

1956

# Macario Arellano v. The Western Pacific Railroad Co. : Brief of Appellant

Utah Supreme Court

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C. C. Patterson for Patterson & Kunz; Attorneys for Plaintiff and Appellant;

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S U P R E M E C O U R T

OF THE STATE OF UTAH

MACARIO ARELLANO,

Plaintiff and Appellant,

-vs-

THE WESTERN PACIFIC  
RAILROAD COMPANY, a  
corporation,

Defendant and Respondent

APPELLANT'S BRIEF

C. C. PATTERSON for  
PATTERSON & KUNZ

Attorneys for Plaintiff  
and Appellant

FILED

MAY 5 1956

Clerk, Supreme Court, U. of U.

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## STATEMENT OF FACTS

Macario Arellano, an illiterate Mexican laborer, is employed by the Western Pacific Railroad Company at its section at Dumphy, Nevada, which is some 23 miles east of Battle Mountain, Nevada. (T-12). The only language which he can speak or understand is Spanish, but he can neither read nor write his native tongue. He cannot speak, read or write English, (T-9, T-103), (T-115), although he does understand certain words as used with relationship to his railroad employment. (T-10). The section crew at Dumphy was a polyglot mixture. It consisted of two Mexicans, Pete Perez and Macario Arellano, and a Puerto Rican named Francisco Matta, none of whom spoke any language but Spanish. (T-13). The other two members of the crew were Indians, Jerry Jackson, who spoke primarily Shoshone dialect and possessed a smattering of knowledge of English, Baul Thompson, who spoke Shoshone and English (T-13), and the Foreman, Enrico Oyva, a Spanish-American who spoke the English language. (T-13). The Roadmaster in charge of the section, whose headquarters were in Elko, Nevada, was Alvid Charlevois, who spoke English but had no knowledge of either Shoshone or Spanish. (T-13, T-137)

On the 31st of March, 1954, Macario Arellano, together with the other members of the section crew, the foreman and the roadmaster, went to a culvert approximately one mile east of the Dumphy section headquarters to dump a load of rock into the culvert. (T-16). The rock was to be used as reinforcement to prevent a possible washout. Upon reaching the culvert, the roadmaster, Charlevois, caused the car to be dumped and in so doing the car was derailed. (T-18). The foreman and Perez were detached from the group to obtain equipment to replace the car on the rails, (T-19), and Charlevois with the four remaining members of the crew undertook to remove the rock from the right of way in order that traffic might be resumed. (T-19, T-139).

At that time the rocks were piled approximately three feet deep at or along the south rail. (T-20, T-21, T-122). The pile extended southerly down the side of the track bed, some of the rocks having fallen into the culvert itself. The crew members commenced to roll the rocks from the top of the pile down the grade, using bars when it was deemed necessary. (T-21).

Charlevois, the roadmaster, assumed active



management and control of the work, (T-139), notwithstanding the fact that two of the four men remaining understood no English, and he understood no Spanish and the other members were Shoshone Indians, only one of whom spoke English and neither spoke Spanish, while Charlevoix possessed no knowledge of the Shoshone dialect. Exhibits 1, 2, 3, and 4 provide a general picture of the area in question. The exhibits show the elevated position of the tracks and provide in addition information as to the nature and extent of the slope that existed from the track to the edge of the culvert, as well as the area immediately south of the culvert. Some orientation of the pictures is necessary. All views of the culvert set forth in exhibits 1, 2, 3, and 4 show the south side of the culvert and the area where the rocks lay. Exhibit 1 is a picture of the culvert facing west and exhibit 4 is a picture of the culvert facing east. Exhibits 2 and 3 are pictures which show substantially the same area and are pictures taken so that the top of the picture would be north, the bottom south, the left hand west toward Battle Mountain, and the right hand east toward Beowane.

Macario Arellano, the appellant, testified that the time of the accident he was standing on the east side of the pile along the top of the pile in an area which he has marked with what would appear to be an "x", rolling stones, (figure 1, exhibit 3), T-21, T-22, T-113). He testified that he worked in that general area for approximately 20 minutes and at the conclusion of said period the roadmaster, Carlevois, directed him to remove a rock on the bottom of the pile which was serving as a dam preventing the rocks from rolling down the hill. At the roadmaster pointed to a particular rock and said "roll that rock". (T-110). That he walked around the east side of the pile where there were no rocks down to the bottom corner of the pile, (figure 2, exhibit 3), to a spot free from rock, and attempted to dislodge the rock the roadmaster had designated. (Figure 3, exhibit 3). At that time he could not move that particular rock but was able to dislodge one immediately adjacent, and he did and turned to throw the rock over the edge, as shown in the exhibits, the pile shifted and commenced to roll down the grade. A rock struck him in the middle of the back and knocked him

er the piling into the immediate vicinity of the  
ack marked area (figure 4, exhibit 3). The  
pellant testified that the other three members  
the crew were on the west side of the pile (T-23),  
d that they were rolling stones in the same manner  
had been rolling stones from the top of the pile  
d in a position of safety and that Charlevois was  
tween him and the other members of the crew and  
a distance of from 12 to 20 feet from Arellano.

Charlevois' version was entirely different. He  
ated, contrary to Arellano, that he, Charlevois,  
s on the east end of the pile and that Arellano  
s on the west end of the pile. (T-139, T-140).

only has a recollection of the whereabouts of  
e appellant. He further testified that Arellano  
s unsteady on his feet and he ordered him by  
lling to get away, and that immediately there-  
ter, Arellano started down the west or left side  
the pile and across the bottom of the pile, at  
ich time he fell from the top of the culvert  
to the rocks below in substantially the same  
ea where Arellano says he fell. (T-140, T-148).

The whereabouts of Matta was unknown at the  
e of trial, although he was allegedly somewhere

Puerto Rico. Of the two remaining witnesses, Jackson was called by the plaintiff. Thompson, a fourth witness, who was at the time of trial still in the employ of the Western Pacific Railroad Company, and in Salt Lake City, was not called as witness by the defendant.

Jackson, one of the Indians, had not seen Arellano from the date of his injury until he saw him in court, and could not have conversed with him when he seen him, by reason of linguistic difficulties. He completely repudiated Charlevois and supported Arellano's testimony in general. He testified that Arellano was on the east side of the pile of falling rocks, which is where Arellano testified he was but which conflicted with Charlevois' version. (T-124). He stated that the other three members of the crew, and Charlevois, were at the west end of the pile, which is where the appellant testified they were. (T-124). He stated that although Charlevois was standing near him, he did not hear Charlevois yell to Arellano or anyone else. That he heard no commotion or statements until he heard someone yell, "The old man fell".

.126). That he looked up and saw Arellano  
ing in almost the exact spot Arellano testified he  
fallen. (T-125, T-126). He stated further he  
worked with Arellano all that day; that he did  
appear to be wobbly on his feet, or ill, which  
contrary to the Charlevoix version. (T-173).  
There is no disagreement that Arellano was injured,  
seriously injured, although there was a con-  
flict as to the extent of the injury. Appellant  
produced testimony that he was permanently in-  
capacitated for work, and again, the only independent  
witness, Miya, verified the position of the appellant's  
physician, namely that Arellano was not capable  
of doing manual work because of the condition of his  
right arm. (T-32). There was no conflict in the  
testimony either that the defendant railroad  
thereafter secured Arellano's resignation by a  
check and a fraud, leading him to believe he was  
receiving a check for groceries when in fact he was  
receiving a resignation. (T-27, T-28), nor is there  
any conflict with the fact that when Arellano was  
advised that he had, in fact, signed a resignation,  
he desired to revoke the same but that the respondent  
railroad would not permit him to go back to work.

It is not denied and therefore must be held  
be admitted that: One of the jurors selected to  
y the above action was a man named Felton Jones,  
o was and is a brother of a Salt Lake City attorney  
med Shirley Jones, Jr. (Sub.Tr.-5). During the noon  
cess of the second day of trial and on Wednesday,  
vember 9, 1955, Shirley Jones Jr. approached Mr.  
wis, one of the defense counsel, in the City and  
unty Building and asked him if the jury was out.  
answer to the statement by Lewis that the case  
s going slowly, Jones stated: "Yes, I know all  
out it, I got a brother that is a juror in  
ere." That he further stated, "It's funny that  
brother gets picked for all these railroad  
ses," and requested a conference with Lewis.  
at they thereafter conversed quietly for a short  
iod of time in tones which the witness could  
hear, although he did hear "That old Mexican."  
b.Tr-5). That the witness subsequently saw  
rley Jones, Jr. at his office. That Jones  
ognized him, stared at him and acted pretty  
vous. (Sub.Tr-6 - 7). Mr. Lewis, one of defense  
nsel, admitted seeing Jones during the trial.

Sub. Tr.-8) and did not deny the conversation above  
set forth. (Sub.Tr-8).

