Am. Jur., Negligence, Sec. 335	33
44 Am. Jur., Railroads, Sec. 629	27

INDEX—Continued

Page

CASES CITED

Alanza v. Texas & P. Ry. Co., (La.) 32 So. 2d 341	57
Allison v. Boston & M. R., (N. H.) 190 A. 127	27
Anderson v. Union Pacific R. Co., 76 Utah 324, 289 P. 146	26, 29
Anstine v. Pa. R. Co., (Pa.) 20 A. 2d 774	51
Atlanta and W. P. R. Co. v. McCord (Ga.) 189 S. E. 403	50
Atwood v. Utah Light & R. Co., 44 Utah 366, 140 P. 137	48
Boscarello v. New York, N. H. & H. R. Co., (Conn.) 152 A. 61	57
Buchhein v. Atchison, T. & S. F. Ry. Co., (Kans.) 75 P. 2d 280	57
Butler v. Darden, (Va.) 53 S. E. 2d 146	57
Canion v. Southern Pacific Co., (Ariz.) 80 P. 2d 397 . .	27
Carson v. Thompson, (Mo.) 161 S. W. 2d 995	51
Cate v. Fresno Traction Company, (Cal.) 2 P. 2d 364 . .	40
Chicago and E. I. Railway Co. v. Felling, (Ind.) 200 N. E. 441	54
Chicago, R. I. & P. Ry. Co. v. Stepp et al., 164 F. 785 . .	28
Clark et al. v. Union Pac. R. Co. et al., 70 Utah 29, 257 P. 1050	23
Cowan v. Salt Lake & U. R. Co., 56 Utah 94, 189 P. 599 . .	45
Cox et al. v. St. Louis-San Francisco Ry. Co., 9 S. W. 2d 96	51
Cox v. Polson Logging Co., (Wash.) 138 P. 2d 169	52

INDEX—Continued

	Page
Drummond v. Union Pacific Railroad Co., 111 Utah 289, 177 P. 2d 903	43
Ealy et ux. v. New York Central Ry. Co., (Pa.) 5 A. 2d 110	27
Earle v. Salt Lake & Utah Railroad Corporation, 109 Utah 111, 165 P. 2d 877	40, 47
Finley v. Lowden, (Iowa) 277 N. W. 487	54
Flagg v. Chicago Great Western Ry. Co., 143 F. 2d 90	27
Folkman v. Jensen, . . . Utah . . . , 218 P. 2d 682	48
Frideres v. Lowden, (Iowa) 17 N. W. 2d 396	54
Gifford v. Pa. R. Co., (N. J.) 196 A. 679	51
Gilkerson v. Baltimore & O. R. Co., 41 S. E. 2d 188	54
Gorman v. Franklin, (Mo.) 117 S. W. 2d 289	50
Grant v. Chicago, M. & St. P. Ry. Co., (Mont.) 252 P. 382	57
Gulf, M. & O. R. Co. v. Underwood, (Tenn.) 187 S. W. 2d 777	52
Holmgren v. Union Pac. R. Co., . . . Utah . . . , 198 P. 2d 459	62
Hooker v. Missouri Pac. R. Co., (Kans.) 8 P. 2d 394	57
Jensen v. Oregon Short Line R. Co., 59 Utah 367, 204 P. 101	23
Koscuik v. Sherf, (Wis.) 272 N. W. 8	54
Lang v. Chicago & N. W. Ry. Co., (Minn.) 295 N. W. 57	55
Lawrence v. Denver & R. G. R. Co., 52 Utah 414, 174 P. 817	44
Lehigh Valley Ry. Co. v. Mamgan, 278 F. 85	27

INDEX—Continued

	Page
Montague v. Salt Lake & U. R. Co., 52 Utah 368, 174 P. 871	45
Norfolk & W. Ry. Co. v. Eley, (Va.) 162 S. E. 3	27
Parramore v. Denver & R. G. W. R. Co., (8th Circuit, Utah) 5 F. 2d 912	47, 56
Parson v. N. Y. Central R. Co., (W. Va.) 34 S. E. 334 ..	53
Pennsylvania R. Co. v. Huss, 180 N. E. 919	54
Pippy v. Oregon Short Line R. Co., 79 Utah 439, 11 P. 2d 305	61
Poland v. City of Seattle, (Wash.) 93 P. 2d 379	27
Powell et al. v. Gary, (Fla.) 200 So. 854	27
Rhodes v. Pennsylvania R. Co., 147 A. 854	51
Robertson v. New York Central Ry. Co., (Ill.) 58 N. E. 2d 527	27
Rogers et al. v. Rio Grande Western Ry. Co., 32 Utah 367, 90 P. 1075	33
Russell v. Watkins, 49 Utah 598, 164 P. 867	21
Ryan v. Union Pacific R. Co., 46 Utah 530, 151 P. 71 ..	62
Sadler v. Northern Pac. Ry. Co., 203 P. 10	53
Sherris v. Northern Pac. Ry. Co., (Mont.) 175 P. 269 ..	57
Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., 101 F. 2d 480	32

INDEX—Continued

	Page
Southern Ry. Co. v. Hale, (Ala.) 133 So. 8	34
State, for Use of Emerson v. Poe (Md.) 190 A. 231 . .	27
Teakle v. San Pedro, L. A. & S. L. R. Co., 32 Utah 276, 90 P. 402	62
Ulrikson v. Chicago, M. St. P. & P. Ry. Co., 268 N. W. 369	56
Union Pacific Ry. Co. v. Gaede, 110 F. 2d 931	27
Valera v. Reading Co., (Pa.) 36 A. 2d 644	52
Van Wagoner et al. v. Union Pac. R. Co., 112 Utah 189, 186 P. 2d 293	62
Vernon v. Illinois Cent. R. Co., (La.) 97 So. 493	35
Waller v. Norfolk & W. R. Co., 152 S. E. 13	54
Willy v. Atchison, T. & S. F. Ry. Co., (Colo.) 172 P. 2d 958	57

In the
Supreme Court of the State of Utah

MONA C. HUDSON,
Plaintiff and Appellant,

vs.

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

Case No.
7449

BRIEF OF RESPONDENT

STATEMENT OF CASE

This action was filed in the Third Judicial District Court at Salt Lake City, Utah by the plaintiff, a resident of Salt Lake County, Utah, seeking to recover damages from the defendant as a result of injuries sustained by her in a crossing accident which occurred on May 1, 1948, near Logandale, Nevada, at a time when an automobile driven by one Era Jones, in which plaintiff was riding as a passenger, collided with a freight train operated by the defendant company.

At the conclusion of all of the evidence the defendant made a motion for a directed verdict on the following grounds:

1. That the evidence did not show any negligence on the part of the railroad company;
2. That negligence, if any, on the part of the railroad company was not in any way a proximate cause of plaintiff's injuries;
3. That the evidence affirmatively showed that the plaintiff was guilty of contributory negligence as a matter of law; and
4. That the evidence affirmatively and conclusively showed that the driver of the car, Era Jones, was negligent as a matter of law and that her negligence was the sole proximate cause of the accident (R. 269).

After listening to arguments upon the motion, the court, without specifying which of the four points he relied upon, granted defendant's motion and directed the jury to return a verdict in favor of the defendant. Judgment was entered thereon in favor of the defendant and from that judgment the plaintiff has appealed.

STATEMENT OF FACTS

The statement of facts as recited by counsel for appellant in their brief is in the main correct, but in some instances the appellant has misstated facts, and in a great many instances has avoided reference to facts which are controlling and which are as binding upon plaintiff as upon the defendant. In connection with their statement of facts counsel for appellant have included some measure of ar-

gument, and for that reason respondent in stating the facts will likewise include some measure of argument in pointing out additional facts or in referring to matters wherein respondent feels that the facts differ from those as stated by appellant's counsel.

At the outset, we admit that the facts must be viewed in the light most favorable to appellant, but in doing so, the entire facts in the case must be considered and not just those plaintiff or her witnesses may have testified to. Also in some instances which we will point out, facts as claimed by plaintiff and testified to by her or her witnesses were in direct conflict with physical facts as shown by actual surveys and photographs, in which event we are sure that the rules require that physical facts and circumstances control rather than testimony from the plaintiff or her witnesses to the contrary.

The accident occurred in a very sparsely settled region, and the pictures as introduced in evidence, being Exhibits 1 to 8, show very definitely the nature of the crossing and surrounding terrain from a photographic standpoint, and a survey map introduced as defendant's Exhibit 10 shows the relative elevations of the railroad track and the highway as it approaches and crosses, with contour elevations of the entire surrounding area.

It is rather interesting to note that appellant's counsel in stating their facts and writing their brief evade any mention whatsoever of the map, defendant's Exhibit 10. Counsel for defendant tried to get plaintiff to stipulate to put the map in evidence early but was unsuccessful, and

plaintiff's counsel seemed to want to avoid having the record show the qualifications of the surveyor or engineer who drew it (R. 134-138). At any rate, appellant's counsel referred only to a rough sketch made by Sheriff Keate and introduced as plaintiff's Exhibit A, which was made from memory by the sheriff without any measurements and not to scale in any respect, and the sheriff was not in any manner a surveyor or engineer. For that reason respondent is going to insist throughout that the sketch or rough map as drawn by the sheriff and introduced as plaintiff's Exhibit A cannot be considered as competent evidence in any manner contradictory to or disproving anything shown by defendant's Exhibit 10, drawn from an actual survey by a competent surveyor engineer who made the survey (R. 134-138).

The plaintiff and her driver knew of the location of the railroad track in question. They had just crossed it a few minutes before the accident and were approaching it on their return, knowing that they would have to recross it. The plaintiff seems to try to excuse herself by stating that she thought it was merely a side and not a main line track. She stated (R. 80): "I thought it was the Wells siding." She also stated that she did not expect a train to be going in that direction in the afternoon because she thought the train went down in the morning and back in the afternoon (R. 83). Nevertheless, there is no dispute over the fact that both the plaintiff and her driver had been over the track just a few minutes before, were retracing their path, knew they had to recross it, and also knew where the point of crossing was.

We agree with appellant, as stated on page 4 of her brief, that the course of the road, its location and elevation, are of importance not only insofar as the issue of contributory negligence is concerned, but also upon the question of the negligence of the driver being the sole proximate cause.

