

the track. Neither under the evidence nor the written rules is any such suggestion made. There would, however, be the other alternative of having some one to warn the workman, as the witness Wedge suggests was the practice. But in this case it is not shewn that any one had instructed Dell to do this particular work at that time on the east-bound track, nor that any one even knew that he was going to be or was engaged upon it. If it was necessary or proper that a flag or flagman should have been put out, and if, as Wedge says, it was a foreman's duty to have seen to that, there was no request to any foreman or superior for any protection, and no knowledge by any foreman or superior of the necessity for any, and no knowledge of the existence of circumstances in which such protection might reasonably have been considered necessary. There is no direct evidence, even, that it was in the line of his ordinary duty that Dell should set about doing what he did without first reporting the defect he set about to correct; the jury might, in the absence of evidence to the contrary, properly infer that it was his duty to do the work; but they could not infer that if, as Wedge says, it was the foreman's duty to see that the workman was protected, the workman was entitled to expect this protection without making known the existence of its necessity.

The evidence shews that Dell was an experienced man, in the defendants' employment for twelve or more years, and knew what protection he should have; and no difficulty was suggested in the way of his applying to a foreman for any protection which, under the rules or practice of the company or the yard, he should have.

I am unable to see how the finding of the jury that there was negligence in not having a flagman, in the sense referred to, can be sustained upon the evidence. Their answer refers to the engine running west upon the east-bound track; but the evidence for the plaintiffs shewed that, within the yard, engines and trains ran upon either track in either direction, as indeed one would expect would be necessary. If that running on the left-hand track in the yard was intended by the jury as an element of negligence, it was unwarranted by the evidence. But it was probably intended only to state one of the circumstances making up the condition of affairs in which it was negligence not to have a flagman. The same may be said of the reference to the engine running backward, which in the very nature of things must be both necessary and frequent. That main finding of the jury upon the first and second questions submitted to them cannot, I think, stand.