The verdict was a 6-2 verdict in favor of the  
defendant, and one of the subscribing jurors to  
that verdict, and an essential part of that  
verdict, was Felton Jones. This same Jones had  
advised another member of the jury that he had a  
relative who was an attorney and he knew a little  
about the law. This is also the same Jones  
who entered the jury room and assumed the initiative  
in the discussion therein, advised everyone he did  
not believe the respondent's version, that Charlevoix's  
story was "hogwash" but that it was his opinion  
there was no negligence on either side and that the  
verdict should be "no cause for action"

#### ASSIGNMENT OF ERRORS

1. That the court erred in giving its instruction  
number 12.
2. That the court erred in refusing to give  
plaintiff's proposed instruction number 3.
3. That the court erred in refusing to give  
plaintiff's proposed instruction number 2.
4. That the court erred in refusing to give



plaintiff's proposed instructions 1 and 5.

5. That the court erred in refusing to give plaintiff's proposed instruction number 6.

6. That the court erred in refusing to give plaintiff's proposed instructions 13 and 14.

7. That the court erred in refusing to grant appellant a new trial by reason of the misconduct of juror.

# I. THE COURT ERRED IN ITS INSTRUCTION 12

The almost unanimous weight of authority throughout the country is to the effect that a party is entitled to have the court instruct the jury on any theory or theories which he may have advanced which are supported by evidence introduced during the trial. That Utah follows the majority rule in this country is established in Startin v. Jensen, 237 P(2) 834, wherein the court stated:

"The instructions should not be susceptible of misconstruction as either comments on the evidence or arguments for either side of the case. It was the duty of the court to cover the theories of both parties in his instructions."

When a court refuses to instruct upon a theory a party to the trial appeals from such refusal, evidence in support of the theory should be



aken in its strongest light in favor of such request. Young v. Carlson, 276 P(2) 23. Plaintiff requested an instruction on last clear chance which was refused by the trial court. Plaintiff appealed on the sole ground that it was prejudicial error for the trial court to have refused to grant his request. The Court of Appeals, in considering this question, stated:

"It is of course the duty of the court to instruct on every theory of the case finding support in the evidence. Daniels v. San Francisco, 40 Cal. (2) 614, 255 P(2) 785; See also Simmer v. San Francisco, 116 Cal. App.(2) 724; Doran v. San Francisco, 127 Cal.App.(2), 274 P(2) 464. Therefore the basic question is whether, interpreting the evidence most strongly in favor of the appellant, there is any reasonable basis for the application of the last clear chance doctrine. Bolton v. Martin, 126 Cal.App.(2) 178, 271 P(2) 991."

Ten of the appellant's proposed instructions related to his theory of the case based upon the facts at bar, it being appellant's theory: (1) that the respondent had the duty to provide a safe manner or method for doing the work required; that when more than one alternative method was employed, one of which is dangerous, the other of which is safe, that it is negligence of the respondent not to employ the safer way; (3)

that the respondent had the duty not to expose the appellant to any unnecessary risk; (4) that the appellant did not assume the risk of his employment and he was not negligent if he worked in a place of danger pursuant to order; (5) that the respondent was required to take into consideration the servant's age, ignorance and ability to comprehend in issuing orders and that orders must be issued in a manner and fashion that the servant could understand; 6) that a master is held to the knowledge that a servant has a duty to obey orders and that if it gives orders in a fashion which it knows cannot be understood by its servant, it is responsible for injuries sustained by reason of a lack of ability to comprehend.

Instructions were prepared on each of the above theories and presented to the court. The court refused to grant a single, solitary one of them. No instruction was given that covered or purported to cover any of appellant's theory. The only instruction which was given and which would operate in any manner to the right of appellant to recover, was submitted by the respondent and

must be held to cover the respondent's theory of appellant's case. Certainly, it cannot be said to cover any of appellant's theories. This instruction submitted by the respondent was the court's instruction number 12 and was excepted to by the appellant. In giving that instruction, the court withdrew two instructions prepared by it which although inadequate were more acceptable to the appellant. Instruction 12 provides:

"You are instructed that some evidence has been received to the effect that plaintiff was in the act of loosening a stone immediately prior to the time that he was injured. This fact, in and of itself, is not sufficient to prove the defendant was negligent. Before you can find that the defendant was negligent, you must find by a preponderance of the evidence that the defendant in some way directed plaintiff to loosen or remove a stone and that at said time the defendant's roadmaster knew, or in the exercise of reasonable care, should have known, that the removal of said stone would expose plaintiff to an unreasonable risk of harm"

Where, might it be asked, is any reference made to the theory of safe method of work?

Where does the instruction contain any reference to the duty of the employer when more than one method of work, one of which is dangerous, is

available to the employer, who elects the dangerous course?

Where is any reference made to the doctrine of unnecessary risk?

Where does the court purport to instruct relative to the duty of an employer in framing and giving orders?

Obviously the instruction given ignores these questions. It does not purport to cover any theory upon which appellant based his claim of recovery.

The effect of the instruction is to minimize the direct, positive, and unequivocal testimony of the appellant that he was ordered and instructed by the respondent's roadmaster to leave a safe place at the top of the pile where he was rolling stones, and to dislodge a particular stone pointed to by respondent's roadmaster, which was at the bottom of the pile, and that in following orders he was knocked down by a rock which struck him in the back. The instruction deprecates and ignores appellant's theory relating to the direction and control of his acts by the respondent's agent and the testimony relating thereto, and by inference would indicate that

uch testimony and theory on the part of the  
ppellant were of no consequence.

Respondent must be held to have knowledge of  
its own testimony and its own theory. Yet, the  
instruction requested by the respondent and given  
by the court flies squarely in the face of facts  
which the respondent's roadmaster admitted to be  
true, namely that it was dangerous for anyone to  
roll a rock from the bottom of the pile or in any  
way to get in front of the rocks as they were  
being rolled down the slope. Respondent conceded  
these facts to be true and offered the evidence  
itself, yet, nevertheless, the respondent made  
knowledge of these facts a fact to be found by a  
jury preliminary to finding any possible liability.

Finally, it is submitted that Instruction 12  
is erroneous when it made the sole test of lia-  
bility the exposure of the appellant to an un-  
reasonable risk without making any effort to advise  
the jury as to how they should determine what  
reasonable risk was.

II. THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NUMBER 3 RELATING TO THE DUTY OF THE EMPLOYER TO FURNISH A SAFE PLAN OR METHOD FOR DOING THE WORK REQUIRED

One of the basic theories of appellant was that the respondent railroad as an employer had a duty or obligation to provide a safe method or manner for doing the work required and that if such duty was not met by the respondent, that it was guilty of negligence. It was further appellant's theory that where as here there were alternative methods available and especially where as here, one way was safe and the other known to be dangerous that it was negligence on the part of the employer to use or require the dangerous method to be used.

That obligation, in fact, did rest upon the respondent?

In Fisher v. Minneapolis & S.L. Ry Co., 199 F(2) 3, the plaintiff was a member of a crew engaged in unloading transmission line poles from a flat car. The poles were about 58 feet in length and weighed about 3000 pounds each. While on the cars, the poles were held in place by wires and bands. The plaintiff climbed upon the load and cut the

last of the retaining bands. Not being held, the logs rolled free and in the confusion plaintiff was killed. Plaintiff sued on the theory that a safe method for doing the work had not been employed. The Circuit Court held:

"But it cannot be questioned as to all such operations that a safe method must be adopted and proper direction and efficient tools supplied by anyone who contracts for and undertakes performance...."

In Jefferson v. City of Raleigh, N.C., 140 SE 76

the plaintiff was employed as a laborer. In the course of his duties he was directed to take a ledge and assist the foreman to cut some pile. The foreman held a wedge on the pipe. While engaged in striking the cleaver with the sledge a lever of steel was knocked loose, striking plaintiff in the eye and blinding him. From a judgment for plaintiff, the defendant appealed. The Supreme Court, in affirming the judgment, stated:

"The law of the state is that an employer of labor is required to exercise reasonable care in providing reasonably safe methods of and means to do the work. Thus in Noble v. Lumber Co. 151 NC 76, 65 SE 622 it is said "It is elementary learning that it is the duty of the master to furnish his servant with a reasonably safe method, so far



as practicable, for doing his work."

It cannot be denied that a safe method did in fact exist in the instant case and it had been used.

Again, the court in A.T. & SF Ry Co. v. Gruder, 213 F(2) 250 had before it a similar problem. Plaintiff was injured while unloading a car of the defendant. Pipe was loaded in a car built for carrying ice and perishables. The work was done by plaintiff, a brakeman, and a head brakeman. To unload, plaintiff took the forward end of a bundle and carried it to the rear corner of the car for the purpose of shortening the overlap beyond the doorway. In order to get his end of pipe through the door, he was obligated to lift the bundle to a position well over his head while the other man held the rear end close to the door. In the exercise of twisting to accomplish task, plaintiff suffered injury to his back.

