

1950

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

Utah Supreme Court

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In the  
**Supreme Court of the State of Utah**

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HYRUM WILLIAMS,  
*Plaintiff and Appellant,*

vs.

THE OGDEN UNION RAILWAY  
AND DEPOT COMPANY, a corp-  
oration,  
*Defendant and Respondent.*

Case No.  
7471

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**BRIEF OF RESPONDENT**

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**FILED**

ARROW PRESS, SALT LAKE

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# In the Supreme Court of the State of Utah

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HYRUM WILLIAMS,  
*Plaintiff and Appellant,*

vs.

THE OGDEN UNION RAILWAY  
AND DEPOT COMPANY, a corporation,  
*Defendant and Respondent.*

Case No.  
7471

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE CASE

The statement of the case and the statement of facts as contained and recited in appellant's brief are, in the main, correct, but in some instances the appellant has misstated certain facts and in other instances appellant has

included some measure of argument in connection with his statement of facts. In admitting the appellant's statement of facts to be substantially correct respondent of course does not admit argumentative matters included in such statement of facts.

Respondent will follow appellant's method of designating citations from the testimony with the page and the indication R-1 or R-2 showing whether the record refers to the transcript from the first trial or from the second trial.

The issues and the facts supporting them as contained in the pleadings and shown by the evidence in this case are fairly simple. Hyrum Williams, a long-time employe of The Ogden Union Railway and Depot Company, had under his charge three switches—two immediately to the west and one a short distance to the east of the river bridge where the Union Pacific main lines cross the Weber River. During his shift of eight hours 8 or 10 trains passed these switches, for only 6 or 7 of which trains was the plaintiff required to change or manipulate the switches for such movements. The plaintiff thus was not required to change or align the switches "every time" any train moved over the tracks as stated by appellant on page 4 of his brief, but would align the switches for 6 or 7 out of the 8 or 10 movements (R. 76-1.)

On the morning of December 9, 1946, shortly after he reported for work and while attempting to manipulate the middle, or No. 2 of the three switches, Mr. Williams slipped and fell and broke the large bone of his left leg about three inches below the knee. He testified that he stood on the

switch ties while trying to manipulate the switch; that the left tie was covered with ice and slippery. At the top of page 6 of his brief appellant states that it was below freezing; however, Exhibits L, M and 13 show the temperature above freezing for a 10-hour period prior to the time of the accident, the temperature ranging between 33° and 35°. Admittedly, this was near freezing and for a short period of time, prior to 10 to 12 hours before the accident, the temperature did get slightly below freezing (See Ex. M).

Appellant in his statement of facts on page 8 states that plaintiff had seen other men stand on the switch ties in manipulating the switch on frequent occasions, as had Beckett who testified for plaintiff. The record is not entirely clear concerning plaintiff's own testimony other than repetitions of the statement that there was no regular or customary way to throw a switch, nor any rules or regulations with respect to how such a switch should be thrown (R. 46-49-2). Plaintiff did not directly testify that he had seen the other men standing on the switch ties to manipulate the switch but merely said he had seen other men manipulate these switches and then added that there was no customary or regular way to do so. As for his witness Beckett, the direct question was asked of Beckett concerning his manipulating of such switches, "Do you, yourself, place your feet on those switch ties?" (R. 137-2), to which he answered directly and positively, "No sir." On being further pressed by counsel for plaintiff Beckett said that in closing the switch "You would come back toward the tie and it would naturally put your feet in position to come in contact

with the tie." But nowhere did Beckett say that he stood on the ties to throw the switch and the only direct answer upon the question given by him was the answer as stated above, "No sir." When Beckett was questioned as to whether he had seen other men throwing this or similar switches from a position on the ties he evaded answering the question directly and again said, "As you align the switch back to the main line you will naturally,—your feet naturally come over toward the tie, the switch ties which hold the switch stand" (R. 138-2).

Counsel for appellant in referring to the testimony, as well as in his argument concerning plaintiff's Requested Instruction No. 4, talks about sprinkling of sand or salt on the ties or in the area of the switch, and on the bottom of page 9 and the top of page 10 he refers to the fact that no salt or sand had been thrown around in the area, although at other areas of the yard there was salt and sand provided. Counsel misstates the record in that respect because nowhere in the record is there any evidence of any sand being used anywhere around the vicinity of switches. Mr. Williams admitted (R. 107-2) that there had been no salt used around the switches or ties in question in all the years that he had worked there, although he understood that there was salt used at some other switches in the yard. Beckett testified that salt was used at other places in the Ogden Yard, particularly in the vicinity of the slip switches (R. 140-2). He admitted, however, that the so-called slip or ball switches do not have electrically controlled switches for the operation of semaphores (R. 150-2), and it was admitted that the

switch in question was a main line switch with bonded wires from which the switch points operated main line semaphores. Neither Beckett nor Williams gave any evidence concerning sand being used in connection with these or any other switches. In spite of that, counsel for appellant insisted on injecting the question of the use of both salt and sand in the area of the switches in question.

With respect to the progress and recovery of Mr. Williams after the cast was placed on his broken leg, appellant inadvertently or otherwise again misstates the record. Near the top of page 12 of appellant's brief it is stated that on February 20, 1947, x-rays revealed callus formation and early incomplete bony union. Appellant is in error in that statement because the x-ray which refers to the incomplete bony union was an x-ray taken on January 31, 1947, and on the same page (R. 29-1) the doctor who was testifying from the x-rays so stated that the January 31 x-rays showed an incomplete bony union, but with respect to the x-ray taken on February 20 the doctor stated, "By that time there was a good bone union" (R. 29-1).

## ARGUMENT

In appellant's brief, although ten separate statements of error are set forth, appellant combines some of such statements of error and argues on six points. In such argument appellant has overlapped and has argued upon the same charge or error under more than one of his designated points. Respondent will address its argument to the same six points as specified by appellant. In appellant's state-



ment of errors he lists ten separate statements wherein he charges the trial court with error. However, with respect to such statements of error he does not argue anything with respect to paragraphs numbered 3, 5 and 8. We therefore assume that by failing to argue upon such claimed errors appellant has waived them.

### POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED DEFENDANT'S MOTION FOR A NEW TRIAL FOLLOWING THE FIRST TRIAL. (Appellant's Statement of Points 9)

It is rather interesting to note that in this case counsel who appear for the plaintiff, Hyrum Williams, find themselves on the opposite side of the question to that which they recently argued before this court in the case of *King v. Union Pacific R. Co.*, 212 P. (2d) 692, decided by this court within the past year. In that case the jury in the trial court had returned a verdict in favor of the defendant "no cause of action" and the trial court, at plaintiff's request, granted a motion for a new trial. The jury on the second trial of the case returned a verdict in favor of the plaintiff for \$75,000.00, which, however, was reduced by the court to \$50,000.00. Counsel who now represent respondent in this case represented the appellant in that case and argued that the trial court had abused its discretion in granting the new trial. Such position was, of course, strenuously opposed by counsel who are counsel for plaintiff herein and in their

brief and in arguing upon the case the same counsel argued very strenuously and with good effect that the trial court had a wide range of discretion in acting upon a motion for new trial. We wish now to call those same matters to the attention of the same counsel and of this court and strenuously insist that the trial court in this case was acting justifiably within a discretion committed to him when he granted a new trial after the original jury's verdict.

We admit the law as quoted by counsel from Utah Code Annotated on page 18 of appellant's brief and respondent will likewise quote and adopt the holding of this court in the case of *Jensen v. D. & R. G. R. Co.*, 44 Utah 100, 138 P. 1185. We will not requote as much from that case as counsel for appellant has, but do wish to call the following to the court's attention as stated by this court therein:

“\* \* \* A court, vacating a verdict and granting a new trial by merely setting up his opinion or judgment against that of a 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.*" (Italics ours.)

In determining whether or not the trial court exercised a sound judicial discretion or abused his discretion we must look to the facts given in evidence in the case and must bear in mind that the trial court had the opportunity to observe the witnesses as they testified, and particularly had the opportunity to observe the plaintiff, Mr. Williams; his manner of testifying; his manner of moving in and out and around the courtroom; and the inconvenience, if any, which he still suffered in view of the fact that he testified that even at the time of the trial he could not do the work required of him in tending these switches to let 6 or 7 trains pass by them during an 8-hour shift (R. 55-1). In considering this evidence we must remind counsel that the verdict of the jury was not \$12,000.00 but that the original jury's verdict was for \$20,000.00, the total amount prayed for by plaintiff. We must keep in mind that the injury suffered by Williams while it was a broken leg—yes, one bone of the lower leg broken in two places, yet there was no disproportioning of the bone—bone shift. The bone appeared to be perfectly straight (R. 25-1), and after the cast was put on the doctor testified that the x-ray "shows the fragment of the tip in excellent position and alignment" (R. 28-1, 34-1). It is true that the original cast placed on the leg was re-

moved about March 25, 1947 and had to be replaced on May 26, 1947. However, on February 20th there was a good bone union and the cast was left on until March 25th, and after the cast was removed on March 25th the plaintiff was walking with a cane and the doctor at that time said that he should be able to return to work in 7 to 10 days (R. 30-1). In spite of that fact something happened and on May 26th when an x-ray was taken a fracture line appeared in the leg and another cast was put on. True, Williams testified that he had not had any subsequent injury, and while defendant had no testimony to show that he had suffered any subsequent injury, we do not think that Williams' testimony as thus given must be believed at all events, particularly in view of the fact that after his release after the cast was removed on March 25th, even though the doctor did see him from time to time thereafter, "it was not until May when he came back and complained of the excess pain" (R. 39-1). Williams insisted, even up to the time of the trial, that he could not do the work of handling those switches even though such a job was considered as a "pension job" (R. 74-2), and yet the doctor testified: "On October 3, 1947 my records show he was released for work. We talked it over with Hyrum and agreed that the case was finished and closed and it was O.K. to return to work" (R. 34-1). The doctor stated that Williams' recovery was a good recovery and entirely normal and on his release it was the opinion of the doctor that Williams could have done any work that he had done before (R. 35-1). This evidence was all before the trial court and during the giving of it the court was able to observe not only the doctor and other witnesses who

testified, but also was able to observe Williams and see how he was able to get about, to come and go, and to evaluate the testimony from the standpoint of personalities as well as from the cold facts of the record.

Counsel for appellant insist that plaintiff's lost wages alone up to the time of the trial amounted to \$3,900.00. In that respect we must advise counsel that the record is not clear as to what his lost wages would amount to over any period of time. Williams testified that his average wage was \$250.00 to \$260.00 a month, *but that was not his take-home pay—that was before deductions* (R. 56-1). There is nothing in the record anywhere to show what his deductions were or what the net amount of his take-home pay was. Also, Williams took his retirement in October of 1947 and there is nothing in the record to show what his retirement pay was, whether he received as a result of his long years of service 50% of his normal pay, or more, or less. Therefore there is nothing in the record to show what Williams lost by way of wages and the most that can be done is to speculate with respect thereto and upon such speculation we can conclude that up to the time when he took his retirement he had been off work for approximately ten months, during which time he would have received something less than \$2,500.00 (minimizing deductions that would have been taken from his pay-check). Thus, instead of having lost wages in the amount of \$3,900.00, Williams' lost wages would be somewhere closer to the figure of \$2,500.00. On that basis, with the court stating as he did that \$5,000.00 should have been sufficient total damages even assuming

negligence on the part of the defendant, it would leave to Williams \$2,500.00 for lost wages and \$2,500.00 for his pain and suffering, the 40% cut from the \$5,000.00 being based on contributory negligence attributable to Williams as found by the jury.

Again we must remind counsel that the original jury's verdict was \$20,000.00, and with lost wages of somewhere in the neighborhood of \$2,500.00, that would have left \$17,500.00 for pain and suffering with a very serious question having been raised as to whether or not the second cast necessitated on Williams' leg was a result of an additional injury suffered after the doctor had originally released him on March 25th, with no complaint from him until May 23rd.

It is interesting to note that counsel state on page 24 of appellant's brief, "Had the court reduced the verdict by a lesser sum perhaps a different situation would have been presented." By such a statement counsel, in effect, admit that the original verdict of \$20,000.00 was high and although the court may have been justified in reducing it counsel, in effect, argue that he should not have reduced it as much as he did. We will ask counsel if they admit that the \$20,000.00 verdict was excessive, and will ask again what their suggestion might have been had the court presented a different situation by reducing the verdict by a lesser sum. The amount of \$20,000.00 was the amount that plaintiff and plaintiff's counsel asked in their pleadings and after the first trial they did not change the request but left it at the \$20,000.00, and now counsel admit that

a different question would have been presented had the court reduced the verdict by a lesser sum.

Throughout all of their argument on Point I counsel for appellant take the attitude that a new trial deprived the plaintiff of the right to recover what he thought he was entitled to. The plaintiff was not forced to take the \$3,000.00 to which the court reduced the judgment after deducting for contributory negligence. He was given the alternative of a new trial and counsel insist that he was denied justice by being given the right to a new trial.

It may be possible that in exercising his discretion in attempting to cut the amount of the original jury's verdict the Judge did assume a figure that was somewhat too low, but that would not say the original figure as submitted by the jury was not too high. Nevertheless, the mere granting of a new trial as an alternative is a mode of saving plaintiff so that he can start over again if the court, in his opinion, places the amount too low. If, in every case where the court concludes that the damages were excessive, the trial court could reduce the amount and compel the plaintiff to take such an amount, then a plaintiff or appellant in such a position as appellant occupies here might at times find himself in a position where a court in evaluating the evidence might have placed an amount too low. Even under such circumstances I do not believe that such a plaintiff or appellant could urge that the court's action had been arbitrary or capricious. The honest judgment of one man or the honest judgment of one Judge is not always the same as the honest judgment of another, and that is one of the reasons



why a litigant is given the option in such cases of accepting the reduced amount or taking a new trial. Upon the new trial the plaintiff had as much chance as the defendant did and the granting of a new trial did not deny substantial justice to the plaintiff.

As is stated in the *Jensen* case, cited *supra*, whether a new trial should or should not be granted, of necessity, must largely rest within the sound discretion of the trial court and in any case, any ruling made by the court with opposing litigants must be against one or the other of such litigants and it cannot be said that in every instance where a Judge rules against one litigant that he does so because of bias or prejudice on his own behalf or as a result of any abuse of discretion. The power of trial courts to be able to control the verdicts of juries to some extent should be maintained in our system of jurisprudence. As was stated by the Appellate Court of the State of California in *DuVall v. Boos Bros. Cafeteria Co.*, 187 P. 767:

“The trial court should be vigilant to set aside verdicts where there is reason to believe passion, prejudice or sympathy has influenced the jury.”

