

1950

Hyrum Williams v. The Ogden Union Railway and Depot Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HYRUM WILLIAMS,
Plaintiff and Appellant,

— vs. —

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY, a cor-
poration,
Defendant and Respondent.

FILED
APR 21 1950

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

Appeal from the District Court of the Second
Judicial District, in and for Weber County, State of Utah
Honorable John A. Hendricks and F. W. Keller,
presiding

**RAWLINGS, WALLACE,
BLACK, ROBERTS &
BLACK**

WAYNE L. BLACK
Counsel for Plaintiff and Ap-
pellant
530 Judge Building
Salt Lake City, Utah

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IN THE SUPREME COURT
of the
STATE OF UTAH

HYRUM WILLIAMS,
Plaintiff and Appellant,

— vs. —

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY, a cor-
poration,
Defendant and Respondent.

Case No.
7471

BRIEF OF APPELLANT

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

The parties will be designated as in the trial court.

All italics are ours.

All record citations of testimony will be followed by -1 or -2 to indicate whether said testimony was received at the first or second trial.

Hyrum Williams, an employee of The Ogden Union Railway and Depot Company, was injured within defendant's yards at Ogden, Weber County, Utah, at approximately 7:10 A.M. on the 9th day of December, 1946 while in the course of his employment as a switch tender for said company.

This action was commenced in the Second Judicial District, in and for Weber County, State of Utah, on the 26th day of February, 1948. The case was first tried before the Honorable John A. Hendricks, commencing on the 26th day of May, 1948, the jury returning a verdict in favor of plaintiff in the sum of \$20,000.00 total verdict, with diminution by reason of contributory negligence in the sum of \$8,000.00, and a net verdict in the sum of \$12,000.00 (R. 057).

Defendant filed a motion for new trial and said Judge, after the motion had been argued by respective counsel, granted plaintiff the choice of accepting a \$9,000.00 reduction in the net verdict, leaving a net recovery of \$3,000.00, or a new trial. Plaintiff, faced with this choice, accepted a new trial (R. 240-2).

The case was tried a second time before the Honorable F. W. Keller, commencing on the 16th day of November, 1948, the jury returning a verdict of No Cause for Action in favor of the defendant and against the plaintiff. Thereafter, plaintiff moved for a new trial and plaintiff's motion was, on the 29th day of September, 1949, denied by said Judge (R. 245-2).

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

The facts pertaining to liability will be related upon the basis of the testimony at the second trial inasmuch as certain errors of law, which will be set forth and discussed in this brief, took place at the second trial.

The facts pertaining to damages will be related upon the basis of the testimony taken at the first trial inasmuch as those facts will be referred to in relation to charged error of Judge Hendricks in granting defendant's motion for new trial following the first trial of this cause.

B. THE FACTS

Hyrum Williams, age 68, and a lifetime employee of the defendant company, was injured while in the course of his employment at approximately 7:10 A.M. on the 9th day of December, 1946 when he slipped on icy switch ties while manipulating railroad switch No. 2 near the Weber River bridge, Ogden, Utah (R. 15-2, 20-2). At the time of his injuries plaintiff was working as a switch tender tending three switches, one east, and two west of the Weber River bridge (R. 2, R-2). He had worked pursuant to said assignment since 1942.

The tracks, switches and general area where plaintiff worked are clearly shown in defendant's Exhibit "1". Generally speaking the westbound and eastbound main line tracks extend in an easterly-westerly direction, with the westbound main line track to the south. These tracks extend over the Weber River by a bridge and a short distance east of the bridge the balloon track circles away from the westbound main line track in a general southeasterly direction. West of the Weber River bridge a crossover, extending in southeasterly-northwesterly direction, connects the westbound and eastbound main line tracks. Switch No. 1 connects the crossover with the eastbound main line track and switch No. 2 connects the crossover with the westbound main line track and is the switch where plaintiff was injured. A switch shanty is located just south of the crossover. The balloon switch is approximately three-quarters of a block from the shanty (R. 19-2).

During the months and years prior to December 9, 1946, an average of between eight and ten trains would pass the switches over which plaintiff had jurisdiction during an eight hour shift. Every time these trains moved along the eastbound or westbound main line tracks the duty of the switch tender required that he manipulate the switches under his control so as to accommodate the movement of these trains (R. 8-2). Whenever a train used the crossover, switches Nos. 1 and 2 would have to be changed and then returned to their normal positions (R. 10-2).

At all times it is the duty of the section crews, working under the section foreman to keep the switches and the area around the switches clean and in good working condition (R. 11, 12, 89-92, 145-147-2). If it snows and storms, section crews are called out as soon as possible to clean the switches and the area around the switches where workmen are required to stand or move in the manipulation of the switches (R. 11, 12, 90, 91, 145-2).

David Danielson, section foreman in general charge of maintenance work from Roy, Utah to Weber River bridge, within which area is located switches Nos. 1 and 2, testified that following a storm on the 7th day of December, 1946 he dispatched a member of his crew to clean five switches, two of which were switches Nos. 1 and 2, and that his workman spent six hours on that day cleaning the switches (R. 213-2). On the 8th day of December, 1946 there was some precipitation of wet snow which ended at approximately 12:45 P.M. *This was the last precipitation that occurred before plaintiff was injured.* (Exs. "L", "M" and "13"). *Thereafter, Mr. Danielson dispatched a man to clean the five switches, among which were switches Nos. 1 and 2, and he worked for a period of six hours during the afternoon of December 8th, 1946 on said assignment* (R. 213, 215, 216-2). During the evening of the 8th and the early morning hours of the 9th the temperature hovered at or near freezing (Exs. "L", "M" and "13").

On the 9th day of December, 1946, plaintiff reported for duty at approximately 6:50 to 6:55 A. M. (R. 15-2).

It was a dark, cloudy morning, below freezing in temperature (R. 15, 16-2). His shift was from 7:00 A.M. to 3:00 P.M. Upon reporting for duty plaintiff received notice that passenger train No. 30 was on the balloon track east of the Weber River bridge ready to proceed in a westerly direction along the westbound main line track across the crossover and onto the eastbound main line track, and also that extra freight train No. 5300 was approaching along the westbound main line track in an easterly direction. His duty therefore required him to stop the freight train, manipulate the switches necessary for the movement of the passenger train from the balloon track to the westbound main line track, over the crossover, to the eastbound main line track and to then change the switches in order that the freight train could proceed along its course on the westbound main line track. In addition, another train at Patterson Avenue was waiting until the manipulations, heretofore mentioned, had been completed so that it could proceed along its course (R. 20-2). Plaintiff, therefore, with his lantern in hand, walked three-quarters of a block from the shanty to the balloon switch, changed that switch, returned to No. 2 switch, changed it, then to the No. 1 switch, changed it, and the passenger train proceeded along its course. Thereafter, plaintiff relined No. 1 switch to its normal position, proceeded to No. 2 switch, and while manipulating it, was injured (R. 15-17-2).

He testified regarding the happening of the accident as follows (R. 20-2):

“Q. As you approached switch No. 2 I want you to tell the jury what you did.

A. I walked from switch No. 1 to switch No. 2 to line it up for the westbound main line. By doing so that cleared the block to let that eastbound train out of the east yard. But I never completed throwing the switch.

Q. Did you get the switch handle unlocked?

A. I got the switch unlocked and the handle out of the lever and was in a position to throw, I just started to throw the switch when my feet slipped out from under me and I went between the switch rod and the tie.”

* * *

“A. Just as soon as I lifted the handle out there, the switch handle, why I grabbed the stand and threwed the switch around where my feet was on the switch ties and this leg went, the left leg went between the switch tie and the switch rod throwing me off balance and I fell forward, or toward the right and the east. Fell towards the bridge.

Q. Will you step down, Mr. Williams, and in about the position I am in now or whatever position is best for you and use this pointer and demonstrate to the jury how this accident happened, the actual movements you went through and what happened?

A. If that is the switch stand, take that for the switch stand, I come here and unlock the switch and let the switch lock down on its chain.

and pull the handle out. After you pull the handle out it is generally so tight in the stock rail that it lets the handle come around but then you get hold of the handle this way, standing in that position, and pull it just around and put it down in the ratchet.

Q. And about how far did you pull the handle when you slipped on this occasion?

A. Oh, I don't know how far just exactly what you'd say it was. The two ratchets, it is just about a 40 degree, took it out of one ratchet and put it in the next one so the switch comes here and it has got to come around to here."

Plaintiff is a man 5 feet 5 inches in height, weighing approximately 150 to 155 pounds, and wearing a size 6½ shoe. There was sufficient space for his foot to slip between the switch tie and the bridle rod (R. 43, 44-2).

Switchmen, in manipulating switches, adopt the means of manipulation most convenient for them. There are no rules or regulations as to how a man should stand in manipulating the switches (R. 46, 52, 53, 178, 179, 201, 202, 205-2). Plaintiff had seen other men stand on the switch ties in manipulating the switch on frequent occasions (R. 46-2), as had Beckett, a switchman with 28 years experience, who testified on behalf of plaintiff. Beckett himself had handled switches in a similar manner (R. 136-138-2).

On the morning he was injured plaintiff was wearing a pair of shoes and new rubbers and was heavily clothed because of the weather (R. 24-2). He had not

noticed ice on the ties and around the switch before he was injured for the reason that he had only been on shift approximately ten minutes and had been very busy manipulating switches in order to facilitate the movement of the two trains waiting for him to accomplish his work (R. 45-2). He had stood on the opposite side of switch No. 2 in throwing it earlier for the crossover. After plaintiff had slipped and fallen he observed a layer of ice on the switch ties and around the switch (R. 50-2).

Beckett, learning that plaintiff had been injured, examined switch No. 2 shortly after 8:00 o'clock on the same morning and testified that the switch ties were covered with ice and a little snow, and that the area around the switch was covered with snow (R. 141-143-2). Photographs produced by the defendant and identified as having been taken at 9:00 A.M. on the day plaintiff was injured clearly and irrefutably indicate that ice and snow were on the ties where plaintiff was injured. Mr. Beckett identified Exhibits "I", "J" and "K" as showing the area as it existed that morning.

That the defendant had had adequate time within which to render plaintiff's place of work safe, was clear. No precipitation had occurred for over 18 hours before plaintiff was injured. During that time no salt nor sand had been thrown on the ties or in the area of the switch; no effort had been made to remove the ice or snow by means of a shovel which was located at the switch shanty; no call had been issued for the section crew to perform

this work, and the two switch tenders who preceded plaintiff on the job had made no effort to clean the switch ties or the area around the switches (R. 90, 91-2, Exhibits "9", "10", R. 107, 146, 147-2). The switch shanties at other areas of the yard contained salt and sand for use in providing adequate footing following storms (R. 107-2).