The court found:

"The theory of the suit is that the carrier was negligent in causing heavy pipe of such length to be placed in a car of the character and dimensions of the reefer, rather than in a flat car, or a gondola, or a box car; and



that appellee sustained his injury in consequence thereof.

"(1) Appellant calls attention to admissions of the appellee and of Scott to the effect that there was "nothing wrong with the inside of the car - no slush, mud, or slippery substance on the floor or any shortcomings of that sort", hence it is said there was admittedly no failure on appellant's part to furnish appellee with a safe place to work. Of course, the reefer was not, per se, unsafe. Whether unsafe or no was a matter dependent on the nature of the freight carried. Cf. Blair v. Baltimore & Ohio Railroad Co., 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490. The car afforded no hazard to the loading or unloading of package or other freight which could without substantial difficulty be put through the doors. But the jury might have reasonably found that it was neither suitable nor safe for the handling of the lengthy bundle of heavy pipe appellee was obliged to wrestle with in the manner heretofore indicated..."

Here the plan or method of doing the work was found to be unsafe. The area was found to be safe, something that cannot be said of the area in question here - yet the court upheld liability on the theory that the carrier could be held liable because it could be found that it was negligent in loading its freight cars with freight that could not be unloaded without unnecessary or unreasonable strain. In other words, the carrier imposed an unnecessary risk upon the plaintiff.

Here the uses of an improper method of trans-

portation and loading came under scrutiny. The railroad was found negligent in not using a car that could have been unloaded with safety. There was nothing wrong with the car or the freight, per se, but when improperly mixed, the witches' broth resulting produced injury for which the carrier was liable.

The plaintiff in Khan v. S.P. Co., Cal., 82 P(2) 78 sued for a loss of eye due to retinal detachment which he alleged was the result of trauma and that the trauma resulted from his eye being struck by a particle of concrete dislodged from a concrete floor when a heavy piece of steel fell against the floor near where he was working. Plaintiff was moving couplers from a disorganized pile three or four feet high which had been unloaded by a magnetic crane. The couplers were being moved by hand trucks. Plaintiff was working on the project which required not only moving those couplers on the ground but those on the pile. While engaged in lifting a coupler, another fell and slid from the pile and struck the plaintiff's eye. Defendant appealed from a judgment

or plaintiff. The court sustained the verdict,

tating:

"We think the jury from the evidence could reasonably infer that appellant was guilty of negligence in sending respondent to work in the way and in the place described. It was reasonably foreseeable that if a workman were engaged close to the disorderly pile of couplers in moving the couplers from the pile and upending them to be carted away by the hand truck, some of the couplers, during the operation, might fall or roll from the pile and strike either the workman or the concrete and cause injury to him. The jury could conclude that these heavy steel objects with their irregular conformation would be beyond the capacity of one man to handle with safety when they were piled as they were. Certainly the jury could say that if one started to slip from the top of the pile the workman could do nothing to prevent its fall and since he was required to work close to the pile he could well be injured. Further, they could say that when an edged steel joist weighing as much as did these couplers struck a concrete surface particles of concrete might be projected with great speed and that it was reasonably foreseeable that such a particle could strike a destructive blow to an eyeball if it hit it. We think the haphazard high piling of these couplers upon a concrete surface, the sending of the respondent to work in moving and disturbing the couplers on the pile in close proximity to the pile, when considered in connection with the great weight of these objects, added up to negligent conduct on the part of appellant, and that the evidence substantially supports the conclusion by the jury that by the falling of the coupler and the blow to appellant's eye such damage as that blow inflicted was proximately caused by that negligence." (Underlining added)



In the case at bar there was nothing to foresee  
the respondent admitted that working in front of the  
rock pile was dangerous.

Oklahoma recognizes the rule. In Jay v. Pope,  
Okla., 53 P(2) 683, which was followed in Enid  
Transfer & Storage Co., Inc. v. Mollenhauer,  
51 P(2) 1068, the plaintiff was the widow of a  
man employed by the defendant as a band shaver at  
a compress used by the defendant to bale cotton.  
The decedent was caught and dragged into the  
compress. The plaintiff claimed defendant was  
negligent because it failed to provide a safe method  
for doing the work. Her claim was granted and on  
appeal the Supreme Court affirmed her position,  
saying:

"It is the master's duty to provide a reasonably  
safe method for the performance of servants  
work and this duty is non-delegable. The  
neglect of this duty imposes a liability  
for resulting injury. Cosden Pipe Line Co.  
v. Berry, 89 Okla. 237, 210 P 141. There was  
sufficient evidence for the consideration of  
the jury as to the primary negligence of the  
defendant in the case in failing to provide  
a safe method of operating the press."

August v. Texas N.D. Ry Co., Texas, 265 SW(2)

1. Plaintiff sued for injuries sustained while  
lifting car couplings by hand while engaged in  
lifting journal boxes. Plaintiff was lifting

couplers so each could be inserted under it for the purpose of lifting the end of the car.

Judgment for the defendant was sustained, but in so doing the court stated:

"The common law principle that the master is under the primary and non-delegable duty to use reasonable care in providing a sufficient number of persons to do the particular piece of work on hand, or in providing reasonably safe means and methods of work appears to be also fully accepted as a part of our fiducial jurisprudence."

Millett v. Main Cent. R. Co. (Maine) 146 A 903.

Plaintiff sued for injury to his eye and alleged that the method of keeping right of way free from grass by burning was actionable negligence as to plaintiff who was injured by a spark striking his eye. Judgment was for the defendant. The court said:

"An employer is bound to exercise ordinary care to provide reasonably safe and reasonably suitable methods, and such only, to enable the employee to do his work as safely as the hazards incident to employment will permit."

1. THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S INSTRUCTION NUMBER 2 RELATIVE TO THE DUTY OF THE EMPLOYER TO USE THE SAFER OF TWO AVAILABLE METHODS ESPECIALLY WHEN ONE OF THE AVAILABLE METHODS WAS DANGEROUS

As we have seen, it is incumbent upon an employer to provide a safe method of accomplishing

ts work. In a proper case, however, this may require a selection of methods or a determination of which of several - two or more - alternative methods should be employed. It can, of course, be maintained that this is included within the obligation to provide a safe method and to a certain extent this must be considered, however here, as here, alternative methods do exist, one of which was dangerous and the other safe, the determination or the employment or selection of a safe method must also be considered. Thus, it is submitted that the correct rule is as laid down

Boston & M.R.R. Co. v. Meech, 1 Cir. 156

2) 109. A train was backing slowly, the bell was ringing and the lights were on. However, the whistle was not blown nor was anyone assigned to keep watch. The court pointed out that although the train was operated in its customary and usual manner, more care could have been taken and that this was enough to raise a jury question.

This view was confirmed in Stone v. NY Chicago & N. Louis Ry Co., 344 US 407, 97 L.Ed. 441, S.Ct. 358. Plaintiff was a railroad laborer

o claimed damages under the Federal Employers' ability Act for a back injury sustained in lling ties. Evidence of three other ways or thods of tie removal were introduced differing om the one complained of. The plaintiff had otested that he was doing all he could. The ore Court of Missouri held that no cause of ion was proved. However, the Supreme Court of United States reversed, stating:

"We think that the case was peculiarly one for the jury. The standard of care is negligence. The question is what a reasonable and prudent man would have done under the circumstances. *Wilkinson v. McCarthy*, 336 US 53, 93 L.Ed. 497, 69 S.Ct. 413. The straw boss had had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. This was not the first difficult tie encountered by the section crew in this stretch of track. The likelihood of injury to men pulling or lifting beyond their capacity is obvious. Whether the straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was culpable is the issue. To us, it appears to be a debatable issue on which fair minded men would differ."

And again:

"The fact that the employee commanded to do the act that caused the injury first protested does not place the risk of injury on him."

ight, Okla., 278 P(2) 830, plaintiff was a section  
ployee under the direction of the foreman. He  
d four others were directed to remove some ties.  
ey got three sets of tongs and in the process of  
agging a tie to place and in lifting it into  
sition the tong slipped, causing plaintiff to be  
rown to the right of way. One of plaintiff's  
ories was based upon the failure to provide a  
asonably safe manner or place for doing the work.  
court said:

"A number of witnesses testified that pulling  
or dragging a rail along the right of way with  
tongs was an improper method to do the work,  
and that a better and safer way would be to  
roll the rail along the track with the use of  
tongs.

"Wheeler, the foreman, although denying that  
the rail was dragged fifteen to twenty-five  
feet, admitted that if so handled it was an  
improper way to make the installation in  
question.

"We are of the view that the evidence was  
sufficient to go to the jury on the question  
of whether the defendant failed to exercise  
reasonable care to provide a reasonably safe  
manner or plan for the doing of the work.  
Also, whether the defendant exercised  
reasonable care to provide safe tools with  
which the work was to be done, and whether the  
number of employees were sufficient to do the  
work in a proper and safe manner. The jury's  
finding of negligence and causation are thus  
sustained.