In the case of *Bonner v. Los Angeles Examiner*, (Cal.) 62 P. (2d) 427, the California Appellate Court said:

“The granting of a new trial is a matter resting so largely in the discretion of the trial court that its action will not be disturbed upon appeal except upon a manifest and unmistakable abuse. On appeal, every presumption is in favor of the order, and the plaintiff must show affirmatively that the order was erroneous. *Rosenberg v. George A. Moore & Co.*,

194 Cal. 392, 396, 229 P. 34. It has been said and quoted over and over again that 'it is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial.' 2 Cal. Jur. 905, and cases cited. This rule arises largely from the fact that the order granting a new trial does not finally dispose of the case, but leaves it for retrial upon the merits.

\* \* \* \* \*

"On appeal from such an order, however, an appellate court will not disturb the order if there is a reasonable or fairly debatable justification for it. It has been said and often quoted 'that the trial court should be vigilant to set aside verdicts where there is reason to believe that passion, prejudice or sympathy has influenced the jury to give more than the facts reasonably warrant. No definite rule can be announced as to when a verdict is or is not so excessive within these rules, but it is settled that an order granting a new trial for excessive damages will not be disturbed if there is a reasonable or fairly debatable justification therefor.'"

This court has had occasion to pass upon the question of the granting or refusing of new trials in several recent cases. In the case of *Moser v. Zion's Co-op. Mercantile Institution*, . . . Utah . . . , 197 P. (2d) 136, this court said:

"It is a matter now too well settled to admit of any serious dispute that the question of granting or denying a motion for a new trial is a matter largely within the discretion of the trial court. \* \* \* This court cannot substitute its discretion for that of the trial court. \* \* \* We do not ordinarily interfere with rulings of the trial court in either granting or denying a motion for a new trial, and unless abuse of or failure to exercise discretion on

the part of the trial judge is quite clearly shown, the ruling of the trial judge will be sustained.”

In the case of *King v. Union Pacific R. Co.*, 212 P. (2d) 692, . . . Utah . . . , which we have already referred to, this court had the question squarely presented to it because the sole error assigned in that case was that the court had abused its discretion in granting a new trial after the jury had returned a verdict of no cause of action. In that case this court referred not only to prior Utah cases but to numerous cases from other jurisdictions. It referred to and quoted from the California case of *Rose v. Carter*, 84 P. (2d) 174, to the effect that the order of a trial court in either granting or denying a new trial will not be disturbed on appeal unless it appears that there was a manifest abuse of discretion.

Also to the Oklahoma case of *Belford v. Allen*, 86 P. (2d) 676, wherein the court held:

“Where the evidence is conflicting the trial judge has the duty to weigh the evidence and to approve or disapprove the verdict, and if the verdict is such that in the opinion of the trial court it should not be permitted to stand, and it is such that he cannot conscientiously approve it and believes it should be for the opposite party, it is his duty to set it aside for a new trial.”

In the *King* case, cited *supra*, it was contended by the defendant, “That if a trial judge is allowed to set aside a verdict returned by a jury which is supported by substantial competent evidence, there results an infringement upon its right to trial by jury.” That is very similar to the position



taken by counsel for appellant in this case, as appellant argues that substantial rights were denied plaintiff because the court reduced the amount of the judgment, or, in the alternative, required the plaintiff to accept a new trial. As this court said in the *King* case, *supra*:

“There is no merit in this contention.

\* \* \* \* \*

“ ‘Trial by jury’ \* \* \* is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them of the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence.’

\* \* \* \* \*

“In *Whitfield v. De Brincat*, 35 Cal. App. 2d 476, 96 P. 2d 156, the court declared that the constitutional right in certain proceedings to have issues determined by a jury is subject to the wide discretion of the trial court, and that the rule that the trial judge, when convinced that the evidence is insufficient to justify the verdict or that the weight of the evidence is against the decision, should grant a new trial, is a salutary one for the protection of litigants.”

At the conclusion of his argument on Point I appellant charges the court with “utter and complete disregard for the uncontroverted evidence presented by plaintiff.” We cannot understand what appellant means by such a charge and what he means by the phrase “uncontroverted evidence.” It is true that the fact that plaintiff suffered the injury of a broken leg, with attendant pain and suffering, was not controverted. The question as to the amount of damage

claimed by plaintiff, however, was controverted. Plaintiff alleged in his complaint that he had been damaged in the amount of \$20,000.00, which charge was denied by defendant. The only evidence giving any monetary basis upon which the jury could figure plaintiff's damages was that plaintiff's average wage had been \$250.00 per month before deductions, and prior to his retirement October 15, 1947. The amount of the deductions was not shown and the amount of his retirement pay was not shown. The question as to defendant's liability was very seriously controverted and very fully controverted by the evidence. As was said by this court in the *King* case, *supra*, at page 698:

"We cannot agree with the trial judge that the evidence is 'uncontroverted' in the two respects mentioned by him in his decision. However, as has been pointed out, it is not necessary that the evidence be uncontroverted in favor of the moving party before the trial court can grant a new trial."

There is one point which we think counsel for appellant have overlooked in their argument, and that is, the fact that the trial court could have granted a new trial without requiring any remission from the verdict as given by the original jury. A trial court is not limited in such cases in granting new trials. We may admit that reasonable men might differ as to whether a \$5,000.00 verdict would have been sufficient as the trial judge insisted in his ruling on the motion for a new trial. At the same time, we feel that most reasonable men would not disagree on the proposition that \$20,000.00, the amount of the original verdict, was excessive in all events.

This court has had before it a similar question recently in the case of *Duffy v. Union Pacific Railroad Company*, . . . Utah . . . , 218 P. (2d) 1080. In that case this court ordered a remittitur where the trial court had refused to reduce the damages allowed by the jury, and in the event the plaintiff failed to accept the remittitur this court ordered that a new trial be granted. In that case the jury returned a verdict of \$12,500.00. The evidence showed, \$1,300.00 in loss of wages, and in deciding as above this court stated:

“We must assume that the jury awarded plaintiff the sum of \$1,300.00 for loss of wages, which were his only established special damages, and this leaves the sum of \$11,200.00 for general damages. When we get in this domain reasonable minds differ as to what amount is excessive. However, there must be a limit beyond which a reasonable jury cannot go and the limit must be determined on the gross amount of the verdict and not the net amount.”

This court concluded that the damages as awarded by the jury were “so grossly excessive and exorbitant as to convince the members of this court that the verdict is far in excess of what a reasonable jury could determine as a maximum amount awardable for this type of injury. For these reasons it appears to us to have been given under the influence of passion and prejudice.”

In the case at bar, disregarding the question raised as to how or in what manner the second break occurred in Williams’ leg, and considering the ten months up to the time when he should have gone back to work but chose to take his retirement instead, the total wages lost to plaintiff in his take-home pay would have been something less than \$2,500.00. Considering the total verdict of \$20,000.00, this

would have left \$17,500.00 for general damages. Even if we assume, as counsel state, that up to the time of trial he had lost \$3,900.00 in wages (which cannot be assumed because the amount of his pension was not shown), still that would leave in excess of \$16,000.00 as general damages. Clearly the same can be said in this case, as was in the *Duffy* case, "There must be a limit beyond which a reasonable jury cannot go and the limit must be determined on the gross amount of the verdict and not the net amount."

We submit that Judge Hendricks was honest in the exercise of his discretion and in concluding that the jury's verdict of \$20,000.00 in this case was excessive. The plaintiff was not required to accept the amount as remitted by the Judge and the fact that a new trial was granted does not infringe upon plaintiff's right to trial by jury, as this court decided in the *King* case, *supra*.

We respectfully submit that the trial court did not err in granting defendant's motion for a new trial following the first trial.

## POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTIONS NUMBERED 4 AND 5, MATTERS IN SAID REQUESTS WHICH WERE PROPER HAVING BEEN OTHERWISE GIVEN IN SUBSTANCE. (Appellant's Statement of Points 1 and 2.)

We do not dispute as a general proposition the law referred to by counsel for appellant in their argument under

Point No. II, because we admit that "each party to a suit is entitled to have his theory, when there is evidence to sustain it, submitted to the jury \* \* \*" In accepting that law, we want to remind counsel for the appellant that the law also is to the effect, as sated in the case of *Toone v. J. P. O'Neill Const. Co.*, 40 Utah 265, 121 P. 10, 16, that:

"\* \* \* 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."

In the case at bar the court briefly and in simple language stated both the theory of plaintiff and the theory of defendant in Instruction No. 9.

It will be noted that in each of the cases cited by counsel under their Point No. II, that the question was raised because the court had refused to give certain instructions requested by counsel. We think that appellant's counsel in this case must admit that if no specific instructions on any particular point are requested, then error cannot be charged against the court for failure to instruct upon such point. It will also be noted that the court in several, if not most of such cases, contrary to appellant's argument, held that the theories of each had been given. In the *Toone* case, above referred to, the court had modified one of appellant's requests, and in ruling upon the matter wherein appellant had contended its theory had not been properly presented, it was stated:

"Appellant's theory of the evidence was sufficiently covered by what the court told the jury, and

hence it was not prejudiced by the court's modification referred to."

As a preface to our argument upon this point, we wish to call the attention of the court and counsel to two rules of law. One is that if a request is in part incorrect, or it is inappropriate if applied to the facts, the court commits no error in wholly refusing it. The court is not required to weed out and reject the bad and give only the good part. The request must be correct in all respects.

*Yenor et ux. v. Spokane United Rys.*, 255 P. 947.

*Wiley v. Young*, 174 P. 316.

*Colburn v. Great Northern Ry. Co.*, 6 P. (2d) 635.

*Chicago, R. I. & P. Ry. Co. v. Brooks*, 11 P. (2d) 142.

*MacDonald v. Calkins*, 251 P. 458.

The second proposition we wish to refer to is that "the general rule is that unless the party requests an instruction on a special matter, he cannot predicate error upon the court's failure to charge."

*State v. Miller*, 111 Utah 255, 177 P. (2d) 727.

*Taylor v. L. A. & S. L. R. Co.*, 61 Utah 524, 216 P. 239.

In the *Miller* case this court stated:

"Our Utah Code provides that in a criminal trial, 'When the evidence is concluded the court must charge the jury as in civil actions.' Sec. 105-32-1(5), U. C. A. 1943. In civil actions Sec. 104-24-14(4), U. C. A. 1943, provides that, 'When the evidence is concluded the court shall instruct the jury in writing

upon the law applicable to the case, \* \* \*.' This requirement that the court instruct 'upon the law applicable to the case' does not place upon the court alone the burden of making up instructions which cover every question which may have arisen in the case."

In this connection it is interesting to note that the trial court accepted and used the help given him by both counsel in their requests, and keeping in mind the rule last stated, we would like to look at the requests as submitted by plaintiff and see which of those requests were actually given by the court. Plaintiff requested only six instructions. The entire content of plaintiff's requested Instruction No. 1 was contained and given in the court's Instruction No. 2. Plaintiff's requested Instruction No. 2 was also embodied in and given in the court's Instruction No. 2. Plaintiff's requested Instruction No. 3 was given verbatim as the court's Instruction No. 8. Plaintiff's requested Instruction No. 6 was given almost verbatim as the court's Instruction No. 22. This leaves only plaintiff's requested Instruction No. 4 and No. 5 as not being given directly and almost verbatim, and as shown by the endorsements of the court thereon, it was at least the trial court's opinion that he had given the substance of them—at least they were so given in so far as the same were applicable to the evidence in the case.

Instruction No. 4 as requested by plaintiff was and would have been entirely improper for the court to give. That instruction in effect would have told the jury to, or would have authorized them to find the defendant negligent if they found "that defendant failed and neglected to render



such (plaintiff's) footing safe by sprinkling salt or sand in the area of said switch \* \* \*." Such an instruction would have been entirely improper under the pleadings and evidence in the case. No negligence was charged in the pleadings for failure to use salt or sand, neither having been mentioned in the pleadings at all. The defendant's witnesses testified that neither salt nor sand was ever used around these switches and that it would be improper to do so (R. 172, 174, 175, 181, 211-2). One of plaintiff's witnesses did testify that salt had been made available at some of the switch shanties elsewhere in the Ogden yard, but none had ever been available at these switches, and plaintiff himself not only testified that none had ever been used at these switches but also that he had never requested any here (R. 78-1). The switches in the yard where salt had been used were not switches connected up with or controlling electric semaphore circuits (R. 175, 176-2), and testimony of the defendant's witnesses was undisputed that not only was salt not used at these electrically activated switches but it was improper and against the rules to use it (R. 181, 211-2). None had ever been used at this switch to plaintiff's own knowledge (R. 44, 45-1) (R. 107-2). None of plaintiff's witnesses testified that sand had been used or that it would have been proper to use it. On the other hand, the defendant's witnesses testified that it would have been improper to use sand and that it was never done, and the section foreman gave the reason stating that if sand were used it would soon fill up the pores in the gravel ballast so that the melting snows or surface waters would puddle and not seep away into the ballast (R. 175, 211-2).



Before Instruction No. 4 would have been proper, it would have been necessary for the court to reframe it. It would have been necessary to eliminate any question with respect to sand and it would also have been necessary to add another instruction directing or authorizing the jury to find from the conflicting evidence whether it was usual or proper to have, or whether reasonable care under the circumstances required defendant to have salt available, and if they found in the affirmative then whether under the circumstances in this case the defendant was negligent in not having salt available at this particular switch. The requested instruction did not embody the facts of this case as it should have done and would have been tantamount to directing the jury to find the defendant negligent if the jury should find that no salt had been made available or used in the area without considering the other circumstances, or that they could find the defendant negligent if no sand was available or sprinkled in the area where neither pleadings nor evidence warranted any such reference to the use of sand.

IF AN INSTRUCTION AS REQUESTED IS NOT PROPER AND DOES NOT FIT THE FACTS AS TESTIFIED TO IN A CASE, THE PARTY REQUESTING SUCH AN INSTRUCTION CANNOT ASSIGN ERROR BECAUSE THE COURT FAILED TO REFRAME OR REMODEL THE INSTRUCTION TO FIT THE FACTS OF THE CASE. Again we say that plaintiff's witnesses gave no testimony whatsoever with respect to the use of sand, and the only evidence concerning the use of sand

showed that it was improper and never done; and the only evidence with respect to salt showed that it had never been used at switches of this type and had never been requested. In spite of this, the appellant now claims that the court should have given his requested Instruction No. 4, which would have told the jury they could find the defendant negligent if the defendant had failed to "sprinkle salt or sand in the area of such switch." The court did not err in refusing to give the instruction as requested but it would have been error for the court to have given such instruction.