The course of the road, its location and elevation, and the comparative elevation of the surrounding terrain are all shown by the contour map, Exhibit 10, as well as the pictures above referred to, the roadway being more particularly shown by Exhibits 1, 2, 3 and 7. The condition and elevation of the roadway north of the so-called ravine is immaterial because after the automobile came up out of the ravine there was still a distance of approximately 400 feet to the crossing. This point where the automobile was out of the ravine can be definitely determined to be at the point as shown on the map marked on the roadway with the letters and figures "El. 98.2." From that point until a point about 75 feet from the tracks, the automobile was following a downhill course, and if there was any negligence that could be considered a proximate cause of the accident on the part of either of the occupants of the car or of the members of the train crew, it would arise as a result of action or inaction on the part of the various parties during the time the automobile proceeded this distance of approximately 400 feet to the crossing and while the train was proceeding approximately the same distance to the crossing, both the train and the car proceeding at a fairly slow rate of speed.

Appellant's counsel refer, on pages 5 and 6, to statements made by Sheriff Keate to the effect that the road was considerably lower than the track and that in order to see a train on the track occupants of an automobile would have had to look "straight up" or "up at an angle." As already stated, Sheriff Keate had made no measurements in the area and was not a surveyor, and his testimony with respect to distances, contour of the terrain or obstructions, cannot prevail against the actual survey as made and shown by the contour map, Exhibit 10, nor against what is shown by the photographs, Exhibits 1 to 8. While the sheriff says that the occupants of the automobile would have to look "straight up," the true situation is reflected by the fact that as the automobile came to the top of the rise out of the ravine (at the point on the map marked on the roadway "El. 98.2"), there was a difference in elevation between the roadway and the railroad track of less than two feet, the roadway elevation at that point being 98.2 and the railroad track being 100.

At page 5 counsel, quoting Sheriff Keate, say: "As the road comes up out of the ravine, it is more or less facing the track. The track can be seen head on, but there is a hill or ridge which prevents anyone in a car from seeing north along the track at this point." Again counsel say: "The fact * * * that even as the car came up out of the ravine (facing the tracks) the tracks to the north were hidden from view is important because, as will be herein-after noted in detail, there is evidence from which the jury could have found that the train was behind (north of) the car as the car came out of the ravine." The physical

facts as shown by the map, Exhibit 10, and the pictures, conclusively dispute the testimony of Sheriff Keate as attempted to be relied upon by appellant's counsel in this respect. When the automobile arrived at the point of elevation marked "El. 98.2" on the roadway where it was out of the ravine, it can be seen by drawing a direct line on the map, Exhibit 10, that there could not possibly be anything other than a two-foot elevation intervening between that point and the track as far back as Engineer's Station 444 as shown on the map, and at Engineer's Station 444 as shown on the map, the elevation of the track was approximately 100.2 feet. Therefore, it would have been impossible for anyone to look from the point on the map marked on the roadway "El 98.2" to the right without being able to see anything at least as far northerly or to the northwest along the track as the Engineer's Station 444, and this would be disregarding the fact that an engine such as the one involved in this case stands from 14 to 16 feet above the rails. These facts are further conclusively shown by the picture in evidence, Exhibit 6, which was taken from the roadway just to the north of the bend as the roadway heads toward the ravine, which picture shows a man on the track at a point 575 feet from the crossing (R. 147), and not only can the man be seen standing at that point, but except for a small bush, the track itself can be seen for that distance. It must further be remembered that if the railroad train was in the vicinity, as it would have to have been when speed and distances are considered as hereinafter pointed out, an engine standing 14 to 16 feet above its rails, (R. 182-183), could not help but be seen by any person who

looked as plaintiff claims to have looked (Exhibit 6). Counsel for appellant state on page 8 that: "There is evidence from which the jury could have found that the train was not on the tracks at that point, but that it was north, and behind this hill as the car came out of the ravine." What is the evidence referred to by counsel? It is the statement of Mrs. Hudson (R. 104) wherein she said that she looked as they came out of the cut or the ravine.

"Q. You say you looked as you came out of the ravine?

"A. Yes.

* * * * *

"Q. When you came out of the ravine both of you could see the track directly ahead of you?

"A. We could see the track.

* * * * *

"A. I looked as we came out of the ravine, I knew the track was there, I wasn't conscious of it, but I looked naturally.

"Q. When you came out of the ravine?

"A. Yes."

The only other evidence referred to by counsel is a statement from the witness Oliver that when the car came out of the ravine and turned along the parallel strip it was slightly ahead of the train. That does not mean that the train was "not on the tracks at that point" or that "it was north and behind this hill." The speeds at which the objects traveled and the fact that they collided at the crossing conclusively prove that the train was not behind any hill but had to be in plain sight, and if the plaintiff looked, as she claims to have done, as she came out of the ravine, she would have had to see the train there in plain view. Thus

where counsel state that there was evidence from which the jury could have found that the train was not on the tracks at that point, we must say that the jury could not have so found because it was contrary to physical facts, and testimony of plaintiff or anyone else that is contrary to demonstrated physical facts is not sufficient for a jury to base any finding on. If the plaintiff looked as she states she did as the car came to the top of the ridge out of the ravine, she was bound to see what was there to be seen, and the train had to be there—it could not possibly have collided with the automobile otherwise.

At this point we would like to refer to the facts regarding speed and distances traveled, some of which were referred to by counsel under the heading, "Movement of the Car and Train," beginning on page 6 of their brief. The speed of the car was estimated by various witnesses as being some 18 to 20 or 22 miles per hour (R. 191-192, 201, 219, 239). The speed of the train was estimated as being all the way from 15 to 20 miles per hour (R. 158, 165, 190, 219, 238). The plaintiff claims never to have seen the train until the moment of impact and therefore could not estimate its speed, and most of the testimony with respect to the speed of the car came from members of the train crew. However, from the contour elevation as shown on the map, Exhibit 10, it cannot be disputed that anyone on the roadway coming up out of the ravine at the time he reached the point marked "El. 92.2" on the roadway, would be able to see to the north at least as far as Engineer's Station marked on the map as 444. From those two points the distances to the crossing are as follows: along the

roadway an automobile would have to travel approximately 400 feet; the train from Station 444 would have to travel approximately 530 feet. As an automobile approached closer to the track and approximately at the point where it would turn to the southeast to parallel the track as shown by the picture, Exhibit 6, anyone in the automobile looking to the right at all would be able to see an approaching train at least a distance of 575 feet from the crossing because a train could at all events be seen as easily as the man standing in the picture, Exhibit 6. With these distances in mind and considering the speeds as testified to, the facts would be conclusive to show the following:

If the automobile traveled the 400 feet to the crossing at 18 miles per hour, which is the closest estimate favorable to the plaintiff that could be taken, the automobile, traveling at 26.4 feet per second, would take approximately 15 seconds to reach the crossing. Taking the highest speed testified to with respect to the train and assuming the train was moving at 20 miles an hour, in those same 15 seconds the train, going at 29.3 feet per second, would travel 440 feet. Therefore, at the time the automobile came out of the ravine and reached the point marked on the roadway as "El. 98.2," the engine of the train had to be at least as close to the crossing as to be approximately at the station marked along the track with the figures "445." If we assumed that the train was going at a slower speed—15 miles per hour, as testified to by some of the members of the train crew—it would travel 22 feet per second and in the 15 seconds it took the automobile to go the 400 feet to the crossing, the train would travel only 330 feet, in which event

the train would be at Engineer's Station 446 when the automobile came out of the ravine to the high point marked "El. 98.2."

We must keep in mind one other matter which is shown by the map. The majority of the testimony in evidence was to the effect that after paralleling the track and then turning towards the crossing, the roadway approached the track nearly at right angles for approximately 75 feet. Before this turn to head directly toward the track the testimony of most of the witnesses stated that the roadway paralleled the track for about 300 feet. The measurements on the map show that this distance wherein the road parallels the track is somewhat less than 300 feet, but nevertheless from the time an automobile would top the rise as it came out of the ravine at the point on the map marked "El. 98.2," the automobile would still have approximately 100 feet to travel, starting in a downhill direction with the track directly in view, before the automobile turned to the south-east to parallel the track. During this time and while the automobile was traveling this 100 feet, the physical facts and circumstances shown by the speeds and distances conclusively demonstrate that the engine and at least some of the front cars of the train had to be within view along the track, if not directly in front of the plaintiff and Mrs. Jones as they approached over this 100 feet almost at right angles to the track. Measurements along the roadway running back from the crossing do show that it is approximately 75 feet from the crossing to the bend in the road, although the bend is not sharp and it is hard to tell where the apex of the curve is. By figuring approximately 75 feet from the

crossing to the bend in the roadway, the distance to the northwest which the roadway then parallels the track would be slightly in excess of 250 feet. Thus from the track going back northerly to the bend where the roadway turns toward the ravine after paralleling the track (to the point where the figures "El. 97.1" appear on the roadway) would be a distance of somewhere in the neighborhood of 325 to 350 feet. If the automobile traveled the last 350 feet to the crossing at 18 miles per hour or 26.4 feet to the second, it would take the automobile approximately 13 seconds to travel this distance of 350 feet. Assuming the train to have been going at the fastest speed testified to or 20 miles per hour, which would be 29.3 feet per second, in this 13 seconds the train would go approximately 381 feet, in which event at the time the automobile turned to the southeast to parallel the track the train would have been 381 feet down the track or slightly beyond the Engineer's Station marked 446. If the speed of the train was lower than the 20 miles per hour, then the train would have been much closer to the crossing and again directly in head of the automobile before it made the turn.

If we consider the testimony of the members of the train crew, which is not in any way disputed by plaintiff or any of her witnesses, that the automobile at all times was traveling at a faster rate of speed than the train, then at the time the automobile made the turn to the southeast to parallel the track at the point marked "El. 97.1," the train was somewhere between the station marked along the track with the figures 446 and the crossing.

Whichever view of the speeds and distances might be taken as herein referred to, there can be no possible escape from the conclusion that had plaintiff looked as she said she did when they came to the top of the rise out of the ravine, she could not possibly have avoided seeing the approaching train.

It does not assist counsel to repeat or attempt to emphasize the claim of Sheriff Keate that anyone approaching in an automobile as the plaintiff and Mrs. Jones were would have to look straight up or that it was hard to see because the track was higher than the roadway, because it will be seen that from the time the automobile came to the top out of the ravine to the point marked "El. 98.2," and from that point on to the crossing, there was a distance of at least 75 feet between the track and the roadway and no more than three feet difference in elevation at any time until after the automobile had turned southeast to parallel the track, at which time the difference in elevation would vary from three feet to less than five feet. An elevation of five feet at a distance in excess of 75 feet away does not require anyone to crane his neck or even turn it to look up, and rather than hindering a view that anyone would have, would only tend to silhouette any object that might be moving along the track in the vicinity.