1 SW 1041. Plaintiff was ordered to place a  
lt in a smoke stack by his foreman, who knew that  
15 to 20 minutes a platform would be built, so  
at the bolt could have been placed with safety.  
ile plaintiff was attempting to place the bolt,  
fell. Judgment for the defendant was reversed.  
e court said:

We think that the rule which has been announced a number of times in this state and which was applied by the court in the case of *Iognus v. Packing Co.*, 185 Mo. at pp 99, 170 SW 675 is applicable to this case; the rule being that if two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way with knowledge of the danger constitutes negligence. This rule has been generally applied to servants where they have been held to have been guilty of contributory negligence, but we can see no reason why it should not apply as well to the master. In this case, the master in getting the bolt put in the hole had two ways open. One was to order the servant to put it there, as the testimony tended to show was done in this case, before the platform was erected, and under the circumstances this was a dangerous and hazardous way. The other was to wait a short time before giving the order until after the platform was built, a comparatively safe way. And by adopting the unsafe way while there was a safe way open must necessarily leave the question open for the triers of fact to determine whether a prudent master would have given the order that the testimony of plaintiff tends to show was given.

employee failed to use funnel to pour gas into  
engine and was burned.

The court said:

"....and if the master expressly and affirmatively order the servant to omit the safe method and to do the work in a dangerous way he has waived, or rather has usurped the duty otherwise resting on the servant, and to use a common term, he is estopped to assert that the duty to avoid the obvious danger was upon the servant unless the danger was so imminent that no person of ordinary prudence should encounter it, even under orders."

E. J. O'Brien & Co. v. Shelton's Admin., Ky.,

SW(2) 352. Defendant employed plaintiff's

estate to assist in wrecking a tobacco ware-

se. Defendant ordered the intestate to climb up

the framing in the inside of the building and

knock off the iron sheeting with a crowbar.

While sitting astride the block, it gave way.

court said:

"While the master cannot be held liable for failing to furnish a safe place when the place itself is being demolished or repaired, yet if he adopts a method for doing the work which is hazardous when a safer method is available and the employee is injured by reason of the master's failure to adopt a safer method, the master is liable.

On the basis of the law heretofore cited, it submitted that appellant's requested instruction number 2 should have been granted in that there is and was ample evidence to support giving of the instruction, and that the same was not covered or excluded with any reasonable or proper interpretation in Instruction No. 12 given by the court.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE MASTER IS GUILTY OF NEGLIGENCE IF IT EXPOSES ITS EMPLOYEES TO AN UNNECESSARY RISK AND THAT SUCH DUTY CANNOT BE DELEGATED

It has long been the rule that the duty placed upon an employer to furnish a safe place to work includes within its terms the duty not to expose its employees to any unnecessary risk. This is a common law rule and it is not new, or the result of statutory legislation such as the Federal Employers' Liability Act.

Thus, in Terrell v. City of Washington, N.C., 151 F.2d 888, the plaintiff was employed by the defendant as a lineman with the operation of its electrical plant. On the day of his injury, the plaintiff was ordered to climb one of the poles for the purpose of removing or repairing a wire. While he was on top of the pole, it fell, causing

e plaintiff serious injuries. Evidence showed that  
e pole was rotten and in bad condition several  
ches under the ground. Judgment was for the  
aintiff. The court affirmed, saying:

"The master fails to supply a "safe place  
for work if he allows work to be conducted  
there habitually in a manner needlessly  
dangerous to the servants."

Later in Tate v. Standard Mirror Co., N.C.,

SE 328, the same court in discussing the charge

the trial court affirmed the rule in these

ds:

"Without dissecting the charge and examining  
in in detail, it is sufficient to say that  
the court charged fully and correctly on the  
first issue and in accordance with the  
principle we have stated and which is thus  
epitomized in Smith v. Baker, AC 352:

"An employer is bound to carry on his opera-  
tions so as not to subject those employed by  
him to unnecessary risk and he is no less  
responsible to his workmen for personal  
injuries occasioned by a defective system of  
using machinery than for injuries caused by  
a defect in the machinery itself."

The same problem was before the court in the  
ent case of Great A&P Tea Co. v. McConnell,

199 F(2) 569. There the plaintiff injured

back in an attempt to move a heavy meat block

the course of her duties in washing down the

s of defendant's meat shop. She claimed

defendant was negligent in failing to supply adequate help to assist plaintiff in moving the block. The Circuit Court of Appeals in affirming judgment for the plaintiff, said:

"The master owes his servant certain inalienable non-assignable duties peculiar to the relationship based in general upon the duty not to expose him to unnecessary or unreasonable risks."

A similar rule is found in Williams v. City of Spokane, Washington, 131 P 833, which was an action for damages for injuries sustained in the erection of a bridge. The defendant was constructing bridge piers, and as plaintiff was engaged in loosening forms and without knowledge that only three rods were imbedded in the pier, he shoved out the pier and because the rods could not hold it, they fell and the plaintiff fell into the river. Defendant appealed from a judgment for the plaintiff, but the court upheld the verdict, saying:

"That it is the duty of the master to exercise reasonable care to furnish the servant a reasonably safe place of work, and to keep that place reasonably safe, is law so familiar as to require no citation of sustaining authority. In the prosecution of an inherently dangerous enterprise reasonable care is care commensurate with the danger reasonably to be anticipated. In such a case reasonable care "means great care." 1

Labatt, Master & Servant, Para 16, p. 30;  
Sprague v. New York & N. P. R. Co., 68 Conn. 345,



36 Atl. 791, 37 L.R.A. 638; 1 Thompson on negligence, para 25."

And again:

"This is especially true as applied to the plan or method of operation deliberately adopted by the master or his representatives. When the plan is inherently defective and unnecessarily dangerous, its adoption is negligence entailing a liability upon the master for resulting injuries. Jobe v. Spokane Gas & Fuel Co., 131 Pac. 235, just decided; Ball v. Megrath, 43 Wash. 107, 109, 86 Pac. 382; Blair v. Spokane, 66 Wash. 399, 405, 119 Pac. 839; Etheridge v. Gordon Constr. Co., 62 Wash. 256, 259, 260, 113 Pac. 639; Rogers v. Valk, 131 Pac. 231, just decided; 1 Labatt, Master & Servant, para 118."

In Smith v. Southern Illinois & Missouri Bridge, Mo. 30 SW(2) 1077, plaintiff was employed a watchman on a bridge. The tracks on the bridge were being repaired and considerable material was piled on the bridge walk-way between the tracks. While on the bridge plaintiff saw an approaching train and started to walk across the tracks to get on another track and out of the way of the train. He slipped on the materials which caused him to fall and be struck by the train. Plaintiff objected to the leaving of the loose wires and other materials lying around rendered the place unsafe and dangerous. Judgment was affirmed by the court, which held:

"Under the instructions given, and under the custom and practice shown, that the watchman, on the approach of a train, for his own safety should cross over to the other track, the leaving of loose wire or wires connected with materials lying between the tracks was an undue enhancement of the dangers to which plaintiff and others in like employment were exposed. No sort of warning light was placed upon or about any of these materials. The performance of plaintiff's duties, under the circumstances shown, was attended with danger. Under the duty of the master to exercise ordinary care to furnish the servant a reasonably safe place to work, there is included the duty to use all reasonable precautions which ordinary prudence would dictate, under the particular circumstances, in respect to the dangers to be reasonably anticipated and likely to occur to the servant in the course of the discharge of his duties."

And finally, in Simmons v. Doublet & Ewin,  
, 145 S 708, the son of plaintiff died while  
king under a pile driver used by the defendant  
the erection of piling necessary for the  
lding of the State Capitol building. Judgment  
plaintiff was affirmed by the court, stating:

"The general rule is that a master must provide a reasonably safe place to work and must see that he is not exposed to unnecessary risks in the course of his employment."

In Yarber v. Chicago & A. Ry Co., 85 NE 928,  
ntiff sued defendant on the grounds that the  
oyer failed to furnish a safe place in which to  
; and for the additional reason that the foreman  
red him into a ~~dangerous place~~. He was employed

one of a gang engaged in removing two box cars  
distance of 40 feet. The cars rested on posts  
cause the trucks had been removed. Having  
then the bars in position, they were raised on  
jacks and beer kegs were placed under the west end  
of the car to hold it up. One of the kegs fell  
and the plaintiff was ordered under the car to set  
the keg, when the car on the jacks fell and  
he was caught and injured. The court stated in  
it as follows:

"While the requirement that the place in which  
the work must be considered in connection with  
the fact that the work was necessarily  
attended with some danger, yet it is the duty  
of the master to use reasonable care to see  
that the servant is not unnecessarily exposed  
to danger in doing his work. If the master  
negligently gives an order, in obeying which  
the servant is exposed to danger which he  
would not otherwise have encountered, the  
master may be held liable for an injury  
suffered by the servant."

