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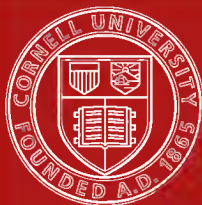
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A TREATISE

ON

THE LAW

OF

CONTRIBUTORY NEGLIGENCE.

BY

CHARLES FISK BEACH, JR.,

COUNSELLOR AT LAW.



NEW YORK:

BAKER, VOORHIS & CO., PUBLISHERS,

66 NASSAU STREET.

1885.

3081

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WILLIS McDONALD & Co., PRINTERS,
25 Park Row, New York.

TO THE
HON. MARCUS BEACH,
OF NEW JERSEY,
A KINSMAN OF MINE,
TO WHOM
I WAS INDEBTED FOR THE
BEGINNINGS OF MY LEGAL EDUCATION,
AND
IN REMEMBRANCE OF MANY KINDNESSES,
I DEDICATE THIS BOOK.

P R E F A C E .

I HAVE made this book upon the Law of Contributory Negligence in the belief that such a work, even if only fairly well done, would be timely, and might possibly be, in some degree, useful to the bench and bar. The libraries have furnished, hitherto, no separate treatise upon this subject; the latest editions of the standard works upon the Law of Negligence, which consider Contributory Negligence only incidentally, were published several years ago, and the subject is one of constant, and constantly increasing interest and importance to the profession. It is by far the most important and material branch of the Law of Negligence, and although we already have at hand, aside from the several English treatises, the three excellent American works of Messrs. Shearman & Redfield, Dr. Wharton, and Judge Thompson respectively—each in its way the best of the three—I have thought, because the subject is an interesting one and impinges so much upon so many other leading titles in the law, that this work of mine might supplement rather than supplant what has already been better done upon the more general subject of Negligence, and that it might, in consequence, turn out not a wholly superfluous undertaking. I have collected and cited more than three thousand cases—not omitting, as I believe, a reference to any valuable adjudication in point, by the State and Federal courts of our own country, and have endeavored to give a due prominence to recent English authorities, and to include, particularly, citations from the latest volumes of the reports and from current periodical legal literature.

I may frankly acknowledge that in the progress of my work I have drawn without stint from many sources. I owe much to the three American treatises on Negligence, to divers other works, and to many essayists, pamphleteers, and reporters, as the notes declare.

CHARLES FISK BEACH, JR.

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CONTRIBUTORY NEGLIGENCE.

CHAPTER I.

INTRODUCTORY.—OF NEGLIGENCE AND OF CONTRIBUTORY NEGLIGENCE GENERALLY.

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|---------------------------------------|---|
| § 1. Origin of the law of Negligence. | § 5. <i>Davies v. Mann.</i> |
| 2. Negligence defined. | 6. Reasons for the rule of Contributory Negligence. |
| 3. Contributory Negligence defined. | |
| 4. <i>Butterfield v. Forrester.</i> | |

§ 1. *Origin of the law of Negligence.*—Our Anglo-American law of Negligence, including, as of course, that of Contributory Negligence, has come down to us, in ordinary generation, from the civil law of imperial Rome. It is a part of that great debt which the common law owes to the classical and the scholastic jurisprudence. No *corpus juris*, adequate to the social and business necessities of an enlightened and active people, could omit such titles as Bailment and Negligence. They were, therefore, inevitably, in the very nature of things, and by reason of the civilization, the wealth, and the commercial enterprise of Rome under the empire, included in the consummate system of jurisprudence which the lawyers and the law-makers of that age originated and developed. The underlying principles and the practical details of the law in this behalf were fully comprehended and worked out by the juriconsults, as part of a body of law suited very exactly to the wants of a people, that, in periods of high civilization, controlled the business of the globe.

This classical jurisprudence, as is well understood, falling into the hands of the scholastic jurists of a subsequent era, was, by them, loaded and hampered with all the belabored judicial subtleties and idealistic fictions of mediævalism, and, thus perverted and distorted, first presented itself to those earlier English jurists, who, in the seventeenth and eighteenth centuries, first began seriously to study the civil law, with a view to adapting it, in some degree, to the growing social and commercial necessities of Englishmen. Accordingly, Lord Holt, in the case of *Coggs v. Bernard*,¹ turning to the Roman law for enlightenment, and relying for his authority, when he found no precedents in the English reports,² upon the scholastic jurists of the middle ages, engrafted, in his famous opinion in this case, upon the stout stem of the English common law a much bescholiazied exotic from the code of Justinian. In this famous case was laid the foundation of the modern English law of Bailment, a subject with which the law of Negligence is so intimately associated that we are accustomed to regard Lord Holt's learned and exhaustive opinion herein, as the leading authority, in a case of novel impression, as well upon the one title as the other. Sir William Jones' treatise on Bailments, wherein Negligence is a principal topic, is confessedly based upon the learning in *Coggs v. Bernard*, and Mr. Justice Story, in his works upon Bailments and Agency, the treatise of Gaius not having been discovered when he wrote, followed these two eminent authorities. Chancellor Kent also added the sanction of his great name to the same

¹ 2 Anne, A. D. 1703; 2 Ld. Raym. 909; S. C. Smith's Leading Cases, 8th edition, 369.

² I have not overlooked Southcote's Case (43 Eliz. A. D. 1601; 4 Rep. 83*b*; Cro. Eliz. 815), which presents the older English law pure and sim-

ple, irrespective of any modern or foreign innovation, but Lord Holt expressly disregards that authority. It is completely overthrown, and the law may fairly be said to date from *Coggs v. Bernard*, *vide* Holmes' Common Law, 196.

general exposition of the law. So it has come to pass that our text writers upon this subject have, for the most part, set forth the law essentially from the standpoint of the jurists or scholiasts of the middle age. The courts, on the other hand, finding this artificial and visionary jurisprudence unsuited to the necessities of our time, have inclined more and more away from the scholastic formulas, accepting the learning, on the authority of the jurists, as theoretically sound, but refusing judicially to impose upon suitors the burdens, inconveniences, and even absurdities they involve. "The consequence was," says Dr. Wharton, in the preface to his learned work upon Negligence, "that our adjudications have been on one plane of jurisprudence, and our principles on another plane." The result of this contest between scholastic theory and modern common sense has been somewhat remarkable. The courts, after starting out, from *Coggs v. Bernard*, upon the theory of the middle ages, have, more or less unconsciously, constructed for us, in flat defiance of authority, a jurisprudence upon this topic that very nearly assimilates itself to the jurisprudence of Rome when it was the money power and the business power of the whole earth. It is the highest possible warrant to the soundness and abstract correctness of our present law, as well as to its inherent justness and propriety, that the social and commercial necessities of our age have developed in the courts, in spite of counter theories, a body of law as to this matter singularly like that worked out by the jurists of the most richly civilized and the most commercial era of antiquity. It is as though Æacus and Rhadamanthus had endorsed our doctrine.

§ 2. *Negligence defined.*—The theorists, the text writers, and the judges have alike stumbled over the definition of this term, and nothing generally satisfactory has

ever been proposed, from which it may perhaps be safe to conclude that it is impossible to define it with such scientific accuracy as to embrace and conclude all the possibilities. Is it not time to concede the point in law literature, notwithstanding the more or less imperious demand upon every law writer for comprehensive, terse, and infallible definitions, that legal principles and legal terms in general are not capable of definition after the fashion of the exact sciences; that law is scarcely a science at all in the scientific sense, and that the attempt to express its principles in definitions or in rules of mathematical precision misleads oftener than it enlightens? As Dr. Johnson once said, you may walk in a straight line on a desert, but you cannot walk in a straight line in Cheapside. The great jurists have not been great definers in the mathematical way, and he who is glibbest at such legal definition is perhaps one who knows a little law wrong.

In the High Court of Chancery the term "fraud" is not defined.¹ By the older lawyers it seems to have been regarded as peculiar in this respect, but are not the reasons they assign for the failure to define it for the most part cogent against defining any comprehensive legal term or principle in the sense in which there is a modern tendency to expect and demand definition? Hardly a better illustration of the futility and inutility of legal definitions of this character is at hand than those proposed by various writers and judges of the term "negligence," and the strictures of each of them upon the definitions of the others. That by Baron Alderson is often quoted with approval. "Negligence," says that discriminating jurist, "is the omission to do something which a reasonable man,

¹ Parks' History of Chancery, 508; *terfield v. Janssen*, 1 Atk. 352 (by Lawson's Snells' Equity, 383; Ches- Lord Hardwicke).

guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”¹ This is, it is submitted, no more a definition of negligence than of the opium habit, or the excessive use of intoxicating liquors, or gambling or reckless speculation, or forty other things.

Mr. John Austin’s definition is this: “The term ‘negligent’ applies exclusively to injurious omissions; to breaches by omission of positive duties. The party omits an act to which he is *obliged* (in the sense of the Roman lawyers). He performs not an act to which he is obliged, because the act and the obligation are absent from his mind. An omission,” he says, “(taking the word in its larger signification,) is the not doing a given act without adverting (at the time) to the act which is not done.”² This, judging from the definition, is not what Baron Alderson was trying to set off by metes and bounds; neither is it what Dr. Wharton understands negligence to be. He proposes this: “Negligence in its civil relations is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces in an ordinary and natural sequence, a damage to another. The inadvertency, or want of due consideration of duty, is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based.”³ Messrs. Shearman and Redfield do not, I believe, attempt a definition in terms. The three already given are some evidence that a definition of any other value than as an illustration of some phase or phases of the subject is impossible.

¹ *Blyth v. Birmingham Water Works Co.*, 11 Exch. 784; S. C. 2 Jur. (N. S.) 333; 25 L. J. (Exch.) 212.

² Austin’s Lectures on Jurisprudence, 3d London ed. 439.

³ Wharton on Negligence, § 3.

From a general view of the subject it may be concluded that legal negligence consists for the most part in the breach, or omission, of a legal duty,¹ which may be either unintentional, as is usually the case, or intentional, as is sometimes the case. This duty may be either one imposed by the rules of civil society, in which case the violation of it is a tort, or one voluntarily assumed by contract, in which the failure is a breach of contract. Whence it appears that negligence, in its legal aspect, is of two distinct sorts, the one springing out of relations resting in contract, and the other not. In the one case there is an action sounding in tort, and in the other there is an action for breach of contract. It is clear that the same definitions and the same rules of law cannot equally apply to each, and that in consequence it is always necessary to consider negligence in this dual aspect. While accurate and scientific knowledge, clear thinking, and precise expression as to the principles of law governing this subject are possible, to define the term "negligence" in its legal sense—in its application to all human interests as they may become subjects of litigation, or to reduce the law of negligence to rules of mathematical completeness and precision, as one writes magic squares—is hopelessly out of the question. There are theorists among law writers who, considering that the story of Robinson Crusoe has been very cleverly retold in words of one syllable, would apply a somewhat analogous method of revision and simplification to the law books. Shall we not, however, rather rest with a presentation of the law as it really is, in as luminous and orderly a way as the subject reasonably admits, without essaying

¹ Shear. & Redf. on Neg., § 2 *et seq.*; Thompson on Neg., preface; Wharton on Neg., § 3 *et seq.*; 3 Puffendorf's Law of Nations, chap. I; Tonawanda R. R. v. Munger, 5 Denio, 255; s. c. 49 Am. Dec. 239; Danner v. South Carolina R. R., 4 Rich. (Law), 329; s. c. 55 Am. Dec. 678; Baltimore, &c., R. R. v. Woodruff, 4 Md. 242; s. c. 59 Am. Dec. 72.

a method and a simplicity which are not in the nature of things?

§ 3. *Contributory Negligence defined.*—Between negligence and contributory negligence there is the difference between genus and species, and it is, accordingly, far easier to state with tolerable precision what contributory negligence is, than to construct a satisfactory definition of the simple term “negligence.” In the qualified term we are held more to a definition of the adjective than of the noun. Conceding, then, the unknown quantity, we may proceed to define, or find the value of the coefficient in terms of the unknown quantity; that is to say, in the result we shall express the unknown quantity with the value of its coefficient somewhat determined. I therefore, employing some such method of definition as this figure suggests, propose the following: Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements. Certainly they are the two points of difficulty in the consideration of the question. “Did the plaintiff exercise ordinary care under the circumstances?” “Was there a proximate connection between his act or omission and the hurt he complains of?” These are the vital questions when contributory negligence is the issue. The definition proposed is believed to cover fairly all the points involved.¹

¹ *Tonawanda R. R. Co. v. Munger*, *Danner v. South Carolina R. R. Co.*, 5 Denio, 255; S. C. 49 Am. Dec. 239; 4 Rich. (Law), 329; S. C. 55 Am. Dec.

§ 4. *Butterfield v. Forrester*.—This is believed to be the earliest reported case in the English law in which the general rule as to contributory negligence is distinctly announced. It was decided by Lord Ellenborough in the Court of King's Bench in 1809,¹ and has ever since been regarded a leading case. It may safely be said that it has been cited with approval as a controlling authority in every jurisdiction where the common law obtains. The opinion is a model of judicial brevity. It declares the rule, sets forth the reasons for it, and suggests a good illustration, within the compass of a dozen lines.² No case is more often referred to in oral argument, and no case in any branch of the law is more generally received as unquestionably sound. It was an action on the case for obstructing the highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown from his horse and injured. It appears that the defendant, for the purpose of making some repairs to his house, which was close by the roadside, had put up a pole partly across the street on his side, leaving, however, free passage through the street along the other side of the way, and that the plaintiff, who was riding rapidly through the street, just at nightfall, but before it was dark, not observing the obstruction, rode violently against it, and, being thrown from his horse, was seriously injured. On this state of facts the court directed the jury that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and they were satisfied that the plaintiff was riding extremely hard through the street, and without ordinary care, they should find a

678; *Baltimore, &c., R. R. Co. v. Woodruff*, 4 Md. 442; S. C. 59 Am. Dec. 72; *O'Brien v. McGlinchy*, 68 Me. 552; *Neanow v. Ullech*, 46 Wis. 590; *Harris v. Union Pacific R. R.*, 4 McCrary, 454.

¹ 11 East, 60.

² Lord Ellenborough's opinion is delivered in exactly one hundred and sixteen words.

verdict for the defendant, which they accordingly did. Upon motion for a new trial, the court say, by Lord Ellenborough, C. J. : " A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road, by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." The doctrine of this case, then, plainly is, that, although the defendant may have been guilty of a want of ordinary care, tending to produce the injury complained of, still the plaintiff will not be entitled to recover damages if he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, or, what is the same thing, that he cannot recover when his own negligence proximately contributed to produce the injury of which he complains. This rule not only commends itself to our instinctive sense of justice, since what can be a more reasonable requirement than that a man must take ordinary care of himself, or suffer the consequences, but it is also in harmony with the spirit of the law in other respects, in that it puts every man upon his guard, and suffers him not to take advantage of his own lack of prudence or care, by first running into danger, and then calling upon some one else to recompense him in damages for what he suffers. It is a principle of law so consonant with justice and right reason that it can never be overthrown.

§ 5. *Davies v. Mann*.—In this case, decided by Lord Abinger in the Court of Exchequer in 1842,¹ an entirely different rule is laid down, one which is not only subversive of the reasonable rule declared in *Butterfield v. Forrester*,² but which practically repudiates the entire doctrine of contributory negligence. It is known sometimes as “the donkey case,” the facts being that the plaintiff’s donkey, which he had fettered and negligently allowed to graze at large upon the highway, was run down and killed by the servant of the defendant, driving a wagon through the street. It was conceded that the act of the plaintiff, in leaving his donkey on the highway, so fettered as to prevent his getting out of the way of passing vehicles, was negligent and unlawful, but, inasmuch as it appeared that the defendant, by the exercise of ordinary care, might have avoided running over the animal, the plaintiff was held entitled to recover. The clear doctrine of this case is that a plaintiff, although he be guilty of negligence, tending to produce the injury he complains of, may, notwithstanding that, recover damages for the injury, if the defendant could, in spite of such negligence, by the exercise of ordinary care upon his part, have avoided inflicting the injury. Under this rule no account is taken of the plaintiff’s negligence. He is not held to the duty of taking even ordinary care of himself. Let him be never so heedless, or stupid, or careless of his safety, if he can only make it appear that his injury might not have happened to him if the defendant had exercised due care, he may, under *Davies v. Mann*, have his action, and the defendant, in the suit he brings, is held to responsibility, not only for the consequence of his own neglect as in *Butterfield v. Forrester*, but he must pay for the neglect of the plaintiff also. Where both parties have

¹ 10 Mee. & W. 546; s. c. 6 Jur. 954; 12 L. J. (Exch.) 10.

² 11 East, 60.

been guilty of negligence, concurring to produce an injury, the doctrine of this case completely exonerates the party who suffers the injury, ignores entirely his contributory negligence, and charges the other party with it all. This is sheer injustice, and it is a striking evidence of the chaotic state of the law upon this subject, that *Davies v. Mann* is esteemed a leading and authoritative case. We find the judges citing it frequently in the reported cases with approval, as enunciating a sound rule of law, and sometimes side by side with *Butterfield v. Forrester*, which it flatly contradicts, so that the two cases cited together make nonsense. The doctrine of *Butterfield v. Forrester* applied to the state of facts upon which *Davies v. Mann* turns would give a judgment to the defendant. Indeed the donkey case is a good deal clearer case than that of the man riding at sundown through the streets of Derby.

If this pernicious and mischief-making authority could be distinctly repudiated, much of the uncertainty and confusion in writing and in thinking upon the subject of contributory negligence would disappear. It is the doctrine that has made all the trouble. The attempts to reconcile some such rule or theory as this case propounds, with the obvious and natural justice of the matter, have driven the courts into all sorts of vagaries, and the reported cases show an endless floundering and confusion. If the simple and just and rational rule that a plaintiff guilty of contributory fault cannot recover be adhered to, and all attempts to reconcile that principle with any such rule as that of *Davies v. Mann* be abandoned and forgotten, the difficulty will be very much at an end. It is submitted that this is the only way to reduce our law in this behalf to an orderly and logical system.

§ 6. *The reasons of the rule.*—The reasons of the rule which denies relief to a plaintiff guilty of contributory

negligence have been variously stated. The common law refuses to apportion damages which arise from negligence. This it does upon considerations of public convenience and public policy, and upon this principle, it is said, depends also the rule which makes the contributory negligence of a plaintiff a complete defense. For the same reason, when there is an action in tort, where injury results from the negligence of two or more persons, the sufferer has a full remedy against any one of them, and no contribution can be enforced between the tort feasons. The policy of the law in this respect is founded upon the inability of human tribunals to mete out exact justice. A perfect code would render each man responsible for the unmixed consequences of his own default; but the common law, in view of the impossibility of assigning all effects to their respective causes, refuses to interfere in those cases where negligence is the issue, at the instance of one whose hands are not free from the stain of contributory fault,¹ and where accordingly the impossibility of apportioning the damage between the parties does not exist, the rule is held not to apply.²

It is said again, that the true theory upon which the rule rests is that the defendant is not the cause of the injury if the plaintiff's negligence contributes to it; but this is a very superficial view. If it is meant that the defendant is not the *sole* cause, the argument only goes around in a circle, and if it is meant that the defendant is liable every time he is the sole cause of an injury, it is not true. "The true ground," says Dr. Wharton, "for the doctrine is that, by the interposition of the plaintiff's independ-

¹ 1 Am. Law Rev. (N. S.) 770, an article by Ernest Howard Crosby, Esq.; Railroad Co. v. Norton, 24 Penn. St. 469; Heil v. Glanding, 42 Penn. St. 493; Shear. & Redf. on Neg., § 42, citing Brendell v. Buffalo, &c., R. R., 27 Barb. 534 (n.); Dascomb v. Buffalo, &c., R. R., 27 Id. 221.

² Needham v. San Francisco, &c., R. R., 37 Cal. 409.

ent will, the causal connection between the defendant's negligence and the injury is broken." ¹ It is also sometimes assumed to rest upon the maxim *volenti non fit injuria*, but the objection to this position, as well as to Dr. Wharton's definition, is that negligence, in its very essence, negatives the idea of an exercise of the will. A person whose negligence causes an injury cannot be spoken of with any accuracy of expression as "willing" it. Negligence can only be conceived upon the hypothesis that the will, as to the particular condition, is inactive. In my judgment no more satisfactory reason for the rule in question has been assigned than that which assumes it to have been founded upon considerations of public policy. We need not seek for any better reason for a rule of law than that, among all the possible rules ² that might be adopted, it is plainly the best—that indeed it is the only rule upon the subject for an instant practicable.

¹ Wharton on Neg., § 300, citing *Tuff v. Warman*, 5 C. B. (N. S.) 573, 585.

² "The State might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and State aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle *pro*

tanto, and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The State does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*." Holmes' "Common Law," 96.

CHAPTER II.

THE GENERAL RULE.

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| <p>§ 7. General statement of the rule.</p> <p>8. Express or implied waiver of a right of action.</p> <p>9. What is ordinary care.</p> <p>10. What is a proximate cause.</p> <p>11. Distinction between causal connection and a plaintiff's negligence.</p> <p>(A.) <i>Particular considerations affecting the plaintiff's right to recover.</i></p> <p>12. Plaintiff's previous knowledge.</p> <p>13. Plaintiff's failure to anticipate the fault of the defendant.</p> <p>14. Plaintiff acting erroneously under the impulse of fear produced by the defendant.</p> <p>15. Plaintiff acting erroneously in trying to save human life.</p> <p>16. Plaintiff doing an illegal act.</p> <p>17. Plaintiff a trespasser.</p> | <p>§ 18. Plaintiff's prior negligence in connection with defendant's subsequent negligence.</p> <p>19. Plaintiff's negligence after the catastrophe.</p> <p>20. Negligence of the decedent under Lord Campbell's act.</p> <p>(B.) <i>Particular considerations affecting the defendant's liability.</i></p> <p>21. When the defendant's negligence is gross.</p> <p>22. When the defendant's negligence is wilful.</p> <p>23. When the defendant by his acts or omissions throws the plaintiff off his guard.</p> <p>24. Mitigation and apportionment of damages.</p> |
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§ 7. *General statement of the rule.*—Contributory negligence, as we have seen,¹ consists, in contemplation of law, in such acts or omissions, on the part of a plaintiff, amounting to a want of ordinary care, as concurring or co-operating with the negligent acts of the defendant, are a proximate cause, or occasion of the injury complained of. It is a general rule, firmly imbedded in the law, and conclusively settled, that such negligence will defeat a recovery.

Says Black, C. J., in *Pennsylvania R. R. Co. v. Aspell*:² "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown

¹ § 3, *supra*.

² 23 Penn. St. 147; s. c. 62 Am. Dec. 323.

that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." From *Butterfield v. Forrester*,¹ to the latest judgments of the appellate courts in every common law jurisdiction, the rule is consistently and uniformly declared.²

¹ 11 East, 60.

² *Freer v. Cameron*, 4 Rich. (Law), 228; S. C. 55 Am. Dec. 663, (and especially Mr. Freeman's scholarly and exhaustive note at page 666); *Shear. & Redf. on Neg.*, § 25 *et seq.*; *Thomp. on Neg.*, 1146; *Wharton on Neg.*, § 300; *Saunders on Neg.*, 55, 60; *Field on Damages*, 158, 159, 173, 529; *Bridge v. Grand Junction Ry.*, 3 Mee. & W. 244; *Tuff v. Warman*; 5 C. B. (N. S.) 573; *Witherley v. Regent's Canal Co.*, 12 Id. 2; S. C. 3 *Fost. & Fin.* 61; 6 L. T. (N. S.) 255; *Dowell v. Steam Navigation Co.*, 5 El. & Bl. 195; *Moak's Underhill on Torts*, 283, 285; 4 *Wait's Actions and Defenses* 718, § 2; *Kennard v. Burton*, 25 Me. 39; S. C. 43 Am. Dec. 249; *Railroad Co v. Jones*, 95 U. S. 439; *Munger v. Tonawanda R. R.*, 4 N. Y. 349; S. C. 53 Am. Dec. 384 and note; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 212; *Central R. R. v. Letcher*, 69 Ala. 106; S. C. 44 Am. Rep. 505; *Little Rock, &c., R. R. v. Pankhurst*, 36 Ark. 371; *Kline v. Central Pacific R. R.*, 37 Cal. 400; *Colorado, &c., R. R. v. Holmes*, 5 Colo. 197; *Illinois, &c., R. R. v. Hetherington*, 83 Ill. 510; *Fleytas v. Ponchartrain R. R. Co.*, 18 La. Ann. 339; S. C. 36 Am. Dec. 658; *Murray v. Ponchartrain R. R.*, 31 La. Ann. 490; *State v. Manchester, &c., R. R.*, 52 N. H. 528; *Pennsylvania R. R. v. Goodman*, 62 Penn. St., 329; *Walsh v. Transportation Co.*, 52 Mo. 434; *Zimmerman v. Hannibal, &c., R. R.*, 71 Id. 476; *Palys v. Erie Ry. Co.*, 30 N. J. Eq., 604; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. Law, 180; *Morrison v. Cornelius*, 63 N. C. 346; *Murphy v. Deane*, 101 Mass. 455; S. C. 3 Am. Rep. 390; *Richmond, &c., R. R. Co. v. Morris*, 31 Gratt. 200;

Id. v. Anderson, 31 Id. 812; *Pennsylvania R. R. Co. v. Sinclair*, 62 Ind. 301; S. C. 30 Am. Rep. 185 (note); *Simpson v. Hand*, 6 Wharton (Penn.), 311; S. C. 36 Am. Dec. 231; *Steele v. Central R. R. of Iowa*, 43 Iowa, 109; *McKean v. R. R. Co.*, 55 Id. 192; *Birge v. Gardner*, 19 Conn. 507; S. C. 50 Am. Dec. 261; *Salem v. Goller*, 76 Ind. 291; *Hoehl v. Muscatine*, 57 Iowa, 444; *Kentucky Central R. R. v. Thomas*, 79 Ky. 160; S. C. 42 Am. Rep. 208; *Bradley v. Andrews*, 51 Vt. 530; *Erie v. Magill*, 101 Penn. St. 616; *Abend v. Terre Haute, &c., R. R.*, Sup. Ct., Ill., Sept. 27, 1884, 19 Cent. L. J. 350; *Jamison v. San Jose, &c., R. R.*, 55 Cal. 593; *Strong v. Sacramento, &c., R. R.*, 61 Id. 326; *Nehrbas v. Central, &c., R. R.*, 62 Id. 320; *McCoy v. Philadelphia, &c., R. R.*, 5 Hous. (Del.) 599; *Louisville, &c., R. R. v. Shanks*, 94 Ind. 598; *Terre Haute, &c., R. R. v. Graham*, 95 Id. 286; *Storey v. Dubuque St. Ry. Co.*, 51 Iowa, 419; *County Com'rs v. Hamilton*, 60 Ind. 340; *Pevery v. Boston*, 136 Mass. 366; S. C. 49 Am. Rep. 37; *Vicksburg, &c., R. R. v. Hart*, 61 Miss. 468; *Dudley v. Camden Ferry Co.*, 45 N. J. L. 368; *Mullen v. Rainear*, 45 Id. 520; *Renneker v. South Car. R. R.*, 20 S. C. 219; *Houston, &c., R. R. v. Richards*, 59 Texas, 373; *Louisville, &c., R. R. v. Goetz*, 79 Ky. 442; *Kentucky Central R. R. v. Lebus*, 14 Bush. 518; *Sullivan v. Bridge Co.*, 9 Id. 81; *Paducah R. R. Co. v. Hoehl*, 12 Id. 41; *Jacobs v. Louisville, &c., R. R.*, 10 Id. 263; *Louisville, &c., R. R. v. Collins*, 2 Duv. (Ky.) 114; *Id. v. Robinson*, 4 Bush. 507; *Martin v. Bishop*, 59 Wis. 417; *Hoth v. Peters*, 55 Id.

And even in those courts that have invented and tolerate the doctrine of "comparative negligence," or that follow, in some sort or another, the strange gods that led the fathers astray, in *Davies v. Mann*,¹ *et id omne genus*, the force and integrity of this rule are equally admitted.²

It would require far greater judicial hardihood to challenge its soundness than it does to explain it away.

§ 8. *Express or implied waiver of a right of action.*—It is held entirely lawful for one, by an express contract, to waive the right of action which he may have against another for damages for an injury occasioned by the negligence of such other person, provided that this contract is supported by some consideration deemed valuable in law, and is in other respects without such fraud or mistake as to its procurement, as would avoid any other contract.³ And when the contract of waiver is made after the injury is received, if it is in other particulars a lawful one, being founded upon a valuable consideration, and procured without imposition or duress, the courts uphold it as valid.⁴ Such a contract may be implied as well as express, as for example, between a master and servant, when the servant enters into, or continues in, the service with full knowledge of the risk to which he exposes him-

405; *Otis v. Janesville*, 47 Id. 422; *Sheff v. Huntington*, 16 West Va. 307; *Cronin v. Delavan*, 50 Wis. 375; *Rexter v. Starin*, 73 N. Y. 601; *Levy v. Carondelet Canal Co.*, 34 La. Ann. 180; *Jeffrey v. Keokuk, &c.*, R. R., 56 Iowa, 546; *Addison on Torts*, 23 *et seq.*, 227, 493; 1 *Sedgwick on Damages*, 172; 2 Id. 347.

¹ 10 Mee. & W. 546.

² *Chicago, &c., R. R. v. George*, 19 Ill. 510; *Illinois, &c., R. R. v. Hetherington*, 83 Id. 510; *Chicago, &c., R. R. v. Johnson*, 103 Ill. 512; *Macon, &c., R. R. v. Winn*, 19 Ga. 440; *Union Pacific R. R. v. Rollins*, 5 Kan. 167.

³ *Western, &c., R. R. v. Bishop*, 50 Ga. 465; *Memphis, &c., R. R. v. Jones*, 2 Head, 517; *Mitchell v. Pennsylvania R. R. Co.*, 1 Am. Law Rep. 717; *Galloway v. Western, &c., R. R.*, 57 Ga. 512. *Contra*, *Roesner v. Hermann*, 10 Biss. 486, where such a contract *in consideration of the employment*, was held illegal as contrary to public policy.

⁴ *Curley v. Harris*, 11 Allen, 112; *Chicago, &c., R. R. v. Doyle*, 18 Kan. 58; *Illinois, &c., R. R. v. Welch*, 52 Ill. 183; S. C. 4 Am. Rep. 593; *Butler v. The Regents*, 32 Wis. 124; *Schultz v. Chicago, &c., R. R.*, 44 Id. 638.

self by reason of his master's negligence.¹ This is held to be an implied contract on the part of the employee to run the risk of the danger, and a waiver of his right to an action against his employer if injury results. Upon this principle also, one who goes upon the premises of another to do business, or as a guest, impliedly accepts the risk of any open or seen dangers that exist about the premises.²

It is clear that this voluntary act by which one waives his right of action for damages resulting to him from the negligence of another, is not at all the same thing as contributory negligence, though in each case the result is the same—that the plaintiff recovers nothing. In the former case the defense is that the plaintiff is barred of his action by his voluntary assumption of the risk, that he has deliberately and with his eyes open, disabled himself from recovering damages, that his case comes within the principle of the maxim *volenti non fit injuria*, while in the latter case the defensive matter is that the plaintiff without any act of the will, was guilty of such negligent acts as, concurring with the acts of the defendant, produced or occasioned the injury of which he complains, or, what is the same thing, that, in the first instance, he is deprived of his right of action by his express or implied contract, which operates as a sort of estoppel, and in the second instance, he is deprived of his right to recover by his negligence. This distinction between a voluntary act and an involuntary one, between a contract and an act of pure negligence, is an important one. There is a confusion of ideas implied in such expressions as that one cannot recover damages "where he has consented or contributed to the act which occasioned the injury."³ It is one thing

¹ This is fully considered in the chapter on Master and Servant, *post*, *q. v.*

² *Indermaur v. Dames*, L. R. 1 C. P. 274; S. C. L. R. 2 C. P. 311; *Kohn v. Lovett*, 44 Ga. 251; *Hargreaves v.*

Deacon, 25 Mich. 1; *Thomp on Neg.*, chap. VII, and cases there collected.

³ *Callahan v. Warne*, 40 Mo. 136; *Trow v. Vermont, &c.*, R. R. Co., 24 Vt. 487; S. C. 58 Am. Dec. 191.

to *consent*, as we have seen, and an essentially different thing to *contribute* to an injury, and, in order to right thinking upon the question of contributory negligence, the distinction should not be overlooked.

§ 9. *What is "ordinary care."*—The Roman jurists of the classical period recognized but two grades of negligence, *culpa lata*, gross negligence,¹ and *culpa levis*, ordinary negligence, or the failure to exercise the diligence belonging to a *diligens, bonus, studiosus paterfamilias, "qui sobrie et non sine exacta deligentia rem suam administrat."* To these the scholastic jurists added a third, *culpa levissima*, slight or infinitesimal negligence. They insisted upon this as a material and essential distinction, but it is conceded at present, that it was not recognized by the classical jurists, and that it is a troublesome and unnecessary refinement. While the text writers and theorists cling to it, it has been found incompatible with the necessities of our modern business jurisprudence, and the courts practically ignore it. The common law, however, recognizes, in theory at least, the soundness of this triple classification. The law students have it "trippingly on the tongue." Ordinary negligence, slight negligence, and gross negligence, for so the text-books expound it. It may be said to date from *Coggs v. Bernard* (2 Anne, A. D. 1703).² In Lord Holt's famous opinion in this case, the scholastic law of negligence, as he had learned it in Bracton, is incorporated into the law of England, and while, as we have seen, the courts of later times have more or less entirely disregarded *culpa levissima*, and the impracticable refinements it involves, the authority of that great case has not been challenged, and the learning

¹ "*Lata culpa est nimia negligentia, id est non intelligere quod omnes intelligunt.*" L. 213, § ult. D. de V. S. Ulpianus lib. 1, Regularum.

² 2 Ld. Raym. 909; S. C. 1 Smith's L. C. (8th ed.) 369.

in it has formed the unquestioned basis of our law in point.

Three grades of negligence imply three correlative grades of diligence, and so we have slight care, ordinary care, and great care, corresponding respectively to gross negligence, ordinary negligence, and slight negligence. Gross negligence is the failure to exercise even slight care, and slight negligence the failure to exercise great or extraordinary care; while the failure to use ordinary care is ordinary negligence. This somewhat alliterative terminology and artificial classification have provoked much criticism,¹ both from the text writers and the courts, and from a practical point of view they must be conceded to be obnoxious to gross objection; "gross" as applied to negligence is said to be merely, in most instances, a species of vituperation,² and the term "gross negligence" to have no uniform meaning.³

For the purposes of this treatise it is not necessary to more than advert to the difficulties involved in a complete and exhaustive discussion of the grades of negligence with their correlative grades of carefulness. We proceed, therefore, to consider "ordinary care" in its bearing upon the rule in question. The two essential elements in contributory negligence are a want of ordinary care on the part of the plaintiff, and a causal connection between that and the injury complained of, the rule being that a plaintiff cannot recover damages for an injury he has sustained, if the injury could have been avoided by the exercise of ordinary care on his part.⁴ The law does

¹ *Steamboat New World v. King*, 16 How. (U. S.) 469, 474.

² *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 600. See, also, 1 *Smith's L. C.* (8th ed.) 384 (n).

³ *Austin v. Manchester, &c.*, Ry. Co., 16 Jur. 766. See, also, *Wharton's Negligence*, §§ 26-69; *Campbell's*

Negligence (London, 1871), § 11; *Phillips v. Clark*, 5 C. B. (N. S.) 884.

⁴ *Butterfield v. Forrester*, 11 East, 60; *Marriott v. Stanley*, 1 *Scott's N. R.* 392; *Smith v. Smith*, 2 *Pick.* 621; S. C. 13 *Am. Dec.* 464; *Steele v. Central R. R.*, 43 *Iowa*, 109; *Hughes v. Muscatine*, 44 *Id.* 672; *Priest v.*

not require the plaintiff to be entirely free from any negligence whatever contributing to the injury, although there is a line of cases to that effect,¹ because that is the same thing as to hold him responsible for slight negligence. This the law does not do; slight negligence is the want of extraordinary or great care, and that is not what is required.² But while extraordinary care is not to be required of a plaintiff who brings an action of negligence, and although slight negligence on his part will not defeat a recovery, it is held that *the slightest want of ordinary care* contributing proximately to the injury will do so. This distinction is made in several cases, by the Supreme Court of Wisconsin. It is ingenious and philosophical, and capable of useful application.³

To essentially the same effect it is said that, although there may have been slight negligence, that is to say, a

Nicholls, 116 Mass. 401; Kennard v. Burton, 25 Me. 39; s. c. 43 Am. Dec. 249; Hill v. New Orleans, &c., R. R., 11 La. Ann. 292; Mercier v. Id., 23 Id. 264; Railroad Co. v. Jones, 95 U. S. 439; Richmond, &c., R. R. v. Morris, 31 Gratt, 200; Crommelin v. Coxe, 30 Ala. 329; Gothard v. Alabama, &c., R. R., 67 Id. 114; Strong v. Sacramento, &c., R. R., 61 Cal. 326; Peverly v. Boston, 136 Mass. 366; s. c. 49 Am. Rep. 37; Jeffery v. Keokuk, &c., R. R., 56 Iowa, 546; Sullivan v. Louisville Bridge Co., 9 Bush, 81; O'Brien v. Philadelphia, &c., R. R., 3 Phila. 76; Marble v. Ross, 124 Mass. 44; Jalie v. Cardinal, 35 Wis. 118; Runyon v. Central R. R., 25 N. J. (Law), 556; Sawyer v. Sauer, 10 Kan. 472; Kansas, &c., R. R. Co. v. Pointer, 9 Id. 620; s. c. 14 Id. 37; Cleveland, &c., R. R. v. Crawford, 24 Ohio St. 631; Indianapolis, &c., R. R. v. Stout, 53 Ind. 143; Daley v. Norwich, &c., R. R. Co., 26 Conn. 591; Williams v. Clinton, 28 Id. 266; Fox v. Glastenbury, 29 Id. 204; Cremer v. Portland, 36 Wis. 99; Beatty v. Gilmore, 16 Penn. St. 463; s. c. 55

Am. Dec. 514; Washburn v. Tracy, 2 D. Chipman (Vt.), 128; s. c. 15 Am. Dec. 661; Noyes v. Shepherd, 30 Me. 173; s. c. 50 Am. Dec. 625; Johnson v. Whitfield, 18 Me. 286; s. c. 36 Am. Dec. 721.

¹ New Jersey Express Co. v. Nichols, 33 N. J. Law, 434; Philadelphia, &c., R. R. v. Boyer, 97 Penn. St. 91; Wilds v. Hudson River R. R., 24 N. Y. 430; Griffen v. New York, &c., R. R., 40 Id. 34; Vanderplank v. Miller, Moody and M. 169; Toledo, &c., R. R. v. Goddard, 25 Ind. 185.

² Whirley v. Whiteman, 1 Head (Tenn.), 610; Nashville, &c., R. R. Co. v. Carroll, 6 Heisk. 347; Mabley v. Kittleberger, 37 Mich. 360; Galena, &c., R. R. v. Jacobs, 20 Ill. 478; Daniels v. Clegg, 28 Mich. 32; Cremer v. Portland, 36 Wis. 92; Springett v. Ball, 4 Fost. & Fin. 472.

³ Cremer v. Portland, 36 Wis. 92; Dreher v. Fitchburg, 22 Id. 675; Ward v. Milwaukee, &c., R. R., 29 Id. 144; Hammond v. Mukwa, 40 Id. 35; Griffin v. Willow, 43 Id. 509; Otis v. Janesville, 47 Id. 422; Cronin v. Delavan, 50 Id. 375.

want of extraordinary or great care on the part of the person injured, an action will nevertheless lie if there was no want of ordinary care contributing to the injury.¹

The standard by which the plaintiff's negligence is to be measured is the standard of ordinary care, and the rule upon the subject is correctly and pertinently summed up in *Cremer v. Portland*² by the Supreme Court of Wisconsin, viz.: "If the plaintiff was guilty of any want of ordinary care and prudence, (however slight,) which neglect contributed directly to produce the injury, he cannot recover. . . . It is not the law that slight negligence on the part of the plaintiff will defeat the action. Slight negligence is the want of extraordinary care and prudence, and the law does not require of a person injured by the carelessness of others, the exercise of that high degree of caution as a condition precedent to his right to recover damages for the injuries thus sustained." The weight of the most intelligent authority will, it is believed, sustain this position. Not slight negligence, but any want, however slight, of ordinary care on the part of a plaintiff, is sufficient to defeat the action.

This want of ordinary care may, in order to operate as a defense to the plaintiff's action, be, in point of time, either prior,³ or subsequent to the negligence of the defendant,⁴ or contemporary therewith.⁵

¹ *Strong v. Placerville R. R. Co.* (Cal.), 14 Rep. 110; *Baltimore, &c., R. R. v. Fitzpatrick*, 35 Md. 32; *Manly v. Wilmington, &c., R. R.*, 74 N. C. 655; *Kerwhacker v. Cleveland, &c., R. R.*, 3 Ohio St. 172; *Dush v. Fitzhugh*, 2 Lea, 307; *Houston, &c., R. R. v. Gorbett*, 49 Texas, 573; *Bridge v. Grand Junction Ry. Co.*, 3 Mec. & W. 244.

² 36 Wis. 92.

³ *Illinois, &c., R. R. Co. v. Hall*, 72 Ill. 222; *Illinois, &c., R. R. v. Hetherington*, 83 Id. 510; *Pennsylvania*

R. R. Co. v. Morgan, 82 Penn. St. 134; *Carroll v. Minnesota, &c., Ry.*, 13 Minn. 930.

⁴ *Butterfield v. Forrester*, 11 East, 60; *Brown v. Milwaukee, &c., R. R.*, 22 Minn. 165; *Martensen v. Chicago, &c., R. R. Co.*, 60 Iowa, 705; *Jackson v. County Com'rs*, 76 N. C. 282.

⁵ *O'Brien v. McGlinchy*, 68 Me. 552; *Doggett v. Richmond, &c., Ry. Co.*, 78 N. C. 305; *Chicago, &c., R. R. Co. v. Beeker*, 76 Ill. 26; s. c. 84 Id. 483; *Moak's Underhill's Torts*, 285.

What is the precise legal intent of the term "ordinary care," must, in the nature of things, depend upon the circumstances of each individual case. It is a relative and not an absolute term. Chancellor Walworth, in the case of the Mayor, &c., of New York *v.* Bailey,¹ says: "The degree of care and foresight which it is necessary to use" (in any given case) "must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against. And it should be that care and prudence which a discreet and cautious individual would, or ought to, use if the whole risk and loss were to be his own exclusively." This doctrine is declared in many other cases.² He who does what is more than ordinarily dangerous, is bound to use more than ordinary care, that is to say, it will require greater care under those circumstances to amount in law to ordinary care than it would if the undertaking were less hazardous.³ And the measure of diligence required of him is greater or less in the direct ratio of the risk his acts entail upon others. The duty of a plaintiff is to be measured by the same rule that is applied to a defendant, and just in proportion as the danger increases must the care of the plaintiff be increased, if it is to be held ordinary care under the

¹ 2 Denio, 433.

² *City of Madison v. Ross*, 3 Ind. 236; S. C. 54 Am. Dec. 481; *Brown v. Milwaukee, &c., R. R. Co.*, 22 Minn. 165; *The Nitro-glycerine Case*, Parrott *v.* Wells, Fargo & Co., 15 Wall. 524; S. C. *sub nom.*, Parrot *v.* Barney, 2 Abb. C. C. 197; S. C. 1 Deady, 405; 1 Sawyer, 423; *Morgan v. Cox*, 22 Mo. 373; *Northern Central R. R. Co. v. Price*, 29 Md. 420; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Moore v. Central R. R. Co.*, 24 N. J. Law, 268; *Wyandotte v. White*, 13 Kan. 191; *Wheeler v. Westport*, 30 Wis. 392; *Ward v. Milwaukee, &c., R. R.*

Co., 29 Wis. 144; *Railroad Co. v. Pollard*, 22 Wall. 341; *Stokes v. Saltonstall*, 13 Peters. 181; *Reynolds v. Burlington*, 52 Vt. 300; *Strong v. Placerville, &c., R. R. Co.* (Cal.), 14 Rep. 550; *Johnson v. West Chester, &c., R. R. Co.*, 70 Penn. St. 357; *Lynch v. Nurdin*, by Lord Denham, C. J., 1 Q. B. 29; S. C. 4 Per. & Dav. 672; 5 Jur. 797; *Baltimore, &c., R. R. Co. v. State (Md.)*, 11 Rep. 160; *Lancaster v. Kissinger* (Penn.), 12 Id. 635; *Aurora, &c., R. R. Co. v. Grimes*, 13 Ill. 585.

³ *Wilson v. Cunningham*, 3 Cal. 241; S. C. 58 Am. Dec. 407.

circumstances. It is clear that what might be entirely prudent in one condition of things would be reckless and grossly negligent in another.

Ordinary care is generally, therefore, a question of fact, and the question is not whether the actor thought his conduct was that of a prudent man, but whether the jury thinks it was.¹ The law prescribes as a standard of conduct—to which all must conform at their peril—the conduct of an ideal average prudent man,² whose equivalent for practical purposes the jury is generally taken to be, and whose culpability or innocence is the supposed test. This is a constant, and his conduct under given circumstances is theoretically always the same.³ But while ordinary care is primarily a question for the jury, there may be observed in the growth of the law a manifest tendency to reduce the featureless generality that a plaintiff is bound to exercise such care as a prudent man would exercise under the circumstances, which means little or much, and leaves every case without compass or rudder, very largely to the caprice of a jury, to some specific rule or requirement of law, that he is bound to use this or that precaution under these or those circumstances. In the infancy of the law of railroads, for an example, it was the rule that a traveller, upon approaching a point where a railway track crossed a highway upon the same level, must exercise due and ordinary care not to be run over by a passing train of cars, and the question of what was ordinary care went to the jury. Now it is tolerably well settled that under such circumstances a

¹ *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 784; *Smith v. London & Southwestern Ry. Co.*, L. R. 5 C. P. 102; *Hays v. Millar*, 77 Penn. St. 238; *Holmes' Common Law*, 107.

² The *diligens, bonus, studiosus paterfamilias* of the Roman lawyers.

³ *Holmes' Common Law*, 111;

Walsh v. Oregon, &c., R. R., 10 Oregon, 250; *Fassett v. Roxbury*, 55 Vt. 552; *Martin v. Bishop*, 59 Wis. 417; *Hassenger v. Michigan, &c., R. R. Co.*, 48 Mich. 205; s. c. 42 Am. Rep. 470; *Cronin v. Delavan*, 50 Wis. 375; *Otis v. Janesville*, 47 Wis. 422.

traveller must look up and down the track attentively, and a failure to do this is generally negligence as a matter of law. So the question of ordinary care tends more and more to definiteness and certainty, and the law in this behalf grows more and more concrete, by judicial decision and by statute. There is less and less danger that the term will be misapplied or misunderstood. Specific rules for specific cases are taking the place of the general rule that one must use ordinary care and prudence; but whenever no such rules have been laid down, we revert to the original theory and decide the case upon the only remaining rational principle, that ordinary care is to be held to mean that measure of prudence and carefulness that the average prudent man¹ might be expected under the circumstances to exercise, allowing the degree of it to vary in proportion to the hazard of the particular enterprise, and referring the ultimate decision to a jury of twelve men.²

¹ In *Hassenger v. Michigan Central R. R. Co.*, 48 Mich. 205; S. C. 42 Am. Rep. 470, it is decided by Cooley, J., that the same degree of care is required of a woman as of a man. See, also, *Fox v. Glastenbury*, 29 Conn. 204.

² Mr. Justice Oliver Wendell Holmes, Jr., of the Supreme Court of Massachusetts, in his excellent work entitled "The Common Law," says, at page 108: "The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that

every man knows the law. But a more satisfactory explanation is that when men live in society a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of heaven; but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account. The rule that the law does in general determine liability by blameworthiness is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man

§ 10. *What is a proximate cause.*—The essence of contributory negligence is, as has been shown, a want of ordinary care on the part of a plaintiff, which is a *proximate cause*, an occasion of the injury. We have considered, in the preceding section, the law affecting ordinary care. It remains to set forth the rules of law in regard to that lack of ordinary care as a proximate cause of the injury of which the plaintiff complains. The courts declare, and it is a settled rule of law, that, not only must the negligence of one injured by another's culpable neglect contribute to produce the injury, but that if it is to constitute contributory negligence, it must contribute as a proximate cause, and not as a remote cause or mere condition.¹

of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts it is our misfortune. So much as that we must have at our peril for the reasons just given."

¹ Tuff *v.* Warman, 2 C. B. (N. S.) 740; s. c. 5 C. B. (N. S.) 573; Irwin *v.* Sprigg, 6 Gill (Md.), 200; s. c. 46 Am. Dec. 667; Northern Central R. R. Co. *v.* Price, 29 Md. 420; Kline *v.* Central, &c., R. R. Co., 37 Cal. 400; Needham *v.* San Francisco, &c., R. R. Co., 37 Id. 409; Flynn *v.* San Francisco, &c., R. R. Co., 40 Cal. 14; Baltimore, &c., R. R. Co. *v.* Reaney, 42 Md. 117; Doggett *v.* Richmond, &c., R. R., 78 N. C. 305; Shaffer *v.* Railroad Co., 105 U. S. 249; Fernandez *v.* Sacramento, &c., R. R., 52 Cal. 45; Meeks *v.* Southern Pacific R. R. Co., 56 Id. 513; s. c. 38 Am. Rep. 67; Isbell *v.* New York, &c., R. R., 27 Conn. 393; The State *v.* Manchester, &c., R. R., 52 N. H. 528; Gunter *v.* Wicker, 85 N. C. 310; Dudley *v.* Camden, &c., Ferry Co., 45 N. J. Law, 368; Palys *v.* Erie Railway Co., 30 N. J. Eq. 604; Thirteenth Street Ry. Co. *v.* Boudrou, 92 Penn. St. 475; s. c. 37 Am. Rep. 707; Oil City Gas Co. *v.* Robinson, 99 Id. 1; Drake *v.* Kiley, 93 Id. 492; Ker-

whacker *v.* Cleveland, &c., R. R., 3 Ohio St. 172; Barbee *v.* Reese, 60 Miss. 906; Louisville, &c., R. R. Co. *v.* Wolfe, 80 Ky. 82; O'Connor *v.* North Truckee Ditch Co., 17 Nevada, 246; Towler *v.* Baltimore, &c., R. R. Co., 18 West Va. 579; Thompsons *v.* Kanawha Board, 21 Id. 224; Harris *v.* Union Pacific R. R. Co., 4 McCrary, 454; Haff *v.* Minneapolis, &c., R. R. Co., 4 Id. 622; Crandall *v.* Goodrich Trans. Co., 11 Biss. 516; s. c. 16 Fed. Rep. 75; Kennard *v.* Burton, 25 Me. 39; s. c. 43 Am. Dec. 249; Fent *v.* Railroad Co., 59 Ill. 349; s. c. 14 Am. Rep. 13; Grant *v.* Mosly, 29 Ala. 302; Gothard *v.* Alabama, &c., R. R. Co., 67 Id. 114; Dyer *v.* Talcott, 16 Ill. 300; Weymire *v.* Wolfe, 52 Iowa, 533; Walsh *v.* Miss. Trans. Co., 52 Mo. 434; Whalen *v.* St. Louis, &c., R. R. Co., 60 Id. 323; Stepp *v.* Chicago, &c., R. R. Co., Sup. Ct., Mo. 20 Cent. L. J. 274; Byram *v.* McGuire, 3 Head, 530; Brown *v.* Chicago, &c., R. R., 54 Wis. 342; s. c. 41 Am. Rep. 41; Nave *v.* Flack, 90 Ind. 205; s. c. 46 Am. Rep. 205; Terre Haute, &c., R. R. Co. *v.* Buck, 96 Ind. 346; s. c. 49 Am. Rep. 168; Williams *v.* Vanderbilt, 28 N. Y. 217; Gunner *v.* Second Avenue R. R. Co., 67 Id. 596; Sauter *v.* New York, &c., R. R. Co.,

This rule is stated over and over in the reports, with almost every possible limitation, and in almost every possible way; as, for example, that if the negligence of both parties be proximately the cause of the injury, or when the plaintiff's negligence only is proximate, while that of the defendant is remote, there can be no recovery,¹ but that when the defendant's negligence is the proximate cause and that of the plaintiff the remote cause, the plaintiff may have his action.² And again, if the negligence of the plaintiff being only a remote cause, the defendant might have avoided inflicting the injury by the exercise of ordinary care, the action for damages is maintainable.³ In such a case the defendant's negligence is the proximate cause, and he is liable.⁴ But if, on the

66 Id. 50; Johnson v. Hudson River R. R. Co., 5 Duer, 27; Button v. Id., 18 N. Y. 248; Austin v. N. J. Steamboat Co., 43 Id. 75; Healey v. Dry Dock, &c., R. R. Co., 46 Super. Ct., Rep. 473; Harvey v. New York, &c., R. R., 19 Hun, 556; Mark v. Hudson, &c., B. Co., 56 How. Pr. 108; Lannen v. Albany Gaslight Co., 44 N. Y. 459; Cosgrove v. New York, &c., R. R., 13 Hun, 329. See, also, 2 Sedgwick on Damages, 348, 362; Field's Corporations, 462, 464; Cooley on Torts, 76 and note; Sutherland on Damages, 62; 2 Bishop's Criminal Law, 637, 639; 1 Hales' P. C., 428; 1 Hawk. P. C., 93; Mr. Freeman's Note, 55 Am. Dec., 668; Thomp. Whart. and Shear. & Redf., *in loco*.

¹ Irwin v. Sprigg, 6 Gill (Md.), 200; S. C. 46 Am. Dec. 667; Trow v. Vermont, &c., R. R., 24 Vt. 487; Richmond, &c., R. R. Co. v. Anderson, 31 Gratt. 812; Alston v. Herring, 11 Exch. 822; Wetherley v. Regent's Canal Co., 12 C. B. (N. S.) 1; Callahan v. Warne, 40 Mo. 131; Frederick v. Taylor, 14 Abb. Pr. (N. S.) 77; Wilds v. Hudson River R. R. Co., 24 N. Y. 430; Stiles v. Geesey, 71 Penn. St. 441; Sherman v. Stage Co., 24 Iowa, 515; Flower v. Adam, 2 Taunt. 314. (In the head-note of

this case it is said that if the *proximate cause* of the injury is the plaintiff's negligence, he cannot recover, although the *primary cause* was the defendant's negligence.

² Pacific R. R. Co. v. Hauts, 12 Kan. 328; Walsh v. Miss. Trans. Co., 52 Mo. 434; Whalen v. St. Louis, &c., R. R., 60 Id. 323; Steele v. Burkhardt, 104 Mass. 59; Needham v. San Francisco, &c., R. R. Co., 37 Cal. 417; Nashville, &c., R. R. Co. v. Smith, 6 Heisk. 174; Manly v. Wilmington, &c., R. R. Co., 74 N. C. 655; Trow v. Vermont, &c., R. R. Co., 24 Vt. 487; State v. Manchester, &c., R. R. Co., 52 N. H. 528; Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio St. 172.

³ Tuff v. Warman, 2 C. B. (N. S.) 740; Day v. Crossman, 4 Thomp. & Cook (N. Y. Super. Ct.), 122; Doggett v. Richmond, &c., R. R. Co., 78 N. C. 305.

⁴ Schierhold v. North Beach, &c., R. R. Co., 40 Cal. 447; Pennsylvania R. R. Co. v. Sinclair, 62 Ind. 301; S. C. 30 Am. Rep. 185; McKean v. Burlington, &c., R. R. Co., 55 Iowa, 192; Nashville, &c., R. R. v. Carroll, 6 Heisk. 347; O'Brien v. McGlinchy, 68 Me. 582; People's, &c., R. R. Co. v. Green, 56 Md. 84; Isbell v. New

contrary, the defendant's negligence being only the remote cause, the plaintiff might have escaped the injury by the exercise of ordinary care, his own negligence is the proximate cause, and he can maintain no action.¹

The plaintiff's negligence, in order to constitute a defense to the action he brings, need not, of course, be the *sole* proximate cause of the injury, for this excludes the idea of negligence on the part of the defendant, as in any legal sense material. If his negligence is the sole cause of his injury, it is not contributory negligence at all. So the Supreme Court of Iowa declares the rule to be that if the plaintiff's want of ordinary care was *in whole or in part* a proximate cause of his injury, he cannot recover.² There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action.³ So it is said that a plaintiff's negligence must *substantially* contribute to produce the injury, in order to avail the defendant anything,⁴ and also that it must not only concur in the

York, &c., R. R. Co., 27 Conn. 393; Zimmerman v. Hannibal, &c., R. R. Co., 71 Mo. 476; Bunting v. Central Pacific R. R. Co., 16 Nevada, 277; Gunter v. Wicker, 85 N. C. 310; Richmond, &c., R. R. Co. v. Anderson, 31 Gratt. 812; s. c. 31 Am. Rep. 750; Radley v. London, &c., Railway Co., L. R. 9 Exch. 71; s. c. 43 L. J. (Exch.) 73; 1 App. Cas. 754.

¹ Butterfield v. Forrester, 11 East, 60; Wood v. Jones, 36 La. Ann.; Hoehl v. City of Muscatine, 57 Iowa, 444; Macon, &c., R. R. Co. v. Winn, 19 Ga. 440; Walsh v. Miss. Trans. Co., 52 Mo. 434; Gothard v. Alabama, &c., R. R. Co., 67 Ala. 114; Dudley v. Camden Ferry Co., 45 N. J. Law, 368; Newhouse v. Miller, 35 Ind. 463; Robinson v. Western, &c., R. R. Co., 48 Cal. 409; Hearne v. Southern, &c., R. R. Co., 50 Id. 482; Morrissey v.

Ferry Co., 43 Mo. 383; Schaabs v. Wheel Co., 56 Id. 173; Williams v. Clinton, 28 Conn. 266; Artz v. Chicago, &c., R. R. Co., 38 Iowa, 293, and generally the cases cited *supra*.

² McAunich v. Mississippi, &c., R. R. Co., 20 Iowa, 338; Muldowney v. Illinois, &c., R. R. Co., 39 Id. 615.

³ Wharton on Negligence, chap. III, and §§ 323-333; Savage v. Corn Exchange Insurance Co., 36 N. Y. 655; Norris v. Litchfield, 35 N. H. 271; Silliman v. Lewis, 49 N. Y. 379; Alger v. Lowell, 3 Allen, 402; Morrison v. Gen. Steam Nav. Co., 8 Exch. 733; Shear. & Redf. on Neg., § 32.

⁴ Daley v. Norwich, &c., R. R. Co., 26 Conn. 591; West v. Martin, 31 Mo. 375; New Haven Steamboat Co. v. Vanderbilt, 16 Conn. 420. See, also, Grippen v. New York, &c., R. R. Co., 40 N. Y. 34.

transaction, but also co-operate in producing the injury.¹ In *Sullivan v. Louisville Bridge Co.*, a leading authority in Kentucky,² it is said to be the rule that the plaintiff's negligence, in order to constitute a defense, must have been so for an *efficient cause* of the injury, that, without it, the injury would not have happened. So also there is a line of cases to the effect that, when the plaintiff, though negligent, could not, by the exercise of ordinary care, have escaped the consequence of the defendant's negligence, he may recover.³

This is a correct rule, but, in the judgment of the author, it is a dangerous way of expressing it. Lord Macaulay said of his style, when some one complimented him about it, that it came very near to being a very bad style; and so the courts, when they fall into this category, come very near to a wrong statement of the rule. There is but a single step from such a rule as this, expressed in this way, to the heresy in *Davies v. Mann*,⁴ which ignores entirely the negligence of the plaintiff, and makes an end of the whole theory upon which the law of contributory negligence rests. If the rule, as these cases put it, means that whenever the plaintiff's negligence is the proximate or a proximate cause of the injury he suffers, he cannot recover, and whenever it is not, that he may recover, it is a sound rule. But if it means anything less than this, it is unsound. It seems to me that nothing is gained by these various round about statements of the rule. The attempts of the judges to ring a new change, or to find some novel and original phrase in which to express the

¹ *Carroll v. New Haven, &c., R. R. Co.*, 1 Duer, 571; *Colegrove v. Id.*, 20 N. Y. 492.

² 9 Bush, 81.