See *Pollari v. Salt Lake City*, 111 Utah 25, 176 P. (2d) 111, wherein this court said:

"The court's statutory duty (Section 104-24-14(4), U. C. A. 1943) to instruct 'upon the law applicable to the case' pertains to the 'case' made by the evidence in support of the allegations in issue. Ordinarily to instruct on the law applicable to evidence which did not support allegations upon which issue was joined or which supported theories outside of the scope of the pleadings would be erroneous

\* \* \*"

See also:

*Fowler v. Medical Arts Bldg.*, 112 Utah 367, 188 P. (2d) 711.

*State Bank of Beaver County v. Hollingshead*, 82 Utah 416, 25 P. (2d) 612.

Appellant has gone to some length in his brief after quoting the cases to argue that plaintiff's theory of the case was not adequately presented. We would like to ask

wherein the plaintiff or his counsel was in any way hampered in his discussions with the jury in expounding his theory of the case or his argument because plaintiff's theory of the case had not been covered. There was nothing in the instructions which detracted from plaintiff's theory or which prevented plaintiff's counsel from taking full advantage of any argument before the jury which they may have desired in connection with that theory, and as a matter of fact, plaintiff's counsel repeated and stressed and reiterated the fact of the freezing weather, the snow and ice in the area, and the claim that it was proper for the plaintiff to stand on the switch ties to throw the switch.

In the discussion had with the court concerning the instructions as they were given to the jury, and immediately following the court's instructing the jury and before argument, counsel did not complain that plaintiff's theory was not presented nor properly covered. After reading the instructions to the jury, the following passed between court and counsel:

THE COURT: I will ask you gentlemen if you observe any error of an elemental nature that you want to call to the Court's attention at this time or if you desire to take any exceptions that you want to argue to the Court.

MR. MINER: I have none.

MR. BLACK: We have none, Your Honor (R. 229-2).

After which it was agreed that exceptions would be taken after the argument and plaintiff's counsel were directed to proceed with their argument to the jury.

Even after argument when exceptions were taken, counsel, although they did take some exceptions, only seriously urged an objection to one instruction. That was to Instruction No. 19 as the court had given it, and the court made a correction in that instruction and called the jury back and gave a substituted instruction to them, with which counsel seemed to be entirely satisfied.

With respect to this question of presenting plaintiff's theory to the jury, let us inquire just what plaintiff's theory was. We think plaintiff's theory can best be summarized by the words of counsel starting with the third line from the top on page 73 of appellant's brief, stating:

“\* \* \* The specific act of negligence relied on by 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.”

It is interesting to note that in this statement, which is the exact statement of theory used by appellant in arguing on the motion for new trial before the trial court, appellant does not follow plaintiff's request No. 4 completely, and particularly will it be noted that appellant in such state-

ment eliminates all reference to salt and sand as was contained in request No. 4.

Even if such a statement had been put before the court in a formal request to give to the jury, there would have to be either a modification or an additional instruction to enable the jury to determine whether the place in question was the place where the "switch tenders would, in the ordinary performance of their duties, *be required to stand.*" But assuming that such a statement had been presented in a request, which it was not, how would it have compared with what the court did tell the jury? The words "by and through its authorized agents, servants, and employees," and anything that such words could convey, were fully covered by the court's Instruction No. 8, and Instruction No. 8 was plaintiff's request No. 3 given verbatim. Does the statement that there was "slush and snow around the switch" and that the weather was "at freezing point," which "would render footing dangerous and unsafe" state anything more or different than was stated by the court where he said that the plaintiff claimed "that the defendant allowed the ties on which the switch was located to become \* \* \* covered with snow and ice, which caused them to be in a slick and slippery and unsafe condition?" There would not be ice unless the weather was at freezing point.

Do the words "that the defendant failed and neglected to make said footing reasonably safe by cleaning the ice and snow off" say any more than what the court stated, "that the defendant allowed the ties \* \* \* to become and *remain* covered with snow and ice, which caused them to be



in a slick and slippery and unsafe condition?" Without adopting the exact words which appellant now uses in his brief, but which he never used in any request, the court could not have stated much more definitely the position of the plaintiff than he did in the short, concise statement as given in Instruction No. 9.

In Instruction No. 8 the court very definitely advised the jury that an employer was liable for the negligent acts or omissions of any of its employes, and that if the negligence of any such employes contributed in whole or in part to proximately cause plaintiff's injury, then the negligence of those employes becomes the negligence of the employer. The court immediately followed with Instruction No. 9 informing the jury as above referred to. The court also in the instructions—however in a later instruction—told the jury that it was the duty of the railroad company to exercise reasonable care to provide its employes with a reasonably safe place to work. As a preface to the entire matter, the court in its Instruction No. 2 gave the substance of plaintiff's requests as numbered 1 and 2, stating as a matter of law that plaintiff and defendant were engaged in interstate commerce and this was a case under the F. E. L. A. and that the laws of the State of Utah and Workmen's Compensation Laws were not applicable to the case. In Instruction No. 6 the court told the jury that they should disregard any attitudes or knowledge they may have gained from other cases concerning the law of negligence applicable to other cases and apply only what was given to them in these instructions, and the law assumes that the jury follows the court's instruc-

tions rather than assuming to the contrary. *Ryan v. Beaver County*, 82 Utah 27, 21 P. (2d) 858.

By the instructions which we have quoted and referred to hereinabove, plaintiff's theory of the case as summarized and stated by plaintiff's own counsel on page 73 of appellant's brief is as effectively put before the jury as it could have been without quibbling over mere words.

Appellant argues at the bottom of page 27 of his brief that the jury was not told that if they find the facts as set forth in Instruction No. 9, they must find the issues in favor of the plaintiff and against the defendant. Such a statement is not true and such an instruction to the jury would not be proper. There was no such absolute duty. The jury could have found that it was not negligence on the part of the defendant to fail to remove all ice and snow from these switch ties. It was the plaintiff's theory that defendant allowed such snow or ice to accumulate on these switch ties, and plaintiff's contended that such was negligence, but even if the jury should find that the defendant had allowed snow and ice to remain on the ties, the jury still had the right to decide whether or not the railroad company, being charged to do what a reasonable man would have done, was negligent in not anticipating that a switchman would step on the icy ties to throw the switch, and the jury was entitled to decide whether even if plaintiff's theory was true, such action on the part of the defendant amounted to negligence. The Court could not direct that it would be considered as negligence as a matter of law.

Plaintiff goes on to complain that the jury should have been instructed that if the ties had become and had re-

mained 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, the jury should have found for plaintiff. Such an instruction would not have been proper because the jury would have had to find whether or not the plaintiff was "required to locate himself" upon the ties to do his work, and even then the jury should be the one to decide whether allowing the ties to be in such condition would be negligence rather than having the court direct the jury that it was negligence as a matter of law. Appellant's counsel seem to proceed on the theory that if the jury could have found that the ties were covered with ice and snow and that the plaintiff slipped on those ties, that then there was an absolute duty to instruct the jury to return a verdict for the plaintiff. Plaintiff's counsel see only one side of the case. They see only the point they are interested in and entirely overlook the fact that the jury was entitled to determine the question as to whether or not it was negligence for the Defendant to fail to clean all snow and ice from the ties and also whether it was necessary, proper or the usual thing to do to stand on the ties to throw the switch, or whether the switch could have just as easily, conveniently, and more properly have been thrown from a position where he would not have been standing on the ties. The jury could have found that the ties were slick because of the ice and snow and could still have found that such was not negligence on the part of the defendant or that the plaintiff was guilty of negligence to such an extent that his negligence was the sole proximate cause of his injuries.



In all of what we have said we must again remind the court and counsel that plaintiff is complaining that the jury was not instructed so-and-so, and yet by including salt and sand in his requested Instruction No. 4, plaintiff went further than his avowed theory and by including too much in the request cannot charge error on the part of the court for failure to give such a request.

There are numerous instances where the plaintiff could have made requests of the court to give instructions which would apply more specifically to some of the facts brought out in evidence, both from plaintiff's and defendant's witnesses. The defendant submitted three times the number of requests that the plaintiff did. Whether or not these requested instructions may have been helpful to the court in framing his charge to the jury, the court, insofar as both plaintiff and defendant were concerned, considered that he had given the substance of all such requests. It is rather unfortunate perhaps, for both plaintiff and defendant, that counsel does not have the time to prepare requested instructions after the evidence is all in. Because of this fact it sometimes becomes necessary to anticipate what the evidence will be, and there are few cases, if any, where the instructions as given cover and clearly reflect all the testimony that has been given in a case in order to guide the jury in its determination thereon. In this particular case the plaintiff had had the benefit of one prior trial and could have changed his requests or submitted additional ones. Plaintiff's requests were substantially the same as on the first trial, and the instructions as actually given to the jury were

substantially the same on both the first and the second trials, the only substantial change being the substitution of an additional Instruction No. 19, which was done at the request of plaintiff's counsel after the close of the argument.

The court cannot be accused of error if no instructions are requested that fit the facts of a case and if it refuses to give instructions that are broader than the pleadings or the evidence, or if it attempts to frame in its own way instructions that may fit the evidence or to reframe some of the instructions that may be requested to try and fit the facts of the case.

It is interesting to note that plaintiff's Instruction No. 4 as requested was the same at the time of the first trial as at the time of the second, and after knowing what the evidence on the first trial was, (R. 78, 83, 102, 161, 162, 179-1) there was no justification whatsoever for including any reference to sand in such request, and he could have modified such instruction with respect to salt. At the first trial such Instruction No. 4 was endorsed by the judge as being given in part and in part refused (R. 034-1). In spite of the experience on the first trial and the apparent knowledge of what the testimony would be, counsel for plaintiff insisted on including the question of sand in their request No. 4 on the second trial although there was an entire lack of pleading or evidence to justify the same.

Under his argument on Point II, plaintiff complains of the court's refusal to give his requested Instruction No.

5. Said request No. 5 contained two paragraphs, the first of which was given almost verbatim in the court's Instruction No. 20, and appellant cannot be heard to quibble over words because of the difference in the wording as that portion of the instruction was actually given. The second paragraph of said requested Instruction No. 5 had reference to the furnishing by defendant to plaintiff of a reasonably safe place to work and suggested to the jury that if they found that the 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 become and remain covered with ice, etc., then they should find for the plaintiff. Such an instruction by including the statement "where plaintiff was required to station himself," assumed a matter which the jury had to decide, and such an instruction under the facts of this case would not be proper because by the wording there given it would have directed the jury to find for the plaintiff if the jury found that there was ice and snow on the switch ties where plaintiff stood to throw the switch regardless of whether the jury might or might not have otherwise found that it was necessary for plaintiff to stand there. In order to have rendered such an instruction proper under the facts of this case it would have been necessary to have in some way included in the instruction not only the question of "if you find that the ice and snow rendered the plaintiff's footing unsafe," but also "and if you find that it was reasonably necessary for plaintiff to stand on said ice covered ties where the footing would be unsafe in order to throw said switch;" and then if the slippery condition, plus the neces-

sity of his standing there, proximately caused the accident in whole or in part, the plaintiff would have been entitled to some verdict, provided, that the jury otherwise found that it was negligence on the part of the defendant to allow ice and snow on the ties in the first place. The matters contained in that second paragraph of Instruction No. 5 were given in substance elsewhere in the instructions besides, and there was no error in the court in refusing to give all of the Instruction No. 5 as requested.

At the top of page 32 of his brief appellant refers to proximate cause and states: "There is no such thing as 'proximate cause' under the Federal Employers' Liability Act." We are surprised at counsel's statement and cannot feel that they are serious in urging such a proposition. In their argument at the top of page 32 counsel were apparently intending to refer to matter contained in the court's Instruction No. 17 wherein the question of proximate cause is raised rather than in Instruction No. 15 of the court's instructions immediately preceding counsel's argument at the top of page 32. In their brief to the trial court counsel attacked the court's Instruction No. 17, then followed with the statement referred to above that there was no such thing as proximate cause under the F. E. L. A.

In the case of *Reynolds, Administratrix v. Atlantic Coast Line Railroad Co.*, 336 U. S. 207 (Decided February 93 L. Ed. 476 69 S. Ct. 511 1949), the United States Supreme Court sustained the Supreme Court of Alabama wherein the Alabama court had found that there was some negligence but that the negligence found was not the proximate cause of the accident

in question. The Supreme Court of the United States in referring to the Alabama court's decision and in affirming that court stated:

“\* \* \* It held, however, that the facts alleged did not show that the accident resulted proximately, in whole or in part, from that negligence. We cannot say that the Supreme Court of Alabama erred.”

Again we say, we are surprised at counsel's statement because it has been our understanding of the law that liability in any negligence case does not attach regardless of whether it is a federal liability case or any other type of case unless such negligence as is chargeable to a defendant is shown to be in some manner a proximate cause of an injury sustained.

On page 33 of appellant's brief, after referring to only parts of Instructions Nos. 21 and 23 as given by the court, counsel complain of instructions as given with respect to guess-work, conjecture or speculation, and state that “as a matter of legal principle a permissive inference could reasonably be deducted that the place of work was unsafe because slick and slippery.” There was no question of permissible or permissive inference in this matter at all. The plaintiff and his witness Beckett testified directly to the slick and slippery and unsafe condition. It was not necessary for the jury to draw any inference or to guess or speculate in any manner whatsoever; the only question was as to whether or not the jury would believe the statements of these witnesses. If they believed them, no inference was

necessary. An inference is permissible where there is no direct testimony upon a subject, but where the plaintiff and his star witness directly state that the whole area was covered with ice and snow, that it was all slick and slippery and unsafe, there is no question of inference in any manner whatsoever, and the fact as to whether or not a court may have instructed the jury that they should not guess or speculate could not apply to such testimony. Appellant seems to feel that if the jury believed that the ties were slick and slippery and unsafe, then that in and of itself would compel a verdict for the plaintiff. Counsel overlook the fact, however, that there was very definitely in this case a question as to whether or not it was negligence on the part of the defendant to fail to keep all ice and snow off these switch ties or whether or not it was necessary or proper for the plaintiff to stand on the ties while manipulating the switch, and that was a matter the jury had to determine as well as the question of the slick and slippery condition of these ties.