Beckett testified upon the basis of 28 years of experience that when he observed a condition of ice and snow around a switch rendering footing insecure, he deemed it his duty to immediately notify the section foreman or chief in charge of the department to come and clean the switch and area, and that it was a common occurrence for section men to be called out during the night to perform such services (R. 146, 147-2). Section crews were on 24 hour call at all times (R. 215, 216-2).

From the foregoing facts it is obvious that plaintiff on duty for ten minutes, confronted with an emergency on a dark, cold morning, had no time nor means within which to examine the switches or determine whether footing was safe and secure. On the other hand the defendant had more than sufficient time and means to have rendered footing secure. During that time one man had spent 6 hours on five switches. From the photographs it is obvious that the switch points and the moving parts of the switch had been cleaned since the storm. It is also obvious that the area where switchmen were required to stand and move in manip-

ulating the switch had been overlooked (See Photographs).

After he was injured plaintiff called for help and R. O. McBride, head brakeman of the freight train, approached the switch where he was lying, picked him up and carried him to the shanty (R. 197-2). McBride later relined the switch himself (R. 198-2).

Plaintiff remained at the shanty and endured extensive pain for 30 to 40 minutes before the ambulance arrived and removed him to the hospital (R. 48-1). After his arrival at the hospital he was taken to the operating room where he remained approximately 45 minutes to an hour while the doctor was applying a cast. During that time he endured extensive pain (R. 49-1).

Dr. L. S. Sycamore testified that plaintiff had sustained a comminuted oblique fracture of the left tibia approximately three or four inches below the knee. That the fragments were in reasonably good position and alignment, with slight posterior displacement of the distal fragments at the time he applied the cast. There were two fractures approximately one inch apart through the bone, slanting slightly (R. 24-26-1). Plaintiff remained in bed at the hospital for ten days, and on the tenth day was allowed out of bed for short periods of time (R. 27-1). On December 23, 1946 he was allowed to leave the hospital (R. 27-1). On January 7, 1947 X-rays were taken showing the bone to be in good position and the fracture line to be still quite distinct with

no bony union (R. 28-1). On January 31, 1947 X-rays were again taken revealing some callous formation but also revealing that bony union was not complete (R. 29-1). On February 20, 1947 X-rays revealed callous formation and early incomplete bony union (R. 29-1). Approximately three months following his injuries the first cast was removed. Plaintiff was seen on March 25 by the doctor. At that time the fracture seemed to be healing and he was able to walk on crutches and to bear weight for a few moments of time (R. 30-1). In May of 1947 plaintiff again contacted Dr. Sycamore complaining of pain around the bone. X-rays revealed a fracture line extending through the callous formation as though a small amount of motion in the area had been present (R. 31-1). On May 26, 1947 plaintiff was hospitalized for a period of 24 hours during which time another cast covering his leg and foot was applied (R. 32-1). On June 30, 1947 X-rays revealed that the fracture line was becoming partially obliterated, and during the latter part of July or first part of August, 1947 the second cast was removed (R. 32-1).

Dr. Sycamore accounted for the re-fracture as being caused either by another injury or some slight torque in the leg at the time the first cast had been applied which didn't allow complete healing. He was unable to testify as to which of these reasons was more predominant (R. 36-1). Plaintiff himself testified that he had suffered no injuries or fall whatsoever following his injury on December 9, 1946 (R. 51-1).

During the long period of time that his leg had been in the casts plaintiff's muscles had atrophied extensively and there was tenderness and pain and complete lack of strength in his left leg as late as September of 1947 (R. 32, 51-52-1). He followed the doctor's instructions regarding massage and exercising implicitly (R. 53-1). However, on September 3, 1947 he was sent to Salt Lake to the Chief Surgeon because of continued complaints of stiffness and soreness around the knee and ankle (R. 33-1).

Plaintiff testified that during the periods of time that his leg was in a cast and thereafter he endured extreme discomfort, anguish, nervousness and sleeplessness (R. 51-1). At the time of the first trial, more than fifteen months after his injury, he was unable to walk more than three or four blocks without extreme fatigue in his left leg and testified that under no circumstance could he perform the duties of a switch tender (R. 55-1). Because of retarded recovery and inability to perform the duties of his employment, Mr. Williams had been forced to retire from railroading (R. 54, 55-1). The superintendent had informed him that he had no alternative but to retire (R. 54-1).

At the time of his injuries plaintiff was earning between \$250.00 and \$260.00 per month (R. 56-1).

Defendant offered no evidence on damages, and the testimony of Dr. Sycamore, plaintiff, and his daughter, remains as the sole and only testimony concerning that subject.

From the foregoing facts it is clear that plaintiff's cause of action rests upon a firm evidentiary basis and that he suffered and sustained very serious disabling injuries.

Plaintiff proposes to show that he was seriously prejudiced by errors which occurred at the first and second trials of his cause.

STATEMENT OF POINTS

1. The trial court erred at the second trial in refusing to give plaintiff's Instruction No. 4.
2. The trial court erred at the second trial in refusing to give plaintiff's requested Instruction No. 5.
3. The trial court erred at the second trial in giving Instruction No. 7 wherein it defined "proximate cause."
4. The trial court erred at the second trial in giving Instruction No. 10.
5. The trial court erred at the second trial in giving Instruction No. 11.
6. The trial court erred at the second trial in giving Instruction No. 12.
7. The trial court erred at the second trial in giving Instruction No. 19.
8. The trial court erred at the second trial in giving Instruction No. 23.

9. The trial court erred in granting defendant's motion for a new trial following the first trial.

10. The trial court erred in refusing to grant plaintiff's motion for new trial following the second trial.

SUMMARY OF ARGUMENT

POINT I.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED DEFENDANT'S MOTION FOR NEW TRIAL FOLLOWING THE FIRST TRIAL (Statement of Points 9).

POINT II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT THE SECOND TRIAL IN REFUSING AND NEGLECTING TO INSTRUCT THE JURY AS TO PLAINTIFF'S THEORY OF LIABILITY (Statement of Points 1 and 4).

POINT III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT THE SECOND TRIAL IN INSTRUCTION NO. 10 WHEN IT INSTRUCTED THE JURY THAT “* * * *the mere happening of the accident to plaintiff is no proof of negligence on the part of either the plaintiff or defendant or evidence of same.*” (Statement of Points 4).

POINT IV.

THE TRIAL COURT, AT THE SECOND TRIAL, BY GIVING INSTRUCTION NO. 12, HAS REVIVED THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE AS A COMPLETE BAR TO RECOVERY BY PLAINTIFF (Statement of Points 6).

POINT V.

THE TRIAL COURT, AT THE SECOND TRIAL, BY GIVING INSTRUCTION NO. 19, PLACED AN UNWARRANTED BURDEN OF PROOF UPON THE SHOULDERS OF PLAINTIFF AND IN EFFECT REVIVED THE DOCTRINES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK AS COMPLETE BARS TO RECOVERY BY PLAINTIFF (Statement of Points 7).

POINT VI.

THE JURY'S VERDICT IS CONTRARY TO IMPORTANT UNCONTROVERTED EVIDENCE PRESENTED AT THE TRIAL.

ARGUMENT

POINT I.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED DEFENDANT'S MO-

TION FOR NEW TRIAL FOLLOWING THE FIRST TRIAL (Statement of Points 9).

In granting defendant's motion for new trial following the first trial the court made the following statement (R. 240-2):

“THE COURT: I will tell you that you needn't argue any further. I am of the opinion this was excessive, and I am going to make this ruling: I had some misgivings about the motion for directed verdict and wondered if I shouldn't have granted it. I am now convinced that I should have granted that motion. I think that if there was negligence, \$5,000 would have been sufficient total damages. The jury found that the plaintiff was guilty of contributory negligence to the extent of 40%. I think this contributory negligence was much more than that—it was over 50%—but I will take it on the basis of 40% as the jury found, and if the plaintiff will accept \$3,000 I will deny the motion for new trial; if not, the motion will be granted.

“MR. BLACK: I don't think we will need to deliberate on that, your Honor. We won't accept it. We will take a new trial.

“THE COURT: All right, the motion for new trial is granted.”

The court's misconception of duty in ruling upon a motion for new trial is readily apparent from the foregoing remarks. If the court were of the opinion that a directed verdict was proper, it was its duty to have entered an order accordingly in order that such a ruling could be properly reviewed by an appellate

court. The court however, made no such order. Rather, it chose to find that the jury's verdict was based upon passion or prejudice.

The jury's total verdict was \$20,000.00. The sum of \$8,000.00 was deducted for contributory negligence, leaving a net verdict of \$12,000.00. The narrow question before this court is whether the trial court abused its discretion in finding that the verdict was based on passion and prejudice and, upon the basis of that finding, confronting plaintiff with the inequitable burden of accepting either a \$9,000.00 reduction in the total verdict or a new trial.

It is manifestly clear that the discretionary power of trial courts in granting or denying a motion for new trial is not a mental discretion giving effect to the will of the judge, but is a legal discretion to be exercised in conformity with the spirit and letter of the law.

Utah Code Annotated, 1943, Sec. 104-40-2, reads as follows:

“Grounds.

“The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

* * * * *

“(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.”

Under the foregoing statute unless the record and testimony at the trial fully justifies a finding by the trial court that the jury was motivated by passion and prejudice the trial court's action in granting a motion for new trial or remitting a portion of the verdict constitutes an abuse of discretion and is nothing short of a capricious and arbitrary exercise of power. This court has so stated in the case of *Jensen v. Denver & R. G. R. Co.*, 44 Utah 100, 138 P. 1185, 1192, and has clearly affirmed its power and duty of reviewing the trial court's action in requiring a remission or a new trial. The following language clearly expresses the Utah law on this subject:

“Since statehood, and as announced in *Nichols v. Railroad*, 28 Utah, 319, 78 Pac. 866, it has repeatedly and uniformly been held ‘that the amount of the verdict, under our Constitution, is a matter wholly within the province of the trial court and jury; the same being a question of fact. Where, as here, there is any evidence to support the verdict, we have no power to pass upon it or to set the verdict aside as being excessive.’ In *Budd v. Salt Lake City Ry. Co.*, 23 Utah, 515, 65 Pac. 486, it was said that it was ‘useless to longer incumber the records with such questions in such cases’; in *Burt v. Utah Light & P. Co.*, 26 Utah, 157, 72 Pac. 497, that this court is unauthorized ‘to review the evidence to determine whether or not the damages are excessive.’ To the same effect are *Brægger v. Railroad*, 24 Utah, 391, 68 Pac. 140, *Palmquist v. M. & M. Supply Co.*, 25 Utah, 257, 70 Pac. 994, and *Railroad v. Russell*, 27 Utah, 457, 76 Pac. 345. In these cases many other prior cases from this

jurisdiction are cited to the same effect. A rule so long and so firmly settled as this will not now be disturbed. The verdict is for \$7,620. The defendant urges that, while there may be evidence to support a verdict for compensatory damages for some substantial amount, yet there is no evidence to support this verdict, a verdict for \$7,620. The argument but amounts to the claim that the verdict is excessive; that the amount rendered is greater than or in excess of that justified by the evidence. Of course neither party is entitled to our judgment of what we, on the evidence, think the damages should be. We are not the tribunal to measure that or to pass judgment on it, and cannot review the evidence for any such purpose.