³ *Radley v. London, &c., Railway Co.*, L. R. 9 Exch. 71; S. C. 43 L. J. (Exch.) 73; 1 App. Cas. 754; *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Ken-*

nard v. Burton, 25 Me. 39; S. C. 43 Am. Dec. 249; *Cummins v. Presley*, 4 Harr. (Del.) 315; *Scott v. Dublin, &c., Ry. Co.*, 11 Ir. Com. Law (N. S.), 377; *Northern Central Railway Co. v. Geis*, 31 Md. 357.

⁴ 10 Mee. & W. 546.

rule, that, whenever the negligence of a plaintiff proximately contributes to cause the injury for which he seeks to recover damages, he has no cause of action, has thrown the law into confusion. *Davies v. Mann*¹ has contributed more than the full share of any one decision to this end. It may be cited as authority for any one, or all, of the four following propositions: 1. When the plaintiff's negligence is only a remote cause of the injury he sustains, it is not contributory negligence and he may recover. 2. Contributory negligence is no bar to an action for a wilful injury. 3. The negligence of the plaintiff and defendant should be compared, and the one most in fault should be held solely responsible. 4. The defendant is on trial, not the plaintiff,² and if he is in fault, he is liable without regard to any contributory negligence of the plaintiff, which is not a material element in the case. The first two of these propositions are unquestionably sound rules of law, and it is believed that they will cover exactly every case in which a correct conclusion has been reached under the rule as declared in *Davies v. Mann*.³ This is well illustrated by a consideration of the cases in the New York reports that assume to follow it, and in which it is cited with approval. It was decided in the Court of Exchequer in 1842, but the first appearance in New York of the doctrine it announces, seems to have been in 1855 in the case of *Johnson v. Hudson River R. R. Co.*,⁴ where it is spoken of as "somewhat novel," but "highly reasonable." The language of the court, after citing *Davies v. Mann*, is: "The defendant is not shielded from a recovery, notwithstanding contributory negligence on the part of the plaintiff is

¹ 10 Mee. & W. 546.

³ 10 Mee. & W. 546.

² See on this point an old Vermont case, *Washburn v. Tracy*, 2 D. Chipman, 128; S. C. 15 Am. Dec. 661.

⁴ 5 Duer, 27.

proved, when it appears that, but for his own subsequent negligence, the accident would never have occurred, *that is when it appears that his own negligence was its sole proximate cause.*" This is assumed in the opinion to be the doctrine in *Davies v. Mann*.

Again in *Button v. Hudson River R. R. Co.*,¹ decided in 1858, the rule in *Davies v. Mann*,² is laid down without qualification, *in ipsissimis verbis*, and Mr. Justice Harris, in stating the rule of remote cause, expressly affirms it to be the equivalent of the rule as declared in the English authority upon which he relies. He says, in concluding his opinion, "Where the negligence of the defendant is proximate and that of the plaintiff remote, the action may be sustained. The question then is whether it being conceded that the plaintiff was not without fault, the defendant might by the exercise of reasonable care and prudence at the time of the injury have avoided it."³

In another line of cases in New York, *Davies v. Mann* is cited as authority for the second of our propositions, viz. : that contributory negligence is no bar to an action for wilful injury. In *Kenyon v. New York, &c., R. R.*,⁴ after citing *Davies v. Mann*, and laying down the doctrine of that case broadly, the court says: "Neglect on the part of the person in charge of the engine to use ordinary care to avoid injuring a person on the track is in contemplation of law equivalent to intentional mischief, and in *Green v. Erie Ry. Co.*,⁵ *Davies v. Mann* is cited as a

¹ 18 N. Y. 248.

² 10 Mee. & W. 546.

³ See, also, the following later cases in New York, in which *Davies v. Mann* is cited as sustaining the doctrine that the remote negligence of a plaintiff is not contributory negligence. *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Cosgrove v.*

New York, &c., R. R., 13 Hun, 329; *Healey v. Dry Dock, &c., R. R. Co.*, 46 Super. Ct. Rep. 473; also, *Steves v. Oswego, &c., R. R. Co.*, 18 N. Y. 422; *Gorton v. Erie Ry. Co.*, 45 N. Y. 660.

⁴ 5 Hun, 479.

⁵ 11 Hun, 333.

controlling authority, and the rule therein is assumed to be equivalent to the proposition that wilful neglect is not to be excused by contributory negligence. "We think it was a proper question for the jury," says the Supreme Court in this case, "whether the defendant was not guilty of such gross negligence as was equivalent to intentional mischief."¹

To this extent there is no objection to the doctrine in *Davies v. Mann*. So far as it teaches the principle that remote causes are not to be regarded, that only when the plaintiff's negligence is a proximate cause will it bar his action, and that contributory negligence is no defense to an action for wilful negligence, it is a sound authority. But it does not end there. It is equally an authority for the doctrine of comparative negligence, short of which there is no place to stop if we frankly accept the rule to its full extent. In the earlier cases in Illinois and other States where the doctrine of comparative negligence now obtains there is no trace of that doctrine,² and it seems clear that it originated in an attempt to adopt and apply the rule in *Davies v. Mann*.³ In those jurisdictions where comparative negligence is not the rule the influence of this case has been to confuse the law and undermine the sound principles upon which it should be based. Its apparent resemblance to the two sound principles which have been referred to, and the rather ingenious, but really clumsy way in which the fallacy is concealed, have enabled it to pass current; but until the falseness of its rea-

¹ See, also, to the same effect, *Wilds v. Hudson River R. R. Co.*, 33 Barb. 503; s. c. 24 N. Y. 430, and 29 N. Y. 315; *Grippen v. New York, &c., R. R. Co.*, 40 N. Y. 34, and an essay by Edward E. Sprague, Esq., of New York, "Contributory Negligence and the Burden of Proof," in Vol. VI of the proceedings of the New York

State Bar Association, for 1883, at page 197.

² *Aurora, &c., R. R. Co. v. Grimes*, 13 Ill. 585; *Macon, &c., R. R. Co. v. Davis*, 18 Ga. 679; *Union Pacific R. R. Co. v. Rollins*, 5 Kan. 167.

³ *Thomp. on Neg.*, 1165.

soning and statement are recognized and its authority is distinctly repudiated, the doctrine of contributory negligence is in peril.

To return from this *excursus* on *Davies v. Mann*, let us consider the definitions the reported cases and the text writers propose for the term "proximate cause." The plaintiff's want of ordinary care must, we have seen, be a proximate cause of his injury or it will not be contributory negligence. What then precisely is a proximate cause? It is a general rule of law that a man is responsible for the natural and probable consequences of his acts, and for these consequences only so far as they are natural and proximate, and such as may on this account be foreseen by ordinary forecast or, as it is sometimes expressed, a man is presumed to intend the natural and probable consequences of his acts. An act is the proximate cause of an event when in the natural order of things, and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result, the *causa causans* of the schoolmen. "If the wrong and the resulting damages are not known by common experience to be usually and naturally in sequence and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action," says Mr. Justice Cooley.¹ That is to say, for remote or secondary causes, men are not legally responsible.² From the nature of the matter there can be no fixed and immediate rule upon this subject that can be applied to all cases—much must depend upon circumstances, and what is, or what is not, a proximate cause will very often have to be determined upon considerations

¹ Torts, 69.

² *Causa proxima non remota spectatur.*

of sound judgment and enlightened common sense¹ without the aid of any certain rule or infallible precedent. Says Mr. Justice Agnew, in *Fairbanks v. Kerr*,² "Many cases illustrate, but none define what is an immediate, or what is a remote cause. Indeed such a cause seems to be incapable of any strict definition which will suit every case." "We are not to link together as cause and effect events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury, but we are not justly called to suffer for it, unless the other event was the effect of our act, or was within the probable range of ordinary circumspection when engaged in the act." For the practical purposes of this treatise nothing can probably be gained by any further consideration of this vexed metaphysical question. All the learning of the speculative philosophers from Aristotle to John Stuart Mill has not availed to reduce it even to tolerable certainty. Lord Bacon in his *Maxims*³ paraphrases the Latin rule,⁴ as follows: "It were infinite for the law to consider the causes of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking for any further degree." He then proceeds to illus-

¹ "Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. *To a sound judgment must*

be left each particular case." *Harrison v. Berkley*, 1 Strobh. Law (S. C.), 525; S. C. 47 Am. Dec. 578.

² 70 Penn. St. 86; S. C. 10 Am. Rep. 664.

³ Reg. 1.

⁴ "*In jure non remota causa sed proxima spectatur.*"

trate the meaning of the rule by citations of familiar cases from the Year Books, avoiding any philosophical discussion of it, and not attempting a definition. I accordingly shall content myself with citing several cases where the distinction between proximate and remote causes is aptly illustrated, *quas vide*.¹

§ II. *Distinction between causal connection and a plaintiff's negligence.*—The distinction between the negligence of a plaintiff, and the causal connection between such negligence and the injury of which he complains must not be overlooked. It is plain that negligence is

¹ The Lords Bailiff-Jurats of Romney Marsh *v.* The Corporation of the Trinity House, L. R. 5 Exch. 204; s. c. L. R. 7 Exch. 247; Salisbury *v.* Herchenroder, 106 Mass. 458; s. c. 8 Am. Rep. 354; Burrows *v.* Marsh Gas & Coke Co., L. R. 5 Exch. 67; s. c. L. R. 7 Exch. 96; Welch *v.* Wesson, 6 Gray 505; Metallic Compression Casting Co. *v.* Fitchburg R. R. Co., 109 Mass. 277; s. c. 12 Am. Rep. 689. (These five cases are selected by Judge Thompson as leading cases and printed in full in his excellent treatise on Negligence, commencing at page 1063); Collins *v.* Middle Levee Commissioners, L. R. 4 C. P. 279; s. c. 38 L. J. (C. P.) 236; 20 L. T. (N. S.) 442; Cleland *v.* Thornton, 43 Cal. 439; Lawrence *v.* Jenkins, L. R. 8 Q. B. 274; s. c. 42 L. J. (Q. B.) 147; Gilman *v.* European, &c., R. R., 60 Me. 235; Carter *v.* Towne, 103 Mass. 507; Mott *v.* Hudson River R. R. Co., 24 N. Y. Supr. Ct. 585; George *v.* Smith, 6 Ired. (N. C.) Law, 273; Texas, &c., R. R. Co. *v.* Anderson, (Sup. Ct. Texas), 4 Texas L. Rev. 211; Brooks *v.* Boston, 19 Pick. 174; *The Squib Case*, Scott *v.* Shepherd, 2 Wm. Black, 892; Bellefontaine, &c., R. R. Co. *v.* Snyder, 18 Ohio St. 399; McGrew *v.* Stone, 53 Penn. St. 436; Greenland *v.* Chaplin, 5 Exch. 243; Harrison *v.* Berkley, 1 Strobh. Law (S.C.), 549; s. c. 47 Am. Dec. 578; Terre Haute, &c., R. R. Co. *v.* Buck, 96 Ind. 346; s. c. 49 Am. Rep. 168; Page *v.* Bucksport, 64 Me. 51; s. c. 18 Am. Rep. 239; Thomas *v.* Winchester, 6 N. Y. 397; s. c. 57 Am. Dec. 455, and note; Milwaukee, &c., R. R. Co. *v.* Kellogg, 94 U. S. 469; Ehr Gott *v.* The Mayor, &c., 96 N. Y. 264; s. c. 48 Am. Rep. 622; Heney *v.* Dennis, 93 Ind. 452; s. c. 47 Am. Rep. 378, and the note; Fent *v.* Toledo, &c., R. R. Co., 59 Ill. 349; s. c. 14 Am. Rep. 13; Beauchamp *v.* Saginaw Mining Co., 50 Mich. 163; s. c. 45 Am. Rep. 30; Henry *v.* St. Louis, &c., R. R. Co., 76 Mo. 288; s. c. 43 Am. Rep. 762; Brown *v.* Chicago, &c., R. R. Co., 54 Wis. 342; s. c. 41 Am. Rep. 41, and note; Hadley *v.* Baxendale, 9 Exch. 341; s. c. 23 L. J. (Exch.) 179; Drake *v.* Kiely, 93 Penn. St. 492; Scheffer *v.* Washington City, Virginia Midland and Great Southern R. R. Co., 105 U. S. 249; Murdock *v.* Boston, &c., R. R. Co., 133 Mass. 15; Penn. R. R. Co. *v.* Kerr, 62 Penn. St. 353; s. c. 1 Am. Rep. 431; Id. *v.* Hope, 80 Id. 373; s. c. 21 Am. Rep. 100; 3 Sutherland on Damages, 714, 715; Addison on Torts, (3d ed.) 5; Cooley on Torts, 69; Wharton on Neg., §§ 134, 138; Shear. & Redf. on Neg., § 33.

one thing, and causal connection an essentially different thing. In order to avail the defendant anything there must be on the part of the plaintiff, not only negligence in the juridical sense, but *contributory* negligence, and in order to be contributory, as the law understands that limitation, there must be, as we have seen, a true proximate causal connection between the negligence and the injury. Collateral negligence, by which is meant such negligence as is neither a cause nor a condition of the injury, is not material,¹ neither is remote negligence, which is described as a condition and not a cause of the catastrophe, nor are even collateral violations of law, if they do not legally contribute to the injury, a defense.²

What the causal connection between the plaintiff's negligence and his injury must be, if it is to amount to a defense to his action, has been precisely defined by the courts. His negligence need not be the *sole* proximate cause of the injury on the one hand,³ nor is he required to be wholly free even from slight negligence on the other hand.⁴ Those cases which hold that the plaintiff must be entirely free from negligence, and that the injury must be wholly due to the defendant's negligence,⁵ have not been

¹ Penn. R. R. Co. v. Righter, 42 N. J. Law, 280; Hayes v. 42d st. R. R. Co., 14 N. Y. Week. Dig. 28; Gray v. Scott, 66 Penn. St. 345.

² Steele v. Burkhardt, 104 Mass. 59; s. c. 6 Am. Rep. 191, and note; Welch v. Wesson, 6 Gray. 505; Baker v. Portland, 58 Me. 199; S. C. 4 Am. Rep. 274; Neanow v. Ullech, 46 Wis. 581.

³ Radley v. London, &c., R. R. Co., L. R. 9 Exch. 91; s. c. 43 L. J. (Exch.) 73; McAnich v. Miss., &c., R. R. Co., 20 Iowa, 338; Muldowney v. Illinois, &c., R. R. Co., 39 Id. 615.

⁴ Bridge v. Grand Junction Ry. Co., 3 Mee. & W. 244; Cremer v. Portland, 36 Wis. 92; Hammond v.

Mukwa, 40 Id. 35; Baltimore, &c., R. R. v. Fitzpatrick, 35 Md. 32; Houston, &c., R. R. Co. v. Gorbett, 49 Texas. 573; Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio St. 172; Manly v. Wilmington, &c., R. R. Co., 74 N. C. 655

⁵ Phila., &c., R. R. Co. v. Boyer, 97 Penn. St. 91; New Jersey Express Co. v. Nichols, 33 N. J. Law, 434; (but see Runyon v. Central R. R. Co., 25 Id. 556, and Telfer v. Northern R. R. Co., 30 Id. 188); Toledo, &c., R. R. Co. v. Goddard, 25 Ind. 185; Wilds v. Hudson River R. R. Co., 24 N. Y. 430; Griffen v. New York, &c., R. R., 40 Id. 34; Vanderplank v. Miller, Moody & M. 169.

generally followed. It is not, however, sufficient that the plaintiff's negligence should have contributed merely to aggravation of the injury without having contributed to the happening of the accident.¹ The true rule is, that if the negligence of the plaintiff contributed *in any degree* to cause or occasion the accident, there can be no recovery. The law refuses to apportion damages in such a case or to weigh the wrong of one party over against the fault of the other, and thus strike a book-keeper's balance, and accordingly, when the plaintiff's negligence is in any degree, however small, contributory to the injury he has no remedy.²

This is of the very essence of the law of contributory negligence. The rule is sometimes said to be that it must appear, in order to defeat the right of action, that, but for the plaintiff's negligence operating as an efficient cause of the injury, in connection with the fault of the defendant, the injury would not have happened.³ And so it is

¹ *Sills v. Brown*, 9 Car. & P. 601; *Stebbens v. Central R. R.*, 54 Vt. 464; s. c. 41 Am. Rep. 855; *Gould v. McKenna*, 86 Penn. St. 297; s. c. 27 Am. Rep. 705; *Secord v. St. Paul, &c., Ry. Co.*, 5 McCrary, 515; *Shear & Red. on Neg.*, § 32, and cases cited in their note; *Wharton on Neg.*, § 868, *et seq.*

² *Dowell v. General Steam Navigation Co.*, 5 El. & Bl. 195; *Witherley v. Regents Canal Co.*, 12 C. B. (N. S.) 2; s. c. 6 L. T. (N. S.) 255, 3 *Fost. & Fin.*, 61; *Lack v. Seward*, 4 Car. & P. 106; *Luxford v. Large*, 5 Id. 421; *Woolf v. Beard*, 8 Id. 373; *Vennall v. Garner*, 1 *Crompt. & M.* 21; *Kent v. Elstob*, 3 *East*, 18; *Cremer v. Portland*, 36 *Wis.* 92; *Otis v. Janesville*, 47 Id. 422; *Knight v. Ponchartrain R. R. Co.*, 23 *La. Ann.* 462; *Johnson v. Canal, &c., R. R. Co.*, 27 Id. 53; *Laicher v. New Orleans, &c., R. R. Co.*, 28 Id. 320; *Broadwell v. Swigert*, 7 *B. Mon.* 39; s. c. 45 *Am.*

Dec. 47, and the note; *O'Brien v. Phila., &c., R. R. Co.*, 3 *Phila.* 76; *Catawissa R. R. Co. v. Armstrong*, 49 *Penn. St.* 186; *Stiles v. Geesey*, 71 Id. 439; *Needham v. San Francisco, &c., R. R. Co.*, 37 *Cal.* 409; *Flemming v. Western, &c., R. R. Co.*, 49 Id. 253; *Hearne v. Southern, &c., R. R. Co.*, 50 Id. 482; *Coombs v. Purington*, 42 *Me.* 332; *Murphy v. Deane*, 101 *Mass.* 455; *Willard v. Pinard*, 44 *Vt.* 34; *Munger v. Tonawanda, &c., R. R. Co.*, 4 *N. Y.* 349; *Crandell v. Goodrich Trans. Co.*, 11 *Biss.* 516; s. c. 16 *Fed. Rep.* 75.

³ *Paducah, &c., R. R. Co. v. Hoehl*, 12 *Bush (Ky.)*, 41; *Kentucky, &c., R. R. Co. v. Thomas*, 79 *Ky.* 160; s. c. 42 *Am. Rep.* 208; *Houston, &c., R. R. Co. v. Clemmons*, 55 *Texas*, 88; s. c. 40 *Am. Rep.* 799; *Hickey v. Boston, &c., R. R. Co.*, 14 *Allen*, 429; *Pennsylvania R. R. Co. v. Langdon*, 92 *Penn. St.* 21; s. c. 37 *Am. Rep.* 651; *Colorado, &c., R. R. Co. v.*

said that the negligence of the plaintiff must "directly" contribute to the happening of the injury or the plaintiff may have his action.¹

However it may have been expressed, the principle underlying all these decisions seems to be, and verily it is the only sound basis upon which they can rest, that whenever the plaintiff's case shows any want of ordinary care under the circumstances, even the slightest, contributing in any degree, even the smallest, as a proximate cause of the injury for which he brings his action, his right to recover is thereby destroyed. Anything more than this imposes upon the plaintiff the duty of exercising more than ordinary care, and refuses him a remedy for injuries that others inflict upon him; and anything less than this, covered up never so mistily in belabored and confusing legal phraseology, imposes upon the defendant the duty of exercising more than ordinary care, requires him to take better care of the plaintiff than the law requires the plaintiff to take of himself, and compels him to pay damages for injuries that he did not inflict. There can be no middle ground; either the truth of these elementary propositions must be conceded or the whole theory of our modern law of contributory negligence must be abandoned. Without this it is a theory of oppression, and injustice. There is no room for it in the common law.

Holmes, 5 Colo. 197; *Murphy v. Deane*, 101 Mass. 455; S. C. 3 Am. Rep. 390; *Richmond, &c., R. R. v. Morris*, 31 Gratt. 200; *Id. v. Anderson*, 31 Id. 812; *Wood v. Jones (La.)*, 15 Rep. 555; *Railroad Co. v. Jones*, 95 U. S. 439; *Runyon v. Central R. R. Co.*, 25 N. J. Law, 556; *Moore v. Id.*, 24 Id. 268; *Telfer v. Northern, &c., R. R. Co.*, 30 Id. 188; *Wharton on Neg.*, § 324.

740; S. C. 5 Id. 573; *Johnson v. Hudson River R. R.*, 20 N. Y. 65; *Norris v. Litchfield*, 35 N. H. 271; *Cleveland, &c., R. R. Co. v. Terry*, 8 Ohio St. 570; *The Farmer v. McCraw*, 26 Ala. 189; *McNaughton v. Caledonian R. R. Co. (Scotch)*, 21 Dunl. B. & M. 160; S. C. 31 Jur. 94; *Hay's Dec.* 260; *Shear. & Red. on Neg.*, § 33. But see *contra*, *Button v. Hudson River R. R.*, 18 N. Y. 248.

¹ *Tuff v. Warman*, 2 C. B. (N. S.)

(A.) PARTICULAR CONSIDERATIONS AFFECTING THE
PLAINTIFF'S RIGHT TO RECOVER.

§ 12. *Plaintiff's previous knowledge.*—Knowledge on the part of the plaintiff as to the danger to which he is exposed, or, what is the same thing in law, a legal obligation to know of it, is an essential element in the case, when contributory negligence is the issue. The law holds no one responsible for exposing himself to a danger of which he knew nothing, and of which he was under no obligation to inform himself. We must use ordinary care and prudence to avoid the ordinary and usual perils that beset us, but we are not bound to guard against those which we have no reason, under the circumstances, to suspect.¹ Hence, knowledge of the probable danger, or a sufficient reason to apprehend it, is essential to constitute contributory negligence. When it appears that the plaintiff has suffered an injury at the hands of the defendant from a cause which neither of them knew, or had reason to believe would produce the result, it is an inevitable accident, and the defendant is not responsible. No one is juridically responsible and the damage must lie where it falls. In the language of Chief Justice Nelson, of New York: "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or which in law or

¹ Jeffrey *v.* Keokuk, &c., R. R. Co., 56 Iowa, 546; Langan *v.* St. Louis, &c., R. R. Co., 72 Mo. 392; Thirteenth Street R. R. Co. *v.* Boudrou, 92 Penn. St. 475; S. C. 37 Am. Rep. 707; Towler *v.* Baltimore, &c., R. R. Co., 18 West Va. 579; Gray *v.* Scott, 66 Penn. St. 345; Dush *v.* Fitzhugh, 2 Lea, 307; McGuire *v.* Spence, 91 N. Y. 303; McGary *v.* Loomis, 63 N. Y. 104; S. C. 20 Am. Rep. 510; Varney *v.* Manchester, 58 N. H. 430; S. C. 42 Am. Rep. 592; Murray *v.* McShane, 52 Md. 217; S. C. 36 Am. Rep. 367.

reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.”¹ And so, by parity of reasoning, when a plaintiff suffers an injury at the hands of a defendant, and it appears that the sufferer neither knew of the danger to which his conduct exposed him, nor had any reasonable ground to apprehend it, he is not guilty of contributory negligence, and if the negligence of the defendant is established, he may recover. It is upon this principle that the law refuses to impute negligence to persons of unsound mind, and to idiots and infants.

While it is unquestionably true that one may voluntarily and unnecessarily expose himself, or his property, to danger without thereby becoming guilty of contributory negligence as matter of law,² it is, nevertheless, an established rule that, where one does knowingly put himself or his property in danger, there is a presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such a course of conduct,³ as where one goes voluntarily upon a railway track, without keeping watch, at a point where it is known to be especially dangerous,⁴ or ventures upon a bridge, track, or highway which he knows to be defective or unsafe.⁵ And where

¹ Harvey v. Dunlop, Lator's Sup., Hill & Denio, 193.

² Dublin, &c., Railway Co. v. Slatery, 3 L. R. App. Cas. 1155; Albion v. Hetrick, 90 Ind. 545; Jeffrey v. Keokuk, &c., R. R. Co., 56 Iowa, 546.

³ Goldstein v. Chicago, &c., R. R. Co., 46 Wis. 404; Lake Shore, &c., R. R. Co. v. Clemens, 5 Brad. 77; Palmer v. Dearing, 17 Week. Dig. (N. Y.) 145.

⁴ Baltimore, &c., R. R. Co. v. Depew, 40 Ohio St.; Pittsburgh, &c., R. R. Co. v. Collins, 87 Penn. St. 405; s. c. 30 Am. Rep. 371.

⁵ City of Erie v. Magill, 101 Penn.

St. 616; s. c. 47 Am. Rep. 739; Coolett v. Leavenworth, 27 Kan. 672; Mehan v. Syracuse, &c., R. R. Co., 73 N. Y. 585; Mansfield, &c., Coal Co. v. McEnery, 91 Penn. St. 185; s. c. 36 Am. Rep. 662. See, also, Lancaster v. Kissenger, 12 Rep. 635; Macomb v. Smithers, 6 Brad. 470; Albion v. Hetrick, 90 Ind. 545; s. c. 46 Am. Rep. 230; Miller v. Union Pacific R. R. Co., 2 McCrary, 87; Wills v. Linn, &c., R. R. Co., 129 Mass. 351; Lehigh Valley Coal Co. v. Jones, 6 Rep. 125; Lake Shore, &c., R. R. v. Roy, 5 Brad. 82; Marquette, &c., R. R. v. Spear, 44 Mich.

one knowing the danger temporarily forgets it, and in consequence suffers, his forgetfulness will not avail him as an excuse. What he knows he must remember at his peril, and not to remember is contributory negligence if it occasions the injury.¹ Knowledge, however, in this respect, does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence. When knowledge is fastened upon the plaintiff, it is presumptive evidence of contributory negligence. But it is a disputable presumption and may be rebutted by proper evidence of the exercise of ordinary care under the circumstances.²

§ 13. *Plaintiff's failure to anticipate the fault of the defendant.*—It is sometimes said that, inasmuch as there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff, as negligence, that he did not anticipate that another person would violate the law, or would act negligently in a given partic-

169; s. c. 38 Am. Rep. 142; *Stebbins v. Township of Keane*, Sup. Ct. of Mich., 22 N. W. Rep. 37; *Wohlfahrt v. Beckert*, 92 N. Y. 490; s. c. 44 Am. Rep. 406; *Griffiths v. Gidlow*, 3 Hurl. & N. 648; *Smith v. St. Lawrence, &c., Co.*, L. R. 5 P. C. 308; *Caswell v. Worth*, 5 El. & Bl. 849.

¹ *Baltimore, &c., R. R. Co. v. Whitacre*, 35 Ohio St. 627; *Bruker v. Covington*, 69 Ind. 33; s. c. 35 Am. Rep. 202; *Bassett v. Fish*, 75 N. Y. 303; *Weed v. Balston Spa*, 76 Id. 329.

² *Reed v. Northfield*, 13 Pick. 94; s. c. 23 Am. Dec. 662; *Frost v. Waltham*, 12 Allen, 86; *Snow v. Housatonic R. R. Co.*, 8 Id. 450; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585; s. c. 3 Am. Rep. 506; *Marble v. Ross*, 124 Mass. 44; *Dewire*

v. Bailey, 131 Id. 169; s. c. 41 Am. Rep. 219; *Osage City v. Brown*, 27 Kan. 74; *Wheeler v. Westport*, 30 Wis. 392; *Turner v. Buchanan*, 82 Ind. 147; s. c. 42 Am. Rep. 485; *Henry Co., &c., Co. v. Jackson*, 86 Ind. 111; s. c. 44 Am. Rep. 274; *Town of Albion v. Hetrick*, 90 Ind. 545; s. c. 46 Am. Rep. 230; *Estelle v. Lake Crystal*, 27 Minn. 243; *Thomas v. Mayor, &c.*, 28 Hun. 110; s. c. 15 Week. Dig. (N. Y.) 378; *Evans v. City of Utica*, 69 N. Y. 166; s. c. 25 Am. Rep. 165; *Bassett v. Fish*, 75 N. Y. 303; *Weed v. Balston Spa*, 76 Id. 329; *Ochsenbein v. Shapley*, 85 N. Y. 214. See, also, *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Pittsburgh, &c., R. R. Co. v. Taylor*, 104 Penn. St. 306; s. c. 49 Am. Rep. 580.

ular, and in accordance with such an anticipation provide against the consequences of it. A long line of authorities is at hand in support of this proposition,¹ and if it means that it is not contributory negligence not to look out for danger, *when there is no reason to apprehend any*, it is a sound rule of law. That all men will under all circumstances act with due care may be a presumption of law. It is after the analogy of the presumption in the criminal law as to innocence, and therein lies the fallacy. Presumptions, or rules of evidence, applicable to guilt and innocence are obviously wholly inapplicable to care and carelessness. There is no sound analogy between carefulness and innocence, or guilt and negligence in this respect, and it is submitted that it is not a presumption of fact that men will exercise care rather than carelessness, on the average, under a given set of circumstances. Men of ordinary carefulness do not act upon such a presumption in the general conduct of their affairs. It is a duty to some extent to anticipate the probable carelessness and wrongdoing of others.² The average prudent man does it every day, in watching the details of his business, in warning his employees, in insuring his property and his life, in bolting his doors at night, and, in short, in about everything he does, that marks him as a prudent and cautious man, and distinguishes him from the most careless and

¹ Ernst *v.* Hudson River R. R. Co., 35 N. Y. 9; Newson *v.* New York, &c., R. R. Co., 29 N. Y. 383; Harpell *v.* Curtis, 1 E. D. Smith, 78; Cleveland, &c., R. R. Co. *v.* Terry, 8 Ohio St. 570; Fox *v.* Sackett, 10 Allen, 535; Fisk *v.* Wait, 104 Mass. 71; Reeves *v.* Delaware, &c., R. R. Co., 30 Penn. St. 454; Brown *v.* Linn, 31 Id. 510; Kellogg *v.* Chicago, &c., R. R. Co., 26 Wis. 223; Damour *v.* Lyons, 44 Iowa, 276; Fraler *v.* Sears Water Co., 12 Cal. 555; Shea *v.* Potrero, &c., R. R. Co., 44 Id. 414; Robinson *v.* Western, &c., R. R. Co., 48 Id. 409; Moulton *v.* Aldrich, 28 Kan. 300; Langan *v.* St. Louis, &c., R. R. Co., 72 Mo. 392; Gee *v.* Metropolitan, &c., R. R. Co., L. R., 8 Q. B. 161; Vennall *v.* Garner, 1 Cromp. & M. 21; The Mangerton, 1 Swab. 120; Foy *v.* Brighton, &c., R. R. Co., 18 C. B. (N. S.) 225; Clayards *v.* Dethick, 12 Q. B. 439; Shear. & Red. on Neg., § 31; Whart. on Neg., §§ 74-78 incl; Thomp. on Neg., 1172; 1 Sedg. on Dam., 170.

² Texas, &c., R. R. Co. *v.* Young, 60 Texas, 201.

hapless of his neighbors. Not to exercise this measure of carefulness is to fall below the standard that men call "ordinary care." In a great variety of instances of everyday occurrence, to proceed upon the presumption of others' carefulness is nothing short of gross negligence. Prudent men, on the average, instead of acting, in general, upon any such happy-go-lucky presumption as this, rather proceed upon the opposite presumption, and conduct themselves according to the maxim of the Kentucky backwoodsman, "*Be sure you are right, then go ahead.*"¹ The rule that a plaintiff must exercise ordinary care under the circumstances in order to escape the imputation of contributory negligence will more often require him to act upon a presumption of the probable or possible negligence, or wrong doing, of others, than it will justify him in acting upon the contrary presumption. This, in the author's judgment, is a view that commends itself to the common experience and common sense of the average of mankind, though it has found little sanction at the hands of the judges.²

§ 14. *Plaintiff acting erroneously under the impulse of fear produced by the defendant.*—When a plaintiff, through the negligence of the defendant, is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency for which he is not responsible, and for which the defendant is responsible, he acts wildly or negligently, and suffers in consequence, such negligent conduct, under these circumstances, is not contributory negligence, for the reason that persons in great peril are not to be required to exercise all that

¹ Attributed to Davy Crockett.

² The Supreme Court of Texas, in the case of *Texas, &c., R. R. Co. v. Young*, decided in 1883, reported in

60 *Texas*, 201, suggests the theory I have developed, but, as far as I have searched, no other reported case has been found precisely in point.

presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. In such a case the negligent act of the defendant is the proximate cause of the injury, and the plaintiff may have his action.¹ Says Lord Ellenborough: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."² And this is equally the rule even though it turn out that no injury would have been sustained had there been no attempt to escape the threatened danger.³ The principle is that errors in judgment on

¹ Jones v. Boyce, 1 Stark. 493; Wright v. Great Northern Ry. Co., 8 Ir. L. R. (C. P. Div.) 257; Woolley v. Scovell, 3 Man. & R. (K. B.) 105; Buel v. New York, &c., R. R. Co., 31 N. Y. 314; Filer v. Id., 49 Id. 47; Coulter v. Am., &c., Express Co., 56 Id. 585; Pittsburgh v. Grier, 22 Penn. St. 54; Johnson v. West Chester, &c., R. R. Co., 70 Id. 357; Pennsylvania R. R. Co. v. Werner (Penn.), 8 Rep. 59; Lancaster v. Kissinger (Penn.), 12 Rep. 635; Pittsburgh, &c., R. R. Co. v. Taylor, 104 Penn. St. 306; s. c. 49 Am. Rep. 580; Cook v. Parham, 24 Ala. 21; Karr v. Parks, 40 Cal. 188; Indianapolis, &c., R. R. Co. v. Stout, 53 Ind. 143; Cook v. Central, &c., R. R. Co. (Ala.), 12 Rep. 356; Gothard v. Alabama, &c., R. R., 67 Ala. 114; Frick v. Potter, 17 Ill. 406; Galena, &c., R. R. Co. v. Yarwood, 17 Ill. 500; Chicago, &c., R. R. Co. v. Becker, 76 Ill. 25; Illinois, &c., R. R. Co. v. Able, 59 Id. 131; Wesley Coal Co. v. Herler, 84 Id. 126; Ingalls v. Bills, 9 Metc. 1; s. c. 43 Am. Dec. 346; Lund v. Tyngsboro, 11 Cush. 563; s. c. 59 Am. Dec. 159; Brooks v. Petersham, 16 Gray, 181; Eastman v. Sanborn, 3 Allen, 596; Stevens v. Boxford, 10 Id. 25; Sears v. Dennis, 105 Mass. 312; Linnehan v. Sampson, 126 Mass. 506; s. c. 30 Am. Rep. 692; Mark v. St. Paul, &c., R. R. Co., 30 Minn. 493; Card v. Ellsworth, 65 Me. 547; s. c. 20 Am.

Rep. 722; Page v. Bucksport, 64 Me. 51; Stickney v. Maidstone, 30 Vt. 738; Southwestern, &c., R. R. v. Paulk, 24 Ga. 356; Stokes v. Saltonstall, 13 Peters, 181; Haff v. Minneapolis, &c., R. R. Co., 4 McCrary, 622; Cunningham v. Chicago, &c., R. R. Co., 5 Id. 465; Stevenson v. Chicago, &c., R. R. Co., 18 Fed. Rep. 493; Wharton on Neg., §§ 305, 377; Thomp. on Neg., 1092, 1174.

² Jones v. Boyce, *supra*.

³ Brown v. Chicago, &c., R. R. Co., 54 Wis. 342; s. c. 41 Am. Rep. 41 (and note); Gumz v. Chicago, &c., R. R. Co., 52 Wis. 672; Schultz v. Id., 44 Id. 638; Turner v. Buchanan, 82 Ind. 147; s. c. 42 Am. Rep. 485; Iron Railway Co. v. Mowery, 36 Ohio St. 418; s. c. 38 Am. Rep. 597; Wilson v. Northern Pacific R. R. Co., 26 Minn. 278; Roll v. Northern, &c., R. R. Co., 15 Hun, 496; Twomley v. Central Park R. R. Co., 69 N.Y. 158; s. c. 25 Am. Rep. 162; Bernhard v. Rensselaer, &c., R. R. Co., 1 Abb. App. Dec. 131; Rexter v. Starin, 73 N. Y. 601; McKinney v. Neil, 1 McLean, 540. (See, also, Commonwealth v. Boston, &c., R. R. Co., 129 Mass. 500; s. c. 37 Am. Rep. 382, and note; Pennsylvania R. R. Co. v. Raney, 89 Ind. 453; s. c. 46 Am. Rep. 173; Cottrill v. Chicago, &c., R. R. Co., 47 Wis. 634; s. c. 32 Am. Rep. 796; Linnehan v. Sampson, 126 Mass. 506; s. c. 30 Am. Rep. 692, and Eckert v. Long

the part of a plaintiff, in trying to escape imminent danger brought about by the defendant's negligence, do not constitute contributory negligence, if the acts done were such as ordinarily prudent persons might have been expected to do under like circumstances, even though the injury would not have happened if the acts had not been done. So, where a passenger, apprehending a collision, rushes out of the car, where he would have been safe, and goes upon the platform, where he is hurt, his act is, upon this principle, justifiable, and he has his action for damages against the railway company;¹ and where one, being lawfully upon a railway track when a train suddenly appears, jumps the wrong way in the excitement of the moment, it is not contributory negligence.² And the rule is also frequently applied where persons leap from trains, or vehicles on the highway, under apprehension of injury from collision or derailment, or other accident, when, if they had not done so, they would have escaped unhurt.³ The question in these cases is not what a prudent man under ordinary circumstances would have done, for the suddenness of the emergency, the excitement, and the influence of terror, must be taken into the account;⁴ and what other persons did at the same time

Island R. R. Co., 43 N. Y. 502; s. c. 3 Am. Rep. 721, and the cases generally cited *supra*.)

¹ Iron Railway Co. v. Mowery, *supra*, 36 Ohio St. 418.

² Indianapolis, &c., R. R. Co. v. Carr, 35 Ind. 510; Coulter v. American, &c., Express Co., 56 N. Y. 585; Schultz v. Chicago, &c., R. R. Co., 44 Wis. 638.

³ Buel v. New York, &c., R. R. Co., 31 N. Y. 314; Twomley v. Central Park, &c., R. R. Co., 69 Id. 158; s. c. 25 Am. Rep. 162; Dyer v. Erie Ry. Co., 71 N. Y. 228; Wilson v. Northern Pacific R. R. Co., 26 Minn. 278; Mobile, &c., R. R. Co. v. Ashcraft, 48 Ala. 15; Georgia, &c., Banking Co.

v. Rhodes, 56 Ga. 645; Turner v. Buchanan, 82 Ind. 147; s. c. 42 Am. Rep. 485; Bell v. New York, &c., R. Co., 17 Week. Dig. (N. Y.) 79; Cook v. Central R. R. Co. (Ala.), 12 Rep. 356; Cuyler v. Decker, 20 Hun, 173; Siegrist v. Arnot, 10 Mo. App. 197.

⁴ Johnson v. West Chester, &c., R. Co., 70 Penn. St. 357; Linnehan v. Sampson, 126 Mass. 506; s. c. 30 Am. Rep. 692; Pittsburgh, &c., R. Co. v. Rohrman, 13 Week. Notes Cas. 258; s. c. 29 Albany Law Jour. 97; Karr v. Parks, 40 Cal. 188; Galena, &c., R. R. Co. v. Yarwood, 17 Ill. 500; Indianapolis R. R. Co. v. Stout, 53 Ind. 143.

may be given in evidence to show what may have been reasonably prudent under the circumstances.¹ In the New York case just cited it appears that the driver of one of the defendant's street cars, in which the plaintiff and several other persons were passengers, attempted to cross the track of the New York Central and Hudson River Railroad, upon which a train was rapidly approaching, and that the passengers in the car, seeing the danger of being run over, rushed out of the car, with a single exception, and that the plaintiff in so doing fell and was hurt. The car, however, passed the track in safety and avoided the threatened collision. Upon the question of the prudence of leaving the car, evidence as to the conduct of the other passengers was held competent.

§ 15. *Plaintiff acting erroneously in trying to save human life.*—So, also, upon a somewhat analogous principle, when one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.² *Eckert v. Long Island R. R. Co.*³ is perhaps the leading authority in point. In that case it appears that the plaintiff intestate, while endeavoring to rescue a child from being run

¹ *Twomley v. Central Park, &c., R. R. Co.*, 69 N. Y. 158; s. c. 25 Am. Rep. 162; *Mobile, &c., R. R. Co. v. Ashcraft*, 48 Ala. 15.

² *Eckert v. Long Island R. R. Co.*, 57 Barb. 555; affirmed, 43 N. Y. 503; s. c. 3 Am. Rep. 721; *Linnehan v. Samp-*

son, 126 Mass. 506; s. c. 30 Am. Rep. 692; *Cottrill v. Chicago, &c., R. R. Co.*, 47 Wis. 634; s. c. 32 Am. Rep. 796; *Pennsylvania Co. v. Raney*, 89 Ind. 453; s. c. 46 Am. Rep. 173.

³ *Supra.*

over by an approaching railway train, was himself struck by the train and so injured that he died. Mr. Justice Grover, in delivering the opinion of the court, said: "The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he, for his own purposes, attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If from the appearances he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to

preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated." There can be no doubt as to the correctness of the conclusion reached in these cases. In *Pennsylvania Co. v. Raney*,¹ this rule is applied to the case of an engineer of a passenger train, who stuck to his locomotive in the face of impending death, and lost his life in an heroic attempt to save his train and the lives of the passengers on board, when he might easily, by jumping from the locomotive, have escaped personal injury.² In an earlier Indiana case,³ however, a contrary doctrine is maintained, and it is held that a son, who, to save the life of his aged father, menaced by an approaching train, ran upon a railway track, and was himself struck by the train and injured, was guilty of such contributory negligence thereby as barred his recovery. But this case does not commend itself, and has not been followed.⁴ On the contrary, in some later cases, the Court of Appeals of New York has taken the ground that, when such risks are assumed, even to save property from destruction, allowance ought

¹ 89 Ind. 453; s. c. 46 Am. Rep. 173.

² See, also, *Cottrill v. Chicago, &c.*, R. R. Co., 47 Wis. 634, and s. c. 32 Am. Rep. 796.

³ *Evansville, &c., R. R. Co. v. Hiatt*, 17 Ind. 102.

⁴ But see *Gramlich v. Wurst*, 86 Penn. St. 74; s. c. 27 Am. Rep. 684.

to be made for the excitement under which one acts in such a case, and that running into danger for this purpose may not, in view of all the circumstances, be such negligence as will bar a recovery for a negligent injury.¹ And, upon the same theory, perhaps, it has been held that when one, in the discharge of a legal duty, does an act manifestly perilous, and suffers in consequence of the negligence of another, he may have his action for the damages he sustains.² This is equivalent, it may be, to a rule that doing one's duty in a lawful manner is not contributory negligence, for in the Maine case just referred to, it appears that a detective, in search for smugglers, whose duty required him to go about upon a defective wharf in the night, without carrying a lantern, which would obviously defeat the purpose of his going, was injured by falling into the water through an opening in the wharf negligently left unguarded and unlighted by the defendants. It was held that, inasmuch as the detective was doing his duty, in a lawful manner, which was also the only practicable manner of doing it at that time, he might recover damages, whereas, it is plain that under ordinary circumstances, to wander about at night upon a dark wharf without a lantern, might be grossly negligent.³ The opinion of Barrows, J., in this case, is a full and luminous presentation of the law in point.

The question whether the plaintiff's conduct in all the cases referred to in this section was wanting in reasonable prudence and caution in view of all the circumstances, is not one of law, but of fact. It should be submitted to the jury "as a question peculiarly for them to decide."⁴

¹ *Rexter v. Starin*, 73 N. Y. 601; *Thompson v. Hermann*, 47 Wis. 602; *Wasmer v. Delaware, &c., R. R. Co.*, 80 N. Y. 212; S. C. 36 Am. Rep. 608. S. C. 32 Am. Rep. 784.

² *Low v. Grand Trunk R. R. Co.*, 72 Me. 313; S. C. 39 Am. Rep. 331; *supra*.

³ *Low v. Grand Trunk R. R. Co.*, *supra*.
⁴ *Linnehan v. Sampson*, 126 Mass. 506, *supra*; S. C. 30 Am. Rep. 692.

“The questions,” says Mr. Justice Barrows, in the very able opinion, to which I have already referred,¹ “are not of a character to be disposed of by a little neat logic. They are rather, as remarked by the court in *Elliott v. Pray*, 10 Allen, 384, ‘questions which can be best determined by practical men on a view of all the facts and circumstances bearing on the issue.’”

§ 16. *Plaintiff doing an illegal act.*—It is no defense to an action for negligence that the plaintiff was engaged in violating the law in a given particular at the time of the happening of the accident, unless the violation of law was a proximate and efficient cause of the injury.² Some mere collateral wrong-doing by the plaintiff, that has no tendency to occasion the injury, cannot, of course, avail the defendant through whose negligence the injury has been suffered. Thus, for example, driving on the wrong side of the road will not, as a matter of law, prevent a recovery in case of a collision. It is a circumstance to go to the jury on the question of the plaintiff’s negligence.³ So, also, one who places his wagon in the street for the purpose of loading it, in such a position as to violate a city ordinance, may, nevertheless, recover from one who negligently runs into it,⁴ and in *Baker v. Portland*,⁵ the court says: [The fact that the plaintiff] “was smoking a cigar in the streets, in violation of a municipal ordinance, while it might subject the offender to a penalty, will not

¹ *Low v. Grand Trunk, &c., R. R. Co.*, *supra*.

² *Spofford v. Harlow*, 3 Allen, 176; *Welch v. Wesson*, 6 Gray, 305; *Steele v. Burkhardt*, 104 Mass. 59; s. c. 6 Am. Rep. 191; *Hall v. Ripley*, 119 Mass. 135; *Morton v. Gloster*, 46 Me. 520; *Bigelow v. Reed*, 51 Id. 325; *Hamilton v. Goding*, 55 Id. 428; *Baker v. Portland*, 58 Id. 199; s. c. 4 Am. Rep. 274; *Neanow v. Ullech*,

46 Wis. 581; *Klipper v. Coffey*, 46 Md. 117; *Albert v. Bleecker St. R. Co.*, 2 Daly, 389; *Griggs v. Fleckenstein*, 14 Minn. 81; *Davidson v. Portland*, 69 Me. 116; s. c. 31 Am. Rep. 253; *Streett v. Laumier*, 34 Mo. 469.

³ *Spofford v. Harlow*, *supra*.

⁴ *Steele v. Burkhardt*, *supra*.

⁵ 58 Me. 199, *supra*.

excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offense did not in any degree contribute to produce the injury of which he complains."

This rule is especially applicable in cases where the defendant's negligence is wilful or wanton. In those cases the plaintiff's collateral fault, or violation of law, is least of all a defense, as, for instance, where the parties were trotting their horses, in competition, on a highway where such high speed was forbidden by a municipal ordinance, and the defendant wilfully ran into the plaintiff's sleigh and caused him an injury, the plaintiff's unlawful act in one particular was held not to exempt the defendant from his obligation to respond in damages, for the injurious consequences of his own illegal misbehavior in another.¹

But when the plaintiff is obliged to lay the foundation of his action in his own violation of law, he cannot recover.² And when his illegal act also contributes to produce the injury of which he complains, he has no action unless the defendant acted wantonly,³ but when the defendant's conduct amounts to wilfulness, or a reckless disregard of another's rights, it seems to be the doctrine of the Massachusetts case just cited, that not even the unlawful character of the plaintiff's act, in addition to the fact that it contributes to produce the injury, is sufficient to excuse the defendant. But, in Illinois, the illegal and fraudulent character of the act—as where one traveling upon

¹ Welch v. Wesson, 6 Gray, 505; Steele v. Burkhardt, 104 Mass. 59; S. C. 6 Am. Rep. 191; Wallace v. Merrimack, &c., Nav. Co., 134 Mass. 95, and generally the cases cited, *supra*.

² Gregg v. Wyman, 4 Cush. 322; Way v. Foster, 1 Allen, 408; Smith v. Boston, &c., R. R. Co., 120 Mass. 490; S. C. 21 Am. Rep. 538; (but see,

also, Crosman v. City of Lynn, 121 Mass. 301; Bosworth v. Swansey, 10 Metc. 363; S. C. 43 Am. Dec. 441; Woodman v. Hubbard, 25 N. H. 67; Phalen v. Clark, 19 Conn. 421; S. C. 50 Am. Dec. 253; Simpson v. Bloss, 7 Taunt. 246.

³ Bank v. Highland Street R. R. Co., 136 Mass. 485; Parker v. Nasua, 59 N. H. 402.

a non-transferable free railroad pass, issued to another person, and passing himself off as such person, was injured by the negligence of the servants of a railway company—is of itself held sufficient to prevent a recovery for such injury, unless the negligence of the railway company was so gross as to amount to wilfulness.¹

So, also, where one is on a train “stealing a ride,” or paying no fare through stealth or fraud, and is killed by the wrongful act of the company his representatives can recover no damages therefor.² The soundness of the conclusions reached by the court in these cases may be fairly questioned. The plaintiff’s illegal act in riding upon a pass which did not belong to him, or in riding without paying fare, was in no possible way a cause of the injury he sustained. It was purely a collateral violation of law, and as such, upon principle, was no proper defense to the action for negligence.

The Supreme Court of Georgia, in reconstruction times, in a case in which their patriotism very far outran their judgment, reached the astonishing conclusion that an employee of a railway company, injured while the train on which he was employed was engaged in transporting troops and munitions of war for the Confederate States, could not recover damages against the company, if he was voluntarily so engaged for the purpose of making war upon the Government of the United States.³ The court applied the maxim “*In pari delicto potior est conditio defendentis et possidentis*,” but whether it proceeded upon the principle of this maxim, or upon any other principle, it was wholly absurd to charge the employee with legal responsibility. Even if the company were chargeable with fault, this man had not the remot-

¹ Toledo, &c., R. R. Co. v. Beggs, 81 Ill. 245; Chicago, &c., R. R. Co. v. Michie, 83 Ill. 427.

² Toledo, &c., R. R. Co. v. Brooks,

³ Wallace v. Cannon, 38 Ga. 199.

est share in it. He was no more legally or morally responsible for the sort of freight the railway that employed him transported, than for the perturbations of Jove's satellites during the period of the civil war. His obliquity was as great in one matter as the other. But, for the purpose of the other view, granting never so much fault on his part in the matter pretended, it was wholly a collateral violation of law, which, as we have seen, is not a defense in an action of negligence—as far removed from being a cause of his injury as the east is from the west. Into such vagaries and juridical nonsense have the courts drifted in attempting refinements upon the elementary principles of the law of contributory negligence.¹ The rule that collateral violations of law shall not operate as a defense in an action brought to recover damages occasioned by the negligence of another, if it were thought possible to impute fault to this employee, applied to this case, would have given a correct result. And the other undoubted rule that a train-man is not a fellow-servant with the contracting freight agent, or superintendent of a railroad, or with a military officer of the Confederate government, applied to the case in hand, would also have given a proper result. If the servant had suffered by the master's neglect, without contributing to his own injury, he ought to have recovered, and, under a fair application of the reasonable rules of law in point, he would have recovered.

It must, to continue, be remembered that when the defendant's negligence is also a violation of law, that is to say, when both plaintiff and defendant are doing an unlawful act at the time of the catastrophe, the defendant's violation of law will not operate in favor of the plaintiff

¹ *Martin v. Wallace*, 40 Ga. 52; *Cannon v. Rowland*, 34 Ga. 422; S. C. 35 Id. 105.

any more than that of the plaintiff will in favor of the defendant. In such a case, where the party injured has been guilty of contributory negligence he cannot recover on the ground that the defendant's negligence is a violation of law. Where, for example, a railroad train fails to give proper signals, or those required by law, at a crossing, and one is injured in attempting to cross without looking up and down the track for a train, which is contributory negligence, the unlawful omission of the signals is not a sufficient ground for a recovery *non obstante*.¹

§ 17. *Plaintiff a trespasser*.—It is a general rule that when the defendant's negligence is wilful, contributory

¹ Meeks v. Southern Pacific R. R. Co., 52 Cal. 602; Curry v. Chicago, &c., R. R. Co., 43 Wis. 665; Chicago, &c., R. R. Co. v. McKean, 40 Ill. 218; Leduke v. St. Louis, &c., R. R. Co., 4 Mo. App. 485; Eaton v. Erie Ry. Co., 51 N. Y. 544; Maginnis v. New York, &c., R. R. Co., 52 Id. 215; Hinckley v. Cape Cod R. R. Co., 120 Mass. 259; Harlan v. St. Louis, &c., R. R. Co., 64 Mo. 480; s. c. 65 Id. 22; Rothe v. Milwaukee, &c., R. R. Co., 21 Wis. 256; Galena, &c., R. R. Co. v. Dill, 22 Ill. 264. See, also, Illinois, &c., R. R. Co. v. Hetherington, 83 Ill. 510; Lake Shore, &c., R. R. Co. v. Berlink, 2 Brad. App. 427. See, also, the following additional cases standing for the general proposition that mere collateral violations of law, on the part either of the plaintiff or defendant, will not, on the one hand, bar the plaintiff's right of action, nor, on the other, make the defendant liable to pay damages, as the text declares. Smith v. Smith, 2 Pick. 621; s. c. 13 Am. Dec. 464; Wallace v. Merrimack, &c., Navigation Co., 134 Mass. 95; s. c. 45 Am. Rep. 301; Phila., &c., R. R. Co. v. Phila., &c., Towboat Co., 23 How. 309; Kidder v. Dunstable, 11 Gray, 342; Counter v. Couch, 8 Allen, 436; Kearns v. Snowden, 104 Mass. 63; Hall v. Corcoran, 107 Id. 251; Wrinn v. Jones, 112 Id. 360; Damon v. Scituate, 119 Id. 66; Smith v. Conway, 121 Id. 216; Sutton v. Wauwatosa, 29 Wis. 21; s. c. 9 Am. Rep. 534; Carroll v. Staten Island R. R. Co., 58 N. Y. 126; Hoffman v. Union Ferry Co., 68 N. Y. 385; Mohney v. Cook, 26 Penn. St. 342; Norris v. Litchfield, 35 N. H. 271; Gale v. Lisbon, 52 Id. 174; Parker v. Nassua, 59 Id. 402; Jennings v. Wayne, 63 Me. 468; Schmid v. Humphrey, 48 Iowa 652; s. c. 30 Am. Rep. 414; Baldwin v. Barney, 12 R. I. 392; s. c. 34 Am. Rep. 670; Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio St. 172; Morrison v. Genl. Steam Nav. Co., 8 Exch. 731; Dimes v. Petley, 15 Q. B. 276; Aston v. Heaven, 2 Espin. 533; Chicago, &c., R. R. v. McKean, 40 Ill. 218; St. Louis, &c., R. R. Co. v. Manly, 58 Id. 300; Kepperly v. Ramsden, 83 Id. 354; McClary v. Lowell, 44 Vt. 116; s. c. 8 Am. Rep. 366; Powhatan, &c., Co. v. Appomattox R. R. Co., 24 How. (U. S.) 247; Daley v. Norwich, &c., R. R. Co., 26 Conn. 591; Churchill v. Rosebeck, 15 Id. 359; Simmonson v. Stellenmerf, Edm. Sel. Cas. 194; Wharton on Neg., §§ 330, 381a, 405, 955; Cooley on Torts, § 157.

negligence is not a defense, and, accordingly, it is held that a mere technical trespass is not such an offense as to deprive the trespasser of his right to recover damage for an injury which he suffers through the wilful negligence of another. The bare fact that one trespasses upon my land, does not place him so far beyond the pale of the law that I may, with impunity, inflict an injury upon him.¹ The owner of property is under no legal obligation to keep it in a safe condition for trespassers.² When, however, the circumstances are such as to imply a license, or invitation, to go upon the property, he who enters is no longer a trespasser, and the owner is bound to

¹ *Sanders v. Reister*, 1 Dakota, 151; *Whirley v. Whiteman*, 1 Head, 610; *Terre Haute, &c., R. R. Co. v. Graham*, 95 Ind. 286; s. c. 48 Am. Rep. 719; *Southwestern R. R. Co. v. Hankerson*, 61 Ga. 114; *Kerwhacker v. Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; *Norris v. Litchfield*, 35 N. H. 271; *State v. Manchester, &c., R. R. Co.*, 52 Id. 528; *Mason v. Missouri Pac. R. R. Co.*, 27 Kansas, 83; s. c. 41 Am. Rep. 405; *Brown v. Lynn*, 31 Penn. St. 510; *Marble v. Ross*, 124 Mass. 44; *Houston, &c., R. R. Co. v. Symplkins*, 54 Texas, 615; s. c. 38 Am. Rep. 632; *Chicago, &c., R. R. Co. v. Kellam*, 92 Ill. 245; s. c. 34 Am. Rep. 128; *Isabel v. Hannibal, &c., R. R. Co.*, 60 Mo. 475; *Herring v. Wilmington, &c., R. R. Co.*, 10 Ired. (Law), 402; s. c. 51 Am. Dec. 395; *Meeks v. Southern Pacific R. R. Co.*, 56 Cal. 513; s. c. 38 Am. Rep. 67; *Mulherrin v. Delaware, &c., R. R. Co.*, 81 Penn. St. 366; *Baltimore, &c., R. R. Co. v. State*, 33 Md. 542; *Weymire v. Wolfe*, 52 Iowa, 533; *Lake Shore, &c., R. R. Co. v. Miller*, 25 Mich. 279; *Little Rock, &c., R. R. Co. v. Pankhurst*, 36 Ark. 371; *Birge v. Gardner*, 19 Conn. 507; s. c. 50 Am. Dec. 261; *Daley v. Norwich, &c., R. R. Co.*, 26 Id. 591; *Isbell v. New York, &c., R. R. Co.*, 27 Conn. 393; *Shear. & Red on Neg.*, § 38; *Thomp-*

on Neg., 303, 1162; *Wharton on Neg.*, §§ 344 *et seq.*

² *Hargreaves v. Deacon*, 25 Mich. 1; *Kohn v. Lovett*, 44 Ga. 251; *Roulston v. Clark*, 3 E. D. Smith, 366; *Zoebisch v. Tarbell*, 10 Allen, 385; *Frost v. Grand Trunk R. R. Co.*, 10 Id. 387; *Morgan v. City of Hallowell*, 57 Me. 377; *Lary v. Cleveland, &c., R. R. Co.*, 78 Ind. 323; s. c. 41 Am. Rep. 572; *Parker v. Portland Publishing Co.*, 69 Me. 173; s. c. 31 Am. Rep. 262; *Gramlich v. Wurst*, 86 Penn. St. 74; *Severy v. Nickerson*, 120 Mass. 306; s. c. 21 Am. Rep. 514; *Pierce v. Whitcomb*, 48 Vt. 127; s. c. 21 Am. Rep. 120; *Illinois, &c., R. R. Co. v. Godfrey*, 71 Ill. 500; s. c. 22 Am. Rep. 112; *Blyth v. Topham, Cro. Jac.* 158 (cited in *Comyn's Digest*, Action upon the Case for a Nuisance, C); *Hardcastle v. The South Yorkshire Ry. Co.*, 4 Hurl. & N. 67; s. c. 28 L. J. (Exch.) 139; *Goutret v. Egerton, L. R.* 2 C. P. 371; s. c. 36 L. J. (C. P.) 191; 15 Week. Rep. 638; 16 L. T. (N. S.) 17; *Stone v. Jackson*, 16 C. B. 199; s. c. 32 Eng. Law & Eq. 349; *Balch v. Smith*, 7 Hurl. & N. 736; s. c. 8 Jur. (N. S.) 197; 31 L. J. (Exch.) 201; 10 Week. Rep. 387; 6 L. T. (N. S.) 158; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; s. c. 6 Jur. (N. S.) 897; 29 L. J. (C. P.) 203; 8 Week. Rep. 227.

exercise ordinary care and prudence toward him. The invitation or license creates this duty.¹ So it is said that the owner, in such a case, is bound to take the same care of one who enters his house by invitation, that he takes of himself and the other members of his household, and that he must not expose him to hidden dangers of which he is himself aware, especially if the danger is in nature of a trap.²

An invitation, in the technical sense of the word, will be inferred where there is a common interest or mutual advantage; as, for instance, there is an implied invitation to the public generally to enter business houses for the purpose of transacting business.³ In such a case the law imposes upon the owner, or proprietor, the duty of exercising ordinary care. "The owner, or occupant of land," says Mr. Justice Gray, in *Carleton v. Franconia Iron Co.*,⁴ "is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him,

¹ *Sweeny v. Old Colony, &c., R. Co.*, 10 Allen, 368; *Graves v. Thomas*, 95 Ind. 361; S. C. 48 Am. Rep. 727; *Campbell v. Boyd*, 88 N. C. 129; S. C. 43 Am. Rep. 740; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219; S. C. 39 Am. Rep. 503; *Hayward v. Miller*, 94 Ill. 349; S. C. 34 Am. Rep. 229; *McAlpin v. Powell*, 70 N. Y. 126; S. C. 26 Am. Rep. 555, and note; *Campbell v. Portland Sugar Co.*, 62 Me. 552; S. C. 16 Am. Rep. 503; *McKone v. Michigan, &c., R. Co.*, 51 Mich. 601; S. C. 47 Am. Rep. 596; *Davis v. Chicago, &c., R. Co.*, 58 Wis. 646; S. C. 46 Am. Rep. 667; *Bennett v. Railroad*, 102 U. S. 577; *Barry v. New York, &c., R. Co.*, 92 N. Y. 289; *Southcote v. Stanley*, 1 Hurl. & N. 247; S. C. 25 L. J. (Exch.) 339.