We firmly disagree with plaintiff's contention that plaintiff's requested Instructions No. 4 and No. 5 are correct statements of the law as applied to the evidence in this case, and we think it would have been error for the court to give them as requested. We think that the court committed no error in refusing them, and we feel that the court was justified in his conclusion in ruling upon the motion for new trial wherein he stated as follows (R. 244-2) :

“During the course of the trial I discussed with counsel for the plaintiff the instructions that were given in the first trial of this case and asked counsel if the instructions as given were substantially in



accord with their views as to the law covering the case. In answer to this, counsel stated that the instructions were substantially correct. With the exception of some minor changes, the instructions as given in the second trial were the same as those given in the first, and the evidence in both trials was substantially the same. If the case were retried, it is my judgment that the instructions could be improved upon, but considering the instructions as a whole, the plaintiff's theory, in my judgment, was adequately presented and the defendant's theory was not over emphasized."

We would like to refer specifically to some of the cases cited by counsel, and have already quoted some from the case of *Toone v. J. P. O'Neill Const. Co.*

The case of *Furkovich v. Bingham Coal and Lumber Co.*, 45 Utah 89, 143 P. 121, was a case involving the doctrine of *res ipsa loquitur*. In that case a request stating that the defendant's responsibility was for "ordinary care" or "reasonable care" was refused because the court said it was not at all adapted to the particular facts and circumstances of the case. This court on appeal indicated that had a proper request been proposed it should have been given, but no otherwise proper request was proposed, and this court held it was not error to refuse the one containing merely abstract principles. Speaking of the appellant in that case, this court said:

"\* \* \* It offered thirteen requests, all of which the court refused. We have carefully examined all of them, and each one contains some fault.  
\* \* \* It must suffice to say that because of the

inherent defects contained in each request the court was fully justified in refusing to give any of them.”

In the case of *Pratt v. Utah Light & Traction Co.*, 57 Utah 7, 169 P. 868, the defendant had given at least three requests covering the same subject matter in a little different way, and this court held that each of the three requests as proposed was entirely proper—none of them containing any objectionable matter—and therefore the court should have given one or the other of them, but all were refused. That is not true in the case at bar. Both of plaintiff’s requests, No. 4 and No. 5, contained objectionable matter and the substance of such instructions was otherwise substantially covered.

The case of *Morgan v. Bingham Stage Lines Co. et al.*, 75 Utah 87, 283 P. 160, while stating a general rule as to theories in a case, cannot otherwise help the appellant. In that case the court had given an instruction referring to the duty of a driver of a motor vehicle “at crossings and street intersections.” The accident involved in that case did not happen at a crossing or street intersection, and this court sustained the appellant’s contention that the giving of an instruction which contained matter outside of or in addition to the pleadings and evidence in the case was erroneous. After citing a number of cases the court concluded:

“\* \* \* These cases establish the proposition that an instruction which related to matters outside the issues, or as to which there is no substantial evidence, is improper.”

That case, therefore, could do nothing else but show conclusively that the giving of Instruction No. 4 as requested

by plaintiff would have been error because it would have allowed the jury to find the defendant negligent for failure to use sand around the switches when the question of sand was entirely outside of any pleadings or evidence in the case.

The case of *Morrison v. Perry*, 104 Utah 151, 140 P. (2d) 772, is an example of an opposite situation where instead of inserting something not within the evidence or pleadings the court's instructions failed to instruct the jury with respect to an emergency created by the plaintiff in driving on the wrong side of the road. We must assume from the statements in that case that some of the instructions presented by defendant were proper and could have been given, this court stating at page 778:

“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. \* \* \*”

In the case of *McDonald v. Union Pacific R. Co.*, 167 P. (2d) 685, the rule with respect to presenting various theories is set forth, and counsel quote on page 43 a portion of the opinion, ending with the question: “But did the court fail in this respect?” Counsel neglected to give this court's answer upon that point, which we quote:

“Keeping in mind that we are now discussing whether or not appellant's theory of the case was submitted to the jury, and are not discussing how well it was submitted, it is believed that a comparison of all the quotations, so far set out in this opinion,

will disclose to the reader that the court follows rather closely the alleged facts and the pleadings. \* \* \* *The court covered these theories as indicated, but, of course, did not agree with appellant in the detail of expounding them.* \* \* \*” (Italics ours.)

We submit that the foregoing statement can be applied very definitely to the case at bar.

At the risk of repetition, we wish to call attention to the instructions as they were given by the court and invite a comparison between those instructions and the claims made by counsel for appellant concerning plaintiff’s theory. In the court’s Instruction No. 2 the court instructed that at the time of the accident both the plaintiff and the defendant were engaged in the conduct of interstate commerce and that the plaintiff was acting in the course of his employment. The instruction further states:

“This action is brought under what is known as the Federal Employers Liability Act which provides in substance, as far as is material in this action, 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 in the operation or maintenance of its appliances or other equipment. The statutes of the State of Utah governing employers liability and workmen’s compensation are not applicable to this case.”

In Instruction No. 6 the court instructed the jury to disabuse their minds with respect to any law of negligence

that they may have gained from any other cases, this instruction being given usually at the request of the plaintiff, but at all events being given because the usual rules with regard to contributory negligence in other cases do not apply in F.E.L.A. cases.

In Instruction No. 8 the court instructed the jury:

“An employer is civilly liable for the negligent acts or omissions of an employee committed while in his service and within the scope of his employment, that is, in the transaction of employer’s business, and if you shall find and believe from a preponderance of the evidence that plaintiff sustained his injuries by reason of the negligence of a fellow employee or fellow employees, (which) contributed in whole or in part to proximately cause the plaintiff’s injuries, then I charge you that such negligence is imputed to and becomes the negligence of the employer.”

In Instruction No. 9 the court tells the jury that the plaintiff claims 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 in an 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. 20 reads:

“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."

In Instruction No. 22 the court gives in a long instruction, not entirely verbatim but wholly in substance and effect, the matters contained in plaintiff's requested Instruction No. 6 with respect to matters which they may consider in determining the amount of damages to award to plaintiff if they find that he is entitled to damages.

We invite a comparison of matters contained in these instructions with the statement given in appellant's brief on page 73 as already herein quoted, and from such comparison it will be seen that the plaintiff's theory was very definitely and adequately covered by the instructions as given. It is true that not all of the instructions followed each other in consecutive sequence. This would be impossible, and in the giving of instructions as was done here, the court interspersed general instructions throughout the whole group of instructions with those which may have referred particularly to some specific point. For instance, after Instruction No. 2 which set forth the basis of plaintiff's claim, Instructions 3 to 5 were general instructions; Instruction 6 sought to disabuse the minds of the jury as to any ideas they may have had on the laws of negligence; Instruction No. 7 then defined negligence; then followed Instructions 8 and 9 which added more to the theory of plaintiff's case. Plaintiff will argue that Instructions 10 and 11



were favorable to defendant; Instruction 12 could not be so considered; and Instructions 13 and 14 again were general. Thus it will be seen that it cannot be contended by plaintiff that any instructions which may have set forth any of defendant's theories on the case were given in any more of a consecutive manner than were those applying to defendant's phase of the case. And here we will ask, are defendant and the court to be charged with error because of the fact that the defendant submitted more requests in an effort to assist the court in preparing the instructions than were submitted by plaintiff? Regardless of what conclusion may be made upon that question, it is a fact that when the instructions are read as a whole the plaintiff's theory is presented as adequately and directly as is any theory on behalf of the defendant, and plaintiff's theory is presented as adequately as was warranted by any proper requests made by plaintiff. Considering these facts, plus the fact that Instructions No. 4 and No. 5 would not have been proper in any respect without some changes, and considering the further fact that the substance of Instructions 4 and 5 which was not objectionable was included by the court in the instructions as given, we confidently state that the jury was not in any way misled, and furthermore we are absolutely certain that appellant's counsel were not hampered in any way but were given a free rein in presenting any argument which might be available to them and in calling the jury's attention to any inference which may have been available. Appellant's Point II and statements of error as numbered 1 and 2 should be decided adversely to appellant.

## POINT III

THE TRIAL COURT DID NOT COMMIT ERROR AT THE SECOND TRIAL IN INSTRUCTION NO. 10 BY INSTRUCTING 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.” (Appellant’s Statement of Points 4).

The entire argument of appellant under this Point III is unavailing and appellant cannot charge error on the part of the court with respect thereto because plaintiff did not except to Instruction No. 10 in any manner that would make the argument he has asserted here proper or in any manner by which he could charge the court with error as he has done in his statement of error No. 4 and his argument under Point III.

Mr. Dwight King, one of the counsel for plaintiff, in taking exceptions to the court’s instructions, merely said with respect to Instruction No. 10 that plaintiff “excepts to the court’s Instruction No. 10 for the reason that said instruction and the whole of said instruction unduly emphasizes and is repetitious of the court’s Instruction No. 7, subsection (c), which defines the meaning of the word ‘negligence’ and also defines ‘burden of proof’ and ‘ponderance of the evidence,’ together with ‘proximate cause’.” Thus the only exception taken was general, on the basis that it was repetitious of Instruction No. 7 giving certain general definitions.

Instruction No. 10 consists of three sentences. The particular part complained of by appellant was contained in the first sentence. If plaintiff objected to that, he should have objected specifically to it and pointed out such objectionable matter to the court. The matter was easily separable and the two sentences following cannot be questioned as good law even though the last one may be somewhat repetitious—not of Instruction No. 7 as charged—but of other matters following in later instructions.

In a rather early case this court made a definite ruling upon the taking of such exceptions and has uniformly adhered to the rule ever since. In *Farnsworth v. Union Pacific Coal Co.*, 32 Utah 112, 89 P. 74, this court said:

“It is no longer an open question in this court, as it has often been held in common with most courts, that in taking exceptions the portion that is excepted to must be pointed out. A mere exception to an instruction is an exception in solido to the whole instruction, and, unless the whole instruction is bad the exception is unavailing for the purpose of having any particular part reviewed and passed upon by this court. \* \* \* It is necessary, however, in taking exceptions to bring sharply to the mind of the trial court the particular part of the instruction that is faulty so that it may be corrected. \* \* \* It is an easy matter to except to a phrase or to a sentence or to any number of such phrases or sentences and when this is done the matter can be intelligently corrected by the trial court.”

This *Farnsworth* case has been cited and followed in numerous cases decided by this court since that time.

Even where parts of an instruction may be bad, if part of the instruction is good, a general exception will not be available. *Rampton v. Cole*, 52 Utah 35, 172 P. 477:

“Conceding the instruction under consideration to be erroneous in that regard, yet as we have pointed out the first paragraph was proper and correctly stated the law. The exception taken was taken to the instruction as a whole, and therefore, for that reason was insufficient and must be disregarded.”

In *McLaughlin v. Chief Consolidated Mining Co., et al.*, 62 Utah 532, 220 P. 726, the court said:

“The exception taken was to the instruction as a whole.

“‘It is a rule too well established to be the subject of controversy that such an exception cannot be sustained if any part of the instruction is good.’ *Hansen v. O. S. L. R. Co.*, 55 Utah, 577, 188 Pac. 852.

\* \* \* \* \*

“The first part of the instruction stated in a separate sentence, closing with a period, is clearly severable from the remainder, and states a correct rule of law, \* \* \*

“It is apparent that appellant’s exception was not properly taken, and that, although part of the instruction be erroneous, it is not a proper subject for review by this court.

“The purpose of an exception to an instruction is to call the attention of the trial court to the particular part of the instruction claimed to be faulty.  
\* \* \*

“\* \* \* ‘It is an easy matter to except to a phrase, or to a sentence, or to any number of such phrases or sentences, and, when this is done, the matter can be intelligently corrected by the trial

court, and, if not corrected, may likewise be intelligently reviewed by this court. Without this no intelligent review can be made, nor is the lower court advised just to what part of the instruction the exception refers, nor does this court, until argument is made upon it. Moreover, it is not a review at all of the lower court's act, since it was not brought to its attention at the trial'."

This rule is seen to be specifically and directly applicable in this case because with respect to Instruction No. 19 as given by the court, when plaintiff's counsel made their exceptions thereto, the court corrected the error, if any therein, recalled the jury, told them to disregard Instruction No. 19 as he had given it to them, and gave them a new Instruction No. 19 from which had been eliminated matters to which plaintiff's counsel had objected (R. 236-2).

In the early case of *Wilson v. Sioux Consolidated Mining Co.*, 16 Utah 392, 52 P. 626, this court stated:

"Errors relating to the instructions of the court were also assigned, but, in the absence of proper exceptions, we cannot consider them. 'An exception, to be of avail in an appellate court, should, in a case where any portion of the charge is correct, be strictly confined to the objectionable matter, and the judge's attention called thereto at the time of the delivery of the charge, so that an opportunity may be afforded him to make a correction'."

In the case of *Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 43 Utah 554, 137 P. 837, the court said:

"\* \* \* The reason for the rule is obvious. When the trial court charges the jury, any defect or

omission or misstatement of the law should be clearly pointed out to that court, so that it may be corrected before the jury has passed on the case. Where it is contended, therefore, that only a portion of a paragraph is faulty, the particular portion must be pointed out in the trial court by the party excepting, so that the court may know just what is excepted to. If this be not done, the trial court has no means of knowing to what point or matter or thing the exception is directed, and hence is unable to supply an omission or to correct an incorrect statement of the law. The rule is intended to aid the trial courts in correcting erroneous statements of the law, and in supplying omissions in the instructions, and if strictly enforced will tend to correct many errors that otherwise would go undetected. \* \* \*

In the case of *Dimmick v. Utah Fuel Co.*, 49 Utah 430, 164 P. 872, the court said:

“The only exception taken at the trial by the appellants to the foregoing instruction was to that portion wherein the court told the jury that ‘the risks that are assumed by an employee \* \* \* are those that \* \* \* appear to threaten immediate injury to such employee.’ Appellants’ counsel, in their brief, contend that the instruction was erroneous and prejudicial in other particulars, but we find no exceptions were taken in the court below to such other portions of the instruction now complained of, and therefore this court cannot here for the first time consider them as grounds for reversal.  
\* \* \*

In *Mehr v. Child et al.*, 90 Utah 348, 61 P. (2d) 624, the court said:

“In any event, the whole instruction is not bad, appellants having confined their objections to the



whole instruction which is divisible into integral parts. They are not entitled to prevail on their assignment with respect to that instruction. When an instruction is divisible into integral parts and any one or more of the integral parts is not open to objection, then, and in such case, an objection to the whole must fail."