“Neither is either party on that question entitled to the judgment of the court below in a case of tort tried to a jury. Both parties, as to that, are entitled to the unprejudiced judgment of the jury. That is exclusively within their province. Their power and discretion, when properly exercised and when they have been properly directed as to the measure of damages and the mode of assessing it, may not be interfered with merely because the court above or below may think the amount rendered is too large, or even may think it appears to be larger than the evidence apparently or fairly justifies. *A court, vacating a verdict and granting a new trial by merely setting up his opinion or judgment against that of the jury, but usurps judicial power and prostitutes the constitutional trial by jury. Still the jury cannot be permitted to go unbridled and unchecked. Hence the Code that a new trial on motion of the aggrieved party may be granted by the court below on the ground of ‘excessive damages appearing to have been given under*

the influence of passion or prejudice.' Whenever that is made to appear, the court, when its action is properly invoked, should require a remission or set the verdict aside and grant a new trial. But, before the court is justified to do that, it should clearly be made to appear that the jury totally mistook or disregarded the rules of law by which the damages were to be regulated, or wholly misconceived or disregarded all the evidence, and by so doing committed gross and palpable error by rendering a verdict so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice. Whether a new trial should or should not be granted on this ground, of necessity, must largely rest within the sound discretion of the trial court.

"Still that court, in such particular, is not supreme or beyond reach. Its action may nevertheless be inquired into and reviewed on an alleged abuse of discretion, or a capricious or arbitrary exercise of power in such respect. Such a review is not a review of a question of fact, but of law. A ruling granting or refusing a motion for a new trial is certainly reviewable when the proceedings with respect to it are properly preserved and presented. That has not been questioned. Of course the ruling will not be disturbed on evidence in conflict, or on matters involving discretion. Yet our power to correct a plain abuse of discretion or undo a mere capricious or arbitrary exercise of power cannot be doubted.

"We have said this much, in view of plaintiff's contention and of opinions heretofore somewhat loosely expressed at the bar, that in a case of tort tried to a jury, no matter how enormous

or flagrantly outrageous a verdict may be, the trial court alone is authorized to grant relief; and though that court may, by a clear abuse of discretion, and by an arbitrary exercise of power, have gone as wild as did the jury and suffered an outrageous and unjust verdict to stand, or on mere whimsical and capricious grounds set a verdict aside amply supported by competent evidence, yet we are powerless to interfere. We do not so understand the prior decisions. In all of them where it was said this court is not authorized to review a question of excessive damages, such question being one of fact, the statements are qualified, except to ascertain 'if there is any evidence to support the verdict,' 'except so far as may be necessary to determine questions of law.' We reaffirm that. And since an assignment based on a ruling alleged to have been made by an abuse of discretion or by a mere capricious or arbitrary exercise of power, in granting or refusing a new trial, presents a question of law, not of fact, we may as such review it."

The question then arises as to what facts and circumstances in the case at bar justified Judge Hendricks in concluding that the jury's verdict was based upon passion and prejudice.

The evidence revealed that Hyrum Williams suffered a very serious injury. The tibia, or weight-bearing bone of his left leg, was fractured in two places. He was hospitalized for a period of two weeks. A plaster cast was applied. On January 31, 1947, almost two months following his injury, no bony union had occurred. On February 20, 1947 bony union was still

incomplete. Three months after his injury the doctor removed the cast, but on May 26, 1947 an X-ray again showed separation at the fracture site and another cast was placed upon his leg. On June 30, 1947 bony union was incomplete. On September 3, 1947, almost nine months following his injury, plaintiff was still unable to be on his leg for more than short periods of time. He still suffered from extreme stiffness and soreness around the knee and ankle and his leg had atrophied extensively.

At the time of the first trial, on February 26, 1948, almost 15 months following his injury, he was unable to walk more than 3 or 4 blocks at a time and testified that he was still physically unfit to perform the duties of a switch tender.

His lost wages alone, up to the time of trial, amounted to \$3,900.00.

Based upon the foregoing evidence the trial court determined that the verdict was "so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice."

It was the trial court's opinion that Hyrum Williams would have been entitled to a maximum of \$1,100.00 for 15 months of pain, suffering and loss of bodily function and for the pain, suffering, loss of bodily function and loss of wages he would undoubtedly suffer in the future. Think of it! \$1,100 a legal maximum which the jury would be allowed to award plaintiff

for this serious crippling injury. Is it any wonder that counsel for the plaintiff demanded a change of judge at the conclusion of these proceedings? If the jury had been influenced and motivated by passion and prejudice, why then would they have reduced the verdict in the amount of \$8,000.00 for contributory negligence? The jury at all times during the progress of the trial listened attentively to the evidence, deliberated for more than an hour and forty-five minutes before returning the verdict, and in no manner whatsoever indicated that it was prejudiced or biased either for or against the plaintiff. On the other hand, it seems inconceivable that the trial court viewing the evidence on damages could have determined that a maximum of \$1,100.00 for pain, suffering, and loss of bodily function, past and future, would be allowed by the court. If this be not an abuse of judicial discretion, what must the record reveal to establish abuse of legal discretion? Had the court reduced the verdict by a lesser sum perhaps a different situation would have been presented, but here is a court that without any justification whatsoever reduces the jury's verdict by three-fourths, thereby giving to plaintiff only a little over three-fourths of what he actually lost in wages, completely disregarding pain and suffering, loss of bodily function, both past and future, and completely disregarding future lost wages.

We submit that substantial rights were denied plaintiff by the court's arbitrary abuse of discretion in requiring plaintiff to accept a remittitur of \$9,000.00 or a new trial. It is manifestly clear that the discretion

exercised by the trial court was not the legal discretion contemplated by our statutes and by the decisions of this Honorable Court, but was a discretion which gave effect solely to the will of the judge trying the case with utter and complete disregard for the uncontroverted evidence presented by plaintiff.

POINT II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT THE SECOND TRIAL IN REFUSING AND NEGLECTING TO INSTRUCT THE JURY AS TO PLAINTIFF'S THEORY OF LIABILITY (Statement of Points 1 and 4).

There are no instructions given by the court which either alone, or in conjunction with each other, contain plaintiff's theory of recovery.

Instruction No. 2 states:

“ * * * that a railroad company while engaged in interstate commerce shall be liable in damages to an employee suffering injuries while he is employed by such company in interstate commerce in cases where such injury results in whole or in part from the railroad company's negligence. * * * ”

Instruction No. 9 reads as follows:

“The plaintiff alleges that the defendant was guilty of negligence in failing to furnish the plaintiff a safe place to work, in the following particular:

“That the defendant allowed the ties on which the switch was located to become and remain covered with snow and ice, which caused them to be in a slick and slippery and unsafe condition.

“These allegations of negligence are denied by the defendant. Defendant alleges that the plaintiff’s injuries were the result of his own negligence.”

Instruction No. 10 reads as follows:

“The jury is instructed that the mere happening of the accident to plaintiff is no proof of negligence on the part of either the plaintiff or defendant or evidence of same. Negligence is never presumed, but must be proved to your satisfaction by a preponderance of the evidence. Before the plaintiff can recover in this case the jury must believe from a preponderance of the evidence that the defendant was negligent in the manner set forth in Instruction No. 9 and that such negligence was a proximate cause of his accident.”

Instructions No. 9 and No. 10, as hereinabove set forth, do not, either directly or by implication, state the duty defendant owed plaintiff and the violation, if any, which would constitute negligence and require a verdict in plaintiff’s favor. These instructions approach the matter from the negative point of view and rather than setting forth plaintiff’s theory of recovery they set forth defendant’s theory of defense.

The only instruction wherein the duty owed plaintiff is discussed in Instruction No. 20. This instruction is set forth as follows:

“You are instructed that it was the duty of the defendant railroad company to exercise reasonable care to provide its employees a reasonably safe place to work. This duty does not require the absolute elimination of all danger, but only requires the elimination of dangers which the exercise of reasonable care would remove or guard against.”

It will be observed that Instruction No. 20 is dissociated with Instructions No. 9 and No. 10. Instruction No. 20 is in the exact language of defendant's Requested Instruction No. 4. How can it be argued in good common sense that such a presentation in negative fashion, contained in four separate instructions, is a compliance with the fundamental rule of law that each party is entitled to have his theory which is supported by the evidence presented to the jury in a clear and concise instruction?

The jury was told that the mere happening of the accident was no proof of negligence or evidence of same and that before plaintiff could recover the jury must find from a preponderance of evidence that the defendant was negligent as set forth in Instruction No. 9. The jury was not told that if they did find the facts to be as set forth in Instruction No. 9 they must find the issues in favor of plaintiff and against the de-

fendant. At no place in the entire set of instructions was the jury told that if the ties and area around the ties, where plaintiff was required to locate himself in manipulating the switch, had become and remained covered with snow and ice and slick and slippery, and that such condition was *a cause, in whole or in part*, of plaintiff's injuries, they were under a duty to find the issues in favor of plaintiff. We submit that plaintiff's theory of recovery could not have been presented to the jury in any manner other than by apprising the jury in clear language of the duty defendant owed, and of the violation as applied to the facts, which, if proved, would require a verdict in favor of the plaintiff.

On the other hand, we invite the court's attention to instructions which contained defendant's theory of defense. The court, in Instruction No. 18 for example, sets forth the duty plaintiff owed of exercising reasonable care for his own safety; sets forth the conduct on the part of plaintiff, from which the jury could find plaintiff negligent and that if this negligence was the sole proximate cause of his injuries, the verdict should be "No Cause of Action." Instruction No. 18 is herein set forth for the convenience of the court:

"You are instructed that it is the duty of every employee to exercise reasonable care for his own safety. Therefore, if you believe from the evidence in this case that the plaintiff in manipulating the switch which he was to turn failed to watch where he was about to step, and you further find that such failure on his part was negligence as in these instructions defined, and if you further

believe from the evidence that such negligence on his part was the sole proximate cause of plaintiff's injuries, then I instruct you that it is your duty to find the issues against the plaintiff and in favor of the defendant and your verdict should be 'no cause of action'."