Counsel try to emphasize the fact that plaintiff and her driver would have had to look backwards. They would not have had to look backwards at any time while traveling the 100 feet from the point marked "El. 98.2" to the bend in the road, and from the point where the road turned

to parallel the track, the speeds and distances when considered with the fact that the collision occurred at the crossing compel the view that the train could not have been very many feet behind the car and at least was 75 feet away from it, so that the angle of looking back, if any necessity existed at all to look back, would not have been severe even at any time while the automobile was traveling the parallel roadway toward the crossing.

There is one other fact that counsel for appellant have overlooked in their statement of facts, and that is that at the time the automobile came up to the crossing the train was still approximately 50 feet away (R. 98, 235-236). If the automobile had not stopped on the crossing, it would have negotiated the crossing without trouble. The driver of the automobile admitted that she never looked at all, stating as follows: "I don't know why my husband allows me to drive. I never even looked" (R. 162). And again, "I never even looked to see if a train was coming" (R. 201). As the automobile approached the crossing the speed at which it was going was such that it could easily have stopped and the members of the train crew assumed that it would stop before going across the track (R. 196, 214, 216, 220) unless the driver concluded that the automobile could make the crossing ahead of the train (R. 194, 205, 217), and the automobile, at the speed at which it continued as it came near the crossing, would have cleared the crossing except for the fact that it stopped on the track, at which time it was too late for the engine crew to do anything.

The driver of plaintiff's car never did look and never did see the train, and that, coupled with plaintiff's failure, to see what was there to be seen when she looked, or her failure to look at all caused the accident, because it was plaintiff's failure to see what she should have seen until at the last moment and then her exclamation, "Oh, my God," which caused the driver of the car to stop on the track when the train was 50 feet away. If the plaintiff had seen the train earlier and if she and her driver had concluded, as they would have been justified in concluding, that they could have made the crossing, plaintiff would not have so exclaimed and the car would not have stopped on the track. If neither of them had ever seen the train but if plaintiff had not so screamed upon her late view of the train, the car in which she was riding would have passed over the crossing safely.

Counsel for appellant at page 7 of their statement of facts state with respect to the engineer: "He perhaps could have seen to the left, but he was not looking." Counsel cannot assume any such fact and are in error in so stating because the type of engine involved in the case was one with the diesel engine framework out in head of the cab, and there was no way for the engineer to look to the left except if he looked exactly at right angles across through the cab and out of the fireman's window.

Counsel also refer on page 9 of their statement of facts to the speed of the train and the distance within which they contend it could have been stopped, and assert that the train could have stopped within 120 feet, because as

a matter of fact it was stopped within 120 feet after the brakes were actually applied. Counsel overlook the fact, however, that the only testimony in the record aside from the fact that it took 120 feet after the brakes were applied to bring the train to a stop is that it takes some little time for the air to equalize back through the air lines to apply the brakes. The only witness who testified with respect to this stated that it would take approximately seven seconds for the air to equalize back through the air lines (R. 199). The train had not yet reached the crossing when the fireman yelled to the engineer, and yet the train went three car lengths, or approximately 120 feet south of the crossing. Therefore, there is no evidence from which plaintiff or anyone else could conclude anything other than that it would take approximately 120 feet to stop after the brakes actually took effect and about seven seconds for the air to equalize back through the brake lines before the brakes would take effect.

Toward the bottom of page 9 counsel state: "As the car came out of the ravine it was ahead of the train. Mrs. Hudson so testified and one of the train crew corroborated her * * *." Mrs. Hudson never so testified because she never saw the train. She states that she looked as she came out of the ravine but never saw the train, so she could not say where it was. If Mrs. Hudson had seen the train and been able to say where it was, then she would have been guilty of contributory negligence without question. The member of the train crew who corroborated, as referred to by counsel, was the witness Mr. Oliver, who stated that as the car came up out of the ravine it was some little dis-

tance ahead of the train. However, after the car came out of the ravine, there was a distance of approximately 100 feet which it had to travel. Also we should remember that if the members of the train crew could see the car as it came out of the ravine then the train was not to the north back of any claimed hill but out in plain view where plaintiff would have seen it had she looked.

The plaintiff did say, "The train was coming back of us," but she claims never to have seen it until just before it struck, when she exclaimed, "Oh, my God." But all of the testimony of those who were able to make any comparison between the train and the automobile is to the effect that the automobile was traveling faster than the train. Therefore, the automobile and the train had to be somewhere in the near vicinity of each other as the automobile turned on the roadway paralleling the track, and as the automobile was traveling a little faster than the train, it gained somewhat on the train so that as it turned on the 75 feet of the roadway to go over the track, it reached the track at a time when the train was still about 50 feet from the crossing. At that time, upon the exclamation of the plaintiff when she saw the train and screamed, "Oh, my God," the driver slammed on the brakes and stopped the car directly on the track in front of the train.

As stated by counsel, the train crew did observe the car in its approach to the crossing, but there was nothing in the movement of the automobile that would indicate to the members of the train crew that there was any hazard, and as a matter of fact, those who had kept watch on the car

concluded that it would pass over the crossing safely until at the last moment when the car stopped directly on the track in front of the train.

Counsel state at the conclusion of their statement of facts that the extent and nature of Mrs. Hudson's injuries are not material here. That is true except it should be pointed out that the nature of the injuries in and of itself will indicate that the train could not have been going at a very high rate of speed. The injuries to the plaintiff were not very serious in and of themselves. The main damages of which plaintiff now complains arises as a result of an embolism or phlebothrombosis which occurred some 10 days after the accident (Exhibit 9). The actual injury was not extensive, and Mrs. Jones, the driver of the car, stated that she was "glad the train was not going fast" (R. 222).

ARGUMENT

POINT I

THERE WAS NO EVIDENCE FROM WHICH A JURY COULD HAVE DETERMINED THAT THE DEFENDANT WAS NEGLIGENT OR THAT ANY NEGLIGENCE ON THE PART OF THE DEFENDANT WAS IN ANY WAY A PROXIMATE CAUSE OF THE ACCIDENT.
(Appellant's Point I and Point II)

The only negligence claimed by plaintiff is that the train crew failed to give adequate warning of its approach. The only testimony offered by plaintiff tending to show the

defendant failed to give the required crossing signal and failed to ring the bell on the train as the train approached the crossing is the testimony of the plaintiff herself. In response to questions by her counsel she stated she heard no whistle and heard no bell as she proceeded toward the crossing (R. 79). Again, she states nothing distracted her attention and no whistle was blown (R. 85). On cross-examination she repeated this testimony, stating in response to a question: "Absolutely there was no whistle of any kind" (R. 107). She further stated on cross-examination that she wasn't conscious of the nearby railroad track (R. 104), that she was talking casually to the driver of the car (R. 93), and that she and the driver were talking about hearing the "click" of the automobile transmission when 20 miles per hour speed was reached. For 300 feet the road paralleled the track and was 75 feet therefrom. She testified the windows of the automobile were down.

In behalf of the railroad the engineer on the train in question testified he sounded the regular crossing whistle—two longs, a short and a long—and that the automatic bell was turned on about two miles from the crossing and was left on after the accident (R. 158-159); that the first blast of the whistle was at a point approximately one-fourth mile from the crossing (R. 174). On cross-examination the engineer admitted he had no definite recollection of blowing the whistle on this occasion but based his testimony with respect to the whistle upon his usual practice in that regard. The fireman testified the engineer blew the whistle for the crossing (R. 192); that the first blast was about one-fourth mile from the crossing (R. 208-210); that the

bell was ringing (R. 193, 210, 215). The brakeman testified the whistle was blown and the bell was ringing (R. 220), and the whistle was still blowing at the time of impact (R. 227). The swing brakeman testified the first he noticed the whistle was when the train went into emergency (R. 240, 244). The conductor testified he heard the whistle at the time the train went into emergency; that the emergency application brought the whistle to his attention (R. 248); that he heard the whistle blowing before the emergency application, but he paid no particular attention to it (R. 250, 252). The conductor further testified he didn't hear the bell until after the train had stopped, but the noise of the train drowns the sound of the bell in the caboose where he was riding (R. 252). Mr. Jackson, brakeman riding in the caboose, testified he heard the engineer whistle for the grade crossing (R. 254). He also testified he didn't hear the bell until after the train stopped because of the noise in the caboose (R. 258).

Against plaintiff's testimony that no whistle was blown and no bell sounded, then, there is the testimony of six crew members that the whistle was blown, one of the six testifying, however, that he first heard the signal at the time of the emergency application and if a person were paying attention he would hear the whistle from his position in the cupola of the caboose; and one other, the engineer, testifying that he based his positive statement upon his custom and habit of whistling at all crossings; and we have the testimony of three members of the crew that the bell was ringing as the train approached the crossing, and the other three members of the crew were in a position where

they could not hear if the bell was ringing. In the face of this positive testimony, the negative evidence as to the failure to give warnings is without probative force.

We preface our argument concerning this negative testimony with our observation that the law applicable to this point is not and cannot be definitely settled, in this jurisdiction or elsewhere. The reports abound with cases in point, and the subject has been exhaustively treated by our own Supreme Court. Because no two items of negative testimony are alike and because so many factors must be considered in analyzing testimony, no accurate rules can be formulated to determine what evidence is negative and what negative evidence has probative value. It is submitted, however, that if the evidence in the case is tested by the formulae announced in the Utah cases, it will be found lacking in probative force.

One of the first Utah cases we find in point is *Russell v. Watkins*, 49 Utah 598, 164 P. 867. Plaintiff was riding a motorcycle toward Ogden, and he approached a horse and wagon traveling in the opposite direction. Defendant was driving an automobile behind the wagon, and he turned out to pass the wagon and collided head-on with the motorcycle. Plaintiff testified defendant failed to blow his horn, and his testimony was corroborated by the driver of the wagon. The court said this:

“As to the first proposition, that of the defendant failing to signal his approach, before the accident, we have searched the record in vain for any tangible evidence to sustain plaintiff’s contention. The direct and positive testimony of the defendant himself con-

cerning his nearing the place of the accident, namely, 'I came up behind a man that had a wagon and two horses at the back, and I honked my horn before I endeavored to turn out; it was about, I should think, 40 to 50 feet before I tried to turn out; I couldn't get his attention, however'—stands in the record to our minds, wholly uncontradicted. True, some of the witnesses testifying for plaintiff, particularly the plaintiff and the witness Bryson, say that they 'did not hear' a warning. When we take into consideration that the plaintiff, according to his own testimony, was at the time without thought and wholly unaware of the approach of defendant's automobile, that he was seated on a motorcycle moving at the rate of 15 or 20 miles an hour, that his view of the traveled road was obscured by Bryson's approaching wagon and horses, and of necessity had to cross immediately to the east side of the highway for safety and in passing the Bryson vehicle, and that the witness Bryson was, at the same time, apprehensively riveting his attention on the motorcycle approaching him, on account of his own safety, and through fear of the horse he was driving making him trouble, we may well believe these witnesses 'did not hear' the horn sounded by the defendant on his approach.

