Hillsborough,
June 26, 1936.

MARSHALL CLARK *v.* BOSTON & MAINE RAILROAD.

Lucier & Dowd (*Mr. Lucier* orally), for the plaintiff.

Warren, Wilson, McLaughlin & Bingham (*Mr. Bingham* orally), for the defendant.

Per Curiam. The defendant contends that the last chance rule does not apply because the plaintiff is bound by his own assertion that just before the accident occurred he was standing in a place of safety. It is unnecessary to consider this contention. On the first transfer of the case it was judicially determined that the plaintiff was guilty of negligence as a matter of law. His fault "was therefore not in issue in the retrial." 87 N. H. 434, 439. For the same reason it cannot be made an issue now.

The defendant's remaining contention that the evidence is insufficient to sustain the verdict is also without merit. It was held on each of the former transfers that there was evidence to be submitted to the jury under the doctrine of the last clear chance. The evidence before us on the present transfer is even more favorable to the plaintiff. It follows that the motion for a nonsuit should have been denied. *Haakensen* v. *Company*, 77 N. H. 588.

In accordance with the agreement of the parties, the order is

Judgment for the plaintiff for $4,000 as of January 16, 1936.