Plaintiff's violation of duty and the mandate of "No Cause of Action" if such violation was the sole cause of his injuries, were all clearly and succinctly set forth in one instruction. Is not plaintiff entitled to the same privilege? Instructions bearing on defendant's various theories of defense are found at other places in the set of instructions and are herein set forth for the convenience of the court.

"INSTRUCTION NO. 17

"The court charges you that if you believe from the evidence that the injuries sustained by the plaintiff happened to him by a mere accident, or that the proximate cause of his injuries was due to his own negligence without negligence on the part of the defendant proximately contributing to his injury, then your verdict must be for the defendant."

"INSTRUCTION NO. 19

"You are instructed that where an employee has two ways of performing an act in the course of his employment, the one safe and the other dangerous, the employee owes a duty to exercise reasonable and ordinary care to discover and use the safe way of performing such duty. Therefore, if you find that the plaintiff could have

manipulated said switch while standing on cinders and gravel and that such a position was reasonably safe and the plaintiff by the exercise of reasonable and ordinary care would have discovered such safe way of operating the switch, but nevertheless chose a position on the ties which he as a reasonable and prudent switchman should have known were slippery and dangerous, then the plaintiff would be guilty of negligence, and if such negligence was the sole proximate cause of the plaintiff's injury, then your verdict must be for the defendant, no cause for action."

The following excerpts from instructions illustrate plaintiff's contention that defendant's various theories of defense were not only covered but were unduly, unnecessarily and erroneously emphasized to plaintiff's prejudice:

"INSTRUCTION NO. 11

"The jury is instructed that it cannot, in the performance of its duty as jurors, reach a verdict for the plaintiff in this case if, in order to do so, it is necessary to rest its verdict upon mere conjecture and speculation. * * *"

"INSTRUCTION NO. 12

"The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of injury to the plaintiff.

To establish the *defense of contributory negligence* the burden is upon the defendant to prove, by a preponderance of evidence, * * * ”

It will be noted that the court erroneously states that contributory negligence is a defense. The error in this instruction will be discussed under another heading.

“INSTRUCTION NO. 15

“ * * * it is the imperative and sworn duty of the jury to hear and determine this case precisely the same as if it were between two individuals. In determining questions of fact you are not at liberty to indulge in speculation or conjecture not based on evidence introduced in the case, nor are you at liberty to follow your own ideas of what the law is or ought to be. * * * without reference to the individual or private character of the plaintiff or the public or corporate business or character of the defendant * * * You should require as much evidence to find an issue against a railroad company as you would against an individual. A railroad company is entitled to the same protection of the law as an individual. Sympathetic feelings have no place whatever in the trial of a case in a court of justice. You should disregard all such influence and determine the case at bar according to the law and the evidence given you in open court, regardless of who the parties are, * * * ”

The court erroneously uses the words "the proximate cause" in the instruction. There is no such thing as "the proximate cause" under the Federal Employers' Liability Act. All factors contributing to an accident must, under that law, be considered and given due weight by the jury in reaching its verdict.

"INSTRUCTION NO. 21

"You are instructed that plaintiff must exercise reasonable care for his own safety. Therefore, if you believe from a preponderance of the evidence in this case that plaintiff's injury was caused by the negligence of the defendant, and if you further believe that the plaintiff at the time and place in question failed to exercise that degree of care that the ordinary reasonably prudent person would exercise under the same or similar circumstances, and, further, that such failure on the part of the plaintiff proximately contributed to cause plaintiff's injury, then the plaintiff would not be entitled to recover full damages, but only a diminished sum * * *"

"INSTRUCTION NO. 23.

"The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfill his burden of proof * * *"

The court does not distinguish between a guess or speculation and a permissible inference drawn from the evidence in the case. The instruction unduly emphasizes the burden resting on plaintiff and to a layman's mind would indicate that from the happening of the accident itself one could not find negligence unless he indulged in guessing or speculation when as a matter of legal principle a permissive inference could reasonably be deducted that the place of work was unsafe because slick and slippery and that the defendant was therefore negligent. This matter will also be discussed under another heading.

We do not believe that the instructions regarding plaintiff's theory of liability when compared with the instructions containing defendant's theory of defense, can be read together without the conclusion being drawn that the court is in effect directing a verdict in favor of the defendant and against the plaintiff. This jurisdiction has traditionally and without exception condemned the conduct of trial courts commenting upon the evidence and injecting their own viewpoint as to the evidence or its weight or sufficiency upon the jury.

The instructions pertaining to matters of defense are cited and discussed to point out the inequity and unfairness of the instructions as a whole, and also to emphasize plaintiff's contention that his theory of the case was not presented in an understandable manner to the jury.

Plaintiff made the following requests for instructions:

**“PLAINTIFF’S REQUESTED
INSTRUCTION NO. 4**

“You are instructed that if you find from a preponderance of the evidence that defendant, by and through its authorized agents, servants and employees, knew, or in the exercise of ordinary care should have known, that the weather was at freezing point and that water and snow around the switch where plaintiff was injured would be frozen and icy and would render that locality icy and slippery of footing and that defendant failed and neglected to render such footing safe by cleaning the ice and snow off the place where switch tenders would in the ordinary performance of their duties be required to stand, or by sprinkling salt or sand in the area of said switch, and that such failure was negligence which proximately caused, in whole or in part, the injuries to plaintiff, then your verdict should be in favor of plaintiff and against the defendant and you should award plaintiff damages in accordance with the instructions herein contained.”

**“PLAINTIFF’S REQUESTED
INSTRUCTION NO. 5**

“You are instructed that it is the duty of the railroad company to exercise reasonable care to provide its employees with a safe place to work. This duty does not require the absolute elimination of all danger, but it does require the elimination of all dangers which the exercise of reasonable care by the railroad company would remove or guard against.

“In this connection you are instructed that if you find by a preponderance of the evidence that defendant failed to furnish plaintiff a reasonably safe place to work in that it allowed the area where plaintiff was required to station himself to throw the switch to become and remain covered with ice and snow rendering the footing of plaintiff and other employees using said switch insecure and unsafe, and if you further find by a preponderance of the evidence that said failure proximately caused, in whole or in part, the injuries to plaintiff, then you should return a verdict in favor of plaintiff and against defendant and award damages to the plaintiff as in these instructions provided.”

The requested instructions were supported by evidence and by the law.

The following cases hold fast to the proposition that each party is entitled to have his theory of the case presented to the jury in a clear and understandable manner:

In *Furkovich v. Bingham Coal and Lumber Co.*, 45 Utah 89, 143 P. 121, the Court stated:

“A charge should be adapted to the facts and circumstances of the case on trial and not merely embody a correct abstract legal principle.”

Toone v. J. P. O'Neill Const. Co., (Jan. 16, 1912) 40 Utah 265, 121 P. 10, 16. From judgment for the plaintiff defendant appeals. An action for personal injuries sustained while plaintiff was an employee of the defendant. While the court stated that the theory

of defendant was sufficiently covered by its instruction and affirmed the judgment, it nevertheless in regard to the duty of the trial court to instruct properly upon the theory of each party stated:

“Without now passing upon the question whether the foregoing instruction was not too broad in view of the evidence, we concede that a party is entitled to have his case submitted to the jury upon the theory of his evidence as well as upon the theory of the whole evidence. One way the court might have followed in charging the jury would have been to charge them in separate instructions, first, in accordance with respondent’s evidence; and, second, in accordance with appellant’s evidence which related to the proposition covered by the instruction in question, and in each instruction have directed the jury to return a verdict in accordance with their findings upon that question. The court was not bound to charge the jury in separate instructions, but could cover the question in one without offending against appellant’s rights.”

Pratt v. Utah Light & Traction Co., (Feb. 5, 1918) 57 Utah 7, 169 P. 868, 869, 870. Action for personal injuries alleged to have been sustained by plaintiff while attempting to board a car of defendant company on Main Street in Salt Lake City. On judgment for plaintiff the defendant appeals. Defendant cited as error refusal of the trial court to grant his instruction to the effect that “*if the jury find from the evidence that plaintiff’s injury was not caused by the starting from a position of rest of the car of the defendant but was caused*

by his action in attempting to board such car while the same was in motion, then the plaintiff would not be entitled to recover." The court, in reversing, stated:

"Each party to a suit is entitled to have his theory, when there is evidence to sustain it, submitted to the jury and the judgment of the jury on the facts tending to support such theory, assuming always that there is testimony offered to support the same, and this court has so held in *Hartley v. Salt Lake City*, 41, Utah, 121, 124 Pac. 522, where, speaking through Straup, J., it is said:

"There are two parties to a lawsuit. Each, on a submission of the case to the jury, is entitled to a submission of it on his theory and the law in respect thereof. The defendant's theory as to the cause of the accident is embodied in the proposed requests. There is some evidence, as we have shown, to render them applicable to the case. That is not disputed. We think the court's refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self-evident and unavoidable."

"To the same effect are the following authorities: *Knock v. Boston Elevated Ry. Co.*, 214 Mass. 398, 101 N. E. 968; *Chicago City Ry. Co. v. Harry C. Gates*, 135 Ill. App. 180; *Patterson v. Electric Ry. Co.*, 26 App. Div. 336, 49 N. Y. Supp. 796; *Kaukus v. Ry. Co.*, 153 Ill. App. 454; *Anderson v. Ry. Co.*, 36 App. Div. 309, 55 N. Y. Supp. 290; *Knoxville Traction Co. v. Carroll*, 113 Tenn. 514, 82 S. W. 313; *Peck v. St. Louis Transit Co.*, 178 Mo. 617, 77 S. W. 736."

* * * * *

“Had the court given either of these instructions as requested or in substance and effect, we should be inclined to hold that the issue presented by the defendant’s answer was sufficiently called to the attention of the jury, and its findings on that particular issue sufficiently determined. But, as indicated, there is nowhere in the instructions any direct or concrete statement instructing the jury that, if they found the facts as claimed by the defendant, the plaintiff would not be entitled to recover. This, in our judgment, should have been done. Where the issues are definite and direct, and testimony is offered in support of the different positions taken by the plaintiff and defendant, the court should, by unequivocal and unambiguous instructions, direct the jury’s attention to the issues of fact as thus presented to be determined by it, and there seems to be no good reason why such instructions should not have been given. Such, in our judgment, was not done by the court in its instructions in this case. The requests on the part of the defendant were seasonably made and were sufficient to direct the court’s attention to the theory of the defendant’s answer, and should have been given, if not in the words as submitted or requested, at least in substance and effect.”