"The weight of negative testimony of witnesses, as to the giving of signals, ordinarily is for the jury to determine; but, when physical conditions and the attending circumstances are such as to render it highly improbable that they could hear, we think the rule should be and is otherwise. *Jordan v. Osborne*, 147 Wis. 623, 133 N. W. 32; *Menard v. Boston, etc., R. R.*, 150 Mass. 386, 23 N. E. 214. In the Massachusetts case, last above cited, the court, in speaking of the weight of this class of testimony, says:

"A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight."

In *Jensen v. Oregon Short Line R. Co.*, 59 Utah 367, 204 P. 101, one witness testified he heard no bell but was giving his attention to another train nearby. The train crew testified the bell was rung. The court held that the negative testimony had no probative value, stating:

“This is not a case in which the witness claims to have been listening for signals and failed to hear them. The witness in this case was not consciously listening at all. His attention was directed in another direction, and his mind was engrossed in other matters. * * *”

There is no claim in the instant case that Mrs. Hudson was listening for signals. The only possible inference to be drawn from the testimony was that she not only was not listening for signals, but that her attention was diverted to her conversation with Mrs. Jones and to listening for the “click” of the automobile transmission.

Clark et al. v. Union Pac. R. Co. et al., 70 Utah 29, 257 P. 1050, contains a thorough review of the law on the point, and in this case the evidence as to failure to give warning was held sufficient to create a controversy. At the time of the accident an extremely heavy fog obscured the railroad crossing. Two school girls walked along the road close to the crossing. They were familiar with the crossing and with the train schedule. They were late for school, and they particularly listened for the train in order to learn just how late they were. They testified they heard no whistle or bell. Two men were driving a team toward the crossing, and because the fog made it impossible for them to see the crossing, they were particularly alert for the sound of the

train. Both of these men testified they heard no whistle or bell. Two other men were feeding cattle near the crossing. One of the two was watching and listening for the train. Both testified they heard no whistle or bell. The court held, with one judge dissenting, that this evidence was of probative value and created a jury question as to failure to give warning. We quote from that opinion:

“* * * As to the question of signals it is the contention of the respondent that there was direct and positive evidence given that the whistle was sounded and the bell rung, and that the testimony of witnesses was merely of a negative character; that they did not hear either the sounding of the whistle or the ringing of the bell; and that in such case such negative testimony did not raise any conflict in the evidence. In support of that Jensen v. O. S. L. R. R. Co., 59 Utah 367, 204 P. 101; Quinley v. Springfield Traction Co., 180 Mo. App. 287, 165 S. W. 346; Oliver v. U. P. R. R. Co., 105 Neb. 243, 179 N. W. 1017; Bannister v. Ill. Cent. Ry. Co., 199 Iowa, 657, 202 N. W. 766; Seaboard Air Line Ry. v. Myrick (Fla.) 109 So. 193, and other cases, are cited. These cases in effect hold that a mere negation on the part of a witness that he did not hear the bell rung or the whistle sounded on an engine approaching a crossing will not sustain a finding by a jury that such signals were not given, when it is shown that the witness was not paying attention to the occurrence, and does not know whether the whistle was or was not sounded or the bell rung, and only testified that he did not hear the warning, and that such testimony does not contradict positive and direct testimony of a witness or witnesses that the whistle was sounded and the bell rung. But a reading of the cases and of other cases on the subject shows that it is not the fact of negative testimony, but the character of the negative

testimony, which is regarded as not sufficient to support a verdict that signals were not given, or to raise a conflict with testimony that the bell was rung and whistle blown. It is clear that, where one witness testifies that the whistle was sounded and the bell rung, and another witness of equal opportunity to know the fact testifies that he was listening to see whether the whistle did or did not sound and the bell ring, and that the whistle did not sound nor the bell ring, positive testimony is met by positive testimony; and, if the witnesses are of equal credibility, the testimony of the one is entitled to as much weight as the other. Even where a witness testifies that he was listening for signals, and was in position to hear the signals had they been given, and that, if they had been given, he would have heard them, but that he did not hear any signals given, some courts treat that kind of evidence not as negative but as positive testimony. Other courts treat it as negative testimony, but in such case not to be disregarded, but to be considered of sufficient probative value to justify a finding that signals were not given, and to raise a conflict in the evidence where there was positive testimony that the bell was rung and the whistle blown. Whether the testimony of a witness, who is shown to have been in position to hear the signals had they been given, that he was listening for them, and would have heard them had they been given, but heard no signals, be regarded as positive or negative in character, still we think the weight of judicial authority shows that such testimony is of such probative value as to justify a jury in giving as much, or even greater, weight to it than to positive testimony of witnesses that the signals were given, if the witnesses are of equal credibility. Though a witness was not specially listening for signals, or giving special attention to the occurrence, yet, if his attention was not engrossed or diverted to other things, and it being

made to appear that he was in position to hear, and in all likelihood would have heard, them, had they been given, his testimony that he heard none is still of probative value, and is not to be disregarded, though its weight be not regarded as great as the testimony of a witness who testified that he was specially watching and listening for signals, and heard none, or of a witness that they were or were not given. * * *

The subject was next treated by the Utah Supreme Court in *Anderson v. Union Pacific R. Co.*, 76 Utah 324, 289 P. 146. In this case two witnesses were working on a steam engine just six feet from the railroad track at the scene of the accident. One of the two testified he had no remembrance of hearing the bell. The other testified he didn't hear the bell or whistle. The court said:

“* * * Upon this evidence the plaintiff was not entitled to go to the jury on such questions. The testimony of the witness which is merely to the effect that he did not hear a whistle blown or a bell rung is not sufficient to overcome positive and direct testimony that the whistle was sounded and the bell rung. To entitle negative testimony such as that of Redden and Thompson affecting the ringing of the bell and the blowing of the whistle on the occasion in question to any probative value, it must be made to appear that they were paying some attention to what actually occurred and that they were in a position where they could and did observe what was done or what was not done. *Clark v. Union Pacific Railroad Company* (Utah) 257 Pac. 1050 and cases there cited.”

From these Utah cases, then, we learn that when there is positive testimony as to the giving of a warning, before

negative testimony that no warning was given raises a conflict with respect thereto, it must appear that the person so testifying was in a position to hear and that he was paying some attention.

Since the subject has been thoroughly treated by the Utah Court, it will serve little purpose to cite other authority. Examination of cases from other jurisdictions shows, however, that the Utah decisions are in accord with the majority. We invite the court's attention to the extensive annotation in 162 A. L. R. at page 9. For later cases on the subject see:

Norfolk & W. Ry. Co. v. Eley, (Va.) 162 S. E. 3.
Poland v. City of Seattle, (Wash.) 93 P. 2d 379.
Union Pacific Ry. Co. v. Gaede, 110 F. 2d. 931.
Flagg v. Chicago Great Western Ry. Co., 143 F. 2d 90.

Canion v. Southern Pacific Co., (Ariz.) 80 P. 2d 397.

Powell et al. v. Gary, (Fla.) 200 So. 854.

Robertson v. New York Central Ry. Co., (Ill.) 58 N. E. 2d 527.

State, for Use of Emerson v. Poe, (Md.) 190 A. 231.

Allison v. Boston & M. R., (N. H.) 190 A. 127.

Ealy et ux. v. New York Central Ry. Co., (Pa.) 5 A. 2d 110.

Lehigh Valley Ry. Co. v. Mamgan, 278 F. 85.

In 44 Am. Jur., Railroads, Sec. 629, it is stated:

“While negative testimony that the witness did not hear the bell or whistle of the train as he approached the crossing is admissible, such evidence ranges through all degrees of credibility. Testimony

of a witness that he did not hear the signal, without proof that the witness was listening and was in a position to hear, carries little or no weight, especially in the face of positive and direct evidence to the contrary. In the face of positive evidence that signals were sounded, testimony of a witness that he did not hear any signal is entitled to no weight and does not create a conflict of evidence sufficient to go to the jury. Especially is this true where it appeared that witnesses who testified that they did not hear the signals were not in a situation to hear, or were not noticing for the purpose of hearing such signals.

* * *

The evidence fails to show that Mrs. Hudson was attentive and was listening for the approaching train. She was not conscious of the nearby railroad track. Her attention was diverted elsewhere. It is not shown that the brakeman was attentive to the whistle until the emergency application attracted his attention. As testified to by the conductor and other crew members, workmen in the caboose pay little or no attention to crossing whistles.

“If the witness had been accustomed to hear such signals frequently so that their impression would be deadened by habit, his testimony that he did not hear them would have no weight as against trustworthy affirmative evidence that the signals were given, unless the witness was able to testify to some circumstance showing that his attention was specially directed to the subject on the occasion in question.”
Chicago, R. I. & P. Ry. Co. v. Stepp et al., 164 F. 785.

The evidence as to defendant's failure to give adequate warning fails to meet the objective tests established by the Utah Court and is therefore without probative force. There

was no evidence upon which the jury could properly have found that the defendant was negligent.

There are cases in which courts have held that the form of a witness' answer might determine whether his testimony is of a negative or positive character. Such courts would apparently treat Mrs. Hudson's testimony that she heard no whistle as a negative statement but her testimony that "Absolutely there was no whistle of any kind" as a positive statement entitled to probative value. The defendant submits that there is no difference in substance between the two forms of testimony. When a witness testifies that she heard no whistle, in substance she is stating that as far as she knows there absolutely was no whistle sounded. It is the substance of the testimony that is important in the trial of an action; a witness should not be permitted to alter the legal effect of his testimony by changing the form of his answer. If it be shown that a witness was in a position where he probably would not hear a whistle, his statement that there was no whistle sounded should bear no more weight than his statement that he heard no whistle. Since Mrs. Hudson testified that her attention was directed to listening for the "click" of the transmission, and she was not aware of the approaching train nor alert to her proximity to the crossing, she was hardly in a position at the trial to testify that there "Absolutely was no whistle of any kind." As stated by the Utah Court in *Anderson v. Union Pac. R. Co.*, supra, the important element is that, "It must be made to appear that they were paying some attention to what actually occurred and that they were in a position where they could and did observe what was done or what was not done."