Can this duty be delegated or transferred? It  
would be possible on this point to fill this brief  
with cases unanimously affirming the fact that the  
duty to provide a safe place to work which rests  
on the employer cannot be delegated. It is  
established, however, that perhaps the phraseology



Butz v. Union Pac. R. Co., 233 P(2) 332 shows as  
early as any the universality of the rule:

"It is settled beyond question that it is the duty of the employer to exercise reasonable care to furnish his employees a reasonably safe place to work and this includes situations where the employer sends his employee on the premises of another to perform his duties. 2 Sherman & Redfield on Negligence, Revised Edition, Sections 193 and 202; Albert Miller & Co. v. Wilkins, 7 Cir., 209 F. 582; Porter v. Terminal R. Assn of St. Louis, 327 Ill. App. 645, 65 N.E. 2d, 31, 33. In the latter case the court referred to that duty and stated the proposition very clearly "\* \* \* and this duty follows the Master even though the servant is sent upon the premises of another to do his work. This duty is non-delegable and affirmative, and must be continuously fulfilled and positively performed", citing supporting authorities."

It is submitted that the trial court erred in using to instruct the jury in accordance with plaintiff's requested instructions numbered 1 and 5.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE PLAINTIFF DID NOT ASSUME THE RISK OF HIS EMPLOYMENT AND THAT HE WAS NOT NEGLIGENT IN CONTINUING TO WORK KNOWING THAT HE WAS REQUIRED TO WORK IN A DANGEROUS OR UNSAFE PLACE

The Congress of the United States, on August 11, 1935, amended the Federal Employers' Liability Act in particular Section 54 thereof, to provide that employees should not be held to have assumed risk of their employment in any case where

ury or death resulted in whole or in part from negligence of an officer, an agent, or an employee of a common carrier.

It has long been the law in Utah that one is ligent to require an employee to perform a gerous act. Tuckett v. American Steam & Handndry, 84 P 500. Equally long, indeed from the e case, it has been established that an employee not held guilty of negligence because he places self in a dangerous position by reason of his ying an order. Thus we find Judge Howell, aking for the court, saying:

"If the order of the master constitutes an act of negligence, and if the servant obeys it, and by reason of such obedience is injured, he can count upon such an act of negligence when he brings an action to recover for his injury. In order, however, to recover, he must show that the obeying of the order was the proximate cause of the injury."

The court went on to quote with approval the lowing language of Labatt, Master and Servant, :ion 439:

"It follows from what has been said that even if we might have said that the plaintiff did not act with that carefulness which every one is legally bound to exercise. If no order had been given by the master to act just as she did, the giving of such an order prevents us from saying so.

The views contained therein were affirmed in  
am v. Ogden Packing & Provisioning Co., 177 P 218.  
d in more recent years, the court has adopted the  
me position in Kaumans v. White Star Gas & Oil Co.,  
P(2) 231:

"We are likewise of the opinion that the evidence fails to establish as a matter of law that plaintiff was negligent in obeying defendant's orders because of the danger necessarily involved in the work ordered done. It is well settled that a servant is not negligent in obeying the directions of his employer or superior unless the danger involved was " 'so absolute and imminent that injury must almost necessarily' have resulted to him by following" such directions. Toone v. J.O. O'Neill Const. Co., 40 Utah 265, 121 P 10, 16; Fowler v. Union Portland Cement Co., 39 Utah 363, 117 P 462; Pascoe v. Nelson, 52 Mont. 405, 158 P 317; Storey v. Williams Bros., Inc. (Mo.App.) 50 SW(2) 698. The mere fact that the servant was aware that he was exposing himself to danger does not make him guilty of contributory negligence. Toone v. J.O. O'Neill Const. Co., supra; Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441 253 NW 579."

These views have been contended and affirmed  
the courts in liability action cases. Thus  
see in Schirra v. D.L.&W. Ry Co., 103 Fed.Supp.812.  
intiff was employed as a machinist and on  
ober 25, 1950 was engaged with others in moving  
engine from a stall where it was being repaired.  
was necessary to raise the engine and place rails

der it. The general foreman told the assistant  
reman to jack up the wheels. The latter went to  
e plaintiff and asked him how he got about that  
d plaintiff suggested placing a block and jack  
raise it and then putting dead rails to cross  
e pit. Plaintiff was then told to come to the  
gine. During the operation plaintiff suggested  
ey needed more stability and the assistant  
reman said to hurry it up, and plaintiff said  
K." "Jack it up". In the process, a piece used  
a level on top of the jack slipped out of place  
d injured plaintiff.

Defendant claimed the plaintiff solely  
gligent because he gave the order to jack it  
, and that he could not shift the responsibility  
the defendant, and that he acted voluntarily.

The court held not so. That it was not the  
sing of the jack that caused the trouble, but  
failure to level the blocking. That the claim  
at plaintiff was acting voluntarily was another  
of saying that he assumed the risk which  
ense was outlawed by statute. Finally, it  
d:

"In the instant case, though there was no testimony of an express command by Wrable to the plaintiff to continue on the job despite plaintiff's apprehension of the danger involved, nevertheless the plaintiff could reasonably infer the same from the position of the parties and the circumstances involved, particularly in view of Wrable's statement, "It will be all right when the weight is on." "We haven't got much time. We want to get the engine out of here tonight."

The doctrine is recognized by the Supreme Court of the United States. In Blair v. B&O Co., supra, the court said:

"It is true that petitioner undertook to do the work after he had complained to the company that the pipe should not be moved in the manner it was. But he was commanded to go ahead by his superiors. Under these circumstances, it cannot be held as a matter of law that he voluntarily assumed all the risks of injury. The court below cited by way of comparison its holding in a former decision. Guerrierro v. Reading Co., 346 P 187, 29 A(2) 510. There it had announced the rule that an employee has a duty to quit his job rather than do something which he knows or ought to know is dangerous. This court does not apply the doctrine of assumption of risk so rigorously."

Since that decision, the doctrine of assumption of risk was abolished by statutory amendment.

ely, plaintiff's position cannot be held to be less than it was before the enactment of the statute.

That is not the law.

In Pritt v. Western Virginia Northern Ry Co.,  
Va., 51 SE(2) 105, the court said:

"The plaintiff herein was under the direction of the conductor of the train and when he was ordered by the conductor to place the Norfolk & Western car under the tipple it was his obligation to obey that order, and he did so. Apparently no one realized the danger that was involved in the direction of the conductor to plaintiff until it was too late to avoid the accident. If it be contended that the plaintiff should have observed the danger and that he assumed the risk, we are met by Title 45, U.S.C.A., Sec. 54 which provides among other things that such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier...."

Finally, we submit Ericksen v. S.P. Co.

11, 246 P(2) 692. Plaintiff, an employee, sued  
injuries sustained on the premises of another.  
Plaintiff was a tree inspector and was hurt while  
inspecting trees on the premises of a lumber company  
had piled trees on the edge of the dock. He  
previously had difficulty and had complained  
his supervisor. The defendant contended that  
the plaintiff had knowledge and that the pre-  
mises were not in its control, that it was not  
liable. The court disagreed:

"The plaintiff's knowledge of the unsafe condition of the premises does not relieve the defendant of liability. Since 1939 the defense of assumption of risk has been barred under the Act. 45 U.S.C A. 54. No subsequent decision has been cited which as a matter of law relieves an employer from liability due to dangers known to the employer simply because those dangers were also known to the employee."

And again:

"The question therefore is whether the defendant is liable under the Act when it knowingly required the plaintiff to work on unsafe premises of a third party and the employee also knew of the danger. State court decisions in applying common law principles are not controlling in the presence of a clear and plain duty under the act. It may be assumed that the common law non-liability doctrine in the absence of direct control applies where the employer has no notice or knowledge of unsafety or danger. But a conclusion of non-liability under the act where the employer requires the employee to work on premises known by the employer to be unsafe would amount to disapproval of the authorities which have recognized liability in such cases. No exception is made when the employee also knows of the unsafe condition but has no alternative except to work in the place of danger. The benefits of the Act are not to be withheld in contravention of the plain intent of the act and contrary to its application in other cases. To do so would be to permit employers, otherwise subject to the act, with impunity to require their employees to work in places of known danger, so long as the unsafe premises are not under the employer's direct control. In cases of known dangerous premises belonging to the third party, the absence of direct control does not absolve the defendant from liability under the act."



It is respectfully submitted that the trial  
erred in refusing to give plaintiff's re-  
quested instruction number 6.

VI. THAT THE COURT ERRED IN REFUSING TO GIVE  
PLAINTIFF'S PROPOSED INSTRUCTIONS NUMBERED  
13 AND 14

The respondent had no theory except that  
expressed in Charlevoix' story that he waved his  
hand and shouted "Get out" to the appellant and that  
thereafter appellant started on a perilous journey  
on his own. Apparently the theory was that if  
the appellant could not hear or understand and  
as a result of these deficiencies was injured,  
then the responsibility was his and his alone.