² *Indermaur v. Dames*, L. R. 1 C. P. 274; S. C. L. R. 2 C. P. 311; *Nicholson v. Lancashire, &c., Ry. Co.*, 34 L. J. (Exch.) 84; *Corby v. Hill*, 4 C. B. (N. S.) 556; S. C. 4 Jur. (N. S.) 512; 27 L. J. (C. P.) 318; *Axford v. Prior*, C. P. 14 W. R. 611; *Paddock v. Northeastern Ry. Co.*, 18 L. T. (N. S.) 60; *Smith v. London & St. Katherine's Dock Co.*, L. R. 3 C. P. 326; *Chapman v. Rothwell, El. & El. 168*; *Holmes v. Northeastern Ry. Co.*, L. R. 4 Exch. 254; *Davis v. Central Congregational Society of Jamaica Plain*, 129 Mass. 367; *Campbell on Neg.*, § 32; *Wharton on Neg.*, § 349; *Thompson on Neg.*, 303.

³ See the cases generally last cited.

⁴ 99 Mass. 216.

and not to them, and which he has negligently suffered to exist, and has given them no notice of.”¹ The courts draw a distinction between an invitation and a mere license as affecting the rule in consideration. While an invitation, express or implied, imposes the duty of ordinary care upon a person in control of premises, a license, which is inferred where the object is the mere pleasure or benefit of the person enjoying it, imposes, as we have already seen, no such duty. Graves, J., in *Hargreaves v. Deacon*,² after considering the question of the duty on the part of an owner of property toward trespassers, idlers and bare licensees, says: “We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity, or motives of private convenience, in no way connected with business, or other relations with the occupant.” This is the doctrine of both the English and the American cases.³ We must remember, however, that when the plaintiff’s trespass contributes to produce the injury he sustains, the general rule as to contributory negligence applies to prevent his recovering damages. Contributory negligence may take the form of a trespass as well as any other form, and, while the mere fact that one is a trespasser will not alone prevent a recovery, it may appear that going upon the premises was such a want of ordinary care under the circumstances as to constitute

¹ To the same effect, see *Gilbert v. Nagle*, 118 Mass. 278; *Lorne v. Hotel Co.*, 116 Mass. 67; *Freer v. Cameron*, 4 Rich. (Law), 228; S. C. 55 Am. Dec. 663; *Ackert v. Lansing*, 48 How. Pr. 374; S. C. 59 N. Y. 646; *Camp v. Wood*, 76 N. Y. 92; S. C. 32 Am. Rep. 282; *Pastene v. Adams*, 49 Cal. 87; *Hayward v. Miller*, 94 Ill. 349; S. C. 34 Am. Rep. 229, and note; *Pierce v. Whitcomb*, 48 Vt. 127; S. C. 21 Am. Rep. 120; *Totten v. Phipps*, 52 N. Y.

354; *Luddington v. Miller*, 4 Jones & Sp. 1; *Ryan v. Thompson*, 2 Id. 133; *Nave v. Flack*, 90 Ind. 205; *White v. France*, 2 C. P. Div. 308; *Chapman v. Rothwell*, El., Bl. & El. 168; *Indermaur v. Dames*, *supra*.

² 25 Mich. 1.

³ *Campbell on Neg.*, § 32; *Sullivan v. Waters*, Ir. C. L. R. 460; *Balch v. Smith*, 7 Hurl. & N. 736; *Gautret v. Egerton*, L. R. 2 C. P. 271.

contributory negligence. The case of *Marble v. Ross*,¹ suggests this distinction. The defendant kept a vicious stag in his pasture, and the plaintiff, trespassing there, was attacked by the stag, and injured. Here it is plain that the matter of defense was not the trespass, but the contributory negligence involved in the trespass. It was an act harmless enough to walk through the pasture, but the stag was known to be somewhat vicious, and it was careless to go within his reach. The plaintiff had no remedy, not because he was a trespasser, but because his trespass was a negligent act, contributing to occasion the injury. And, *a fortiori*, there is the same rule when the plaintiff inflicts the injury, or brings the disaster upon himself, by meddling or trespassing with dangerous tools, or machinery, or other property, inadvertently exposed upon the defendant's premises.² Accordingly, it is held, in a recent carefully considered case in South Carolina,³ that a railroad company is not liable for the death of one who, while walking on its track without right, intermeddled with a torpedo which had been placed there as a danger signal, and was killed by its explosion. And in the old case of *Bush v. Brainard*,⁴ where the defendant, having made maple sugar in his unfenced woodland, left some of the syrup in a kettle, under an uninclosed shed, and the plaintiff's cow, running at large in the wood, came by night and drank of it and died, there being no evidence of any town by-law permitting cattle to run at large, nor of the defendant's consent that the plaintiff's cattle, or cattle generally, might run on his premises, it was held that the plaintiff had no right of action.

¹ 124 Mass. 44.

² *Bush v. Brainard*, 1 Cowen, 78; S. C. 13 Am. Dec. 513; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; S. C. 53 Am. Dec. 384; *Carter v. Columbia, &c., R. R. Co.*, 19 S. C. 20; S. C. 45 Am. Rep. 754; *Everhart v.*

Terre Haute, &c., R. R. Co. 78 Ind. 292; S. C. 41 Am. Rep. 567; *Galena, &c., R. R. Co. v. Jacobs*, 20 Ill. 478; *Lygo v. Newbold*, 9 Exch. 302.

³ *Carter v. Columbia, &c., R. R. Co.*, *supra*.

⁴ *Supra*.

This rule, in its application to the case of an infant trespasser, is somewhat modified.¹

§ 18. *Plaintiff's prior negligence in connection with defendant's subsequent negligence.*—It is sometimes said to be the rule that a plaintiff may recover, notwithstanding the fact that his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him,² or, as Judge Thompson puts it,³ "perhaps a better expression of this rule is that, although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation*, inflicts the injury upon him, through a failure to exercise ordinary care, the plaintiff may recover damages."⁴ This is but another attempt to make sense out of the rule laid down in the case of *Davies v. Mann*,⁵ and to make it square with the recognized and unquestioned rules of law which obtain upon the subject of contributory negligence. As it is first formulated above it is equivalent, for practical purposes, to the rule that when the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the action will lie. This, as has been shown,⁶ is a correct rule, and, it is correctly expressed. As used in this sense "prior" and "subsequent" are very nearly, and often exactly, equivalent to proximate and remote; "prior negligence" will usually be found substantially the same as negligence

¹ See Chap. IV, *infra*, and Chap. V, §§ 69, 70.

² Shear. & Red. on Neg., § 36.

³ Thomp. on Neg., 1157, note.

⁴ Citing *Barker v. Savage*, 45 N. Y. 191, 194; *Brown v. Lynn*, 31 Penn. St. 510; *Northern, &c., R. R. Co. v. Price*, 29 Md. 420; *Locke v. First Div., &c., R. R. Co.*, 15 Minn. 350;

Nelson v. Atlantic, &c., R. R. Co., 68 Mo. 593; *O'Keefe v. Chicago, &c., R. R. Co.*, 32 Iowa, 467; *Morris v. Id.*, 45 Id. 29. Compare *Lannen v. Albany Gaslight Co.*, 44 N. Y. 459; affirming 46 Barb. 264.

⁵ 10 Me. & W. 546.

⁶ § 10, *supra*.

that is regarded as a remote cause, and "subsequent negligence" means, ordinarily, in the judge's opinion, the negligence that did the mischief, which is more usually known as negligence which is a proximate cause. On the other hand as the rule, as stated by Judge Thompson, it is only an indifferent way of saying that when the defendant's negligence is wilful, the plaintiff's contributory negligence is not a defense. When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me and "inflicts" the injury upon me as a result of his negligence, there is very little room for a claim that such conduct on his part is not wilful negligence. The author believes, as he has already suggested,¹ that every case in the reports which assumes to rest upon the rule that the prior negligence of the plaintiff is not a defense to the subsequent negligence of the defendant, where a correct conclusion has been reached, will be found to turn upon one or the other of these elementary propositions. When the plaintiff in these cases is held entitled to recover, it will appear either that the defendant's negligence was wilful, or that it was the proximate cause of the injury. If this be true, nothing is gained by stating the rule in this way. It begets confusion in expression and in thinking. And, moreover, as an abstract proposition of law, it is open to the criticism that, whether we express it in one way or the other, and either with or without Judge Thompson's discovery clause, it ignores the principle upon which the law of contributory negligence has been made to rest, and proceeds upon the theory of punishment. The tendency of it is to unsettle and confuse established principles. The culmination of it is "comparative negligence." The courts have usually adopted this

¹ § 10, *supra*.

form of expressing the law in cases where the negligence of the plaintiff preceded that of the defendant in point of time, and it has more generally been applied where the defendant's negligence is the proximate cause of the injury.¹ When the negligent acts or omissions of the parties to the action were contemporaneous—or, what is to say the same thing, when the catastrophe is the result of concurring or mutual acts of negligence, the plaintiff cannot recover damages. This is hardly more than a reiteration of the general rule of contributory negligence, but it is the form in which the rule is sometimes stated.²

¹ *Kerwacker v. Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; s. c. 62 Am. Dec. 246; *Cleveland, &c., R. R. Co. v. Elliott*, 28 Ohio St. 340; *Johnson v. Hudson River R. R. Co.*, 5 Duer, 27; *Button v. Id.*, 18 N. Y. 248; *Austin v. N. J. Steamboat Co.*, 43 Id. 75; *Healy v. Dry Dock, &c., R. R. Co.*, 46 N. Y. Super. Ct. 473; *Kansas, &c., R. R. Co. v. Cranmer*, 4 Colo. 524; *Doggett v. Richmond, &c., R. R. Co.*, 78 N. C. 305; *Gunter v. Wicker*, 85 N. C. 310; *Needham v. San Francisco, &c., R. R. Co.*, 37 Cal. 409; *Gothard v. Alabama, &c., R. R. Co.*, 67 Ala. 114; *Zimmerman v. Hannibal, &c., R. R. Co.*, 71 Mo. 476; *Swigert v. Id.*, 75 Id. 475; *Trow v. Vermont, &c., R. R. Co.*, 24 Vt. 487; *Wright v. Brown*, 4 Ind. 95; s. c. 58 Am. Dec. 622; *Cummins v. Presley*, 4 Harr. (Del.) 315; *Baltimore, &c., R. R. Co. v. Trainor*, 33 Md. 542; *Id. v. McDonnell*, 43 Id. 534; *Id. v. Mulligan*, 45 Id. 486; *Mississippi, &c., R. R. Co. v. Mason*, 51 Miss. 234; *Johnson v. Canal, &c., R. R. Co.*, 27 La. Ann. 53; *Isbell v. New York, &c., R. R. Co.*, 27 Conn. 393; *Byram v. McGuire*, 3 Head, 530; *Underwood v. Waldron*, 33 Mich. 232; *O'Rourke v. Chicago, &c., R. R. Co.*, 44 Iowa, 526; *Morris v. Id.*, 45 Id. 29; *Illinois, &c., R. R. Co. v. Hoffman*, 67 Ill. 287; *Chicago, &c., R. R. Co. v. Donahue*, 75 Id. 106; *Ohio, &c., R. R. Co. v. Stratton*, 78 Id. 88; *Georgia, &c., R. R. Co. v. Neely*, 56 Ga. 504;

Lane v. Atlantic Works, 107 Mass. 104; *Britton v. Cummington*, 107 Id. 347; *Hibbard v. Thompson*, 109 Id. 288; *Tuff v. Warman*, 2 C. B. (N. S.) 740; s. c. 5 Id. 573; *Scott v. Dublin, &c., R. R. Co.*, 11 Ir. C. L. 377; *Radley v. London, &c., Ry. Co.*, 1 App. Cas. 754; s. c. L. R. 9 Exch. 71; 43 L. J. (Exch.) 73; *Feld on Damages*, 161; *Shear. & Red. on Neg.*, §§ 36, 493; *Thomp. on Neg.*, 1157; *Wharton on Neg.*, §§ 335 *et seq.*

² *Pennsylvania R. R. Co. v. Aspell*, 23 Penn. St. 147; s. c. 62 Am. Dec. 323; *Railroad Company v. Norton*, 24 Penn. St. 469; *Simpson v. Hand*, 6 Wharton (Penn.), 311; s. c. 36 Am. Dec. 231; *Beatty v. Gilmore*, 16 Penn. St. 463; s. c. 55 Am. Dec. 514; *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St. 318; *Heil v. Glanding*, 42 Id. 493; *Stiles v. Geesey*, 71 Id. 439; *Cook v. Champlain, &c., R. R. Co.*, 1 Denio, 91; *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Wilds v. Id.*, 24 Id. 432; *Hance v. Cayuga, &c., R. R. Co.*, 26 Id. 428; *Ring v. City of Cohoes*, 77 N. Y. 83; s. c. 33 Am. Rep. 574; *Allen v. Hancock*, 16 Vt. 230; *Trow v. Vermont, &c., R. R. Co.*, 24 Id. 487; s. c. 58 Am. Dec. 191; *Wood v. Jones*, 34 La. Ann. 1086; *Bosworth v. Swansea*, 10 Metc. 363; s. c. 43 Am. Dec. 441; *Worcester v. Essex Merrimac Bridge Corp.*, 7 Gray, 457; *Heland v. Lowell*, 3 Allen, 407; *Timmons v. Ohio, &c., R. R. Co.*, 6 Ohio

“Contributory” is the word most used in the decisions to describe that sort of negligence on the part of a plaintiff which is juridically sufficient to prevent a recovery of damages—though it is criticised by Crompton, J., in *Tuff v. Warman*,¹ as “much too loose,” and as “a very unsafe word.” Sometimes the word “concur” is used, as we have just seen,² and sometimes “co-operate,”³ but contributory and contribute are the safer words to use, as having a more settled legal signification, and a more unchallenged currency.

Having now considered the legal effect of the plaintiff's negligence, both when, in point of time, it is prior to that of the defendant, and when it is contemporaneous therewith, we proceed to a discussion of the consequences of that negligence when it is subsequent to the negligent wrong-doing of the defendant.

§ 19. *Plaintiff's negligence after the catastrophe.*—In the preceding section an attempt was made to show that, when the defendant's negligence appears to have been subsequent to that of the plaintiff, so that the rule that the plaintiff's prior negligence is not a defense to the subsequent neglect, or wrong-doing of the defendant, is applied, if a correct conclusion is reached, it will be found, in the last analysis, either that the defendant's negligence was the proximate cause of the injury, or that his negligence was wilful. It has perhaps been somewhat overlooked, both by the text-writers and the courts, that the converse of this proposition is also true. The ques-

St. 105; *Larkin v. Taylor*, 5 Kan. 433; *Stucke v. Milwaukee, &c.*, R. R. Co., 9 Wis. 214; *Haley v. Chicago, &c.*, R. R. Co., 21 Iowa, 25; *Reynolds v. Hindman*, 32 Id. 149; *Northern Central R. R. Co. v. Price*, 29 Md. 420; *Id. v. Gies*, 31 Id. 357; *Needham v. San Francisco, &c.*, R. R. Co., 37 Cal. 423; *Straus v. Kansas,*

&c., R. R. Co., 75 Mo. 185; *Crandall v. Goodrich Trans. Co.*, 11 Biss. 516; S. C. 16 Fed. Rep. 75; *Burrows v. The Marsh Gas & Coke Co. L. R.* 5 Exch. 67; S. C. L. R. 7 Exch. 96; 2 *Sedgwick on Damages*, 361.

¹ 5 C. B. (N. S.) 573, 584.

² *Vide* the cases last cited.

³ *Shear. & Red. on Neg.*, § 25, note 4.

tion being whose negligence was the proximate cause of the injury of which the plaintiff complains, it will occasionally appear that the plaintiff's negligent act, or omission to act, *after the defendant's negligence*, was the efficient cause of the mischief. Whenever it can be shown in evidence that the plaintiff, after the defendant's negligent act or omission, and with knowledge, actual or constructive, of such negligence and its probable consequences, refused or omitted to exercise ordinary care under the circumstances to prevent an injury from that cause to himself or his property, then, if he suffers, his own negligence is the proximate and efficient cause of the injury, and, upon familiar grounds, his right of action is gone. The issue, upon the determination of which the plaintiff's case rests, is, what was the proximate cause, and when his own negligence, being, in point of time, either prior to that of the defendant, or contemporaneous with it, or subsequent to it, turns out to have been the proximate cause, his right to recover is barred. It is wholly immaterial *when* the plaintiff's negligence operated to produce the injury. If it was the proximate cause he has no cause of action, and that his negligence may as well be subsequent to that of the defendant as any other way, may well be illustrated by reference to the reported cases. In *Illinois, &c., R. R. Co. v. McClelland*,¹ it appeared that a son of the plaintiff saw a fire in some stubble near a fence separating the plaintiff's land from a railway track, while on his way homeward, but that instead of stopping and trying to put the fire out, he went on, and, upon returning to the place some time afterward, found the fire burning so hotly and extending so far as to be beyond control. The court held this an act of negligence, chargeable to the plaintiff, and sufficient to prevent his re-

¹ 42 Ill. 355.

covery. Here the negligence of the plaintiff in failing to stamp out a fire negligently kindled by sparks from the defendant's locomotive, after the probability that the fire would spread and burn up his fence had been brought to his knowledge, was the proximate cause of the injury he sustained. And again in *Toledo, &c., R. R. Co. v. Pindar*,¹ where the plaintiff's house was negligently set on fire by a passing locomotive on the defendant's railway, and the plaintiff, although he had ample time and opportunity after the house began to burn up, to get out some money he had in the house, but forgot it, and suffered it to be burned, it was held that the plaintiff's failure to secure the money was the proximate cause of its loss, and that therefore he could not recover.² It is unquestionably a correct rule, and, at least, in view of the precedents, not a wholly incorrect way of expressing it, that the subsequent negligence of the plaintiff will be a defense to the prior negligence of the defendant whenever the plaintiff, by the exercise of ordinary care under the circumstances, after the discovery of the negligent act of the defendant, could have escaped the injury. Perhaps this is reading Judge Thompson's rendition of the rule in *Davies v. Mann*³ backwards, but, however that may be, it states a correct rule, in a way which, in view of the fact that many cases in the reports contain the reverse proposition, more or less exactly put, will emphasize a phase of the subject which should not be overlooked. The careful reader will not fail to have noted that the author deprecates this way of expressing the rule, and has attempted to show that the real issue is, not whose negligence came first

¹ 53 Ill. 447; S. C. 5 Am. Rep. 57.

² See, also, *Washburn v. Tracy*, 2 D. Chipman (Vermont), 128; S. C. 15 Am. Dec. 661; *McNarra v. Chicago, &c., R. R. Co.*, 41 Wis. 69; *Snyder v.*

Pittsburgh, &c., R. R. Co., 11 West Va. 15; *Secord v. St. Paul, &c., R. R. Co.*, 5 McCrary, 515; *Sedgwick on Damages*, 164, 166 (n.)

³ *Thomp. on Neg.*, 1155, §§ 7 and 8.

or last, but whose negligence, however it came, was the proximate cause.

When the subsequent negligence of the plaintiff contributes, not to cause, but to aggravate the injury, it will not, as has been hitherto suggested,¹ avail the defendant as a defense, for the obvious reason that, howsoever much it may have increased the damage, it did not cause the injury, and the defendant's negligence did cause it, which is the ground of his chargeability.² How far such negligence on the part of a plaintiff will count in mitigation of damages is considered hereafter.³

§ 20. *Negligence of the decedent under Lord Campbell's act.*—In every State in the Union there is a statute, modelled more or less exactly after the English statute, known as Lord Campbell's act,⁴ under which actions are brought by the personal representatives of deceased persons to recover damages for injuries which have resulted in death. These statutes uniformly provide that no action is maintainable by the representatives in cases where the deceased himself could not have maintained the action if death had not ensued. All the rules of contributory negligence, therefore, applicable to any individual case, had it been brought by the deceased in his lifetime, apply in full force when the action is brought by his personal representatives after his death. The contributory negligence of the dead person is as completely a bar to the action brought for the benefit of his next of kin, by his representative, as it would have been had he lived to bring the action

¹ § 11, *supra*.

² *Gould v. McKenna*, 86 Penn. St. 297; S. C. 27 Am. Rep. 705; *Stebbens v. Central, &c.*, R. R. Co., 54 Vt. 464; S. C. 41 Am. Rep. 855; *Secord v. St. Paul, &c.*, R. R. Co., 5 McCra-

ry, 515; *Sills v. Brown*, 9 Car. & P. 601; *Greenland v. Chaplin*, 5 Exch. 243; *Shear. & Red. on Neg.*, § 32, and note; *Wharton on Neg.*, §§ 868 *et seq.*

³ § 24, *infra*.

⁴ 9 and 10 Vict. chap. 93.

himself for his own benefit. A very considerable proportion of all the cases in which the question of contributory negligence is involved are those in which the action has been brought to recover damages for injuries which resulted in death. Accordingly, to consider the authorities in detail under this section would be to go over again each title of the whole subject *seriatim*. This would be fruitless, and the citations below, selected to illustrate the application of the rules of law in point to many special instances, are believed to be fully sufficient to instruct the student or gratify the curiosity of the general reader, while the practitioner will look, in addition, for his authorities, as the exigencies of his case require, under the proper heads elsewhere.¹

¹ Batchelor *v.* Fortescue, 11 L. R. Q. B. Div. 474; Armstrong *v.* South-eastern Ry. Co., 11 Jur. 758; Tucker *v.* Chaplin, 2 Car. & K. 730; Thoroughgood *v.* Bryan, 8 C. B. 115; S. C. 18 L. J. (C. P.) 336; Springett *v.* Ball, 4 Fost. & Fin. 472; Marshall *v.* Stewart, 33 Eng. Law & Eq. 1; Hutchinson *v.* York, &c., Ry. Co., 6 Eng. Rail. Cas. 580; Smith *v.* Steele, L. R. 10 Q. B. 125; S. C. 44 L. J. (Q. B.) 60; Wigmore *v.* Jay, 5 Exch. 354; S. C. 19 L. J. (Exch.) 300; Dynen *v.* Leach, 26 Id. 221; Carey *v.* Berkshire R. R. Co. and Skinner *v.* Housatonic R. R. Co., 1 Cush. 475; S. C. 48 Am. Dec. 616, and Mr. Freeman's learned note, pp. 619 to 641; Hubgh *v.* New Orleans, &c., R. R. Co., 6 La. Ann. 495; S. C. 54 Am. Dec. 565; Knight *v.* Pontchartrain R. R. Co., 23 La. Ann. 462; Telfer *v.* Northern, &c., R. R. Co., 30 N. J. Law, 188; Paulmier *v.* Erie Ry. Co., 34 Id. 151; Willetts *v.* Buffalo, &c., R. R. Co., 14 Barb. 585; Gay *v.* Winter, 34 Cal. 153; Elliott *v.* St. Louis, &c., R. R. Co., 67 Mo. 272; State *v.* Manchester, &c., R. R. Co., 52 N. H. 528; Dennick *v.* Railroad Co., 103 U. S. 11; Scheffer *v.* Washington, &c., R. R. Co., 105 Id. 249; Indianapolis, &c., R. R. Co. *v.* Stout, 53 Ind. 143; Bancroft *v.* Boston, &c., R. R. Co., 97 Mass. 275; Bradbury *v.* Furlong, 13 R. I. 15; S. C. 43 Am. Rep. 1; Sauter *v.* New York, &c., R. R. Co., 66 N. Y. 50; S. C. 23 Am. Rep. 18; Louisville, &c., R. R. Co. *v.* Collins, 2 Duv. 114; Packet Co. *v.* McCue, 17 Wall. 508; Toledo, &c., R. R. Co. *v.* Moore, 77 Ill. 217; Schmidt *v.* Chicago, &c., R. R. Co., 83 Id. 405; Chicago, &c., R. R. Co. *v.* Triplett, 38 Id. 482; Kansas, &c., R. R. Co. *v.* Salmon, 11 Kan. 83; Cumberland, &c., R. R. Co. *v.* Fazzenbaker, 37 Md. 156; Pennsylvania R. R. Co. *v.* Zebe, 33 Penn. St. 318; Hill *v.* Louisville, &c., R. R. Co., 9 Heisk. 823; McLean *v.* Burbank, 11 Minn. 277; Nickerson *v.* Harriman, 38 Me. 277; Sherman *v.* Western Stage Co., 24 Iowa, 515; Atlanta, &c., R. R. Co. *v.* Ayers, 53 Ga. 12; Nashville, &c., R. R. Co. *v.* Smith, 6 Heisk. 174; Thomp. on Neg., 1279, 1294, at § 92; Shear. & Red. on Neg., § 302; Cooley on Torts, 264; Addison on Torts, 503.

(B.) PARTICULAR CONSIDERATIONS AFFECTING THE DEFENDANT'S LIABILITY.

§ 21. *When the defendant's negligence is gross.*—“Gross neglect,” says Chancellor Kent, “is the want of that care which every man of common sense under the circumstances takes of his own property.”¹ However much this definition may be obnoxious to criticism in other respects, it defines gross negligence in such a way as to mark clearly the distinction between that grade of fault and wilful negligence, with which it has sometimes been rather strangely confounded. We find the term “gross negligence” occasionally used in the reports in such a way as to be, for the most part, equivalent to *wilful* negligence. In *St. Louis, &c., R. R. Co. v. Todd*,² gross negligence is defined as “amounting to wilful injury,” while, at the other extreme, there is a class of cases holding that there is no juridical difference between gross negligence and negligence merely.³ Baron Rolfe also calls “gross” a “vituperative epithet,” and intimates that he sees no difference between negligence simply and negligence with gross prefixed.⁴ It should seem, however, at that extreme, not hard to see the essential distinction between ordinary negligence and gross negligence, but it is with the confusion and misunderstanding as to the line of demarcation proper to be observed between the terms gross negligence and wilful negligence that we have now especially to do. The distinction between these two grades of fault is suggested in a famous New York decision,⁵

¹ 2 Com. 560.

² 36 Ill. 409.

³ *Hinton v. Dibbin*, 2 Q. B. 661; *Austin v. Manchester, &c., R. R. Co.*, 10 C. B. 454, 474; *Wells v. New York, &c., R. R. Co.*, 24 N. Y. 181; *Perkins v. Id.*, 24 Id. 196; *Smith v. Id.*,

24 Id. 222; *New World v. King*, 16 How. (U. S.) 474.

⁴ *Wilson v. Brett*, 11 Mee. & W. 113. See, also, *Grill v. Genl., &c., Collier Co.*, L. R. 1 C. P. 612.

⁵ *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; S. C. 49 Am. Dec. 239.

in which Beardsley, J., says: "Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief."¹ Notwithstanding the confusion in the use of these terms in the earlier cases, there is, it is believed, a somewhat settled and determined meaning for each of them as they are used by the judges at present. By negligence is meant ordinary negligence, a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence, that which is mere inadvertence in the superlative degree.² It is a convenient designation of a real thing, and in this sense gross is merely intensive and not "vituperative." By wilful negligence is meant not strictly *negligence* at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of the will in a particular direction, there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another.³ Such conduct is not negligent in any proper sense, and the term "wilful negligence," if these words are to be interpreted with scientific accuracy, is a misnomer. It is, however, the name which the courts have fastened upon a fault of that character, and by which it is most usually designated in the reports. Recognizing these several grades of negligence, and distinguishing them as I have proposed, we come to a line of cases which hold that when the defendant's negligence, either *in faciendo* or *in non faciendo*, amounts to gross negligence, the contributory negligence of the plaintiff will not prevent a recovery.⁴ Of this rule, as an abstract proposition of law, it

¹ See, also, in point, *Hansford's Admx. v. Payne*, 11 Bush, 380.

² *Gulf, &c., R. R. Co. v. Levy*, Sup. Ct., Texas, 19 Am. Law Rev. 480.

³ *Gulf, &c., R. R. Co. v. Levy*, Sup. Ct., Texas, 19 Am. Law Rev. 480.

⁴ *Kerwhacker v. Cleveland, &c., R. Co.*, 3 Ohio St. 172; *Augusta, &c.,*

may be said that it is unsound. An examination of the cases cited, and others that announce the same rule, will show that they, for the most part, fall into one of two classes. Either the "gross negligence" that they refer to is in reality *wilful* negligence, or the doctrine of comparative negligence is discovered. The older judges had a fashion of using the expression "gross or wilful negligence," as though the two were in substance the same,¹ and in many of the earlier cases, where this or some equivalent form of expression is found, it is plain that that grade of negligent wrong-doing is referred to which is considered in the succeeding section, and that what is there called "gross, or wilful," means simply wilful negligence. In the later cases, the distinction between these two essentially different grades of fault is more generally recognized, and, as a consequence, we read in the recent reports less and less about gross negligence, when wilful negligence is meant. Except in those jurisdictions where the doctrine of comparative negligence obtains, it is not at present usual to announce the rule in this way, *i. e.*, that contributory negligence is no defense when the negligence of the defendant is gross, for the reason, as we have seen, that it either states the rule wrong, or states it right in a wrong way.

§ 22. *When the defendant's negligence is wilful.*—
When the wrong-doing of the defendant is merely negli-

R. R. Co. v. McElmurry, 24 Ga. 75; Macon, &c., R. R. Co. v. Davis, 27 Id. 113; Kansas, &c., R. R. Co. v. Pointer, 14 Kan. 37; Louisville, &c., R. R. Co. v. Collins, 2 Duv. 114; Id. v. Robinson, 4 Bush, 507; Hartfield v. Roper, 21 Wend. 615; S. C. 34 Am. Dec. 273; McGrath v. Hudson River R. R. Co., 32 Barb. 155; S. C. 19 How. Pr. 224; Rathbun v. Payne, 19 Wend. 399; Chapman v. New Haven, &c., R. R. Co., 19 N. Y. 341; Button v. Hudson River R. R. Co., 18 Id. 248; Galena, &c., R. R. Co. v. Jacobs, 20 Ill. 478; Chicago, &c., R. R. Co. v. Gretzner, 46 Id. 75; Ohio, &c., R. R. Co. v. Porter, 92 Id. 437; Stacke v. Milwaukee, &c., R. R. Co., 9 Wis. 202; Evansville, &c., R. R. Co. v. Lowdermilk, 15 Ind. 120; La Fayette, &c., R. R. Co. v. Adams, 26 Id. 76; Whirley v. Whiteman, 1 Head, 610.

¹ Hartfield v. Roper; Kerwhacker v. Cleveland, &c., R. R. Co.; and Evansville, &c., R. R. Co. v. Lowdermilk, *supra*.

gence, the contributory negligence of the plaintiff may, as is well understood, operate as a defense, but when the defendant's conduct is wilful, it is no longer negligence, and when the injury sustained by the plaintiff is the result of the wanton and wilful act of the defendant, the question of the plaintiff's contributory negligence as a defense cannot arise. In order to constitute *contributory* negligence on the part of the plaintiff, there must be *negligence* on the part of the defendant.¹ It is accordingly the settled rule that when the defendant's conduct amounts to wilfulness, and when the mischief is occasioned by his intentional and wanton wrong-doing, the plaintiff's negligence is no defense.² So it is held that contributory negligence is no defense to an action for an assault and battery,³ for the reason that the person assaulted is under no obligation to exercise any care to avoid the assault by retreating or otherwise, and because, moreover, his want of care can in no just sense be said to contribute to the injury inflicted upon him. An intentional assault inflicted upon one is an invasion of his right of personal security, for which there is a redress by an action at law, and he cannot be

¹ Ruter *v.* Foy, 46 Iowa, 132; Steinmetz *v.* Kelly, 72 Ind. 442; S. C. 37 Am. Rep. 170.

² Hartford *v.* Roper, 21 Wend. 615; s. C. 34 Am. Dec. 273; Birge *v.* Gardner, 19 Conn. 507; s. C. 50 Am. Dec. 261; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255; s. C. 49 Am. Dec. 239; Williams *v.* Michigan, &c., R.R. Co., 2 Mich. 259; s. C. 55 Am. Dec. 59; Chicago, &c., R.R. Co. *v.* Smith, 46 Mich. 504; Kerwhacker *v.* Cleveland, &c., R. R. Co., 3 Ohio St. 172; Cincinnati, &c., R. R. Co. *v.* Waterson, 4 Ohio St. 424; Pittsburg, &c., R.R. Co. *v.* Smith, 26 Ohio St. 124; Brownell *v.* Flagler, 5 Hill, 282; Sanford *v.* Eighth Ave. R. R. Co., 23 N. Y. 343; Vandegrift *v.* Rediker, 22 N. J. Law, 185; New Jersey Express Co. *v.* Nichols, 32 Id. 166; s. C. 33 Id. 434; Tanner

v. Louisville, &c., R. R. Co., 60 Ala. 621; Gothard *v.* Alabama, &c., R. R. Co., 67 Ala. 114; Banks *v.* Highland St. R. R. Co., 136 Mass. 485; Morrissey *v.* Eastern, &c., R. R. Co., 126 Id. 377; s. C. 30 Am. Rep. 686; Johnson *v.* Boston, &c., R. R. Co., 125 Mass. 75; Wynn *v.* Allard, 5 Watts & S. 524; Bunting *v.* Central, &c., R. R. Co., 16 Nevada, 277; Holstine *v.* Oregon, &c., R. R. Co., 9 Oregon, 163; Maumus *v.* Champion, 40 Cal. 121; Carroll *v.* Minnesota, &c., R. R. Co., 13 Minn. 30; Griggs *v.* Fleckenstein, 14 Id. 81; Pennsylvania R. R. Co. *v.* Sinclair, 62 Ind. 301; s. C. 30 Am. Rep. 185, and note; Town of Salem *v.* Goller, 76 Ind. 291.

³ Steinmetz *v.* Kelly, 72 Ind. 442; s. C. 37 Am. Rep. 170; Ruter *v.* Foy, 46 Iowa, 132.

deprived of this redress on the ground that he was negligent and took no care to avoid such an invasion of his rights. Moreover, aptly says Adams, J.:¹ "There can be no contributory negligence except where the defendant has been guilty of negligence to which the plaintiff's negligence could contribute. An assault and battery is not negligence. The former is intentional, the latter is unintentional."² This reasoning applies with equal force to any other intentional injury inflicted upon a plaintiff, and the rule that when the defendant's conduct is of this character the plaintiff's negligence is not a defense, is sustained not only by precedent, but upon the soundest principles of legal right reason.

In Pennsylvania, the courts have materially limited the application of this principle in actions for injuries sustained by persons while unlawfully upon the track of a railway company, by taking an extreme ground, somewhat beyond that which is taken in other jurisdictions, as to the right of the company to a clear track. In such cases the rule in Pennsylvania seems to be that the trespasser acts wholly at his peril; that the railroad company hardly owes him the duty of even slight care, and that, if he is injured from the ordinary prosecution of the company's lawful business, he must blame his own rashness and folly, and not expect the courts to assist him except in cases of the most wanton injury.³

In Kentucky, on the contrary, the courts have gone to the other extreme, and, under a statute⁴ providing for the recovery of punitive damages in case of loss of life "by

¹ Ruter *v.* Foy, *supra*.

² See, also, Chiles *v.* Drake, 2 Metc. (Ky.) 146; Springs Admr. *v.* Glenn, 12 Bush, 172.

³ Railroad Co. *v.* Norton, 22 Penn. St. 465; Philadelphia R. R. Co. *v.* Spearen, 47 Id. 304; Philadelphia, &c., R. R. Co. *v.* Hummell, 44 Id.

375; Mulherrin *v.* Delaware, &c., R. R. Co., 81 Id. 366. See, also, Chap. V. *infra*, where the Pennsylvania rule upon this subject is fully considered.

⁴ Genl. Stat. of Ky., 1873, chap. 57, § 3, or 2 Stantons Ky. Rev. Stat., 510, § 3.

the wilful neglect of another person," railway corporations, in cases where persons are injured in their employ, or in being exposed to danger upon their tracks or elsewhere, through the negligence of the company, are held to a somewhat unusual degree of care, and there is a tendency to construe many acts and omissions "wilful" that perhaps in other jurisdictions might not be so severely regarded.¹

§ 23. *When the defendant by his acts or omissions throws the plaintiff off his guard.*—When the defendant, by his own negligent or wrongful acts, or omissions, throws the plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety induced by the defendant, when there is, in reality, danger, to which the plaintiff is exposing himself, in a way and to an extent which, but for the defendant's inducement, might be imputed to the plaintiff as negligence, sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent, for the purpose of a defense to the action. The defendant by his own negligent conduct which has occasioned the conduct of the plaintiff is estopped, in a certain sense, from making the defense that the plaintiff's conduct was negligent, or in other words, he is not to be allowed first, to induce the plaintiff to be careless, and then to plead that carelessness as a defense to an action brought against

¹ Board of Internal Improvements *v.* Scarce, 2 Duv. 576; Lexington *v.* Lewis' Admx., 10 Bush, 677; Claxton *v.* Lexington, &c., R. R. Co., 13 Bush, 636. See, also, Louisville, &c., R. R. Co. *v.* Collins, 2 Duv. 114, and three very recent cases; Kentucky,

&c., R. R. Co. *v.* Gastineon's Admr., Ct. of App., filed June 3, 1885; Jones' Admr. *v.* Louisville, &c., R. R. Co., Super. Ct., filed March 28, 1885, and Louisville, &c., R. R. Co., *v.* Brooks' Admr. (Ct. of App.), filed June 11, 1885, each to be reported.

him for the mischief that has been the result. The defendant must not take advantage of his own wrong in such a way as that. When, for an example, a traveller, upon approaching a railway crossing at a point where the view is obstructed, stops and listens for the customary signal, and, hearing nothing, drives upon the track and is immediately run over by a passing train and injured, the railway company will not be allowed to make the defense that the plaintiff was negligent in relying upon the fact that there was no whistle blown or bell rung at the crossing, as evidence that no train was near. The plaintiff in such a case, having been lulled into a feeling of security by the defendant's negligent failure to make the required signal, and having suffered an injury thereby, may have his action.¹ So, where the plaintiff acts in obedience to the directions, or assurances, of the defendant, or his servants, upon whom he has a right to rely, in doing the act deemed negligent, unless the danger was a patent one, if he is injured in so doing he may recover, as when a passenger does as the conductor tells him to do in jumping from a train in motion, or in otherwise exposing himself.² In these cases the defendant having induced the plaintiff to act in a certain way cannot, when injury results, set up that act as negligence in defense. If the plaintiff exercises ordinary care and prudence under the circumstances in relying upon the

¹ *Pennsylvania R. R. Co. v. Ogier*, 35 Penn. St. 60. See, also, *Towler v. Baltimore, &c., R. R. Co.*, 18 West Va. 579; *Philadelphia, &c., R. R. Co. v. Hogan*, 47 Penn. St. 244; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 28; *Chicago, &c., R. R. Co. v. Triplett*, 38 Ill. 488.

² *Louisville, &c., R. R. Co. v. Kelly*, 92 Ind. 371; s. c. 47 Am. Rep. 149; *Filer v. New York &c., R. R. Co.*, 49 N. Y. 471; s. c. 10 Am. Rep. 327,

and 59 Id. 351; *Pool v. Chicago, &c., R. R. Co.*, 53 Wis. 659; s. c. 56 Id. 227; *St. Louis, &c., R. R. Co. v. Cantrell*, 37 Ark. 519; s. c. 40 Am. Rep. 105; *Towler v. Baltimore, &c., R. R. Co.*, 18 West Va. 579. See, also, *Hickey v. Boston, &c., R. R. Co.*, 14 Allen, 429; *Pennsylvania R. R. Co. v. Aspell*, 23 Penn. St. 147; s. c. 62 Am. Dec. 323; *Philadelphia, &c., R. R. Co. v. Boyer*, 97 Penn. St. 91.

defendant's inducement, or in obeying defendant's orders and directions, he may have his action.

§ 24. *Mitigation and apportionment of damages.*—As a general rule, contributory negligence is never looked to in mitigation of damages, and whenever it is a defense at all it is a complete defense to the action. When both parties have been guilty of negligence, it is said that “the law has no scales to determine, in such cases, whose wrong-doing weighed most in the compound that occasioned the mischief.”¹ And, to the same effect, Pollock, C. B., in *Greenland v. Chaplin*,² says: “The man who is guilty of a wrong, who thereby produces mischief to another, has no right to say ‘part of that mischief would not have arisen if you had not yourself been guilty of some negligence.’” But, while this is the usual rule, when, as we have seen,³ the negligence of the plaintiff contributed not to cause, but merely to aggravate the injury, the rule is otherwise, and in those cases the defendant, to catch the phrase of Baron Pollock, may say, “part of that mischief would not have arisen if you had not yourself aggravated the injury which my negligence caused,” and whenever the injury produced by the plaintiff's negligence is capable of a distinct separation and apportionment from that produced by the defendant, such an apportionment must be made, and the defendant held liable only for such a part of the total damage as his negligence produced.⁴ This is well illustrated by the facts in

¹ *Railroad Co. v. Norton*, 24 Penn. St. 469.

² 5 Exch. 243.

³ §§ 11 and 19, *supra*.

⁴ *Nitro Phosphate Co. v. Docks Co.*, 9 L. R. Ch. Div. 503; *Sills v. Brown*, 9 Car. & P. 601; *Thomas v. Kenyon*, 1 Daly, 132; *Hunt v. Lowell Gas Co.*, 1 Allen, 343; *Sherman v. Fall River Iron Co.*, 2 Id. 524; *Chase v. New York, &c., R. R. Co.*, 24 Barb. 273;

Wright v. Illinois, &c., Telegraph Co., 20 Iowa, 195; *Gould v. McKenna*, 86 Penn. St. 297; S. C. 27 Am. Rep. 705; *Stebbins v. Central, &c., R. R. Co.*, 54 Vt. 464; S. C. 41 Am. Rep. 855; *Matthews v. Warner*, 29 Gratt. 570; S. C. 26 Am. Rep. 396; *Secord v. St. Paul, &c., R. R. Co.*, 5 McCrary, 515; *Hibbard v. Thompson*, 109 Mass. 286.

the case of *Gould v. McKenna*.¹ The defendant had so constructed and maintained the roof of his building that the water flowed therefrom upon the wall of the plaintiff's adjoining building, and, penetrating it, damaged his goods. As a defense to the action the defendant plead the openness and looseness of the plaintiff's wall, and charged that the condition of the wall made a case of contributory negligence on the part of the plaintiff. It appeared in evidence that the improper construction of the defendant's roof was the cause of the injury, but that the bad condition of the plaintiff's wall had materially aggravated it. The water ran down into the plaintiff's store because the defendant had built his roof as he had, but the leak was much worse than it would have been had there been no cracks and chinks in the plaintiff's wall. The court held that these two causes of injury were separable and independent; that the defendant was liable for so much of the damage as was due to the improper construction of his roof, but not for that which was due to the open condition of the wall, and that it was the duty of the jury to apportion the loss according to the actual injury of the defendant, by separating it, as well as they could upon the evidence, from the loss arising from the openness of the wall; that although there might be a practical difficulty in separating the damage from each independent cause, still that difficulty constituted no reason for declining to undertake it, and that it did not change the nature of the tortious act of the defendant nor relieve him from liability, for the reason that a negligence which has no operation in causing the injury, but which merely adds to the damage resulting, cannot be a bar to the action, although it will detract from the damages as a whole.² Perhaps it is safe to remark that this is rather a

¹ *Supra*.

² See, also, in this connection, the learned and exhaustive case of *Fay v.*

Parker, 53 N. H. 342; S. C. 16 Am. Rep. 270.

dangerous doctrine. There is an obvious misapplication of it in the case of *Wright v. Illinois, &c., Telegraph Co.*,¹ which Judge Thompson has called attention to.² In Tennessee the courts make an application of it, which is very like the rule in Illinois and in Kansas. If not exactly, it is almost comparative negligence.³ And in Georgia this doctrine has been adopted in connection with the rule in *Davies v. Mann*,⁴ and applied and elaborated in such a way as to make the rule in that State at least in the judgment of so discriminating a jurist as Dr. Wharton, also equivalent to the rule of comparative negligence.⁵

But, however, it may have been misapplied, and notwithstanding its tendency toward the doctrine of comparative negligence, the rule as stated at the head of this section, and as illustrated in the case of *Gould v. McKenna*,⁶ and applied in the cases generally cited above in its support, has a sound basis in the logic of the law, and subserves the ends of substantial justice.

¹ 20 Iowa, 195, 215.

² *Thomp. on Neg.*, 1163.

³ *Nashville, &c., R. R. Co. v. Carroll*, 6 Heisk. 347; *Nashville, &c., R. R. Co. v. Smith*, 6 Heisk. 174; *Whirley v. Whiteman*, 1 Head, 619; *Dash v. Fitzhugh*, 2 Lea, 307. This need not be discussed here, as the "Tennessee rule" is fully considered in the following chapter *q. v.*

⁴ 10 Mee. & W. 545.

⁵ Wharton on Neg., § 334; *Macon,*

&c., R. R. Co. v. Davis, 18 Ga. 686; *Augusta, &c., R. R. Co. v. McElmurry*, 24 Ga. 75; *Macon, &c., R. R. Co. v. Johnson*, 38 Ga. 409; *Hendricks v. Western, &c., R. R. Co.*, 52 Ga. 467; *Atlanta, &c., R. R. Co. v. Ayers*, 53 Ga. 12. See, also, the discussion of the "Georgia rule," in the succeeding chapter.

⁶ 86 Penn. St. 297; s. c. 27 Am. Rep. 705, *supra*.

CHAPTER III.

COMPARATIVE NEGLIGENCE.—THE MODIFIED RULE IN ILLINOIS, KANSAS, GEORGIA, TENNESSEE, AND KENTUCKY.

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| § 25. Comparative Negligence. | § 28. The rule in Kansas. |
| 26. This modification generally repudiated. | 29. The rule in Georgia. |
| 27. The rule in Illinois. | 30. The rule in Tennessee. |
| | 31. The rule in Kentucky. |

§ 25. *Comparative Negligence*.—Instead of the general rules of law concerning contributory negligence, which, as we have seen, prevail in England and in most of the States of the Union, an exceptional doctrine—known as the rule of comparative negligence—obtains in several jurisdictions in this country. When an injury results to one of two parties from the mutual and concurring negligence of both of them the one who suffers the injury can, according to the prevalent doctrine, recover nothing from the other by way of compensation or damages. The contributory negligence of the injured party is a defense and a complete defense to the action, because “the law has no scales to determine, in such cases, whose wrong-doing weighed most in the compound that occasioned the mischief.”¹ The common law refuses either to apportion the damages as best it may, giving to each man according to his deserts, as far as they can be ascertained, or to divide the damages equally between the parties in fault, as in the *rusticum judicium* of the admiralty, and “the reason why, in cases of mutual, concurring negligence, neither party can maintain an action

¹ *Railroad v. Norton*, 24 Penn. St. 469.

against the other," said Mr. Justice Strong,¹ "is not that the wrong of the one is set-off against the wrong of the other; it is, that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault." Upon considerations of public policy and general convenience the common law has steadily refused either to enforce contribution between tort feorsors, or to parcel out the damages between the parties in cases of injury from mutual and concurring neglect. In those jurisdictions, however, where the doctrine of comparative negligence obtains, the courts have proceeded upon an exactly contrary theory. They assume it to be at once possible and judicious to compare the negligence of the plaintiff with the negligence of the defendant, in these actions, for the purpose of determining where the ultimate liability for the injury shall rest, and if, upon such a comparison, judicially instituted, the negligence of the plaintiff appears to have been slight, while that of the defendant was gross—the plaintiff may have his action. This is something more than a modification of the usual rule. Under its operation contributory negligence is no longer a defense. It completely ignores the principle of compensation in awarding the damages, and proceeds upon the theory of punishment. It contradicts the rule it assumes to qualify. The rule is that contributory negligence is a defense. The qualification is that it is not a defense. Reduced to a canon it amounts to this: Slight negligence on the part of a plaintiff, although never so much contributory negligence, is not a defense to gross negligence on the part of the defendant.²

The term "gross negligence," as used in this rule,

¹ Heil v. Glanding, 42 Penn. St. 499.

² Galena, &c., R. R. Co. v. Jacobs, 20 Ill. 478; Illinois, &c., R. R. Co. v. Hetherington, 83 Id. 510; Chicago,

&c., R. R. Co. v. Clark, 108 Id. 113; Pacific, &c., R. R. Co. v. Houts, 12 Kan. 328; Central, &c., R. R. Co. v. Gleason, 69 Ga. 200.

must be understood to mean, not negligence merely, on the one hand, as some English authorities suggest,¹ nor wilful negligence on the other hand, but that absence of slight care which is mere inadvertence in a very high degree. It means nonfeasance or misfeasance in the extreme, but not malfeasance. The rule in question recognizes the three degrees of negligence with their reciprocal grades of carefulness,² and it implies a comparison of the negligence of the plaintiff with that of the defendant—*by these degrees*. It is not the rule that a mere preponderance of negligence on the part of the defendant will warrant a recovery,³ nor that the plaintiff may have his action, unless he was guilty of more carelessness,⁴ or greater negligence,⁵ than the defendant. The comparison to be instituted is not precisely like that made by a book-keeper of the two sides of his accounts, and the rule is not meant to regard slight differences in the relative amounts of negligence, of plaintiff and defendant. There is no attempt to balance to a cent, or, in other words, using the figure of Mr. Justice Woodward in a case already cited,⁶ the scales are not graduated to fractions of a degree, and unless there is a difference in favor of the plaintiff of at least one whole degree the rule cannot apply. "The rule of this court is," say Scholfield, J., in *Rockford, Rock Island & St. Louis R. R. v. Delaney*,⁷ "that *the relative degrees of negligence*, in cases of this kind, is matter of comparison, and that

¹ *Hinton v. Dibbin*, 2 Q. B. 646, 661 (by Denham, C. J.); *Wilson v. Brett*, 11 Mee. & W. 113 (by Baron Rolfe); *Grill v. Genl. &c., Collier Co.*, L. R. 1 C. P. 600, 612.

² *Chicago, &c., R. R. Co. v. Johnson*, 103 Ill. 512.

³ *Indianapolis, &c., R. R. Co. v. Evans*, 88 Ill. 63; *Chicago, &c., R. R. Co. v. Dimick*, 96 Id. 42.

⁴ *Chicago, &c., R. R. Co. v. Dunn*,

61 Ill. 385. But compare *Illinois, &c., R. R. Co. v. Middlesworth*, 43 Ill. 64.

⁵ *Illinois, &c., R. R. Co. v. Maffit*, 67 Ill. 431; *Joliet v. Seward*, 86 Ill. 402. But see *Macon, &c., R. R. Co. v. Davis*, 27 Ga. 113, 119.

⁶ *Railroad Co. v. Norton*, 24 Penn. St. 465.

⁷ 82 Ill. 196; s. c. 25 Am. Rep. 308.

the plaintiff may recover although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight and that of the defendant gross in comparison with each other; and, consequently, if the intestate's negligence was not slight, and that of the defendant gross in comparison with each other, there can be no recovery."

The doctrine of comparative negligence had its origin, as it seems from a consideration of the first case in which it is distinctly declared,¹ in a misunderstanding of the effect of previous decisions, and also in an attempt to reconcile the rule laid down in the English case of *Davies v. Mann*,² with the generally established doctrines of the law of contributory negligence. It prevails to its full extent in but a single State of the Union. In Illinois, where it originated, it is, as will appear hereafter,³ the established rule, and in Georgia, Kansas, Kentucky and Tennessee, and possibly elsewhere—jurisdictions where it has not been explicitly repudiated, as it has been in a majority of the States, the courts have either followed the Illinois rule, or proceeded independently upon a parallel theory to a greater or less extent. In each of these States we find a rule upon the subject of contributory negligence *sui generis*, and, in each, savoring somewhat of the rule of comparative negligence. This chapter is written to set out and illustrate the law in these jurisdictions *seriatim*, so far as it is in any material particular anomalous.

§ 26. *This modification generally repudiated.*—The doctrine of comparative negligence, being so entirely at variance with the accepted rules of law concerning contributory negligence, has very naturally provoked much

¹ *Galena, &c., R. R. Co. v. Jacobs*,
20 Ill. 478.

² 10 Mee. & W. 546.
³ § 27, *infra*.

sharp criticism,¹ and the courts of other States very occasionally repudiate it with emphasis. The Court of Appeals of New York in an early case—when the rule of comparative negligence had just been announced—said: “The question presented to the court or the jury is never one of comparative negligence, as between the parties, nor does very great negligence on the part of a defendant so operate to strike a balance as to give a judgment to a plaintiff whose own negligence contributed in any degree to the injury. . . . The law says to the defendant: If you have by simple negligence caused this injury, so far as you are concerned the ground of action is complete. At the same time it says to the plaintiff: Although, so far as the defendant’s acts are concerned, the case is made out, yet cannot prevail if you have by your simple negligence helped to bring about the injury.”² So, also, the Supreme Court of Indiana, in a late case, says: “We agree with counsel that the doctrine of comparative negligence is unsound. We have no doubt that the rule is that, in actions to recover for injuries caused by negligence, the contributory negligence of the plaintiff will defeat the action, although it is much less in degree than that of the defendant.”³ And in *O’Keefe v. Chicago, &c., R. R. Co.*,⁴ it is said by the Supreme Court of Iowa: “This court recognizes and applies the doctrine of ‘contributory negligence,’ and not the doctrine of ‘comparative negligence.’ The latter doctrine obtains only in Illinois and Georgia, while the

¹ Judge Thompson says it is a rule “not likely to be adopted in any other State where it does not now prevail, unless by legislation,” (Thomp. on Neg., 1168, § 16,) and the author remembers, when a law student, to have heard Prof. Theodore W. Dwight, in his lectures in the Columbia College Law School, criticise this

doctrine with some severity. Perhaps his judgment upon such a point is not inferior to that of any contemporary critic.

² *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 432.

³ *Pennsylvania Co. v. Roney*, 89 Ind. 453; S. C. 46 Am. Rep. 173.

⁴ 32 Iowa, 467.

former obtains in the other States, and also in the Federal Courts.¹ The Illinois doctrine is also expressly denied in New Jersey,² Alabama,³ Wisconsin,⁴ Kansas,⁵ Texas,⁶ Massachusetts,⁷ Pennsylvania,⁸ and Kentucky.⁹

§ 27. *The rule in Illinois.*—In the earlier cases in the Illinois reports the doctrine of contributory negligence is plainly declared. It was the unquestioned rule in that State¹⁰ as in all other jurisdictions where the English common law prevails, until, in the case of the Galena and Chicago Union R. R. Co. *v.* Jacobs,¹¹ Mr. Justice Breese worked out the theory of comparative negligence. There is no hint of it in any earlier case in the Illinois reports. To this early decision, and to this judge, is, therefore, properly ascribed the origin of the doctrine. It is put forward as a qualification of the rule that contributory negligence is a defense, but it contradicts entirely the rule it assumes to qualify, and proceeds upon a theory the very opposite of that which justifies the original doctrine. It ignores the principle of compensation, and proceeds upon the theory of punishment. It gives damages to the plaintiff not because he has suffered an injury, but it makes the defendant pay damages because he is very much more to blame than the plaintiff. It gives damages to the plaintiff for an injury which he helped to inflict upon himself, because he was

¹ See, also, *Artz v. Chicago, &c.*, R. R. Co., 38 Iowa, 293.

² *Pennsylvania Co. v. Righter*, 42 N. J. Law, 180.

³ *Gothard v. Alabama, &c.*, R. R. Co., 67 Ala. 114.

⁴ *Potter v. Chicago, &c.*, R. R. Co., 21 Wis. 372; s. c. 22 Wis. 615; *Cunningham v. Lyness*, 22 Wis. 245.

⁵ *Kansas, &c.*, R. R. Co. *v.* Peavey, 29 Kan. 170; s. c., partially reported, in 44 Am. Rep. 630, omitting this point.

⁶ *Houston, &c.*, R. R. Co. *v.* Gorbett, 49 Texas, 573.

⁷ *Marble v. Ross*, 124 Mass. 44.

⁸ *Railroad Co. v. Norton*, 24 Penn. St. 469; *Heil v. Glanding*, 42 Id. 499; *Stiles v. Geesey*, 71 Penn. St. 439; *Potter v. Warner*, 91 Penn. St. 362; s. c. 36 Am. Rep. 668.

⁹ *Digby v. Kenton Iron Works*, 8 Bush, 166.

¹⁰ *Aurora, &c.*, R. R. Co. *v.* Grimes, 13 Ill. 585; *Galena, &c.*, R. R. Co. *v.* Foy, 16 Ill. 558; s. c. 63 Am. Dec. 323; *Chicago, &c.*, R. R. Co. *v.* Sweeney, 52 Id. 330.

¹¹ 20 Ill. 478.

not very much in fault, and makes the defendant pay damages for an injury for which he is only partially responsible, because he behaved decidedly worse, upon the whole, than the plaintiff did.

But let the cases speak for themselves: In Galena, &c., R. R. Co. *v.* Jacobs,¹ the case in which the doctrine of comparative negligence was first announced, the court, "after reviewing a number of decisions, *none of which announced such a rule as that in question,*"² says, "it will be seen from these cases that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care, or want of care, as manifested by both parties, for all care, or negligence, is, at best, but relative; the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that, in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff, that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover," and the conclusion of the whole matter is found in these words: "We say, then, that, in this, or in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."³ The rule as thus conveniently formulated has never since been challenged in that State, and a long line of subsequent decisions reiterate this anomalous doctrine without addition or abatement.⁴

¹ 20 Ill. 478.

² Thomp. on Neg., 1169, note.