In the concurring opinion of Justice Wolfe in the case of *Fowler v. Medical Arts Bldg.* 112 Utah 367, 188 P. (2d) 711, the rule was recognized and stated as follows:

"\* \* \* It is well settled in this jurisdiction that where an exception is taken to the whole of an instruction, the exception will not be sustained unless the whole instruction is bad. If the instruction is partially correct and partially erroneous, the erroneous part of the instruction must be pointed out by the party taking exception thereto. Since the exception was to the whole of the instruction and only a part, if any, of the instruction was erroneous, it follows that the assignment of error cannot be sustained. \* \* \*"

See also:

*Walkenhorst v. Kesler*, 92 Utah 312, 67 P. (2d) 654.

*Reid's Branson Instructions to Juries*, 3d Ed., Vol. 1, Sec. 174, p. 464.

*Ryan v. Beaver County*, 82 Utah 27, 21 P. (2d) 858.

Respondent does not waive its right to insist that such error cannot be charged because of failure on the part of plaintiff to properly except thereto, but without waiving such right and in spite of continuing our insistence that the

matter was not properly preserved for argument before this court by proper exceptions, respondent nevertheless insists that Instruction No. 10, including that particular part now attacked by appellant, was proper.

Appellant on page 45 of his brief quotes from 38 *American Jurisprudence*, Sec. 290, p. 985. Counsel fail to quote the general statement given at the beginning of that Sec. 290, p. 983, wherein it is stated:

“\* \* \* Negligence, however, is a fault, and is not to be presumed, but rather must be proved. *Apart from the rule of res ipsa loquitur, negligence cannot be assumed from the mere fact of an accident and an injury. The mere fact that an accident happens is not evidence of negligence.* (Italics ours.)  
\* \* \*”

The cases cited in the footnote statements quoted by counsel on page 45 are *res ipsa loquitur* cases, or rather the Michigan case is a *res ipsa loquitur* case and the Massachusetts case is one involving a defective coupler, which is similar to a *res ipsa loquitur* case, and now in effect made such by the Federal Safety Appliance Act. Likewise some of the cases cited by counsel, if not the majority of cases supporting any such position for which they contend, are *res ipsa loquitur* cases or cases with peculiar facts similar to *res ipsa loquitur* cases.

In *res ipsa loquitur* cases, the mere fact of the accident does not raise an inference of negligence, but where in addition to the fact of the happening of the accident it is shown that the instrumentality causing the injury is under

the exclusive control of the defendant charged with negligence, and where it also appears that the very nature of the accident is such that it does not ordinarily happen unless the person in charge of such instrumentality is negligent, then, and only when such circumstances appear, negligence can be inferred. That is not true in the case at bar. Counsel misconstrue the fact of the accident or injury with the circumstances surrounding the injury and how the accident and injury happened. That is something more than and in addition to the mere fact of accident. Such a view includes all surrounding circumstances which go to show why the accident happened. Such matters are evidentiary matters and are proper in an attempt to prove negligence. However, the mere fact that Williams fell and broke his leg does not say that he, the railroad, or anyone else was negligent.

Counsel on page 47 of their brief state that "The slipping and falling on the switch ties \* \* \*" was proper proof of negligence on behalf of the defendant in failing to furnish a safe place to work. "The slipping and falling on the switch ties" is something more and in addition to the mere fact of the accident. Those are evidentiary facts surrounding the accident, showing how and why it happened, not merely that it happened. Counsel add: "yet this event and occurrence was removed from jury consideration." Such a statement is absurd and counsel know better and know that not only was it not removed from the jury's consideration, but counsel developed fully the circumstances surrounding the happening of the accident and developed in

detail how the accident occurred according to plaintiff's theory. The happening of an accident is one thing; the facts surrounding it, giving evidence as to how and why it happened, are another; and counsel should distinguish between the two.

In the case of *Lewis v. Davis*, 59 Utah 85, 201 P. 861, the nature of the accident itself was something tending to show negligence. In fact, the court concluded that the explosion would not have occurred had the carbide gas generator been properly handled. The *Lewis* case is really a *res ipsa loquitur* case. There was no eyewitness to the accident and Lewis was dead. He was dead as a result of an explosion, and the court concluded the explosion would not have happened if the railroad company, which had charge of the carbide gas generator, had maintained it properly. It was the type of an accident which would not have occurred except for negligence on the part of someone having control of it.

Counsel cite and quote at length from the case of *Orris v. Chicago, R. I. & P. Ry Co.*, 214 S. W. 125. It is interesting to note with respect to this case that the publishers in setting out the syllabus give as Syllabus 2: "The mere fact of injury standing alone is no proof of negligence," and the court admits in that case that such had been the holding theretofore. The court then says that the 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. One of the judges in a dissenting opinion in the

*Orris* case accuses the court of having departed from the rule theretofore followed in Missouri, and states:

“\* \* \* Injury and suit of themselves, or per se, do not warrant an inference of negligence in cases where the doctrine of *res ipsa loquitur* has no application. Such has been the uniform ruling of this court. *Blanton v. Dold*, 109 Mo. loc. cit. 74, 18 S. W. 1149. In such cases the plaintiff must do three things in order to discharge the burden of proving the negligence charged: First, show an injury; second, negligence on the part of the defendant; and, third, a causal connection between the negligence and the injury. In taking these steps no inference of negligence arises from proof of the naked fact of injury, and if the plaintiff stops there no recovery can be had. But the plaintiff must go further and establish negligence from other facts and circumstances. Having done that, and having also shown the efficiency of the negligence in causing the injury, a case is then (and not until then) made for the jury, \* \* \*

We would like to point out to the court and counsel that the *Orris* case is not considered law in the State of Missouri now.

In the case of *Nicholson v. Franciscus et al.*, 40 S. W. (2d) 623, an instruction had been given as follows:

“The court instructs the jury that the plaintiff is not entitled to recover in this case merely because she may have been injured while working for the defendants.”

After a jury verdict for defendants, plaintiff appealed charging error and citing the *Orris* case. The Supreme

Court of Missouri refused to follow the *Orris* case and sustained the trial court's judgment, saying:

“\* \* \* Ordinarily, it is not error to tell the jury that the mere fact that plaintiff was injured does not necessarily create liability or warrant an inference of defendant's negligence. The rulings in the *Orris* Case and the cases following it are based upon a distinction between cases wherein the character of the injury is of itself a material link in the chain of circumstances tending to show negligence, and cases where the injury is not of such a character. *Sharp v. City of Carthage*, 319 Mo. 1028, 5 S. W. (2d) 6. The rule laid down in the *Orris* Case is followed and applied by the courts only in that class of cases wherein the peculiar characteristics of the injury itself may be a link in the chain of circumstances tending to prove the negligence alleged in the petition. *Manthey v. Kellerman Contracting Co.*, 311 Mo. 147, 277 S. W. 927; *Sharp v. City of Carthage*, supra; *Schmeer v. Anchor Cold Storage Co.* (Mo. Sup.) 12 S. W. (2d) 433, 436; *Moss v. Wells* (Mo. Sup.) 249 S. W. 411. In the instant case, there is nothing in the character of the injury sustained by plaintiff tending to show negligence on the part of defendants. \* \* \*

With this and other cases, the Missouri court has limited the rule as announced in the *Orris* case to the peculiar facts of the case. At first, it seemed to limit the ruling of the case to *res ipsa loquitur* cases, but later the Missouri court approved such an instruction even in *res ipsa loquitur* cases.

In the case of *Palmer v. Hygrade Water & Soda Co.*, (Mo.) 151 S. W. (2d) 548, the trial court had granted a new trial after a verdict for the defendant upon the basis



that it thought it had erred in giving an instruction numbered as Instruction No. 9, but the Missouri Appellate Court reversed the trial court and reinstated the original judgment and approved the giving of an instruction that the happening of an accident is no evidence of negligence. We quote the following from that opinion:

“The gist of the criticized instruction, when stripped of explanatory words, was to the effect that the mere fact that plaintiff was injured and has brought suit is no evidence of defendant’s negligence or liability unless plaintiff has established the negligence of defendant by a preponderance of the evidence as described in the other instructions.

\* \* \*

“There are cases where the nature and character of the wound inflicted, the injury, has a material bearing on the question of negligence, and such was the case of *Orris v. Chicago, R. I. & P. Railway Co.*, 279 Mo. 1, 214 S. W. 124, \* \* \*. And for that reason an instruction in the *Orris* case, practically the same as defendant’s instruction No. 9 in this case, was held to be erroneous; however, such ruling was limited to the facts in that case, and the Supreme Court in the later case of *Nicholson v. Franciscus*, 328 Mo. 96, 40 S. W. 2d 623, 625, in approving a similar instruction, distinguished the *Orris* case from that case in these words: ‘The rule laid down in the *Orris* case is followed and applied by the courts only in that class of cases wherein the peculiar characteristics of the injury itself may be a link in the chain of circumstances tending to prove the negligence alleged in the petition.’”

The Missouri court went on to state in the *Palmer* case:

“In the case of *Barraclough v. Union Pac. R. Co.*, 331 Mo. 157, 52 S. W. 2d 998, an instruction,

almost identical with defendant's instruction No. 9 in this case, was approved. Similar instructions were approved in *Hicks v. Vieths*, Mo. Sup., 46 S. W. 2d 604, and *Gardner v. Turk*, 343 Mo. 899, 123 S. W. 2d 158. These cited cases were not brought on the theory of *res ipsa loquitur*; however, the fact that this case is brought under that doctrine could not deprive the defendant of its right to this instruction. The rule as to such instruction is the same in a *res ipsa* case as an ordinary negligence case.

"In the case of *Sakowski v. Baird*, 334 Mo. 951, 69 S. W. 2d 649, which is referred to as a typical *res ipsa* case, the trial court set aside a verdict for the defendant on the ground that it had committed error in giving an instruction as follows: 'The Court instructs the jury that although you believe and find from the evidence that the plaintiff in this case was injured, this fact alone, regardless of how serious such injuries to her person may be, will not warrant you in finding in favor of the plaintiff for any sum unless you further find and believe from the evidence that the defendant was negligent and that such negligence, if any, was the proximate cause of such injury, if any.'

"The Supreme Court reversed and remanded the cause with directions to set aside the order granting a new trial, reinstate the verdict, overrule the motion for a new trial, and enter judgment on the verdict. And in the course of the opinion the Supreme Court, with reference to this instruction, said: 'It merely states an essential requirement to recovery in every case founded upon negligence whether it be a *res ipsa* or ordinary negligence case'."

In the case of *Boyd v. San Pedro, L. A. & S. L. R. Co.*, 45 Utah 449, 146 P. 282, this court had a problem before it similar to the one before it now. In that case a proper

exception had not been taken. We quote the following from the opinion:

“An exception was taken to that portion italicized. The alleged error here pointed out and argued is not that, but to the first part of the paragraph, where the court stated that:

“‘The mere fact that an accident has happened is not sufficient proof to charge the defendant with negligence or the plaintiff (deceased) with contributory negligence.’

“What is urged against it is that by the use of the word ‘sufficient’ the thought is implied that the happening of the accident was some evidence to show negligence on the part of the defendant. It is enough to say that that portion was not excepted to nor the court’s attention directed to it by the exception. Then there is no substance to the argument. The fair meaning of the charge is that negligence of neither party is to be inferred from the mere happening of the accident. The argument, however, makes the charge as strong against the plaintiff as the defendant. The defendant cannot maintain that by the charge the jury understood that the happening of the accident was some evidence to show the defendant’s negligence but not to show contributory negligence. The court said it was not sufficient to show either. That certainly does not imply that it is some evidence to show the defendant’s negligence but not contributory negligence.”

In *Major v. Oregon Short Line R. Co.*, 21 Utah 141, 59 P. 522, this court held:

“\* \* \* And the mere proof that an injury was received on a train or vehicle is not sufficient to raise the presumption of negligence. It must be further shown that there was some defect in appliances, or in the manner of their use. \* \* \*”

In *Wells v. Utah Construction Co.*, 27 Utah 524, 76 P. 560, the defendant requested an instruction containing the following: "You are further charged that the mere fact that the accident has happened is not sufficient proof to charge the defendant with negligence." The instruction also contained matter on burden of proof and weight of evidence. For refusing such instruction this court reversed the trial court, saying:

"\* \* \* The instruction requested by the defendant was correct in all of its parts, and the trial court therefore erred in omitting any part of the same in the instructions given to the jury."

In the case of *Moser v. Zion's Coop. Merc. Institution*, ... Utah ..., 197 P. 2d 136, this court in affirming the trial court, held the following instruction not to be error:

"You are instructed that the mere fact that an accident happened, or that plaintiff was injured, constitutes no proof of negligence against the defendants."

Cases from other jurisdictions approving such an instruction are numerous. Without quoting further we will merely refer to the following:

*McKinney v. Public Service Interstate Transp. Co.*, (N. J.) 72 A. (2d) 326.

*Briscoe v. Pacific Electric Railway Co.*, (Cal.) 200 P. (2d) 875.

*Snyder v. McDowell*, (Kan.) 203 P. (2d) 225.  
*Kansas, Oklahoma & Gulf Ry. Co. v. Wickliffe*, (Okla.) 202 P. (2d) 423.

*Lakey v. McAlester Coal Co.*, (Okla.) 224 P. 309.

- Stanalonis v. Branch Motor Express Co.*, (Pa.)  
57 A. (2d) 866.
- Automobile Insurance Co. v. Pere Marquette  
R. Co.*, (Mich.) 34 N. W. (2d) 46.
- Vaughn v. Huff*, (Va.) 41 S. E. (2d) 482.
- Miller v. Cranston*, (Cal.) 106 P. (2d) 963.
- Amarillo Coca-Cola Bottling Co. v. Loudder*,  
(Texas) 207 S. W. (2d) 632.
- Pacific Coast R. Co. v. American Mail Line*,  
(Wash.) 172 P. (2d) 226.
- Goff v. City Lines of W. Va.*, 43 S. E. (2d) 800.
- Tamagno v. Conley*, (Mass.) 76 N. E. (2d) 637.
- Swanson v. Progress Electric Co.*, 39 Ill. App.  
188, 67 N. E. (2d) 426.
- Halliday v. Raymond*, (Neb.) 22 N. W. (2d)  
614.
- Goodloe v. Jo-Mar Dairies Co.*, (Kan.) 185 P.  
(2d) 158.

Respondent respectfully submits not only was it not error for the court to instruct the jury as he did in Instruction No. 10, but the failure of plaintiff to except to said instruction, and specifically the failure to except to that portion now attacked by appellant, precludes appellant from urging error on that basis in this court.