This is a version that a jury could in the  
absence of correct instructions apply to the  
appellant's theory. A jury could come to the  
conclusion that appellant merely thought he was  
ordered to pull the rock from the bottom of the  
hole and that by reason of his misconstruction of  
the supervisor's orders, he was injured.

Neither the court nor the respondent en-  
deavored to correct this misconception. The  
appellant endeavored to do so but his requested  
instructions were refused.

The difficulty with respondent's theory is that it assumes too much. It assumes that an employee has full and complete responsibility to hear, understand and obey any order or command given him by a superior, even though he be deaf, dumb and blind, and that having given an order or command the employer can sit complacently and smugly by - protected from all the consequences that flow from an order. It assumes that in issuing an order there is no duty imposed upon the giver to give it clearly, to see that it is heard and understood, to take into consideration the abilities or infirmities of the person to whom it is given or to realize that some response is obligatory upon its recipient and to guard against needless ambiguity or incomprehensibility.

The respondent's roadmaster was an intelligent, capable person who had risen from the ranks of common laborer to that of Assistant Division Engineer. His intellect and ability must have been far above the average employee. He was the best ranking officer of the respondent on the scene. The roadmaster knew of his own language

mitations. He expressed some doubt as to similar limitations on the part of the appellant and his co-employees, and this doubt alone should have given him pause. However, it is submitted that when this doubt is weighed in consideration of all the facts that the mist of doubt dissolves and the fact of knowledge appears.

All of the men on the crew had been employees of the respondent for a considerable period of time. The roadmaster was in direct and personal charge of all the section crews in his area. The appellant's foreman, Leyva, was personally responsible to him. He was in charge on the ground of all operations in his area similar to that being conducted that day by his men. He paid, or issued the pay checks, directly to the men. He was present and he heard Leyva address the employees in the Spanish language, which would have been an obviously unnecessary act if the employees were conversant with English. Finally, as a sort of superintendent or officer in charge, he and the respondent must be held to have had knowledge of the nature, character, abilities and type of person under his immediate jurisdiction and control. It

d be absurd to contend that he had no knowledge of the language limitations of his Indian, Mexican Spanish subordinates.

Notwithstanding these facts, he permitted the supervisory employee who could readily communicate with his men to depart from the scene and he assumed the active direction and control of the work when he knew that he lacked means of communication with his men.

It is well established law that a master may be held responsible for negligence in the giving of orders. As is stated in "Naval Leadership", published by the U. S. Naval Academy:

"The giving of a command requires a commander to speak with assurance, firmness, in a clear tone of voice, and loudly enough so that every man who is expected to execute that command can hear."

The Naval Watch Officers' Guide, another standard Navy publication, states:

"The manner in which you give commands is important. Speak clearly, loud enough to be heard, and with a positive, incisive voice."

Speaking specifically, they make the additional comment:

"Nowhere in the Navy is exact phraseology as

important as it is to the conning officer in giving commands to the helmsman or engine order telegraph watch, because misunderstandings or ambiguity can be so quickly disastrous there must be no possibility of a mistaken meaning."

These rules would seem to be so self-evident not to admit to any argument that the rules are for military personnel but have no place in everyday life. It would seem so simple as to require no explanation that an order or a command is not a command unless the recipient can hear and understand that a command is being given and that it is being directed to him.

Labatt, Master and Servant, Section 1159, speaking of the sufficiency of the warning states:

"The extent of the master's obligation in regard to imparting information to a servant is to give him such instruction as will enable him to avoid injury. If the master relies on the fact that he admonished the servant of the danger which caused the injury, he must show that the warning was timely and explicit. Merely going through the form of giving instructions is not sufficient."

Indeed, if an order is not understood, it has no effect as an order.

In Upton v. Conway Lumber Co., N.H., 128 A 802 judgment in favor of plaintiff was affirmed on the ground among others that proper warnings or in-

struction

court said:

"It is undoubtedly true that the servant must show, inferentially at least, that his ignorance is justifiable under the circumstances. *Camire v. Laconia Car Co.*, 79 N.H. 531, 11 A. 340. But this is far from saying that he must elucidate in advance every conceivable circumstance which might tend to endow him with knowledge. It is not necessary for him "to assert his ignorance in terms" (*Bjork v. U.S. Bobbin & Shuttle Co.*, 79 N.H. 402, 406, 111 A. 284, 533), nor is his lack of knowledge and appreciation inexcusable merely because express warning and instruction have been given. In all cases the warning or instruction must be sufficient to fully inform the servant of danger. *Willis v. Plymouth & Compton Tel. Exch. Co.*, 75 N.H. 453, 455, 75 A. 877, 30 L.R.A. (N.S.) 477. But if instead of receiving instruction from the master, he obtains through other channels sufficient knowledge to understand and appreciate his peril, he cannot recover. *Paige v. Co.* 80 N.H. 439, 119 A. 303. On the other hand, there are occasions where any warning the master may give is insufficient. *Richardson v. Adams*, 77 N.H. 571, 94 A. 967."

The same result was reached by the Supreme Court of Wisconsin in *Fidelity Trust Co. v. Wisconsin Iron Works*, 129 NW 615. The problem involved was substantially the same and again in affirming a judgment for the plaintiff, the court held:

"An insufficient warning is in legal effect equivalent to no warning. *McDougall v. Ashland, etc., Co.*, 97 Wis. 387, 73 N.W. 327; *Fox v. Peninsular, etc., Works*, 84 Mich. 676, 48 N.W. 203; *James v. Rapids Lumber Co.*, 50 La. Ann. 717, 23 South. 470, 44 L.R.A. 81 and notes; *Wolski v. Knapp-Stout & Co.*, 90 Wis. 178, 63 N.W. 87."



And again:

"Here the warning to be of any value must have been sufficiently specific to apprise an ordinarily prudent person possessing the experience of decedent of the nature of the change made or the danger to be apprehended. Any other warning would have been quite an idle ceremony."

The master must do more than merely speak early so that the servant can hear. He must also take into consideration the servant's age, intelligence, and ability to comprehend.

The rule is stated in Sadler v. Lynch, Va.,  
10 E(2) 669:

"The sufficiency of the warning may depend upon a number of factors such as the intelligence and experience of the servant and the nature of the danger."

A similar rule was laid down by the Circuit Court in Grant Storage Battery v. DeLay, 87 F(2) 726:  
Plaintiff was employed by the defendant in its storage battery company factory in Omaha and he was compelled to leave his employment by reason of lead poisoning. One of plaintiff's grounds for negligence was an alleged neglect of duty upon the part of the defendant to warn plaintiff as to the danger arising from lead poisoning. Defendant attempted to withdraw the issue from the jury on the



unds that plaintiff was fully warned and  
reciated the danger. The Supreme Court in  
olding that contention that by reason of the  
t that plaintiff was a high school graduate with  
vious experience who could read and who had  
eived a letter of instruction warning him of  
difficulty, stated:

"The sufficiency of caution, warning, or instruction of an employee, or its necessity, may depend upon a number of factors, including the age, intelligence, and experience of the employee, the nature of the danger, the character of the work to which the employee is assigned, and other circumstances."

The court, however, on the above facts, concluded

"As has been observed, plaintiff was neither young, inexperienced, illiterate, nor lacking in intelligence."

And again:

"This notice gave him both warning and instruction, and with this notice, being of mature years and intelligent, he had the same knowledge relative to the danger attendant upon his occupation which his employer had, and this warning or instruction certainly gave him reasonable notice of the danger of his employment arising from lead poisoning. Not only did he understand the notice and instructions, but he claimed in his evidence to have heeded them to some extent at least."

It should be apparent that when one gives an  
or instruction in a language that he knows his  
ant is unable to understand, that the giver is

igent. The problem of difference in language  
the basis of litigation in In Re Panasuka, Mass.  
NE 386. The plaintiff, Panasuka, was injured  
e in the employ of the Tauton Wool Stock Company.  
linter became embedded in his hand resulting  
ain, swelling, and an abcess which required a  
ical operation and dressing. The doctor who  
ted him presented the bill to the plaintiff  
paid it. The plaintiff sought to recover this  
nt from the employer and its insurance carrier.  
Industrial Accident Board found that the  
icant was an illiterate foreigner who was  
le to read, write or understand the English  
uage and he had no notice or information as  
ow to proceed. A notice to employees was  
ted in English - was posted in a place where  
employees worked. The insurance carrier  
ended that there was adequate notice and that  
as not responsible. The Supreme Court of  
achusetts rejected this contention, stating:

"The obligation to furnish medical and hospital  
services for the first two weeks after the  
injury is imposed on the insurer by the express  
words of the Act. This duty must be performed  
or reasonable efforts made to that end before  
the statutory obligation is satisfied. "Furnish"

means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives "a personal injury arising out of or in the course of his employment." Such a person manifestly is presumed by the Act to be under more or less physical disability and hence not in his normal condition of ability to look out for himself. The word "furnish" in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required service must of course be made. Then either express notice must be given to the employee or there must be such publication or posting of the information as warrants the fair inference that knowledge has reached the employee. If the insurer had made adequate arrangements for the care of those to whom the duty is owed in the event of injury, and then by conspicuous notices suitably posted in places frequented by the employee in a language capable of being read by him, has given full information of that fact, and directions as to steps to be taken by an injured person in order to avail himself of these arrangements, a very different question would be presented. This might go a long way toward proving compliance with the requirements of the statute. But in the case at bar the notice appears not to have been of a character to challenge attention, although perhaps it might have been enough if the employee had been able to read the English language. The insurer has readily accessible means for ascertaining the nationality of employees insured by it and their degree of intelligence. If among them are those who cannot read or speak the English language, this circumstance requires greater effort on its part in order to comply with the statute. *Beers v. Isaac Prouty Company*, 200 Mass. 19, 85 N.E. 864, 20 L.R.A. (N.S.) 39, 128 Am.St. Rep. 374."