³ The Jacobs Case, at page 496

⁴ Chicago, &c., R. R., Co. *v.* Dewey, 26 Ill. 255; Chicago, &c.,

R. Co. *v.* Hazzard, 26 Id. 373; Bass *v.* Chicago, &c., R. R. Co., 28 Id. 9; St. Louis, &c., R. R. Co. *v.* Todd, 36 Id. 409; Coursen *v.* Ely, 37 Id. 338; Illinois, &c., R. R. Co. *v.* Simmons,

In *Chicago and Northwestern R. R. Co. v. Sweeny*,¹ we find the following detailed re-assertion of the rule of comparative negligence, by the same judge who delivered the opinion in the first case in which the doctrine is an-

38 Id. 242; *Chicago, &c., R. R. Co. v. Hogarth*, 38 Id. 370; *Id. v. Triplett*, 38 Id. 482; *Great Western R. R. Co. v. Haworth*, 39 Id. 346; *Chicago, &c., R. R. Co. v. McKean*, 40 Id. 218; *Ohio, &c., R. R. Co. v. Eaves*, 42 Id. 288; *Illinois, &c., R. R. Co. v. Mills*, 42 Id. 407; *Id. v. Middlesworth*, 43 Id. 64; s. c. 46 Id. 494; *Ortmayer v. Johnson*, 45 Id. 469; *Chicago, &c., R. R. Co. v. Gretzner*, 46 Id. 74; *Ohio, &c., R. R. Co. v. Shanefelt*, 47 Id. 497; *Illinois, &c., R. R. Co. v. Frazier*, 47 Id. 505; *Chicago, &c., R. R. Co. v. Payne*, 49 Id. 499; s. c. 59 Id. 534; *Illinois, &c., R. R. Co. v. Nunn*, 51 Ill. 78; *Id. v. Pondrom*, 51 Id. 333; s. c. 2 Am. Rep. 306; *Id. v. Sweeny*, 52 Ill. 325; *Id. v. Fears*, 53 Id. 115; *Toledo, &c., R. R. Co. v. Pindar*, 53 Id. 447; s. c. 5 Am. Rep. 57; *Kerr v. Forgue*, 54 Ill. 482; s. c. 5 Am. Rep. 146; *Chicago, &c., R. R. Co. v. Simonson*, 54 Id. 504; s. c. 5 Am. Rep. 155; *Illinois, &c., R. R. Co. v. Baches*, 55 Ill. 379; *Brown v. Hard*, 56 Id. 317; *Chicago, &c., R. R. Co. v. Gregory*, 58 Id. 272; *St. Louis, &c., R. R. Co. v. Manly*, 58 Id. 300; *Chicago, &c., R. R. Co. v. Lee*, 60 Id. 501; s. c. 68 Id. 566; 87 Id. 454; *Chicago, &c., R. R. Co. v. Dunn*, 61 Id. 385; s. c. 52 Id. 451; *Indianapolis, &c., R. R. Co., v. Stables*, 62 Id. 313; *Chicago, &c., R. R. Co. v. Murray*, 62 Id. 326; s. c. 71 Id. 601; *Id. v. Sullivan*, 63 Id. 293; *Id. v. Van Patten*, 64 Id. 510; s. c. 74 Id. 91; *Toledo, &c., R. R. Co. v. Spencer*, 66 Id. 528; *Illinois, &c., R. R. Co. v. Maffit*, 67 Id. 431; *Pittsburg, &c., R. R. Co., v. Kuntson*, 69 Id. 103; *Illinois, &c., R. R. Co. v. Benton*, 69 Id. 174; *Chicago, &c., R. R. Co. v. Clark*, 70 Id. 276; *Illinois, &c., R. R. Co. v. Cragin*, 71 Id. 177; *Toledo, &c., R. R. Co. v. McGinnis*, 71 Id. 346; *Illinois, &c., R. R. Co. v. Godfrey*, 71 Id. 500; s. c. 22 Am. Rep. 112; *Chicago, &c., R. R. Co. v. Mock*, 72 Ill. 141; *Illinois, &c., R. R. Co. v. Hall*, 72 Id. 222; *Rockford, &c., R. R. Co. v. Hillmer*, 72 Id. 235; *Illinois, &c., R. R. Co. v. Hammer*, 72 Id. 347; s. c. 85 Id. 526; *Grandtower Manfg. Co. v. Hawkins*, 72 Id. 386; *Hund v. Geier*, 72 Id. 393; *Rockford, &c., R. R. Co. v. Irish*, 72 Id. 404; *Illinois, &c., R. R. Co., v. Goddard*, 72 Id. 567; *Rockford, &c., R. R. Co. v. Rafferty*, 73 Id. 58; *Fairbank v. Haentzsche*, 73 Id. 236; *Chicago, &c., R. R. Co. v. Coss*, 73 Id. 394; *Id. v. Donahue*, 75 Id. 106; *Toledo, &c., R. R. Co. v. O'Connor*, 77 Id. 391; *Chicago, &c., R. R. Co. v. Hatch*, 79 Id. 137; *Kewanee v. Depew*, 80 Id. 119; *Sterling Bridge Co. v. Pearl*, 80 Id. 251; *Litchfield Coal Co. v. Taylor*, 81 Id. 590; *Rockford, &c., R. R. Co. v. Delaney*, 82 Id. 198; s. c. 25 Am. Rep. 308; *City of Chicago v. Hesing*, 83 Ill. 204; s. c. 25 Am. Rep. 378; *Schmidt v. Chicago, &c., R. R. Co.*, 83 Ill. 405; *Illinois, &c., R. R. Co. v. Hetherington*, 83 Id. 510; *Foster v. Chicago, &c., R. R. Co.*, 84 Id. 164; *Quinn v. Donovan*, 85 Id. 194; *Grayville v. Whitaker*, 85 Id. 439; *Joliet v. Seward*, 86 Id. 402; *Indianapolis, &c., R. R. Co. v. Evans*, 88 Id. 63; *Toledo, &c., R. R. Co. v. Grable*, 88 Id. 441; *Wabash, &c., R. R. Co. v. Hensks*, 91 Id. 406; *Ohio, &c., R. R. Co. v. Porter*, 92 Id. 437; *Hayward v. Miller*, 94 Id. 349; s. c. 34 Am. Rep. 229; *Stratton v. Central Street Ry. Co.*, 95 Id. 25; *Chicago, &c., R. R. Co. v. Dimick*, 96 Id. 42; *Id. v. Johnson*, 103 Id. 512; *City of Chicago v. Stearns*, 105 Id. 554; *Chicago, &c., R. R. Co. v. Clark*, 108 Id. 113; *Id. v. Langley*, 2 Bradw. 505; *North Chicago, &c., Mills v. Monka*, 4 Id. 664; *Chicago, &c., R. R. Co. v. Lewis*, 5 Id. 242; *Glover v. Gray*, 9 Id. 329.

¹ 52 Ill. 330.

nounced.¹ "As some misapprehension seems to exist in respect to the extent this court has gone in discussing the doctrine of comparative negligence, it may not be amiss to review the several cases on that subject.

"But for that purpose it is not necessary to go back of the case of the Galena and Chicago Union R. R. Co. *v.* Jacobs, 20 Ill. 478, as in that case all the previous decisions were reviewed and commented upon. Jacobs' case was the first case announcing the doctrine of comparative negligence, the received rule prior thereto having been if there was any negligence on the part of the plaintiff he could not recover. The English cases on this point were cited and commented on." Then follows a statement of the rule in the Jacobs case, that part of the opinion in that case which I have quoted above being repeated *in ipsissimis verbis* and re-announced as the correct rule. The learned judge continues: "Following this case" (meaning the Jacobs case), "was the case of the Chicago, Burlington and Quincy R. R. Co. *v.* Dewey, 26 Ibid. 255, where it was said, it was not enough to show a railroad company guilty of negligence, but it must appear that the injured party was not also negligent and blamable. Each party must employ all reasonable means to foresee and prevent injury, and if the negligence of one party is only slight, and that of the other appears gross, a recovery may be had. In the case of the same railroad company against Hazzard, Ibid 373, the ruling in Jacobs' case was commented upon and approved. The next case in the order of time, having reference to injury to persons, is that of the Chicago, Burlington and Quincy R. R. Co. *v.* Triplett's Admr., 38 Ibid 482, in which it was again said although the plaintiff may have himself been guilty of some degree of neg-

¹ Breese, J., in Galena, &c., R. R. Co. *v.* Jacobs, 20 Ill. 478.

ligence, yet if it be but slight, in comparison with that of the defendant, it should be no bar to his recovery. No inflexible rule can be laid down. Each case must depend upon its own circumstances, and the question of comparative negligence must be left to the jury, under the supervision of the court. . . . The rule is the same in actions against railroad companies for injuries to personal property."

This is the doctrine as the late Chief Justice Breese, the father of the rule in question, understood it. It is not a rule of contributory negligence at all, but a law under which men are fined for gross negligence, the fine being paid over to the plaintiff, if he, on his part, has been guilty of only slight negligence. It had its origin apparently from a misunderstanding, on the part of the judge who first declared the rule, as to the effect of previous decisions. He seems to have thought that he found his rule in the earlier English and American cases that he cites. "Although these cases," said he,¹ "do not distinctly avow this doctrine in terms, there is a view of it, very perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence, the plaintiff need not be wholly without fault as in *Raisin v. Mitchell*, 9 Car. & P. 613, and *Lynch v. Nurdin*, 1 Q. B. 29." This language indicates very plainly that the learned chief justice misunderstood the effect of these decisions, and that he founded his theory upon this misapprehension. It is the essentially unanimous judgment of common law judges and lawyers throughout every jurisdiction where that law obtains, that these cases are not the smallest authority for such a doctrine as the Illinois Supreme Court maintains. The

¹ *Galena, &c., R. R. Co. v. Jacobs*, 20 Ill. 478, 496.

mistake is, it is believed, in confounding the two essential elements which must concur to render negligence contributory negligence, (*a*) a want of ordinary care on the part of the plaintiff, and (*b*) a proximate connection between such want of care and the injury complained of. The rule that the plaintiff may have his action whenever his negligence is merely the remote cause of the mischief, while that of the defendant is the proximate cause, is, in the rule of comparative negligence, rewritten so as to make it that the plaintiff may recover when his own negligence is slight and that of the defendant gross. This confuses two essentially different things, and in such a way as to destroy the rule upon which only a refinement is attempted. Either contributory negligence in its true juridical sense is, or it is not, a defense. If it is a defense, as the general rule declares, then there is no room for such a theory as that of Mr. Justice Breese; if it is not a defense then the whole theory upon which our law in this behalf has been made to rest falls to the ground.

Under the Illinois rule the question of proximateness and remoteness as regards the cause of the injury does not arise. The question is not whose negligence was the proximate cause, but was the negligence of one party slight and that of the other gross. It will be conceded without argument; *first*, that this is a much easier question to answer than that; that juries can far more readily compare one man's conduct with another's, than they can determine so metaphysical a question as that of causation; that it makes the question concrete instead of abstract, and brings it nearer to the common sense of the average juror; and *second*, that correct conclusions can be reached perhaps as often under this rule as under the other, that while the reason and the reasoning will be wrong the result attained may be correct. We catch a

glimpse of the process by which this rule has been worked out in the *dictum* of Mr. Justice Valentine in his opinion in *Union Pacific R. R. Co. v. Rollins*.¹ "An act that may be grossly negligent if it proximately contributes to the injury may be reasonably careful if it only remotely contributes thereto."

Whether the act was gross negligence or slight negligence, or ordinary negligence, is one thing, to be determined upon a consideration both of the intrinsic character of the act itself, and of the circumstances under which it was performed, and whether or not it was the proximate cause of an injury is another thing, to be determined upon a consideration of the law of cause and effect.

While it may be said in favor of this rule that it is a convenient one for the jury, and that under its operation a correct result is frequently reached, it may also be suggested that it is rather a poor reason for having one's rule wrong, that it gives the right answer about as often as the true rule.² By reading the Illinois cases attentively it will be found that, very frequently, when the plaintiff has had a judgment under the rule of comparative negligence, if a correct result was reached, what the judges called the "gross negligence" of the defendant was, in truth, nothing more than negligence merely that was the proximate cause of the injury, while what they called the "slight negligence" of the plaintiff was negligence merely that was only a remote cause, or condition of the injury. "But if such negligence was only slight, *or the remote cause of the injury*," says the Supreme Court of Kansas,³ in announcing the rule of comparative negligence, "the plaintiff may still recover, *notwithstanding such slight negligence or remote cause*." Sometimes also the "gross

¹ 5 Kan. 167, 182.

² Cf. Wharton on Neg., § 335.

³ *Sawyer v. Sauer*, 10 Kan. 466.

negligence" of the defendant is wilful negligence, and then, upon familiar grounds, the plaintiff should have his action. In both these classes of cases a correct conclusion is reached under the rule of comparative negligence, no more and no less a correct conclusion, however, than would have been reached by the application of the general rules of contributory negligence, and *quod hoc* the rule applied was not in reality a rule of *comparative* negligence at all. It was a true application of the established rules of law in point. But in the third and remaining class of cases there is a real application of this anomalous doctrine, and the result is rank injustice. I mean that class of cases where the negligence of the plaintiff, though what the court is pleased to denominate his "slight negligence," is a proximate cause of the injury he suffers. In these cases, under the rule of comparative negligence, the plaintiff recovers, or rather the defendant is compelled to pay damages to the plaintiff, for an injury which the plaintiff's own negligence has materially assisted in producing.

This is comparative negligence, pure and simple, and, without the admixture of the wholesome exceptional rules of contributory negligence as in the two preceding classes of cases, it is a rule which, Judge Thompson might well say, "is not likely to be adopted in any other State . . . unless by legislation."¹

In order to a fair statement of this Illinois rule, it must be emphasized that the plaintiff can recover, when he has himself been guilty of contributory negligence, only when his negligence is slight and the defendant's is gross, in comparison with each other. The rule is that gross negligence is ground for an action in spite of slight

¹ Thomp. on Neg., 1168 § 16. But, compare, *Bequette v. Peoples' Transportation Co.*, 2 Oregon, 200, and *Holstine v. Oregon, &c., R. R. Co.*, 8

Id. 163, wherein there is a suggestion that this rule finds some favor in at least one State on the Pacific coast.

negligence, or that slight negligence is not a defense when the defendant's negligence is gross.¹ In some of the earlier cases the judges tripped a little in stating the doctrine, making it equivalent to a rule that a mere preponderance of negligence on the part of the defendant was sufficient to warrant a recovery. It was said that "he who is guilty of *the greater negligence* or wrong, must be considered the original aggressor, and accountable accordingly,"² and that unless the defendant has been guilty of negligence *more gross* than the plaintiff there can be no recovery.³ But that this is an entire misconception of the doctrine is expressly declared in many later cases.⁴ The settled rule seems to be that the relative degrees of negligence are to be compared, and that the plaintiff may recover, although guilty of contributory negligence, provided his negligence was slight and that of the defendant gross in comparison with each other, and consequently that, whenever it appears that the plaintiff's negligence was not slight and the defendant's gross in comparison with each other, there can be no recovery.⁵ That the plaintiff's negligence is slight is not alone sufficient. It must also appear, at the same time, in order to the action, that the defendant's negligence was gross,⁶ and whenever the

¹ See the cases generally cited above.

² Macon, &c., R. R. Co. v. Davis, 27 Ga. 113, 119. Compare S. C. 13 Id. 68; 18 Id. 679.

³ Illinois, &c., R. R. Co. v. Middlesworth, 43 Ill. 64. Compare St. Louis, &c., R. R. Co. v. Todd, 36 Ill. 414.

⁴ Chicago, &c., R. R. Co. v. Dunn, 61 Ill. 385; Chicago, &c., R. R. Co. v. Van Patten, 64 Id. 510; Illinois, &c., R. R. Co. v. Maffit, 67 Ill. 431; Chicago, &c., R. R. Co. v. Lee, 68 Id. 576; Illinois, &c., R. R. Co. v. Benton, 69 Id. 174; Chicago, &c., R. R. Co. v. Mock, 72 Id. 141; Illinois,

&c., R. R. Co. v. Hammer, 72 Id. 347; Id. v. Goddard, 72 Id. 567; Chicago, &c., R. R. Co. v. Donahue, 75 Id. 106; Id. v. Hatch, 79 Id. 137; Joliet v. Seward, 86 Id. 402; Indianapolis, &c., R. R. Co. v. Evans, 88 Id. 63; Toledo, &c., R. R. Co. v. Grable, 88 Id. 441; Chicago, &c., R. R. Co. v. Dimick, 96 Id. 42; Earlville v. Carter, 2 Bradw. 34; Wabash, &c., R. R. Co. v. Jones, 5 Id. 607.

⁵ Rockford, &c., R. R. Co. v. Delaney, 82 Ill. 198; S. C. 25 Am. Rep. 308.

⁶ Winchester v. Case, 5 Bradw. 486.

plaintiff's negligence is of a higher degree, his right of action is gone. If it is equivalent to a want of ordinary care, even though the defendant's negligence was gross, the plaintiff cannot recover,¹ which is the same as to say, that ordinary negligence, or any higher degree than slight negligence, is a defense to an action even for gross negligence, under this rule. When the plaintiff's negligence is gross there can be no recovery, according to a recent decision,² unless that of the person inflicting the injury was wilful or criminal.

"Under this rule," says Judge Thompson,³ "the negligence of both parties may combine to produce the injury, the negligence of the person injured may operate as a factor in producing the injury, but it is excluded as a factor in measuring the damages. The plaintiff's negligence, or that of the person on account of whose injury he sues, helps in some degree to produce the injury, but the defendant must bear all the damages."

§ 28. *The rule in Kansas.*—The Supreme Court of Kansas has adopted a rule upon the question of contributory negligence which differs essentially from the general rule, and which for practical purposes is equivalent to the Illinois rule of comparative negligence. The Kansas rule was first announced by Valentine, J., in the early case of the Union Pacific R. R. Co. *v.* Rollins.⁴ In the opinion in this case there is an elaborate consideration of the whole question, and the result reached is that it is not necessary in order to enable a plaintiff to recover, even for injuries to his property, that he be himself entirely free from negligence; that if his negligence is slight, or the remote cause of his injury, while

¹ Illinois, &c., R. R. Co. *v.* Hetherington, 83 Ill. 510; Earlville *v.* Carter, 6 Bradw. 421.

² Illinois, &c., R. R. Co. *v.* Hetherington, 83 Ill. 510.

³ Thomp. on Neg., 1171.

⁴ 5 Kan. 167.

that of the defendant is gross, or the proximate cause, the plaintiff may have his action; that whether or not there has been negligence, in a given case, and its nature and degree if found, are questions of fact for the jury; but that to determine what degree of care and diligence on the one hand, and of negligence on the other, will entitle the plaintiff to a verdict, is a question of law for the court. In the later cases the rule in *Union Pacific R. R. Co. v. Rollins*, as above prevails.¹

The doctrine is formulated in such a way in several of the cases cited as to suggest the conclusion that "slight negligence," as used in what we may call the Kansas rule, is synonymous with negligence which is but a remote cause, and that "gross negligence" means hardly more than negligence which is a proximate cause. In the leading case it is said: "An act that may be grossly negligent if it proximately contributes to the injury, may be reasonably careful if it only remotely contributes thereto."² And in a later case we find the following gloss upon this statement of the law: "If the jury believe from the evidence that the plaintiff's negligence contributed to the injury complained of," [by which must have been meant that if the plaintiff's negligence appeared to them to have been a proximate cause of the injury,] "he cannot recover. But if such negligence was only slight, or the remote cause of the injury, he may still recover, notwithstanding such slight negligence or remote cause."³ Such statements as this, it has been attempted in the preceding section to show, involve

¹ *Caulkins v. Matthews*, 5 Kan. 191; *Sawyer v. Sauer*, 10 Id. 466; *Pacific, &c., R. R. Co. v. Houts*, 12 Id. 328; *Kansas Pacific R. R. Co. v. Pointer*, 14 Id. 37; *Kansas, &c., R. R. Co. v. Fitzsimmons*, 18 Id. 34; *S. C. 22 Id. 686*; 31 Am. Rep. 203; *Central, &c., R. R. Co. v. Henigh*, 23

Kan. 347; *Mason v. Missouri, &c., R. R. Co.*, 27 Id. 83; *S. C. 41 Am. Rep. 405*; *Kansas, &c., R. R. Co. v. Peavey*, 29 Kan. 169.

² *Union Pacific R. R. Co. v. Rollins*, at page 182.

³ *Sawyer v. Sauer*, 10 Kan. 466.

a confusion of ideas. There is a mistaking of causation for negligence. In one of the later cases¹ it is denied that the rule of comparative negligence obtains in this State. But it is submitted, after a somewhat extended reading of the Kansas decisions, that the distinction, if any there be, between the rule as declared in Illinois and the rule taught by these cases, is exceedingly minute, and one which, in practice, it will be found at once impracticable and impossible to bring out.

§ 29. *The rule in Georgia.*—The Georgia rule upon this subject differs, on the one hand, from the general rule of contributory negligence, and on the other hand from the exceptional rule of comparative negligence. Under the general rule, the negligence of the plaintiff, if contributory in the juridical sense, is a defense. Under the exceptional rule, the slight negligence of the plaintiff, though contributory, is not a defense when the negligence of the defendant is gross, and under the rule as declared by the Supreme Court of Georgia, the slight negligence of the plaintiff, though contributory, is not a defense when the negligence of the defendant is gross, but it goes in mitigation of damages. Both Dr. Wharton² and the Supreme Court of Iowa³ state that the rule of comparative negligence obtains in Georgia; but perhaps this rule is more correctly described as a rule in mitigation of damages than as a rule of comparative negligence. Although the rule implies a comparison of the negligence of one party with the negligence of the other, in order to fix the ultimate liability, yet this comparison is not the most characteristic feature of the rule. In addition to the comparison, and as the distinguishing element in the Georgia rule, the negligence of the plaintiff, when not so great as

¹ Kansas Pacific R. R. Co. v. Peavey, 29 Kan. 170.

³ O'Keefe v. Chicago, &c., R. R. Co., 32 Iowa, 467.

² Wharton on Neg., § 334.

to bar a recovery under an application of the general rule, is looked to in mitigation of damages.

The rule in question may be said to have had its inception in the case of *Macon, &c., R. R. Co. v. Davis*.¹ This is the first important case in the Georgia reports in which the general question of the effect of contributory negligence is considered. It proceeds upon the theory that the rule of contributory negligence as laid down in the English case of *Butterfield v. Forrester*,² that if the injury results in whole or in part from the misconduct of the plaintiff, he cannot recover, had been so modified by later decisions, especially, by the doctrine in *Davies v. Mann*,³ as to be equivalent to a rule that, in cases where the negligence of both parties concurred to occasion the mischief, the plaintiff may nevertheless recover if the defendant, by the exercise of ordinary care under the circumstances, could have avoided the infliction of the injury. This pernicious and pestiferous doctrine, which is the same thing as a rule that when two are to blame, one shall be held responsible and the other discharged and exonerated, seems to have imposed upon the court in rather a peculiar way. When the case under consideration⁴ was first decided, it was decided right, under a true application of the general rule of law in point.⁵ At the rehearing the court attempts to apply the supposed modification of that rule by the later case of *Davies v. Mann*, and says: "We approve of this modification of the principle, and think it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendants could not, in the exercise of reasonable diligence, have prevented the collision."⁶ But

¹ 27 Ga. 113; S. C. 18 Id. 679; 13 Id. 68.

² 11 East, 60.

³ 10 Mee. & W. 546.

⁴ *Macon, &c., R. R. Co. v. Davis*, *supra*.

⁵ *Cf. Brannon v. May*, 17 Ga. 136.

⁶ *The Davis Case*, 18 Ga., at page 686.

when the case came up again, upon a second rehearing, the court seems to have begun to lose faith in the *Davies v. Mann* "modification," which at the first rehearing they had expounded and approved, and, after beating about for some middle ground, reaches the conclusion, upon which the case finally rested, that "he who is guilty of the greater negligence, or wrong, must be considered the original aggressor, and accountable accordingly."¹ Starting out with the rule in *Butterfield v. Forrester*,² which declares the received rule of contributory negligence, the court attempts to apply, in connection therewith, the rule in *Davies v. Mann*,³ and the result is the rule of comparative negligence, in so extreme a form, that it has been found necessary, even where that rule obtains, to reduce it to less objectionable shape.

While the case of *Macon, &c., R. R. Co. v. Davis*⁴ was in process of decision, two other cases were decided which should be noticed here. In another case growing out of the same accident⁵ which had occasioned the case of *Macon, &c., R. R. Co. v. Davis*, the court, by Lumpkin, J., lays down with much clearness the rule that contributory negligence is a defense, fortifying that position by the citation of many authorities, both English and American, and following the earlier case of *Brannon v. May*,⁶ in which the general rule is correctly declared. Confronted with the later case of *Macon, &c., R. R. Co. v. Davis*, which had just been decided on the rehearing,⁷ in which the doctrine in *Davies v. Mann* is approved and declared, the learned judge attempts very ingeniously to reconcile the two cases. He says: "Is there any conflict between *Brannon v. May* and the *Macon, &c., R. R. Co.*

¹ The *Davis* Case, 27 Ga., at page 119.

² 11 East, 60.

³ 10 Mee. & W. 546.

⁴ *Supra*.

⁵ *Macon, &c., R. R. Co. v. Winn*, 19 Ga. 440; S. C. 26 Id. 250.

⁶ 17 Ga. 136.

⁷ 18 Ga. 679.

v. Davis? We do not perceive it; the two may, and do, well stand together;” and then enters into an extended argument to establish his proposition, standing firmly to the ground taken, but endeavoring to reconcile it with the modification. Upon a rehearing in this case, Benning, J., in a dissenting opinion, argues at length that the damages should suffer a reduction in proportion to the fault of the plaintiff.¹ Then followed, in point of time, the final decision in the case of *Macon, &c., R. R. Co. v. Davis*,² in which the doctrine of comparative negligence is broadly announced, and, in the same year, the case of *Flanders v. Meath*,³ in which it is held that when both parties are in fault the plaintiff may have his action, but that, inasmuch as the defendant was only *slightly* the most in fault, the damages awarded should be *small*. This is comparative negligence and mitigation of damages at once. But before this, and before the announcement of the final rule in *Macon, &c., R. R. Co. v. Davis*,⁴ in the case of *Augusta, &c., R. R. Co. v. McElmurry*,⁵ when in the court below the counsel for the defendant requested the court to charge the jury that the plaintiff’s own freedom from contributory negligence was an essential element in his case, according to the rule in *Brannon v. May*,⁶ and the court refused, but charged “that the defendants are bound for reasonable care and diligence in running their cars, and a departure from the rules of running is a want of such care and diligence; that when the plaintiff is *chiefly in fault* he cannot maintain an action; where the parties are *equally in fault* he cannot maintain an action; but that, though the plaintiff be *somewhat in fault*, yet, if the defendants have been guilty of gross negligence, he may

¹ The Winn Case, 26 Ga. 250.

² 27 Ga. 113.

³ 27 Ga. 358.

⁴ 27 Ga. 113.

⁵ 24 Ga. 75.

⁶ 17 Ga. 136.

maintain an action." The court above held the refusal to give the instruction asked, not error, and that the instruction given was a correct enunciation of the established rule in that State, which was "that although the plaintiff be somewhat in fault, yet, if the defendant be grossly negligent, and thereby occasioned, or did not prevent, the mischief, the action may be maintained." This is comparative negligence pure and simple without the modification as to mitigation of damages, and it is substantially followed in a comparatively recent case.¹ We find, however, in *Atlanta, &c., R. R. Co. v. Ayers*,² the rule thus laid down: "If it appears that both parties were guilty of negligence, and that the person injured could not by ordinary care and diligence have avoided the consequences to himself of the negligence of the company, or its agents, he may recover, but the jury shall lessen the damages in proportion to the negligence and want of ordinary care of the injured person."

Taking the decisions in point as a whole, from first to last, it may be said that the rule in Georgia is not settled. There is a tendency toward the rule of comparative negligence,³ and it is certainly usual, in cases where the plaintiff's negligence is not regarded sufficient to prevent entirely a recovery, to direct the jury to look to it in mitigation of damages as has already appeared. But even this is not a universal rule. It is the usage rather than the rule. The latest cases take now one view and now the other,⁴ and we must hear further from the Supreme Court before there can be formulated anything exactly and explicitly as the Georgia rule.

¹ *Rome v. Dodd*, 58 Ga. 238.

² 53 Ga. 12.

³ *e. g.* *Augusta, &c., R. R. Co. v. McElmurry*, 24 Ga. 75, where this rule is explicitly set forth.

⁴ *Central, &c., R. R. Co. v. Gleason*, 69 Ga. 200; *Atlanta, &c., R. R.*

Co. v. Wyly, 65 Id. 120; *Thompson v. Central, &c., R. R. Co.*, 54 Id. 509; *Campbell v. Atlanta, &c., R. R. Co.*, 53 Id. 488; s. c. 56 Id. 586; *Hendricks v. Western, &c., R. R. Co.*, 52 Id. 467; *Macon, &c., R. R. Co. v. Johnson*, 38 Id. 408.

§ 30. *The rule in Tennessee.*—In Tennessee the contributory negligence of a plaintiff is not a defense precisely to the same extent that it is in the other States of the Union in general. As, between the doctrine of comparative negligence and the generally accepted rules of contributory negligence, the Supreme Court of Tennessee has not taken, it is believed, a doubtful position. Comparative negligence is not the rule of that court, and, to state it broadly, the court maintains, in general, the rule that when a plaintiff's own negligence is the proximate cause of the injury of which he complains he cannot recover.¹ But, whenever the negligence of the plaintiff is slight, or merely the absence of a superior degree of care or diligence, such negligence being not sufficient to bar the action, may be looked to in mitigation of damages.² In this respect the rule in Tennessee is the same as in Georgia. In both these States the negligence of the plaintiff when slight is not a defense. In Georgia this is a modification of the rule of comparative negligence, but in Tennessee it is rather a qualification of the general rule as to contributory negligence. *Whirley v. Whiteman*,³ decided in 1858, is regarded as the leading case in point. It has been sometimes misunderstood to announce the doctrine of comparative negligence. But a careful reading of the opinion will show that such an impression is a pure misunderstanding. The court says: "When a party brings an injury upon himself, or contributes to it, the mere want of a superior degree of care or diligence cannot be set up as a bar to

¹ *Jackson v. Nashville, &c., R. R. Co.*, 13 Lea, 491; S. C. 49 Am. Rep. 663; *Nashville, &c., R. R. Co. v. Wheless*, 10 Lea, 741; S. C. 43 Am. Rep. 317; *Whirley v. Whiteman*, 1 Head, 610.

² *Dush v. Fitzhugh*, 2 Lea, 307;

— *R. R. Co. v. Walker*, 11 Heisk. 383; *Hill v. Nashville, &c., R. R. Co.*, 9 Heisk. 823; *Nashville, &c., R. R. Co. v. Carroll*, 6 Heisk. 347; *Smith v. Nashville, &c., R. R. Co.*, 6 Id. 174.

³ 1 Head, 610.

the plaintiff's claim for redress; and, although the plaintiff may himself have been guilty of negligence, yet, unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he will be entitled to recover." This is but to say that a mere want of great care on the part of the plaintiff is not sufficient to constitute contributory negligence, or that the measure of the plaintiff's diligence is the standard of ordinary care, which, as we have seen,¹ is the general rule. But in subsequent cases it has been held that the failure to exercise extraordinary care on the part of the plaintiff, while not a defense to the action, may be looked to in mitigation of damages,² and there is a noticeable tendency to extend this rule so as to include cases where the plaintiff's negligence is something more than a want of slight care—especially where the negligence of plaintiff and defendant is highly disproportionate.³

Much may be said in favor of the rule which counts the plaintiff's negligence in mitigation of the damages, in those cases which frequently arise, wherein, on the one hand, a real injury has been suffered by the plaintiff, by reason of the culpable negligence of the defendant, and yet where, on the other hand, the plaintiff's conduct was such as, to some extent, to contribute to the injury, but yet in so small a degree that, to impose upon him the entire loss, seems not to take a just account of the defendant's negligence. In those cases which may be denominated "hard cases" the Georgia and Tennessee rule in mitigation of damages, without necessarily sacrificing the principle upon which the law as to contributory negligence rests, is a rule against which, in respect of justice and humanity, nothing can be said. Where

¹ § 9, *supra*.

² See, particularly, *Nashville, &c., R. R. Co. v. Carroll*, 6 Heisk. 347,

and the later cases generally cited above.

³ *Dush v. Fitzhugh*, 2 Lea, 307.

the severity of the general rule might refuse the plaintiff any remedy whatever, as the sheer injustice of the rule as laid down in *Davies v. Mann*,¹ would impose the whole liability upon the defendant, it is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff's misconduct, but does not decline to impose them at all, would work substantial justice between the parties.

§ 31. *The rule in Kentucky.*—A consideration of the rule upon the subject in Kentucky is included in this chapter, not because the rule of comparative negligence obtains in this State to any extent, or in any sense, nor because the Court of Appeals at Frankfort is unsound to any degree upon the general doctrines of the law of contributory negligence, but because citations are occasionally made from the Kentucky reports by text-writers, and by the courts of other States, to this effect, and in such a way, and with such a gloss as to give currency to the impression that the Kentucky decisions are obnoxious to this criticism. So far is this from being the truth that it may safely be asserted that nowhere is the generally accepted doctrine upon this subject more positively declared, or more firmly and consistently adhered to than in Kentucky. "When the defense is contributory negligence," says the Court of Appeals in the comparatively recent case of the *Kentucky Central Railroad Co. v. Thomas' administrators*,² "the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution that, but for such negligence

¹ 10 Mee. & W. 546.

² 79 Ky. 160; S. C. 42 Am. Rep. 208.

or want of ordinary care and caution on his part, the misfortune would not have occurred. In the first case, the plaintiff would be entitled to recover; in the latter, he would not." This is the doctrine in both the earlier and the latter cases.¹

As supplementary to the common law rules in point, or, perhaps, rather as declarative of a common law rule, there is a statute in Kentucky² which provides for the recovery of punitive damages in certain cases, where death results from the "wilful negligence" of the defendant. In cases that have arisen under this statute, it has been held, conformably to the common law rule, that the contributory negligence of the plaintiff, in such a case, is not a defense to the action,³ and some of these cases, in which the court has been perhaps a little inexact in expressing the rule, have been cited as authority for the rule of comparative negligence.⁴

¹ Louisville, &c., R. R. Co. v. Filbern's Admx., 6 Bush, 574; City of Covington v. Bryant, 7 Bush, 248; Digby v. Kenton Iron Works, 8 Bush, 166; Jacobs Admr. v. Louisville, &c., R. R. Co., 10 Bush, 263; Sullivan's Admr. v. Louisville Bridge Co., 9 Bush, 81; Padacah, &c., R. R. Co. v. Hoehl, 12 Id. 41; Louisville, &c., R. R. Co. v. Goetz's Admx., 79 Ky. 442; S. C. 42 Am. Rep. 227; Louisville, &c., R. R. Co. v. Commonwealth, 80 Id. 143; S. C. 44 Am. Rep. 468; Jones' Admr. v. Louisville, &c., R. R. Co., Super. Ct. of Ky., March 28, 1885. (To be reported.)

² 2 Stanton's Ky. Stat., 510 § 3, Genl. Stat. of Ky. Chap. 57 § 3. Enacted March 10, 1854.

³ But it is said that "if the injury received by the deceased was caused wholly by his own negligence it necessarily results that his life was not lost by the wilful neglect of the defendant, and the action cannot be maintained." Jones' Admr. v. Louisville, &c., R. R. Co., Super. Ct. of Ky., March 28, 1885. (To be reported.)

⁴ *Ex. gr.* Dr. Wharton cites Louisville, &c., R. R. Co. v. [Sickings], 5 Bush, 1; *Id.* v. Mahoney, 7 Bush, 255 (*i.e.* 235); (Wharton on Neg., § 335, note), and Mr. Freeman, in his learned annotation of the case of *Casey v. Berkshire R. R. Co.*, 48 Am. Dec. 616, cites at page 637, the case of *Jacobs v. Louisville, &c., R. R. Co.*, 10 Bush, 263, in connection with some cases from the Illinois reports, as an authority for the proposition, "Except where the effect of slight contributory negligence is held to be overcome by evidence of the defendant's gross or wanton negligence, as is the rule in some States," which should seem to be equivalent to the statement that the rules in Illinois and Kentucky are, in this respect the same. Judge Thompson also discusses an "innovation" that he discovers in the Kentucky reported cases, under the title of comparative negligence (Thomp. on Neg., 1022 § 26) and, while perhaps he makes the impression that this rule prevails in Kentucky, he does not say so. In another connection,

This misapprehension seems to have arisen principally from some expressions of Chief Justice Robertson in his opinion in the case of the Louisville, &c., R. R. Co. *v.* Collins.¹ This was an action brought by a common laborer for injuries sustained by reason of the negligence of the defendant's engineer, whose orders it was the plaintiff's duty to obey. It was not an action under the statute of 1854, hitherto referred to, since the injuries did not result in death.²

In delivering the opinion of the court our great Chief Justice said: "But had the appellee [plaintiff] been guilty of negligence, nevertheless, the injury might have been avoided by the proper care of the engineer, and is, therefore attributable to his gross negligence. In such a case both principle and preponderating authority seem to decide that such a remediable fault of the person injured should not exonerate the wrong-doers from legal liability for the damage which, without gross negligence, he could have prevented."³ And, in a later case, in reaffirming this doctrine, the same judge speaks of "the extraordinary or gross negligence" passed upon in the Collins case, and then proceeds to a definition of it in these terms: "Gross neglect is either an intentional wrong, or such a reckless disregard of security and right as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law, which in some respects is *quasi-criminal*."⁴ Inasmuch as this is what his honor meant by gross negligence, the opinion in the

however, he gives the Court of Appeals a "character" as to the anomalous doctrine. (Thomp. on Neg., 1003.)

¹ 2 Duv. 114.

² Upon the question "Who is a fellow-servant?" this case laid down the eminently just and reasonable rule which has recently been adopted by

the Supreme Court of the United States in Chicago, Milwaukee & St. Paul R. R. Co. *v.* Ross, 112 U. S. 377. See the chapter on Master and Servant, *infra*.

³ Louisville, &c., R. R. Co. *v.* Collins, 2 Duv. 114, at page 119.

⁴ Louisville, &c., R. R. Co. *v.* Robinson, 4 Bush. 507, 509.

case of Collins gives no shadow of just ground for the impression that that case teaches the doctrine of comparative negligence. That case, therefore, upon this point, teaches that wilful negligence is not to be defended by a plea of slight negligence, which is called in the opinion "the remediable fault of the person injured." and this is but the unquestioned rule of the common law.¹

In order that the position of the court may not be misunderstood, immediately following the definition of gross negligence just quoted, the learned judge says: "But if the party complaining of hurt by his own negligence contributed to it, he cannot recover damages from the company unless its co-operating agent charged with gross" [*i.e.* according to his definition, wilful and intentional] "neglect could have avoided the impending damage, by the observance of ordinary diligence, notwithstanding the neglect of the complaining party."² It may be conceded that this is rather a clumsy and confused statement of law, and that the definition proposed for gross negligence is misleading. What is termed gross negligence the better authorities now call wilful negligence, or wilful wrong-doing. But in the two opinions, the one explaining the other, there is no uncertain sound upon the point in dispute. There is no suggestion of a rule of comparative negligence, and it is submitted that a reading of the Kentucky decisions demonstrates that the Court of Appeals of this State has placed itself squarely in line with other common law courts in an orthodox attitude upon the matter of contributory negligence.³

¹ *Cf.* Louisville, &c., Canal Co. *v.* Murphy's Admr. 9 Bush. 521, and the note.

² Louisville, &c., R. R. Co. *v.* Robinson, 4 Bush. 509. See, also, Louisville, &c., R. R. Co. *v.* Sickings, 5 Bush. 1.

³ See an essay by Helm Bruce, Esq., of the Louisville Bar, in the Kentucky Law Journal for April, 1882, upon "The Kentucky doctrine of contributory negligence," in which the whole subject is fully and learnedly considered.

CHAPTER IV.

THE IMPUTED CONTRIBUTORY NEGLIGENCE OF THIRD PERSONS.

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| § 32. The rule stated.
33. The contributory negligence of the plaintiff's agent must be imputed to the plaintiff.
34. The rule in <i>Thorogood v. Bryan</i> .
35. <i>Thorogood v. Bryan</i> in the United States.
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42. A criticism of <i>Hartfield v. Roper</i> .
43. The rule in <i>Hartfield v. Roper</i> , denied.
44. When the action is for the parent's benefit.
45. The rule modified by reason of the plaintiff's poverty or destitution.
46. Ordinary care in a child.
47. Children as trespassers.
48. What acts and omissions on the part of parents have been held contributory negligence in these actions. |
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§ 32. *The rule stated.*—Contributory negligence in its juridical sense, is usually the personal default of the plaintiff himself. The general rule is that when the plaintiff's own want of ordinary care is a proximate cause of the injury he sustains, he cannot recover damages from another therefor. But, under certain exceptional conditions, which we are to consider in this chapter, a plaintiff may be legally chargeable with the negligence of some third person, which is imputed to him as though it were his own. In this particular the law of negligence is analogous to the general principles of the law as to liability, under which one is primarily responsible for his own acts, and only secondarily for the acts of others, as *e. g.* those of his servant or agent. The rule upon this branch of our subject is that the contributory negligence of third persons constitutes a valid defense to the plaintiff's action only when that negligence

is legally imputable to the plaintiff. There must, in order to create this imputability, be some connection, which the law recognizes between the plaintiff and the third person, from which the legal responsibility may arise. The negligence of the third person and its legal imputability must concur. It is clear that there is no justification for the negligent misconduct of the defendant in that some third person, a stranger, was also in the wrong. When the defendant pleads the negligence of a party other than the plaintiff in bar of the action, it must appear, not only that such third person was in fault, but that the plaintiff ought to be charged with that fault. In a case in New York, for example, the defendant's street car, on which the plaintiff's intestate was a passenger, having become over crowded, and the deceased having been thrown off by another passenger rushing by him in haste in leaving the car, it was held that the wrongful act of such passenger did not relieve the defendants from the consequences of their wrongful act in crowding their car, and thereby compelling the deceased to stand upon the platform;¹ or, in other words, that the negligent act of the passenger who pushed his way recklessly through the crowd, upon the platform, in leaving the car, ought not to be imputed to one who was thereby pushed off and injured. So, in an action against a railway company for damages resulting from the carelessness of its servants in running over and cutting fire hose, and thus letting the plaintiff's buildings burn, it was held insufficient as a defense, that the firemen were also negligent in stretching their hose across the track and failing to warn an approaching train, the court saying: "The grounds upon which the defendants are

¹ *Sheridan v. Brooklyn, &c., R. R. Co.*, 36 N. Y. 39. Compare *Cannon v. The Railway*, 6 Irish L. R. 199.

charged in such a case is that the wrong was done by an act in the doing of which it was an actor. The fact that others co-operated, or concurred with it in effecting the wrong does not affect the question or measure of its liability.¹ And, in an action against a gas company for injuries arising from an explosion of gas, upon the ground that the company had supplied a defective gas pipe, it was held no defense that a gas-fitter's servant had negligently ignited the gas.² In each of these cases there was no sufficient legal connection between the plaintiff and the person whose negligence or wrong-doing was sought to be interposed as a defense, and in each there was, accordingly, no legal imputability. This principle is, in some sort, a branch of the rule which refuses to enforce a contribution among tort feorsors. Not only, it may be said, does the common law decline to enforce contribution when judgment has gone against one for the wrong-doing of several, but it refuses to allow one wrong-doer to set up the concurrent wrong-doing of another as a defense in the original action. The defendant will not be heard to say that, though guilty himself of negligence, the injury would not have been inflicted, if some third person, a stranger to the plaintiff's case, had not also been negligent. This is familiar learning.

Numerous cases illustrate and enforce the rule, that the contributory negligence of third persons, who are mere strangers, or mere joint tort feorsors, is not a defense in an action for damages resulting from negligence when the actionable negligence of the defendant is established.³ The rule which imputes to a plaintiff in any

¹ Hunt, J., *Id. Mott v. Hudson River R. R. Co.*; 8 Bosw. 345; S. C. 1 Robertson. 585.

² *Burrows v. March Gas and Coke Co.*, L. R. 5 Exch. 67; S. C. L. R. 7 Id. 96.

³ *Cayzer v. Taylor*, 10 Gray, 274; *Eaton v. Boston, &c., R. R. Co.*, 11 Allen, 500; *Churchill v. Holt*, 127 Mass. 165; S. C. 34 Am. Rep. 355; S. C. 131 Mass. 67; S. C. 41 Am. Rep. 191 *Brehm v. Greatwestern Ry. Co.*, 34

case the negligence of another, savoring as it does, to some extent, of harshness, should not be applied except in a plain case, and, says Chief Justice Church, of New York: "should not be extended to new cases where the reason for its adoption is not apparent."¹

§ 33. *The contributory negligence of the plaintiff's agent must be imputed to the plaintiff.*—Inasmuch as the contributory negligence of third persons is, under some circumstances, but not generally, to be imputed to a plaintiff who seeks to recover damages for an injury sustained through the negligence of the defendant, it is material to determine what contributory negligence of third persons will be so imputed to him as to prevent his recovery. We remark at the outset that, in order to this imputability, there must be a *pro tanto* identification of the third person with the plaintiff, and that such an identity will be found to exist, or be in dispute, in two classes of cases—the first, where the third person was guilty of the contributory negligence as the agent of the plaintiff, and the second, where the cause of action is derived from the third person. The rule as to the first class of cases may be expressed as follows: The contributory negligence of a third person who is guilty thereof as the agent of the plaintiff must be imputed to the plaintiff. An agent, in the contemplation of this rule, is a person whose negligence, as understood in the rule, would be treated as the princi-

Barb. 256; Barrett v. Third Ave. R. R. Co., 45 N. Y. 628; Ring v. City of Cohoes, 77 Id. 83; S. C. 33 Am. Rep. 574; Masterton v. New York, &c., R. R. Co., 84 N. Y. 247; S. C. 38 Am. Rep. 510; Cuddy v. Horn 46 Mich. 596; S. C. 41 Am. Rep. 178; Beauchamp v. Saginaw Mining Co., 50 Mich. 163; S. C. 45 Am. Rep. 30; Baltimore, &c., R. R. Co. v. Reaney, 42 Md. 117; Transfer Co. v. Kelly, 36 Ohio

St. 86; S. C. 38 Am. Rep. 558; Town of Albion v. Hetrick, 90 Ind. 545; S. C. 46 Am. Rep. 230; Sullivan v. Phila., &c., R. R. Co., 30 Penn. St. 234; Byrne v. Wilson, 15 Ir. Rep. C. L. 332; Wettor v. Dunk, 4 Fost. v. Fin. 298; Harrison v. Great Northern Ry. Co., 3 Hurl. & C. 231.

¹ Robinson v. New York, &c., R. R. Co., 66 N. Y. 13; S. C. 23 Am. Rep. 1.

pal's in an action for such negligence brought by a third person against the principal. Whenever the contributory negligence of the third person is of such a character, and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff, for damages for the consequences of such negligence, then, when the plaintiff himself brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him. *Qui facit per alium facit per se*, and whenever the agency is undisputed and full, the rule is manifestly correct.¹ Where, for example, a servant, having in charge a valuable team, stopped on the highway, and, leaving the team unhitched and unattended, engaged in a boisterous altercation with one R., which frightened the team so that it ran away, and the horses were injured, it was held, in an action by the owner of the horses to recover damages from R., that the contributory negligence of the plaintiff's servant, in exposing the horses upon the highway, was a defense. The court says: "For such a wrong, no doubt the defendant R. would be liable, unless the negligence of the plaintiff, or the person whom he had placed in charge of the team, contributed proximately to the injury. But if the servant was guilty of such negligence in the care of the team as would preclude him, if he had been its owner, from maintaining an action against R., this negligence must be equally fatal in an action brought by this plaintiff, who confided the team to his servant's care. It is true, the plaintiff was not responsible for the unlawful act of his servant in accepting the challenge and fighting with R.; but for leaving the team loose and uncared for, whilst this noisy affray was occurring in close proximity, he was re-

¹ *Puterbaugh v. Reasor*, 9 Ohio St. 484.

sponsible, so far as others were concerned, if he entrusted the custody of the horses to his servant, and his remedy in such a case is against the servant alone;" and further, the court concludes: "the same want of proper care which would give the plaintiff a cause of action against his servant must prevent a recovery against R."¹ It is not necessary to cite the reader to authorities in support of the proposition that a master or principal is responsible for the negligent wrong-doing of his servant or agent in all cases in which the servant or agent is acting about his master's or principal's business, of which the rule just laid down is a necessary corollary.

§ 34. *The rule in Thorogood v. Bryan.*—^{introduced 1846} A common or private carrier is, for certain purposes, unquestionably the agent of the passenger or shipper whose person or goods he receives for transportation. The undertaking of the carrier is to receive and transport persons or property from place to place, and, in virtue of that undertaking, he constitutes himself *quoad hoc* the agent of the person who employs him.² In cases of injury by collision or other misadventure, occasioned by the negligence or misconduct of the carrier, or his servants, concurring or cooperating with the negligent wrong-doing of a third party, where the passenger or shipper brings his action for damages against the third party, rather than against his carrier, the question is at once presented whether the carrier is so far forth the agent of the plaintiff that the rule set forth in the preceding section should be applied; or in other words, the question is, whether the contributory negligence of the common carrier is to be imputed to the plaintiff, in such a case, as a defense to the action

¹ *Puterbaugh v. Reasor*, 9 Ohio St. 484. carrier, *Bedel v. Lull*, Cro. Jac. 224; *Simpson v. Hand*, 6 Whart. (Penn.) 311; S. C. 36 Am. Dec. 231.

² See, as between a shipper and his

against the third party. This question has been found one of very considerable difficulty, and the authorities are not consistent upon the point in dispute. We find two distinct lines of cases, declaring antinomous doctrines, which may be denominated respectively the English and the American rule.

*Thorogood v. Bryan*¹ is the leading English case in point, and it established the rule that, in these actions, the negligence of the carrier, contributing to produce the mischief, must be imputed to the plaintiff to bar a recovery. This is the English rule. In the case just cited it appeared that the plaintiff's intestate had been a passenger in an omnibus, and that his death was caused by a collision of the omnibus with the defendant's vehicle. The court, holding that the negligence of the omnibus driver prevented a recovery, says: "The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence, he must be considered a party to it."² Lord Tenterden, more than twenty years before, in an action against the owners of a vessel for damage done to goods upon another vessel, announced a similar rule,³ and it is plain that the doctrine of privity in negligence between a public carrier and a passenger or shipper is well established in England, at least to the extent of preventing recoveries in actions of this character.⁴ In a com-

¹ 8 C. B. 115, decided in 1849.

² *Thorogood v. Bryan*, 8 C. B., at page 130.

³ *Vanderplank v. Miller*, 1 *Moody & M.* 169; compare *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470.

⁴ *Bridge v. Grand Junction Ry. Co.*, 3 *Mee. & W.* 244; *Child v. Hearn*, 22 *W. R.* 864; *s. c. L. R.* 9 *Exch.* 176; *Armstrong v. The Lancashire & Yorkshire Ry. Co.*, 23 *W. R.* 295; *s. c. L. R.* 10 *Exch.* 47; (compare, also, *Waite*

paratively recent case¹ the rule in *Thorogood v. Bryan* is strongly insisted upon, Bramwell, B., saying: "It must not be supposed, as far as my individual opinion is of any value, that I am at all dissatisfied with the decision in *Thorogood v. Bryan*, . . . which, though it may have been questioned and impeached, has never been overruled, and has since been acted on." As the learned Baron suggests, however, this rule has been much "questioned and impeached" by the English judges. Dr. Lushington said that he would not be bound by it, and did not approve of it.² In the note to *Ashby v. White*, in *Smith's Leading Cases*,³ the rule is sharply criticised, "and this criticism," says Chief Justice Beasley, "has on two occasions at least been referred to by the English courts with marked respect."⁴ From these considerations this case does not bear the weight which a deliberate decision of the Court of the King's Bench ordinarily carries with it."⁵ Not only has the correctness of the rule⁶ been frequently questioned in the English decisions, but the reason upon which it was originally made to rest has been flatly denied, and wholly abandoned.

Says Baron Pollock: "The only difficulty I have had in applying it [*i.e.* the rule in *Thorogood v. Bryan*] has been in consequence of the use of the word 'identified' in the judgment of the court there. If the courts are to

v. Northeastern, &c., Ry. Co., 7 W. R. 311; *El. Bl. & El.*, 719, 728, in which case, although the action was against the contracting company, from the opinions it may be inferred that the same conclusion would have been reached had it been against another company.)

¹ *Armstrong v. Lancashire, &c., Ry. Co.*, L. R. 10 Exch. 47. *supra*.

² *The Milan, Lush, Adm.* 388.

³ 1 *Smith's L. C.* (6th Eng. ed.), 266, but see the S. C. in the new 8th American edition of 1885, vol. 1, page 505.

⁴ Citing *Tuff v. Warman*, 2 C. B. (N. S.) 750, and *Waite v. Northeastern, &c., R. R. Co.*, *El. Bl. & El.* 728.

⁵ *Bennett v. New Jersey, &c., R. R. Co.*, 36 N. J. Law, 225.

⁶ Consult, on this point, *Rigby v. Hewett*, 5 Exch. 240; *Greenland v. Chaplin*, 5 Id. 243; *Quarman v. Burnett*, 6 Mee. & W. 499; *Reedie v. London, &c., Ry. Co.*, 4 Exch. 244; *Dayrell v. Tyrer*, 28 L. J. (Q. B.), 52; *Tuff v. Warman*, 2 C. B. (N. S.), 740; *Waite v. Northeastern, &c., Ry. Co.*, *El. Bl. & El.* 719.

be taken as meaning by that word, that the plaintiff by his own proper conduct, or by the selection of the omnibus in which he was riding, so acted as to constitute the driver his agent, the proportion would, I think, be an unsustainable one. But I do not understand the word to be used in that sense, I take the court to mean by it that, under the circumstances of the case, the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus, or his driver. The case of *Waite v. Northeastern, &c., Ry. Co., El., Bl. & El.* 719, is an illustration of this, where the child, as far as regards contributory negligence, was 'identified' with its grandmother, in whose charge it was, although it could not be said that the child exercised any volition in the selection of its grandmother for its companion."¹ From which it appears that the theory of agency, as a reason for the rule, is now abandoned, and the theory of identity substituted; but that, while the reason is changed,² the rule itself remains.

§ 35. *Thorogood v. Bryan, in the United States.*—The English rule upon this subject, as declared in *Thorogood v. Bryan*,³ prevails in several States of the Union. In Pennsylvania it is followed both in the case of a shipper who brings his action for damage to his goods,⁴ and in the case of a passenger where the action is brought for personal injuries.⁵ In each instance it is held without equivocation that the negligence of the carrier must be imputed to the plaintiff, to the extent of barring his action. *Simpson v. Hand*,⁶ which is a leading authority,

¹ *Armstrong v. Lancashire, &c., Ry. Co.*, L. R. 10 Exch. 47.

² Read, upon this point, *Wabash, &c., R. R. Co. v. Shacklet*, 105 Ill. 364; S. C. 44 Am. Rep. 791.

³ 8 C. B. 115.

⁴ *Simpson v. Hand*, 6 Wharton, 311; S. C. 36 Am. Dec. 231.

⁵ *Lockhart v. Lichtenthaler*, 46 Penn. St. 151; *Phila., &c., R. R. Co. v. Boyer*, 97 Penn. St. 91.

⁶ *Supra.*

was decided long before *Thorogood v. Bryan*. It is the earliest case, excepting only *Vanderplank v. Miller*,¹ precisely in point, which I have found. The opinion was written by Chief Justice Gibson and the reason upon which that eminent judge rested his position is, that the carrier is the shipper's agent for whose negligence, contributing to the loss, the shipper is justly held responsible. He cited *Vanderplank v. Miller* with approval. The case of *Lockhart v. Lichtenthaler*,² was an action for the accidental killing of a brakeman—the circumstances, however, being such that the court held that the deceased must not be considered, for the purposes of the action, a servant, but rather regarded in the light of a passenger. This case is, therefore, an authority upon the second branch of the subject, *i. e.* the rule as affecting actions for personal injuries, as contra-distinguished from those for the loss of goods. It sustains the ruling in *Thorogood v. Bryan*, but questions the reason of the rule as set forth in that case—rejecting alike the theory of agency, which had controlled not only in *Thorogood v. Bryan*, but also in *Simpson v. Hood*,³ and the theory of identity, and assigning as the true reason “that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence.”⁴

In Arkansas, also, in a very carefully considered case, the English rule was followed. The plaintiff, in this action, sued to recover damages for the loss of some cattle which he had shipped on board a Mississippi river steamboat bound to New Orleans, which steamboat, going down the river, was negligently run into and sunk by the defendant's steamboat coming up the river, whereby

¹ 1 *Moody & M.* 169, by Lord Tenterden.

² *Supra.*

³ *Supra.*

⁴ *Lockhart v. Lichtenthaler*, 46 Penn. St. 151.

the plaintiff's cattle were drowned. The defendants had judgment in the court below on the ground of the contributory negligence of the plaintiff's carrier, and upon appeal the judgment on this point was affirmed.¹ The Supreme Court of Arkansas for the twenty years prior to the Civil War was a very learned and able court, and *Duggins v. Watson* is entitled to count as a cogent authority in favor of the English rule in the United States.

In Iowa the rule is also laid down, conformably to the English precedent, that where one rides with the owner of a private vehicle, and is injured by reason of the negligence of the person with whom he rides concurring with the negligence of a third person, the contributory negligence of the owner of the vehicle is sufficient to prevent a recovery by the injured party in an action against the third person.²

In Wisconsin, likewise, the contributory negligence of the driver of a private vehicle is imputed to one riding with him,³ and it is a fair inference from the tenor of the opinions, wherein the English rule is referred to with approval, that the Supreme Court of Wisconsin would adopt the rule in *Thorogood v. Bryan* to the full extent should the general question be fairly presented.⁴

In several jurisdictions it has been held, where an

¹ *Duggins v. Watson*, 15 Ark. 118; s. c. 60 Am. Dec. 560.

² *Artz v. Chicago, &c., R. R. Co.*, 34 Iowa, 153; *Payne v. Id.*, 39 Id. 523. And where the owner of the vehicle permits his friend who rides with him to drive the horses, the negligence of the driver will be imputed to the owner so as to prevent a recovery in an action of negligence against a third person. *Stafford v. City of Oskaloosa*, 57 Iowa, 749.

³ *Prideaux v. Mineral Point*, 43 Wis. 513; s. c. 28 Am. Rep. 558;

Otis v. Janesville, 47 Wis. 422. See, for a contrary rule in such a case, *Knapp v. Dagg*, 18 How. Pr. (N. Y.) 165; *Metcalf v. Baker*, 11 Abb. Pr. (N. S.), 431; *Sheridan v. Brooklyn City R. R. Co.*, 36 N. Y. 39; *Robinson v. New York, &c., R. R., Co.*, 66 N. Y. 11; and *Dyer v. Erie Ry. Co.*, 71 Id. 228.

⁴ Compare *Houfe v. Fulton*, 29 Wis. 296; s. c. 9 Am. Rep. 568; s. c. 34 Wis. 608; s. c. 17 Am. Rep. 463.

action is brought for injuries to a wife from the negligence of the defendant, that the contributory negligence of her husband, driving the vehicle in which she was hurt, should be imputed to her in bar of the action.¹ But, perhaps, in these cases, as also in a Michigan case,² where the negligence of a master was imputed to a servant girl riding with him in his wagon, which he carelessly suffered to be wrecked by a railway train, there is not so much an application of the rule in *Thorogood v. Bryan*, as of the general common law rule of principal and agent, which charges a principal with liability for the acts of his agent within the scope of his employment.³

It appears that the English doctrine of privity in negligence between a common carrier and a passenger or shipper, obtains to the full extent, in the United States, only in Pennsylvania; that it has been held applicable as between a shipper and a common carrier in Arkansas, and this will hereafter be shown to be the rule in New York and Kentucky;⁴ that it would probably be adopted in Wisconsin, should a case in point reach the Supreme Court of that State, and that in Iowa there is a tendency to follow *Thorogood v. Bryan*. With these exceptions we shall see that elsewhere, in this country, a different rule is applied.

§ 36. *The American rule.*—The rule in *Thorogood v. Bryan*, except as has appeared in the preceding sec-

¹ *Peck v. New York, &c., R. R. Co.*, 50 Conn. 379; *Carlisle v. Sheldon*, 38 Vt. 440; *Gahn v. Ottumwa*, 60 Iowa, 429; *Huntoon v. Trumbull*, 2 McCrary, 314. *Contra*, *Flori v. St. Louis*, 3 Mo. App. 231.

² *Lake Shore, &c., R. R. Co. v. Miller*, 25 Mich. 274.

³ See § 33, and the discussion therein of the case of *Puterbaugh v. Reasor*, 9 Ohio St. 484. And observe

that *Smith v. Smith*, (2 Pick. 621; S. C. 13 Am. Dec. 464), which is a standing citation, both by judges and text-writers, as an authority in support of the rule in *Thorogood v. Bryan*, has nothing to do with the question at all. *Puterbaugh v. Reasor*, (*supra*), is sometimes miscited to the same effect.