#### POINT IV

THE TRIAL COURT, AT THE SECOND TRIAL, DID NOT ERR BY GIVING INSTRUCTION NO. 12, NOR DID THE COURT BY SUCH INSTRUCTION REVIVE THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE AS A COMPLETE BAR TO RECOVERY. (Statement of Points 6.)

In Instruction No. 12 the court attempted to point out to the jury which of the respective parties had the burden



of proof with respect to the issues of negligence on the part of defendant or contributory negligence on the part of the plaintiff, and by objecting as appellant has done to the instruction in question, we must again charge appellant with quibbling over mere words. Counsel for appellant assume the position in their argument under Point No. IV that the word "defense" can mean nothing in any instance except a complete bar. There is nothing to indicate that the jury would so consider it, nor is there even anything in the record nor in appellant's argument to indicate that an average attorney or court dealing with technical language day-by-day would so assume that the use of the word defense would mean a complete bar. Appellant gives Webster's Dictionary definition of defense as, "An opposing or denial of the truth or validity of the plaintiff's case," and then adds: "Contributory negligence is only material as bearing on the issue of damages." We think it could as consistently be said that in as much as contributory negligence is material in an F.E.L.A. case as bearing on the issue of damages, it is therefore a *defense pro tanto*. It is interesting to note that Section 53 of U.S.C.A. as quoted by counsel does not say that contributory negligence shall not be a defense, but says 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 \* \* \*" Must we assume without anything more than this record shows that a jury of laymen would conclude by the use of the words "defense of contributory negligence," as used by the court, that the court intended to indicate that such would be a complete



bar? The mere stating of such a question shows that the obvious answer would be a denial. The court specifically instructed the jury in Instruction No. 6 that if they had ever had any experinece in any other negligence case that they "should wholly disregard any and all conceptions which you may have had with respect to the law of negligence" as gained by such prior experience, and the court told them: "You are to be guided solely and wholly by these instructions, and you must wholly disregard your own conception of what the law is or ought to be in this case."

If we are to indulge in any assumption upon the matter, we should assume as was stated by this court in *Ryan v. Beaver County*, 82 Utah 27, 21 P. (2d) 858:

"The jury is bound on questions of law to yield full obedience to instructions of the court, and this applies as well to that part of the charge defining the issues, as made by the pleadings, as to the law as declared by the court and made applicable to the evidence as submitted."

Counsel go on under their Point IV to cite cases to the effect that conflicting instructions should not be given. We admit to be good law the rule that it is error to give conflicting instructions where such instructions, when considered together with other instructions, cannot be reconciled. But that is not the question here. In order to show the extent to which counsel for appellant have gone to quibble over words, we would like to call attention to other instructions given by the court. Following Instruction No. 12, the court gave Instructions No. 13 and No. 14, in which he tried to explain the meaning of the term negligence,

which broadens to some extent the definitions given of negligence and ordinary care in paragraphs (a) and (b) of Instruction No. 7. In none of these was the jury told what their duty would be if they found the plaintiff to be contributorily negligent, nor were they in any respect advised as to their responsibilities if they determined that the "defense" of contributory negligence had been established. In Instruction No. 21, however, the court did tell the jury that if they found that the plaintiff failed to exercise that degree of care that an ordinary reasonably prudent person would have done, and if they found "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 bearing the same relation to the full damages that the negligence attributable to the defendant bears to the negligence attributable to both parties, the purpose being to exclude from the recovery a proportional part of the damages corresponding to the plaintiff's contribution to the total negligence."

The plaintiff took no exception whatsoever to the court's manner of thus telling the jury in Instruction No. 21 what they should do if they found that contributory negligence had been established. Instruction No. 21 is not conflicting nor contradictory of Instruction No. 12, but merely explains No. 12 and tells the jury what they should do if they find contributory negligence on the part of the plaintiff. Instruction 21 would have been sufficient to obviate any question with respect to Instruction No. 12 had nothing further been said with respect thereto, but the court did

not leave it at that. In Instruction No. 23 the court went on to state: "If you should find that it is just as probable that plaintiff was free from negligence, or even if negligent, that his negligence did not contribute as a proximate cause of the injury, as it is that negligence on the plaintiff's part did contribute as a proximate cause, then the defense of contributory negligence has not been established." The same wording of "defense of contributory negligence" is thus used in Instruction No. 23, but counsel for appellant artfully evade quoting that portion of Instruction No. 23 where they quote Instructions 21 and 23 on page 32 of their brief. The last paragraph of Instruction 23 following immediately the wording just given, "then the defense of contributory negligence has not been established," reads, "You are further instructed in this case that if you find the plaintiff guilty of contributory negligence, you can only consider that in mitigating the damages, or, in other words, if the plaintiff is guilty of contributory negligence, you are to determine the portion of the amount of damages he has sustained that he is to bear himself."

We repeat that there is nothing in the record to indicate that ordinary laymen sitting on a jury would assume that the use of the words "defense of contributory negligence" as used by the court would mean to such laymen that they should consider such contributory negligence as a complete bar.

The decided cases are not by any means all in accord with counsel's attitude in this case that the word defense must mean a complete bar.

In *Aetna Life Insurance Co. v. Brockman*, 70 F. (2d) 647, the Federal Circuit Court of Appeals, in a case arising in Colorado, quoted and followed the case of *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, wherein it was said:

“\* \* \* Whatever tends to diminish the plaintiff’s cause of action or to defeat recovery *in whole or in part* amounts in law to a defense \* \* \*”  
(Italics ours.)

In *Waterford Lumber Co. v. Jacobs*, (Miss.) 97 S. 187, the court said:

“A defense to a cause of action is any fact or state of facts which will defeat it in whole or in part, or, in other words, any matter which tends to diminish the amount of recovery or to entirely defeat the cause of action.”

In *Scott v. District Court of Fifth Judicial District*, (N. D.) 107 N. W. 61, the court said:

“A defense is any fact or state of facts which will defeat in whole or in part a cause of action. 2 Words & Phrases, p. 1939.”

We think that the case of *McMaster v. Salt Lake Transp. Co.*, 108 Utah 207, 159 P. (2d) 121, decided by this court, is a complete answer to appellant’s argument under Point IV. That case involved injury to a passenger riding in a taxicab operated by a company considered to be a common carrier. Admittedly the duty owed by the taxicab company to the passenger was a duty to exercise the highest degree of care. It was contended on appeal that the trial

court erred because in one of the instructions it gave a definition of "ordinary care," and it was argued that thereby the jury was allowed to believe that "ordinary care" was all that was required of the defendant. In affirming the trial court this court stated:

"\* \* \* The duty imposed upon the defendant by law was to use the utmost care to transport the plaintiff safely. \* \* \* Therefore, an instruction defining 'ordinary care' could have been of no possible aid to the jury. \* \* \* Yet in view of the other instructions given, we do not think that the jury could have been misled in this regard.

"The jury was told in instruction number 8 that the law imposes on the defendant taxicab company the duty to exercise the highest degree of care. Instruction number 10 told the jury that: 'While such relationship (of public taxicab carrier and passenger) exists, the law imposes the duty upon a taxicab carrier of exercising the highest degree of care to protect its passengers against accidents'."

The court then concluded:

"In view of the instructions telling the jury that the defendant owed the highest degree of care to transport the plaintiff safely \* \* \* it is not likely that the jury was at all misled or confused by the giving of a definition of ordinary care.  
\* \* \*

The court concluded its opinion stating:

"\* \* \* The granting or denying of a motion for a new trial rests largely in the discretion of the trial court. There is nothing in the record on appeal to indicate that this discretion was abused in this case."

The use of the words "defense of contributory negligence" as complained of by appellant herein would not be as serious as a definition of ordinary care in a case where something in addition to ordinary care was required because we cannot assume that a jury would have in mind counsel's opinion that the word defense meant a complete bar, particularly in view of the fact that the court, in the other instructions referred to, specifically told the jury what they should do "if the defense of contributory negligence" was established and if they so found, that it should only be considered in mitigation or by way of diminishing damages that plaintiff might otherwise be entitled to.

We respectfully submit that the court did not err in giving Instruction No. 12.

## POINT V

THE TRIAL COURT AT THE SECOND TRIAL DID NOT ERR IN GIVING INSTRUCTION NO. 19, NOR DID HE THEREBY REVIVE THE DOCTRINES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK. (Statement of Point 7.)

Without repeating the cases which we have heretofore cited in this brief in connection with our argument under appellant's Point III, we wish to point out to the court that any claimed error resulting from the giving of Instruction No. 19 is not properly before this court for review because the plaintiff and appellant failed to take any exception whatsoever to said Instruction No. 19 as given. We



respectfully refer the court to the cases heretofore cited in connection with our argument under appellant's Point III and to the law as therein set forth.

When the court upon the second trial in this case concluded his instructions to the jury and before argument to the jury he asked counsel for both parties if they had observed any error of an elemental nature that they wanted to call to the court's attention and both counsel said they had none (R. 229-2).

After the argument to the jury and after the jury had retired to deliberate, formal exceptions were then taken and among others the defendant did take an exception to the court's instruction No. 19 as given. The exception as taken was mainly of a general nature but plaintiff's counsel added "and plaintiff excepts particularly to the words 'and any voluntary departure from the path of safety will prevent his recovery for his injury.'" (R. 232-2). The instruction as the court had theretofore given it was verbatim with the instruction as given on the first trial of the case and upon the plaintiff thus taking exception the court had some discussion with counsel and the court concluded that it would be necessary for him to change and reframe the instruction. The court thereupon recalled the jury and re-instructed them in connection therewith as follows: "Gentlemen of the jury, since you retired from the courtroom the court has concluded to withdraw from your consideration what he read as Instruction No. 19 and to substitute what I am about to read as Instruction No. 19" (R. 236-2). The court then gave Instruction No. 19 as is set forth on page 62 of appellant's brief, which instruction had

been reframed and from which was entirely deleted the words "any voluntary departure from the path of safety will prevent his recovery for his injury," as theretofore excepted to by plaintiff's counsel. The substituted Instruction No. 19 as thus given by the court was agreed to by plaintiff's counsel and after the giving of such substituted instruction PLAINTIFF MADE NO OBJECTION OR EXCEPTION THERETO WHATSOEVER, in spite of the fact that counsel for defendant did except because by the changing of such instruction the court had not given defendant's Instruction No. 10 as requested. The change thus made by the court was made at the request of counsel for plaintiff, was agreed to by counsel for plaintiff, and after the giving of the substituted instruction no objection or exception was taken by plaintiff and plaintiff cannot be heard to complain in this court that the trial court committed error in the giving of such instruction.

WE DO NOT WISH TO WAIVE OUR RIGHT TO INSIST THAT PLAINTIFF'S FAILURE TO EXCEPT TO SUCH INSTRUCTION PRECLUDES HIM FROM CHARGING ERROR HEREIN, BUT ASIDE FROM THAT FACT WE STRENUOUSLY INSIST THAT THE COURT DID NOT COMMIT ERROR IN THE GIVING OF SAID INSTRUCTION NO. 19.

Appellant starts from a false premise and argues throughout on this point, not upon the question as to whether the plaintiff had a safe and an unsafe place or way in which he could do his work with a safe place amply available to him, but appellant argues upon the premise that plaintiff had been assigned to work in an unsafe place

and then argues that by the court instructing the jury on contributory negligence the court had revived the doctrine of assumption of risk. Appellant states on page 62 of his brief that "plaintiff owed no duty to exercise 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." Thus appellant admits that plaintiff did owe the duty of conducting himself as a reasonably prudent person under the circumstances and IN INSTRUCTION NO. 19 THE COURT TOLD THE JURY NOTHING MORE THAN THAT PLAINTIFF SHOULD ACT AS A REASONABLY PRUDENT PERSON WOULD HAVE DONE UNDER THE CIRCUMSTANCES. Appellant further states at the top of page 63 of his brief, "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 \* \* \*." There was no attempt on the part of either court or counsel to say that the failure to use a safe way rather than a dangerous way was other than negligence. However, that negligence may have been either contributory negligence or the jury may have found that such negligence was the sole negligence in the case. The facts of this case did not compel a finding of negligence on the part of the defendant but it was left for the jury to decide whether, under the circumstances, either plaintiff or defendant or both were negligent, and the court was required to instruct the jury, upon proper request being

made, that they should determine just who was negligent and what negligence was the proximate cause of the injury to plaintiff, whether the negligence proximately causing plaintiff's injury was entirely his "without negligence on the part of the defendant" as set forth in Instruction No. 17, (against which plaintiff also complains without excepting thereto), or whether the negligence was that of defendant, or both.

We think in their argument under Point V counsel for appellant again unjustly accuse the court and twist the language of the instructions in an attempt to do so. On page 65 of their brief counsel say: "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." Again we are amazed at counsel's interpretation or understanding of the English language. Wherein could it be said that the court holds the plaintiff to the responsibility of "discovering at his peril." The instruction says, "The employe owes a duty to exercise reasonable and ordinary care to discover and use the safe way." That does not mean "discovering at his peril", but merely means that the plaintiff should act as an ordinary, reasonable man. Later on in the instruction the court directs the jury to find whether "the plaintiff by the exercise of reasonable and ordinary care would have discovered such safe way." This again is not charging him to discover it at his peril but only to act as a reasonable man. Again the instruction says, "but nevertheless chose a position on the ties which he as a *reasonable and prudent switchman* should have known were slippery and dangerous." The

court does not say that the plaintiff should act at his peril but says that he is held to the responsibility of acting as a reasonable man would have acted and the court repeats that measuring stick "as a reasonable and prudent man" three times in the instruction and only states that the plaintiff would be guilty of negligence if he did not act as an ordinary, reasonable and prudent man. That does not say that he must be held to the responsibility of "discovering at his peril", but merely states that the plaintiff has the responsibility of acting as an ordinary, reasonable and prudent man would have acted under the circumstances. AND THAT IS THE LAW, REGARDLESS OF HOW PLAINTIFF'S COUNSEL MAY SEEK TO TWIST THE MEANING OF THE PLAIN WORDS USED BY THE COURT IN THE INSTRUCTION.