What is the real difference between the spoken  
the written word? If a notice printed in a  
guage a person cannot read is not adequate, how  
an order given in a language one cannot com-  
hend be deemed adequate?

This is especially true in cases involving the  
ing of orders because the employee has a duty  
give obedience.

In Leonidas v. Gr. Northern Ry Co., 72 P(2)  
7, where a section laborer filed an action for  
uries, alleging that he was injured by reason  
the negligence of the foreman in ordering him  
carry ties without assistance, the court said:

"Ordinarily, an employee has a right to assume  
that he may safely act under the direction of  
the foreman. Sorenson v. Northern Pacific Ry  
Co., supra. In 18 R.C.L. 655, the author has  
well stated principles which we think apply  
to this case. It is there said: 'It is a  
fundamental of the relation of master and  
servant that the servant shall yield obedience  
to the master and this obedience an employee  
may properly accord even when confronted with  
perils that otherwise should be avoided. In  
any case, but more plainly when a command is  
sudden and there is little or no time for  
reflection and deliberation, the employee may  
not set up his judgment against that of his  
recognized superiors; on the contrary, he may  
rely upon their advice, assurances and commands,  
notwithstanding many misgivings of his own. It  
by no means follows that because he could  
justify disobedience of the order he is barred

of recovery for injuries received in obeying. He is not required to balance the degree of danger and decide whether it is safe for him to act, but he is relieved in a measure of the usual obligation of exercising vigilance to detect and avoid danger. Ordinarily, he may assume that the employer has superior knowledge and rely thereon, especially when the act is one that could be made safe by the exercise of special care on the part of the employer. The employee may assume that such care will be taken. Again, it is a psychological truth that employees form a habit of obedience that overcomes independent thought and action, depriving them of power to exercise intelligence that otherwise would protect them."

There may be negligence in giving orders or instructions. In this case the negligence was proved aggravated by the incompetency of the roadmaster to give any order due to his inability to speak and understand Spanish.

The rule as to competency is set forth in

J. Master and Servant, Section 342:

"It is the duty of an employer to select and retain competent employees, and when one is injured by a fellow employee who, the evidence shows, was not competent to perform the service in which he was engaged, and the injury to the victim was attributable to his incompetency, a recovery against the employer may be had, provided it is further made to appear that the employer knew, or is chargeable with knowledge, of the incompetency of such fellow employee and that the injured employee did not know, actually or constructively of such incompetency. Incompetency on the part of the co-employee is deemed to be the equivalent of insufficiency or defectiveness in respect of an appliance or place of working. As has been said: "In a sense

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If a master



knowingly employs servants who are incompetent by reason of their habits or otherwise, he is liable for an injury occasioned to a fellow servant by their incompetency just as he would be liable for an injury caused by a defective machine."

However, it is even more succinctly stated in J., Master and Servant, 352, that an employee does not possess the capacity to understand and the rules of his superiors, is lacking in general education, or is ignorant of the language that is commonly employed may be held to be incompetent in the rules stated.

Thus in Pullman Co. v. Ransaw, 203 SW 122, Ransaw filed a suit against the Pullman and Texas & Pacific Railway Company for damages suffered by being unlawfully arrested by appellant's watchman, and by death of a gunshot wound. The defendant's watchman ejected plaintiff from the car and in so doing injured him, was not able to read or speak the English language. The court found that both employees had no right to be where they were and that the accident was caused because neither was able to understand the language of the other, and each was acting in the line of duty. The court, in sustaining the verdict for the plaintiff stated:



"We think the incompetence of the watchman is made clear in view of the fact that he could not speak the same language of the porter and in connection with their conflicting duties. Ruling Case Law, vol. 18, p. 621 states the rule:

"If a master knowingly employs servants who are incompetent by reason of their habits, or otherwise, he is liable for an injury occasioned to a fellow servant by their incompetency just as he would be liable for any injury caused by a defective machine."

"Ignorance of the language customarily employed is held to constitute incompetency. Ruling Case Law, vol. 18, p. 727, and cases referred to under note 19."

In this case we are not confronted with the lack of knowledge or the lack of it on the part of the employer, nor are we confronted with the application of the fellow servant rule. Charlevoix, the defendant, was in charge of an entire area for the defendant and entrusted with its proper supervision, and Charlevoix knew and was fully aware of the language barrier existing between himself and the employees at the time he undertook their active and direct supervision.

It would be a complete absurdity to contend that an employer can be held liable for the incompetency of a menial servant and cannot be held liable for the incompetency of a superior supervisory

ligence is more culpable, and any doubt is  
olved by Richard v. Amoskeag Mfg. Co., 79 N.H. 380

A. 88. The plaintiff did not speak English.  
The noon hour approached, she, in violation of  
any rules, left her place of work to go to the  
. The defendant's foreman, who was unable to  
k her language, and who apparently recognized  
she could not understand and did not speak  
ish, attempted to compel her to return to her  
e of duty. In the process, he exerted more  
e than was necessary, and plaintiff sued the  
ndant to recover for her injuries. The employer  
ended that the act of its foreman constituted an  
ult and battery and as a result was without the  
e of his employment, and that consequently it  
not negligent or liable. The Supreme Court of  
lampshire disagreed, stating:

"When the plaintiff quitted her work it was  
Smith's duty to call her attention to her viola-  
tion of the rule of the room and in some way to  
request her to resume her proper place. To  
make the request verbally would have been  
ineffective because she did not understand the  
English language, the only language he could use.  
He was obliged to resort to some other means of  
informing her of his request, as, for instance,  
by putting his hand upon her and leading or

pushing her back to the position she had wrongfully left. The use of some degree of physical force might reasonably be found to have been authorized by the defendant, and it follows, in accordance with the defendant's argument and the authorities above referred to, that the defendant would be liable for the excessive and unreasonable force used by Smith in the performance of his duty to the defendant."

It is submitted that appellant was entitled to his proposed instructions 13 and 14 to the jury that the omission of these instructions seriously prejudiced his right of recovery.

THE COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S A NEW TRIAL BY REASON OF THE MISCONDUCT OF A JUROR

At each recess, the court instructed the jury, pursuant to the provisions of Rule 47K, Utah Rules of Civil Procedure, which provides as follows:

"(k) SEPARATION OF JURY. If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

Notwithstanding the provisions of the Rule and instructions of the court, and although the court at one stage advised the jurors that violation of the Rule could result in imprisonment, on the

nd day of trial at the noon recess, a brother of  
or came up the steps from the lower landing to  
of the counsel for the respondent, and asked him  
s case had gone to the jury. (S.Tr. 5) Upon  
iving an answer he then stated: "I know all  
: your case - I have a brother on the jury".

. 5) A few minutes later he expressed concern  
se his brother seemed to be picked on railroad

. A private conversation in lowered tones  
ed during which the words "That old Mexican"  
mentioned (S.Tr. 5). Is it not significant

the appellant was a 63 year old Mexican? A  
lays later when confronted with the witness who  
overheard the conversation, and who identified  
speaker as an attorney, he appeared embarrassed  
concerned upon seeing the witness. (S.Tr 7).

All of this testimony was contained in affidavits  
worn testimony which was subject to cross  
nation. The evidence was not denied and  
fore stands admitted. These facts present the  
wing questions: (1) How did the juror's brother  
that counsel was trying a railroad case? (2)  
did he know his brother was a juror on a rail-  
case? (3) How did he know all about the case

own statement, as a result of conversations  
with his brother. (4) Why discuss privately "An  
Mexican"? (5) Why was the juror's brother  
embarrassed and upset upon seeing the witness who  
took part of the conversation?

It is possible that there is an innocent  
explanation for all of these highly unusual events,  
in the absence of any explanation which  
the defendant did not choose to make, it is sub-  
mitted that the conversation must stand upon the  
attested facts and the logical inferences that must  
be adduced therefrom.