While as a matter of legal principle we oppose a rule which over-emphasizes the importance of the form of testimony, still in this case the question of which rule is the proper one is not of great materiality. As plaintiff stated in her brief, the Utah statute must govern in this case, and as plaintiff points out, the Utah statute, Section 77-0-14, Utah Code Annotated 1943, requires the ringing of a bell, or in the alternative, the blowing of a whistle. Cases from almost every jurisdiction having a statute similar to the one in question have held that both the ringing of the bell and the blowing of the whistle are not required, either being sufficient. Thus even if we concede that plaintiff's testimony regarding absence of a whistle is positive evidence, this would not be true of her testimony regarding the ringing of the bell. Nowhere in her testimony did the plaintiff attempt to state definitely that a bell was not rung. Even in those jurisdictions which might hold that plaintiff's testimony that no whistle was sounded was of some probative value because of the form thereof, her testimony that she heard no bell must still be held to be negative testimony only and not of sufficient probative force to overcome the positive testimony on the part of the members of the train crew that the bell was ringing and that they had to turn it off even after the accident. We repeat that the law does not require both the ringing of the bell and the blowing of the whistle, and even though the plaintiff might be considered as having positively testified that the whistle was not blown, that cannot be said of any of her testimony with respect to the ringing of the bell, and in any view of the testimony plaintiff

has failed to prove both that the whistle was not blown and the bell was not rung. It was incumbent upon her to prove not only that there was no whistle blown but also, under the alternative statute, that the bell was not ringing. Her negative testimony with respect to the bell, in all events, is insufficient to meet the requirements and must be fatal to her cause.

Assuming an issue was raised as to failure to give adequate warning, it is not shown by plaintiff that such failure was the proximate cause of the accident. It is not shown that the driver of the car was unaware of the approaching train. While a jury could find from the evidence that the automobile was a little distance ahead of the train when the automobile came out of the ravine, the automobile still had approximately 100 feet to travel coming toward the track before turning parallel to the track, during which time the train may have passed the point directly ahead of the car because the evidence shows that the automobile was behind the train going faster than the train, overtaking it, and that it got ahead of the train as it passed along the parallel strip and thus beat the train to the crossing. The uncontradicted evidence is that the automobile stopped on the tracks, that there was time for it to clear the tracks had it not stopped. The burden of proof was on the plaintiff, and as one of the elements of her cause of action she had the burden of proving that Mrs. Jones entered upon the railroad tracks and the accident happened as a direct and proximate result of some negligence on the part of the defendant. Mere speculation cannot be substituted for proof of this essential element. We have the testimony of the plaintiff that she did not see

the train until the automobile was on the crossing. She did not have control of the automobile, however. We do not know what the driver of the car saw. For all that appears she was available to testify at the trial, and the burden was on the plaintiff, if she wished to prevail, to secure her testimony that she was unaware of the train if that was the fact. To permit the jury to find that she was not aware of the train is to permit the founding of a verdict upon mere speculation, for the undisputed evidence shows that she could have negotiated the crossing without mishap had she not stopped on the track. She may have seen the train and concluded she could cross ahead of it until stopped by the exclamation of plaintiff. From the evidence before the court it was just as reasonable to infer that Mrs. Jones saw the train and tried to beat it over the crossing as to infer that she never saw it at all.

“When proofs are such that two or more reasonable inferences may be drawn from the known facts in respect to negligence, or that the negligence was proximately the cause of an injury, they present no more than a choice of probabilities, and the plaintiff must fail, since the burden of proof is on him.” *Somogyi v. Cincinnati, N. O. & T. P. Ry. Co.*, 101 F. 2d 480.

In 38 Am. Jur., Negligence, Sec. 285, it is stated:

“In showing that the negligence charged was the proximate cause of the injury, it is not enough for the plaintiff to prove that the negligence might perhaps have caused the injury. If, for example, the injury complained of might well have resulted from any one of many causes, it is incumbent upon the

plaintiff to produce evidence which will exclude the operation of these causes for which defendant is under no legal obligation. If the cause of the injury to the plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of fastening tortious conduct upon the defendant. * * *

And in 38 Am. Jur., Negligence, Sec. 335:

“* * * the evidence must not leave the causal connection a matter of conjecture; it must be something more than consistent with plaintiff's theory as to how the accident occurred. Where the proof of causal connection is equally balanced, or the facts are as consistent with one theory as with another, plaintiff has not met the burden the law casts upon him.”

In the case of *Rogers et al. v. Rio Grande Western Ry. Co.*, 32 Utah 367, 90 P. 1075, the court said:

“It may be conceded that the failure to comply with the statute with regard to warning signals generally constitutes negligence per se, as was held by this court in *Smith v. Min. & S. S. Co.* (Utah) 88 Pac. 683, but proof of negligence without more, however, is not enough. In addition to this the party upon whom rests the burden of proof must show by some competent evidence that the negligence proved was the proximate cause of the injury complained of, or, where there is more than one cause, that it at least was one of the causes.”

We do not know why the plaintiff, in discharge of her burden of proof, failed to call Mrs. Jones to testify as to this

important link in her cause of action. Mrs. Jones alone knew the truth as to this indispensable matter. We do not know why the plaintiff failed to call Mrs. Jones, but we are entitled to presume the reason she did not was that Mrs. Jones' testimony would be adverse to her.

In 20 Am. Jur., Evidence, Sec. 187, it is stated:

"It is well settled that if a party fails to produce the testimony of an available witness of a material issue in the cause, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call the witness."

The inference as to proximate cause to be drawn from the evidence is at least equally consistent with non-liability as with liability. The presumption as to the testimony of the one person who knows which inference is the proper one is against the plaintiff. The jury could not be permitted to conjecture as to the truth of one inference over another equally plausible. To permit such conjecture in the face of a contrary presumption would be highly improper.

In any event, plaintiff does not deny that the car stopped on the track. The testimony of the fireman and of Brake-man Oliver that it did stop is not disputed. Had the automobile not stopped there would have been no collision. IT WAS THE STOPPING ON THE TRACK AND NOT A FAILURE TO GIVE WARNING THAT WAS THE DIRECT AND PROXIMATE CAUSE OF THE ACCIDENT.

In *Southern Ry. Co. v. Hale*, (Ala.) 133 So. 8, the plaintiff drove upon defendant's tracks without looking, and

sought to excuse his contributory negligence on the ground that his automobile stalled on the track and but for this stalling he would have safely negotiated the crossing. The court said in its opinion :

“This leads to the conclusion that the proximate cause of the accident was not the failure on plaintiff’s part to stop, look and listen as required by law, but the choking of the engine of his automobile upon the track. But, as said by the Florida Court in *Louisville & Nashville Ry. Co. v. Harrison*, 78 Fla. 381, 83 So. 89, a case here very much in point, ‘with that the railroad had nothing to do and in no way contributed to it * * * If the engine of the automobile had not choked down when it got on the track, the accident would not have occurred. This was not a contingency that the railroad employees were called upon to anticipate.’ ”

See also *Vernon v. Illinois Cent. R. Co.*, (La.) 97 So. 493, wherein the court says :

“The flagman testifies (and the physical fact seems to corroborate him) that the automobile would have cleared the crossing but for the fact that it stopped upon the middle of the track in front of the oncoming train ; which latter fact is also shown by testimony of many other witnesses, although the record is barren of any evidence tending to show whether this was the result of the automobile engine ‘going dead’ or of the driver becoming panic stricken. At any rate it is certain that the sudden stopping of the automobile upon the track was the direct and only cause of the accident, which then became inevitable.”

The defendant submits that there was no evidence from which the jury could have properly found that the collision

was proximately caused by any negligence on the part of the defendant.

Plaintiff's counsel in their argument on page 14 state: "The car had done nothing whatever to suggest that the driver had seen the train." While that may be true, the converse is also true—the car had done nothing and there was nothing in the manner of operation or movements of the car to indicate that the driver had not seen the train. Firemen, as well as other members of the train crews, observe cars approaching crossings every day and many times a day. That does not mean that every time a member of an engine crew sees a car approaching a crossing he must bring the train to a stop to let the automobile go by. The law has repeatedly stated that members of a train crew are entitled to assume that the driver or other occupants of an approaching car will see the train and will stop to let it go by, and members of a train crew are entitled to so assume until something in either the movements of the car or what they may see of its occupants will indicate to a reasonable man something to the contrary. There was nothing in the evidence here to so indicate until the time when members of the train crew concluded that the automobile was not going to stop but that it was going to proceed over the crossing, at which time the automobile had ample time to pass over the crossing ahead of the train, and the evidence shows that it would have done so except for the fact that the automobile stopped on the tracks at a time when the train was approximately 50 feet distant therefrom.

Counsel state again on page 14: "With the crew knowing that the train and the car were thus approaching a

crossing, the crew had a common law duty either to adjust the speed of the train to avoid an accident or to warn the car of its approach." Counsel cite no law for this point and we submit that their statement is contrary to law. The law has always been and still is to the effect that an automobile approaching a railroad crossing has the duty to stop and let a train go by rather than for the train to stop and let the automobile go by. But even should we admit the statement of counsel, the evidence is undisputed that at the speed the train was going and the distance the train was from the crossing when the car came to the crossing, the car could have passed over the crossing and there would have been no necessity to slow down or adjust the speed of the train in order to allow the car to pass over the crossing. The reason the car did not pass over the crossing is because instead of continuing at the speed it was going it stopped on the tracks right in head of the train, and according to plaintiff's testimony, was thus stopped solely as a result of her exclamation. When it was thus stopped there was nothing that the engineer or anyone else could have done.

Counsel state again on page 17 of their brief that there was evidence that the train was only going 15 miles an hour, and "At this slow speed the train could have been slowed slightly to await the further action of the car." Counsel further state that the train could have been stopped in 120 feet "had the engineer been aware of the approaching danger." There was no approaching danger to be aware of. As the members of the train crew testified, they watched the automobile and there was nothing in the movements of the automobile to indicate it would not stop until at the time it came

close enough to the crossing when at the speed it was going they concluded it was not going to stop but that it had plenty of time to pass over the crossing. Even at that time there was no peril to the car or its occupants and no approaching danger because had the automobile proceeded as it was going it would have cleared the crossing. Again referring to counsels' statement that the train could have been slowed to await the further action of the car, this argument might be availing if the engine had hit the car while the car was still moving, and there may have been some reasons to apprehend that at the speeds the two vehicles were moving they would meet at the crossing, but that was not the case. If the car had kept moving, it would not have been hit. The reason the car was hit was because it stopped on the tracks, and the train traveled the last 50 feet while the car was stopped on the tracks. At that point there was absolutely nothing that could be done by the engineer or any other member of the train crew because the only evidence in the record shows that it would take seven seconds for the air to equalize through the lines, and the train would go more than the remaining 50 feet before the brakes could take effect.