Even in the case of *Brady v. Florence & C. C. R. Co.*, (Colo.) 98 P. 321, quoted by counsel on page 64 of their brief, the court gives the measuring stick as that of a reasonable man and says that a person is not negligent if he acts as a reasonable man would have acted under the circumstances, and at the same time inferentially states that if the method chosen would not have been adopted under like circumstances by a reasonable and prudent man, then Brady would have been negligent. In the case at bar the court did not say that Williams would be guilty of negligence if he failed to use a safer way, but the court did say that he was held to act as a reasonable man would have acted and that the jury could find that he was negligent if the jury should find that as a reasonable man he should have determined there was a safer way and if as a reasonable

man he should have used the safer way. Such an instruction was no more favorable to defendant than to plaintiff. It merely held plaintiff to the same rule to which other instructions held the defendant, and that is, that he should have acted as a reasonable man would have acted under the circumstances.

Appellant refers to the fact that plaintiff said he did not know the switch ties were slick and slippery until he slipped and fell. Still appellant insists that respondent must be charged with the knowledge of the slickness of the surrounding area and plaintiff was in a better position to know than anyone else, because prior to his accident he had already covered the entire area of the three switches and manipulated each of the three.

At the bottom of page 65 and top of page 66 of his brief appellant states: "If the place of work was unsafe the defendant must under the law be charged with violation of its duty toward plaintiff." By "place of work" plaintiff's counsel can mean nothing other than the place where plaintiff did the work and if that is their meaning the statement is not correct because the defendant need not be charged with violation of its duty toward plaintiff if the place where he did his work was unsafe, if there was a safe place and a safer way to do the work and such safe place and safer way would have been discovered and used by a reasonable man under the circumstances, as referred to in Instruction No. 19.

We call attention to the fact that not only the defendant, but plaintiff requested an instruction which told the



jury that the defendant must exercise reasonable care to provide its employes a reasonably safe place to work, and that this duty does not require the *absolute elimination of all danger*, but only requires the elimination of danger which the *exercise of reasonable care* would remove or guard against. The defendant is not an insurer of its employes and the cases are legion holding that an employer is entitled to assume that its employes will exercise reasonable care or that care which an ordinary, reasonably prudent employe would exercise.

Plaintiff's counsel attempt to drag a "red herring" across the trail by arguing the doctrine of assumption of risk. There is no question of assumption of risk involved herein and I am surprised at the efforts of appellant's counsel to cloud the issues in that way. It is similar to their attempt to convince the court that "proximate cause" is not to be considered in Federal Employers' Liability Act cases. Regardless of whether counsel may call it assumption of risk, or whatever it is, an employe as well as an employer is still bound by law to act as an ordinary, reasonable, prudent man, and heaven help us if the time ever comes when it can be said that employers must act as reasonable men but employes need not do so. Requiring an employe to act as a reasonable man cannot in any way be considered as placing on him the burden of "assumption of risk."

On page 66 of appellant's brief counsel state that the instruction was the same as saying to the jury, "If plaintiff should have discovered the unsafe place of work, but did not, and was injured thereby, he assumes the risks assoc-

iated with the unsafe condition.” Counsel are again playing with words. Instruction No. 19 told the jury, in effect, that if plaintiff should, as a reasonable man, have discovered that one way of doing the work was unsafe, but a safe way was available, and if a reasonable man would have discovered and used the safer way, then the jury could find plaintiff negligent for not acting as a reasonable man would have done in discovering and using the safe way. That is the most that could be stated with respect to the instruction and that is the law, and in two other instructions as given by the court the court repeated that negligence on plaintiff’s part could only be considered in mitigating of damages and that his right to damages otherwise, if the jury so found, could only be diminished proportionately, unless, as the court said in Instruction No. 17, plaintiff’s injuries were “due to his own negligence without negligence on the part of the defendant proximately contributing” thereto.

Not only are appellant’s counsel wrong in their logic and in their interpretation of the English language, but the cases cited by them do not support the propositions asserted by them. The case of *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, as cited and quoted at length by appellant’s counsel applies in cases where only one type of place of work is provided by an employer and that one place of work has certain dangers inherent in it and no safer place or safer way of doing the work is available or provided which a reasonable employe would know that he should use. The *Tiller* case had no question whatsoever involved in it with respect to a choice

of places of work or manner of performing the work being available to the employe. The case of *Boston & M. R. R. Co. v. Cabana*, 148 F. (2d) 150, cited and quoted on page 63 of appellant's brief is a case similar to the case of *Wilkerson v. McCarthy*, which will be referred to later. The basis of the appeal in the *Cabana* case was the claim of defendant that the trial court should have directed a verdict in favor of defendant. The Federal Circuit Court, however, stated that the negligence of plaintiff, or contributory negligence, was a question for the jury to decide and that a directed verdict would have been improper.

On page 64 appellant cites and quotes from the case *Wilkerson v. McCarthy*, 336 U. S. 53, 69 Sup. Ct. 413. Counsel should get no comfort from that case because that case again involves solely the question as to whether the court should have directed a verdict or whether it should have been left to the jury to decide whether the railroad was guilty of negligence and whether Wilkerson himself was guilty of contributory negligence. In the *Wilkerson* case there were two ways open to the employe and it was contended that he should have chosen the safer, in spite of the fact that the evidence showed that numerous other employes took the same path that he did across the slippery board. The Supreme Court of the United States in reversing the case said: (quoting from the syllabus.)

"In this action under the Federal Employers' Liability Act there was evidence (detailed in the opinion) which would support a jury finding of negligence on the part of the defendants and it was error for the trial court to direct a verdict against the plaintiff."

Upon the question of negligence generally, the Supreme Court said:

“Much of respondents’ argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. *Coray v. Southern Pac. Co.*, 335 U. S. 520. But the issue of negligence is one for juries to determine according to their finding of whether an employer’s conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master ‘liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,’ bearing in mind that ‘the standard of care must be commensurate to the dangers of the business’.”

With respect to the contributory negligence of the employee the United States Supreme Court stated the language as quoted on pages 64 and 65 of appellant’s brief and we wish to call particular attention to the part therein that states: “\* \* \* while petitioner’s failure to use a safer method of crossing might be found by the jury to be contributory negligence, the Act provides \* \* \*.” Thus the Supreme Court in the *Wilkerson* case holds that while the jury may, where there is evidence, as there was in that case, find negligence on the part of the railroad company, at the same time “PETITIONER’S FAILURE TO USE A SAFER METHOD OF CROSSING MIGHT BE FOUND BY THE JURY TO BE CONTRIBUTORY NEGLIGENCE.”

In the case at bar in Instruction No. 19 the trial court instructed the jury that the employe had the responsibility to act as a reasonable, prudent man and that if a reasonable, prudent man would have discovered and used a safer way, then the jury could find the plaintiff guilty of negligence if they found that he did not act as a reasonable, prudent man would have done in using the safer way. The *Wilkerson* case is authority to sustain the trial court in the giving of Instruction No. 19. In the case at bar the question of negligence on the part of both plaintiff and defendant was submitted to the jury and counsel cannot complain of the manner in which it was submitted. The law sustains the instructions as given, and by failing to take proper exceptions thereto appellant is precluded by law from urging error herein.

At two or three points in his argument appellant complains because the court included in the instructions a basis upon which the jury could find that the negligence of the plaintiff was the sole proximate cause of his injuries. We submit that such instructions were correct, but *plaintiff did not in any instance except to such portion of any of the instructions and he is now out of order in complaining of the question of proximate cause as so submitted by the court.*

With respect to counsel's argument on the question of assumption of risk we would like to refer the court to the case of *Illinois Cent. R. Co. v. Skinner's Admx.*, (Ky.) 197 S. W. 552. That case involved a suit for the death of an employe under the Federal Employers' Liability Act. The case was decided at a time when assumption of risk was still

a complete defense and had assumption of risk been determined to be the basis of injury in that case, there would have been no right of recovery. In that case it was argued that the deceased employe chose an unsafe way of doing a particular job when a safe place was equally available to him. In connection with this and upon the point of assumption of risk, the Kentucky Appellate Court said:

“\* \* \* the decision of this and other courts hold that the failure to choose the safe, instead of an unsafe way, is contributory negligence, and not assumed risk; and hence, under the Federal Employers' Liability Act does not bar a recovery, but is to be considered by the jury in diminution of the damages.”

We do not think the argument of assumption of risk merits any further discussion.

With respect to the obligation on the part of an employe to use reasonable care to choose a safe way when there is more than one way available, we would like to refer the court to the following authorities:

The text *Shearman & Redfield on Negligence* (1941 Edition) at page 332, states as a general rule that it is a well settled rule of law that a voluntary choice of an unsafe method of procedure when a safe way is open and obvious, constitutes contributory negligence.

This question has been presented to this court in a prior case and was passed upon by this court in the case of *Raymond v. Union Pacific R. Co.*, . . . Utah . . . , 191 P. (2d) 137. That was not a Federal Employers' Liability Act case but did involve a man with railroad experience handling



the switching of cars at the Remington Arms Plant at Salt Lake City for the federal government. The facts of that case showed that the plaintiff employe chose an unsafe way to do his work when a safe way was available to him. The trial court held him guilty of negligence as a matter of law and upon that point this court sustained the trial court by giving only the following short statement:

“The obvious truth from plaintiff’s own testimony is that he gave no thought to his own safety. *He placed his hand in a position which he knew to be dangerous, when there was a safe method open to him. The court below correctly held that plaintiff was guilty of contributory negligence as a matter of law.*”

In the case at bar the court did not hold the plaintiff to be guilty of negligence as a matter of law, but instructed the jury that where an employe has two ways of performing an act, the one safe and the other dangerous, if he as a reasonable man should have discovered that one was safe and the other dangerous, he owed a duty to use reasonable and ordinary care to use the safe way. The court told the jury that if they found that the plaintiff by the exercise of reasonable and ordinary care would have discovered that one way was safer than the other, but nevertheless, if he did not do that which he as a reasonable and prudent man should have done, the jury could find him guilty of negligence. See also

*Groome v. City of Statesville*, (N. C.) 177 S. E. 638.

*Chesapeake & O. Ry. Co. v. Ghee’s Admx.*, (Va.) 66 S. E. 826.

*Harrison v. Myers Construction Co.*, (8th C. C. A.) 42 F. (2d) 950.

*Balente v. Lindner*, (Pa.) 17 A. (2d) 371.

*Smith v. City of Pittsburg*, (Pa.) 12 A. (2d) 788.

*Wolfe v. Henwood*, 162 F. (2d) 998.

*Uzich v. E. & G. Brooke Iron Co.*, 76 Fed. Supp. 788.

We submit that plaintiff's charge of error in his statement of point 7 and as argued under his Point V should be denied and decided adversely to appellant.

## POINT VI

THE JURY'S VERDICT IS NOT CONTRARY TO THE EVIDENCE, EITHER UNCONTROVERTED OR OTHERWISE, AS PRESENTED AT THE TRIAL.

In arguing under their Point VI counsel for appellant do not indicate just which particular statement of error they address their remarks to. We assume, but are not sure, that counsel must refer to statement of error No. 10 wherein they charge the trial court with error in refusing to grant plaintiff's motion for new trial after the second trial. At this point counsel for appellant repeat the statement of their theory of the case and also give a considerable amount of repetition of the facts in the case. On page 75 of appellant's brief they state:

"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 \* \* \*"

We are surprised at counsel's attitude and can only say this is a good example of a situation where counsel become so convinced of their own thoughts upon a subject and of the truth of the testimony given by their own witnesses that they cannot conceive that anybody would contradict them, or that any contradictory evidence that might have been produced was worthy of belief by either court or jury.

At this point we must remind counsel for the plaintiff that even the jury in the first case which rendered an original verdict for the entire amount which plaintiff had asked held that the plaintiff was guilty of contributory negligence, at least to the extent of 40 percent. The court, after having heard the entire case and after having considered it for sometime after the trial, and after having heard arguments upon the motion for a new trial, stated that he had become convinced since the trial that he had erred in not granting the motion for directed verdict, thus in effect stating he had concluded that the defendant was not negligent in failing to remove all ice and snow from the ties. At any rate, he stated that in his opinion the plaintiff was guilty of more than the 40 percent of the total negligence.

We would have to conclude from counsel's argument under appellant's Point V that counsel for appellant feel that there was no basis for submitting to the jury the question of whether or not plaintiff was guilty of any contributory negligence at all, in spite of the fact that all of the defendant's witnesses testified that it was not proper to attempt to throw the switch from a position where the

switchman would be standing on the ties. Now in Point VI counsel argue that the court should have directed a verdict for plaintiff on the question of defendant's negligence. Therefore, the only logical conclusion that could follow from counsel's argument is that the court should have decided the question of negligence on behalf of both parties adversely to defendant as a matter of law and submitted the matter to the jury solely upon the question as to how much damage the plaintiff had sustained. Would counsel argue as a result of the decision of the United States Supreme Court in the *Wilkerson* case that instead of directing a verdict for the defendant, the trial court should have directed a verdict for the plaintiff Wilkerson? In that case there were two places where Wilkerson could have walked in performing his work, and the trial court directed a verdict in favor of the railroad company because another and safer place was available where plaintiff should have walked. The Supreme Court of the United States did not say that because of the fact that the jury might have found that Wilkerson acted as a reasonable man in walking across the board where he walked that therefore the defendant should be found guilty of negligence as a matter of law, nor that Wilkerson should be found to be free of negligence as a matter of law. The United State Supreme Court said that under the circumstances it was for the jury to decide whether the defendant was negligent in leaving the greasy board available so that Wilkerson could walk on it, not that the defendant was negligent as a matter of law, and the United States Supreme Court also held that Wilkerson's voluntary choice and decision to walk across the greasy board could

have been considered by the jury in determining whether or not Wilkerson was guilty of contributory negligence.

Just so in the case at bar, in applying the *Wilkerson* case to this case, it may be that the trial court considered that he would not hold the defendant to be free from negligence as a matter of law because there was ice on these switch ties, even though the evidence was in conflict as to whether or not it was proper to stand on the ties when manipulating the switch although a safer and more normal place on the gravel ballast was available. Just so in this case also, the trial court submitted to the jury the question as to whether or not Williams, in choosing to stand on the switch ties to manipulate the switch, acted as a reasonable man or whether he was negligent in so doing. *The Wilkerson case is direct authority for such submission.*

As a crowning point in counsel's solicitousness of their client, we refer to their statement on page 74 of appellant's brief, where it is stated:

“\* \* \* 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, \* \* \*”

Yes, the court instructed the jury that the defendant would be responsible for the negligence of its employes, and if other employes were negligent the plaintiff could take advantage of that fact. It is true that there were two switch tenders on duty after the plaintiff had left his duty the day before, and plaintiff's counsel now as a final shot say that because of that 16 hours that had elapsed with two shifts of

switch tenders who succeeded plaintiff at his post, one or the other of those switch tenders should have taken a shovel out to the switch stand and cleaned it. In saying so do counsel recognize the fact that it is equally true that the plaintiff himself could have taken either the shovel or the broom out to the switch stand and could, with one swath, have removed all snow and slush from the ties (he could not have dried it out anymore than defendant could). Plaintiff was at work for a couple of hours after the storm had ceased and there was no more snow during the following 16 hours. Plaintiff did not think it was necessary to clean this snow away, yet he wants to charge the other employees and the defendant with negligence because they did not determine it to be necessary.

