

At the time of the happening of the accident, March 14th, the snow and ice upon the ground would thaw during the day and freeze at night. A ditch crossed the yard for the purpose of conveying away water that had accumulated upon the tracks. It was necessary to have this ditch opened by pick and shovel. A gang of yardmen, including the plaintiff, were detailed to attend to this task. The position of these men while actually upon any of the tracks was dangerous, as cars might at any time be shunted along the tracks. The plaintiff was run down and injured. No action was brought within the time limited by the Workmen's Compensation Act; and this action, if it can succeed at all, must be found to be maintainable at common law.

The plaintiff in his statement of claim sets out that the cars were shunted along the tracks where he was working, without any warning to him of their approach, and that this failure was a "defect in the ways, works, machinery, plant, or the condition and arrangement thereof, and was negligence," which entitles him to recover.

At one stage of the trial—I think after the close of the plaintiff's case—some suggestion was made that the system of the operation of the defendants' line was defective. The defendants' counsel objected that this was not the case made upon the pleadings and that if the system was to be investigated he would require a postponement. I ruled against the admission of evidence of this kind without an amendment, which would involve a postponement, and the case proceeded.

The defendants' case upon the evidence was that the man in charge of the shunting gave ample warning by word of mouth to the men upon the track. The plaintiff denied this warning, and denied the sufficiency of the warning alleged. I therefore asked the jury whether they accepted the evidence of these witnesses. In their answer to the third question they say they do not; so that it must be taken that the warning said to be given was not actually given.

In answer to the other question submitted, the jury found negligence because of the failure of the company's servants to give reasonable warning; and the answer to the question submitted as to the existence of defects in the ways, works, etc., was that there was a defect, it being "a lack of arrangement to reasonably warn men working on tracks of approaching danger." Neither counsel desired me