

moved to the next piling place to leave the remaining half of the lumber—the distance for the car to go was only about 16 or 17 feet—and there was to this place a slight down grade. The defendants had in their yard a locomotive with steam up and ready for use to move any car from point to point as required. On this occasion the car was in charge of plaintiff and another workman. The plaintiff was as much in charge as the other. Both men were in same grade of employment, considering the short distance to go, and that the grade was down toward the next stopping point the plaintiff did not ask for the locomotive, but with a “punch bar” started the car. The car started more easily and went more rapidly than the plaintiff expected, and then the plaintiff, intending to stop the car and prevent its going beyond the piling place—went from behind, going to the right of the car toward the front—on his way picking up a piece of board—he intended to use this piece of board to stop the car—but he has no recollection of actually using it, and would not swear positively one way or the other. His recollection is that as he got to the front he saw the flange of the front wheel on the right hand side of the car upon the rail, and in an instant, by the jolt of the car wheel coming to the ground or tie, the lumber was precipitated from the car upon the plaintiff, and the plaintiff was very badly injured. His right leg was broken; his left knee and right shoulder were dislocated—and he was otherwise injured.

The plaintiff charges the defendants with negligence in very many respects. At the trial, the assignments of negligence relied upon by plaintiff were:—

(1) that the car in question should have been supplied with brakes; (2) that one of the rails, where the accident happened was twisted and bent, and had been so for a considerable time to the knowledge of the defendants; (3) that at the place where the front wheels of the car left the tracks, there was a curve, and the resisting rail or outer rail should have been higher than the other rail, instead of that, both rails were of equal height, and (4) that there was no sufficient system of inspection of roadbed, track, and cars.

The defendants, while denying negligence on their part, allege contributory negligence on the part of plaintiff:—

(1) In not using locomotive to haul the car—when ready to be moved; (2) in moving the car with its half load standing high and unsupported, instead of having the lumber dis-