In Panko v. Flintco Co., N.J., 80 A(2) 302, the  
defendant moved for a new trial by virtue of mis-  
conduct of a juror. The facts as finally adduced  
were that a brother in law of a juror had phoned an  
insurance adjustor relative to the question of in-  
surance from downstairs while the juror was upstairs  
sleeping, but did not disclose any of the facts of  
the conversation to the juror, although some refer-  
ence to the case was made, namely that the juror was  
sleeping in the trial of the case, the character of  
the case, and the names of the parties. The only  
evidence of misconduct of the juror was that

ween the brother in law and the juror prior to conclusion of the case. The brother in law stated he had not mentioned insurance to the juror until subsequent to the termination of the trial. The Supreme Court of New Jersey, in making of the telephone call from the brother in law to the insurance adjustor, said this:

"No rational explanation for the call is given, but the inference is inescapable that it was made for the purpose of getting information.....It is beyond belief that having secured the desired information, Smith did not give it to his brother in law (the juror), during the considerable time they remained together in the house thereafter."

In the instant case no rational explanation is given, in fact no explanation whatsoever was given. However, when one couples the statements of Jones' brother with the statement previously made by Juror Jones to another juror that he had relatives who were lawyers and he knew something about the law, and this brother's subsequent embarrassment upon being recognized, the inference is inescapable that the juror had in fact conversed with his brother who was an attorney, and that in so doing he violated the law and the express and direct instructions of the court. How could any other



rence be drawn? The claim of knowledge was led with the statement that he had a brother on jury. In the Panko, supra, case, the trial t, as did the trial court here, refused to t a new trial, however, the Supreme Court of Jersey had no difficulty with the problem and unanimous decision did reverse and did grant w trial, stating:

"It is well settled that the test for determining whether a new trial will be granted because of the misconduct of jurors or the intrusion of irregular influence is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs, and the court's charge. If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so. The stringency of this rule is grounded upon the necessity of keeping the administration of justice pure and free from all suspicion of corrupting practices. It is said to be "imperatively required to secure verdicts based on proofs taken openly at the trial, free from all danger by extraneous influences." *Lamphear v. MacLean*, 176 App.Div. 473, 162 N.Y.S. 432, 434, (N.Y.App. Div. 1916); *Gall v. New York & New Brunswick Auto Express Co.*, 132 N.J.L. 466, 468, 40 A.2d 643 (E&A 1944; in re Phelan, 126 N.J.L. 410, 411, 19 A.2d 792 (Sup.Ct. 1941); *Den ex dem. Cox v. Tomlin*, 19 N.J.L. 76, 80 (Sup.Ct. 1842; *Consumers Coal Co. v. Hutchinson*, 36 N.J.L. 24, 26, 28 (Sup.Ct. 1872); *Sloan v. Harrison*, 1 N.J.L. 123 (Reprint page 145)

(Sup.Ct. 1792); In re Collins, 15 A.2d 98, 18 N.J. Misc. 492, 497 (Cape May Co., Cir.Ct. 1940); York v. Wyman, 115 Me. 353, 98 A.1024 L.R.A. 1917B, 246 (Me. 353, 98 A. 1024) L.R.A. 1917B, 246 (Me.Sup.Jud.Ct. 1916); 39 AmJur, New Trial Sect. 96 P. 111."

submitted that if, as the Supreme Court of Jersey said "The fundamental right of trial by fair and impartial jury is jealously guarded by our courts", that it had no alternative but to grant a new trial unless it desired merely to give the service to a rule and then disregard the same.

The Supreme Court of Pennsylvania had a similar problem in Gross v. Moore, 73 A(2) 221. In that case the court was confronted with a trial where a juror was a niece of an insurance adjustor. The insurance adjustor was seen by the jury to have had a conversation with the juror as well as with counsel for the defense. The juror and the adjustor admitted the conversation but stated that it related solely to legal matters and no contrary evidence was adduced. A motion for new trial was denied by the trial court again, but again the Supreme Court of the State by an unanimous decision overruled the trial court and granted a new trial, stating:

'Although there may have been no actual fraud

or gross misbehavior on the part of anyone in this case, on the facts set forth in the record and the additional facts admitted at the argument before this Court a new trial will be granted. In our opinion, a new trial is required to assure a fair and impartial trial in fact as well as in appearance, and to preserve the orderly administration of justice."

Thus it will be seen that two States having an identical problem to the problem at bar have determined that the right to an impartial jury trial is fundamental and such a basic and essential part of the administration of justice that even if the appearance is wrong and even though no actual bias can in fact be proved, that a new trial should be granted. Likewise in Whitehead v. Texas & P. Ry 84 SW(2) 779, the Supreme Court of Texas had a similar problem in that a member of the jury having stated that he was free from bias or prejudice and in the confines of the jury room made inflammatory and improper remarks relative to the defendant and plaintiff's integrity. All of the other jurors testified that the improper remarks did not affect them or their deliberations in any way and they did not consider them. The tenor of their answers indicated that they intended to find for the plaintiff, and would have found for the defendant notwithstanding the remarks of such juror and that the

or's vote was not essential or necessary part of verdict. Notwithstanding these facts which were disputed by evidence, the Texas Court of Appeals erred, stating:

"We believe it clear that the remarks of Cruce referred to constituted reversible error. It would be a travesty and a reflection on our whole jury system to uphold a verdict tainted with such misconduct on the part of a juror who is selected upon his assurance that he is free of bias or prejudice toward either of the parties. And as repeatedly announced in our decisions, the verdict is vitiated even if only one juror is improperly influenced."

It would seem that the Supreme Court of California has in effect adopted a rule slightly different than that heretofore laid down by New Jersey, Pennsylvania and Texas and that the modification may be stated as follows: That a case may have misconduct by a juror in it but that the decision will not be set aside solely for that reason unless it appears that the conduct of the offending juror was essential to the verdict finally rendered. Thus we see that in the case of Walter v. Avaziam, Cal., 25  
526 a new trial was granted, whereas in the case of Kritzer v. Catron, 244 P(2) 808 a new trial was not granted because in the Kritzer case the verdict was 11 to 1 with the offending juror being

lone dissenter, and as a result the dissenter's  
e would not have upset or modified the verdict.  
is submitted that this verdict made certain basic  
umptions that are not necessarily justified. It  
umes, for example, that the arguments of that  
or did not in fact have effect in the size or the  
unt of the verdict. However, notwithstanding  
t problem under the rule in California as here-  
ore set forth, the plaintiff here would be en-  
led to a new trial because in this case the  
y was polled and one of the essential votes  
essary to sustain the verdict for the respondent  
against the appellant was the vote of the  
ending juror, Jones.

The effect of the above facts is bolstered by  
idavits of jurors Baessler and Tippetts in that  
y show beyond any doubt the manner in which the  
or, Jones, participated in the formation and  
ation of the verdict, together with the legal  
aseology and conclusions which he used to  
ress his views.

Respondent objected and moved to strike the  
davits, apparently upon the authority of Wheat v.  
W, 250 P.2d 222, 223. examination of the



contents of the affidavits here discloses that they  
make no effort to impeach or question the verdict  
or to show the grounds upon which the verdict was  
rendered, nor to show any misunderstanding of fact  
or law.

The affidavits do not disclose the surmises  
or processes of reason of the juror nor do they  
purport to do so. As a result, it is respectfully  
submitted that the affidavits do not come within the  
restriction set forth in the Wheat, supra, case and  
that the ruling of the trial court in excluding  
them was erroneous. Under the California rule  
it is necessary to show the misconduct of the juror  
is harmful to the appellant. It is submitted that  
the affidavits were offered only for the purpose  
of showing that the misconduct of the juror, Jones,  
was in fact vitally detrimental to appellant's cause.  
It is submitted that the affidavits do in fact, when  
considered in conjunction with the sworn testimony  
which is not controverted, show that irreparable  
damage as a result of such misconduct was done to  
the appellant by the offending juror.

The affidavits do not purport to show mis-  
conduct in the conduct of the misconduct of



e juror, Jones was in fact proven by his brother  
d by his statement at the time the jury was polled.  
may be that the statements contained in the affi-  
vits are cumulative, but that does not make the  
vidence contained therein incompetent. The verdict  
d already been rendered invalid by the acts and  
nversations of Jones outside of the court room

It must necessarily follow that the request of  
pellant for a new trial on this ground should  
ve been granted on the basis of these undisputed,  
contradicted facts.

#### CONCLUSION

It is respectfully submitted that the appellant  
s deprived of all of the fundamental rights of a  
ry trial in the above entitled case, because he  
s required to submit his claim for recovery to  
jury that was not advised as to any theory  
on which the appellant predicated his right or  
aim for recovery. On the contrary, the only  
formation that the jury had relating to the  
stion as to whether or not the appellant had  
ight to recover damages for his injuries was an  
dequate, improper and incomplete instruction

sed solely upon the respondent's theory, if any.  
is respectfully submitted that the appellant  
entitled to a new trial upon the issues involved  
this law suit and upon the court's failure to  
struct, and for the additional reason that the  
urt erred in refusing to grant a new trial by  
ason of the misconduct of the juror, Jones.

Respectfully submitted,

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Plaintiff and Appellant