Here it is interesting to note just what the evidence shows with respect to circumstances surrounding this area. Exhibit "L" introduced by plaintiff shows that the total amount of the water equivalent of the precipitation from midnight of December 7 to midnight of December 8 was 0.06 inches; that during this same period there was a total of 1.0 inches snowfall. The depth of the snow on the ground at midnight December 7 was 5.2 inches, and yet with an additional inch of snowfall thereafter, the depth of snow on the ground at midnight on December 8 was 2.0 inches. On December 9 there was no precipitation, and the depth of snow on the ground at midnight December 9 was 1.0 inches. During the three days in question the temperature ranged from a minimum of 29° F., which was reached sometime after the accident occurred, to a maximum of 42° F.,



which was reached on midafternoon of December 8, as shown by plaintiff's Exhibit "M". Thus, as shown by Exhibit "L", the depth of snow on the ground at the time of plaintiff's injury was something less than, or at least not in excess of two inches—the depth at midnight December 8. In fact, we could assume that it was something less than that because at midnight on December 8 the temperature stood at 34° F., and thereafter for the seven hours plus until plaintiff was injured, the temperature ranged from one to three degrees above freezing, and there would have been some additional melting of this snow. Should the railroad company, being charged with acting as a reasonable person would act under the circumstances, have anticipated that during such wet, snowy weather, with the snow melting fast and with only two inches of snow on the ground at the time of the accident, that such condition would have been in any way hazardous to an experienced switchman in going from switch to switch and manipulating them, where gravel ballast is provided for such a switchman to walk and stand on and where the melting snows do not puddle to freeze but seep away in such ballast (R. 78-1) ?

We question very much whether the defendant could be charged with negligence in the first instance here. We think that there was as much ground, if not more of a proper basis, for directing a verdict in favor of the defendant in this case than there was in the *Wilkerson* case. In this country and this particular area we are met in our daily life every winter with icy conditions, and with such conditions which might change in a few minutes. People in their normal

everyday walks of life during winter weather have occasions where they must walk and work in snow to a depth of two inches, or more, very often.

Here again it is interesting to note the evidence produced over the signature of plaintiff and appellant Williams himself. Exhibits 5, 6 and 7 were statements taken by three separate individuals, all of which were signed by Williams, and in connection with each of which over his signature, and before signing, Williams stated that he had read the same and that it was true. The matters contained in Exhibit 5, according to testimony which was uncontradicted (since appellant's counsel have chosen to refer to uncontradicted testimony), were matters that were taken in shorthand verbatim as Mr. Williams stated it (R. 189-191-2). In that statement Williams said:

“There were several inches of snow on the ground at this location, but in the vicinity of this switch it had been cleaned away but there was a light covering of ice on the ties which was covered with frost and this is what caused me to slip. There was no defective condition of the switch, roadbed or ties or anything else that I know of that contributed to this injury, was merely a case of me slipping due to this light covering of ice and frost.”

We particularly want the court to remember this statement with respect to *frost*, and this statement was signed just four days after the accident.

Exhibit 6, also a statement, was taken by one of the railroad claim agents over two months after the accident

in plaintiff's home and witnessed by his daughter. In that statement the plaintiff said:

"There was nothing whatsoever defective about the switch stand or the ties or in fact there was nothing about any of the equipment which caused or contributed to my injury \* \* \*

"There was nothing that the O. U. R. & D. or any of its servants could have done to have prevented this accident. It is just one of those accidents that happens and as I put it the Great Almighty himself was responsible for what happened to me."

The statement, Exhibit 7, was taken by another claim agent almost a year after the accident and not long before filing of the complaint, and in that statement Williams said:

"The condition which I think had something to do with my injury was the fact that the ties and irons were all ice-coated, *but the cinders and gravel were not icy as the water had went through them.*"

At the trial of the case counsel for plaintiff belabored and berated the claim agents for taking such statements, and we recognize the fact that not only attorneys in such cases, but even judges from the bench, have taken their turn in criticizing claim agents. Nevertheless with respect to these statements the plaintiff said, referring to Exhibit 5 (R. 129-2):

"Q. Was what was written there the truth?

"A. Yes, that is true. Just exactly how it happened, I told the truth all the way through.

"Q. All right, Exhibit 6 that Mr. Hills took right in your bed room was that the truth?

"A. Yes, sir that is the truth too."

Those statements reflect the attitude and opinion that Williams had before his attorneys filed his complaint for him, and after two trials, at the conclusion of the second trial as just referred to, Mr. Williams emphatically said that it was still the truth (R. 129-2).

The plaintiff himself did not think that the situation surrounding the accident was such as to cause any reasonable man concern. It had stopped snowing nearly three hours before he left shift on the 8th day of December, and the only amount of precipitation that there was at all on the 8th consisted of light snow showers during the forenoon of the 8th as shown by plaintiff's Exhibit "M", and during the whole of that time that precipitation amounted to only one inch total snowfall, with a water content of .06 inches. With respect to this on the 8th, Williams did not know when the sectionmen came to clean the snow away. He said: "They had cleared it away previous to this day on several occasions when we had had a snow;" and then he added: "I don't remember of them being there on the morning of the 8th, no, sir because there wasn't enough snow there right in the morning to I don't think call to their attention but they'd come down later in the afternoon, maybe after I had gone off shift" (R. 94-2). Thus even the plaintiff himself did not think there was enough snow there to call their attention to it on the morning of the 8th, and he did not know whether or not they had yet cleared it off.

Suppose the railroad company had removed all of the snow from the switch ties. What would a reasonable man

anticipate? If during stormy weather such as then existed the weather got down to freezing, there would be *frost* on the ties in the early morning even if there were no ice at all on the ties, and such frost would make them slick. Suppose there had been no snow at all but merely normal frost on the ties the morning of the accident. Would the plaintiff Williams claim that the defendant had the responsibility of removing the frost and drying out the ties for him? What reasonable care could a person take in eliminating such condition of frost to remove a slippery condition from the ties? Such frost would make the ties slippery and no amount of reasonable care or foresight on the part of any individual could protect a workman, but a reasonable man should be allowed to anticipate that an employe in the position that Williams was in would act as a reasonable man and would stand on the gravel ballast rather than on the frosty ties.

AN EMPLOYER IS NOT BOUND TO ANTICIPATE THAT AN EMPLOYE WILL ACT NEGLIGENTLY AND PROVIDE AGAINST SUCH NEGLIGENCE IN ADVANCE.

It must be kept in mind that the plaintiff, with three switches to take care of, had to cross the river bridge in walking between them. It could just as well be argued that the defendant company was under the obligation not only of cleaning all snow away but of drying a path for plaintiff wherever he had to walk or work, as also to do the same with respect to other employes. Such an attitude would require not only the clearing away of all snow from all of the Ogden yard, but would also require the drying of the yard

in some manner so that residual wetness on the ground would not freeze, or so that the atmosphere, containing moisture as it does under such stormy conditions, would not condense in frost upon iron rails or wooden ties in the morning such as was the case here. The absurdity of such a proposition is a sufficient answer. An employer is not the insurer of the safety of his employees while they are on duty, and an employer is not required to eliminate all danger, *Ellis v. Union Pacific Railroad Co.*, 329 U. S. 649, and an employee can be presumed to be a reasonable man and held to act as such.

We assume that counsel will again cry out that by such a statement we are again reviving the doctrine of assumption of risk. The doctrine of assumption of risk applied to risks that are attendant upon or inherent in a particular type of work, and it was never held in any of the cases nor assumed by the courts that the question of assumption of risk applied where the risks, if such they could be called, were not peculiar to the work itself, but only conditions which were normal to an area and which all people living in the area met in their day-to-day work or in going to and fro, whether at work or not.

Williams had already crossed over the Weber river bridge, and the bridge was icy and he had to be careful going across (R. 79-2). Williams had also had to walk on some sort of a path between the three switches, and plaintiff's Exhibit I shows something of the nature of the pathway followed by plaintiff between the switch shanty and the switch where the injury occurred. It appears that there



is a spot or two of ice on the boards leading from the switch shanty. Should the defendant have likewise cleaned and dried those boards? Should the defendant have cleaned all snow and dried a path between that switch shanty and switch 2, different than the path appears in plaintiff's Exhibit I? Should the defendant have cleared all the spots of melting snow and in some manner removed all of the residual wetness from the ties shown in Exhibit 10? This Exhibit 10 shows where plaintiff had to walk in crossing from the switch shanty to switch number 2. Defendant's Exhibit 8 shows something of the circumstances surrounding the switch stand where the injury occurred. The picture is looking to the west and is taken opposite to where Williams should have stood in manipulating the switch, and Williams testified that he did stand to the west or opposite side of the switch from the view shown in the picture when he first manipulated it (R. 51-52-2 and 82-2), and it appears that there was gravel ballast which would have given him good footing.

Counsel argue on page 74 of their brief that it was uncontroverted that ice covered the switch ties and the "ice and snow covered the area around the switch stand." Counsel misstate the record. Defendant's witness John E. O. Burton, who appears in the picture Exhibit I, states with reference to ice on the ties: "There wasn't ice, there was particles of snow that had partly melted and froze but it was not covered with ice" (R. 185-2). The plaintiff himself confirmed this, both in his testimony and his statement, Exhibit 7, above referred to wherein he said that "the cinders and gravel were not icy."

In connection with this matter and as an answer to plaintiff's argument, while we think the *Wilkerson* case is a sufficient and a direct answer thereto, we would like to call the court's attention to the case of *Missouri Pacific Railroad Co. v. Aeby*, 275 U. S. 426. In that case the United States Supreme Court reversed a judgment against the railroad company on a basis that no negligence had been shown, and while the case was decided prior to the change in the law with respect to assumption of risk, the court in its opinion excluded the question of assumption of risk from its decision. That case involved an agent in the employ of the defendant railroad company and involved slipping on an icy path where the circumstances were much stronger against the railroad company than in the case at bar. Water had dripped from the eaves of the depot building and had accumulated in a depression on the gravelled "platform". This depression was near the door entrance to the waiting room and was about four inches deep. The depression had been there for some time. "During the night it rained, froze and snowed." Ice had formed in this depression and then it was covered with snow. The employe went out and passed over the spot once but when returning to the waiting room slipped, fell and was injured.

72 L. Ed. 351  
48 S. Ct. 177

In holding that the railroad company was not negligent the United States Supreme Court said:

"This case is governed by the Act and the applicable principles of common law as established and applied in federal courts. There is no liability in the absence of negligence on the part of the carrier.

\* \* \* Its duty in respect of the platform did not

make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances.

\* \* \* The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition.

\* \* \* No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. \* \* \* *It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her.* \* \* \*

Again we state, the Supreme Court decided that case on the ground of lack of negligence and stated with respect to petitioner: "we need not consider its contentions in respect of assumption of risk and negligence on the part of respondent."

We would like also to refer the court to the case of *Wolfe v. Henwood*, (Eighth Circuit) 162 F. (2d) 998. The plaintiff, a section hand, used gasoline to clean oil from his clothes, which he got on in the course of his work. He went to dispose of some old gasoline which he had thus used,

lit a match which caught fire to his glove, and then he slapped his leg with the glove, the gasoline on his trousers caught fire, and he burned to death.

After a verdict had been granted to the plaintiff, the trial court granted judgment for the defendant notwithstanding the verdict. This was affirmed by the Eighth Circuit Court, and we quote from the opinion:

“The defendant had the duty to use reasonable care to furnish Wolfe a safe place in which to perform his work. \* \* \* But defendant’s obligation was not such as to impose liability for injury regardless of due care and *regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant’s act.* \* \* \* (Italics ours.)

“\* \* \* the employer’s liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: “In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.” Of course in any case the standard of care must be commensurate to the dangers of the business. \* \* \*”

Here we have a situation where on December 8 there were only two inches of snow on the ground (Exhibit L); and the weather in the main was considerably above freez-

ing and had been continued wet and stormy. The section hands had at least cleaned the major portion of the snow away from the switch points, as well as an area on the ballast to the west of the switch stand where they would assume a switchman would stand. There was no ice or frozen snow on this ballast, water from melting snow having seeped away into the ballast (R. 211-2, Exhibit 7). In addition, a broom and hand shovel were available, and according to defendant's witness, they were as much a part of a switchman's equipment as they were of a sectionman's (R. 182, 186-187-1).

Under the circumstances, the question should be whether the injury as occurred to Williams here was one "reasonably to be anticipated or foreseen as a natural consequence of defendant's act." Instead of being one that should have been reasonably foreseen, we think there is a serious question that the accident even happened as alleged considering the manner in which Williams claims to have fallen. He stated that he fell to the east, although he states it was his left leg which slipped and it slipped to the east. He had his right hand on the switch stand and his left hand on the lever to the west, and with his left leg slipping to the east he would normally have fallen to the west. Considering also the depth of the clearing between the two switch ties where Williams stated that his leg went, there would have been only six or seven inches, and the injury or break suffered by Williams being at least double that distance up from the bottom of his foot, we feel that we can say, as was said by this court in the case of *Pollari v. Salt Lake City*, 111 Utah 25, 176 P. (2d) 111, at page 117:

“Plaintiff’s contention that the verdict is against the great weight of the evidence is obviously without foundation to anyone who reads the record. The improbability of the fall occurring as the plaintiff testified it did,” (and other facts placed before the jury and argued at length) “clearly support the verdict of no cause of action.”

### CONCLUSION

Respondent respectfully submits that Judge Hendricks could have granted a new trial without requiring any remission from the original jury’s verdict, and he did not commit error in granting the new trial on the basis used by him.

Plaintiff’s theory was fully presented and argued at length upon every point claimed by appellant’s counsel, and the trial court did not commit error either in the giving of instructions, nor refusing to give Instructions No. 4 and No. 5 requested by the plaintiff, nor in refusing plaintiff’s request for a new trial.

We therefore respectfully submit that the verdict of the jury and the judgment of the court thereon, including the order of the court denying the motion for new trial, should be affirmed.

Respectfully submitted,

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