Morgan v. Bingham Stage Lines Co. et al. (Dec. 13, 1929), 283 P. 160, 166, 167. Action by plaintiff for the wrongful death of one Orson Morgan as a result of the alleged negligence of defendant in operation of one of its motor buses. Judgment for plaintiff. Defendants appeal. There was a conflict in the testimony as to whether or not the motor vehicle driven by defendant ran into plaintiff at a time when he was crossing the

street to mount a standing street car. Some of the testimony indicated that the street car was standing, some that it was moving at the time of the accident. There was evidence which the court found authorized submission to the jury of the question of defendant's negligence in failing to operate the vehicle at a proper and safe speed and in failing to keep a proper lookout. The court, in reversing and granting a new trial, discussed the obligation of the trial court to give instructions covering the theory of both parties to the case in the following language:

“The court refused to give either of these requests, and the only instruction with reference to defendants' theory of contributory negligence in addition to instruction No. 5, already quoted, was instruction No. 12, as follows:

“‘You are instructed that contributory negligence is the failure to use that ordinary care and diligence that would be expected of an ordinary prudent person of similar age and experience to that of the deceased, Orson Morgan, under like circumstances to avoid an injury. Therefore, even though you find that the defendants were negligent, still, if you find that the deceased, Orson Morgan, did not exercise that ordinary care and diligence to prevent injury to himself that would be expected of ordinary and prudent persons of similar age and experience situated as Orson Morgan was, you should find for the defendants and against the plaintiff, no cause of action.’

“A party is entitled to have his case submitted to the jury on the theory of his evidence as well as upon the theory of the whole evidence. *Toone v. O'Neill Const. Co.*, 40 Utah, 265, 121 P. 10; *Hartley v. Salt Lake City*, 41 Utah, 121, 124 P. 522, 523, and *Miller v. Utah Consol. M. Co. et al.*, 53 Utah, 366, 178 P. 771; *Pratt v. Utah Light & Traction Co.*, 57 Utah, 7, 169 P. 868.

“The following language of Mr. Justice Straup in the case of *Hartley v. Salt Lake City*, *supra*, is peculiarly applicable here: ‘There are two parties to a lawsuit. Each, on a submission of the case to the jury, is entitled to a submission of it on his theory and the law in respect thereof. The defendant’s theory as to the cause of the accident is embodied in the proposed requests. There is some evidence, as we have shown, to render them applicable to the case. That is not disputed. We think the court’s refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self-evident and unavoidable.’

“Respondent’s counsel apparently do not contest this rule of law, but they argue these requests were substantially covered, as the court found was the case in the cases cited. The court in other instructions set forth fully plaintiff’s theory of the evidence as to the alleged negligence on the part of the defendants, but, except as pointed out, gave no instructions on defendants’ theory.

“While the requests are not models of accuracy, we think the defendants were entitled to have at least the substance of the same given so as to present their theory of the evidence to the jury, and that a failure on the part of the court to do so was prejudicial error.

“By what is here said it is not intended to hold that, in every case where a pedestrian attempts to approach a street car, he must either stop or look or listen for approaching vehicles and his failure to do so would constitute contributory negligence as a matter of law. All that it is intended to hold is that defendant is entitled to have his theory of the case presented to the jury. Briefly, they were entitled to have the jury told, in substance, that in crossing or attempting to cross a public street, it was the duty of the deceased to exercise due care and reasonable vigilance to discover approaching vehicles, and that, if the jury should find that as a matter of fact the deceased failed to do what due care required by suddenly, without looking, stepping out from the curb line between two parked cars directly into or in front of defendants’ car at a time and under such circumstances that defendants’ agent could not, by the exercise of ordinary care, have avoided the accident they might find such conduct to be negligence on the part of the deceased, and, if they further found that such negligence directly contributed to the accident, then plaintiff could not recover.”

In *Morrison v. Perry* (Aug. 17, 1943), 140 P. (2d) 772, 778, the court stated:

“Defendant’s theory, which was supported by evidence, was that deceased, by driving on his left-hand side of the highway, and his failure to turn to his right side in time to avoid creating an emergency, did create an emergency which confronted defendant through no fault of his. *The court failed to properly separate the theories of the parties, but instead gave general instructions*

treating the rights and duties of each driver as being mutual, without regard to defendant's theory as to deceased's negligence in first being on his wrong side of the highway. Defendant is entitled to have his case submitted to the jury on any theory justified by proper evidence. *Morgan v. Bingham Stage Line Co.*, 75 Utah 87, 283 P. 160; *Hartley v. Salt Lake City*, 41 Utah 121, 124 P. 522; *Pratt v. Utah Light & Traction Co.*, 57 Utah 7, 169 P. 868; *Smith v. Lenzi*, 74 Utah 362, 279 P. 893; *Martineau v. Hanson*, 47 Utah 549, 155 P. 432.

“Each party is entitled to have his theory of the case presented in such a way as to aid the jury and not confuse it. In *Toone v. J. P. O'Neill Construction Company*, 40 Utah 265, 121 P. 10, 16, the Court suggests the better practice of presenting the parties' theories of the case to the jury; ‘One way the court might have followed in charging the jury would have been to charge them in separate instructions, first, in accordance with respondent's evidence; and, second, in accordance with appellant's evidence which related to the proposition covered by the instruction in question, and in each instruction have directed the jury to return a verdict in accordance with their findings upon that question.’

“The court should have given some of the defendant's requested instructions pertaining to his theory of the case. The defendant submitted 49 requests for instructions, some of which were admittedly repetitious. Such a method of submitting requests for instructions does not aid the trial court in preparing the charge to the jury. We call attention to the fact that defendant in his brief took time and effort to point out errors in instructions to which he took no exceptions.”

The case of *McDonald v. Union Pacific R. Co.*, (Apr. 5, 1946), 167 P. (2d) 685, 686, was an action under the Federal Employers' Liability Act for damages caused by the alleged negligence of the defendant in failing to furnish plaintiff a reasonably safe place to work. From judgment plaintiff appeals, citing as error the refusal of the trial court to grant instructions covering plaintiff's theory of the case. The appellate court found that the trial court had granted instructions covering plaintiff's theory of the case in other instructions. However, the court affirmed the general rule applicable in the following language:

“Appellant has discussed his errors covering the lower court's refusal to give the requested instructions as a group. The substance of his objection is that, by such refusal, the lower court failed to submit to the jury appellant's theory of his case. There is no question that appellant is entitled to have his theory of the case submitted to the jury — that need not be argued. *Pratt v. Utah Light & Traction Co.*, 57 Utah 7, 169 P. 868; *Morgan v. Bingham Stage Lines Co.*, 75 Utah 87, 283 P. 160. But did the court fail in this respect?”

All of the foregoing authorities support plaintiff's contention with respect to the court's refusal to grant and give plaintiff's Requests No. 4 and No. 5. Plaintiff's Requested Instructions No. 4 and No. 5 are correct statements of the law as applied to the evidence in this case, in an affirmative manner setting forth plaintiff's theory of recovery. In all fairness plaintiff was en-

titled to these instructions and at no other place in the instructions does plaintiff's theory of recovery appear.

We feel certain that the grave miscarriage of justice demonstrated by the jury's verdict was caused, in part at least, by the error herein complained of and that therefore this error was grossly prejudicial to plaintiff.

POINT III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT THE SECOND TRIAL IN INSTRUCTION NO. 10 WHEN IT INSTRUCTED THE JURY THAT “* * * *the mere happening of the accident to plaintiff is no proof of negligence on the part of either the plaintiff or defendant or evidence of same.*” (Statement of Points 4).

By this instruction all of the pertinent facts supported by the testimony upon which plaintiff relied as establishing the negligence of defendant, and which stand uncontradicted, are withdrawn from jury consideration. The happening of the accident involved the fact that plaintiff slipped on the ice over the ties while engaged in the performance of his duties as a switch tender. The fact that he slipped was of important probative value in determining the ultimate question of whether or not his place of work was unsafe because slippery. The instruction of the court told the jury that the happening of the accident, that is, plaintiff slipping on the ice over the ties, was no evidence of negligence.

The happening of the accident was the very essence of plaintiff's case. The law on this point is clearly declared and stated in *38 Am. Jur.* beginning at the top of page 985 in the following language:

“While it is true that simply because an accident has occurred, negligence is not to be presumed, still, in determining the question of negligence, the fact that an accident has occurred may be and should be taken into consideration, in connection with all other facts and circumstances of the case, for the purpose of determining whether in fact there was negligence. Negligence may be inferred from circumstances surrounding the injury, if not from the fact of the injury itself.”

In the footnote at page 985 of *38 American Jurisprudence* appears the following supported statement:

“No general rule can be laid down that the mere occurrence of an accident is or is not sufficient prima facie proof of actionable negligence. * * * *Griffin v. Boston & A. R. Co.*, 148 Mass. 143, 19 N. E. 166, 1 L.R.A. 698, 12 Am. St. Rep. 526.

“Negligence, like any other fact, may be inferred from the circumstances, and the case may be such that though there be no positive proof that the defendant has been guilty of any neglect of duty, the inference of negligence would be irresistible. *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L.R.A. 33.”

The Supreme Court of Utah has without doubt recognized this fundamental and controlling proposition.

See *Lewis v. Davis*, 201 Pac. 861, 864, wherein the court stated:

“At the close of plaintiffs’ evidence defendant moved for a nonsuit, and when all of the evidence was submitted moved for a directed verdict. Both motions were denied. Defendant excepted to both rulings of the court and argues the exceptions together. The grounds assigned for the motion are (1) Failure to prove defendant’s negligence at all; (2) failure to show that defendant permitted gas to leak; (3) the evidence shows that deceased was guilty of contributory negligence; (4) the injury, if caused by failure to properly care for the generator, was due to the negligence of fellow servants; (5) the evidence fails to show the proximate cause of the injury; (6) the deceased assumed the risk. The gist of defendant’s contention in support of this assignment seems to be that there is no definite proof of any specific act or omission on the part of defendant constituting negligence which was the proximate cause of the injury.

“It is true that no one saw the accident happen. No one knew just what Mr. Lewis was doing when the explosion occurred. No one testified that the generator leaked gas, or that the hose was disconnected, thereby permitting gas to escape. No one saw water and carbide in the tank, or noticed the condition of the float. No one saw the generator so as to see whether it

had been taken apart, or whether the parts were in place, each performing its function in the generation of gas. No one knows the immediate cause of the explosion, or just how Mr. Lewis came to his death.

“The above propositions, in substance, constitute the basis upon which defendant relies in support of the contention that the court erred in denying its motion for nonsuit and directed verdict.