⁴ See the following section.

tion, is denied in the United States. It is the general American rule that there is no privity in negligence between passenger and carrier, and that, therefore, when the passenger brings an action of negligence the contributory negligence of his carrier is not to be imputed to him, in any degree, for the purpose of barring his recovery. The rule in *Thorogood v. Bryan* is wholly repudiated. Neither upon the theory of agency, nor upon the theory of identity, nor from a supposed consideration of public policy and convenience, will the passenger be held to such a connection with the common carrier by which he is transported, as to be responsible for negligence on his part.¹

This doctrine, which may properly be denominated the American rule, as distinguished from the English

¹ *Danville, &c., Turnpike Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville, &c., R. R. Co. v. Case's Admr.*, 9 Bush, 728; *Otis v. Thorn*, 23 Ala. 469; *Bennett v. New Jersey, &c., Trans. Co.*, 36 N. J. Law, 225; s. c. 13 Am. Rep. 435; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; s. c. 38 Am. Rep. 558; *Town of Albion v. Hetrick*, 90 Ind. 545; s. c. 46 Am. Rep. 230; *Cuddy v. Horn*, 46 Mich. 596; s. c. 41 Am. Rep. 178; *Wabash, &c., R. R. Co. v. Shacklet*, 105 Ill. 364; s. c. 44 Am. Rep. 791; *The Washington and The Gregory*, 9 Wall. 513; *Knapp v. Dagg*, 18 How. Prac. 165; *Chapman v. New Haven, &c., R. R. Co.*, 19 N. Y. 341; *Colgrove v. New York, &c., R. R. Co.*, 20 N. Y. 492; *Sheridan v. Brooklyn City R. R. Co.*, 36 N. Y. 39; *Webster v. Hudson River R. R. Co.*, 38 Id. 260; *Barrett v. Third Ave. Ry. Co.*, 45 Id. 628; *Robinson v. New York, &c., R. R. Co.*, 66 Id. 11; s. c. 65 Barb. 146; s. c. 23 Am. Rep. 1, (and note); *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Metcalfe v. Baker*, 11 Abb. Pr., (N. S.), 431; *Perry v. Lansing*, 17 Hun. 34. *Contra*, *Brown v. New York, &c., R. R. Co.*, 32 N. Y. 597; s. c. 31 Barb. 385; *Mooney v. Hudson River R. R. Co.*, 5 Robt. 548; *Beck v. East River Ferry Co.*, 6 Id. 82. [These three cases announcing a contrary doctrine have been distinctly overruled, and it is clear that, in New York, the contributory negligence of the managers of a vehicle or vessel—either a public or private carrier—is not to be imputed to a passenger, whether he be journeying gratuitously or for hire, and irrespective of the kind of conveyance. Compare, also, as illustrating the New York rule, *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230; s. c. 13 Am. Rep. 570; *Cooper v. E. T. Co.*, 75 N. Y. 116; (compare with this case *Hillman v. Newington*, 57 Cal. 56); *Masterton v. New York, &c., R. R. Co.*, 84 N. Y. 247; s. c. 38 Am. Rep. 510.] See, also, *Ricker v. Freeman*, 50 N. H. 420; *Wheeler v. Worcester*, 10 Allen, 591; *Eaton v. Boston, &c., R. R. Co.*, 11 Id. 500; *McMahon v. Davidson*, 12 Minn. 357; *Griggs v. Fleckenstein*, 14 Id. 81; *Peck v. Neil*, 3 McLean, 26.

rule in *Thorogood v. Bryan*, is fully set forth by Beasley, C. J., in the New Jersey case of *Bennett v. New Jersey Railroad, and Transportation Co.*,¹ and again by Mr. Justice Mulkey, in the very recent case of *Wabash, St. Louis & Pacific Railway Co. v. Shacklet*.² In the opinions in these two leading cases, the question in dispute is learnedly and exhaustively argued, and, in the judgment of the writer, so far as that may be supposed to have any value, the reasons assigned for the refusal to follow the English precedent are cogent and conclusive.

In the New Jersey case the Chief Justice says: "The reason given for the judgment [in *Thorogood v. Bryan*] is that the passenger in the omnibus 'must be considered as identified with the driver of the omnibus in which he voluntarily' becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is, that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could only result in one way, that is by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view it certainly does not exist. The passenger has no control over the driver, or agent in charge of the vehicle, and it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the pas-

¹ Reported in 36 N. J. Law, 225; 791, handed down in the Supreme Court of Illinois, at the January term, S. C. 13 Am. Rep. 435.

² 105 Ill. 364; S. C. 44 Am. Rep. 1883.

senger on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver, or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor, because if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. And yet it is to be presumed that no court would go this length and impose on each person being carried by a railroad train, responsibility for the misconduct of the engineer or conductor of such train. The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single purpose of preventing the passenger from bringing suit against a third party, whose negligence has co-operated with that of the driver in the production of the injury. I am compelled to dissent to such a proposition. Under the circumstances in question, the passenger is a perfectly innocent party, having no control over either of the wrong-doers, and I see no reason why, according to the usual rule, an action will not lie in his behalf against either or both of the employers of such wrong-doers."¹

The English doctrine has not found favor with the critics or text-writers;² it has been, as has appeared, gen-

¹ *Bennett v. New Jersey, &c., Transportation Co., supra.*

² *Shear. & Redf. on Neg., § 46; Whart. on Neg., § 395; Thomp. on Carriers, 284; 1 Smith's Leading Cases (Eighth Am. edition of 1885), 505, the note to Ashby v. White. See, also, an essay by Ernest How-*

ard Crosby, Esq., of the New York Bar, upon "The Imputed Contributory Negligence of Third Persons," Am. Law Rev., Nov., 1880, Vol. I, (N. S.) 770, to which I have frequently referred in the preparation of this section.

erally repudiated by our courts, and it is reasonably certain that *Thorogood v. Bryan* will not be followed in the future, in any State in the Union not already committed to that rule. Whether it will not ultimately be abandoned in Pennsylvania and the English Courts is at least a question.

§ 37. *Privity in negligence between a public carrier and a shipper of goods.*—The doctrine of privity in negligence between a common carrier and a shipper of goods stands upon quite a different ground from that upon which the rule in *Thorogood v. Bryan* has been made to rest. The contract for the carriage of goods differs in several very essential particulars from that for the carriage of passengers. In the one case the carrier, at common law, is an insurer, in the other he is not. As to the shipper, the carrier is an agent, and liable to the full extent involved in that relation; as to a passenger, the carrier is indeed an agent to a certain extent; but in a degree essentially different, and with powers and obligations materially modified and curtailed. The possession of the carrier is that of the merchant-shipper, he is the bailee and *quasi*, the agent of the shipper. Whatever he does in the course of the service and bailment, he does as the agent and representative of the owner of the goods, and, this being so, it follows that all the consequences of the negligence of the carrier ought to be visited upon the owner of the freight, to the extent of depriving him of a remedy over against a third party for losses to which the carrier by his wrongful or negligent act has contributed. The general rules as to contributory negligence as a defense are properly applied to the shipper in a case of this kind. It needs no argument to show that there is no analogy between these cases and those in which passengers in one conveyance have been held entitled to an

action against the owner of either, or both of the vehicles, from the negligent management of which, injury has been received. In those cases there is no bailment, and no agency. There is in them no absolute obligation on the part of the carrier, to deliver his passenger safely, and the carrier cannot maintain an action for an injury to the passenger, whose right of action, however, is, and ought to be, the same against both wrong-doers, and rests upon the same foundation of wrong-doing. If it is concurrent, although not in intentional concert, the injured passenger may recover of either. But the shipper, who has entrusted his goods to the common carrier, stands upon no such footing, and it is justly held that the negligence of the carrier shall be imputed to the shipper, when it has contributed to produce the injury for which the shipper brings his action against a third party. This rule is announced in *Vanderplank v. Miller*,¹ by Lord Tenterden, and it has been followed in this country, in *Kentucky*,² *Pennsylvania*,³ *New York*,⁴ *Arkansas*,⁵ and perhaps in *Massachusetts*.⁶

The weight of authority is, without question, in favor of imputing the negligence of a common carrier to a shipper, in actions of the character considered in this and the preceding sections, to the extent of barring an action by him against a third party, upon the grounds herein set forth; and on the other hand, there is a decided weight of precedent against imputing the negligence of the carrier to a passenger in like case. The shipper should, while

¹ 1 *Moody & M.* 169.

² *Broadwell v. Swigert*, 7 *B. Mon.* 39; *S. C.* 45 *Am. Dec.* 47.

³ *Simpson v. Hand*, 6 *Wash.* 311; *S. C.* 36 *Am. Dec.* 231.

⁴ *Arctic Fire Ins. Co. v. Austin*, 69 *N. Y.* 470; *S. C.* 25 *Am. Rep.* 221.

⁵ *Duggins v. Watson*, 15 *Ark.* 118; *S. C.* 60 *Am. Dec.* 560.

⁶ *Smith v. Smith*, 2 *Pick.* 621; *S. C.* 13 *Am. Dec.* 464. In this case the owner, suing for an injury to a horse received from a nuisance in the highway, while in possession, and being used by one who had hired him, was defeated of his action by reason of the negligence of the bailee in possession.

the passenger should not, be charged with his carrier's negligence. The shipper, having constituted the carrier his agent, should recover only when his agent has been free from fault, while the passenger, not having constituted the carrier his agent to the same extent, and not being chargeable with the consequences of his acts or defaults, should recover whenever he is himself free from the imputation of contributory neglect, without regard to the acts or omissions of the carrier. This is the rule, in respect of both shipper and passenger, as declared by the Courts of Appeal in New York,¹ and Kentucky,² and it is submitted as the proper solution of the question.

§ 38. *In the case of persons non sui juris.*—In actions brought by or in behalf of children, idiots, lunatics, or other persons *non sui juris*, for injuries to which the negligence of their legal custodians contributed, the question has arisen, whether or not, upon the theory of agency or identity, such contributory negligence on the part of the parent or guardian should be imputed to the plaintiff in bar of the action. Upon this question the courts have not been able to agree. It is held in many jurisdictions in this country, that such negligence is justly to be imputed to an infant plaintiff, while in others it is strenuously denied. Let us first consider the classes of persons to which the term *non sui juris* is applicable.

§ 39. *Who are to be held non sui juris.*—Idiots and lunatics are of this class, and, therefore, in general, have no redress when injured through the carelessness of their

¹ Compare the case of *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341, for the rule of non-imputability in the case of a passenger, and *The Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470, for the rule of imputability in case of a shipper.

² See *Danville, &c., Turnpike Co. v. Stewart*, 2 Metc. (Ky.), 119, for the rule as to passengers, and *Broadwell v. Swigert*, 7 B. Mon. 39, for the corresponding rule as to a shipper.

legal custodians in exposing them, or in suffering them to expose themselves to danger, or where they are liable to injury from being subjected to the same rules of conduct as rational persons.¹ Infants, also, it may be said, in general, belong to this class, but not all infants very evidently. It is a question of capacity, and it has been found a very difficult question, and has been, in many courts, a very fruitful source of controversy, as to what age is sufficient to constitute an infant *sui juris*. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid danger, the court will decide it as a matter of law. Thus, courts have held, as a matter of law, children of various ages from one year and five months to seven years *non sui juris*.²

“An infant,” says the Court of Appeals of New York, “in its first years is not *sui juris*. It belongs to another to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by law to its parents, or to those standing *in*

¹ Willetts *v.* Buffalo, &c., R. R., 14 Barb. 585.

² Kreig *v.* Wells, 1 E. D. Smith, 76; Toledo, &c., R. R. *v.* Grable, 88 Ill. 441; Callahan *v.* Bean, 9 Allen 401; Evansville, &c., R. R. *v.* Wolf, 59 Ind. 89; O'Flaherty *v.* Union, R. R. Co., 45 Mo. 70; Mangam *v.* Brooklyn, &c., R. R. Co., 38 N. Y. 455; Mascheck *v.* St. Louis, &c., R. R. Co., 3 Mo. App. 600; LaFayette, &c., R. R. Co. *v.* Huffman, 28 Ind. 287; Pittsburg, &c., R. R. Co. *v.* Caldwell, 74 Penn. St. 421; Jeffersonville &c., R. R. Co. *v.* Bowen, 40 Ind. 545; McGary *v.* Loomis, 63 N. Y. 104; s. c. 20 Am. Rep. 510; North Penn. R. R. Co., *v.* Mahoney, 57 Penn. St., 187; Lehman *v.* Brooklyn, 29 Barb. 234; McLain *v.* Van Zandt, 7 Jones and Spenc. 347; Gavin *v.* City of Chicago, 97 Ill. 66; Bay Shore R. R. Co. *v.* Harris, 67 Ala. 6; Morgan *v.* Bridge Co., 5 Dillon, 96; McGearly *v.*

East, &c., R. R. Co., 135 Mass. 363; Texas, &c., R. R. Co. *v.* O'Donnell, 58 Texas, 27; Frick *v.* St. Louis, &c., R. R. Co., 75 Mo. 542 and 595; Chicago, *v.* Starr's Admr. 42 Ill. 174; Meeks *v.* Southern, &c., R. R. Co., 52 Cal. 602; Pittsburg, &c., R. R. Co. *v.* Vining, 27 Ind. 513. But a child seven or eight years of age has been held capable of taking ordinary care of himself. Gillespie *v.* McGowen, 100 Penn. St. 144. So a child of eleven years when active and intelligent. McMahan *v.* New York, 33 N. Y., 642; and so one of thirteen and of fourteen years of age; Achtenhagen *v.* Watertown, 18 Wis. 331; Plumley *v.* Birge, 124 Mass. 57; s. c. 26 Am. Rep. 645; Rockford, &c., R. R. Co. *v.* Delaney, 82 Ill. 198; s. c. 25 Am. Rep. 308; Nagle *v.* Allegheny, &c., R. R. Co., 88 Penn. St. 35; s. c. 32 Am. Rep. 413.

loco parentis, and not having that discretion necessary for personal protection, the parent is held in law to exercise it for him, and in cases of personal injuries received from the negligence of others, the law imputes to the infant the negligence of the parents. The infant being *non sui juris*, and having a keeper in law, to whose discretion in the care of his person he is confided, his acts, as regards third persons, must be held in law the acts of the infant, his negligence the negligence of the infant."¹

§ 40. *The New York rule, Hartfield v. Roper.*— In New York it is sturdily maintained that the contributory negligence of a third person, who is guilty thereof as parent, custodian, or one *in loco parentis*, must be imputed to a plaintiff, who is *non sui juris*, and who is, therefore, in contemplation of law under the charge or control of such third person. The leading authority upon this question is the case of *Hartfield v. Roper*,² in which this question, as affecting an infant plaintiff, was first presented to the court. The facts disclosed by the evidence were these: The plaintiff, a child about two years old, was alone in the traveled portion of a highway at some distance from any house; the defendant was driving a sleigh; the child was run over by the horses and injured; neither the defendant nor those with him saw the child before the injury. The action was an action upon the case. The verdict was for the plaintiff. The opinion of the court was by Cowen, J., upon a motion for a new trial. A new trial was granted; first, because the evidence, which is fully reported, failed to show negligence on the part of the defendant, and, secondly, because it did show clearly, negligence on the part of the plaintiff.

¹ *Mangam v. Brooklyn, &c., R. R. Co.*, 38 N. Y. 455. 273; decided in the Supreme Court of judicature of New York in 1839.

² 21 Wend. 615; S. C. 34 Am. Dec.

The reasoning of the court upon the second branch of the decision is in substance as follows: The custody of a child is confided by law to its parents; it cannot be exposed, as this child was, without gross negligence. An adult injured by a collision cannot recover if he has contributed to the injury; the same rule is applicable to children; it can be enforced only by requiring care from those who have their custody. An infant is not *sui juris*. He belongs to his custodian; the custodian is his agent. The custodian's neglect is the infant's neglect.

"Was the plaintiff," said the learned judge, the first of common law magistrates in New York, "guilty of negligence! His counsel seem to think he made a complete exception to the general rule demanding care on his part by reason of his extreme infancy. Is this, indeed, so? The custody of such a child is confided by law to its parents, or to others standing in their place, and it is absurd to imagine that it could be exposed in the road, as this child was, without gross carelessness. . . . The child has the right to the road for the purposes of travel, attended by a proper escort. But at the tender age of two or three years, and even more, the infant cannot personally exercise that degree of discretion that becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in this country. It is perfectly well settled that if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect he is not entitled to an action, even though he be lawfully in the highway pursuing his travels, which can scarcely be said of a toppling infant suffered by his guardians to be there, either as a traveler or for the purpose of pursuing his sports. The application may be harsh when made to small children. As

they are known to have no personal discretion, common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule when they bring an action for redress—and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case have delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons his act must be deemed that of the infant, his neglect the infant's neglect. . . . If his proper agent and guardian has suffered him to incur mischief it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travelers, and then harass them in courts of justice, recovering heavy verdicts for his own misconduct."¹

This judgment, and the reasoning upon which it was based, have always satisfied the New York courts, and they have consistently adhered to this rule, abating no jot or tittle of its anomaly and harshness.² It is fol-

¹ Hartfield *v.* Roper, 21 Wend. 615.

² See Thurber *v.* Harlem, &c., R. R. Co., 60 N. Y. 333; Mangam *v.* Brooklyn, &c., R. R. Co., 36 Barb. 239; s. c. 38 N. Y. 456; Lehman *v.* City of Brooklyn, 29 Barb. 237; Mowrey *v.* Central, &c., R. R. Co., 66 Id. 43; McLain *v.* Van Zandt, 7 Jones and Spenc. 351; McGary *v.* Loomis, 63 N. Y. 104; s. c. 20 Am. Rep. 510; Morrison *v.* Erie Ry. Co., 56 N. Y. 302; Honegsberger *v.* Second Ave. R. R. Co., 1 Keys, 552; s. c. 33 How. Pr. 193; 2 Abb., App. Dec. 378; Burke *v.* Broadway, &c., R. R. Co., 49 Barb. 532; Kreig *v.* Wells, 1 E. D. Smith, 77; Ihl *v.* Forty-Second Street R. R. Co., 47 N. Y. 323; s. c. 7 Am. Rep. 450; Cosgrove *v.* Ogden, 49 N. Y.

255; s. c. 10 Am. Rep. 361. But, compare, Lannen *v.* Albany Gas Light Co., 46 Barb. 270, in which Justice Hogeboom says: "I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent when, if he were an adult, he would escape it." This is a much quoted but somewhat irrelevant *dictum*. The opinion from which it is taken was given in a case where the child was of such an age as to have, perhaps, some degree of discretion. In such cases, as will hereafter appear, the rule in Hartfield *v.* Roper is usually modified even in those jurisdictions where it is generally upheld.

lowed, moreover, by the courts of many other States, to the effect that, in the case of a young child, the negligence of a parent, or other person to whose care the child is entrusted, has the same effect in preventing the maintenance of an action for an injury occasioned by the negligence of another, that his own want of due care would have if the plaintiff were an adult.¹

§ 41. *The rule modified in various jurisdictions.*— It appears that the New York rule laid down in *Hartfield v. Roper*,² obtains in Massachusetts, Maine, California, Minnesota, Maryland, Indiana, Illinois, and Kansas. But in several instances the courts of these States, while adhering more or less consistently to the rule, have modified it in several very essential particulars. The harshness of it is recognized even in the courts that are governed by it, and there may be noticed in the reports of each of these States a tendency to confine the rule very

¹ *Wright v. Malden, &c.*, R. R. Co., 4 Allen, 283; *Lovett v. Salem, &c.*, R. R. Co., 9 Id. 557; *Callahan v. Bean*, 9 Id. 401; *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104 Id. 52; s. c. 6 Am. Rep. 188; *McGerry v. East, &c.*, R. R. Co., 135 Id. 363; *Brown v. European, &c.*, R. R. Co., 58 Maine, 384; *Leslie v. City of Lewiston*, 62 Id. 468. Compare *O'Brien v. McGlinchy*, 68 Id. 552; *Karr v. Parks*, 40 Cal. 188; *Schierhold v. North, &c.*, R. R. Co., 40 Id. 447; *Meeks v. Southern, &c.*, R. R. Co., 52 Id. 602; s. c. 56 Id. 513; 38 Am. Rep. 67; *City of St. Paul v. Kuby*, 8 Minn. 166; *Fitzgerald v. St. Paul, &c.*, R. R. Co., 29 Id. 336; s. c. 43 Am. Rep. 212; *McMahon v. Northern, &c.*, R. R. Co., 39 Md. 439; *Baltimore, &c.*, R. R. Co. v. *McDonnell*, 43 Id. 551; *Pittsburgh, &c.*, R. R. Co. v. *Vinings' Admr.*, 27 Ind. 513; *La Fayette, &c.*, R. R. Co. v. *Huffman*, 28 Id. 287; *Jeffersonville, &c.*, R. R. Co. v. *Bowen*, 40 Id. 545; s. c. 49 Id. 154; *Hathaway v. Toledo, &c.*, R. R. Co., 46 Id. 25; *Evansville, &c.*, R. R. Co., v. *Wolf*, 59 Id. 89; *Aurora, &c.*, R. R. Co. v. *Grimes*, 13 Ill. 585; *Chicago, &c.*, R. R. Co. v. *Major*, 18 Id. 349; *Id. v. Starr's Admr.*, 42 Id. 174; *Id. v. Gregory*, 58 Id. 226; *Hund v. Geier*, 72 Id. 393; *Chicago, &c.*, R. R. Co. v. *Becker*, 76 Id. 25; s. c. 84 Id. 482; *Ohio, &c.*, R. R. Co. v. *Stratton*, 78 Id. 88; *Chicago, &c.*, R. R. Co. v. *Hesing*, 83 Id. 204; *Toledo, &c.*, R. R. Co. v. *Gable*, 88 Id. 441; *Gavin v. City of Chicago*, 97 Id. 66. [In Illinois this question seems to be unsettled, with a decided tendency to apply the rule in *Hartfield v. Roper*, as modified by the local rule of comparative negligence.] *Smith v. Atchison, &c.*, R. R. Co., 25 Kan. 738; *Atchison, &c.*, R. R. Co., v. *Smith*, 28 Id. 541.

² 21 Wend. 615; s. c. 34 Am. Rep. 273.

strictly, and not in any wise to extend it. Thus, in Maryland, it has been held that, where the defendant might, by the exercise of ordinary care and prudence, have avoided the consequences of his negligence, a child *non sui juris* will not be prevented from recovering in consequence of its parents' neglect.¹ This is, perhaps, an attempt to apply the learning in *Davies v. Mann*,² since it amounts to very little more than the rule that if the defendant, being a traveler, can, by the exercise of ordinary care, avoid doing an injury to something exposed in the highway, he is bound at his peril to do it—without much reference to the conduct of the plaintiff. In another Maryland case,³ where the plaintiff, a child five years and nine months old, having been sent by its parents across a street, upon an errand, was injured by the defendant's cars, while returning to its home, and there was some evidence of negligence on the part of the persons in charge of the train, it was held a proper case for the jury, and the court instructed the jury that the plaintiff might recover if the injury resulted from a want of ordinary care on the part of the defendant's agents, provided it appeared that the plaintiff had acted with such a degree of care and caution as, under the circumstances, might reasonably be expected from one of his age and intelligence.⁴ The doctrine of comparative negligence, of course, modifies the rigor of the rule in Illinois.⁵

Even in New York, where the rule was first announced, it has been in some degree qualified in late

¹ *Baltimore, &c., R. R. Co. v. McDonnell*, 43 Md. 556.

² 10 Mee. & W. 546.

³ *McMahon v. Northern, &c., R. R. Co.*, 39 Md. 439.

⁴ See, also, *Barksdull v. New Orleans, &c., R. R. Co.*, 23 La. Ann. 180.

⁵ *Chicago, &c., R. R. Co. v. Major*, 18 Ill. 349; *Pittsburgh, &c., R. R. Co. v. Bumstead*, 48 Ill. 221; *Kerr v. Fergie*, 54 Ill. 482; S. C. 5 Am. Rep. 146; *Chicago, &c., R. R. Co. v. Gregory*, 58 Id. 226; *Hund v. Geier*, 72 Id. 393; *Chicago, &c., R. R. Co. v. Hesing*, 83 Id. 204.

decisions. In *McGary v. Loomis*,¹ it was held that a child four years old, being upon the sidewalk and in the exercise of due care, might recover for an injury received by falling into a pool of hot water formed near the sidewalk by the escape of water from a waste pipe from the works of the defendant,² and, again, in *Ihl v. Forty-Second St. R. R. Co.*,³ where a child about three years of age was run down and fatally injured by the negligent management of a street railroad car, it was held that, if the child exercised proper care, the company was liable without reference to the negligence of the parents of the child in allowing it to go across the street. But it was said that, if the child did not exercise due care the conduct of its parents would then be essential to determine the liability of the company.

Where a child, even though never so much *non sui juris*, has not committed, or omitted any act which would be held to constitute negligence in an adult, the contributory negligence of its parent or guardian must not be imputed to it, in an action in its behalf, for an injury from the negligence of another. When the child has, of itself, acted with discretion, and is, notwithstanding that, injured by another's fault, it is hardly short of monstrous to impute its parents' or custodian's negligence or folly to it for the purpose of defeating its action for the injury it has suffered.⁴

"I know of no just or legal principle," says Mr. Jus-

¹ 63 N. Y. 104; S. C. 20 Am. Rep. 510.

² Upon a precisely similar state of facts in the case of *Prime v. Kentucky Furniture Co.* it was decided, in Nov., 1884, in the Court of Common Pleas at Louisville, by Mr. Justice Stites, that the defendant was not liable for such hot water suffered to escape into a gutter, and that there

was in consequence no cause of action in favor of a scalded child.

³ 47 N. Y. 317; S. C. 7 Am. Rep. 450.

⁴ *Munn v. Reed*, 4 Allen, 431; *Lynch v. Smith*, 104 Mass. 52; S. C. 6 Am. Rep. 188; *O'Brien v. McGlinchy*, 68 Me. 552; *Pittsburgh, &c., R. R. Co. v. Bumstead*, 48 Ill. 221.

tice Hogeboom, "which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when if he were an adult he would escape it. This would be, I think, 'visiting the sins of the fathers upon the children' to an extent not contemplated in the Decalogue, or in the more imperfect digests of human law."¹

It is believed that the rule of *Hartfield v. Roper* has not been construed in any court, either to excuse gross negligence or to permit a voluntary injury to one *non sui juris*. It is a general rule, quite apart from this matter of the imputability of a parents' negligence to an injured child, that a higher degree of care must be exercised toward persons of this class than the law exacts in dealing with other classes of persons.² Conduct which might ordinarily be up to the standard of "due care" is sometimes held "gross negligence," or as evidence of a purpose to do a wilful injury, when considered with reference to these irresponsible classes.³ Children, by reason of their tender age, are entitled to more care under the same circumstance than an adult. The policy of the law requires that peculiar tenderness should be exercised in extending to them civil protection. This view is clearly recognized on the criminal side of the law. So far from the neglect, or dereliction, of parents or guardians being

¹ *Lannen v. Gas Co.*, 46 Barb. 264; affirmed 44 N. Y. 459.

² *Phila., &c., R. R. v. Spearen*, 47 Penn. St. 300; *Smith v. O'Conner*, 48 Id. 218; *Penn. R. R. v. Morgan*, 82 Id. 134; *Isabel v. Hannibal R. R.*, 60 Mo. 475; *Chicago, &c., R. R. v. Dewey*, 26 Ill. 259; *Bannon v. Baltimore R. R.*, 24 Md. 108; *Walters v. Chicago, &c., R. R. Co.*, 41 Iowa, 76; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *Singleton v. Eastern Counties, Ry Co.*, 7 C. B. (N. S.)

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³ *Robinson v. Cone*, 22 Vt. 213;

S. C. 54 Am. Dec. 67; *Pittsburgh, &c., R. R. Co. v. Caldwell*, 74 Penn. St. 421; *Lucas v. Taunton, &c., R. R. Co.*, 6 Gray, 71; *Kerr v. Forgee*, 54 Ill. 484; S. C. 5 Am. Rep. 146; *Brennan v. Fair Haven, &c., R. R. Co.*, 45 Conn. 284; *Walters v. Chicago, &c., R. R. Co.*, 41 Iowa, 76; *East Saginaw, &c., R. R. Co. v. Bohn*, 27 Mich. 503; *Kenyon v. New York, &c., R. R. Co.*, 5 Hun. 479; *Texas, &c., R. R. Co. v. O'Donnell*, 58 Texas, 27; *Galveston, &c., R. R. Co. v. Evansich*, 61 Id. 3; S. C. 61 Id. 24.

a reason why a child should be misused with impunity by third persons, it has been held that such wrong-doing causing injury to children is an offense of an aggravated nature.¹

In actions for injuries to irresponsible persons there must be, in every case, where the action can be sustained, a breach of duty. It is not enough that somebody's child is hurt. There must be some dereliction on the part of the defendant, or it is, in case of the child, as in the case of any one else, *damnum absque injuria*. This important element in every proper action of this nature seems frequently to be overlooked. Judge Thompson calls attention to a curious instance of it in the case of *Lygo v. Newbold*.² Alderson, B., says, in that opinion: "The negligence in truth is attributable to the parent who permits the child to be at large. It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury." In such a supposed case as this *dictum* suggests, we should have the thoughtless act of a child bringing himself in contact with a person performing his business in a lawful manner, and, although the child were too young to perceive the difference between danger and safety, still, there being no breach of duty on the part of the owner of the vehicle, the action as supposed would clearly be entirely without foundation.³ In *North Penn. R. R. v. Mahon*

¹ Wharton's Crim. Law, § 2529, *R. v. Friend*, R. & R. 20; *R. v. Squire*, 1 Russ. C. & M. 80, 678; *R. v. Bubb*, 4 Cox's C. C. 455; *R. v. Smith*, L. & C. 607; s. c. 10 Cox's C. C. 82.

² 9 Exch. 302.

³ See, also, *Phila., &c., R. R. Co. v. Spearen*, 47 Penn. St. 300; *Bulger v. Albany, &c., R. R. Co.*, 42 N. Y.

459; *Hubener v. New Orleans, &c., R. R. Co.*, 23 La. Ann. 492; *Chicago, &c., R. R. Co. v. Stumps*, 69 Ill. 409; *Phila., &c., R. R. Co. v. Hummel*, 44 Penn. St. 375; *Ostertag v. Pacific, &c., R. R. Co.*, 64 Mo. 421; *Snyder v. Hannibal, &c., R. R. Co.*, 60 Id. 413; *Boland v. Missouri, &c., R. R. Co.*, 36 Id. 484; *Brown v. European, &c., R.*

ey,¹ where an infant was in the arms of one to whom it had not been entrusted, and who, having rescued it from one peril, immediately exposed it to another, it was held that the child was not barred of its action, there being no proper legal connection between the infant plaintiff and its self-constituted custodian.² The English rule is declared in *Waite v. Northeastern Ry. Co.*³ In this case it appears that the plaintiff, an infant about five years of age, was in charge of its grandmother, who procured tickets for both at a station, with the intention of taking the train at that place. In crossing the track to reach a platform they were run down by a train, under circumstances of concurrent negligence on the part of the grandmother and of the servants of the company. The grandmother was killed, and the plaintiff seriously injured. Lord Campbell held that the plaintiff was so identified with its grandmother that the action could not be maintained. This view was sustained on the appeal. "The case is the same as if the child had been in the mother's arms." "The person who has charge of the child is identified with the child." "If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident which by the exercise of reasonable care he might have avoided, it would be strange to say that though he himself could not maintain an action, the child could," say the judges in the Court of Exchequer Chamber to which this case was appealed.

There seems to be no other English case in point, and no decisions similar to those in the American reports that follow more or less exactly the New York case of Hart-

R. Co., 58 Me. 384; *Meeks v. Southern, &c., R. R. Co.*, 52 Cal. 602; S. C. 56 Id. 513.

¹ 57 Penn. St. 187.

² Compare *Pittsburgh R. R. v. Caldwell*, 74 Penn. St. 421; *Bellefon-*

taine, &c., R. R. Co. v. Snyder, 18 Ohio St. 399; S. C. 24 Id. 670; *East Saginaw, &c., R. R. Co. v. Bohn*, 27 Mich. 503. *Contra*, *Leslie v. Lewiston*, 62 Me. 468.

³ El., Bl. & El. 719.

field *v. Roper*.¹ *Waite v. Northeastern Ry. Co.*² turns upon the legal identity of the infant plaintiff with his guardian or custodian, and it does not go beyond that class of cases in which the parent or custodian is present and controlling the infant at the time of the injury. Many American cases recognize it to be material, in actions of this kind, when the negligence of the parent is to be imputed to the infant, that the parent be present when the injury is suffered. *Holly v. Boston Gaslight Co.*³ is in point. In this case a child nine years of age was injured by escaping gas, in her father's house, the father failing to take proper precautions against injury after the leak was discovered. The court held that the plaintiff, being under the control of her parent, would have to bear the consequences of any want of ordinary care on his part. "She was under the care of her father," says the court, "who had the custody of her person, and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was her's to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself."⁴

This is the doctrine of the English case,⁵ which, reduced to a rule, is, that whenever the child is in the actual

¹ But see, *Singleton v. Eastern Counties Ry. Co.*, 7 C. B. (N. S.) 287; *Mangan v. Atterton*, 4 Hurl. & Colt, 388; s. c. L. R. 1 Exch. 239; *Gardner v. Grace*, 1 Fost. & Fin. 359; *Hughes v. Macfie*, 2 Hurl. & Colt, 744; s. c. 10 Jur. (N. S.), 682; 33 L. J. (Exch.), 177; *Campbell's Negligence*, § 81.

² *Supra*.

³ 8 Gray, 123.

⁴ *Holly v. Boston Gaslight Co.*, *supra*.

⁵ *Waite v. Northeastern Ry. Co.*, El., Bl. & El. 719.

custody and control of the parent or guardian, any negligence contributing to the injury, of which such custodian may have been guilty, must be imputed to the child, in an action by, or for the benefit of the child, for damages suffered by reason of the negligence of another.¹

§ 42. *A criticism of Hartfield v. Roper.*—The rule of imputed negligence, as applied to persons *non sui juris*, is an anomaly. The English law on this point presents an extraordinary illustration. On the one hand it is held that the negligence of a person having charge of a child is the negligence of the child, and imputable to it, when the child comes into a court of justice and asks damages for an injury negligently inflicted upon it by the defendant.² But, *per contra*, where a donkey is carelessly run down in the highway, where he is negligently exposed, the defendant is held liable,³ and though oysters are negligently placed in a river-bed, it is an injury redressible at law in damages for a vessel negligently to disturb them.⁴ It appears, therefore, that the child, were he an ass or an oyster,⁵ would secure a protection which is denied him as a human being of tender years, in such jurisdictions as enforce the English or the New York rule in this respect.⁶ But the objection to the rule which imputes a parent's or guardian's negligence to an infant plaintiff, goes far beyond the matter of consistency or inconsistency. The case of *Hartfield v. Roper* is obnoxious to far more serious criticism than that it seems to afford less protection

¹ *Stillson v. Hannibal, &c.*, R. R. Co., 67 Mo. 671; *Lannen v. The Albany Gas Co.*, 46 Barb. 264; S. C. 44 N. Y. 459; *Ohio, &c., R. R. Co. v. Stratton*, 78 Ill. 88; *Carter v. Towne*, 98 Mass. 567; S. C. 103 Mass. 507; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302.

² *Waite v. Northeastern Ry. Co.*, El., Bl. & El., 719.

³ *Davies v. Mann*, 10 Mee. & W. 546.

⁴ *Mayor of Colchester v. Brooke*, 7 Q. B. 377; *Vennall v. Garner*, 1 Crompt. & M. 21.

⁵ In England, even a dog, when a trespasser, has some rights. *Townsend v. Wathen*, 9 East, 277.

⁶ *Wharton on Neg.*, § 312; *Thompson on Neg.*, 1184, § 34 *et seq.*

in courts of justice to our infant children than to dogs, and oysters and asses. With respect to the reasoning of Mr. Justice Cowen in that case, it may be said, (*a.*) that whether the distinction made between slight negligence, and gross negligence, and voluntary injury has any foundation in principle is, to say the least, doubtful.¹ A person, generally, in exercising his own rights, must take due care not to interfere with the rights of others. What is due care depends, in any given instance, upon the particular circumstances of the case. If a person does not use due care, that is, the care requisite under the circumstances, he then is guilty of negligence in the legal signification of the word. Whether his conduct be called simply negligence, or be alluded to with tenderness as slight negligence, or be spoken of vituperatively as gross negligence, his liability is the same. Neither is there generally a distinction, except perhaps in the form of action, between the negligent and the wilful infliction of an injury.

(*b.*) A second objection to the defense in question may be drawn from its novelty. That an action is of first impression is regarded as a weighty argument against it, but that a defense has been for the first time taken in a class of actions where, if valid, there must have been many previous opportunities for setting it up, is considered a very weighty, and all but conclusive objection to its validity.²

(*c.*) A third objection lies to the false assumption as to the legal status of an infant. It is not true that an infant is not *sui juris*. In the sense of being entitled to maintain an action for his own benefit he is *sui juris*. As far as his right of action is concerned he is in no re-

¹ *Grill v. General, &c., Collier Co.*, 28 Vt. 185; *Steamboat New World v. L. R.* 1 C. P. 600; *Briggs v. Taylor*, King, 16 How. (U. S.) 474.

² Co. Litt. 81 b., 379 b.

spect the chattel of his father. At common law he was required to sue by guardian. By Stats. Westm., I. c., 48, and Westm., II. c., 15, he was authorized to sue by *prochein ami*. But in theory of law both guardian and *prochein ami* are appointed by the court. They are at all times subject to the control of the court, and are its officers. To protect the interests of the minor is the common law duty of the court. The judgment, if any is recovered, is the property of the minor; it is recovered to his sole use. It is an entirely false assumption, in *Hartfield v. Roper*, that the parent or guardian may recover "heavy verdicts for their own misconduct." Again, it is assumed in that opinion, that an infant, injured by the joint negligence of his parent and a third person, can have legal redress against his parent. "It is much more fit," says the court, "that he should look for redress to that guardian." If this be so, if the right of the infant be so distinct from the duty of the parent, that the relation of parent and child is not an objection to the maintenance of such a suit, then the whole theory upon which this class of cases rests falls to the ground.

(*d.*) Again it is falsely assumed that the parent is the agent of the child. "Agency is founded upon a contract either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his own account, and by which the other assumes to do the business and to render an account of it."¹ The relation of child and parent is not the relation of principal and agent, neither is it analogous to it. The child does not appoint his father; he has no control over his acts; he cannot remove him from power, or appoint another in his stead; he has no right of action against him; every element of agency is

¹ 2 Kent's Com. 612.

wanting. The want of any one of these elements is sufficient to prevent the acts or omissions of the parent from being viewed as the acts or omissions of the child upon any analogy to be drawn from the law of agency. By the common law, a child cannot appoint an agent. The authority by which the parent exercises control over the child is, therefore, an authority derived from the law. It is a principle of law, laid down before "the spacious days of great Elizabeth," that the abuse of an authority derived from the law shall not work harm to, or prejudice the rights of the person subjected to it.¹ The parents authority is given for the protection of the child, but the principle of *Hartfield v. Roper* turns the shield into a sword, and uses it to deprive the child of the very protection arising from the parental relation.

(e.) Again the negligence which will bar the plaintiff's recovery must be negligence which contributes to the injury. But the negligence of a parent in suffering his child to be exposed to danger, is not negligence which can be said in any legal sense to contribute to the injury. Even if such negligence be therefore imputed to the infant plaintiff it cannot bar his recovery.²

The doctrine of *Hartfield v. Roper*, not being based upon authority, must be judged by the reasoning by which it can be supported. The reasoning is founded upon false assumptions that there are varying degrees of negligence, and corresponding degrees of liability; that the judgment recovered, belongs not to the child but to the parent; that there is no duty upon the court to protect the child; that the parent is the child's agent; that the child has an ade-

¹ *The Six Carpenters' Case*, 8 Rep. 546; *Tuff v. Warman*, 2 C. B. (N. S.) 739; S. C. 5 Id. 573; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Townsend v. Wathen*, 9 East, 277.

² *Davies v. Mann*, 10 Mee. & W.

quate remedy against his parent, and that such negligence is contributory negligence.¹

§ 43. *The rule in Hartfield v. Roper, denied.*—The rule which imputes the negligence of parents and custodians to persons *non sui juris*, is denied in many of the States of the Union. A leading case, repudiating the rule of *Hartfield v. Roper*, is *Robinson v. Cone*, decided by the Supreme Court of Vermont, in 1850.² In this case, the plaintiff, a boy less than four years of age, attending a school in the country, as he returned home from school, amused himself by sliding down hill on his sled, and, while engaging in his sport, as he lay on his breast upon the sled, with his legs hanging over the sled, was run down by the two-horse sleigh of the defendant who drove down the hill upon a smart trot. Plaintiff's injuries were serious. The court denied the doctrine of imputed negligence, and held that, although a child of tender years may be in the highway through the fault or negligence of his parents, and so be improperly there, yet, if he be injured through the negligence of the defendant, he is not precluded from his redress; all that is required of an infant plaintiff in such a case, being that he exercise care and prudence equal to his capacity.

The Supreme Court of Pennsylvania has shown no toleration of the doctrine of imputed negligence in these cases. In an action on behalf of a child four years of age, says that court: "To a child of plaintiff's years no contributory negligence can be imputed, she is not precluded from recovery against one tort feisor, by showing that others have borne a share in it."³ And this rule

¹ In the preparation of this section I have drawn freely from a very trenchant article, entitled "Contributory negligence on the part of an infant," in the "American Law Review," for April, 1870 (Vol. IV. page 405), pub-

lished anonymously, but evidently from the pen of a Massachusetts lawyer.

² 22 Vt. 213; S. C. 54 Am. Dec. 67.

³ North Penn. R. R. Co. v. Ma-

which prevents the imputation of a parent's or custodian's negligence or folly, to an infant, in an action brought by it or in its behalf, is maintained in several other States.¹

While on the one hand, in the States of New York, Massachusetts, Maine, California, Minnesota, Maryland, Indiana, Illinois, and Kansas,² the negligence or misconduct of a parent or custodian is imputed to an infant plaintiff, who brings an action for damages he has sustained by reason of another's negligence, the better rule, that in such an action, by or in behalf of an infant, the negligence of parent or guardian is not to be so imputed, prevails in Pennsylvania, Virginia, Vermont, Alabama, Tennessee, Ohio, Connecticut, Missouri, Nebraska, and Texas.

§ 44. *When the action is for the parent's benefit.*—When an action for the negligent injury of an infant is brought by the parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action. This is only one phase of the general rule of contributory negligence to the effect that the plaintiff's own negligence is a defense to his action. Its application to cases of this kind

honey, 57 Penn. St. 187; s. c. 6 Phila. 242. Compare Pennsylvania R. R. Co. v. Kelly, 31 Penn. St. 372; Rauch v. Lloyd, 31 Id. 358; Phila., &c., R. R. Co. v. Spearen, 47 Id. 300; Smith v. O'Connor, 48 Id. 218; Glassey v. Hestonville, &c., R. R. Co., 57 Id. 172; Kay v. Penn. R. R. Co., 65 Id. 269; s. c. 3 Am. Rep. 628; Phila. &c., R. R. Co. v. Long, 75 Id. 257; Whar-ton on Neg., § 310, note.

¹ Government St. R. R. Co. v. Hanlon, 53 Ala. 70; Bellefontaine, &c., R. R. Co. v. Snyder, 18 Ohio St. 399; Cleveland, &c., R. R. Co. v. Manson, 30 Ohio St. 451; Norfolk, &c., R. R. Co. v. Ormsby, 27 Gratt.

455; Birge v. Gardner, 19 Conn. 507; Daley v. Norwich, &c., R. R. Co., 26 Id. 591; Bronson v. Southbury, 37 Id. 199; Boland v. Missouri, &c., R. R. Co., 36 Mo. 484; Stillson v. Hannibal, &c., R. R. Co., 67 Id. 671; Frick v. St. Louis, &c., R. R. Co., 75 Id. 542; s. c. 75 Id. 595; Huff v. Ames, 16 Neb. 139; s. c. 49 Am. Rep. 716; Whirley v. Whiteman, 1 Head, 610; Galveston, &c., R. R. Co. v. Moore, 59 Texas. 64; s. c. 46 Am. Rep. 265; Texas, &c., R. R. Co. v. O'Donnell, 58 Id. 27; Houston, &c., R. R. Co. v. Simpson, 60 Id. 103; Railroad Co. v. Herbeck, 60 Id. 612.

² § 40, *supra*.

is well illustrated in the case of the Bellefontaine, &c., R. R. Co. *v.* Snyder.¹ In the earlier action, brought in the name of the child, for injuries received by it through the negligence of the employees of the railway company, the contributory negligence of the parent, or of the person to whom the parent had temporarily entrusted the child, was held no bar to the action; while in the second suit, brought by the parent in his own name, and for his own benefit, it was held that the action would not lie. The negligence of his agent to whom he had entrusted the child having contributed to cause the injury, and such negligence being, in contemplation of law, the parent's negligence, was held to bar the action. A great number of authorities can be cited in support of this rule.²

And so, in actions of this kind, by a parent, will the child's contributory negligence defeat the claim, because when a plaintiff derives his course of action from an injury done to a third person, such plaintiff is justly chargeable with the contributory negligence of the third person.³ "The father can recover only under the same circumstances of prudence as would be required if the action were on behalf of the boy."⁴ This rule is applicable to

¹ 18 Ohio St. 399; s. c. 24 Id. 670.

² *Smith v. Hestonville, &c., R. R. Co.*, 92 Penn. St. 450; s. c. 37 Am. Rep. 705; *Penn. R. R. Co. v. Bock*, 93 Id. 427; *Id. v. James*, 81 Id. 194; *Phila., &c., R. R. Co. v. Long*, 75 Id. 257; *Pittsburgh, &c., R. R. Co. v. Pearson*, 72 Id. 169; *Kay v. Penn. R. R. Co.*, 65 Id. 269; s. c. 3 Am. Rep. 628; *Glassey v. Hestonville, &c., R. R. Co.*, 57 Id. 172; *Penn. R. R. Co. v. Zebe*, 33 Id. 318; s. c. 37 Id. 420; *Williams v. Texas, &c., R. R. Co.*, 60 Texas, 205; *Isabel v. Hannibal, &c., R. R. Co.*, 60 Mo. 475; *Koons v. St. Louis, &c., R. R. Co.*, 65 Id. 592; *O'Flaherty v. Union, &c., R. R. Co.*, 45 Id. 70; *Daley v. Norwich, &c., R. R. Co.*, 26 Conn. 591; *Birmingham v. Dorer*, 3 Brews. 69; *Walters v. Chicago, &c., R. R.*

Co., 41 Iowa, 71; *Albertson v. Keokuk, &c., R. R. Co.*, 48 Iowa, 492; *Wright v. Malden, &c., R. R. Co.*, 4 Allen, 283; *Pittsburgh, &c., R. R. Co. v. Vinings' Admr.*, 27 Ind. 573; *Chicago v. Major*, 18 Ill. 349; *Louisville, &c., Canal Co. v. Murphy*, 9 Bush. 522.

³ *Chicago, &c., R. R. Co. v. Harney*, 28 Ind. 28; *Gilligan v. New York, &c., R. R. Co.*, 1 E. D. Smith, 453; *Kennard v. Burton*, 25 Me. 39; s. c. 43 Am. Dec. 249; *Burke v. Broadway, &c., R. R. Co.*, 34 How. Pr. 239; s. c. 49 Barb. 529; *Fitzgerald v. St. Pool, &c., R. R. Co.*, 29 Minn. 336; s. c. 43 Am. Rep. 212.

⁴ *Burke v. Broadway, &c., R. R. Co.*, *supra*.

actions under Lord Campbell's act,¹ and the statutes in this country which authorize actions for personal injuries resulting in death. It is accordingly held in suits brought under statutes of this kind, that any contributory negligence which might have barred a recovery by the deceased, had he survived, in an action brought by him for his injuries, is a defense in the action for the benefit of the next of kin.²

§ 45. *The rule modified by reason of the plaintiff's poverty or destitution.*—In courts which repudiate the harsh rule in *Hartfield v. Roper*, an infant plaintiff, as we have seen, is not prejudiced in his action by an imputation to him of his parent's neglect. In some States we find it held, as a refinement even upon this rule, that it may be a matter to go to the jury, in case the parent is poor, and destitute of means for safely restraining his child, whether or not proper, or ordinary, care was displayed; the question being, whether the parent has exercised reasonable care of his child, the jury may take account of his lack of means in determining it.³

Mr. Justice Sharswood says, in *Pittsburgh, &c., R. R. Co. v. Pearson*:⁴ "The only question raised by these assignments of error which it is deemed necessary to

¹ 9 and 10 Vict. Chap. 93.

² *Thorogood v. Bryan*, 8 C. B. 115; *Tucker v. Chaplin*, 2 Car. & Kir. 730; *Witherley v. Regent's Canal Co.*, 12 C. B. (N. S.) 2; s. c. 6 L. T. (N. S.) 255; 3 Fost. & Fin. 61; *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Wilds v. Hudson River R. R. Co.*, 24 Id. 430; s. c. 29 N. Y. 315; 33 Barb. 503; *Lehman v. Brooklyn*, 29 Barb. 234; *Chicago v. Major*, 18 Ill. 349; *Chicago v. Starr's Admr.*, 42 Id. 174; *Boland v. Missouri, &c., R. R. Co.*, 36 Mo. 484; *Ewen v. Chicago, &c., R. R. Co.*, 38 Wis. 613. This defense is also valid in those States where the statute contains no pro-

vision applying to the negligence of the deceased. *Lofton v. Vogles*, 17 Ind. 105 [2 Stat. of Indiana (1876) 44, § 27]; *Penn. R. R. Co. v. Lewis*, 79 Penn. St. 33 [Laws of Penn. (1855) c. 323]; *Rowland v. Cannon*, 35 Ga. 105 [Code of Georgia (1873) § 2971]. See, also, *Walters v. Chicago, &c., R. R. Co.*, 41 Iowa, 71 [Laws of Iowa (1860) § 411.]

³ *Isabel v. Hannibal, &c., R. R. Co.*, 60 Mo. 475, 483; *Walters v. Chicago, &c., R. R. Co.*, 41 Iowa, 71; *Pittsburgh, &c., R. R. Co. v. Pearson*, 72 Penn. St. 169; *Phila., &c., R. R. Co. v. Long*, 75 Id. 257.

⁴ *Supra*.

discuss, is whether, under the evidence, the plaintiffs below—the parents of the child who was run over and killed by the railroad car of the defendants—were guilty of culpable negligence in permitting him to run abroad in the street without a competent protector. It was undoubtedly, settled very properly in *Glassey v. Hestonville Passenger Railway Co.*, 7 P. F. Smith, 172, that, if the parents permit a child of tender years to run at large without a protector in a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom. If the case is barely such, the negligence is a conclusion of law, and ought not to be submitted to the determination of the jury. But in this case there was evidence that the child was not permitted to run at large without a protector, and it was a question for the jury whether the accident was to be attributed to the negligence of the parents. These parents were careful parents. A board at the door prevented the child from leaving the house of his own accord. When abroad he was in charge of an older sister, between twelve and thirteen years of age. It so happened, however, that the board was removed temporarily for the purpose of scrubbing the floor. The child watched his opportunity and escaped. He was immediately missed, and his brother at once sent after him. He returned and said that he was playing in the alley with Lizzie Orr, a little girl of the neighborhood, between seven and eight years of age, who was in the habit of playing with him. The parents were satisfied that he was safe with her. In the caprice of childhood the little boy ran away from her down the alley to Rebecca street, where the railway was, ran across the track, and in the course of a very few minutes was run over. Now, whether Lizzie Orr was a competent pro-

tor, whether the parents ought to have been satisfied when informed that he was with her, were questions for the jury. Children of that age—more especially girls—are often sufficiently prudent and thoughtful to be intrusted with the care of young children. Persons in the condition of life of these parents cannot afford to employ servants to look after their children. Their necessary domestic duties prevent them from being constantly on the watch themselves. We agree that ‘to say it is negligence to permit a child to go out and play without it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of these blessings to the poor.’ *O’Flaherty v. Union R. R. Co.*, 45 Mo. 70. Mr. Justice Agnew has made a similar observation in *Kay v. The Pennsylvania R. R. Co.*, 15 P. F. Smith (65 Penn. St.), 277: ‘Here, a mother toiling for daily bread, and having done the best she could in the midst of her necessary employment, loses sight of her child for an instant, and it strays upon the track. With no means to provide a servant for her child, why should the necessities of her position in life attach to the child and cover it with blame?’ That, indeed, was an action by the child in which the negligence of the parent would, perhaps, be no defense, but we may ask with equal propriety why should the necessities of the parents’ position cover them with blame if they have done all in their circumstances they could do?”

Again, in *Phila., &c., R. R. Co. v. Long*,¹ the case of a child of humble parents run over in the street, the court, Agnew, J., says: “In that part of the charge recited in the fourth assignment the judge said, ‘that the

¹ 75 Penn. St. 257.

fact that the child is found in the street affords a strong presumption of negligence on the part of the plaintiffs. You will, therefore, consider whether the mother took reasonable care of the child ; if she did not, it was negligence.' To suffer a child to wander on the street has the sense of permit. If such permission or sufferance exist, it is negligence. This is the assertion of a principle. But whether the mother did suffer the child so to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be reasonable care, dependent upon the circumstances. This is a fact for the jury. If she did not exercise this care, she was negligent. What more than this care can be demanded of her? When a railroad runs through a populous city, has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds, otherwise it is negligence? Is it negligence for the poor who congregate these crowded streets unless, even in the summer's heat, they live shut up in the noisome vapors of their closed tenements without a breath of healthy air? Is this the life they must lead, or be adjudged to be negligent? This mother gave her child a piece of bread to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil cloth on the floor, and before her labor was finished, and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say that this was negligence *per se*, and that she *suffered* her child to wander into the street? What sort of justice is that which tells the mother agonizing

over her dying child: '*Your* negligence caused this. *You* suffered your child to run into the jaws of death. We cannot perceive any fault in the railroad company. A speed of eight miles an hour along this populous thoroughfare was all right.' We can endorse no such cruel doctrine, but we must say, as was said in *Kay v. Railroad Co.*,¹ the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil."

This argument satisfies at once the sense of justice and the instincts of humanity. Unless the rights of the poor are to be carelessly sacrificed to the rapacity of the rich, account must be taken in such actions as these, of the pecuniary condition of the plaintiff, in determining whether or not due care has been exercised. Most of the families living in the large cities are poor, and unable to employ assistance in taking care of their children. Often both parents' labor is required away from home, to procure the food necessary for the family. Children are crowded together in the ill-ventilated rooms of tenement houses. A child cannot live if constantly confined in that manner. The children of the poor can have no place of resort but the streets. If one of these children is injured in its helplessness, it by no means follows that either the child or its parents have neglected any duty. If it is injured by accident, all that can be done is to pity those whose poverty exposes them to such accidents; but, if it is injured by the negligence of others, not only ought it to have the same measure of justice to which every one is entitled who brings an action in court, but also when its parents are needy, that circumstance ought to be duly considered by the court in reaching a conclusion upon

¹ 65 Penn. St. 276.

the question of negligence. Poverty, in these cases, ought to be, however, only a shield, and never a sword. The destitution of the parent is not a license to the child to act recklessly. But is there any principle of law by which in this class of actions children are excepted out of the rule applicable to all other plaintiffs, and on account of their own weakness, and their parents poverty, are made to bear an additional burden? Is there any principle upon which it can be held that they must establish not only their own due care, but the due care of another person over whom they have no control, measured by a standard beyond that other person's power to attain?

§ 46. *Ordinary care in a child.*—An infant plaintiff, who, on the one hand, is not so young as to escape entirely all legal accountability, and on the other hand, is not so mature as to be held to the responsibility of an adult, is, of course, in cases involving the question of negligence, to be held responsible for ordinary care, and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child.¹ In *Lynch v. Smith*² the court says: "If the jury find that the plaintiff was of such capacity that he was in the street without negligence, either on the part of himself or his parents, then the question arises, what degree of care he was bound to exercise. In *Mulligan v. Curtis*, 100 Mass. 512, it was held to be a question for the jury, whether a boy three and a half years old might not without negligence be trusted to go across the street, accompanied by his brother nine years old. Certainly the jury could not find that a boy nine years old must exercise the capacity of an adult. But it was im-

¹ *Lynch v. Nurdin*, 1 Q. B. 29; 66 Penn. St. 345; *Robinson v. Cone*, Railroad Company v. Stout, 17 Wall. 22 Vt. 213; S. C. 54 Am. Dec. 67. 657; S. C. 2 Dill. 294; *Gray v. Scott*,
² 104 Mass. 52; S. C. 6 Am. Rep. 188.

plied that, if it was proper for him to be there, it was only necessary for him to exercise such capacity as he had. School children who are properly sent to school unattended, must use such reasonable care as school children can. It must be reasonable care, adapted to the circumstances or, in other words, the ordinary care of school children. . . . If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury."

In *Munn v. Reed*,¹ where the infant had been bitten while playing with a dog, it was held that if the child had been attacked by the dog while using such care as is usual with children of its age, the action might be maintained. The decisions enforcing this rule that children are to be held responsible only for such a degree of care as may reasonably be expected of them, taking due account of their age and the particular circumstances of each case, are very numerous.²

§ 47. *Children as trespassers*.—*Lynch v. Nurdin*,³ is the leading English case upon this subject. The circumstances of the case were these : Negligence on the part of the defendant's servant, tempting the plaintiff to mischief ; a technical trespass by the infant, a child, capable of only a small measure of care for its own safety ; con-

¹ 4 Allen, 431.

² *Hicks v. Pacific, &c.*, R. R. Co., 64 Mo. 430; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Kay v. Penn., &c.*, R. R. Co. 65 Penn. St. 269; S. C. 3 Am. Rep. 628; *Manly v. Wilmington, &c.*, R. R. Co., 74 N. C. 655; *Mobile, &c.*, R. R. Co. *v. Crenshaw*, 65 Ala. 566; *Barry v. N. Y., &c.*, R. R. Co., 92 N. Y. 289; s. C. 44 Am.

Rep. 377; *Byrne v. N. Y., &c.*, R. R. Co., 83 N. Y. 620; *Houston, &c.*, R. R. Co. *v. Simpson*, 60 Texas, 103; *Galveston, &c.*, R. R. Co. *v. Moore*, 59 Id. 64; s. C. 46 Am. Rep. 265; *Plumley v. Birge*, 124 Mass. 57; S. C. 26 Am. Rep. 645; *Meibus v. Dodge*, 38 Wis. 300; s. C. 20 Id. 6.

³ 1 Q. B. 29.

duct by the plaintiff which in an adult would have been negligence *per se*. The facts were these: Defendant's cart being in charge of his cartman was driven into a street where a number of children were playing; the cartman left the horse and cart standing unattended before the door of a house which he had entered; the plaintiff, a child under seven years of age, climbed upon the wheel of the cart; another boy led the horse a step or two forward, the plaintiff fell off and was run over by the wheel, and his leg was broken. The defendant was held liable, although the plaintiff was a trespasser, and contributed to the mischief by his own act.

The question of the negligence of the lad's parents, in suffering him to be at large in the street unattended, was not raised, and this case is therefore no authority upon this point, though it is often cited as though it were. *Waite v. Northeastern Ry. Co.*¹ should not be regarded as questioning it, for the two cases have nothing in common; but whether or not *Hughes v. Macfie*,² and *Mangan v. Atterton*,³ are not to be regarded as shaking its authority is a much more difficult question. The opinion of Pollock, C. B., in the former case, if not expressly repudiating, is wholly inconsistent with it. In that case two children seven and five years of age respectively, playing about and jumping on the covering of a bulkhead which had been left tilted up against a wall upon a highway, were injured by its falling upon them. The court says: "We think the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose. Had he been an adult, it is clear he could have maintained no action. He would voluntarily have meddled, for no lawful purpose, with that, which if left alone

¹ El., Bl. & El 719.

² 2 Hurl. & Colt, 744.

³ L. R. 1 Exch. 239.

would not have hurt him. He would, therefore, at all events, have contributed by his own negligence to his damage. As far as the child's act is concerned, he had no more right to touch this flap, for the purpose for which he did touch it, than he would have had if it had been inside the defendant's premises." ¹ In *Mangan v. Atterton* ² the defendant exposed for sale, unfenced and unattended, a machine which might be set in motion by any passer-by, and which when in motion was dangerous. The plaintiff, a boy of four years old, by the direction of his brother, a boy of seven, put his fingers into the cogs of the machine, while another boy was turning the handle, whereby his hand was crushed. The defendant was held not liable, on the ground that he was guilty of no negligence in exposing his machine, and because the plaintiff's own act had brought the injury upon himself. The judge, in rendering the opinion, which was probably right, assigned a reason which was certainly wrong. "The defendant," says the court, "is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor." ³

Nothing worse than this, as a specimen of judicial reasoning, can be found in the reports. These three comparatively recent cases seem to leave unsettled in England the question whether a child of tender years, exercising all the care that can be expected of him, but yet yielding to a temptation in his play to commit a technical

¹ *Hughes v. Macfie*, 2 Hurl. & Colt, 744.