We submit that the evidence shows that there was no negligence on the part of the train crew that was in any way a proximate cause of the accident.

POINT II

THE APPELLANT WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. (Appellant's Point III)

In commencing their argument upon their Point No. III, counsel for appellant state: "It is this third point upon

which we believe the trial court granted the directed verdict." The appellant and her counsel have no basis whatsoever in making such a statement and indulging in such an assumption, and we challenge counsel to produce anything from the record that would give any support to such a statement. The court did not indicate from the bench or otherwise which of the four points of plaintiff's motion he relied upon in granting the directed verdict.

Regardless of that fact, we still feel that the plaintiff was guilty of contributory negligence as a matter of law.

Again under this argument counsel admit that there is a conflict in the evidence, but state on page 24: "Mrs. Hudson testified that as they came out of the ravine she looked at the tracks and there was no train there. Her vision under the evidence, was blocked so that she could not see north along the track." Again we state that testimony which is contrary to demonstrated physical facts cannot be used as a basis for any jury finding, and even though the plaintiff testified that there was no train there, the train had to be there, and if she looked she was bound under the law to see it because the train was within view and to the south or southeast from any obstructions, otherwise the train could not possibly have reached the crossing in time to be involved in the collision which resulted. It is true that one of the members of the train crew stated that the car was ahead of the train when it came out of the ravine, but again we must remind court and counsel that at that point where the letters and figures "El. 98.2" appear on the roadway on the map, the automobile still had approximately 100 feet

to travel toward the track before it turned on the strip of roadway paralleling the track. Counsel refer to the case of *Earle v. Salt Lake & Utah Railroad Corporation*, 109 Utah 111, 165 P. 2d 877, and then referring to plaintiff state on page 25: "Certainly her opportunity to see the train was not as good as that of the plaintiff in the Earle case." Counsel are in error because during the time that the automobile traveled the 100 feet toward the parallel strip after coming out of the ravine, it was traveling almost at right angles toward the track. The train was there and had to be there or it could not have been at the crossing for the collision. The plaintiff had a much better view than anyone in the Earle case had, and not only that, but different than what appeared in the Earle case, the plaintiff herself testified that she actually did look. If she looked she was bound to see what was there to be seen.

On page 26 of their brief counsel for appellant refer to the fact that the car could have stopped almost to the point of impact at the speed that the car was going. That is true and can give the crew justification in assuming that the car would stop if it did not have time to go over the crossing, and they thought it would stop until at the time it continued toward the track there was still time to go over the crossing and negotiate it in safety except for the fact that it stopped on the track directly in front of the train.

On page 28 of their brief counsel refer to the case of *Cate v. Fresno Traction Company*, (Cal.) 2 P. 2d 364. The California court has gone further than the Utah courts on this question of contributory negligence, and we would like

to point out to the court that in the *Cate* case there was no dispute between the parties but it was tacitly agreed and so stated in the opinion that both parties were in agreement upon the proposition that contributory negligence in that case was a question for the jury. That is not agreed in this case and the *Cate* case cannot be authority here.

In considering the question of plaintiff's contributory negligence we call the court's attention to the following undisputed facts which appear in the record. Plaintiff was riding in the front seat of the automobile to the right of the driver (R. 53). She was awake and in full control of her faculties. The car window on her side was down (R. 78). After coming out of the ravine the car traveled toward the track for about 100 feet, during which time the train had to be somewhere near in full view or it would not have reached the crossing when it did. For approximately 300 feet the car paralleled the train which was on the track 75 feet from the highway and on plaintiffs side (R. 55). Physical facts shown by speed and distances and the contour map show conclusively that the train was to the south of and past any obstructions when the automobile reached the top of the rise as it came out of the ravine—this at the exact time plaintiff said that she looked. There was no evidence of any obstructions at all in the vicinity of the crossing. The track was a little higher than the highway, but instead of a passenger having to look up high in the air, the angle of looking to see the train would be inconsequential and the difference in elevation would only tend to silhouette the train and make it stand out in bold relief (R. 56). Admittedly it would be more difficult for the driver to see during the time

the car was traveling the 300-foot parallel strip. Plaintiff, then, had a better view of the train than did the driver. The car proceeded slowly toward the crossing and could have been stopped had plaintiff warned the driver (R. 241). Plaintiff was familiar with the crossing, had passed over it a few minutes before, must have been aware of its presence, and knew the automobile was approaching the railroad track (R. 91). She observed the cross-arms giving warning of a railroad crossing (R. 91). Plaintiff and the driver were talking about the gear shift of the car right up to the time plaintiff looked up and saw the train almost upon them (R. 93, 98). After the car turned to negotiate the crossing the train approached from plaintiff's side, and she had better opportunity than the driver to then see it (R. 98). Plaintiff herself had engaged the driver in a conversation about the gear shift and had thus diverted her attention (R. 98).

We believe it can safely be said that the cases in Utah and elsewhere are unanimous in holding to the fundamental principle that a passenger in an automobile cannot ordinarily rely blindly upon the driver but must exercise reasonable care for his own safety. The above facts, as to the truth of which we believe there is no substantial doubt, show quite conclusively that the plaintiff exercised no care at all for her own safety, but ignored the imminent danger presented by the railroad crossing. Unless it can be said that an automobile passenger under circumstances such as those in this case can discharge her duty to exercise reasonable care by exercising no care at all, then it must be said that plaintiff was negligent.

No doubt there are instances when a passenger can in the exercise of reasonable care rely blindly on the driver. It is not negligence under all circumstances for a passenger to sleep. Generally, as is true of all negligence cases, the question of whether or not a passenger has conformed to the required standard of reasonable care is left to the jury. As in the case of the driver, however, the law has defined what conduct on the part of a passenger under certain circumstances measures up to the required standard, and when that question appears free from substantial doubt it is proper for the court to take the question from the jury. Defendant's position is that Mrs. Hudson's conduct shows, free from substantial doubt, that she was negligent.

There is one thing which is conclusive as to plaintiff's negligence in this case. Whatever the law may be as to the requirement that a passenger such as plaintiff keep a look-out, we here have plaintiff's direct testimony that she did look. She says she looked as they came to the top out of the ravine. She says she looked but the train was not in sight. It had to be. Under the demonstrated physical facts and circumstances as shown by the maps, and pictures, the measurements and speeds as testified to, the train had to be in view for her to see when she came out of the ravine and when she says she looked. A person cannot be heard to say that he looked but did not see anything which he must have seen had he looked. The law says that when one looks he is bound to see what is there to be seen.

In the case of *Drummond v. Union Pacific Railroad Co.*, 111 Utah 289, 177 P. 2d 903, this court stated:

“Plaintiff made no claim that she did not look down the track because it was off to the right rear. On the contrary she claims to have made this effort and to have looked. Such being the case, her duty to see was in no way diminished by the position of the train with reference to her. She was still bound to see what was there to be seen.”

An analysis of the Utah cases shows that the court has been clear and consistent in its treatment of this subject. The pivotal case among the Utah decisions is *Lawrence v. Denver & R. G. R. Co.*, 52 Utah 414, 174 P. 817. In this case plaintiff sat in the front seat with the driver. The court determined the bell on the train was ringing. Plaintiff's vision was partly obstructed by a tree and telephone poles, but had he looked he could have seen the train. The court first states as follows:

“* * * Furthermore, it is a well recognized rule that a steam railroad track in actual use is a constant warning of danger, and its presence is sufficient, as a matter of law, to put a reasonably careful person approaching it on notice of such danger.
* * *”

After then discussing the question of whether or not the plaintiff and the driver were engaged in a joint enterprise, the court concludes with this statement:

“Assuming for the sake of argument, but not conceding, that plaintiff was merely the guest of Bird, and was in no sense responsible for the manner in which Bird operated and managed the automobile while making the trip in question, it nevertheless was incumbent upon him to exercise ordinary care and prudence by making diligent use of his senses o

sight and hearing, by looking and listening for trains as the automobile approached the crossing, and to heed the warnings and signals of the approach of the train, and to suggest to Bird that they stop until the danger was over, and to protest if that was not done (Citing cases)."

During the same term of court as that in which the *Lawrence* case was considered, our court had before it *Montague v. Salt Lake & U. R. Co.*, 52 Utah 368, 174 P. 871. A cursory reading of this case may lead to the belief that the court within one week reached diametrically opposite results on similar cases. This is not true. In the *Montague* case the plaintiff was riding in the front seat, but there were seven other occupants in the car; there was much laughing and talking going on in the car; plaintiff was just 17 years old; there was evidence that the train was visible only at a point 90 feet from the crossing; telephone poles and trees and a barn partly obscured vision; dust was created by a car in front of that occupied by plaintiff; and the train approached from the driver's side of the automobile. The court, after stating it taxed one's credulity to believe plaintiff neither saw nor heard the train from her position in the front seat, says that still because of her youth and inexperience and because of the other circumstances outlined above, there was some doubt as to whether she was negligent.

None of the extenuating circumstances surrounding this case are present in our instant case.

Cowan v. Salt Lake & U. R. Co., 56 Utah 94, 189 P. 599, is the next case we find dealing with the duty of a passenger in an automobile at a railroad crossing. It is a companion

case of *Montague v. Salt Lake & U. R. Co.* Plaintiff relies on this case in support of her position, but an analysis shows it is not really helpful to her. Plaintiff Cowan was a 20-year-old girl riding in the same automobile as Miss Montague. In addition to the circumstances as to partially obscured vision mentioned in the *Montague* case, plaintiff was riding in the rear seat of the automobile with another passenger seated on her lap. Miss Cowan was not familiar with the crossing where the accident occurred. She certainly did not have as good an opportunity as the driver to observe the train. The court rules that the question of whether a passenger was guilty of contributory negligence should be left to the jury unless that question is free from substantial doubt. It then concludes there was substantial doubt as to the matter, and under the extenuating circumstances of that case, we can have no quarrel with the court's determination.

In the *Cowan* case, however, the court quotes the paragraph we have quoted above from the *Lawrence* case, and explains and reaffirms that rule as follows:

"The excerpt quoted from the *Lawrence* case is good law when applied to the undisputed facts of that case and to any other case where the facts are similar. * * * *Lawrence*, by reason of the fact that he sat in the front seat with the driver, had the same, if not a better, opportunity than the driver to keep a lookout for and to hear the warning signals of the on-coming train, and to see its approach. In view, therefore, of *Lawrence's* position in the automobile, he was required to make vigilant use of his senses, and to exercise ordinary care to avoid injury. In his case the evidence was clear and free from substantial doubt that his conduct did not measure up to the requirement of the law" (Italics ours).