“(2) In the opinion of the court, under the evidence in the record, the fact that an explosion actually occurred is an answer to practically every proposition above set forth. If there had been no water and no carbide in the generator under pressure by means of a float on top and no gas leaking or hose disconnected by which gas could escape and no contact between the gas and a lighted torch or other fire there could have been no explosion, and if there had been no explosion Robert Lewis would not have been killed in the manner shown by the evidence.”

Plaintiff charged defendant with neglect in failing to furnish him a safe place to work. The slipping and falling on the switch ties, under the authorities revealed here, was proper proof of this allegation, yet this event and occurrence was removed from jury consideration by Instruction No. 10 given upon defendant's request. In the *Lewis v. Davis* case the happening of the accident and the facts surrounding it were found to be entirely sufficient to support the verdict of the jury favorable to the plaintiff.

The position of plaintiff is well stated in the case of *Orris v. Chicago, R. I. & P. Ry. Co.* (Mo.), 214 S.W. 125, as:

“I. The plaintiff says that there was error committed by the court in giving for defendant its instruction No. 1, which reads:

“ ‘The court instructs you that the mere fact that plaintiff was injured while employed by defendant, and the fact that he has sued to recover damages therefor, are of themselves no evidence whatever of the defendant’s negligence or liability in this case, and there can be no recovery by the plaintiff in this case, unless the plaintiff has, by a preponderance of the credible evidence in the case, established negligence on the part of the defendant, as described in other instructions herein.’

“We think this instruction misleading and harmful in this case. Let us shorten the instruction so that its view may more fully appear. Thus shortened, it reads:

“ ‘The court instructs you that the mere fact that plaintiff was injured while employed by defendant * * * is of itself no evidence whatever of the defendant’s negligence or liability in this case, and there can be no recovery by the plaintiff in this case unless the plaintiff has, by a preponderance of the creditable evidence in the case, established negligence on the part of the defendant, as described in other instructions herein.’

“From this instruction the jury could well draw the conclusion that they should not consider the injury to plaintiff in determining the matter of defendant’s negligence. They could well draw the conclusion that they should not consider the

character of injury to plaintiff in determining the matter of defendant's negligence. They could well conclude that 'the creditable evidence' used in the latter part of the instruction meant evidence other than evidence as to the injury and the character of the injury. In this particular case the character of the injury is a material link in the chain of circumstances tending to show negligence. To make the matter clearer some additional facts in evidence should be stated. There is evidence tending to show that when the netting is in proper shape only small cinders escape through the smokestack, and that after night they would look to be alive, and 'just a minute and they were out; they were fine cinders.' The evidence also shows that with some flues not working the suction through the others is greater, and this tends to throw the cinders out of the smokestack with more force and velocity. In addition the plaintiff says this particular cinder burned his eye, indicating heat and size.

"So taking all the facts, the very character of the injury would be a link in the chain of circumstances tending to prove a defective spark arrester, or negligence. The eye being burned indicates heat in the cinder as well as size. The small cinders lose their heat more rapidly upon exposure to the air. The large cinder carries its heat or burning power longer and further. So the character of the injury in a case like this tends to show a larger cinder, and a larger cinder tends to show a defective spark arrester. In cases like this the jury should consider the injury and its character in an effort to determine negligence. This instruction, in our judgment, is misleading upon this matter. It is true that the mere fact of injury, standing alone, is no proof

of negligence. In *Blanton v. Dold*, 109 Mo. loc. cit. 74, 18 S.W. 1151, this court said:

“ ‘The mere fact of an injury to plaintiff does not necessarily create a liability or warrant an inference of defendants’ negligence. The burden of proof was on plaintiff to establish directly or by just inference, some want of care to which his injury might fairly and reasonably be traced.’ ”

“ ‘There is a line of cases to like effect. But these cases do not conflict with the views we have expressed in this case. These cases do not say that the character of the injury inflicted may not be a circumstance tending to show negligence, or a fact from which, when coupled with other facts, negligence may not be inferred.’ ”

“ ‘Instruction No. 1 says that the mere fact that plaintiff was injured is no evidence whatever of defendant’s negligence. This naturally led the jury to believe that they should not consider the injury in determining negligence in this case. We think the instruction wrong and so rule. The instruction, under the peculiar facts of this case, is but little better than the instruction so forcefully condemned by *Brown, C.*, in *Myers v. City of Independence*, 189 S. W. loc. cit. 823. After setting out the instruction, our learned commissioner commented thus:

“ ‘This instruction illustrates that masterly use of language by which even experts are puzzled, and juries wait with patience for such explanation as their author can give of the meaning of the terms he has used. It tells them that unless he has proven his case by the greater weight of the testimony they must disregard the fact that he received injuries. In a case in

which, according to all authority, the fact that he received injuries cuts so large an evidential figure, it is important that the jury should be plainly instructed whether he must prove his case by the greater weight of evidence before the jury could take into consideration the fact that he was injured, or whether the fact that he was injured by the turning of the current of electricity through his body might be taken into consideration in proving 'his case' is not explained. A careful reading of this instruction impresses us that the words we have italicized have no logical or grammatical office in it, other than that which lies in the Websterian definition of the word 'injury' as 'an act which damages, harms, or hurts,' or its legal definition, 'an actionable wrong.' In a case of this character, where so much depends upon the deduction of fact to be drawn from the occurrence of the injury, the vice of such an instruction is especially manifest.'

"So we say of this instruction. It is misleading to the utmost. From it the jury could readily conclude that in determining negligence or liability they should entirely exclude the injury and its peculiar character.

"In *Walker v. Railroad*, 178 S. W. loc. cit. 109, we had before us this instruction:

" 'The mere fact, if it be a fact, that plaintiff was injured does not entitle her to recover in this case, and you should not allow such fact to influence you in arriving at your verdict.'

"In that case, like this, the jury had found for the defendant. The foregoing instruction had been given for the defendant. Of this instruction we said:

“ ‘The court instructed the jury at the instance of defendant that they should not allow the fact that the plaintiff was injured to influence them in arriving at their verdict. While we understand that the fact of injury is not alone sufficient to authorize a recovery on the ground of negligence, we do not understand how it is possible for the jury to remain uninfluenced by the existence of a fact the existence or nonexistence of which is the ultimate subject of their inquiry. The fact that plaintiff was permitted to fall to the ground is the negligence charged. Negligence is predicated upon the fact, which the jury must find, that the fall is liable to injure her, and they must also find that the injury was the immediate result of letting her fall. There is a refinement somewhere in this instruction which we are unable to grasp, and we think that is sufficient reason for withholding the task from the jury.’

“ ‘So we say in this case. The task of grasping defendant’s instruction No. 1 should have been withheld from the jury.’ ”

In *Southern Ry. Co. v. Smith* (Ala.), 221 Ala. 273, 128 S. 228, 230, the trial court refused to give the following instructions requested by the defendant:

“7. ‘The court charges the jury that the fact, if it be a fact, that the plaintiff was thrown or caused to fall by the sudden movement or jerking of the cars is not evidence of negligence.’

“8. ‘The court charges the jury that the mere fact that the plaintiff was thrown or caused to fall from the cars to the ground and sustained the injuries complained of, is not sufficient to

authorize the jury to find that the defendant's engineer was guilty of any negligence proximately causing the plaintiff's injuries.' "

The Appellate Court held that these requests were properly refused, and stated:

"We do not think the particular attitude of plaintiff on top of the car, as a matter of law, prevents an application of the rule there stated, that the fact that he fell off the train, in consequence of a jerk, is some evidence that the jerk was unusually or negligently severe, unless the jury should find that his attitude was such as that an ordinarily careful jerk would have caused him to fall as he did. In view of the fact that the jury could find that an ordinary jerk would not have caused plaintiff thus to fall, we cannot say as a matter of law in this case that a fall caused by the jerk was not some evidence of negligence. To say so would invade the province of the jury. It will be observed that, the jury was not instructed that in this case the fall, occasioned by a jerk, was some evidence that it was unusual or negligent. That would likewise have been invasive of the province of the jury as applied to the facts and contentions in this case."

The error herein complained of becomes more manifest when viewed in relation to the Court's Instruction No. 11, herein set forth:

"The jury is instructed that it cannot, in the performance of its duty as jurors, reach a verdict for the plaintiff in this case if, in order to do so, it is necessary to rest its verdict upon mere conjecture and speculation. Before finding a verdict

for the plaintiff the jury must believe, from a preponderance of the evidence and as a fair inference from the evidence adduced, that the plaintiff was injured by reason of the alleged act of negligence set forth in Instruction No. 9 and heretofore mentioned.”

By Instructions Nos. 10 and 11 the jury was told that the mere happening of the accident was no proof of negligence nor evidence of same and that they could not base a finding upon mere conjecture and speculation. No distinction was made between mere conjecture and speculation, and permissible inferences allowable from the fact plaintiff slipped and was injured.

In *Lavender v. Kurn, et al.*, 327 U.S. 645, 66 S. Ct. 740, 743, the Supreme Court of the United States declared:

“It is no answer to say that the jury’s verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury’s verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court’s function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary

inference or feel that another conclusion is more reasonable.”

In the case at bar the fact that an accident occurred was a most important fact in the determination of whether or not defendant was negligent. The event consisted of Williams slipping on the switch ties. From the fact that he slipped, the permissible inference could be drawn that there was a slippery, unsafe condition which caused him to fall, and the consideration of that factor, together with the other circumstances in the case, might well have led a properly instructed jury to conclude that negligence existed. But the jury was not permitted to consider Williams' slipping in reaching its determination of the existence or nonexistence of negligence nor to draw any inferences therefrom. Such limitation on the jury deprived plaintiff of substantial rights. *That this error occurred in an instruction which the court intended as the instruction containing plaintiff's theory of the case makes the error much more manifest.* In other words, the jury is directed to Instruction No. 10 as containing plaintiff's theory of the case and in that instruction is confronted with the erroneous legal principle that the mere happening of the accident is no proof of negligence on the part of defendant or evidence of same.

We submit that the gross error contained in Instruction No. 10 was most prejudicial, and in and of itself requires reversal.

POINT IV.

THE TRIAL COURT, AT THE SECOND TRIAL, BY GIVING INSTRUCTION NO. 12, HAS REVIVED THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE AS A COMPLETE BAR TO RECOVERY BY PLAINTIFF (Statement of Points 6).

Instruction No. 12 is herein set forth for the convenience of the court:

“The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of injury to the plaintiff. To establish the defense of contributory negligence the burden is upon the defendant to prove, by a preponderance of evidence, that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury.” (R. 064).