² L. R. 1 Exch. 239.

³ *Mangan v. Atterton*, *supra*.

trespass, may recover of a defendant for an injury caused by his negligently exposing that which a child's natural instinct may bring him in contact with to his hurt.¹

In this country the rule in *Lynch v. Nurdin* has been very generally followed, both in the Federal and many State courts. The leading case in the United States reports is *Railroad Co. v. Stout*,² which went up from Mr. Justice Dillon's Circuit.³ This is the turn-table case. It holds a railroad company liable for an injury to an infant caused by a turn-table, left unguarded and unlocked, in a place likely to attract children, even though upon the company's own ground.⁴

In the case of *Birge v. Gardner*⁵ the facts are essentially the same as in the English case of *Hughes v. Macfie*,⁶ but the Connecticut court sustains the authority of *Lynch v. Nurdin* and reaches a conclusion exactly contrary to that of its English counterpart.⁷ But where a pile of lumber fell upon a child, in a lumber yard, from some unknown cause, the defendants, who had given orders to their watchman to exclude all children from the yard, were held not liable.⁸

Under different circumstances, however, the owners of lumber piled upon and near the sidewalk of a public street

¹ *Clark v. Chambers*, 3 Q. B. Div. 327. In this case a contrary doctrine to the later English cases is laid down. It goes even farther than *Lynch v. Nurdin*.

² 17 Wall. 657.

³ 2 Dillon, 294.

⁴ Compare *Kerr v. Fergie*, 54 Ill. 482; s. c. 5 Am. Rep. 146; *Chicago v. Starr's Admr.*, 42 Ill. 174; *Keffe v. Milwaukee, &c.*, R. R. Co., 21 Minn. 207; s. c. 18 Am. Rep. 393; *Nagel v. Missouri, &c.*, R. R. Co., 75 Mo. 653; s. c. 42 Am. Rep. 418; *Evansich v. Gulf, &c.*, R. R. Co., 57 Texas, 126; s. c. 44 Am. Rep. 586; *Kansas, &c.*, R. R. Co. *v. Fitzsimmons*, 22 Kan.

686; s. c. 31 Am. Rep. 203; *Koons v. St. Louis, &c.*, R. R. Co., 65 Mo. 592; *St. Louis, &c.*, R. R. Co. *v. Bell*, 81 Ill. 76; s. c. 25 Am. Rep. 269; *Birge v. Gardner*, 19 Conn. 507; s. c. 50 Am. Dec. 261. And see a full discussion of "the turn-table cases" in the following chapter, § 70, *infra*.

⁵ *Supra*.

⁶ 2 Hurl. & Colt, 744.

⁷ *Whirley v. Whiteman*, 1 Head, 610; *Mullaney v. Spence*, 15 Abb. Pr. (N. S.), 319. Compare *Meibus v. Dodge*, 38 Wis. 300; *Hydraulic Works v. Orr*, 83 Penn. St. 332.

⁸ *Vanderbeck v. Hendry*, 34 N. J. Law, 467.

may be liable for damages to children from it, though it was piled contrary to their order.¹ The Massachusetts court seems to follow the rule in *Mangan v. Atterton*² and *Hughes v. Macfie*.³ It is the only court in this country that has not affirmed *Lynch v. Nurdin*.⁴ *Lane v. Atlantic Works*⁵ was the case of an infant, seven years old, injured while playing about a truck, standing in front of a foundry, loaded with a heavy casting, which, when the truck was shaken or moved, rolled off and injured the plaintiff. The defendant, owner of the foundry, was held not liable upon essentially the grounds assumed in the English cases.⁶

The position of the Supreme Judicial Court of Massachusetts, upon the general question of contributory negligence, as well as upon that branch of it affecting infant plaintiffs, is not a satisfactory one. It has taken extreme ground upon almost every point.⁷

¹ *Cosgrove v. Ogden*, 49 N. Y. 255. See, also, as germane to this subject, *McAlpin v. Powell*, 55 How. Prac. 163; S. C. 70 N. Y. 126.

² *Supra*.

³ *Supra*.

⁴ *Lane v. Atlantic Works*, 109 Mass. 104; S. C. 111 Id. 136.

⁵ *Supra*.

⁶ See, also, *Lyons v. Brookline*, 119 Mass. 491; *Wood v. School District*, 44 Iowa, 27; *Boland v. Missouri R. R.*, 36 Mo. 484. In this last case, *Wagner, J.*, says: "If, therefore, any one using dangerous instruments, running machinery, or employing vehicles which are peculiarly hazardous, knows that infants, idiots, or others who are bereft of, or have but imperfect discretion, are in close or immediate proximity, he will be compelled to the exercise of a degree of caution, skill and diligence which would not be required in cases of other persons." And see, *Gillespie v. McGowen*, 100 Penn. St. 144.

⁷ "The law gives equal protection to all, and requires, in turn, that each, according to his capacity, shall protect himself. A different requirement would place the weak at the mercy of the strong, against whom they have a right to ask for protection. It is plain that, in the case of a foot passenger who is injured in the street by being run over, through the negligence of another, the negligence of the plaintiff is not to be measured, except by his capacity. Any other rule would deprive half mankind of the protection of the law. Infants, lunatics and persons weak in body or mind are all civilly responsible for the injury they inflict upon others. When they become active doers of injury, it may be, that to protect the community, they are held responsible for that prudent foresight which might be expected from a strong and intelligent adult, and that no allowance is to be made for their want of strength, of skill, or of understanding. But where they are the

§ 48. *What acts and omissions on the part of parents have been held contributory negligence.*—If parents permit a child of tender years to run at large, without a protector, in the streets of a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom ;¹ but it is not negligence *per se* in a mother to allow a boy twelve years of age to go from one car to another of a train, upon which they are traveling, in search of a seat,² nor to permit children to play upon an unfrequented street in the absence of any circumstance to render it dangerous ;³ nor to allow small children to go to and fro from school without attendance ;⁴ nor to send children of errands in the street under ordinary circum-

victims of wrong, there is no rule of law which makes the afflicted of Providence outlaws in court. An old person is not required to avoid danger with the activity of youth, or a woman to ward off peril with the strength of a man. Sometimes blind men walk the streets. Their necessities compel them to do so. They have a legal right in the highway, but from their infirmity they are more exposed to accidents than other men are. For accidental injuries there is no redress. If a blind man is run over by a vehicle, the fact that the driver was ignorant of the man's infirmity is to be considered in determining the question of the driver's negligence. Yet, when that negligence is established, it is very unreasonable to say that the fact that impaired vision might perhaps have enabled the blind man to escape the peril is an answer to the action. If the law does not require, under such circumstances, sight from the blind nor strength from the weak, neither should it under the same circumstances require from a child more forethought than it pos-

sesses. It should not require, as the Massachusetts cases do require, that the child of a foolish man should have a prudent father." IV. Am. Law Rev. 405, April, 1870, an essay which arraigns the Massachusetts courts upon this point almost savagely.

¹ *Glassey v. Hestonville Passenger R. R.*, 57 Penn. St. 172.

² *Downs v. N. Y., &c., R. R. Co.*, 47 N. Y. 83.

³ *Karr v. Parks*, 40 Cal. 188 ; *Mangam v. Brooklyn, &c., R. R. Co.*, 38 N. Y. 455 ; *Jetter v. New York, &c., R. R. Co.*, 2 Keyes. 154 ; *O'Flaherty v. Union R. R. Co.*, 45 Mo. 70 ; *McGary v. Loomis*, 63 N. Y. 104 ; S. C. 20 Am. Rep. 510 ; *Cosgrove v. Ogden*, 49 Id. 255 ; *Oldfield v. Harlem, &c., R. R. Co.*, 14 N. Y. 310 ; *Schierhold v. North Beach, &c., R. R. Co.*, 40 Cal. 447.

⁴ *Drew v. Sixth Ave. R. R. Co.*, 26 N. Y. 49 ; *Lynch v. Smith*, 104 Mass. 53 ; S. C. 6 Am. Rep. 188 ; *Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317 ; S. C. 7 Am. Rep. 450.

stances.¹ But to allow a child to engage in a dangerous occupation is negligence.²

¹ East Saginaw City R. R. Co. v. Bohn, 27 Mich. 503; Bellefontaine, &c., R. R. Co. v. Snyder, 18 Ohio St. 399; McMahon v. Northern, &c., R. R. Co., 39 Md. 438; Mulligan v. Curtis, 100 Mass. 512.

² Smith v. Hestonville, &c., R. R. Co., 92 Penn. St. 450. See, also, Conley v. Pittsburgh, &c., R. R. Co., 95 Penn. St. 398; s. c. 98 Id. 498; Gavin v. City of Chicago, 97 Ill. 66; Morgan v. Bridge Co., 5 Dillon, 96; Penn. R. Co. v. Bock, 93 Penn. St. 427. Parents are not obliged to restrain their children within doors at their peril. Mangam v. Brooklyn, &c., R. R. Co., 38 N. Y. 455; Mullaney v. Spence, 15 Abb. Pr. (N. S.), 319; McGary v. Loomis, 63 N. Y. 104; s. c. 20 Am. Rep. 510; Cosgrove v. Ogden, 49 N. Y. 255; Fallon v. Central Park, 64 Id. 13; Lovett v. Salem, &c., R. R. Co., 9 Allen, 557; Barksdull v. New Orleans, &c., R. R. Co., 23 La. Ann. 180; Munn v. Reed, 4 Allen, 431.

CHAPTER V.

THE RULE AS AFFECTING RAILWAY CORPORATIONS.

§ 49. Contributory negligence as a defense to actions brought against railway companies.

(A.) *As to Passengers.*

50. Duty of a public carrier to passengers.
51. The reciprocal duty of the passenger.
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(B.) *As to Strangers.*

- § 62. Duty of a public carrier to persons lawfully upon its premises but who are neither passengers nor employees.
63. Duty of the public at railway crossings.
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65. When the view at the crossing is obstructed.
66. Plaintiff deaf or intoxicated.
67. Trespassers on a railway track—the Pennsylvania rule.
68. The modified rule as to trespassers.
69. Children as trespassers on railroad property.
70. The turn-table cases.
71. Walking upon railway tracks.
72. Various other acts of trespass upon railway property.
73. Injuries to domestic animals trespassing on railway tracks.
74. Duty of a railway company to maintain fences.
75. Negligent communication of fire.

§ 49. *Contributory negligence as a defense to actions brought against railway companies.*—In this chapter it is proposed to consider contributory negligence as a defense in actions brought against railway companies (a) by passengers and (b) by strangers. The term passengers will include not only regular passengers for hire, but free passengers, intended passengers, and those classes of persons transported which may be known as *quasi* passengers; and by the term strangers is meant all persons who bring actions against railway companies who are not, on the one hand, passengers, or on the

other, employees. The law of contributory negligence, from one point of view, is scarcely more than a branch of the law of railways. A very large proportion of the cases in which the plea of contributory negligence is made in defense are actions against these corporations. In addition to the two classes of plaintiffs in such actions, already referred to, we find employees of the railroads bringing a great number of suits in which this defense is urged—and within these three classes passengers, strangers, and employees, may be included all the actions, a consideration of which as concerning railways, is pertinent to this treatise. In the chapter upon master and servant,¹ is found a full discussion of the law affecting actions by railway employees. It therefore remains, herein, to treat of contributory negligence as a defence in actions by plaintiffs of the two former classes—and, first, of passengers.

(A.) AS TO PASSENGERS.

§ 50. *Duty of a public carrier to passengers.*—A carrier of passengers, unlike a carrier of goods at common law, is not an insurer. He is not held to warrant absolutely the safety of his passengers.² But while the passenger assumes all the ordinary risks incident to the carriage,³ it is the settled rule, both here and in England, that the carrier must exercise the highest possible degree of care, diligence, vigilance and skill both in the selection, construction and repair of his vehicles, and in the conduct and management of them, in every particular,

¹ Chap. VII, *infra*, q. v.

² *Peters v. Rylands*, 20 Penn. St. 497; s. C. 59 Am. Dec. 746; *Ingalls v. Bills*, 9 Metc. 1; s. C. 43 Am. Dec. 346, and the note; *Galena, &c., R. R. Co. v. Fay*, 16 Ill. 558; s. C. 63 Am. Dec. 323; *Carroll v. Staten Island R. Co.*, 58 N. Y. 138; s. C. 17 Am.

Rep. 228; 2 *Redfield on Railways* (5th ed.), 216; *Angell on Carriers*, § 570; *Story on Bailments*, § 601; *Thompson on Carriers*, 200.

³ *Galena, &c., R. R. Co. v. Fay*, *supra*; *Chicago, &c., R. R. Co. v. Hazard*, 26 Ill. 381.

with a view to the safety of his passengers and their baggage. For the slightest negligence or carelessness in these respects the carrier is liable.¹ This measure of carefulness must be exercised alike toward all classes of passengers. It is a duty to be discharged not only toward regular passengers for hire, but also as to free passengers,² intended passengers,³ and that class which may be known as *quasi* passengers.⁴

¹ Ford *v.* London, &c., Ry. Co., 2 Fost. & Fin. 730; Readhead *v.* Midland Ry. Co., L. R. 2 Q. B. 412; s. c. L. R. 4 Q. B. 379; Stokes *v.* Saltonstall, 13 Peters, 181; Philadelphia R. R. Co. *v.* Derby, 14 How. (U. S.) 468; Pennsylvania R. R. Co. *v.* Ray, 102 U. S. 451; Baltimore, &c., R. R. Co. *v.* Wightman, 29 Gratt. 431; s. c. 26 Am. Rep. 384; Farish *v.* Reigle, 11 Gratt. 697; s. c. 62 Am. Dec. 666; Taylor *v.* Grand Trunk Ry. Co., 48 N. H. 304; s. c. 2 Am. Rep. 229; Laing *v.* Colder, 8 Penn. St. 479; s. c. 49 Am. Dec. 533; McElroy *v.* Nashua, &c., R. R. Co., 4 Cush. 400; Union Pacific R. R. Co. *v.* Hand, 7 Kan. 380; Simmons *v.* New Bedford, &c., R. R. Co., 97 Mass. 368; Keokuk Packet Co. *v.* True, 88 Ill. 608; Philadelphia, &c., R. R. Co. *v.* Boyer, 97 Penn. St. 91; Lemon *v.* Chanslor, 68 Mo. 340; s. c. 30 Am. Rep. 799, and the citations generally, *supra*.

² Philadelphia, &c., R. R. Co. *v.* Derby, 14 How. (U. S.) 468; Indianapolis, &c., R. R. Co. *v.* Horst, 93 U. S. 291; Steamboat New World *v.* King, 16 How. (U. S.) 469; Jacobus *v.* St. Paul, &c., R. R. Co., 20 Minn. 125; s. c. 18 Am. Rep. 360; Brennan *v.* Fairhaven, &c., R. R. Co., 45 Conn. 284; s. c. 29 Am. Rep. 679; Waterbury *v.* New York, &c., R. R. Co., 21 Blatchf. 314; Todd *v.* Old Colony, &c., R. R. Co., 3 Allen, 18; Lemon *v.* Chanslor, 68 Mo. 340; s. c. 30 Am. Rep. 799. Compare Kinney *v.* Central R. R. Co., 34 N. J. Law, 513; s. c. 3 Am. Rep. 265; Austin *v.* Great Western, &c., Ry. Co., L. R. 2 Q.

B. 442; Angell on Carriers, § 528. [But the rule is otherwise in the case of baggage carried gratuitously, Flint, &c., R. R. Co. *v.* Wier, 37 Mich. 111; s. c. 26 Am. Rep. 499.]

³ Shephard *v.* Midland Ry. Co., 20 W. R. 705; Longmore *v.* Great Western Ry. Co., 19 C. B. (N. S.) 183; s. c. 115 Eng. Com. L. 183; Burgess *v.* Great Western Ry. Co., 6 C. B. (N. S.) 923; s. c. 95 Eng. Com. L. 923; Carpenter *v.* Boston, &c., R. R. Co., 97 N. Y. 494; s. c. 49 Am. Rep. 540; Weston *v.* Elevated Ry. Co., 73 Id. 595; McDonald *v.* Chicago, &c., R. R. Co., 26 Iowa 124, by Dillon, C. J.; Caswell *v.* Boston, &c., R. R. Co., 98 Mass. 194; Snow *v.* Fitchburg R. R. Co., 136 Id. 552; s. c. 49 Am. Rep. 40. [Compare Wheelwright *v.* Boston, &c., R. R. Co., 135 Mass. 225.]

⁴ *E. g.* Employees of express companies riding on railway trains in the line of their duty. Kentucky Central R. R. Co. *v.* Thomas, 79 Ky. 160; s. c. 42 Am. Rep. 208; Blair *v.* Erie Ry. Co., 66 N. Y. 313; s. c. 23 Am. Rep. 55; Yeomans *v.* Contra Costa, &c., Co., 44 Cal. 71. [Mail agents riding in postal cars. See, also, Rev. Stat. of U. S., §§ 3997-4005.] Seybolt *v.* New York, &c., R. R. Co., 95 N. Y. 562; s. c. 47 Am. Rep. 75; Hammond *v.* Northeastern R. R. Co., 6 S. C. 130; s. c. 24 Am. Rep. 467. Compare, for a contrary view, Pennsylvania R. R. Co. *v.* Price, 96 Penn. St. 256. [Persons traveling on "drovers' passes."] Lockwood *v.* New York, &c., R. R. Co., 17 Wall. 357; s. c. 10 Am. Rep. 366; Martin *v.* Baltimore, &c., R. R. Co., 14 West

§ 51. *The reciprocal duty of the passenger.*—This duty on the part of the carrier is qualified by the reciprocal duty which is imposed upon the passenger. While the carrier must exercise extraordinary, or great care and diligence in taking care of his passenger, the passenger must, on his part, exercise ordinary care and prudence in taking care of himself.¹ If the passenger's failure to exercise ordinary care causes or contributes to the injury, such a failure is, upon familiar grounds, a bar to his action against the carrier. In the succeeding sections the contributory negligence of a passenger, as affecting his right to recover damages from a railway company by whose negligence he has suffered, is considered in detail. The duty of a passenger in his dealings with a public carrier to exercise ordinary care, as, under all circumstances, and in dealing with every other person, there is imposed upon all men a duty to exercise ordinary care, being assumed, we may take up in order various acts and omissions on the part of a passenger held to be negligent, to the extent of preventing a recovery when an action is brought by a passenger against a railway company, for personal injuries sustained through the company's negligent default.

§ 52. *Boarding moving trains.*—It is not contributory negligence, as matter of law, to attempt to get on to a moving railway train.² The circumstances may be such

Va. 180; s. c. 35 Am. Rep. 748; Little Rock, &c., R. R. Co. v. Miles, 40 Ark. 298; s. c. 48 Am. Rep. 10; Ohio, &c., R. R. Co. v. Selby, 47 Ind. 471; s. c. 17 Am. Rep. 719; Penn. R. R. Co. v. Henderson, 51 Penn. St. 315. *Contra*, Poucher v. New York, &c., R. R. Co., 49 N. Y. 263; s. c. 10 Am. Rep. 364. Gallin v. London, &c., Ry. Co., L. R. 10 Q. B. 212. See, also, Commonwealth v. Vermont, &c., R. R. Co., 108 Mass. 7; s. c. 11 Am.

Rep. 301, and McCorkle v. Chicago, &c., R. R. Co., 61 Iowa, 555.

For a consideration of the question how far a common carrier of passengers may limit his common law liability by contract, see section 59, *infra*.

¹ Thompson on Carriers, 257; Jeffersonville, &c., R. R. Co. v. Hendricks, 26 Ind. 228; Price v. St. Louis, &c., R. R. Co., 72 Mo. 414.

² Johnson v. West Chester, &c., R.

as to render it entirely safe and prudent, and whether or not there was contributory negligence in the attempt is generally a question for the jury upon a view of all the facts.¹ In a majority of instances, however, where the character of such an act has been an issue, it has been held contributory negligence.² And in Massachusetts it is held, as matter of law, that such an attempt is *prima facie* contributory negligence.³ The weight of authority is to the effect that while an attempt to board a moving train of cars is not *per se* negligent, it is, nevertheless, presumptively negligent, and in a majority of cases actually negligent to the extent of preventing a recovery from the railway company. In *Texas, &c., R. R. Co. v. Murphy*,⁴ a charge by the lower court that an attempt to board a train moving rapidly would be negligent, while such an attempt, if the train were moving slowly, would not be negligent, was held error on appeal.

§ 53. *Alighting from moving trains.*—As in the case of boarding a railway train in motion, so it is held not contributory negligence *per se*, for a passenger to jump off a train which is moving.⁵ Whether or not a railway company shall be held liable in damages for injuries sustained by a passenger in attempting to leave one of its trains while in motion, will depend upon whether under

R. Co., 70 Penn. St. 357; *Swigert v. Hannibal, &c., R. R. Co.*, 75 Mo. 475; *Stoner v. Pennsylvania Co.*, 98 Ind. 384; S. C. 49 Am. Rep. 764; *Texas, &c., R. R. Co., v. Murphy*, 46 Texas, 356; S. C. 26 Am. Rep. 272.

¹ *Jamison v. San Jose, &c., R. R. Co.*, 55 Cal. 593; *Johnson v. West Chester, &c., R. R. Co.*, *supra*; *Illinois, &c., R. R. Co. v. Abel*, 59 Ill. 131.

² *Phillips v. Rennselaer, &c., R. R. Co.*, 49 N. Y. 177; *Knight v. Pont-*

chartrain R. R. Co., 23 La. Ann. 462; *Harper v. Erie Ry. Co.*, 32 N. J. Law, 88; *Chicago, &c., R. R. Co. v. Scates* 90 Ill. 586; *Vicksburg, &c., R. R. Co. v. Hart*, 61 Miss. 468.

³ *Harvey v. Eastern, &c., R. R. Co.*, 116 Mass. 269.

⁴ *Supra*.

⁵ *Galveston, &c., R. R. Co. v. Smith*, 59 Texas, 406; *Loyd v. Hannibal, &c., R. R. Co.*, 53 Mo. 509; *Penn. R. R. Co. v. Kilgore*, 32 Penn. St. 292; *Brooks v. Boston, &c., R. R. Co.*, 135 Mass. 21.

all the circumstances, it was prudent for him to make the attempt.¹ In many cases such an act has been held sufficient to prevent a recovery. "Locomotives are not the only things that may go off too fast; and railroad accidents are not always produced by the misconduct of agents. A large proportion of them is caused by the recklessness of passengers," said Black, C. J., in a leading case,² in which it is held that a passenger who jumps from a running train to avoid being carried beyond his destination cannot recover for injuries thereby suffered. This is the doctrine of many other cases.³

But where the passenger, acting under the advice or directions of the company's employees, jumps from a train in motion the case is different. When he jumps, in spite of the remonstrances and protests of the train-men,⁴ it is negligence of an aggravated nature which, as of course, will prevent a recovery. When, however, the passenger, under the encouragement or instruction of the company's servants, makes the leap, and suffers an injury therefrom, such an act on the part of the passenger is not

¹ *Price v. St. Louis, &c., R. R. Co.*, 72 Mo. 414; *Doss v. Missouri, &c., R. R. Co.*, 59 Mo. 27; S. C. 21 Am. Rep. 371; *Kelly v. Hannibal, &c., R. R. Co.*, 70 Mo. 604; *Karle v. Kansas, &c., R. R. Co.*, 55 Id. 476.

² *Pennsylvania R. R. Co. v. Aspell*, 23 Penn. St. 147; S. C. 62 Am. Dec. 323.

³ *Damont v. New Orleans, &c., R. R. Co.*, 9 La. Ann. 441; S. C. 61 Am. Dec. 214; *Jewell v. Chicago, &c., R. R. Co.*, 54 Wis. 610; S. C. 41 Am. Rep. 63; *Richmond, &c., R. R. Co. v. Morris*, 31 Gratt. 200; *Cumberland, &c., R. R. Co. v. Mangans*, 61 Md. 53; *Central, &c., R. R. Co. v. Letcher*, 69 Ala. 106; S. C. 44 Am. Rep. 505; *South, &c., R. R. Co. v. Singleton*, 66 Ga. 252; S. C. 67 Id. 306; *Jeffersonville, &c., R. R. Co. v. Hendricks*, 26 Ind. 228; *Lucas v.*

New Bedford, &c., R. R. Co., 6 Gray, 64; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302; *Burrows v. Id.*, 63 Id. 556; *Dougherty v. Chicago, &c., R. R. Co.*, 86 Ill. 467; *Lambeth v. North, &c., R. R. Co.*, 66 N. C. 494; *Lake Shore, &c., R. R. Co. v. Bangs*, 47 Mich. 470; *Mitchell v. Chicago, &c., R. R. Co.*, 51 Mich. 236; S. C. 47 Am. Rep. 566; *Houston, &c., R. R. Co. v. Leslie*, 57 Texas, 83. Compare *Illinois, &c., R. R. Co. v. Green*, 81 Ill. 19; S. C. 25 Am. Rep. 255; and *Commonwealth v. Boston, &c., R. R. Co.*, 129 Mass. 500; S. C. 37 Am. Rep. 382.

⁴ *Pennsylvania R. R. Co. v. Aspell*, 23 Penn. St. 147; S. C. 62 Am. Dec. 323; *Jewell v. Chicago, &c., R. R. Co.*, 54 Wis. 610; S. C. 41 Am. Rep. 63.

generally held contributory negligence.¹ But when the passenger leaves the train voluntarily, even though at the suggestion of the conductor or other train-men, while the train is in motion, it is a question for the jury whether he acted as a prudent man under the circumstances.²

It is not, as has already been shown,³ an act of negligence on the part of a passenger to leap from a train in motion under apprehension of impending peril, and with a reasonable belief that by so doing he is to escape injury.⁴

§ 54. *Standing or riding on platforms.*—It is not negligent *per se* for a passenger to ride upon the platform of a railway car;⁵ nor is it negligence to stand upon the platform of cars in motion when there are no vacant seats inside the car;⁶ but, as a general rule, voluntarily and unnecessarily to stand or ride upon the

¹ Central, &c., R. R. Co. v. Smith, 69 Ga., 268; St. Louis, &c., R. R. Co. v. Cantrell, 37 Ark. 519; S. C. 40 Am. Rep. 105; Filer v. New York, &c., R. R. Co., 49 N. Y. 47; S. C. 10 Am. Rep. 327; Lambeth v. North, &c., R. R. Co., 66 N. C. 499; S. C. 8 Am. Rep. 508; Georgia, &c., R. R. Co. v. McCurdy, 45 Ga. 288; S. C. 12 Am. Rep. 577. Compare Delamatyr v. Milwaukee, &c., R. R. Co., 24 Wis. 578.

² Chicago, &c., R. R. Co. v. Randolph, 53 Ill. 510; S. C. 5 Am. Rep. 60; Cincinnati, &c., R. R. Co. v. Peters, 80 Ind. 168; Pennsylvania Co. v. Dean, 92 Id. 459; Benton v. Chicago, &c., R. R. Co., 55 Iowa, 496; Southwestern, &c., R. R. Co. v. Singleton, 66 Ga. 252; S. C. 67 Id. 306. See, also, Galena, &c., R. R. Co. v. Fay, 16 Ill. 558; S. C. 63 Am. Dec. 323; Houston, &c., R. R. Co. v. Gorbett, 49 Texas, 573; Atchison, &c., R. R. Co. v. Flinn, 24 Kan. 627; [a case of children who had boarded a train without money to pay their

fare, and who, being *quasi* trespassers, were ordered to leave the train by the conductor, and did so while the train was in motion, which action on their part, in view of their being on board without right, was held contributory negligence, in an action against the railway for damages sustained by them in leaving the train]. Compare Higley v. Gilmer, 3 Montana, 90; S. C. 35 Am. Rep. 450.

³ § 14, *supra*.

⁴ Wilson v. Northern Pacific R. R. Co., 26 Minn. 278; S. C. 37 Am. Rep. 410; Buel v. New York, &c., R. R. Co., 31 N. Y. 314; Iron Railway Co. v. Mowery, 36 Ohio St. 418; S. C. 38 Am. Rep. 597; Frink v. Potter, 17 Ill. 406; Eastman v. Sanborn, 3 Allen, 596; Stokes v. Soltonstall, 13 Peters, 181; Jones v. Boyce, 1 Stark. 493; Ingalls v. Bills, 9 Metc. 1; S. C. 43 Am. Dec. 346.

⁵ Zemp v. Wilmington, &c., R. R. Co., 9 Rich. (Law), 84.

⁶ Willis v. Long Island R. R. Co., 34 N. Y. 670.

platform is such negligence as will prevent a recovery for injuries received while there.¹ If there is even standing room within the car it is negligent to occupy the platform. This is the rule in Pennsylvania² and in Illinois,³ and it is commended by Dr. Wharton;⁴ but in New York one may safely stand on the platform if there are no seats inside the car unoccupied.⁵ And so when one passes on the platform from car to car on a train in motion, with the sanction of the conductor, on a proper errand, it is not an act of contributory negligence.⁶

§ 55. *Riding in baggage cars, on locomotives, or in other unauthorized positions or places.*—It is contributory negligence on the part of a passenger to ride in a baggage car, contrary to the rules of the company. The contract of carriage must be understood to be a contract to carry the passengers in a passenger car and the baggage in the baggage car. The passenger car is the place the company provides for the passenger. It is his duty to occupy that car, and to keep out of the other cars of the train. A failure to do this is negligence.⁷ It is sometimes said that riding in a baggage car is such negligence as will prevent a recovery from

¹ Camden, &c., R. R. Co. v. Hoosey, 99 Penn. St. 492; S. C. 44 Am. Rep. 120; Hickey v. Boston, &c., R. R. Co., 14 Allen, 429; McAunich v. Mississippi, &c., R. R. Co., 20 Iowa, 338; Higgins v. Harlem, &c., R. R. Co., 2 Bosw. (N. Y.), 131; Quinn v. Illinois, &c., R. R. Co., 51 Ill. 495; Buel v. New York, &c., R. R. Co., 31 N. Y. 314; Alabama, &c., R. R. Co. v. Hawk, 72 Ala. 112; Cannon v. Railway, 6 Ir. L. R. 199.

² Camden, &c., R. R. Co. v. Hoosey, *supra*.

³ Quinn v. Illinois, &c., R. R. Co., *supra*.

⁴ Wharton on Neg., § 367.

⁵ Willis v. Long Island R. R. Co., *supra*.

⁶ McIntyre v. New York, &c., R. R. Co., 43 Barb. 532; affirmed, 37 N. Y. 287; Louisville, &c., R. R. Co. v. Kelly, 92 Ind. 371; S. C. 47 Am. Rep. 149. Compare Galena, &c., R. R. Co. v. Yarwood, 15 Ill. 468; Id. v. Fay, 16 Id. 558; S. C. 63 Am. Dec. 323.

⁷ Pennsylvania R. R. Co. v. Langdon, 92 Penn. St. 21; S. C. 37 Am. Rep. 651; Kentucky Central R. R. Co. v. Thomas, 79 Ky. 160; S. C. 42 Am. Rep. 208; Houston, &c., R. R. Co. v. Clemmons, 55 Texas, 88; S. C. 40 Am. Rep. 799.

the railway company only when it appears that the passenger would have escaped injury had he been in the passenger car. In such a rule as this the theory is that when being in the baggage car is a proximate cause of the injury, it will prevent a recovery, but when it is not such a cause, that the action will lie. Something may be said in favor of this rule.¹ But, on the other hand, it may be urged that a passenger voluntarily in a baggage car, when he might just as conveniently be in the car provided for his transportation, is a *quasi* trespasser. He plainly has no business in that car, and toward trespassers a carrier is not bound to exercise that high degree of care and circumspection due to his regular passengers.² If the passenger would hold the carrier to the full measure of his responsibility for safe carriage, he must conform to all the reasonable rules the carrier makes, looking to the passenger's safety and convenience, and if he violates such rules and regulations by riding where he has no right to ride, it is no very harsh rule that requires him to do it at his proper peril. When the conductor or train-men consent, or encourage the passenger to ride in the baggage car, and especially, when they direct him so to do, it is held that then the passenger is not guilty of negligence of such a kind as to prevent his recovery if he sustains injuries while riding there.³ But it is difficult to see what sound basis such a qualification as this can have. "If the passenger," says the Supreme Court of Pennsylvania,

¹ Kentucky Central R. R. Co. v. Thomas, *supra*; Houston, &c., R. R. Co. v. Clemmons, *supra*.

² Higley v. Gilmer, 3 Montana, 90; s. c. 35 Am. Rep. 450. And see, also, Atchison, &c., R. R. Co. v. Flinn, 24 Kan. 627.

³ Carroll v. New York, &c., R. R. Co., 1 Duer, 571; O'Donnell v. Allegheny, &c., R. R. Co., 50 Penn. St. 490; s. c. 59 Penn. St. 239. See, also, Dunn v. Grand Trunk Ry. Co.,

58 Me. 187; s. c. 4 Am. Rep. 267; 10 Am. Law Reg. (N. S.), 615; Edgerton v. New York, &c., R. R. Co., 39 N. Y. 227; Pool v. Chicago, &c., R. R. Co., 53 Wis. 657; Rucker v. Missouri, &c., R. R. Co., 61 Texas, 499; Washburn v. Nashville R. R. Co., 3 Head, 638; Keith v. Pinkham, 13 Me. 501; Watson v. Northern, &c., R. R. Co., 24 Upper Can. Q. B. 98; and Jacobus v. St. Paul, &c., R. R. Co., 20 Minn. 125; s. c. 18 Am. Rep. 360.

“thus recklessly exposing his life to possible accidents,” [referring to a passenger injured while riding in a baggage car with the consent of the conductor], “were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge, or even the assent of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true the conductor has the control of the train, and may assign passengers their seats; but he may not assign a passenger to a seat on the cow-catcher, a position on the platform, or in the baggage car. This is known to every intelligent man, and appears upon the face of the rule itself,” [the printed rules of the company posted in the baggage cars]. “He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible.”¹ This is sound reasoning. How can an employee authorize a passenger to violate, not only the express rules of the company, but also the rules that every prudent man establishes for himself for his own protection, to the extent of rendering the company liable when injury results from the violation of these regulations?

Upon what principle of justice or equity can a passenger, who voluntarily leaves his proper place in the passenger car, in violation of the rules of the company, to ride in the baggage car, or other place of known danger, though he have never so much the consent of one of the employees of the company, and who is injured

¹ Pennsylvania R. R. Co. v. Langdon, 92 Penn. St. 21; S. C. 37 Am. Rep. 651.

while riding in that exposed and unlawful position, call upon the carrier for damages for such an injury? The baggage cars are known places of especial danger. In this respect they differ from the cow-catcher and the platforms only in degree. They are placed ahead of the passenger cars and next to or near the locomotive, the passenger cars being placed last in order in making up the train, for the express purpose of affording the passengers the utmost safety. An infant or an imbecile might be excused for riding in baggage cars, by reason of their conspicuous lack of mental capacity, but persons of average intelligence may reasonably be presumed to know the danger of such a course, and held to assume the risks involved. The better rule is, that riding in such exposed and unauthorized positions is negligence, and that a passenger who suffers an injury while so exposing himself, whether by the consent of the train-men or not, and whether the injury would have been sustained or not, had the passenger remained in his proper place, can have no action against the carrier for damages so occasioned. The passenger forfeits his right to recover when he violates the rules of the company or fails to avail himself to the full extent of all the protection the carrier provides for him. He may not refuse to be protected and then claim damages. After reviewing the decided cases upon this subject, Mr. Justice Paxson, of Pennsylvania, in the opinion from which I have already quoted, as the conclusion of the whole matter, says: "I am not aware that it has been decided, in any well considered case, that a passenger may, as a matter of right, ride in the baggage car at the risk of the company. In a few cases it has been held that the assent of the conductor is sufficient to charge the latter with the consequences of such act; that it amounts to a waiver of the rule forbidding passengers to ride in the baggage car. But how can a conductor waive a rule

which, by its very terms, he is commanded to enforce? He may neglect to enforce it, and, when the rule is a mere police arrangement of the company, such neglect may, perhaps, amount to a waiver, as between the passenger and the company. But when the rule is for the protection of human life, the case is very different. We are not disposed to encourage conductors, or other railroad officials, in violating reasonable rules which are essential to the protection of the traveling public. If it is once understood that a man who rides in a baggage car, in violation of the rules, does so at his own risk, we shall have fewer accidents of this description."¹

This reasoning applies with equal cogency to the case of passengers riding in any other exposed or unlawful position upon a railway train, and with the greater force in proportion as the risk increases. If it is negligent to ride in baggage cars, it is all the more negligent to ride upon locomotives, even with the consent of the trainmen,² or upon freight trains in violation of the company's rule,³ or upon hand-cars,⁴ or upon the tops of freight

¹ Pennsylvania R. R. Co. v. Langdon, 92 Penn. St. 21; S. C. 37 Am. Rep. 651.

² Robertson v. Erie Ry. Co., 22 Barb. 91; Waterbury v. New York, &c., R. R. Co., 21 Blatchf. 314; Austin v. Greatwestern, &c., Ry. Co., L. R. 2 Q. B. 442; *contra* Rucker v. Missouri, &c., R. R. Co., 61 Texas, 499, which was the case of a negro boy, a passenger on the defendant's train, who, doing as he was told to do by the person in charge of the train, rode upon the pilot of the engine, and while there, was injured. His conduct, under the circumstances, was held not to have been negligent. This was a hard case, and the conclusion reached is an illustration of the truth of the proverb among lawyers, that hard cases make bad law. The negro did as he was told, as negroes are expected to do, and he got hurt,

without having been personally much at fault. The authority of this case should not, accordingly, count against the rule. Compare Miles v. Atlantic, &c., R. R. Co., 4 Hughes, 172, and Carter v. Louisville, &c., R. R. Co., 98 Ind. 552; S. C. 49 Am. Rep. 780.

³ Houston, &c., R. R. Co. v. Moore, 49 Texas, 31; S. C. 30 Am. Rep. 98; Sherman v. Hannibal, &c., R. R. Co., 72 Mo. 62; S. C. 37 Am. Rep. 423; Eaton v. Delaware, &c., R. R. Co., 57 N. Y. 382; S. C. 15 Am. Rep. 513. See, also, Elkins v. Boston, &c., R. R. Co., 23 N. H. 275; Lygo v. Newbold, 9 Exch. 302; Redfield's Am. Ry. Cases, 490.

⁴ Hoar v. Maine Central R. R. Co., 70 Me. 65; S. C. 35 Am. Rep. 299; McQueen v. Chicago, &c., R. R. Co., 30 Kan. 689; Pool v. Chicago, &c., R. R. Co., 53 Wis. 657.

cars.¹ With respect, however, to the carriage of passengers upon freight trains, the rule is somewhat modified, to the effect that, whenever the company receives passengers upon those trains, and collects fare from them, although it is done in violation of a rule of the company, it is lawful for the passenger to ride, and if, while so riding, he suffers an injury, due to the company's negligence he may have his action.² When the passenger is received on the freight train, and is allowed to pay his fare, notwithstanding a rule to the contrary, the relation of carrier and passenger is held to be thereby created, and in case of an injury, the passenger may recover.³

§ 56. *Injuries at car windows and doors.*—It is a general rule that a passenger who puts his head, or elbow, or any other part of his body, out of the window of the car in which he is riding, has no cause of action against the railway company for any injury that he may sustain on that account, from contact with outside obstacles or forces. If any part of the passenger's body extends through the open window, beyond the place where the sash would be when the window is shut, it is sufficient to prevent a recovery of damages by him.⁴ The opinion of

¹ Little Rock, &c., R. R. Co. v. Miles, 40 Ark. 298; S. C. 48 Am. Rep. 10; McCorkle v. Chicago, &c., R. R. Co., 61 Iowa, 555. But *contra*, Indianapolis, &c., R. R. Co. v. Horst, 93 U. S. 291.

² Dunn v. Grand Trunk R. R. Co., 58 Me. 187; S. C. 4 Am. Rep. 267; 10 Am. Law Reg. (N. S.) 615; Lawrenceburg, &c., R. R. Co. v. Montgomery, 7 Ind. 476; Creed v. Pennsylvania R. R. Co., 86 Penn. St. 139; S. C. 27 Am. Rep. 693; Arnold v. Illinois, &c., R. R. Co., 83 Ill. 273; S. C. 25 Am. Rep. 383; Edgerton v. New York, &c., R. R. Co., 39 N. Y. 227; Chicago, &c., R. R. Co. v. Hazard, 26 Ill. 375; Lucas v. Mil-

waukee, &c., R. R. Co., 33 Wis. 41; S. C. 14 Am. Rep. 735, and see, Murch v. The Concord R. R. Co., 29 N. H. 9; Ohio, &c., R. R. Co. v. Muhling, 30 Ill. 9; Ryan v. Cumberland, &c., R. R. Co., 23 Penn. St. 384; Gillshannon v. Stony Brook R. R. Co., 10 Cush. 228; Graham v. Toronto, &c., Ry. Co., 23 Up. Can. (C. P.) 514; Sheerman v. Id. 34 Up. Can. (Q. B.) 451.

³ See the cases generally last cited.

⁴ Dun v. Seaboard, &c., R. R. Co., 78 Va. 645; S. C. 49 Am. Rep. 388; Pittsburgh, &c., R. R. Co. v. McClurg, 56 Penn. St. 294; (overruling New Jersey, &c., R. R. Co. v. Ken-

Thompson, C. J., in the case of Pittsburgh, &c., R. R. Co. v. McClurg,¹ is often quoted as declaring a sound doctrine in these cases. He says, *inter alia*: "A passenger on entering a railroad car is to be presumed to know the use of a seat, and the use of a window—that the former is to sit in, and the latter to admit light and air; each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy, but not to occupy.² Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest it. If, therefore, he sit with his elbow in it, he does so without authority, and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled in regard to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court.

. . . . In the absence of some justifying necessity, or incapacity to take care of himself, on the part of the

nard, 21 Penn. St. 203; Pittsburgh, &c., R. R. Co. v. Andrews, 39 Md. 329; S. C. 17 Am. Rep. 568; Holbrook v. Utica, &c., R. R. Co., 12 N. Y. 236; Todd v. Old Colony, &c., R. R. Co. 3 Allen, 18; S. C. 7 Id. 207; Indianapolis, &c., R. R. Co. v. Rutherford, 29 Ind. 82; Louisville, &c., R. R. Co. v. Sickings, 5 Bush,

1; Laing v. Colder, 8 Penn. St. 479; S. C. 49 Am. Dec. 533; Judge Redfield's note to Pittsburgh, &c., R. R. Co. v. McClurg, 2 Am. Ry. Cases, 552.

¹ 56 Penn. St. 294.

² See, on this point, Gee v. Metropolitan, &c., Ry. Co., L. R. 8 Q. B. 165.

passenger, no one can doubt, I think, from the reason of the thing, in view of the nature of the vehicle used, being a railroad car, that to extend an arm or a hand beyond the window sill is dangerous, and is recklessness or negligence. Wherever the facts present such a case, singly and without any controlling or justifying necessity, we think the court ought to declare the act negligence, and as there was nothing like this shown in the case before us, we think the court ought not to have affirmed plaintiff's point. Unconsciously exposing himself did not help the plaintiff's case, as it was not shown that his unconsciousness was not the result of a want of prudent attention to his situation on the part of the plaintiff. It would be a novel answer to the allegation of negligence to allege that the plaintiff had slept in the position he was in when hurt, and that would be a condition of unconsciousness. Sleeping, when due care would require one to be awake, or in dangerous circumstances, is negligence, and no answer to the company can be given to such act. Of course, these views are predicated of a case in which there are no facts to qualify or justify the act. It is possible that a state of facts might be found to show an exception to the rule, and where that occurs, the rule ceases."¹

In another line of authorities it is held that such an act on the part of a passenger is not negligence *per se*, but that, whether or not the mere fact that the plaintiff had his arm outside of the car window contributed to produce the injury complained of, is a proper question for the jury.² A consideration of the cases to be cited in support

¹ *Vide* Wharton on Neg., § 361; 306; Spencer v. Milwaukee, &c., R. Shear. & Redf. on Neg., § 281. R. Co., 17 Wis. 487; New Jersey,

² Barton v. St. Louis, &c., R. R. &c., R. R. Co. v. Kennard, 21 Penn. Co., 52 Mo. 253; S. C. 14 Am. Rep. St. 203; Farlow v. Kelly, 108 U. S. 418; Chicago, &c., R. R. Co. v. Pondrom, 51 Ill. 333; S. C. 2 Am. Rep. 288.

of this view will, however, show that there is but a slight basis for it, and that the weight of authority is decidedly against any such position. The case of the New Jersey, &c., R. R. Co. *v.* Kennard,¹ has been expressly overruled, and does not declare the rule now held in Pennsylvania. It was the earliest case in which this question arose, and Chief Justice Gibson who delivered the opinion, took very extreme ground. It has never been followed. The decision in the Illinois case² was reached under the influence of the rule of comparative negligence, which will suffice to destroy its influence as a controlling authority in other jurisdictions. Farlow *v.* Kelly,³ goes no further than to hold that it is not contributory negligence for a passenger to rest his arm upon the window-sill of the car in which he is riding, without having it protrude, which is scarcely the question in issue. In Barton *v.* St. Louis, &c., R. R. Co.,⁴ the evidence tended to show that the plaintiff, when injured, was sitting in the rear car of the train, at, or near, an open window, and that the injury to his arm was caused by the car coming in contact with a wagon loaded with a skiff. As to the position of his arm at the instant of injury, whether inside or protruded out of the window, the evidence was conflicting. In this state of facts, the court held that, even if the plaintiff had his arm outside the window, still this was not negligent *per se*, under the circumstances, and that whether it contributed to the injury was a question for the jury. This case cannot, therefore, count very strongly against the more accepted doctrine.

The Supreme Court of Wisconsin, in the case of Spencer *v.* Milwaukee, &c., R. R. Co.,⁵ considers the

¹ *Supra.*

² Chicago, &c., R. R. Co. *v.* Pondrom, *supra.*

³ *Supra.*

⁴ *Supra.*

⁵ 17 Wis. 487, cited *supra*, which is practically the only case in which the rule that such an act is negligent *per se*, is squarely denied.

question with great ability, and reaches a conclusion contrary to the general rule upon the subject. This is the only case, as far as my reading goes, in which, upon the general question fairly presented, a court of last resort has held that such acts are not negligent, as matter of law. But that the case stands alone, is no conclusive argument against it. It is entitled to weight not only as the deliberate judgment of a court of acknowledged ability, but also by reason of the vigor of its reasoning, and the inherent fitness of the position it takes. In the opinion, after reviewing the cases in point, the court says: "When we consider the manner in which railroad cars are usually constructed, with windows so that they can be opened and arranged at a sufficient height, from the seat, so that passengers will almost unconsciously place their arms upon the sill for support, there being no bars or slats before the window to prevent their doing so, then, to say that, if a passenger's arm extends the slightest degree beyond the outside surface, he is wanting in proper care and attention, and if an injury happens, he cannot recover because his conduct must have necessarily contributed to the result, appears to us to be laying down a very arbitrary and unreasonable rule of law. It is, probably, the habit of every person while riding in the cars, to rest the arm upon the base of the window. If the window is open, it is liable to extend slightly outside. This, we suppose, is common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must, necessarily, be so to accommodate the motion of the car. Passengers know this, and regulate their conduct accordingly; they do not suppose that the agents and managers of the road suffer obstacles to be so placed as to barely miss the car while passing. And it seems to us almost absurd to hold that, in every case, and under all circum-

stances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence."

In some of the cases there is an intimation that the question should turn upon, whether or not, timely notice of the danger had been given by the company, so that the passenger might have avoided it, and it is an inference that the company might be held liable when the notice is not given.¹ These cases seem to proceed upon the theory that, ordinarily, it may not be especially dangerous to allow the hand or arm to protrude somewhat beyond the outer edge of the open window, and that the passenger is justified in acting upon that supposition. And, that whenever, for any reason, the danger in this regard is increased it is the duty of the company to notify their passengers, and to warn them of it, the carrier's failure in the discharge of this duty, entitling the injured passenger to his action.

It is sometimes a question, when a passenger has sustained an injury in opening or closing the door of a car, or has suffered the injury when an employee of the company opened or shut it, whether or not the passenger's own negligence contributed to the injury. In a recent case, where the plaintiff, who sat near the front door of a dark and crowded car on the defendant's railway, attempted, in passing through a long tunnel, to shut the door, in order to keep out the smoke and cinders, and received an injury in the attempt, there being no servant of the defendant at hand to do it, the Court of Appeals of Maryland held that the plaintiff was not guilty of negligence in so doing, and that the defendant was liable.² It

¹ *Laing v. Colder*, 8 Penn. St. 479; S. C. 49 Am. Dec. 533; *Dun v. Sea Board, &c., R. R. Co.*, 78 Va. 645; S. C. 49 Am. Rep. 388.

² *Western, &c., R. R. Co. v. Stanley*, 61 Md. 266; S. C. 48 Am. Rep. 96.

is in this case declared to be the duty of the company to provide servants to perform such services for the passengers, and the right of the passenger, in case no servant is at hand, to perform the service for himself, and, when the passenger is injured in doing something for himself of this nature, which it is the company's duty to have done for him, the company's plea of contributory negligence as a defense to the action for damages is bad. "If the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience," says Chief Justice Cockburn.¹ There are several English cases in which this question has been passed upon, but they are not entitled to much weight in this country, by reason of the difference, in very essential particulars, between the railway service of the two countries. In *Gee v. Metropolitan Ry. Co.*,² it is held that a passenger may lawfully look out of a window in a door, and if, in so doing, he leans against the door which is imperfectly and negligently fastened, and which, in consequence, flies open, and he falls out and is hurt, he may have his action. In this case, in the Court of Exchequer Chamber, Cockburn, J., said: "The passenger did nothing more than that which came within the scope of his enjoyment while traveling, without committing any imprudence. In passing through a beautiful country he certainly is at liberty to stand up and look at the view, not in a negligent, but in the ordinary manner of people traveling for pleasure." In the case of *Adams v. Lancashire, &c., Ry. Co.*,³ in

¹ In deciding this very point in the case of *Gee v. Metropolitan, &c., Ry. Co.*, L. R. 8 Q. B. 161; 5 Eng. Rep. 169.

² L. R. 8 Q. B. 161.

³ L. R. 4 C. P. 739.

which it appeared that the plaintiff shut the door of the railway carriage, which flew open through the negligence of the company, three several times, and that, in trying to shut it for the fourth time, he fell out and was hurt, there was evidence that the car was not crowded, that the plaintiff could have found a seat away from the door, and that the train would have stopped at a station in three minutes. Under this state of facts, the court held, that, inasmuch as the inconvenience from the open door was slight, and the passenger might have escaped it entirely by moving his seat, while the danger of attempting to close the door was considerable, the conduct of the plaintiff so far contributed to occasion the injury that he could not recover.¹

§ 57. *Injuries at and about railway stations.*—It is the plain duty of a railway company, as a common carrier of passengers, to keep its stations, and the approaches thereto, in such a condition that those who have occasion to use these premises for the purposes for which they are designed, may do so with safety. Any failure upon the part of the company to exercise ordinary care to this end is a breach of duty for which an action will lie.² Mr. Justice Cooley says: "When one, expressly or by implication, invites others to come upon his premises, whether for business, or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the

¹ Compare, also, the following English cases upon this general question; *Siner v. Great Western Ry. Co.*, L. R. 4 Exch. 117; *Richardson v. The Metropolitan Ry. Co.*, L. R. 3 C. P. 374 (note); *Fordham v. London, &c., Ry. Co.*, L. R. 4 C. P. 619;

Maddox v. Railway Company, 38 L. T. (N. S.) 458, (C. P. Div.), and see *Wharton on Neg.*, §§ 363 (and note), 632.

² *Railroad Co. v. Henning*, 15 Wall. 659; *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 373.

visit.”¹ The cases are numerous where passengers have recovered for injuries received after alighting from the cars, the carrier having failed to exercise due care in providing means for their safe egress.² “Railroad companies,” says the Supreme Court of Pennsylvania,³ “must carry the passengers to their respective places of destination, and set them down safely, if human care and foresight can do it.” But when the passenger, on his own part, fails to exercise proper care and prudence, his right of action, upon familiar grounds, is thereby forfeited.⁴

When the train stops elsewhere than at a station as at a water tank,⁵ or upon a side track, to allow another train to pass, or for any other purpose,⁶ or upon approaching the crossing of another railway,⁷ or upon a bridge or culvert,⁸ or in a tunnel,⁹ or at any other place at which there is no express or implied invitation to

¹ Cooley on Torts, 604.

² *Stewart v. International, &c., R. R. Co.*, 53 Texas, 289; s. c. 37 Am. Rep. 753; *Bennett v. Louisville, &c., R. R. Co.*, 102 U. S. 577; *Gaynor v. Old Colony, &c., R. R. Co.*, 100 Mass. 211; *McDonald v. Chicago, &c., R. R. Co.*, 26 Iowa, 124; *Columbus, &c., R. R. Co. v. Farrell*, 31 Ind. 408; *Osborne v. Union Ferry Co.*, 53 Barb. 629; *Dice v. Willamette, Trans., &c., Co.*, 8 Oregon, 60; s. c. 34 Am. Rep. 575; *Imhoff v. Chicago, &c., R. R. Co.*, 20 Wis. 364; *Patten v. Id.*, 32 Id. 533; *Martin v. Great Northern, &c., Ry. Co.*, 16 C. B. 179; s. c. 81 Eng. Com. Law, 179; *Nicholson v. Lancashire, &c., Ry. Co.*, 3 Hurl. & C. 534; *Caterham Ry. Co. v. London R.*, 87 Eng. Com. Law, 410; *Hutchinson on Carriers*, § 516 *et seq.*; *Redfield on Carriers*, § 514; *Shear. & Redf. on Neg.*, § 275.

³ *Pennsylvania R. R. Co. v. Aspell*, 23 Penn. St. 149; s. c. 62 Am. Dec. 323.

⁴ *Evansville, &c., R. R. Co. v. Duncan*, 28 Ind. 442; *Forsyth v. Boston, &c., R. R. Co.*, 103 Mass., 510; *Commonwealth v. Id.*, 129 Id. 500; s. c.

37 Am. Rep. 382; *Illinois, &c., R. R. Co. v. Green*, 81 Ill. 19; s. c. 25 Am. Rep. 255; *Mitchell v. Chicago, &c., R. R. Co.*, 51 Mich. 236; s. c. 47 Am. Rep. 566. See, also, *Sevier v. Vicksburg, &c., R. R. Co.*, 61 Miss. 8; s. c. 48 Am. Rep. 74.

⁵ *Illinois, &c., R. R. Co. v. Green, supra*; *State v. Grand Trunk Ry. Co.*, 58 Me. 176; s. c. 4 Am. Rep. 258.

⁶ *Frost v. Grand Trunk, &c., Ry. Co.*, 10 Allen, 387; *Montgomery, &c., R. R. Co. v. Boring*, 51 Ga. 182.

⁷ *Mitchell v. Chicago, &c., R. R. Co.*, 51 Mich. 236; s. c. 47 Am. Rep. 566.

⁸ *Columbus, &c., R. R. Co. v. Farrell*, 31 Ind. 408; *Terre Haute, &c., R. R. Co. v. Buck*, 96 Id. 346; s. c. 49 Am. Rep. 168; *Taber v. Delaware, &c., R. R. Co.*, 71 N. Y. 489; *Montgomery, &c., R. R. Co. v. Boring*, 51 Ga. 182; *Whittaker v. Manchester, &c., Ry. Co.*, L. R. 5 C. P. 464 (note 3).

⁹ *Bridges v. North London Ry. Co.*, L. R. 6 Q. B. 377; s. c. 24 L. T. Rep. (N. S.), 835.

the passenger to alight,¹ and where the stop is made for the purposes of the railroad alone, it is generally held that, when the passenger leaves the cars under these circumstances, he acts at his peril, and that, if he suffers an injury in so doing, his own negligence will prevent a recovery.² When, however, the name of the station is announced by the proper employee of the company, the passenger may rightfully infer that the first stoppage of the train will be at that station, and he will not be guilty of such contributory negligence as will bar his recovery by construing such announcement and stoppage as an invitation to him to alight.³ Upon this point Chief Justice Cockburn well says: "An invitation to passengers to alight, on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence, . . . and, it appears to us, that the bringing up of a train to a final standstill for the purpose of the passengers' alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out, if he proposes to alight at the particular station."⁴ When the train is stopped at any unusual place, and the passenger is either compelled, or advised, to alight by the servants of the carrier, the company will be liable, if injury result. An illustration of the application in

¹ Lewis v. The London, &c., Ry. Co., L. R. 2 Q. B. 66.

² See the cases generally cited, *supra*.

³ Central, &c., R. R. Co. v. Van Horn, 38 N. J. Law, 133; Milliman v. New York, &c., R. R. Co., 66 N. Y. 642; Cockle v. London, &c., Ry. Co., L. R. 7 C. P. 321.

⁴ Cockle v. London, &c., Ry. Co., L. R. 7 C. P. 321; s. C. 27 L. T. Rep. (N. S.), 320. See, also, Praeger v. The Bristol, &c., Ry. Co., 24 L. T. Rep. (N. S.), 105; Terre Haute, &c., R. R. Co. v. Buck, 96 Ind. 346; s. C. 49 Am. Rep. 168; Mitchell v. Chicago, &c., R. R. Co., 51 Mich. 236; s. C. 47 Am. Rep. 566.

this rule is found in the case of the Memphis and Charleston R. R. Co. *v.* Whitfield,¹ where the defendants, having stopped their train several hundred yards from the station, at a point where the land was low, and covered with sleet and ice, compelled the plaintiff, by refusing to back the train up to the platform, to alight upon the ice and snow, whereby he dislocated his knee. The jury found negligence in the defendants, and gave a verdict for the plaintiff, and upon appeal, the court held that the judgment should be affirmed, saying: "A railway company stopping its train for passengers at a place so steep that they could not easily climb upon the train would be bound to assist them to do so, and, most assuredly, not less so to aid a passenger in alighting under similar circumstances. The conductor is bound, upon the request of any passenger, to move the train backward or forward, so as to enable the passenger to step upon the platform." In *Brown v. Chicago, &c., R. R. Co.*,² it is held that where a pregnant woman passenger on a railway train was carelessly directed by one of the train-men to leave the train on a stormy night, three miles short of her destination, and the exertion of walking home in the night brought on a miscarriage and consequent sickness and distress, the company was liable. This case contains an exhaustive review of the authorities, and states the law in point with great clearness and force.³ Many cases may be cited in support of the rule that when a railway passenger train is stopped elsewhere than at the platform of a station, and passengers are compelled to alight there, they may lawfully do so without any imputation of negli-

¹ 44 Miss. 466; S. C. 7 Am. Rep. 699.

² 54 Wis. 342; S. C. 41 Am. Rep. 41.

³ Mr. Irving Browne's learned note to this case, 41 Am. Rep. 53, is a valuable *scholion* upon the general question.

gence, and, if injury results to them, may have an action against the carrier.¹

In *Carpenter v. Boston and Albany R. R. Co.*² it was decided that where a plaintiff, waiting on the platform of the defendant's station for the purpose of taking an incoming train, was struck by a mail bag thrown from the postal car in the approaching train, by a clerk in the employ of the United States government, and it appearing that it had long been the well-known custom to throw off the bags when passengers were on the platform, and that the defendant took no precautions to prevent injury therefrom, such failure on the part of the company was negligent, and that a recovery might be had. The plaintiff used the platform in a lawful manner without negligence,³ and was accordingly entitled to protection in this particular. Precisely the same point, coming up in just the same way, was made in the case of *Snow v. Fitchburgh R. R. Co.*⁴ by the Supreme Judicial Court of Massachusetts; but when the bag was thrown off, not upon the platform, but some two hundred feet beyond, and struck the leg of a scaffold upon which the plaintiff was at work, so that it fell, and the plaintiff was injured, the Supreme Court of Wisconsin

¹ *Foy v. London, &c., Ry. Co.*, 18 C. B. (N. S.) 225; *Curtiss v. Rochester, &c., R. R. Co.*, 20 Barb. 285; *Dice v. Willamette Trans. &c., Co.*, 8 Oregon, 60; s. c. 34 Am. Rep. 575; *Fitzpatrick v. Great Western Ry. Co.*, 12 Up. Can. (Q. B.), 645; *Thompson v. New Orleans, &c., R. R. Co.*, 50 Miss. 315; s. c. 19 Am. Rep. 12; *Thompson on Carriers*, 228; *Angell on Carriers*, §§ 559-569; 2 *Redfield on Railways*, § 176; *Hutchinson on Carriers*, § 612; *Pierce on Railways*, 475; *Sedgwick on Damages*, 539. Compare *Siner v. Great Western Ry. Co.*, L. R. 3 Exch. 150; *Evansville, &c., R. R. Co. v. Duncan*, 28 Ind. 442; *Indianapolis, &c., R. R. Co. v.*

Birney, 71 Ill. 391; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Henry v. St. Louis, &c., R. R. Co.*, 76 Mo. 288; s. c. 43 Am. Rep. 762; *Illinois, &c., R. R. Co. v. Green*, 81 Ill. 19; s. c. 25 Am. Rep. 255; *Commonwealth v. Boston, &c., R. R. Co.*, 129 Mass. 500; s. c. 37 Am. Rep. 382; *Toledo, &c., R. R. Co. v. Baddeley*, 54 Ill. 19; s. c. 5 Am. Rep. 71; *Sevier v. Vicksburg, &c., R. R. Co.*, 61 Miss 8; s. c. 48 Am. Rep. 74.