If such was clear in the *Lawrence* case, how much clearer it is in the case under consideration, where the plaintiff not only sat in the front seat, but had a clearer view of the train at all times than did the driver. We submit that it is a matter free from substantial doubt that Mrs. Hudson did not make vigilant use, or any use, of her senses to avoid injury to herself. If the rule of the *Lawrence* case, as explained and reaffirmed in the *Cowan* case, is the rule in this jurisdiction, Mrs. Hudson must be held contributorily negligent as a matter of law. See also *Parramore v. Denver & R. G. W. R. Co.* (8th Circuit, Utah) 5 F. 2d 912.

Earle et al. v. Salt Lake & Utah R. Corporation et al., 109 Utah 111, 165 P. 2d 877, does not overrule the *Lawrence* case. Aside from the fact that it did not appear what position in the car the plaintiffs occupied, and vegetation partially obstructed the view of the train (at least it does not appear free from substantial doubt that the plaintiffs had as good or better opportunity than the driver to see the train), the duty sought to be imposed on the passengers was a greater duty than that imposed in the *Lawrence* case. It is true, the plaintiffs saw the crossing, but it does not appear that they could have seen the train approaching the crossing. The defendant sought to charge plaintiffs with negligence for failing to warn the driver of the crossing. We concede that a passenger should not have to warn the driver every time they approach a railroad crossing. But it is not unreasonable to say, as the court said in the *Lawrence* case, that when a passenger has as good or better opportunity than the driver to observe an approaching train when crossing a railroad track he ought at least to take a

cursory glance. The *Earle* case is not at all similar to the *Lawrence* case or to our present case.

Atwood v. Utah Light & R. Co., 44 Utah 366, 140 P. 137, is cited in most of the Utah cases and is relied upon by the plaintiff in her brief. This is not a railroad crossing case and is authority only for the unquestioned propositions that a driver's negligence is not imputed to a guest, and the duty imposed upon a guest is not identical to that imposed upon the driver.

Finally, the recent case of *Folkman v. Jensen*, . . . Utah . . . , 218 P. 2d 682, should be mentioned. It cannot be said that this case overrules the *Lawrence* case. This does not involve a railroad crossing. As the court said, Patterson Avenue in Ogden is not such as to create a condition of imminent danger, as is a railroad crossing. Plaintiff held an infant child, and her attention was directed toward caring for it and for another small child in the rear seat of the automobile. There was no reason for her to be apprehensive, and it could not be said her failure to look was negligence free from substantial doubt.

We see, then, that the Utah court has been consistent throughout in its rulings with respect to the duty of a passenger. Extenuating circumstances may exist in a particular case which will lower the standard of care required of a passenger. There are no extenuating circumstances which lower the reasonable standard required of Mrs. Hudson. Her attention was diverted, it is true, but it was negligently diverted. If we are to excuse her complete lack of care, we can do so only by casting aside the *Lawrence*

case and the sound reasoning behind it and hold in defiance of fundamental principles of the law of negligence that a person can close his eyes in the face of imminent danger and placidly rely on another person to see him through that danger.

Plaintiff seeks to explain her complete lack of care. In discussing the *Earle* case at page 25 of her brief she states that she had concluded Mrs. Jones was a careful driver and so relied upon her. It is true that if a passenger observes the driver is reckless, she has a duty to avoid the consequences of that recklessness. But this is not her only duty. She has the duty imposed by the *Lawrence* case, and she cannot explain away that duty by reference to the conduct of the driver. Plaintiff states the driver knew she was approaching a crossing and so plaintiff could rely upon her. This, again, might explain away one duty of a passenger, but not the duty imposed by the *Lawrence* case. Then she states the train crew saw the car as it approached the tracks. How can we explain or analyze the conduct of one party by reference to knowledge in the hands of someone else? The same observation is true of her fourth statement on page 26. Finally, she says the train was to the rear and above the car, and she could see it only by looking up and back. This is contrary to the undisputed fact disclosed by the testimony. For 100 feet as the auto approached almost at right angles to the track the train was almost directly in front of the automobile. The fact is, the car passed the train (R. 201), and in any event after the car negotiated the final turn and started up toward the track, she could have seen the train in time to warn the driver and stop the

car had she but exercised slight care for her own safety by making a cursory glance. There is no explanation for her conduct other than that she was negligent. There are no extenuating circumstances at all, and the matter is free from substantial doubt.

The defendant hesitates to extend its brief by referring to cases from other jurisdictions. The court has itself exhaustively researched this subject in the past. The court is undoubtedly aware that a great many jurisdictions impose a greater duty upon the passenger than the very reasonable duty imposed by the *Lawrence* case.

Referring to cases from other jurisdictions serves little useful purpose for in a case of this type the facts are so controlling. A brief examination of the cases cited by plaintiff in her brief at page 30 illustrates the truth of this. Thus *Atlanta and W. P. R. Co. v. McCord*, (Ga.) 189 S. E. 403, the first case cited by plaintiff, is one in which the facts surrounding the collision are not stated in the opinion. The opinion is therefore of little value for we do not know what facts the court had in mind and what facts the language used in the opinion was applied to.

Gorman v. Franklin, (Mo.) 117 S. W. 2d 289, the next case cited by plaintiff, is one in which the train approached the crossing from the east and the view 300 feet down the track was obstructed by a bluff. The automobile in which plaintiff's intestate was a passenger stopped 10 feet from the track, and plaintiff's intestate himself looked for an approaching train. The car was then started, drove upon the tracks and was struck. Plaintiff's intestate, the guest

was alert and did look, and the court analyzes the speed of the car and the train, concludes the train was more than 300 feet away and thus out of view when the guest and driver looked, and decides that while it was a close case it could not be said as a matter of law that the guest was negligent.

Carson v. Thompson, (Mo.) 161 S. W. 2d 995, is a case in which four men were riding in the front seat of a car, the plaintiff sitting on the lap of one of the other occupants. It could certainly not be said that the plaintiff thus had an opportunity equal with the driver to observe the approaching train. For a Missouri case in which the facts are more nearly analogous to the facts in our present case, we refer the court to *Cox et al. v. St. Louis-San Francisco Ry. Co.*, 9 S. W. 2d 96.

Gifford v. Pa. R. Co., (N. J.) 196 A. 679, is a case in which plaintiff's intestate was riding on the car fender away from the approaching train, and so the court says his view was obstructed. Furthermore, the court points out, since both the driver and the guest on the running board were killed, for all that appears the guest may have exercised due care, may have seen the approaching train, but because of his position was powerless to do anything about it.

Anstine v. Pa. R. Co., (Pa.) 20 A. 2d 774, is a case of a minor plaintiff asleep at the time of the crossing accident. For a Pennsylvania case in which the court holds the passenger contributorily negligent as a matter of law under a fact situation similar to that under consideration, see *Rhodes v. Pennsylvania R. Co.*, 147 A. 854.

The case of *Valera v. Reading Co.*, (Pa.) 36 A. 2d 644, is one in which plaintiff passenger was alert, looked up and down the track when the driver stopped at the track, but the crossing was enveloped in darkness and there was evidence that no lights were burning on the approaching train, and so it could not be said as a matter of law that plaintiff should have seen the train in time to warn the driver.

We are unable to locate the case of *Wichita Valley Ry. Co. v. Durrett*, and so cannot analyze the fact situation there present.

Gulf, M. & O. R. Co. v. Underwood, (Tenn.) 187 S. W. 2d 777, is one in which plaintiff guest was riding in the front seat. The night was dark and somewhat foggy, and it was uncontradicted "that the unlighted freight car loomed suddenly before the automobile and that the collision ensued immediately, with no opportunity for the driver to stop the car and a fortiori with no opportunity for the guest to warn the driver or take other steps for her own safety." The court approves a previous ruling that: "Of course, if an adult, who while riding in a vehicle driven by another sees, or ought by due diligence to see, a danger not obvious to the driver, or who sees that the driver is incompetent or careless, or is not taking proper precautions, it is his duty to give some warning of danger, and a failure to do so is negligence." Tested by this rule Mrs. Hudson was negligent, for by exercising due diligence she should have seen the train and then given some warning rather than permit Mrs. Jones to drive carelessly upon the tracks.

Cox v. Polson Logging Co., (Wash.) 138 P. 2d 169, is a case in which the car in which plaintiff's intestate was rid-

ing approached a dark, unlighted crossing at night. Visibility was largely obstructed, and the passenger did not know they were in the vicinity of a crossing. We do not argue that a passenger must be alert every minute he rides in an automobile. For a Washington case in which the facts more nearly approach those under consideration, see *Sadler v. Northern Pac. Ry. Co.*, 203 P. 10. Here plaintiff's intestate was sitting in the front seat of the automobile on the side from which the train approached. In reversing a verdict for the plaintiff the court said:

“* * * the jury must have found that Sadler looked and listened as he approached the railroad track, and therefore exercised reasonable care, or took the same precautions as a reasonably prudent man would have taken for his protection; and this in face of the fact, as testified to by Ball, the driver, that Sadler said nothing to him, and in face of the facts that the train could have been seen for a distance of 70 feet back from the track 1,000 feet away, and in plenty of time to warn the driver, or to have left the truck. In face of these undisputed facts we feel obliged to say that the matter of Sadler's contributory negligence was conclusively established, and left no fact upon that question for the jury to determine.”

In *Parsons v. N. Y. Central R. Co.*, (W. Va.) 34 S. E. 334, plaintiff, a passenger, was alert and looked down the tracks, but his view was obstructed. Because of the way the truck was constructed only the driver had clear vision. The car was brought to a stop and plaintiff moved out of the way to give the driver a clear view. The court held that the jury could have found the plaintiff did all he reasonably

could do under the circumstances. For West Virginia cases more nearly in point with the facts under consideration see *Gilkerson v. Baltimore & O. R. Co.*, 41 S. E. 2d 188; and *Waller v. Norfolk & W. R. Co.*, 152 S. E. 13.

Kosciuk v. Sherf, (Wis.) 272 N. W. 8, is a case in which the passenger was unaware of the presence of the railroad crossing until it was too late for him to do anything about it.

In *Chicago and E. I. Railway Co. v. Felling*, (Ind.) 200 N. E. 441, plaintiff, a passenger, was alert and looking and listening for trains. It was nighttime and there were no visible lights on the train. Defendant relied on an earlier Indiana case (*Pennsylvania R. Co. v. Huss*, 180 N. E. 919) which held that if "ordinary observation" would disclose the presence of a train, the passenger was negligent in not seeing it. The court held that it could not be said as a matter of law that ordinary observation would have disclosed the presence of the unlighted train.