It is readily apparent from a cursory reading of the instruction that the trial court misconceived the roll of contributory negligence under the Federal Employers' Liability Act. Where the concept of multiplicity of causes and apportionment of damages is recognized, contributory negligence can never be considered as a defense. Webster's Dictionary defines defense as, “An opposing or denial of the truth or validity of the plaintiff's case.” Contributory negligence is only material as bearing on the issue of damages.

45 *United States Code Annotated*, Section 53, reads as follows:

“In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.”

Instruction No. 12 is a stock instruction applicable to common law negligence actions but wholly erroneous in an action under the Federal Employers' Liability Act.

Instruction No. 21, which pertains to assessment of damages, does not correct the error contained in Instruction No. 12.

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

“It is proper to refuse, and error to give conflicting and contradictory instructions, since a charge containing two distinct propositions conflicting with each other tends so to confuse the jury as to prevent their rendition of an intelligent verdict, the jury cannot be required to determine what part of a contradictory charge is correct,

or left to reconcile conflicting principles of law; it ordinarily cannot be determined from the verdict which rule was adopted by the jury, the court is left in doubt and uncertainty as to the facts actually found by the jury as a basis for its verdict, and where instructions are inconsistent with, or contradict, each other, it is usually impossible to say whether the jury were controlled by the one or the other.”

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

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

“Instruction No. 3 is erroneous in that it makes no reference to an unavoidable accident, but would allow recovery if the jury simply found the plaintiff free of fault. This instruction is thus in conflict with and vitiates instruction

‘G’, given on behalf of the defendants, which is in the following language:

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

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

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

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

In *Thomas v. Stott* (Mo.), 114 S. W. 2d 142, 144, the court found that there was a fact situation in which the

jury could find that plaintiff's negligence was the sole negligence in the case and held that instructing the jury that contributory negligence does not defeat recovery under the humanitarian doctrine without also instructing that the sole negligence of the plaintiff would defeat recovery was error. The Court stated:

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

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

Other cases where it has been held that instructions were conflicting and therefore prejudicial are herein

cited for the convenience of the court: *Westberg v. Willde* (Cal.), 85 P. 2d 507; *Morrison v. Perry* (Utah), (1943), 140 P. 2d 772; *Alcamisi v. Market St. Ry. Co.*, 67 Cal. App. 710, 228 P. 410; *Hageman v. Arnold* (Mont.), 254 P. 1070; *Skelton v. Great Northern Ry. Co.*, (Mont.), 100 P. 2d 929.

We recognize the doctrine that the instructions as given by the court are to be considered and read as a whole. However, where two instructions are apparently conflicting and are not related one to the other by reference, as in the case at bar, it can never be determined which instruction was followed by the jury, and although one of said instructions is correct, that in no way excuses the error contained in the other. Here the jury is referred to “the defense of contributory negligence,” and that if the palintiff was negligent and such negligence contributed as a cause of his injures *the defense of contributory negligence* is available to the defendant, Such instruction in a Federal Employers’ Liability Act case is confusing and misleading especially where at no place in the instructions is the jury told that contributory negligence is not a defense, but can only be considered in mitigation of damages.

POINT V.

THE TRIAL COURT, AT THE SECOND TRIAL, BY GIVING INSTRUCTION NO. 19, PLACED AN UNWARRANTED BURDEN OF PROOF UPON THE SHOULDERS OF PLAINTIFF AND IN EFFECT

REVIVED THE DOCTRINES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK AS COMPLETE BARS TO RECOVERY BY PLAINTIFF (Statement of Points 7).

For convenience of the court, Instruction No. 19 is set forth herein:

“INSTRUCTION NO. 19

“You are instructed that where an employee has two ways of performing an act in the course of his employment, the one safe and the other dangerous, the employee owes a duty to exercise reasonable and ordinary care to discover and use the safe way of performing such duty. Therefore, if you find that the plaintiff could have manipulated said switch while standing on cinders and gravel and that such a position was reasonably safe and the plaintiff by the exercise of reasonable and ordinary care would have discovered such safe way of operating the switch, but nevertheless chose a position on the ties which he as a reasonable and prudent switchman should have known were slippery and dangerous, then the plaintiff would be guilty of negligence, and if such negligence was the sole proximate cause of the plaintiff's injury, then your verdict must be for the defendant, no cause for action.”

The character of the duty which plaintiff owed is clearly confused in Instruction No. 19. *Plaintiff owed no duty of exercising reasonable and ordinary care to discover and use a safe way of throwing the switch even assuming that there was a safe and a dangerous way*

available to him. He simply owed the duty of conducting himself as a reasonably prudent person under the circumstances. If he negligently chose a dangerous way when a safe way were available to him, that could amount to nothing more than contributory negligence on his part and the question remaining for the jury's consideration is whether or not the place was unsafe and whether or not the railroad company neglected its duty in failing to furnish him with a reasonably safe place in which to work. The duty imposed upon plaintiff by the instruction was therefore a greater and different duty than that imposed by the Federal Employers' Liability Act.

In *Boston & M.R.R. v. Cabana*, 148 F. 2d 150, 152, the court stated:

“The defendant contends that it was under no duty to light the area near the door at the back of the engine house where the plaintiff's work did not require him to go. Such an argument may prove too much since if the plaintiff had been working near the rear wheels the short route to the other side would have been the one he actually followed. On the facts here, however, he took the longer way around, and the reasonableness of that is for the jury. At the most it has to do with contributory negligence on his part, and under the Act contributory negligence is not a defense and goes merely to the mitigation of damages.”

We conceive the correct rule of law to be set forth in *Brady v. Florence & C.C.R. Co.*, 44 Colo. 283, 98 P. 321, 323, wherein it is stated that even though one manner

of performing a task is more dangerous than another, the plaintiff is not guilty of neglect in choosing the more dangerous method if in doing so he does not disobey instructions or rules, acts in good faith and the method chosen might have been adopted under like circumstances by a reasonable and prudent man. We quote from the case as follows:

“ * * * But it is insisted that Brady was negligent in regard to the method employed by him for performing this duty. Such negligence consisting in uncoupling the air brake from the inside, instead of from the outside of the curve upon which train No. 37 was standing. In other words, that Brady chose the more dangerous of two methods for performing his duty, and hence assumed all the risk involved in so doing. Touching the proposition of law thus invoked, we suggest in passing that the choice does not establish contributory negligence, if in so doing he does not disobey instructions or rules, acts in good faith, and the method chosen might have been adopted under like circumstances by a reasonable and prudent man.”

And in the recent case of *Wilkerson v. McCarthy et al.*, 336 U. S. 53, 69 S. Ct. 413, 417, reversing the Utah Supreme Court 187 P. 2d 188, the United States Supreme Court supported the proposition herein contended for in the following language:

“There was, as the state court pointed out, evidence to show that petitioner could have taken a slightly longer route and walked around the pit, thus avoiding the use of the board. This

fact, however, under the terms of the Federal Employers' Liability Act, would not completely immunize the respondents from liability if the injury was 'in part' the result of respondents' negligence. For while petitioner's failure to use a safer method of crossing might be found by the jury to be contributory negligence, the Act provides that 'contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *.' "

It will be noted that the court places the burden on plaintiff of *discovering at his peril*, the safer or less dangerous of two available ways of performing a duty. That duty has never been pronounced as an affirmative duty on the part of plaintiff. Plaintiff's only duty is to exercise that degree of care of an ordinary prudent person under the circumstances. *If plaintiff were negligent under the evidence in this case he could have only been negligent because he failed to discover a more safe way available to him.* There is absolutely no evidence from which a jury could find that plaintiff at any time actually discovered the unsafe condition which resulted in his injury. It was dark, and he was in a hurry. He said he did not know the switch ties were slick and slippery until he slipped and fell. If the jury, under the court's instruction, found that plaintiff was negligent in failing to discover a safe way of performing his work, they were invited by the court's instruction to find also that this failure was the sole proximate cause of plaintiff's injury. Plaintiff could only be negligent if the place he chose for working was unsafe. If the place of

work was unsafe the defendant must, under the law, be charged with violation of its duty toward plaintiff, and if the jury is invited under those circumstances to find that plaintiff's negligence was the sole proximate cause of his injury, the court is reviving the doctrine of assumption of risk and is saying to the jury, "If plaintiff should have discovered the unsafe place of work but didn't, and is injured thereby, he assumed the risks associated with the unsafe condition." Our Federal Congress has eliminated the defense of assumption of risk in the following language, 45 U.S.C.A., Section 54:

"Section 54. Assumption of risks of employment.

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

In the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 446, it appeared that a railroad policeman was inspecting seals on cars of

a train moving slowly on one track when he was killed by the rear car of a train backing in an opposite direction on another track. The rear of the train which killed the policeman was unlighted, although a brakeman with a lantern was riding on the back step on the side away from the policeman and the bell was ringing on the engine but no special signal of warning was given. The trial court granted a directed verdict against plaintiff which was affirmed by the Circuit Court of Appeals, (*128 F. (2d) 420*), whereupon plaintiff was granted a writ of certiorari by the Supreme Court of the United States and the case was reversed, the court holding that questions of negligence and contributory negligence should have been submitted to the jury. The negligence claimed by plaintiff was in failure of the defendant to furnish plaintiff a reasonably safe place to work. The court stated:

“The Circuit Court distinguished between assumption of risk as a defense by employers against the consequence of their own negligence, and assumption of risk as negating any conclusion that negligence existed at all. The court reasoned that if, for example, the respondent had negligently failed to provide a workman with a sound tool, and he was thereby injured, it could not under the amendment claim that he had assumed the risk of using the defective implement; but that if a workman were injured in the ordinary course of his work, as in such a switching operation as this, the assumption of risk might still be relied upon to prove that the respondent had no duty to protect him from accustomed danger. The court rejected petitioner’s argument that

since the doctrine of assumption of risk had been abolished 'the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter.' In rejecting this argument the court below put the core of its decision in these words: 'The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine of the assumption of the risk must be given its accustomed weight.'

"We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent to non-negligence. We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U.S.C.A. Sec. 1 et seq., 'Unless great care be taken, the servant's rights will be sacrificed by simply

charging him with assumption of the risk under another name;’ and no such result can be permitted here.

“Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant tort doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the ‘human overhead’ which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry. The assumption of risk doctrine for example was attributed by this Court to ‘a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to considerable and often ruinous responsibilities, thereby embarrassing all branches of business,’ but would also encourage carelessness on the part of the employee. In the pursuit of its general objective the common law took many forms and developed many doctrines. One of the first was the fellow servant-assumption of risk rule which originated in *Priestly v. Fowler*. In *Priestly v. Fowler*, the Court said, ‘The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master.’