² 97 N. Y. 494; s. c. 49 Am. Rep. 540.

³ Upon this point, see *Weston v. Elevated Ry. Co.*, 73 N. Y. 595.

⁴ 136 Mass. 552; s. c. 49 Am. Rep. 40.

held that the railway company was not liable, upon the ground that the company could not be charged with notice that the bag was likely to be thrown off at the depot, and hence was not bound to guard, by notice or otherwise, against an accident to the plaintiff resulting from its being thrown off, as it was upon the occasion in question.¹

§ 58. *Injuries to free passengers.*—When an action is brought against a railway company for damages for an injury sustained by a person who was carried gratuitously, two questions are usually presented; (a) did the relation of carrier and passenger actually subsist between the parties, and (b) was the common law liability of the carrier in any degree limited by special contract? With respect to the first question, it is the general rule that when the carrier receives the passenger and undertakes his transportation, whether upon a consideration or not, he becomes *ipso facto* liable as a carrier for the carriage, and will not be heard to say, when injury results from his carelessness, that the passenger rode gratuitously and, therefore, should not recover.² Having undertaken to carry, the duty arises to carry safely. The carrier does not, by consenting to carry a person gratuitously, thereby relieve himself of responsibility for negligence. When the assent to the riding free, has been legally and properly given, the person carried is entitled in all respects to the

¹ *Muster v. Chicago, &c., R. R. Co.*, Sup. Ct., Wis., Nov. 1884, partially reported 49 Am. Rep. 41.

² *Austin v. Great Western Ry Co.*, L. R. 2 Q. B. 442; *Waterbury v. New York, &c., R. R. Co.*, 21 Blatchf. 314; *Blair v. Erie Ry. Co.*, 66 N. Y. 313; s. c. 23 Am. Rep. 55; *Todd v. Old Colony, &c., R. R. Co.*, 3 Allen, 18; *Phila., &c., R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Steam-*

boat New World v. King, 16 Id. 469; *Little Rock, &c., R. R. Co. v. Miles*, 40 Ark. 298; s. c. 48 Am. Rep. 10; *Nolton v. Western R. R. Co.*, 15 N. Y. 444; *Perkins v. New York, &c., R. R.*, 24 Id. 200; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; s. c. 9 Am. Rep. 11; 2 *Redfield on Railways*, 184, 185, and notes; *Jacobus v. St. Paul, &c., R. R. Co.*, 20 Minn. 125; s. c. 18 Am. Rep. 360.

same degree of care as if he had paid for the transportation.¹ "The right which a passenger by a railway has to be carried safely does not depend on his having made a contract;" but, "the fact of his being a passenger, casts a duty on the company to carry him safely."² But where one rides upon a railway train, without the proper assent of the company, as a free passenger, the rule is otherwise. There must be a true undertaking to carry, or the relation of carrier and passenger will not be held to subsist.³ So, when the plaintiff rides without the defendant's permission, as where he is invited or suffered to ride gratuitously by the defendant's employees, who have no right to carry any one free, there can be no recovery in case of injury.⁴ It is familiar learning that a principal is not liable for the acts of his servant or agent beyond the sphere of his duty, and for the employees of a railway to invite or permit persons to ride gratuitously will, generally, be outside the scope of their employment. The train-men are not hired for that sort of service, and it is not in their power to impose a burden upon their employers in that respect. It would be a harsh rule that required a carrier to pay damages for the negligent injury of a person upon their train, whose injury was sustained through the negligence of the very employees who wrongfully permitted him to be upon

¹ The cases *supra*.

² Blackburn, J., in *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442. Compare *Hammond v. North Eastern R. R. Co.*, 6 S. C. 130; S. C. 24 Am. Rep. 467.

³ See on this point, *Merrill v. Eastern R. R. Co.* (Supr. Jud. Ct. Mass.), 1885, 31 Albany Law Jour. 503.

⁴ *Lygo v. Newbold*, 9 Exch. 302; *Eaton v. Delaware, &c., R. R. Co.*, (by Theo. W. Dwight, C.), 57 N. Y. 382; S. C. 15 Am. Rep. 513; *Robertson v. Erie Ry. Co.*, 22 Barb. 91; *Snyder v. Hannibal, &c., R. R. Co.*,

60 Mo., 413; *Flower v. Penn. R. R. Co.*, 69 Penn. St. 210; S. C. 8 Am. Rep. 251; *Union Pacific R. R. Co. v. Nichols*, 8 Kan. 505; S. C. 12 Am. Rep. 475; *Moss v. Johnson*, 22 Ill. 633; *Quinn v. Power*, 24 N. Y. Sup. Ct. 102; *Houston, &c., R. R. Co. v. Moore*, 49 Texas, 31; S. C. 30 Am. Rep. 98; *Cox v. Railway*, 3 Exch. 268; *Marvin v. Wilber*, 52 N. Y. 270, 273; *Elkins v. Boston, &c., R. R. Co.*, 23 N. H. 275. But see, *Prince v. International, &c., R. R. Co.* (Sup. Ct. Texas), 1885, 20 Cent. Law Jour. 479.

the train as a free passenger.¹ In cases of this kind, the defendant corporation was not a carrier as to the plaintiff, nor under a carrier's obligation as to him. No contract of carriage, express or implied, can be assumed to exist in such a case, and such a passenger must be held to travel at his own proper peril.

A question as to the liability of the railway may arise in cases of injury to persons allowed to be upon the trains of the company in the capacity of newsboys, peddlers, and the like. In the case of the *Commonwealth v. Vermont, &c., R. R. Co.*,² in which a person, who furnished the passengers upon the defendants' trains with iced water, under a contract with the company, and was also allowed to ride upon the trains and sell pop-corn, was negligently killed while so riding, it was held that, while traveling under this arrangement, such person was a passenger, and not an employee, and that, consequently, the company might be held responsible for the injury he sustained. And the same rule was declared in *Yoe-mans v. Contra Costa Steam Navigation Co.*³ In this case it appears that the plaintiff kept a bar upon the defendant's steamboat, paying two hundred dollars per month for the privilege. He also acted as agent for an express company which carried on its business over the defendant's lines. The defendant's route consisted partly of a passage by steamer and partly of a passage by railway, and the plaintiff was injured by one of the defendant's locomotives while on his way to the boat on his proper business. The court held him a passenger, and not an employee, and, therefore, entitled to his action.⁴ But, on the contrary, a railway company is not

¹ *Sherman v. Hannibal, &c., R. R. Co.*, 72 Mo. 62; S. C. 37 Am. Rep. 423. See, also, *New Orleans, &c., R. R. Co. v. Harrison*, 48 Miss. 112; S. C. 12 Am. Rep. 356.

² 108 Mass. 7; S. C. 11 Am. Rep. 301.

³ 44 Cal. 71.

⁴ See, also, *Brennan v. Fairhaven, &c., R. R. Co.*, 45 Conn. 284; S. C. 29 Am. Rep. 679; *Smallman v.*

liable for the accidental death of a boy, permitted by the conductor, against its rules, to ride gratuitously on the train to sell papers.¹

The duty of the carrier toward express messengers, mail agents, persons riding on drover's passes, and such other classes of persons as may be denominated *quasi* passengers, has been considered in a preceding section.²

§ 59. *Carrier's liability limited by contract.*—It is usual for a common carrier to stipulate, as part of the contract by which he undertakes to transport passengers gratuitously, against liability to such passengers in case of injury. When a pass is issued it generally contains some such exemption clause as this: "The person accepting and using this pass assumes all risks and damages for any injury to the person, or for any loss or injury to his property, while using or having the benefit of it, and waives all claim on this company therefor,"³ or, "The person accepting this ticket assumes in consideration thereof, all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the person using this ticket,"⁴ or, "The person accepting and using this pass thereby assumes all risk of accident and damage to person or property."⁵ By some such stipulation as this it is generally sought to escape liability in case of injury to free passengers. The courts have, in consequence, been called upon repeatedly to pass upon the question whether, in this or any equiva-

Whilter, 87 Ill. 545; s. c. 29 Am. Rep. 76; Barry v. Oyster Bay & Huntington Steamboat Co., 67 N. Y. 301; s. c. 23 Am. Rep. 115.

¹ Duff v. Allegheny R. R. Co., 91 Penn. St. 458; s. c. 36 Am. Rep. 675.

² § 50, *supra*.

³ This is the clause inserted in the passes issued by the Chicago, Milwaukee & St. Paul R. R. Co.

⁴ Old Dominion Steamship Co.'s passes.

⁵ Upon passes issued by the Louisville and Nashville R. R. Co.

lent way, a common carrier may thus stipulate, and, by special contract, exempt himself, in cases of this kind, from liability for his own or his servant's negligence. The older English authorities answered this question in the negative, holding special stipulations by a public carrier against liability for negligence or misconduct, illegal and void. Thus, in the *Doctor and Student*,¹ speaking of a common carrier, it is said: "If he would *per se* refuse to carry it, [articles delivered for carriage], unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."² This was the law in England until about the year 1832,³ but from that time, until the passage of the Railway and Traffic Acts of 1854, it was held that a carrier might, by a special notice, make a contract limiting his responsibility, even in the case of gross negligence, misconduct or fraud, on the part of his servants.⁴ "It is not for us," said Baron Parke, in a case decided in 1852,⁵ "to fritter away the true sense and meaning of these contracts merely with a view to make men careful. If any inconvenience should arise from their being entered into, this is not a matter for our interference, but it must be left to the legislature, who may, if they please, put a stop to this mode which carriers have adopted of limiting their liability." The railway companies were, therefore,

¹ Dial, 2 c. 38.

² Quoted in Noy's Maxims, 92. See, also, 2 Stephens' Com. 135.

³ Peek v. North Staffordshire, &c., Ry. Co., 10 H. L. Cas. 494.

⁴ Wyld v. Pickford, 8 Mee. & W. 443; Walker v. York, &c., Ry. Co. 2 El. & Bl. 750; Hinton v. Dibbin, 2 Q. B. 646; Shaw v. York, &c., Ry. Co., 13 Id. 347; Austin v. Manchester, &c., Ry. Co., 16 Id. 600; s. c.

10 C. B. 454; Chippendale v. Lancashire, &c., Ry. Co., 21 L. J. (N. S.) Q. B. 22; Carr v. Id. 7 Exch. 707; Great Northern, &c., Ry. Co. v. Morville, 21 L. J. (N. S.) Q. B. 319; York, &c., Ry. Co. v. Crisp, 14 C. B. 527; Hughes v. Great Western, &c., Ry. Co., 14 C. B. 637; Slim v. Great Northern, &c., Ry. Co., 14 C. B. 647.

⁵ Carr v. Lancashire, &c., Ry. Co., *supra*.

enabled, for the most part, "to evade altogether the salutary policy of the common law." In this state of the law, parliament, in 1854, passed an act entitled, "The Railway and Canal Traffic Act,"¹ which made railways liable for the negligence of themselves or their servants, notwithstanding any notice or condition to the contrary, unless the court should adjudge the conditions just and reasonable.² Much controversy has arisen in the courts in construing this act;³ but it seems now to be settled that it amounts, in effect, to a restoration of the common law doctrine as held prior to the year 1832.⁴

The leading authority in this country upon the question, is *Railroad Co. v. Lockwood*, decided by the Supreme Court of the United States, at the October term, in 1873.⁵ Mr. Justice Bradley delivered the opinion of the court, which, after a very full and impartial review of the authorities, concludes as follows: "The conclusions to which we have come are:

"*First.* That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"*Secondly.* That it is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servant.

"*Thirdly.* That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

"*Fourthly.* That a drover, traveling on a pass, such as

¹ 17 and 18 Vict., c. 31, § 7.

² 1 Fisher's Digest, 1466.

³ *Pardington v. South Wales Ry. Co.*, 1 Hurl. & N. 392.

⁴ *Peek v. North Staffordshire, &c., Ry. Co.*, 10 H. of L. Cas. 473; *McManus v. Lancashire, &c., Ry. Co.*, 4 Hurl. & N. 328. "The truth is, that

this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it." *Bradley, J., in Railroad Co. v. Lockwood*, 17 Wall. 364.

⁵ 17 Wall. 357; S. C. 10 Am. Rep. 366.

was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

“These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment, had we considered the plaintiff a free passenger instead of a passenger of hire.”

In some of the earlier decisions of various State courts in this country, there was a tendency, as between what was denominated gross negligence, and what is called ordinary negligence, to hold that, while a carrier might lawfully stipulate, in these cases, against liability for the consequences of ordinary neglect, it was contrary to public policy to permit such a stipulation for the consequences of gross negligence.¹ But in the case from which I have just quoted,² and which is everywhere regarded as a controlling authority, except, possibly, in the State of New York, where the Court of Appeals refuses to be influenced by it, speaking to this point, it is said: “We have already adverted to the tendency of judicial opinion, adverse to the distinction between gross and ordinary negligence. Strictly speaking, these distinctions are indica-

¹ *Wells v. New York, &c., R. R. Co.*, 26 Barb. 641; s. c. 24 N. Y. 181; *Perkins v. Id.*, 24 N. Y. 196; *Smith v. Id.*, 29 Barb. 132; s. c. 24 N. Y. 222; *Bissell v. Id.*, 29 Barb. 602; s. c. 25 N. Y. 442; *Poucher v. Id.*, 49 N. Y. 263; s. c. 10 Am. Rep. 364; *Ashmore v. Penn. Steam, &c., Co.*, 28 N. J. Law, 180; *Kinney v. Central, &c., R. R. Co.*, 34 N. J. Law, 513; s. c. 3 Am. Rep. 265; *Cole v. Goodwin*, 19 Wend. 251; s. c. 32 Am. Dec. 470, [and Mr. Freeman's learned note appended, in which the authorities *pro* and *con* are very fully cited]; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539; s. c. 39 Am. Dec. 398; *Lawrence v. New York, &c., R. R. Co.*,

36 Conn. 63; *Kimball v. Rutland, &c., R. R. Co.*, 26 Vt. 247; *Mann v. Birchard*, 40 Vt. 326; *Illinois, &c., R. R. Co. v. Adams*, 42 Ill. 474; *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57; s. c. 18 Id. 427; *Baltimore, &c., R. R. Co. v. Brady*, 32 Md. 328; *Levering v. Union, &c., R. R. Co.*, 42 Id. 88. Many of these cases were, however, decided by divided courts; some of them limit the exception to cases of slight negligence, some of them to ordinary negligence, and a few of them incline to extend the doctrine to cases of gross negligence.

² *Railroad Co. v. Lockwood*, 17 Wall. 357.

tive, rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence; if very great care is due, and he fails to come up to the work required, it is called slight negligence; and, if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply negligence, and this seems to be the tendency of modern authority."

Aside from New York, where it may now be regarded as settled that a common carrier for hire, or otherwise, may, by special contract, exempt himself from all responsibility for loss or damage, arising from the negligence of his servants, though this negligence be gross,¹ it is the general rule in this country, in both State and Federal Courts, that, while a common carrier for hire, or otherwise, may, by express agreement, limit his common law liability as *an insurer* of property intrusted to him for transportation, he cannot stipulate for freedom from liability for injury or loss, either to passengers or goods, resulting from the negligence of himself or his servants, nor limit his liability, as a common carrier at common law, to such injuries or losses as are caused by his own, or his agents'

¹ Poucher v. New York, &c., R. R. Co., 49 N. Y. 263; s. c. 10 Am. Rep. 364; Cragin v. Id., 51 N. Y. 61; s. c. 10 Am. Rep. 559; Bissell v. New York, &c., R. R. Co., 25 N. Y. 442; Magnin v. Dinsmore, 70 N. Y. 410; s. c. 26 Am. Rep. 608; s. c. 56 N. Y. 168; Steers v. Liverpool, New York & Phila. Steamship Co., 57 N. Y. 1; s. c. 15 Am. Rep. 453; Canfield v. Baltimore, &c., R. R. Co., 93 N. Y. 532; s. c. 45 Am. Rep. 268; s. c. 75 N. Y. 144; Mynard v. Syracuse, &c., R. R. Co., 71 N. Y. 183; s. c. 27 Am. Rep. 28. Compare Seybolt v. Erie Ry. Co., 95 N. Y. 562; s. c. 47 Am. Rep. 75.

gross negligence. Only a very small part of the multitude of decisions of all the courts that insist upon the salutary rule can be cited here.¹

In actions, therefore, by a free passenger, who is lawfully and regularly a passenger, against a common carrier for damages sustained by reason of the carrier's negligence, it is not, as a rule, any defense to the action that the passenger was carried gratuitously; the courts will refuse to enforce any stipulation against liability for negligence on the part of the carrier or his servants, and, in cases in which the passenger himself is free from contributory negligence, his action will lie, and he may recover. This proposition is believed to be fully sustained by the weight of authority as already cited.²

§ 60. *Passenger's negligence as to baggage.*—The common law makes the carrier an insurer of the passenger's baggage, and he is answerable for all loss or damage

¹ Maslin *v.* Baltimore, &c., R. R. Co., 14 West Va. 180; s. c. 35 Am. Rep. 748 [Entitled to rank as a leading case. The opinion of Judge Green, herein, is luminous and exhaustive]; Laing *v.* Colder, 8 Penn. St. 479; s. c. 49 Am. Dec. 533; Empire Trans. Co. *v.* Wamsutta Oil Co., 63 Penn. St. 14; s. c. 3 Am. Rep. 515; Penn. R. R. Co. *v.* Henderson, 51 Penn. St. 315; Jones *v.* Voorhees, 10 Ohio, 145; Cleveland, &c., R. R. Co. *v.* Curran, 19 Ohio St. 1; s. c. 2 Am. Rep. 362; Knowlton *v.* Erie Ry. Co., 19 Ohio St. 260; s. c. 2 Am. Rep. 395; Sayer *v.* Portsmouth, &c., R. R. Co., 31 Me. 228; School District *v.* Boston, &c., R. R. Co., 102 Mass. 552; s. c. 3 Am. Rep. 502; Galt *v.* Adams Express Co., MacArth. & Mack, 124; s. c. 48 Am. Rep. 742; Kansas, &c., R. R. Co. *v.* Simpson, 30 Kan. 645; s. c. 46 Am. Rep. 104; Chicago, &c., R. R. Co. *v.* Moss, 60 Miss. 1003; s. c. 45 Am. Rep. 428; Black *v.* Goodrich Trans. Co., 55 Wis. 319; s. c. 42 Am. Rep. 713; Shriver *v.* Sioux City, &c., R. R. Co., 24 Minn. 506; s. c. 31 Am. Rep. 353; Virginia, &c., R. R. Co. *v.* Sayres, 26 Grattan, 328; New Orleans, &c., Ins. Co. *v.* Railroad Co., 20 La. Ann. 302; Merchant's, &c., Co. *v.* Cornforth, 3 Colo. 280; s. c. 25 Am. Rep. 757; Erie Ry. Co. *v.* Wilcox, 84 Ill. 239; s. c. 25 Am. Rep. 451; Orndorff *v.* Adams Express Co., 3 Bush, 194; Southern Express Co. *v.* Crook, 44 Ala. 468; s. c. 4 Am. Rep. 140; Swindler *v.* Hilliard, 2 Rich. (Law) 286; s. c. 45 Am. Dec. 732; Flinn *v.* Phila., &c., R. R. Co., 1 Hous. (Del.) 472; Ohio, &c., R. R. Co. *v.* Selby, 47 Ind. 471; s. c. 17 Am. Rep. 719; Id. *v.* Nichols, 71 Ind. 271; Graham *v.* Pacific R. R. Co., 66 Mo. 536; Rose *v.* Des Moines, &c., R. R. Co., 39 Iowa, 246; Jacobus *v.* St. Paul, &c., R. R. Co., 20 Minn. 125; s. c. 18 Am. Rep. 360; Railroad Co. *v.* Stevens, 95 U. S. 655.

² See an essay, "The Rights of Gratuitous Passengers on Railways," by H. Campbell Black, Esq., of the St. Paul Bar, 20 Cent. Law Jour. 485, June 19, 1885.

to it, not occasioned by act of God or the public enemy, although the owner accompanies the property.¹ But in order to this liability there must be a delivery of the baggage to the carrier—a real bailment. The passenger must wholly part with the possession of his luggage, or the carrier will not be liable.² It is accordingly held that sleeping and parlor car companies are not, in respect of their passenger's luggage, either inn-keepers or common carriers, because the passenger in those cars does not surrender the possession of his goods.³

Notices or conditions, stamped or printed upon a baggage check, have no effect to limit the carrier's liability, the check being no evidence of any contract. Such notices do not bind the passenger, unless his assent to the condition is shown, and accepting the check is no evidence of such assent.⁴ It is not contributory negligence on the part of a passenger to take the checks that a baggage-master gives him, without examining them.⁵

¹ *Cole v. Goodwin*, 19 Wend. 251; s. c. 32 Am. Dec. 470, and the note; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 620; s. c. 51 Am. Dec. 682; *Peixotti v. McLaughlin*, 1 Strobb. 468; s. c. 47 Am. Dec. 563; *Tower v. Utica, &c.*, R. R. Co., 7 Hill, 47; s. c. 42 Am. Dec. 36; *Logan v. Ponchartrain*, 11 Robinson (La.), 24; s. c. 43 Am. Dec. 199; *Dibble v. Brown*, 12 Ga. 217; s. c. 56 Am. Dec. 460; *Camden, &c.*, R. R. Co. v. *Baldauf*, 16 Penn. St. 67; s. c. 55 Am. Dec. 481; *Woods v. Devin*, 13 Ill. 747; s. c. 56 Am. Dec. 483.

² *Wilkins v. Earl*, 3 Rob. 369; s. c. 19 Abb. Pr. 196; *Tower v. Utica, &c.*, R. R. Co., 7 Hill, 47; s. c. 42 Am. Dec. 36; *Weeks v. New York, &c.*, R. R. Co., 9 Hun, 671; s. c. 72 N. Y. 50; *The R. E. Lee*, 2 Abb. (U. S.) 49; *Clark v. Burns*, 118 Mass. 277; *Merriam v. Hartford, &c.*, R. R. Co., 20 Conn. 354; s. c. 52 Am. Dec. 344; *Railroad Co. v. Barrett*, 36 Ohio St. 452

³ *Thomp. on Carriers*, 530 § 20; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. (N. S.) 354; *Pullman Palace Car Co.*, 73 Ill. 365. See, also, *Macclin v. New Jersey Steamboat Co.*, 7 Abb. Pr. (N. S.) 236; *Morris v. Third Ave. R. R. Co.*, 23 How. Pr. 345, and "The responsibility of the Pullman Palace Car Company for thefts from passengers," by Sterling B. Toney, Esq., of the Louisville Bar, XIX Am. Law Rev. (N. S.) 204, March-April, 1885, in which this question is thoroughly discussed.

⁴ *Wilson v. Chesapeake, &c.*, R. R. Co., 21 Gratt. 654; *Burnham v. Grand Trunk R. R. Co.*, 63 Me. 298; s. c. 18 Am. Rep. 220; *Brown v. Eastern, R. R. Co.*, 11 CUSH. 97; *Rawson v. Penn. R. R. Co.*, 48 N. Y. 212; s. c. 8 Am. Rep. 543; *Madan v. Sherard*, 73 N. Y. 329; s. c. 29 Am. Rep. 153.

⁵ *Isaacson v. New York, &c.*, R. R. Co., 94 N. Y. 278; s. c. 46 Am. Rep. 142.

If the baggage miscarries and the passenger is thereby injured, he may have his action; and, when a passenger leaves the train without claiming his baggage, such an act on his part is not negligence which absolves the carrier from liability;¹ and, upon the other hand, when a passenger upon arriving at his destination, instead of trusting the carrier, as he might lawfully do, under the doctrine of the case just cited, goes forward to the baggage car, immediately upon alighting from the train, in order to look up his luggage, and assist about it, and while so engaged, is run over and killed by the negligence of the defendant's servants, it is held that an action will lie against the company, and that a plea of contributory negligence is bad. Negligence is not imputable to one who looks after his property in a lawful manner in such a case as this.²

§ 61. *Traveling on Sunday.*—In some of the New England courts it has been held that when one travels on Sunday, in violation of a statute which prohibits traveling on the Lord's day, except from necessity or charity, no action can be maintained for an injury thereby sustained. The violation of law involved in traveling on Sunday is, in those States, a sufficient defense to an action for damages for an injury resulting from the defendant's negligence. In Massachusetts the courts seem to proceed upon the theory of contributory negligence. Nothing could, however, be more illogical or judicially absurd. "The Massachusetts decisions upon the Sunday law," says Mr. Justice Grier, "depend upon the peculiar legislation and customs of that State more than upon any general principles of justice or law."³ In actions of this kind, the violation of the

¹ Cary v. Cleveland, &c., R. R. Co., 29 Barb. 47.

² Ormond v. Hayes, 60 Texas, 180.

³ Philadelphia, &c., R. R. Co. v. Towboat Co., 23 How. (U. S.), 209.

Sunday law is, upon familiar grounds, to be regarded as an entirely collateral violation of law. It is, in no proper sense, a proximate cause of the injury complained of, and upon the general principles of law applicable to these cases, is no more a defense to an action for negligence than that the plaintiff is guilty of violating the revenue laws, or has been a smuggler, or is, upon general principles, a bad and unworthy person. It is not generally necessary for the plaintiff to establish the fact that he is a nice man, when he has been hurt through the carelessness of a railway company; and that his character is not what it might be, is just as good a defense to such an action, in justice and right reason, as that he is riding in the cars on a Sunday.¹ But, notwithstanding the indefensibility of such a rule, it is, nevertheless, stoutly maintained. The earliest case in which it was declared, is *Bosworth v. Inhabitants of Swansey*,² wherein the opinion was written by Chief Justice Shaw. In this case it is held that a person who is injured by reason of a defect in a highway, over which he is traveling on secular business, on Sunday, cannot recover of the town, without proof that he is traveling from necessity or charity, the burden being on him to show that his own fault did not concur in causing the injury.³ In *Stanton v. Metropolitan Street Railway Co.*,⁴ the rule was applied to the case of one riding upon a street car upon the Sabbath day; and it was held that such a passenger, who was rid-

¹ *Sutton v. Town of Wauwatosa*, 29 Wis. 21; S. C. 9 Am. Rep. 534; *Schmid v. Humphrey*, 48 Iowa, 652; S. C. 30 Am. Rep. 414; *Baldwin v. Barney*, 12 R. I. 392; S. C. 34 Am. Rep. 670; *Cooley on Torts*, § 157; *Wharton on Neg.*, § 331.

² 10 Metc. 363; S. C. 43 Am. Dec. 441.

³ In *Jones v. Inhabitants of Andover*, 10 Allen, 18, a similar case was similarly decided.

⁴ 14 Allen, 485.

ing for the purpose of making a visit, was violating the law, and therefore was not entitled to redress for an injury which he would not have received but for such violation.¹ So, also, in cases of accident to persons traveling, on Sunday, upon railway trains, unless the plaintiff can make it appear that his errand was one of necessity or charity, he cannot recover.² The logic of these cases, is that a person who receives an injury while traveling, which he could not have received if he had not been traveling, contributes³ to the injury by the act of traveling, and that he is, therefore, bound to show his right to travel, in order to show that his own fault did not concur in causing his injury. The validity of this reasoning depends on the validity of the assumption that the act of traveling is a contributory or concurring cause of injury. Is the assumption just? Is not the act of traveling to be regarded rather as a condition than as a cause of the injury? or, to state the question in another way, is not the injury to be regarded rather as an incident than as an effect of the traveling?⁴ This is peculiarly a Massachusetts doctrine,⁵ but it also obtains in Vermont⁶ and in Maine.⁷ It is, however, denied with emphasis in

¹ See, also, *Hamilton v. Boston*, 14 Allen, 475, for an extended discussion of this rule and a history of the Massachusetts legislation in point.

² *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; s. c. 12 Am. Rep. 720. [Compare, with this case, *Bennett v. Brooks*, 9 Allen, 118; *Commonwealth v. Sampson*, 97 Mass. 407; and *Hamilton v. Boston*, 14 Allen, 475]. *Doyle v. Lynn, &c.*, R. R. Co., 118 Mass. 195; s. c. 19 Am. Rep. 431; *Bucher v. Fitchburg R. R. Co.*, 131 Mass. 156; s. c. 41 Am. Rep. 216; *Day v. Highland St. R. R. Co.*, 135 Mass. 113; s. c. 46 Am. Rep. 447.

³ In *Hall v. Corcoran*, 107 Mass. 251, it is expressly declared that the

plaintiff's illegally traveling on Sunday "necessarily contributed" to his injury. But compare *McGrath v. Merwin*, 112 Mass. 467; s. c. 17 Am. Rep. 119.

⁴ *Baldwin v. Barney*, 12 R. I. 392; s. c. 34 Am. Rep. 670.

⁵ *Phila., &c., R. R. Co. v. Phila., &c., Towboat Co.*, 23 How. (U. S.), 209.

⁶ *Johnson v. Irasburgh*, 47 Vt. 28; s. c. 19 Am. Rep. 111.

⁷ *Hinckley v. Penobscot*, 42 Me. 89; *Cratty v. Bangor*, 57 Me. 423; *Morton v. Gloster*, 46 Me. 420; *Bryant v. Biddeford*, 39 Me. 193; *Davidson v. Portland*, 69 Me. 116; s. c. 31 Am. Rep. 253.

Rhode Island,¹ and in New Hampshire,² and finds no countenance outside of New England.³

The question of the effect of Sunday traveling, upon the plaintiff's right to recover in case of injury through the negligence of another, has, in the courts of New England, very frequently arisen in actions brought against towns or cities for defects in highways. These cases are considered in the following chapter.⁴ This defense has also occasionally availed the railway corporations of New England in actions brought against them for injuries to persons at railway crossings.⁵ Mr. Irving Browne, in his *Humorous Phases of the Law*,⁶ has set forth the law upon this general question in an entertaining and instructive fashion. The industrious reader will refer to it.

(B.) AS TO STRANGERS.

§ 62. *Duty of a public carrier to persons lawfully upon its premises, but who are neither passengers nor employees.*—The common carrier of passengers is, as we

¹ *Baldwin v. Barney*, 12 R. I. 392; s. c. 34 Am. Rep. 670.
² *Dutton v. Weare*, 17 N. H. 34; s. c. 43 Am. Dec. 590; *Corey v. Bath*, 35 N. H. 531; *Norris v. Litchfield*, 35 N. H. 271; *Frost v. Hull*, 4 N. H. 153; *Allen v. Deming*, 14 Id. 133.
³ *Phila., &c., R. R. Co. v. Phila. Towboat Co.*, 23 How. (U. S.) 209; *Sutton v. Wauwatosa*, 29 Wis. 21; s. c. 9 Am. Rep. 534; *Mohney v. Cook*, 26 Penn. St. 342; *Schmid v. Humphrey*, 48 Iowa, 652; s. c. 30 Am. Rep. 414; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; s. c. 17 Am. Rep. 221; *Platz v. City of Cohoes*, 89 N. Y. 219; s. c. 42 Am. Rep. 286. Compare, also, *State v. Railroad Co.*, 24 West Va. 783; s. c. 49 Am. Rep. 290; *State v. Baltimore, &c., R. R. Co.*, 15 West Va. 362; s. c. 36 Am. Rep. 803; *Commonwealth v. Louisville, &c., R. R. Co.*, 80 Ky. 291; s. c. 44 Am. Rep. 475; *Phila., &c., R. R. Co. v. Lehman*, 56 Md. 409; s. c. 40 Am. Rep. 415; *Yonoski v. State*, 79 Ind. 393; s. c. 47 Am. Rep. 614; *McGatrick v. Watson*, 4 Ohio St. 566; *State v. Goff*, 20 Ark. 289; *Whitcomb v. Gilman*, 35 Vt. 297; *Connolly v. City of Boston*, 117 Mass. 64; s. c. 19 Am. Rep. 396; *Gorman v. Lowell*, 117 Mass. 65; *Smith v. Boston & Maine R. R. Co.*, 120 Mass. 490; s. c. 21 Am. Rep. 538; *McClary v. Lowell*, 44 Vt. 116; s. c. 8 Am. Rep. 366; *Crossman v. City of Lynn*, 121 Mass. 301.
⁴ *Vide*, § 81 *infra*.
⁵ *Smith v. Boston, &c., R. R. Co.*, 120 Mass. 490, *supra*. See *infra*, upon this point.
⁶ Chap. II.

have seen,¹ bound to exercise great or extraordinary care to the end that those who entrust themselves to him as his passengers may be safe, but as to all other persons with whom he deals, the carrier is not held to so high a degree of responsibility. Toward them he must exercise that measure of circumspection which we call ordinary care, and which, as a rule, all men are held bound to exercise toward all other men with whom they come in contact. When one comes lawfully upon my premises, I owe him the duty of ordinary care;² but I owe but slight care to a mere trespasser.³ A railway company, accordingly, is bound to exercise ordinary care toward all persons who come about its depots, or shops, or yards, or otherwise upon its premises, upon their proper business. There is an implied invitation to the public to do business with the railroad, and out of this implied invitation arises, on the one hand, the right which the public has to go upon the premises of the railway company, in the usual manner, for purposes of business, and, on the other hand, the duty of the company toward persons of this description.⁴

When persons cross a railway track at a regular crossing upon the highway, they are neither passengers nor employees, nor are they upon the premises of the railway company by virtue of the implied invitation to which I

¹ § 50, *supra*.

² Toledo, &c., R. R. Co. v. Grush, 67 Ill. 262; s. c. 16 Am. Rep. 618; Tobin v. Portland, &c., R. R. Co., 59 Me. 183; s. c. 8 Am. Rep. 415; McDonald v. Chicago, &c., R. R. Co., 26 Iowa, 124 (by Dillon, C. J.); Caswell v. Boston, &c., R. R. Co., 98 Mass. 194; Campbell v. Portland Sugar Co., 62 Me. 552; s. c. 16 Am. Rep. 503; Wendell v. Baxter, 12 Gray, 494; Pittsburgh v. Grier, 22 Penn. St. 54; s. c. 60 Am. Dec. 65; McKone v. Michigan, &c., R. R. Co., 51 Mich. 601; s. c. 47 Am. Rep. 596; Doss v. Missouri, &c., R.

R. Co., 59 Mo. 27; s. c. 21 Am. Rep. 371; Louisville, &c., R. R. Co. v. Wolfe, 80 Ky. 82; Cooley on Torts, 604-607; Bennett v. Louisville, &c., R. R. Co., 102 U.S. 577.

³ Pittsburgh, &c., R. R. Co. v. Bingham, 29 Ohio St. 365; s. c. 23 Am. Rep. 751; Sweeny v. Old Colony, &c., R. R. Co., 10 Allen, 372; Gillis v. Pennsylvania R. R. Co., 59 Penn. St. 129; Severy v. Nickerson, 120 Mass. 306; s. c. 21 Am. Rep. 514; Illinois, &c., R. R. Co. v. Godfrey, 71 Ill. 500; s. c. 22 Am. Rep. 112. See, also, § 17, *supra*.

⁴ See the cases, *supra*.

have just referred, and under which, persons so upon the company's premises are protected, but, nevertheless, they are lawfully upon the track, and the railway company is bound to exercise toward them the full measure of ordinary care. This is a duty not springing out of any contract, express or implied, as in the relations to which I have referred, but an obligation imposed upon the railway company by the rules of civil society. The passenger has his action for breach of contract, and so has the employee, when either of them suffer by reason of the company's neglect,¹ but, when one is carelessly run down at a crossing, by a railway train, he brings an action sounding in tort, because the company has, by its negligence, violated one of the rules of civil order. The railway company owes him the duty of ordinary care, and when it fails to exercise that measure of carefulness, the injured person may have his action.

§ 63. *Duty of the public at railway crossings.*—When one approaches a point upon the highway, where a railway track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption.² The

¹ Each may, moreover, of course, have an action in tort.

² *Daniel v. Metropolitan Ry. Co.*, 5 H. L. 45; s. c. L. R. 3 C. B. 591; *State v. Maine Central R. R. Co.*, 76 Me. 357; s. c. 49 Am. Rep. 622; *Phila., &c., R. R. Co. v. Stebbing*, 62 Md. 504; *Cleveland, &c., R. R. Co. v. Crawford*, 24 Ohio St. 631; s. c. 15 Am. Rep. 633; *Louisville, &c., R. R. Co. v. Goetz*, 79 Ky. 442; s. c. 42 Am. Rep. 227; *Penn. R. R. Co. v.*

Beale, 73 Penn. St. 504; s. c. 13 Am. Rep. 753; *Karle v. Kansas, &c., R. R. Co.*, 55 Mo. 476; *Kennedy v. North Mo. R. R. Co.*, 36 Id. 351; *Whalen v. St. Louis, &c., R. R. Co.*, 60 Id. 323; *McGrath v. Hudson River R. R. Co.*, 32 Barb. 144; s. c. 19 How. Pr. 211; 59 N. Y. 468; 17 Am. Rep. 359; *Bernhardt v. Rensselaer, &c., R. R. Co.*, 1 Abb. App. Dec. 131; s. c. 32 Barb. 165; 18 How. Pr. 427; 19 How. Pr. 199; *Beisegel v. New York, &c.,*

requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term "ordinary care under the circumstances" shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings as affecting the traveler, is no longer, as a rule, a question for the jury. The *quantum* of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts enforce this reasonable rule.¹ He must

R.R.Co., 14 Abb. Pr. (N. S.) 29; s. C. 40 N. Y. 9; Eaton v. Erie Ry. Co., 51 N. Y. 544; Maginnis v. New York, &c., R. R. Co., 52 Id. 215; Central, &c., R. R. Co. v. Moore, 24 N. J. Law, 824; Indianapolis, &c., R. R. Co. v. Stout, 53 Ind. 143; Mercer v. New Orleans, &c., R. R. Co., 23 La. Ann, 264; Chicago, &c., R. R. Co. v. Jacobs, 63 Ill. 178; Id. v. Kusel, 63 Id. 180; Continental Improvement Co. v. Stead, 95 U. S. 161; Cooley on Torts, 673.

¹Reading, &c., R. R. Co. v. Ritchie, 102 Penn. St. 425; Gothard v. Ala., &c., R. R. Co., 67 Ala. 114; Chicago, &c., R. R. Co. v. Dimick, 96 Ill. 42; Penn. R. R. Co. v. Rudel, 100 Id. 603; Peoria, &c., R. R. Co. v. Clayberg, 107 Id. 644; Terre Haute, &c., R. R. Co. v. Clark, 73 Ind. 168; Pittsburgh, &c., R. R. Co. v. Martin, 82 Id. 476; Saverenz v. Chicago, &c., R. R. Co., 56 Iowa, 689; Funston v. Id., 61 Id. 452; Wheelwright v. Boston, &c., R. R. Co., 135 Mass. 225; Johnson v. Chicago, &c., R. R. Co., 77 Mo. 546; Galveston, &c., R. R. Co. v. Bracken, 59 Texas 71; Id. v. Graves, 59 Id. 330; Louisville, &c., R. R. Co. v. Goetz, 79 Ky. 442; Field v. Chicago, &c., R. R. Co., 4 McCrary, 593; Tully v. Fitchburg R. R. Co., 134 Mass. 499; Kelly v. Hannibal, &c., R.

R. Co., 75 Mo. 138; Powell v. Mo. Pac. R. R. Co., 76 Id. 80; Randall v. Conn., &c., R. R. Co., 132 Mass. 499; Schofield v. Chicago, &c., R. R. Co., 2 McCrary, 268; Plummer v. Eastern R. R. Co., 73 Me. 591; Haas v. Grand Rapids, &c., R. R. Co. 47 Mich. 401; Penn. &c., R. R. Co. v. Rathgeb, 32 Ohio St. 66; Henze v. St. Louis, &c., R. R. Co., 71 Mo. 636; So. Ala. R. R. Co., v. Thompson 62 Ala. 494; Baltimore, &c., R. R. Co., v. Whiteacre, 35 Ohio St. 627; Dublin, &c., Ry. Co. v. Slattery, 3 L. R. App. Cas. 1155; Stublely v. London, Ry. Co., L. R. 1 Exch. 13; Cliff v. Midland Ry. Co. 5 Q. B. 258; Telfer v. North, &c., R. R. Co., 30 N. J. Law 138; State v. Manchester R. R. Co., 52 N. H. 258; Webb v. Portland, &c. R. R. Co., 57 Me. 117; McCall v. R. R. Co., 54 N. Y. 642; Gillespie v. City, 54 Id. 468; Belton v. Baxter, 54 Id. 245; Penn. R. R. Co. v. Beale, 73 Penn. St. 504; s. C. 13 Am. Rep. 753; Wilson v. Charlestown, 8 Allen 138; Allyn v. Boston, &c., R. R. Co., 105 Mass. 77; DeArmand v. New Orleans, &c., R. R. Co. 23 La. Am. 264; Wilcox v. Rome, &c., R. R. Co., 39 N. Y. 358; Baxter v. Troy, &c., R. R. Co., 41 N. Y. 502; North Penn. R. R. Co. v. Heileman, 49 Penn. St. 60; Hanover, &c., R. R. Co. v. Coyle, 55 Id. 396;

even come to a halt for this purpose;¹ but he is not required to get out of his wagon and go forward on foot for the purpose of looking,² especially when such a course would not have prevented the collision,³ but would rather have exposed the traveler to the very peril it was designed to avoid.⁴ In Pennsylvania a contrary rule has been laid down in at least one case;⁵ also in Minnesota.⁶ If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*.⁷

St. Louis, &c., R. R. Co. v. Manly, 58 Ill. 300; Illinois, &c., R. R. Co. v. Bach-
 es, 55 Id. 379; Chicago, &c., R. R. Co.
 v. Sweeney, 52 Id. 325; Id. v. Gretzner,
 46 Id. 74; Penn. Canal Co. v. Bent-
 ley, 66 Penn. St. 30; Lehigh Valley R.
 R. Co. v. Hall, 61 Id. 361; Baltimore,
 &c., R. R. Co. v. Breinig, 25 Md. 378;
 Lake Shore, &c., R. R. Co. v. Miller,
 25 Mich. 274; Kelly v. Hendrie, 26 Id.
 255; Bellefontaine, &c., R. R. Co. v.
 Hunter, 33 Ind. 365; Brown v. Mil-
 waukee, &c., R. R. Co., 22 Minn. 165;
 Ernst v. Hudson, &c., R. R. Co., 39
 N. Y. 61; Stackus v. N. Y. &c., R. R.
 Co., 79 N. Y. 464; Chicago, &c.,
 R. R. Co. v. Kusel, 63 Ill. 180
 (note); Id. v. McKean, 40 Id. 218;
 Id. v. Still, 19 Id. 499; Railroad
 Co. v. Houston, 95 U. S. 697;
 Linfield v. Old Colony R. R. Co., 10
 Cush. 562; Chicago, &c., R. R. Co.
 v. Hatch, 79 Ill. 137; Whitney v.
 Maine, &c., R. R. Co., 69 Me. 208;
 Grows v. Id., 67 Id. 412; Bohan v.
 Milwaukee, &c., R. R. Co., 58 Wis.
 30; Copley v. New Haven, &c., R.
 R. Co., 136 Mass. 6; Wendell v. N.
 Y., &c., R. R. Co., 91 N. Y. 420;
 Baughman v. Shenango, &c., R. R.
 Co., 92 Penn. St. 335; s. c. 37 Am.
 Rep. 690; Schofield v. Chicago, &c.,
 R. R. Co., Sup. Ct. U. S., May 4,
 1885, 5 Sup. Ct. Rep. 1125; s. c. 32
 Alb. Law Jour. 72.

¹ Wilds v. Hudson, &c., R. R. Co.,

29 N. Y. 315; Schulz v. Penn. R. R.
 Co., 5 Reporter. 376; Penn. Canal Co.
 v. Bentley, 66 Penn. St. 30; Penn.
 R. R. Co. v. Beale, 73 Penn. St. 504;
 s. c. 13 Am. Rep. 753; Id. v. Weber,
 76 Penn. St. 157. Compare Baugh-
 man v. Shenango, &c., R. R. Co., 92
 Penn. St. 335; s. c. 37 Am. Rep. 690.
Contra, Leavenworth, &c., R. R. Co. v.
 Rice, 10 Kan. 426; Davis v. N. Y., &c.,
 R. R. Co., 47 N. Y. 400. See also, Cleve-
 land, &c., R. R. Co. v. Crawford, 24
 Ohio St. 631; s. c. 15 Am. Rep. 633,
 and Cosgrove v. New York, &c., R. R.
 Co., 87 N. Y. 88; s. c. 41 Am. Rep. 355.

² Pittsburgh, &c., R. R. Co. v.
 Wright, 80 Ind. 182; Davis v. N. Y.,
 &c., R. R. Co., 47 N. Y. 400.
³ Penn. R. R. Co. v. Ackerman, 74
 Penn. St. 265; McGuire v. Hudson, &c.,
 R. R. Co., 2 Daly. 761; Cleveland, &c.,
 R. R. Co. v. Crawford, 24 Ohio St. 361;
 s. c. 15 Am. Rep. 633; Weber v. N.
 Y., &c., R. R. Co., 58 N. Y. 451; s.
 c. 67 Id. 587.

⁴ Duffy v. Chicago, &c., R. R. Co.,
 32 Wis. 269.

⁵ Penn., &c., R. R. Co. v. Beale, 73
 Penn. St. 504; s. c. 13 Am. Rep. 753.

⁶ Shaber v. St. Paul R. R., 28 Minn.
 103.

⁷ Chicago, &c., R. R. Co. v. Dame-
 rell, 81 Ill. 450; Rockford, &c., R. R.
 Co., v. Byam, 80 Id. 528; Morse v.
 Erie Ry. Co., 65 Barb. 490; Haring
 v. N. Y., &c., R. R. Co., 13 Id. 9;

The strictness of this rule is relaxed in some jurisdictions. Thus, in Texas it is held not contributory negligence *per se*, in the absence of a statutory requirement, not to look up and down the track upon attempting to cross it;¹ and so in Missouri.² But while it is not negligence not to let down a buggy top in looking about at a crossing,³ yet, where a person approaches a crossing in a covered wagon, having an umbrella hoisted inside as an additional protection from rain falling at the time, and looked only straight ahead, it was held negligence.⁴ And, where a traveler was so wrapped up to protect himself from cold, that he could not hear distinctly, he was held under obligation to exercise especial care to overcome the temporary disability.⁵

Benton v. Central R. R. Co., 42 Iowa, 192; Haines v. Illinois, &c., R. R. Co., 41 Id. 227; New Orleans, &c., R. R. Co. v. Mitchell, 52 Miss. 808; Gordon v. Erie Ry. Co., 45 N. Y. 660; Reynolds v. N. Y., &c., R. R. Co., 58 Id. 248; Cleveland, &c., R. R. Co. v. Elliott, 28 Ohio St. 340; Baltimore, &c., R. R. Co. v. Whittaker, 24 Id. 642; Marietta, &c., R. R. Co. v. Picksléy, 24 Id. 654; Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 274; Id. v. Sunderland, 2 Bradw. 307; Wilcox v. Rome, &c., R. R. Co., 39 N. Y. 359; Griffin v. N. Y., &c., R. R. Co., 40 Id. 34; Davis v. Id., 47 Id. 400; Butterfield v. West., &c., R. R. Co., 10 Allen, 532; Allyn v. Boston, &c., R. R. Co., 105 Mass. 77; Wheelock v. Id., 105 Id. 203; Fletcher v. Atlantic, &c., R. R. Co., 64 Mo. 484; Toledo, &c., R. R. Co. v. Goddard, 25 Ind. 185; Bellefontaine, &c., R. R. Co. v. Hunter, 33 Id. 356; North Penn. R. R. Co. v. Heileman, 49 Penn. St. 60; Penn. R. R. Co. v. Beale, 73 Id. 504; Baltimore, &c., R. R. Co. v. State, 29 Md. 252; McCall v. Railroad, 54 N. Y. 642; Johnson v. Chicago, &c., R. R. Co., 77 Mo. 546; Louisville, &c., R. R. Co. v. Goetz, 79 Ky. 442; S. C. 42 Am. Rep. 227; State v. Maine Central R. R. Co., 76 Me. 357; S. C. 49 Am. Rep. 622; Daniel v. Metropol-

itan Ry. Co., L. R. 3 C. B. 591; S. C. 5 H. L. 45. But, see *contra*, Lehigh Valley R. R. Co. v. Hall, 61 Penn. St. 361; Penn. R. R. Co. v. Weber, 76 Id. 157; S. C. 18 Am. Rep. 407; Weiss v. Penn. R. R. Co., 79 Penn. St. 387; Cassidy v. Angell, 12 R. I. 447; S. C. 34 Am. Rep. 690, and the note; Railroad Co. v. Gladmon, 15 Wall. 401; Id. v. Houston, 95 U. S. 697; Dublin, &c., Ry. Co. v. Slatery, 3 App. Cas. 1155; 18 Albany Law Jour. 144, 164, 184, 204; Cooley on Torts, 673.

¹ Texas, &c., R. R. Co. v. Chapman, 57 Texas, 75; Houston, &c., R. R. Co. v. Wilson, 60 Id. 142.

² Zimmerman v. Hannibal, &c., R. R. Co., 71 Mo. 476.

³ Stackus v. N. Y., &c., R. R. Co., 79 N. Y. 464.

⁴ Sheffield v. Rochester, &c., R. R. Co., 21 Barb. 339.

⁵ Illinois, &c., R. R. Co. v. Ebert, 74 Ill. 399; Butterfield v. Western, R. R. Co., 10 Allen, 532; Steves v. Oswego, &c., R. R. Co., 18 N. Y. 422; Chicago, &c., R. R. Co. v. Still, 19 Ill. 508; Hanover, &c., R. R. Co. v. Coyle, 54 Penn. St. 396. See also, Elkins v. Boston, &c., R. R. Co., 115 Mass. 190; Harlan v. St. Louis, &c., R. R. Co., 64 Mo. 480; S. C. 65 Mo. 22; Moran v. Nashville, &c., R. R. Co.,

Upon this point the Supreme Judicial Court of Massachusetts says: "Plaintiff was acquainted with the highway and railroad. If he had looked, he would have seen the train. It came from the west, and for half a mile west of the highway the track was in plain sight. It was a stormy night; raining, blowing hard from the northwest, and snowing some. He had his hand up, holding his hat on his head, and this prevented him from seeing the train. He was listening for the cars; his attention was called to the subject, and he expected to hear the bell or whistle, but there was no bell rung or whistle blown. Plaintiff's neglect to use his own eyes was palpable negligence."¹

§ 64. *Duty of the railway company at crossings.*— Statutes and municipal ordinances in every jurisdiction prescribe specifically the duty of railway corporations in respect to railway crossings;² but no failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing, upon approaching a railway crossing, and, whenever the due use of either senses would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence, without any reference to the railroad's failure to perform its duty.³

58 Tenn. 379; Phila., &c., R. R. Co. v. Spearen, 47 Penn. St. 300. What amount of precaution is necessary, and whether or not it is a duty to stop, or look, upon nearing a railway crossing, is held to depend upon the circumstances. Plummer v. East., &c., R. R. Co., 73 Me. 591; Shaber v. St. Paul, &c., R. R. Co., 28 Minn. 103.

¹ Butterfield v. Western, &c., R. R. Co., 10 Allen, 532. Compare Schofield v. Chicago, &c., R. R. Co., Sup. Ct., U. S., May 4, 1885, 5 Sup. Ct. Rep. 1125; S. C. xix Am. Law. Rev. 669.

² See, on this point, Peoria, &c., R.

R. Co. v. Clayberg, 107 Ill. 644; Pittsburgh, &c., R. R. Co. v. Yundt, 78 Ind. 373; Railroad Co. v. Lowrey, 61 Texas, 149.

³ Field v. Chicago, &c., R. R. Co., 4 McCrary, 573; Brendell v. Buffalo, &c., R. R. Co., 27 Barb. 534; Bellefontaine, &c., R. R. Co. v. Hunter, 33 Ind. 335; Toledo, &c., R. R. Co. v. Shuckman, 50 Id. 42; St. Louis, &c., R. R. Co. v. Mathias, 50 Id. 65; Chicago, &c., R. R. Co. v. Notzki, 66 Ill. 455; Moore v. Central R. R. Co., 24 N. J. Law, 268; Runyon v. Id., 25 Id. 557; Artz v. Chicago, &c.,

This rule is only an application of the elementary principles of the law upon this subject. "It should and must be regarded as very little short of recklessness for any one to drive on the track of a railroad without first looking and listening whether a moving train is near. The negligence of the defendant in this case was a failure to ring the bell or sound the whistle. Yet, as the plaintiff was also negligent, he cannot recover. Those living near a railroad may, by contact, become careless, but they will be no less chargeable with negligence in case they rush on the track without looking and trying to ascertain first whether danger is near. Failing in this respect, they cannot be permitted to recover for injuries received. It is a well settled principle of the common law, that he, whose negligence has contributed in any essential degree to the injury sustained, cannot maintain an action against the party whose negligence has also contributed to the injury. When negligence is the issue, it must be a case of unmixed negligence. This rule is important—salutary in its effects—and should be maintained in its purity. The careless are thereby taught that if they sustain an injury, to which their own negligence has contributed, the law will afford them no redress."¹

If a statute requires that a train should give a particular warning of its approach, travelers have a right to presume that the provisions of the statute will be regarded by

R. R. Co., 34 Iowa, 160; *Havens v. Erie Ry. Co.*, 41 N. Y. 296; *Ernst v. Hudson, &c.*, R. R. Co., 39 Id. 61; s. C. 35 Id. 9; *Wilcox v. Rome, &c.*, R. R. Co., 39 Id. 358; *Baxter v. Troy, &c.*, R. R. Co., 41 N. Y. 502; *Nicholson v. Erie Ry. Co.*, 41 Id. 525; *Gorton v. Erie Ry. Co.*, 45 Id. 660; *Harlan v. St. Louis, &c.*, R. R., 64 Mo 480; s. C. 65 Id. 22; *Chicago, &c.*, R. R. Co. *v. Fears*, 53 Ill. 115; *LaFayette, &c.*, R. R. Co. *v. Huffman*, 28 Ind. 287; *Pittsburgh, &c.*, R. R. Co. *v. Vining*, 27 Id. 573;

Cleveland, &c., R. R. Co. *v. Terry*, 8 Ohio St., 570; *North Penn. R. R. Co. v. Heileman*, 49 Penn St. 60; *Toledo, &c.*, R. R. Co. *v. Riley*, 47 Ill. 514; *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257; *Zeigler v. Railroad Co.*, 5 S. C. 221; s. C. 7 Id. 402.

¹ *Dascomb v. Buffalo &c.*, R. R. Co., 27 Barb. 221; *Schofield v. Chicago, &c.*, R. R. Co., Sup. Ct., U. S., May 4, 1885, 5 Sup. Ct. Rep. 1125; s. C. 32 Alb. Law Jour. 72; xix Am. Law Rev. 669.

train-men, and that in default of such warning, the speed of the train will be reduced. Hence, if a railroad neglects signals and lookout, when required either by statute or common law, it is liable, although the plaintiff was incautiously on the track, if he kept a proper lookout,¹ and in Kentucky it is held to be the duty of a railway company to give signals of warning to travelers on public highways at crossings, although none are required by statute.²

Neither does the negligence of a plaintiff constitute a defense when the injury might have been avoided by the exercise of ordinary care and caution on the part of the railway company. Even a trespasser cannot be run down with impunity simply because he is a trespasser.³

¹ Baltimore, &c., R. R. Co. v. Trainor, 33 Md. 542; Cliff v. Midland Ry. Co., L. R. 5 Q. B. 258; Wakefield v. R. R. Co., 37 Vt. 330; Ernst v. Hudson, &c., R. R. Co., 35 N. Y. 9; s. c. 39 N. Y. 61; 32 Barb. 159; 19 How. Pr. 205; 24 Id. 97, and 32 Id. 262. Renwick v. New York, &c., R. R. Co., 36 N. Y. 132; Steves v. Oswego, &c., R. R. Co., 18 Id. 422; Galena, &c., R. R. Co. v. Loomis, 13 Ill. 548; St. Louis, &c., R. R. Co. v. Manly, 58 Id. 97; Reynolds v. Hindman, 32 Iowa, 146; Artz v. Chicago, &c., R. R. Co., 34 Id. 153; Ohio, &c., R. R. Co. v. Eaves, 42 Mo. 288. See, also, St. Louis, &c., R. R. Co. v. Terhune, 50 Ill. 151; Chicago, &c., R. R. Co. v. Adler, 56 Id. 344.

Mr. Thompson's note thereto; Hart v. Chicago, &c., R. R. Co., 56 Iowa, 166; s. c. 41 Am. Rep. 93; Houghkirk v. President, &c., 92 N. Y. 219; s. c. 44 Am. Rep. 370; Welsch v. Hannibal, &c., R. R. Co., 72 Mo. 451; s. c. 37 Am. Rep. 440.

² § 17, *supra*; Brown v. Hannibal, &c., R. R. Co., 50 Mo. 461; Gray v. Scott, 66 Penn. St. 345; Trow v. Vermont, &c., R. R. Co., 24 Vt. 487; s. c. 58 Am. Dec. 191; Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio St. 172; s. c. 62 Am. Dec. 246; Columbus, &c., R. R. Co. v. Terry, 8 Ohio St. 570; Louisville, &c., R. R. Co. v. Collins, 2 Duv. (Ky.) 114; Railroad Co. v. State, 36 Md. 366; Rothe v. Milwaukee, &c., R. R. Co., 21 Wis. 256; Macon, &c., R. R. Co. v. Davis, 18 Ga. 672; Lackawanna, &c., R. R. Co. v. Chendworth, 52 Penn. St. 382; Daley v. Norwich, &c., R. R. Co., 26 Conn. 591; Butler v. Milwaukee, &c., R. R. Co., 28 Wis. 487; Railroad Co. v. Whitton, 13 Wall. 270; Louisville, &c., R. R. Co. v. Burke, 6 Cold. 45; Bridge v. Grand Junc., &c., Ry. Co., 3 M. & W. 244; Bunting v. Central R. R. Co., 16 Nevada, 277; Holstine v. Oregon, &c., R. R. Co., 9 Oregon. 163; Meyers v. Chicago, &c., R. R. Co., 59 Mo. 223; Ream v. Pittsburgh, &c., R. R. Co.,

³ Louisville, &c., R. R. Co. v. Commonwealth, 13 Bush. 388; s. c. 26 Am. Rep. 205. See, upon this point, for modified views, Carroll v. Penn. R. R. Co., Sup. Ct. Penn., 12 Week. Notes Cas. 348; Ransom v. Chicago, &c., R. R. Co., Sup. Ct. Wis., Jan. 13, 1885, 32 Alb. Law Jour. 15; Moore v. Phila, &c., R. R. Co., Sup. Ct. Penn., Mch. 2, 1885, 32 Alb. Law Jour. 98; Longenecker v. Penn. R. R. Co., Sup. Ct. Penn., Feb. 6, 1885; xix Am. Law Rev. 331; McGrath v. New York, &c., R. R. Co., 59 N. Y. 468; s. c. 17 Am. Rep. 359, and

But it is not negligence for an engineer not to stop his train to avoid a collision with one crossing the track, in case the train cannot be brought to a halt in time to prevent the accident, except at risks which a prudent engineer would not assume.¹

Where the plaintiff had no previous knowledge of the crossing and failed to learn of it in time to avoid the collision, merely because he did not look out, his ignorance was held no defense,² but where a traveler is a stranger, the question of his negligence at a crossing may go to a jury.³ And, where one supposed a regular train had passed, when, in fact, being behind time, it had not passed, a failure to look out was still held negligence.⁴ And trying to cross a track when a train is known to be due, and when the slightest delay in getting across would probably be fatal, is negligence.⁵

If the traveler rushes forward at such a high rate of speed as to be unable to stop in time to avoid a collision at a crossing, he will be regarded negligent,⁶ and this negligence may be so gross as to operate to excuse even the gross negligence of the railway company.⁷ And if, with an approaching train in full view, he undertakes to reach the crossing and get over in advance of the train

49 Ind. 93; *Wasmer v. Delaware, &c., R. R. Co.*, 80 N. Y. 212; S. C. 36 Am. Rep. 608.

¹ *Chicago, &c., R. R. Co. v. Gretzner*, 46 Ill. 74; *Jones v. North Car., &c., R. R. Co.*, 67 N. C. 125; *Phila., &c., R. R. Co. v. Spearen*, 47 Penn. St. 300; *Telfer v. Northern R. R. Co.*, 30 N. J. Law, 188.