In *Finley v. Lowden*, (Iowa) 277 N. W. 487, the court states in its opinion that the train was visible only from the driver's seat, and in order for the passenger to see it would have been necessary for him to lean over in front of the driver, put his head out the driver's window and look backward. The driver himself looked twice, but the court said that under the circumstances it could not say that the plaintiff in the exercise of reasonable care should have looked.

In *Frideres v. Lowden*, (Iowa) 17 N. W. 2d 396, the court points out that the passenger had sat up all the night before with the body of a dead aunt and he was drowsing or

resting as the car proceeded toward the crossing; that he was entirely unfamiliar with the crossing; that the train approached from the direction opposite that in which the passenger faced; and that the sun was shining in his face, there being a sunshade only on the driver's side.

The facts are not stated in the opinion in *Lang v. Chicago & N. W. Ry. Co.*, (Minn.) 295 N. W. 57, the court merely stating that the passenger does not have the same duty as a driver and that the defendant had failed to sustain the burden of proving deceased, seated in the rear seat of the automobile, was contributorily negligent.

The California court alone seems to support plaintiff's position, holding that only when a guest performs some negligent overt act contributing to the collision can he be held contributorily negligent as a matter of law. We believe such a rule is not only contrary to the law established in Utah but contrary to the general principles of negligence. In principle, circumstances may impose a positive duty to act as well as a duty not to act negligently if one is to exercise reasonable care, and, in principle, whenever a question is free from substantial doubt, there is nothing to submit to the jury whether it concerns a person occupying the position of driver, of passenger, or any other position in the law.

For a good opinion which thoroughly treats the subject of the contributory negligence of an automobile passenger involved in a railroad crossing accident, and which treats of a fact situation similar to that under consideration, and in which the South Dakota Supreme Court analyzes the

law similar to the manner in which it has in the past been analyzed by the Utah Supreme Court, we refer to the court to *Ulrikson v. Chicago, M. St. P. & P. Ry. Co.*, 268 N. W. 369.

Decisions from the Federal courts are not always helpful because the Federal courts seem to impose a greater duty upon a passenger than has been imposed by the Utah court. The language of the Eighth Circuit Court in *Parramore et al. v. Denver & R. G. W. R. Co.*, 5 F. 2d 912, is helpful to our analysis however. The facts were that the passenger sat in the front seat of the automobile on the side from which the train approached. The court said:

“The driver of the car was bound by his legal duty carefully to operate and control the speed and the direction of the car, and to look and listen for engines and trains on each side and in front of him before he attempted to cross the track on which this engine came. Unconsciously he may have relaxed his vigilance and failed, as he did, to look to the north from the time he crossed the tracks of the Oregon Short Line Railroad, because he was trusting Mr. Parramore, who sat on the north side of him and had the better opportunity to look and listen for engines and trains coming from the north, to give him notice of the approach of engines from that direction. However that may be, Mr. Parramore had the best opportunity of anyone in the automobile to look, listen, watch, and act to prevent the collision and the injury that might result from engines coming from the north, and his legal duty so to do was not less clear and imperative under the evidence in this case than was that of the driver of the car so to do. He had nothing else to do or to distract his attention. If he had discharged his duty to look, the car would undoubtedly have been stopped before it reached the

track on which the engine was moving, and the collision and death would have been avoided. In this state of the record there seems to be no escape from the conclusion that the evidence so conclusively established the negligence of Mr. Parramore, which directly contributed to cause the collision and death, that there was no material issue for the jury to try and that it was the duty of the court to instruct them, as it did, to return a verdict for the defendant."

See also:

Hooker v. Missouri Pac. R. Co., (Kans.) 8 P. 2d 394.

Buchhein v. Atchison, T. & S. F. Ry. Co., (Kans.) 75 P. 2d 280.

Butler v. Darden, (Va.) 53 S. E. 2d 146.

Willy v. Atchison, T. & S. F. Ry. Co., (Colo.) 172 P. 2d 958.

Alanza v. Texas & P. Ry. Co., (La.) 32 So. 2d 341.

Grant v. Chicago, M. & St. P. Ry. Co., (Mont.) 252 P. 382.

Sherris v. Northern Pac. Ry. Co., (Mont.) 175 P. 269.

Boscarello v. New York, N. H. & H. R. Co., (Conn.) 152 A. 61.

An analysis of the Utah cases and of the cases from other jurisdictions leads to the conclusion that Mrs. Hudson was, under the circumstances, charged with the duty of making reasonable observation for an approaching train. The evidence conclusively shows that she failed to do so, and also conclusively shows that had she done so she would have observed the approaching train in time to avoid the accident. There is no substantial doubt as to the facts in the

case and it follows that she must be held guilty of contributory negligence as a matter of law.

POINT III

THE DOCTRINE OF LAST CLEAR CHANCE IS NOT APPLICABLE TO THE FACTS OF THE CASE AT BAR.

Without setting it out as a separate point for argument, counsel for appellant under their Point III and on the last two pages of their brief argue the doctrine of last clear chance. They include this argument under their Point III where in they state that the appellant was not guilty of contributory negligence as a matter of law. Appellant must remember that the last clear chance doctrine applies only under circumstances where negligence of a plaintiff is conceded and the negligence of the plaintiff is voided by the claim that the defendant had a last clear chance to avoid the injury.

Counsel state on page 32 of their brief: "There certainly was a point at which the train crew knew full well that the car was going up on to the tracks." That is very true, and at that time the crew concluded—and justifiably so—that the car would pass over the tracks safely ahead of the train, and it would have done so had not the plaintiff exclaimed: "Oh, my God," thereby causing her driver, Mrs. Jones, to slam on her brakes and stop her car right on the track in front of the train.

At that time—when the crew concluded that Mrs. Jones would continue onto the tracks—the train was 50 feet away. The train could not possibly have stopped and there was no necessity for it to stop because had the automobile continued without stopping it would have passed over the crossing safely, but at the time Mrs. Jones stopped her car on the track the train could not possibly have been stopped, and any slowing of it, if such had been possible, would not have avoided the injury in any way.

It must be remembered that the injury to plaintiff as far as outward physical injury was concerned was not serious. Her main claim for damages arises as a result of an embolism which followed the injury, a phlebothrombosis as referred to by one doctor (Exhibit 9), arising from a bruise on plaintiff's leg. Thus any question of the seriousness of the accident or the possibility of her injuries being less serious if the train could have been slowed cannot possibly be involved herein, and the evidence shows that the train could not have been stopped and there is no evidence as to whether it could have been slowed appreciably. As a matter of fact it could not have been slowed down even because in the few seconds it would take for the air to go through the air lines to the brake cylinders the train would have been to the crossing before the brakes could have taken effect, the only evidence in the record being that it would take seven seconds for the air to equalize back through the lines. In seven seconds the car in which plaintiff was riding, traveling at the rate of 26.4 feet per second, would be back somewhere in excess of 150 feet from the crossing. Clearly counsel would not suggest that it was incumbent upon the

train crew to apply the emergency brakes and stop the train because they saw the automobile driving along the parallel strip at 18 miles an hour when there is no question but what the automobile could have stopped at any time, at least within the 75 feet after making the turn to proceed directly toward the crossing.

Counsel also state at page 32: "A sounding of the whistle most certainly would have stopped the car." That is another assumption which counsel are not at liberty to make under the circumstances. A sounding of the whistle, if we believe that it was not otherwise sounded, may have had exactly the same effect that plaintiff's exclamation did. It might have caused the driver to slam on her brakes and bring her car to a stop on the tracks just as happened when plaintiff screamed. Nevertheless, a sounding of the train whistle while the operator of the automobile was still approaching the crossing at a time when such automobile driver could still stop and while her negligence and the negligence of the plaintiff was still active in their progress toward the track would provide no basis for the application of the last clear chance. The car and its occupants at that time were in no peril and their movements were not such as to indicate any hazards to members of the train crew. From that point on it was purely a matter of continuing negligence on the part of the plaintiff herself and her driver.

In this argument as urged by appellant, counsel seeks to impose an additional and a greater duty upon the defendant by reason of the fact that the crew saw the automobile approaching—and in a manner such as automobiles normally

approach a crossing. Upon this phase we refer again to that portion of our brief having to do with the fact that signals were given and the fact that the evidence of negligence produced by plaintiff is not sufficient to prove a failure to give a warning. Again we urge the court that the evidence does not show that the whistle was not blown, and even should the court consider that plaintiff's testimony with respect to the whistle would amount to positive testimony, clearly her evidence concerning the bell was not sufficient and did not rise above what would be considered bare negative testimony and would not be sufficient to warrant a jury in finding that the bell was not rung.

Plaintiff would have the court believe that the train crew knew the driver of the car was going to drive onto the crossing and stop in front of the train. The evidence fails to substantiate her position in this respect. Plaintiff's counsel sought unsuccessfully to lead the crew into such an admission on cross-examination, but there is nothing in the evidence to take this case out of the general rule applied almost everywhere and affirmed by the Utah Court in *Pippy v. Oregon Short Line R. Co.*, 79 Utah 439, 11 P. 2d 305:

"Train operators may assume, until the situation otherwise discloses, that one approaching a railway track will yield precedent to the right of way and will exercise ordinary care to take care of himself
* * *"

Even though the crew saw the automobile passing the train on the nearby road, they were certainly not required to anticipate the occupants would turn onto the crossing

and attempt to cross the tracks unless such crossing could be made in safety.

In any event there was clearly no last clear chance negligence in the case. If the railroad was negligent, the occupants of the automobile were negligent, and their negligence was active and concurring right up to the time the automobile was on the track. Plaintiff's negligence had not come to rest, leaving her in a position of peril from which she could not reasonably escape.

Ryan v. Union Pacific R. Co., 46 Utah 530, 151 P. 71.

Teakle v. San Pedro, L. A. & S. L. R. Co., 32 Utah 276, 90 P. 402.

After the auto in which plaintiff was riding drove onto the track and stopped and the plaintiff was in her position of danger on the track, there was no clear opportunity for the crew to avoid the collision. The plaintiff was not in any position of peril at any other time.

Van Wagoner et al. v. Union Pac. R. Co., 111 Utah 189, 186 P. 2d 293.

Holmgren v. Union Pac. R. Co., . . . Utah . . . 198 P. 2d 459.

We respectfully submit that the trial court did not err in directing a verdict for the defendant and against the plaintiff and the judgment of the trial court should be affirmed.

Respectfully submitted,

BRYAN P. LEVERICH,
M. J. BRONSON,
A. U. MINER,
HOWARD F. CORAY,
D. A. ALSUP,

*Counsel for Defendant
and Respondent.*

10 South Main Street
Salt Lake City, Utah