“As English courts lived with the assumption of risk doctrine they discovered that the theory

they had created had become morally unacceptable but of such legal force that it could not be repudiated. The English sought to eliminate the fellow servant rule, which placed the burden of an employee's negligence as it affected another employee on the injured person rather than on the business enterprise, by the employers' Liability Act of 1880 and found that the assumption of risk doctrine still left the employee in a hopelessly unprotected position. In the leading case of *Thomas v. Quartermaine*, 1887, 18 Q.B.D. 685, the court held that an employee standing on a three foot runway between two unfenced vats who was attempting to dislodge a piece of wood from one of the vats and who by accident fell into the other and was scalded was barred from recovery. *Since he had long known of the possible dangers of the narrow passage he was held to have assumed the risk of his position.* In 1897 the English finally abandoned the common law remedy altogether as a protection for injured employees and adopted a workman's compensation law. 60 & Vict. c. 37."

It is observed that in the old English case, cited by the court, it was held that since plaintiff had long known of the possible dangers of the narrow passage he assumed the risk of his position. That was the typical case of assumption of risk which the court held that the 1939 amendment was designed to forever erase from the law as it pertains to railroad employees under the F.E. L.A. The court said:

"The doctrine of assumption of risk cannot be 'abolished in toto' and still remain in partial existence as the court below suggests. The theory that a servant is completely barred from recovery

for injury resulting from his master's negligence, *which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk*, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon * * *."

This court disregarded the *Tiller* case and in effect accepted the old *Thomas v. Quartermaine* case and the doctrine of assumption of risk as its authority, when it invited the jury to find that the place where plaintiff was working was unsafe and at the same time to find that plaintiff's failure to discover that unsafe condition was the sole proximate cause of his injuries.

The sole question which was of importance to this jury was whether the place where plaintiff was injured was a place for men to work and whether the unsafe condition contributed, in whole or in part, to the injuries he sustained.

It will be noted that throughout the instructions the jury, under given circumstances, are invited to find that contributory negligence on the part of plaintiff was the sole proximate cause of his injuries. Instruction No. 17 states:

"* * * or that the proximate cause of his injuries was due to his own negligence without negligence on the part of the defendant proximately contributing to his injury, then your verdict must be for the defendant."

Instruction No. 18 also contains the same proposition:

“ * * * if you further believe from the evidence that such negligence on his part was the sole proximate cause of plaintiff's injuries, then * * * it is your duty to find the issues against the plaintiff * * * ”

In Instruction No. 19 the same proposition appears.

“ * * * then the plaintiff would be guilty of negligence, and if such negligence was the sole proximate cause of the plaintiff's injury, then your verdict must be for the defendant, * * * ”

Permeating the whole of the instructions is the erroneous proposition that the jury could at one and the same time find plaintiff guilty of negligence in failing to discover an unsafe place to work, and also that such negligence was the sole proximate cause of his injury. This constitutes revival, in full regalia, of the ancient and vicious doctrine of assumption of risk which our Federal Congress has endeavored to eradicate from the field of F.E.L.A. law.

POINT VI

THE JURY'S VERDICT IS CONTRARY TO IMPORTANT UNCONTROVERTED EVIDENCE PRESENTED AT THE TRIAL.

Plaintiff's right of recovery is based upon the Federal Employers' Liability Act, which affords remedy

in all cases where the injury of an employee is caused, either in whole or in part, by negligence of the carrier. The specific act of negligence relied on by the plaintiff is that defendant, by and through its authorized agents, servants and employees, knew, or in the exercise of ordinary care should have known, that the weather was at freezing point and that slush and snow around the switch where plaintiff was injured would be frozen and would render footing dangerous and unsafe and that defendant failed and neglected to make said footing reasonably safe by cleaning the ice and snow off the place where switch tenders would, in the ordinary performance of their duties, be required to stand, move or walk, and that said negligent conduct proximately caused, in whole or in part, the injuries to plaintiff.

The uncontroverted evidence presented at the trial is that plaintiff was injured at approximately 7:10 a.m. on the 9th day of December, 1946. The last precipitation in the area where the accident occurred had ended at approximately 12:45 p.m. on the 8th day of December, 1946. This precipitation consisted of snow and sleet. It was Sunday and the precipitation was heavy enough that workmen were called out specially to clean switch points and areas around switch stands and had worked from noon until 6 p.m. on the 8th day of December, 1946; the temperature had gone down to freezing. Thereafter, during the course of the night, it had hovered near freezing. Plaintiff was injured while it was still dark. Workmen were still required to use their lanterns in the per-

formance of their duties. The plaintiff had only been working ten minutes. During that time he had been exceedingly busy, having thrown four switches. A passenger train was standing on the westbound track waiting until he had thrown the switch where he was injured. He was working against time. All of these facts were uncontroverted by any evidence in the case.

Also uncontroverted was the fact that ice covered the switch ties at the switch where he was injured and that ice and snow covered the area around the switchstand. The photographs taken by defendant's employees at 9 o'clock on the morning of the 9th prove without any possibility of conflict or controversy that the condition of the area where plaintiff was injured was as he alleged it to be. The photographs also show that the switch points themselves had been cleaned out by maintenance crews, after the last precipitation. In other words, defendant had adequate time, employees and material with which to have cleaned the area around the switch stand where switchmen were required to work and stand while manipulating the switch, but had unfortunately neglected to clean the area around the switch and make it safe for the switch tenders. Two other shifts had been at work at the switch before plaintiff reported for work. Sixteen hours had elapsed during which time the switch tender on duty could have taken a shovel out to the area of the switch stand and

cleaned it, or could have reported the condition to the section foreman in charge of maintenance, who was on twenty-four hour call. If the railroad company had kept salt or sand in the shack workmen could have sprinkled salt or sand over the switch ties, and in the area where men were required to stand. None of these precautions were taken.

The railroad clearly owes the absolute and non-delegable duty of exercising reasonable care in furnishing plaintiff with a safe place in which to work, and while this duty does not require the absolute elimination of all danger, it nevertheless requires and makes mandatory the elimination of all dangers which the exercise of reasonable care would remove or guard against.

Plaintiff sincerely contends that the evidence, as herein outlined, was sufficient for the court to have granted a directed verdict in favor of the plaintiff on the issue of defendant's neglect as a contributing cause of plaintiff's injuries, and yet in no less than three instructions does the court invite the jury to find *that the sole proximate cause of his injuries was plaintiff's own contributory negligence*. (See Instructions 17, 18 and 19; see also the definition of proximate cause in Instruction No. 7, excepted to by plaintiff, where the court completely misconceives the law of multiplicity of causes under the Federal Employers' Liability Act and instructs on the common law doctrine of proximate cause).

In *Melody v. Des Moines Union R. Co.*, (1913) 161 Iowa 695, 141 N.W. 438, (rehearing denied in (1914, Iowa) 145 N.W. 466), a switchman who had dismounted from the engine to throw a switch in the switchyard of the defendant to allow the cars to be set back upon another track was injured as he attempted to mount the footboards of the locomotive—his left foot slipping on a sloping ice ridge and his right foot, which had been lifted to the footboard, slipping on the ice accumulated there, with the result that his grip upon the handhold which he had seized to assist his movements was broken and he fell in such a manner that his leg was crushed under the wheels of the locomotive. In his action charging the defendant with negligence in failing to supply him with a safe place to work in that it permitted snow and ice to accumulate in the yard and upon the footboard of the locomotive to the peril of switchmen in the performance of their duties and failed to remedy or remove such dangerous condition, it was held, as against the contention of the railroad company that the evidence disclosed no negligence on the part of the defendant, that the issue of negligence was one for the jury. The court said:

“A switchyard is a switchman’s place of work. The nature of his duties requires him to traverse the yard in almost every direction, both day and night. Much of his movements has to do with the making up of trains, the coupling,

uncoupling, assembling, and distribution of cars. He must move with celerity. The service is at best essentially dangerous, and he must be ever alert of eye and of ear to avoid being run over or caught and crushed between cars. He cannot always take careful note of his footsteps to make sure of his path, and within reasonable limits he must and rightfully may rely upon his employer to see that there are no traps or pits or obstructions into or over which he may fall to his injury, save only such as pertain to the proper and necessary preparation and equipment of the yard for its intended use. True, a railway company, having no control over the laws of nature, is not negligent simply because snow falls upon its yards; but, snow having fallen thereon, we cannot say, as a matter of law, that the company may without neglect of duty leave it there indefinitely and permit it to become worn or trodden into icy mounds, ridges, and slopes at places where its switchmen are required to go in the performance of their work, thus exposing them to the danger of slipping and falling to their serious injury. The duty of the employer is to exercise reasonable care to provide his employees a safe place to work, and is no less applicable to a switchyard than to a machine shop. True, the phrase 'safe place to work' is a relative one. It does not mean the absolute elimination of all danger, but it does mean the elimination of all dangers which the exercise of reasonable care by the employer would remove or guard against. In the case before us it sufficiently appears that the conditions of which plaintiff complains were not the result of falling snow alone, but also of the use which had been made of the yard by the defendant whereby the surface of the yard became uneven, hard, and slippery.

Whether reasonable care on defendant's part would have prevented this source of danger or caused its removal before the plaintiff's injury is a question of fact and not of law."

See also *Skidmore v. Baltimore & O. R. Co.*, decided March 15, 1948, 167 F. 2d 54, and *Randenbush v. Baltimore & O. R. Co.*, 160 F. 2d 363. For other interesting cases see:

Lillie v. Thompson, 332 U.S. 459, 68 S.Ct. 140, 162 F. 2d 716; *Anderson v. Atchison, Topeka and Santa Fe Ry. Co.*, 333 U.S. 821, 68 S. Ct. 854; *Heeb v. New York Central R. Co.*, 39 N.W. 2d 44, where a railroad worker was allowed recovery for frozen feet and the court held that so-called acts of God will not plague the injured railroad worker in this class of cases since the doctrine of assumption of risk has been eliminated in this class of cases.

CONCLUSION

It is respectfully submitted that Judge Hendricks abused his legal discretion when he ruled that the jury's verdict was based upon passion and prejudice and upon that basis forced plaintiff to the choice of a \$9,000.00 reduction in the verdict or a new trial.

It is further submitted that the instructions to the jury, given by a second trial court, are fraught with error prejudicial to the rights of plaintiff.

We, therefore, respectfully submit that the jury's verdict at the second trial and judgment thereon should be set aside and also that the original verdict should be reinstated.

Respectfully submitted,

RAWLINGS, WALLACE, BLACK,
ROBERTS & BLACK,

Attorneys for Appellant,

530 Judge Building

Salt Lake City, Utah

RECEIVED copies of the within Brief

Appellant this day of April, A. D. 1950.

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Attorneys for Respondent.