² *Allyn v. Boston, &c., R. R. Co.*, 105 Mass. 77.

³ *Cohen v. Eureka, &c., R. R. Co.*, 14 Nevada, 376.

⁴ *Toledo, &c., R. R. Co. v. Jones*, 76 Ill. 311; *Mahlen v. Lake Shore, &c., R. R. Co.*, 49 Mich. 585. See, also, *Phila., &c., R. R. Co. v. Carr*, 99 Penn. St. 505.

⁵ *Palys v. Erie Ry. Co.*, 30 N. J. Eq. 604; *Brooks v. Buffalo, &c., R. R. Co.*, 1 Abb. App. Dec. 211; *Reynolds v. N. Y., &c., R. R. Co.*, 58 N. Y. 248.

⁶ *Grippen v. New York, &c., R. R. Co.*, 40 N. Y. 34; *Salter v. Utica, &c., R. R. Co.*, 13 Hun 197; *Kelly v. Hannibal, &c., R. R. Co.*, 75 Mo. 138; *Powell v. Missouri, &c., R. R. Co.*, 76 Mo. 80.

⁷ *Haring v. New York, &c., R. R.*, 13 Barb. 9; *Grows v. Maine, &c., R. R. Co.*, 67 Me. 100. But, see *Hackford v. New York, &c., R. R. Co.*, 53 N. Y. 654; S. C. 43 How. Pr. 222.

by fast driving, it is negligence.¹ So, it is held negligence to attempt to drive a frightened horse toward a crossing where an engine is standing.² But if, having approached the crossing without negligence so near as to render retreat apparently impossible, the traveler resorts to fast driving as the only practicable means of extricating himself from the danger of his situation, such a course may be justifiable on the ground of prudence,³ even though, had he not been overcome with terror at the sudden peril in which he found himself, he might have acted more wisely.⁴

Flagmen or other servants of the company are presumed to act as agents in giving notice, and where a person attempts to cross the track, having been notified or invited to cross by such an agent, even though it may be in view of an approaching train, he may, in case he is injured, recover damages therefor from the company.⁵

But a flagman, stationed at a crossing to look out for trains, and give warning of their approach, if run over by a train, cannot recover.⁶ It is not *per se*, however, contributory negligence to attempt to cross a track after a notice that it is not safe,⁷ nor is it negligence on the part

¹ *Grows v. Maine, &c., R. R. Co.*, 67 Me. 100; *Pittsburgh, &c., R. R. Co. v. Taylor*, 104 Penn. St. 306; S. C. 49 Am. Rep. 580; *Chicago, &c., R. R. Co. v. Jacobs*, 63 Ill. 178; *Id. v. Kusel*, 63 Id. 180, (note); *Stout v. Indianapolis, &c., R. R. Co.*, 1 Wils. (Ind'pls.) 80; S. C. *sub nom.*, *Indianapolis, &c., R. R. Co. v. Stout*, 41 Ind. 149, and 53 Ind. 143.

² *Louisville, &c., R. R. Co. v. Schmidt*, 81 Ind. 264; *Pittsburgh, &c., R. R. Co. v. Taylor*, 104 Penn. St. 306; S. C. 49 Am. Rep. 580. But see, *Turner v. Buchanan*, 82 Id. 147; S. C. 42 Am. Rep. 485, for a modification.

³ *Macon, &c., R. R. Co. v. Davis*, 27 Ga. 113.

⁴ But see, *Wright v. Great Northern R. R.*, 8 Ir. L. R. 257. C. P. Div.

⁵ *Lunt v. London, &c., Ry. Co.*, L.

R. 1 Q. B. 277; *Chaffee v. Boston, &c., R. R. Co.*, 104 Mass. 108; *Whelock v. Id.*, 105 Id. 203; *Warren v. Fitchburg, R. R. Co.*, 8 Allen, 227; *Spencer v. Illinois, &c., R. R. Co.*, 29 Iowa, 55; *Sweeney v. Old Colony, R. R. Co.*, 10 Allen, 368; *Northeastern Ry. Co. v. Wanless*, 43 L. J. (Q. B.) 185; S. C. L. R. 7 H. L. 12, 30 L. T. (N. S.) 275; *Wanless v. Northeastern Ry. Co.*, 25 L. T. (N. S.) 103; S. C. L. R. 6 Q. B. 481; L. R. 1 Q. B. 277; *Dublin, &c., R. R. Co. v. Slattery*, 3 App. Cas. 1213. See, also, § 23 *supra*.

⁶ *Clark v. Boston, &c., R. R. Co.*, 128 Mass. 1. See, also, *Holland v. Chicago, &c., R. R. Co.*, 5 McCrary, 549.

⁷ *Kelly v. Southern, &c., R. R. Co.*, 28 Minn. 98.

of a pedestrian to cross the track anywhere at a regular crossing, whether on the sidewalk or in the roadway.¹

§ 65. *When the view at the crossing is obstructed.*—When the view of the track is obstructed, or when, for any reason, there is an inadequate outlook, this is a circumstance which demands of the employees of the railway company the exercise of increased vigilance.² But by this is meant the requisite degree of care, due care, under the circumstances; the railroad need not anticipate circumstances that are extraordinary in their nature.³ And where the dangerous character of the crossing is enhanced by its negligent construction, or where the track is so laid as to render it difficult for loaded vehicles to cross, the railway company, in case of an injury therefrom, is held liable.⁴ When the track is obscured by smoke or fog, a failure to sound the whistle, even in the absence of any statutory duty, is evidence of negligence,⁵ so, also, where the railroad company permitted corn-cribs to stand near the tracks in such a way as to cut off the view of the cross-

¹ Louisville, &c., R. R. Co. v. Herd, 80 Ind. 117.

² Chicago, &c., R. R. Co. v. Payne, 59 Ill. 534; s. c. 49 Id. 499; Indianapolis, &c., R. R. Co. v. Stables, 62 Id. 313; Richardson v. N. Y. &c., R. R. Co., 45 N. Y. 846; Illinois, &c., R. R. Co. v. Benton, 69 Ill. 174; Artz v. Chicago, &c., R. R. Co., 44 Iowa, 284; Penn. R. R. Co. v. Matthews, 36 N. J. Law. 531; Dimick v. Chicago, &c., R. R. Co., 80 Ill. 338; Craig v. N. Y., &c., R. R. Co., 118 Mass. 431; Cordell v. Id. 70 N. Y. 119; Indianapolis, &c., R. R. Co. v. Smith, 78 Ill. 112; Ohio, &c., R. R. Co. v. Clutter, 82 Id. 123.

³ Shaw v. Boston, &c., R. R. Co., 8 Gray, 45; Balto., &c., R. R. v. Breinig, 25 Md. 378; Grippen v. N. Y., &c., R. R. Co., 40 N. Y. 34.

⁴ Indianapolis, &c., R. R. Co. v. Stout, 53 Ind. 143; Payne v. Troy, &c., R. R. Co., 9 Hun. 526; Richardson v. N. Y., &c., R. R. Co., 45 N. Y. 846; Milwaukee, &c., R. R. Co. v. Hunter, 11 Wis. 160; Mann v. Central, &c., R. R. Co., 55 Vt. 484; s. c. 45 Am. Rep. 628; Pittsburgh, &c., R. R. Co. v. Dunn, 56 Penn. St. 280; Gramlick v. Railroad Co., 9 Phila. 78; Dimick v. Chicago, &c., R. R. Co., 80 Ill. 338; Ingersoll v. N. Y., &c., R. R. Co., 6 N. Y. Supr. Ct. 416; Artman v. Kansas, &c., R. R. Co., 22 Kan. 296.

⁵ Prescott v. Eastern, &c., R. R. Co., 113 Mass. 370 (note); James v. Great Western Ry. Co., L. R. 2 C. P. 635 (note).

ing,¹ or where piles of lumber, operated in the same way to obstruct the view.²

Where the traveler is misled by appearances, seeing a train with the rear toward him, and believing it to be receding, when in fact it is approaching, it is a question for the jury whether under the circumstances in continuing to cross he exercises proper care.³

A railway consisting of several lines, crossed a public foot-path on a level at a point near a station, but the foot-path was not in other respects dangerous. On each side of the railway was a good and sufficient swing-gate. The railway company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. B, wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then without looking up or down the line, commenced crossing the railway, and was killed by a passing train. If he had looked up the line he would have seen the train coming, in time to stop and avoid the accident. In an action against the company by B's administratrix, it was held in the English common pleas, that B contributed to the accident by his negligence. It was argued that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to B to come on to the track, and that, therefore, even if B were not guilty of contributory negligence, the company was not liable.⁴

But, in Pennsylvania, it is held not contributory neg-

¹ Rockford, &c., R. R. Co. v. Hillmer, 72 Ill. 235.

² Mackay v. N. Y., &c., R. R. Co., 35 N. Y. 75; *Contra*, Cordell v. Id. 70 Id. 123; S. C. 26 Am. Rep. 550.

³ Bonnell v. Delaware, &c., R. R. Co., 39 N. J. Law, 189. Compare Carroll v. Penn. R. R. Co., 12 Week. Notes Cas. 348; Moore v. Phila., &c.,

R. R. Co., Sup. Ct., Penn., Mch. 2, 1885, 32 Alb. Law Jour. 98; Haycroft v. Lake Shore, &c., R. R. Co., 64 N. Y. 636; New Jersey Trans. Co. v. West, 32 N. J. Law, 91; Penn. R. R. Co. v. Matthews, 36 Id. 531.

⁴ Skelton v. London, &c., Ry. Co., L. R. 2 C. P. 631.

ligence, *per se*, to attempt to cross a railway track at a regular crossing without waiting until a train that has just passed is far enough away to allow sight of a train coming up in a contrary direction.¹

Says the Court of Appeals of New York: "The law requires care at all times when in a situation of danger; and mental absorption or reverie, from business, grief, etc., will not excuse its omission. The inquiry is whether, from the evidence, it satisfactorily appears that the plaintiff, by looking, could have seen the train in time to have avoided the collision. If so, the plaintiff should have been nonsuited."² And Brainwell, B., in a carefully considered case said: "The track is of itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming. Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that way to see if danger is to be apprehended."³

When a train is backed over a crossing, or cars are pushed ahead in front of an engine, it is held evidence of negligence not to employ a lookout and all available means to avoid accidents to travelers at the crossing,⁴ and merely ringing the bell or blowing the whistle upon a locomotive attached to a freight train standing with its rear end partially across a street, is not proper notice to the passers-by of an intention to back the train over the crossing. Without other notice, the company in such a case will be held negligent.⁵

¹ Phila., &c., R. R. Co. v. Carr, 99 Penn. St. 505; Carroll v. Penn. R. R. Co., Sup. Ct. Penn., 12 Week. Notes Cas. 348; Moore v. Phila., &c., R. R. Co., Sup. Ct. Penn., Mch. 2, 1885, 32 Alb. Law Jour. 98.

² Baxter v. Troy, &c., R. R. Co., 41 N. Y. 502.

³ Stublely v. London, &c., Ry. Co., L. R. 1 Exch. 13.

⁴ Bailey v. New Haven, &c., R. R. Co., 107 Mass. 496; Show v. Boston,

&c., R. R. Co., 8 Gray, 45, 66; Bradley v. Id., 2 Cush. 539; Grippen v. N. Y., &c., R. R. Co., 40 N. Y. 34; Leavenworth, &c., R. R. Co. v. Rice, 10 Kan. 426; Kennedy v. North Mo. R. R. Co., 36 Mo. 351; Hathaway v. Toledo, &c., R. R. Co., 46 Ind. 25. See, also, Young v. Detroit, &c., R. R. Co., Sup. Ct., Mich., April 22, 1885, 23 N. W. Rep. 67; S. C. 20 Cent. Law Jour. 479.

⁵ Linfield v. Old Colony R. R. Co.,

The Supreme Court of Iowa declares the law upon this point in the following language : “ If the view of the railroad, as the crossing is approached upon the highway, is obstructed by any means so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then, whether it was negligence on the part of the plaintiff or the person injured, under the particular circumstances of the case, is a question of fact for the jury.”¹

In proportion as the danger increases must the vigilance of the person who attempts the crossing be increased. A railway crossing should, at all times and under all circumstances, be approached with caution ; but, at an obstructed crossing, it is the duty of a traveler to exercise a greater degree of care and caution than is incumbent upon him usually.² He is not, however, required to show that he took precautions which the surrounding circumstances would have rendered unavailing.³ When the train came from a direction where it could not have been seen in time, one crossing is not required to look in that direction,⁴ and when there was noise suffi-

10 Cush. 564; Chicago, &c., R. R. Co. v. Garvey, 58 Ill. 85; Illinois, &c., R. R. Co. v. Ebert, 74 Id. 399; Eaton v. Erie Ry. Co., 51 N. Y. 544; Maginnis v. N. Y., &c., R. R. Co., 52 Id. 215; McGovern v. Id., 67 Id. 417.

¹ Artz v. Chicago, &c., R. R. Co., 34 Iowa, 160. See, also, Laverenz v. Id., 56 Id. 689; Tabor v. Missouri, &c., R. R. Co., 46 Mo. 353; s. c. 2 Am. Rep. 517; Kennayde v. Pacific, &c., R. R. Co., 45 Mo. 255; Milwaukee, &c., R. R. Co. v. Hunter, 11 Wis. 160; Kelly v. Minneapolis, &c., R. R. Co., 29 Minn. 1; Faber v. St. Paul, &c., R. R. Co., 29 Id. 465; Abbett v. Chicago, &c., R. R. Co., 29 Id. 482; Strong v. Sacramento, &c., R. R. Co., 61 Cal. 326.

² Thomas v. Delaware, &c., R. R.

Co., 19 Blatch. 533; Strong v. Sacramento, &c., R. R. Co., 61 Cal. 326; Laverenz v. Chicago, &c., R. R. Co. 56 Iowa, 689; Johnson v. Chicago, &c., R. R. Co., 77 Mo. 546; Bunting v. Central R. R. Co., 14 Nevada, 351; Davey v. London, &c., Ry. Co., 11 L. R. Q. B. Div. 213. See, also, Lehey v. Hudson River R. R. Co., 4 Robt. 204; Schaick v. Id., 43 N. Y. 527.

³ Davis v. N. Y., &c., R. R. Co., 47 N. Y. 400; Hackford v. Id., 6 Lans. 381; s. c. 53 N. Y. 654; 43 How. Prac. 222; Leonard v. Id., 10 Jones & S. 225.

⁴ McGuire v. Hudson River R. R. Co., 2 Daly, 76; Chicago, &c., R. R. Co. v. Lee, 87 Ill. 454. See, also, Phila., &c., R. R. Co. v. Carr, 99 Penn. St. 505; Strong v. Sacramento,

ciently loud to drown the rumbling sound of a train in motion, the fact that the injured party did not listen, when there was no signal by either bell or whistle of the approaching train, was held not negligence.¹

§ 66. *Plaintiff deaf or intoxicated*.—Deafness, so far from excusing one for a failure to use his eyesight, rather imposes upon him the duty of increased vigilance in the employment of that faculty,² and when contributory negligence is charged, it is, as a rule, not sufficient for the plaintiff to urge his deafness by way of excuse. It may be of the very essence of the plaintiff's default that, being deaf, he put himself in a position where his deafness would especially expose him to injury. The rule is *caveat surdus*.

Neither will intoxication excuse one crossing a railroad track from the exercise of such care as is due from a sober man.³ But intoxication can hardly be said, as matter of law, to be contributory negligence. It tends to show contributory negligence, and is matter to go to the jury.⁴ "Slight intoxication," however, when

&c., R. R. Co., 61 Cal. 326; Davey v. London, &c., Ry. Co., 11 L. R. Q. B. Div. 213.

¹ Davis v. N. Y., &c., R. R. Co., 47 N. Y. 400; Leonard v. Id., 10 Jones & S. 225. See, also, Mahlen v. Lake Shore, &c., R. R. Co., 49 Mich. 585.

² Cleveland, &c., R. R. Co. v. Terry, 8 Ohio St. 570; Morris, &c., R. R. Co. v. Haslan, 38 N. J. Law. 147; Central, &c., R. R. Co. v. Fellar, 84 Penn. St. 226; Zimmerman v. Hannibal, &c., R. R. Co., 71 Mo. 476; Purl v. St. Louis, &c., R. R. Co., 72 Id. 168; Illinois, &c., R. R. Co. v. Buckner, 28 Ill. 299; Chicago, &c., R. R. Co. v. Triplett, 38 Id. 482; New Jersey Trans. Co. v. West, 32 N. J. Law, 91; Laicher v. New Orleans, &c., R. R. Co., 28 La. Ann. 320; Cogswell v. Oregon, &c., R. R. Co., 6 Oregon, 417; Terre Haute, &c., R. R. Co. v.

Graham, 46 Ind. 239; s. c. 95 Ind. 286; 48 Am. Rep. 719; Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 279; Hayes v. Michigan, &c., R. R. Co., 111 U. S. 228.

³ Kean v. Baltimore, &c., R. R. Co., 61 Md. 154; Toledo, &c., R. R. Co. v. Riley, 47 Ill. 514; Chicago, &c., R. R. Co. v. Bell, 70 Id. 102; Yarnall v. St. Louis, &c., R. R. Co., 75 Mo. 575; Southwestern R. R. Co. v. Hankerson, 61 Ga. 114; Houston, &c., R. R. Co. v. Sympkins, 54 Texas, 615; s. c. 38 Am. Rep. 632; Herring v. Wilmington, &c., R. R. Co., 10 Ired. (Law), 402; s. c. 51 Am. Dec. 395; Jones v. North Carolina R. R. Co., 67 N. C. 125; Little Rock, &c., R. R. Co. v. Pankhurst, 36 Ark. 371.

⁴ Aurora v. Hillman, 90 Ill. 61; Baltimore, &c., R. R. Co. v. Boteler, 38 Md. 568; Ditchett v. Spuyten

on the track of a railway, is said, in Illinois, not to be contributory negligence; ¹ while under the Georgia Code, intoxication is an absolute defense to actions of this character. ² In every jurisdiction, presumably, falling asleep, or being helplessly drunk, upon a railway track, would be held such contributory negligence as to bar an action for damages. ³

§ 67. *Trespassers on a railway track—the Pennsylvania rule.*—There are two views taken by the courts in this country as to the degree of care to be exacted from railway corporations with reference to trespassers upon its tracks.

One class of cases hold that the agents of a railroad company are under no obligation to take precautions for the safety of trespassers. "Except at crossings," says the Pennsylvania court, "where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril." ⁴ "The law insists upon a clear track." ⁵ The Pennsylvania courts insist to the utmost upon this rule. In *Phila., &c., R. R. Co. v. Hummell*, ⁶ Strong, J., says: "It is time it should be understood in this State that the use of a railroad track, cutting, or embankment, is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it

Duyvil, &c., R. R. Co., 5 Hun, 165; s. c. 67 N. Y. 425; Illinois, &c., R. R. Co. v. Cragin, 71 Ill. 177; Barker v. Savage, 45 N. Y. 191. See, also, Abbott's Trial Evidence, 779; Field's Damages, 188; Shear. & Redf. on Neg., § 487.

¹ Indianapolis, &c., R. R. Co. v. Galbraith, 63 Ill. 436.

² Southwestern, &c., R. R. Co. v. Hankerson, 61 Ga. 114.

³ Yarnall v. St. Louis, &c., R. R. Co., 75 Mo. 575; Denman v. St. Paul, &c., R. R. Co., 26 Minn. 357; Felder v. Louisville, &c., R. R. Co., 2 Mc-

Mull. (Law), 403; Richardson v. Wilmington, &c., R. R. Co., 8 Rich. (Law), 120; Herring v. Id., 10 Ired. (Law), 402; s. c. 51 Am. Dec. 395; Manly v. Id., 74 N. C. 655; Illinois, &c., R. R. Co. v. Hutchison, 47 Ill. 408; Weymire v. Wolfe, 52 Iowa, 533.

⁴ Mulherrin v. Delaware, &c., R. R. Co., 81 Penn. St. 366.

⁵ Railroad Co. v. Norton, 24 Penn. St. 465; s. c. 64 Am. Dec. 672. Compare Galena, &c., R. R. Co. v. Jacobs, 20 Ill. 478; Lake Shore, &c., R. R. Co. v. Hart, 87 Id. 529.

⁶ 44 Penn. St. 375.

must so be held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offense to go upon a railroad. With us, if not that, it is a civil wrong, of an aggravated nature; for it endangers not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge Gibson, with the concurrence of all the court, that ' a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietor of it, and of a licence to use the highest attainable rate of speed, with which neither the person nor property of another may interfere. The company, on the one hand, and the people of the vicinage, on the other, attend respectively to their particular concerns, with this restriction of their acts, that no needless damage be done. But the conductor of the train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested (R. R. v. Skinner, 19 Penn. St. 298). So, in R. R. v. Norton, 24 Penn. St. 465, it was said, that ' until the legislature shall authorize the construction of railroads for something else than travel and transportation, we shall hold any use of them for other purposes to be unlawful, if not, indeed, a public offense punishable by indictment.' But if the use of a railroad is exclusively for its owners, or those acting under them, if others have no right to be upon it, if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligation to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume, and act on the presumption that those in the vicinity will not violate the laws, will not trespass upon the right of a clear track; that even chil-

dren of a tender age will not be there, for, though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another, where care is only rendered necessary by his own wrongful act. It is true, that what amounts to ordinary care, under the circumstances of the case, is generally to be determined by the jury. Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty and negligence. Such is this case. The defendants had no reason to suppose that either man, woman, or child, might be upon the railroad where the accident happened. They had a right to presume that no one would be on it, and to act upon the presumption. Blowing the whistle of the locomotive, or making any other signal, was not a duty owed to the persons in the neighborhood, and, consequently, the fact that the whistle was not blown, nor a signal made, was no evidence of negligence. Were it worth while, abundant authority might be cited to show that the law does not require anyone to presume that another may be negligent, much less to presume that another may be an active wrong-doer. The principle was asserted in *Brown v. Lynn* (31 Penn. St. 510), and in *Reeves v. Delaware R. R.* (30 Penn. St. 454). It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action. There is as perfect a duty to guard against accidental injury to a night intruder

into one's bed chamber, as there is to look out for trespassers upon a railroad, where the public has no right to be. And the rule must be the same, whether the railroad is in the vicinage of many or few inhabitants. In the one case, as in the other, going upon it is unlawful, and, therefore, need not be expected. In this case it appears that there are fifteen houses between the railroad and public highway, all but two of them built since the railroad was constructed. The danger of trespassing may have been increased by the increase of the population, but the standard of duty in the use of one's property is not elevated or depressed by a varying risk of unlawful intrusions upon his rights. Of course, we are not speaking of the duties of railroad companies to the public at lawful crossings of their railways. We refer only to their obligations at points where their right is exclusive."

This is a luminous and explicit statement of the rule as held not only in Pennsylvania but in other States of the Union. Where this rule prevails, only such aggravated negligence, as amounts to intentional mischief on the part of the railway, will render it liable in the event of an injury to a trespasser.¹

¹ *Jeffersonville, &c., R. R. Co. v. Goldsmith*, 47 Ind. 43; *LaFayette, &c., R. R. Co. v. Huffman*, 28 Id. 287; *Cincinnati, &c., R. R. Co. v. Eaton*, 53 Id. 310; *Evansville, &c., R. R. Co. v. Wolf*, 59 Id. 89; *Carroll v. Minn., &c., R. R. Co.*, 13 Minn. 30; *Illinois, &c., R. R. Co. v. Godfrey*, 71 Ill. 500; *S. C. 22 Am. Rep.* 112; *Donaldson v. Milwaukee, &c., R. R. Co.*, 21 Minn. 293; *Herring v. Wilmington, &c., R. R. Co.*, 10 Ired. 402; *S. C. 51 Am. Dec.* 395; *Kenyon v. N. Y., &c., R. R. Co.*, 5 Hun, 479; *Green v. Erie Ry. Co.*, 11 Id. 333; *Balto., &c., R. R. Co. v. Schwindling*, 101 Penn. St. 258; *S. C. 47 Am. Rep.* 706; *Railroad Co. v. Houston*, 95 U. S. 697; *Ream v. Pittsburgh, &c., R. R. Co.*, 49 Ind. 93; *Gaynor v. Old Colony R. R. Co.*, 100 Mass. 208; *Indiana, &c., R. R. Co. v. Hudelson*, 13 Ind. 325; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; *S. C. 30 Am. Rep.* 686; *Terre Haute, &c., R. R. Co. v. Graham*, 95 Ind. 286; *S. C. 48 Am. Rep.* 719; *Pittsburgh, &c., R. R. Co. v. Collins*, 87 Penn. St. 405; *S. C. 30 Am. Rep.* 371; *Mason v. Mo. Pac. R. R. Co.*, 27 Kan. 83; *S. C. 41 Am. Rep.* 405; *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525. Compare *McAlpin v. Powell*, 70 N. Y. 126; *S. C. 26 Am. Rep.* 555, and Mr. Browne's note. The English statute upon this subject (3 & 4 Vict., c. 97, § 16), makes it a penal offense wilfully to trespass upon the line of a railway, and this is generally the rule of law on the continent of Europe. See *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *S. C. 6 Jur.* (N.

§ 68. *The modified rule as to trespassers.*—But the courts of some of the American States incline to relax the severity of the rule as to the public, and hold that a railway company is bound to run its trains with a view to the probability, or, at most, the possibility, of constant trespass upon its tracks. This is, however, neither correct in principle nor conformed to the analogy in other branches of the law of trespass. This doctrine is laid down by the Missouri court, viz. : “ If, after discovering the danger in which the party had placed himself, even by his own negligence, the company could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which, the company is liable. When it is said, in cases where plaintiff has been guilty of contributory negligence, that the company is liable if, by the exercise of ordinary care, it could have prevented the accident, it is to be understood that it will be so liable if, by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity.”¹ As a general rule, a trespasser on the track is

S.) 897; 29 L. J. (C. P.) 203; 8 Week. Rep. 227; 97 Eng. Com. Law, 731.

¹ Harlan v. St. Louis, &c., R. R. Co., 64 Mo. 480. See, also, s. C. 65 Id. 22; Brown v. Hannibal, &c., R. R. Co., 50 Id. 461; s. C. 11 Am. Rep. 420; Isabel v. Id., 60 Mo. 475; Finlayson v. Chicago, &c., R. R. Co., 1 Dill. 579; Baltimore, &c., R. R. Co. v. State, 33 Md. 542; State v. Balto., &c., R. R. Co., 36 Id. 366; Balto., &c., R. R. Co. v. State, 54 Id. 648; Penn., &c., R. R. Co. v. Id., 61 Id. 108; Balto., &c., R. R. Co. v. State Ct. of App. Md., 32 Alb. Law Jour. 13, to

be reported in 62 Md. Hassenger v. Mich., &c., R. R. Co., 48 Mich. 205; s. C. 42 Am. Rep. 470; Johnson v. Chicago, &c., R. R. Co., 56 Wis. 274; Austin v. Chicago, &c., R. R. Co., 91 Ill. 35; Houston, &c., R. R. Co. v. Sympkins, 54 Texas, 615; s. C. 30 Am. Rep. 632; Birge v. Gardner, 19 Conn. 507; s. C. 50 Am. Dec. 261; Gothard v. Alabama, &c., R. R. Co., 67 Ala. 114. Compare Carter v. Louisville, &c., R. R. Co., 98 Ind. 552; s. C. 49 Am. Rep. 780, and see § 17, *supra*. It is not contributory negligence for one walking on the track, in a snow

held to be there at his peril. He must keep himself informed of the approach of trains from any direction, and, in case of injury, will be held guilty of such contributory negligence, that he cannot recover from the railway company, notwithstanding concurrent negligence on their part.¹ The doctrine upon this point, declared by the Supreme Court of Missouri, is evidently an attempt to apply the rule that Judge Thompson has formulated² for the purpose of neutralizing the heresy in *Davies v. Mann*,³ but, as has been already suggested,⁴ it is, in the author's judgment, better to abandon the theory of that case than to explain it away. A railway company is not liable for a failure on the part of its employees to stop the train, on seeing a person walking on the track, even though there was time enough to do so, provided the proper signals of warning were given. The company may presume that the trespasser is in full possession of his senses, and that he will appreciate his danger, and act with discretion.⁵ But an engineer, who sees a helpless

storm, when the snow was blinding, to presume that the railway employees will be careful in running their train. *Solen v. Virginia, &c., R. R. Co.*, 13 Nevada, 106.

¹ *Gonzales v. N. Y., &c., R. R. Co.*, 50 How. Pr. 126; *Elwood v. N. Y., &c., R. R. Co.*, 4 Hun, 808; *Green v. Erie Ry. Co.*, 11 Id. 333; *Illinois, &c., R. R. Co. v. Hall*, 72 Ill. 222; *Id. v. Hetherington*, 83 Id. 510; *Lake Shore, &c., R. R. Co. v. Hart*, 87 Id. 529; *Austin v. Chicago, &c., R. R. Co.*, 91 Ill. 35; *Poole v. N. C. R. R. Co.*, 8 Jones (Law), 340; *Carlin v. Chicago, &c., R. R. Co.*, 37 Iowa, 316; *Murphy v. Id.*, 45 Id. 661; S. C. 38 Id. 539; *Bancroft v. Boston, &c., R. R. Co.*, 11 Allen, 34; S. C. 97 Mass. 275; *Laicher v. N. O., &c., R. R. Co.*, 28 La. Ann. 320; *Carroll v. Minn., &c., R. R. Co.*, 13 Minn. 30; *Donaldson v. Milwaukee, &c., R. R. Co.*, 21 Id. 293; *Smith v. Minn., &c., R. R. Co.*, 26 Minn. 419; *Rothe v. Mil-*

waukee, &c., R. R. Co., 21 Wis. 256; *Moore v. Penn. R. R. Co.*, 99 Penn. St. 301; *Mason v. Mo. Pac. R. R. Co.*, 27 Kan. 83; *Hoover v. Texas, &c., R. R. Co.*, 61 Texas, 503; *Lenix v. Mo. Pac. R. R. Co.*, 76 Mo. 86; *Meek v. Penn., &c., R. R. Co.*, 38 Ohio St. 632; *State v. Balto., &c., R. R. Co.*, 58 Md. 482; *Feunenbrack v. South Pac. R. R. Co.*, 59 Cal. 269.

² *Vide* § 18, *supra*.

³ *Thomp. on Neg.*, 1155, § 7.

⁴ § 10, *supra*.

⁵ *Illinois, &c., R. R. Co. v. Modglin*, 85 Ill. 481; *Herring v. Wilmington, &c., R. R. Co.*, 10 Ired. L. 402; S. C. 51 Am. Dec. 395; *Poole v. North Car. R. R. Co.*, 8 Jones (Law), 340; *Manly v. Wilmington, &c., R. R. Co.*, 74 N. C. 655; *Holmes v. Central, &c., R. R. Co.*, 37 Ga. 593; *Maher v. Atlantic, &c., R. R. Co.*, 64 Mo., 267; *Frech v. Phila., &c., R. R. Co.*, 39 Md. 574; *Willets v. Buffalo, &c., R. R. Co.*, 14 Barb. 585; *Kenyon v. N.*

person, incapable of moving, on the track, is guilty of negligence if he fails to make all prudent efforts to avoid the collision, and this without reference to the cause of the person's disability.¹

§ 69. *Children as trespassers on railroad property.*—The severity of the rule, as to trespassers upon railroad property, is essentially relaxed in the case of trespassers of tender years, who, in general, have not the faculties requisite for the perception of danger, or, having such faculties, are not capable of exercising them with the discretion of adults.² When the trespasser is an infant, the railway company, on the one hand, is held bound to exercise a higher degree of care and caution than is required as to adults, and the infant, on the other hand, is not required to exercise a discretion and prudence beyond its

Y., &c., R. R. Co., 5 Hun, 479; Harty v. Central, &c., R. R. Co., 42 N. Y. 468; Little Rock, &c., R. R. Co. v. Pankhurst, 36 Ark. 371; Laverenz v. Chicago, &c., R. R. Co., 56 Iowa, 689; Cogswell v. Oregon, &c., R. R. Co., 6 Oregon, 417; Terre Haute, &c., R. R. Co. v. Graham, 46 Ind. 239; s. C. 95 Ind. 286; 48 Am. Rep. 719; Indianapolis, &c., R. R. Co. v. McClaren, 62 Ind. 566; Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 279; Weymire v. Wolfe, 52 Iowa, 533; Moore v. Phila., &c., R. R. Co., Sup. Ct. Penn., Mch. 2, 1885; 32 Alb. Law Jour. 98.

¹ Houston, &c., R. R. Co. v. Sympkins, 54 Texas, 615; s. C. 38 Am. Rep. 632; Telfer v. Northern, &c., R. R. Co., 30 N. J. Law, 188; East Tenn., &c., R. R. Co. v. St. John, 5 Sneed, 524; Meeks v. Southern, &c., R. R. Co., 56 Cal. 513; s. C. 38 Am. Rep. 67; Schierhold v. North Beach, &c., R. R. Co., 40 Cal. 447; Isabel v. Hannibal, &c., R. R. Co., 60 Mo. 475.

² Evansich v. Gulf, &c., R. R. Co., 57 Texas, 126; s. C. 44 Am. Rep. 586; s. C. *sub nom.*, Gulf, &c., R. R. Co. v. Evansich, 61 Texas, 24, and s. C. 61 Texas, 3; Rockford, &c., R.

R. Co. v. Delaney, 82 Ill. 198; s. C. 25 Am. Rep. 308; Nagel v. Mo. Pac. R. R. Co., 75 Mo. 653; s. C. 42 Am. Rep. 418; Kansas, &c., R. R. Co. v. Fitzsimmons, 22 Kan. 686; s. C. 31 Am. Rep. 203; Isabel v. Hannibal, &c., R. R. Co., 60 Mo. 475; Frick v. St. Louis, &c., R. R. Co., 75 Mo. 542; s. C. again at page 595; Barley v. Chicago, &c., R. R. Co., 4 Biss. 430; Phila., &c., R. R. Co. v. Spearen, 47 Penn. St. 300; Kay v. Penn. R. R. Co., 65 Id. 269; s. C. 3 Am. Rep. 628; Penn. R. R. Co. v. Lewis, 79 Penn. St. 33; Penn. R. R. Co. v. Morgan, 82 Id. 134; Byrne v. New York, &c., R. R. Co., 83 N. Y. 620; Meyer v. Midland, &c., R. R. Co., 2 Neb. 319; Johnson v. Chicago, &c., R. R. Co., 56 Wis. 274; Fitzpatrick v. Fitchburg R. R. Co., 128 Mass. 13; McMullan v. Burlington, &c., R. R. Co., 46 Iowa, 231. See, also, Plumley v. Birge, 124 Mass. 57; s. C. 26 Am. Rep. 645; Kerr v. Forgue, 54 Ill. 482; s. C. 5 Am. Rep. 146; Meibus v. Dodge, 38 Wis. 300; s. C. 20 Am. Rep. 6; Munn v. Reed, 4 Allen, 431; Dowd v. Chicopee, 116 Mass. 93; Keyser v. Chicago, &c., R. R. Co., Sup. Ct. Mich. N. W. Rep. May 16, 1885; s. C. xix Am. Law Rev. 668.

years, but only that measure of sense and judgment which it may reasonably be expected to possess in view of its age.¹ When, however, children go so far, by way of a trespass, as to make a play-ground of the railroad track, or of other exposed railway premises or property, cases are not wanting to support the rule that such conduct is negligent *per se*, and that the company will not be liable for injury to children so conducting themselves, unless the acts of their employees evince a reckless and wanton disregard of human life which is equivalent to intentional mischief.²

Where a child, too young to know the danger of its situation, was at play upon a railway track, when a train approached suddenly at a high rate of speed, and one, seeing the peril in which the child had placed itself, ran upon the track and rescued the child, but was too late to save himself, and was run down by the locomotive and killed, the court held that such an act, for the purpose of saving the child's life, was not, as matter of law, negligent, to the extent of precluding a recovery.³

§ 70. *The turn-table cases.*—In the application of the general principles of the law of negligence and trespass to cases involving the rights of infants, or persons of tender years, various questions of considerable difficulty have arisen. As a rule, a trespasser acts at his peril, and

¹ See the cases last cited.

² *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; s. c. 30 Am. Rep. 686; *Central Branch, &c., R. R. Co. v. Henigh*, 23 Kan. 347; s. c. 33 Am. Rep. 167; *Smith v. Atchison, &c., R. R. Co.*, 25 Kan. 738; s. c. *sub nom.*, *Atchison, &c., R. R. Co. v. Smith*, 28 Kan. 541; *Cauley v. Pittsburgh, &c., R. R. Co.*, 95 Penn. St. 398; s. c. 40 Am. Rep. 664; *Moore v. Penn. R. R. Co.*, 99 Penn. St. 301; s. c. 44 Am. Rep. 106; *Baltimore, &c., R. R.*

Co. v. Schwindling, 101 Penn. St. 258; s. c. 47 Am. Rep. 706; *Chicago, &c., R. R. Co. v. Smith*, 46 Mich. 504; *St. Louis, &c., R. R. Co. v. Bell*, 81 Ill. 76; s. c. 25 Am. Rep. 269; *Ex parte Stell*, 4 Hughes, 157; *Miles v. Atlantic, &c., R. R. Co.*, 4 Id. 172.

³ *Eckert v. Long Island, &c., R. R. Co.*, 43 N. Y. 502; s. c. 3 Am. Rep. 721. Compare *Linnahan v. Sampson*, 126 Mass. 506; s. c. 30 Am. Rep. 692, and *vide* § 15, *supra*.

one owes no duty to such a person except that a wanton injury must not be inflicted upon him; but where one goes upon the premises or property of another, not as a mere trespasser, or by mere passive license, but by some sort of an invitation from the owner, the latter owes him a larger duty. "The general rule or principle applicable to this class of cases," says Chief Justice Bigelow, in *Sweeny v. Old Colony and Newport R. R. Co.*,¹ "is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon or pass over them, using due care, if he has held out any inducement, invitation or allurement, either express or implied, by which they have been led to enter thereon."²

There is a line of cases that hold, as an application of this doctrine, that what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. Accordingly, when one exposes upon his premises, in a place to which children may, or are likely to resort or be attracted, a dangerous tool, or machine, or other contrivance, which is calculated to inflict an injury upon any one who meddles with it, or even touches it heedlessly, without any precaution upon the part of the person so exposing it against mischief, it is held that such a person is not only guilty of negligence, but of negligence of a very reprehensible character.³

¹ 10 Allen, 368.

² Compare *Indermaur v. Dames*, L. R. 1 C. P. 274; s. c. 12 Jur. (N. S.) 432; 35 L. J. (C. P.) 184; 14 Week. Rep. 586; 14 L. T. (N. S.) 484; affirmed, 36 L. J. (C. P.) 181; L. R. 2 C. P. 311; 15 Week. Rep. 434; 16 L. T. (N. S.) 293, and see § 23, *supra*.

³ *Lynch v. Nurdin*, 1 Q. B. 29; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Hughes v. Macfie and Abbott v. Id.*, 2 Hurl. & Colt, 744;

s. c. 10 Jur. (N. S.) 682; 33 L. J. (Exch.) 177; 12 Week. Rep. 315. [But, for a contrary rule, see *Mangan v. Atterton*, 4 Hurl. & Colt, 388;] *Whirley v. Whitman*, 1 Head (Tenn.), 610; *Birge v. Gardner*, 19 Conn. 507; s. c. 50 Am. Dec. 261; *Wood v. School District*, 44 Iowa, 27; *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332; *Lane v. Atlantic Works*, 107 Mass. 104; *Mullaney v. Spence*, 15 Abb. Pr. (N. S.) 319. See, also, *Townsend v. Wathen*, 9 East, 277,

Stout v. Sioux City and Pacific R. R. Co.,¹ is the first of a series of adjudications, which may be known as the turn-table cases, in which this rule is applied in actions brought by, or in behalf of, infants, who have been injured while playing on, or about, turn-tables, left by railway companies unlocked or unguarded—and in such exposed positions as to tempt children to play with them. In this case, the plaintiff, a boy six years of age, who was playing upon such an exposed and unguarded turn-table in company with several other boys, was seriously hurt, and Mr. Justice Dillon, in delivering the charge, insisted that the circumstance that the plaintiff was in some sense a trespasser, did not, under these circumstances, exempt the defendant from the duty of care. The boy being the plaintiff, and not his parents, and it being conceded that there was no negligence on the part of the parents, and that as the plaintiff was but six years of age, none could be predicated of him, the simple question was as to the liability of the company by reason of their leaving the turn-table unlocked and unguarded in a place where boys were likely to come. It was held that the plaintiff might recover, and, upon appeal, the judgment of the court below was affirmed.²

The next case in which this question came before a court of last resort was one,³ in which, upon an essentially similar state of facts, the same result was reached. The court says: “We agree with the defendant’s counsel that a railroad company is not required to make its land a safe play-ground for children. It has the same right to

a case in which it was held to be unlawful for a man to tempt even his neighbor’s dogs into danger, by setting traps on his own land, baited with strong-scented meat, by which the dogs were allured to come upon his land and into his traps—and that,

too, although the traps were not set to catch the dogs.

¹ 2 Dill. 294.

² S. C. *sub nom.*, *Railroad Co. v. Stout*, 17 Wall. 657, (by Hunt, J.)

³ *Keffe v. Milwaukee, &c., R. R. Co.*, 21 Minn. 207; S. C. 18 Am. Rep. 393.

maintain and use its turn-table that any land owner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case, must, in general, be a question for the jury upon all the circumstances of the case.”¹ In the same opinion it is declared that: “To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint that the turn-table, which was situate in a public, (by which we understand an open, frequented), place, was, when left unfastened, very attractive, and when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of them were in the habit of going upon it to play. The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff’s position and that of a voluntary trespasser capable of using care, consists in this—that the plaintiff was induced to come upon the defendant’s turn-table by the defendant’s own conduct, and that as to him, the turn-table was a hidden danger—a trap.”² The same rule is laid down in several later

¹ *Keffe v. Milwaukee, &c., R. R. Co.*, *supra*, citing *Railroad Co. v. Stout*, 17 Wall. 657, and *Stout v. Sioux City, &c., R. R. Co.*, 2 Dill. 294.

² *Keffe v. Milwaukee, &c., R. R. Co.*, *supra*.

cases,¹ and, except in a single case in Illinois,² it is, I believe, nowhere denied that in such an action an infant plaintiff may recover. In that case, the question is not very fairly presented, and we may suspect that the doctrine of comparative negligence influenced the court at least to some extent. The plaintiff was nine years of age, and, in company with several older boys, on a Sunday afternoon, while taking a walk, went upon a turntable, which was situated in an isolated place, away from any public street or passage, and was injured. It appeared, also, that the table was fastened with a latch, which prevented it from being turned by accident; but it was not locked. In this state of the case, the court says: "After a careful examination of the testimony this court is of opinion that, in view of the isolated position in which the turn-table was located, the proofs fail to show that appellant was guilty of such want of care as could lawfully charge it with damages for the accident."³ This case cannot, therefore, count against the rule. The New York Court of Appeals remarks *obiter*, in *McAlpin v. Powell*:⁴ "We are not now called to express an opinion as to the soundness of these decisions in such a case," [referring to the turn-table cases,] "and while we are not prepared to uphold them, it is enough to say that the facts are by no means analogous," from which it may

¹ Kansas, &c., R. R. Co., *v. Fitzsimmons*, 22 Kan. 686; s. c. 31 Am. Rep. 203; s. c. 18 Kan. 34; Kansas, &c., R. R. Co. *v. Allen*, 22 Kan. 285; *Koons v. St. Louis, &c., R. R. Co.*, 65 Mo. 592; *Evansich v. Gulf, &c., R. R. Co.*, 57 Texas, 126; s. c. 44 Am. Rep. 586; *Nagel v. Missouri, &c., R. R. Co.*, 75 Mo. 653; s. c. 42 Am. Rep. 418. Compare *Baltimore, &c., R. R. Co. v. Schwindling*, 101 Penn. St. 258; s. c. 47 Am. Rep. 706; *Cauley v. Pittsburgh, &c., R. R. Co.*, 95 Penn. St. 398; s. c. 40

Am. Rep. 664; *Central Branch, &c., R. R. Co. v. Henigh*, 23 Kan. 347; s. c. 33 Am. Rep. 167; *Gavin v. Chicago*, 97 Ill. 66; s. c. 37 Am. Rep. 99; *Meeks v. Southern Pacific R. R. Co.*, 56 Cal. 513; s. c. 38 Am. Rep. 67; *Keyser v. Chicago, &c., R. R. Co.*, Sup. Ct., Mich., N. W. Rep., May 16, 1885; s. c. xix Am. Law Rev. 668.

² *St. Louis, &c., R. R. Co., v. Bell*, 81 Ill. 76; s. c. 25 Am. Rep. 269.

³ *St. Louis, &c., R. R. Co. v. Bell*, *supra*.

⁴ 70 N. Y. 126; s. c. 26 Am. Rep. 561.

be inferred that the New York courts might not follow the rule of *Railroad Co. v. Stout*,¹ should a case in point come before them. But, aside from these two cases, there is no intimation in the reports, as far as my reading has gone, that any contrary views upon this question prevail. The rule is eminently just and reasonable, and commends itself alike to the judgment and the natural instincts.

§ 71. *Walking along a railway track*.—As a general rule, the courts declare that walking upon the track of a railway is not negligence *per se*, but, in the event of an injury, the question of negligence as to that act, is one proper to go to the jury.² So, also, even when one is upon the track, on horseback, between the crossings, such conduct is held not to constitute negligence as matter of law. Upon this point, the Maryland Court of Appeals says: "He may have been attempting to cross it under circumstances which would relieve him of all imputation of negligence."³ The courts of Pennsylvania, however, go to the opposite extreme.⁴ What would be negligence, sufficient to bar a right of action in a trespasser upon the company's track, will also be sufficient in the case of one of the company's servant's walking or riding upon the track of the company in whose employ he is, if such action be not in the line of his duty, or essential to the discharge of his duty.⁵

¹ 17 Wall. 657.

² *Carter v. Columbia, &c.*, R. R. Co., 19 S. C. 20; S. C. 45 Am. Rep. 754; *Gothard v. Alabama, &c.*, R. R. Co., 67 Ala. 114; *Townley v. Chicago, &c.*, R. R. Co., 53 Wis. 626; *Fitzpatrick v. Fitchburg R. R. Co.*, 128 Mass. 13; *Hassenger v. Michigan, &c.*, R. R. Co., 48 Mich. 205; S. C. 42 Am. Rep. 470; *Johnson v. Chicago, &c.*, R. R. Co., 56 Wis. 274. But in Pennsylvania, such an act is negli-

gence, as matter of law; *Moore v. Pennsylvania R. R. Co.*, 99 Penn. St. 301; S. C. 44 Am. Rep. 106; *Cauley v. Pittsburgh, &c.*, R. R. Co., 95 Penn. St. 398; S. C. 40 Am. Rep. 664; *Vide*, also, § 67, *supra*.

³ *Northern, &c.*, R. R. Co. *v. State*, 29 Md. 420.

⁴ § 67, *supra*.

⁵ *Burling v. Illinois, &c.*, R. R. Co., 85 Ill. 18; *Mulherrin v. Delaware, &c.*, R. R. Co., 81 Penn. St. 366;

The omission to give the signals, required by statute, at the public crossing, is not evidence of negligence toward a person injured upon the track beyond the crossing. This provision of law is made for the benefit only of persons traveling upon the highway and coming lawfully upon the track at a public crossing. The Supreme Judicial Court of Massachusetts says, upon this point: "The law requires no one to provide protection or safeguards for mere trespassers or wrong-doers, nor, indeed, for those who enter by mere permission, without inducement held out by the owner. Such go at their own risk, and enjoy the license subject to its perils. Toward them there exists no unfulfilled obligation or duty on the part of the owner."¹

Where the track of a railway company is used by pedestrians for purposes of travel, by permission of the company, such pedestrian thereby becomes a licensee. He is no longer a mere trespasser upon the track at his peril; and this consideration enhances the duty of the employees of the company to exercise caution and increased prudence in operating the road at this point.² But that

Maher v. Atlantic, &c., R. R. Co., 64 Mo. 267; *Clark v. Boston, &c., R. R. Co.*, 128 Mass. 1; *Holland v. Chicago, &c., R. R. Co.*, 5 McCrary, 549; *Miller v. Union Pac. R. R. Co.*, 2 Id. 87; *Sweeney v. Boston, &c., R. R. Co.*, 128 Mass. 5.

¹ *Gaynor v. Old Colony, &c., R. R. Co.*, 100 Mass. 208. See, also, *O'Donnell v. Providence, &c., R. R. Co.*, 6 R. I. 211; *Holmes v. Central R. R. Co.*, 37 Ga. 593; *Railroad Co. v. Houston*, 95 U. S. 697; *Phila. &c., R. R. Co. v. Spearen*, 47 Penn. St. 300; *Elwood v. N. Y. &c., R. R. Co.*, 4 Hun, 808; *Harty v. Central R. R. Co.*, 42 N. Y. 468; *Mason v. Mo. Pac. R. R. Co.*, 27 Kan. 83; s. c. 41 Am. Rep. 405; *Pittsburgh, &c., R. R. Co. v. Collins*, 87 Penn. St. 405; s. c. 30 Am. Rep. 371; *Morrissey v. Eastern,*

&c., R. R. Co., 126 Mass. 377; s. c. 30 Am. Rep. 686; *Meeks v. Southern Pacific R. R. Co.*, 56 Cal. 513; s. c. 38 Am. Rep. 67; *Terre Haute, &c., R. R. Co. v. Graham*, 95 Ind. 286; s. c. 48 Am. Rep. 719; *Houston, &c., R. R. Co. v. Sympkins*, 54 Texas, 615; s. c. 38 Am. Rep. 632.

² *Illinois, &c. R. R. Co. v. Hammer*, 72 Ill. 347; *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; *Penn. R. R. Co. v. Lewis*, 79 Id. 33; *Davis v. Chicago, &c., R. R. Co.*, 58 Wis. 646; s. c. 46 Am. Rep. 667; *Barry v. New York, &c., R. R. Co.*, 92 N. Y. 289; s. c. 44 Am. Rep. 377; *Solen v. Virginia, &c., R. R. Co.*, 13 Nevada, 106; *Fitzpatrick v. Fitchburg R. R. Co.*, 128 Mass. 13; *Daley v. Norwich, &c., R. R. Co.*, 26 Conn. 591; *Kansas, &c., R. R. Co. v. Pointer*, 9 Kan. 620; s.

there has grown up a habit on the part of individuals, or of the public generally, to travel over the track on foot, and that no measures have been taken to prevent it, does not change the relative rights and obligations of the public and the company. It is not the less a trespass in that it is repeated, or that there are many trespassers.¹ A contrary doctrine is laid down in at least one case in Illinois, the court holding, that when the railroad permits people to pass over their grounds, they thereby tacitly license the public to come upon them, and that they do not become trespassers if they do so in a proper matter.² This does not appear, however, from subsequent decisions, to be the law in that State,³ and it is, moreover, contrary to the general course of authority in this country.⁴

In England, it has been decided in a comparatively recent and very carefully considered case, that where notices have been put up by the railway company, forbidding persons to cross the track at a certain point, but

c. 14 Id. 38; *Brown v. Hannibal, &c.*, R. R. Co., 50 Mo. 461; *Harty v. Central R. R. Co.*, 42 N. Y. 468; *Murphy v. Chicago, &c.*, R. R. Co., 38 Iowa, 539; s. c. 45 Id. 661. See, also, *Sutton v. N. Y. &c.*, R. R. Co., 66 N. Y. 243; *Nicholson v. Erie Ry. Co.*, 41 Id. 425; *Donaldson v. Milwaukee, &c.*, R. R. Co., 21 Minn. 293; *Graves v. Thomas*, 95 Ind. 361; s. c. 48 Am. Rep. 727; *Campbell v. Boyd*, 88 N. C. 129; s. c. 43 Am. Rep. 740; *Bennett v. Louisville, &c.*, R. R. Co., 102 U. S. 577.

¹ *Phila. &c.*, R. R. Co. v. *Hummel*, 44 Penn. St. 375; *Gaynor v. Old Colony, &c.*, R. R. Co., 100 Mass. 208; *Bancroft v. Boston, &c.*, R. R. Co., 97 Id. 276; *Finlayson v. Chicago, &c.*, R. R. Co., 1 Dill. 579; *Indiana, &c.*, R. R. Co. v. *Hudelson*, 13 Ind. 325; *Jeffersonville, &c.*, R. R. Co. v. *Goldsmith*, 47 Id. 43; *Galena, &c.*, R. R. Co. v. *Jacobs*, 20 Ill. 478; *Illinois, &c.*, R. R. Co. v. *Godfrey*, 71 Id. 500;

s. c. 22 Am. Rep. 112; *Id. v. Hetherington*, 83 Id. 510; *Aurora, &c.*, R. R. Co. v. *Grimes*, 13 Id. 585; *Parker v. Portland Publishing Co.*, 69 Me. 173; s. c. 31 Am. Rep. 262; *Sullivan v. Waters*, 14 Ir. C. L. 466; *Holmes v. N. E. Ry. Co.*, L. R. 4 Exch. 257.

² *Illinois, &c.*, R. R. Co. v. *Hammer*, 72 Ill. 347. Compare *Graves v. Thomas*, 95 Ind. 361; s. c. 48 Am. Rep. 727.

³ *Illinois, &c.*, R. R. Co. v. *Heatherington*, 83 Ill. 510.

⁴ *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; *Railroad Co. v. Norton*, 24 Id. 465; *Penn. R. R. Co. v. Lewis*, 79 Id. 33; *Gillespie v. McGowen*, 100 Id. 144; s. c. 45 Am. Rep. 365; *Blockman v. Toronto Street Railway Co.*, 38 Up. Can. Q. B. 173; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Pierce v. Whitcomb*, 48 Vt. 127; s. c. 21 Am. Rep. 120; *Seymour v. Maddox*, 16 Q. B. 326; s. c. 20 L. J. (Q. B.) 327.

these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in case of an injury to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages.¹

This is the rule of *Illinois, &c., R. R. Co. v. Hammer*,² but it is not the received rule in this country, as we have seen. Our courts very generally and consistently, adhere to the stricter rule which is well expounded by the Massachusetts Supreme Judicial Court: "The law requires no one to provide protection, or safe-guards for mere trespassers or wrong-doers, nor indeed, for those who enter by mere permission, without inducement held out by the owner. Such go at their own risk, and enjoy the license subject to its perils. Toward them there exists no unfulfilled obligation, or duty, on the part of the owner."³

The English case of *Dublin Ry. Co. v. Slattery*, cited above, as stating the present English rule in point, is very luminously set forth, and the opinions of the judges fully reproduced by Mr. Thompson, in his "Law of Negligence," at page 455. This exact and learned writer concludes: "The current of authority of this country is, undoubtedly, with the dissenting opinions in this case,⁴ as to the duty incumbent upon one stepping upon a railroad track, to have all his faculties alive to the sense of danger, the neglect of which precaution amounts to negligence, *per se*."⁵

¹ *Dublin, &c., Ry. Co. v. Slattery*, 3 App. Cas. 1155.

² 72 Ill. 347.

³ *Gaynor v. Old Colony, &c., R. R. Co.*, 100 Mass. 208.

⁴ *Dublin Ry. Co. v. Slattery*.

⁵ Citing, *Railroad Co. v. Houston*, 95 U. S. 697; *Bancroft v. Boston, &c., R. R. Co.*, 97 Mass. 275; *Wilcox v. Rome, &c., R. R. Co.*, 39 N. Y. 358; *Ernst v. Hudson River R. R. Co.*, 39 Id. 61; *Sutton v. N. Y. &c., R. R. Co.*, 66 Id. 243; *Mulherrin v. Delaware, &c., R. R. Co.*, 81 Penn. St. 366; *Illinois, &c., R. R. Co. v. Hetherington*, 83 Ill 510; *North Penn.*

The courts of Pennsylvania have taken high ground upon this question, insisting upon the absolute right of the railway company to a clear track. This position, as I understand it, is not extreme, and if the public could understand that venturing upon a railway track, in this way, is negligence, *semper ubique*, and that he who so acts, acts at his peril, and in case of injury has no remedy, it can well be believed, that fewer accidents of such a character would happen.

In Tennessee, the matter of injuries to persons upon the track is regulated by statute.¹ "Every railroad company," this statute provides, "shall keep the engineer, firemen, or some other person upon the locomotive, always upon the look out ahead, and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." The burden of proof is upon the company; it must show that all the statutory requirements have been complied with.² It is not sufficient merely to show that the accident was inevitable, and would certainly not have been prevented by a strict compliance on the part of the railroad, with all the requirements of the statute.³ This is a somewhat more onerous obligation than the law usually imposes upon railway corporations in this particular.

Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway

R. R. Co. v. Heileman, 49 Penn. St. 60. Smith v. Nashville, &c., R. R. Co., 6 Id. 589; s. c. 6 Heisk, 174; Nashville, &c., R. R. Co. v. Prince, 2 Id. 580; Railroad Co. v. Walker, 11 Id. 383. See, also, Hill v. Louisville, &c. R. R. Co., 9 Id. 823; Louisville, &c., R. R. Co. v. Conner, 9 Id. 19.

¹ Thompson & Steiger, § 1166 (5.)
² § 1168.
³ East Tenn. &c., R. R. Co. v. St. John, 5 Sneed, 524; Louisville, &c., R. R. Co. v. Burke, 6 Coldw. 45;

company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after; and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person. This is not more a rule of law than a dictate of humanity. Where it appeared that a person, run over and thought to be dead, was placed upon some rubbish in a railway warehouse by the station master, and there left over night, during which time he had revived and dragged himself some distance along the floor, where he was found dead the next morning with his body yet warm, in a stooping posture, pressing his hand upon his leg to stop the flow of blood from a severed artery, it was held that, even though the accident was caused by the negligence of the deceased, still it might go to the jury whether his death did not result from the subsequent negligence of the railway employees.¹

§ 72. *Various other acts of trespass upon railway property.*—It is negligence *per se*, to attempt to crawl under cars which have been stopped temporarily upon the tracks.² And the act of climbing over stationary cars, without looking to see whether or not they were attached to a locomotive, is held gross negligence.³ When the plaintiff was a child, and the position of the

¹ Northern, &c., R. R. Co. v. State, 29 Md. 420, 442; 1 Redf. on Railways, 510. Compare Phila., &c., R. R. v. Derby, 14 How. 468; Whatman v. Pearson, L. R. 3 C. P. 422

² Chicago, &c., R. R. Co. v. Dewey, 26 Ill. 255; Id. v. Coss, 73 Id. 394; Id. v. Sykes, 96 Id. 162; Smith v. Chicago, &c., R. R. Co., 55 Iowa, 33; Central R. R. Co. v. Dixon, 42 Ga. 327; Ostertag v. Pacific, &c., R. R. Co., 64 Mo. 421; Stillson v. Han-

nibal, &c., R. R. Co., 67 Id. 671; Gahagan v. Boston, &c., R. R. Co., 1 Allen, 187; Lewis v. Baltimore, &c., R. R. Co., 38 Md. 588; McMahon v. Northern, &c., R. R. Co., 39 Id. 438. Compare Central Branch, &c., R. R. Co. v. Henigh, 23 Kan. 347; S. C. 33 Am. Rep. 167.

³ Lewis v. Baltimore, &c., R. R. Co., 33 Md. 588; Gahagan v. Boston, &c., R. R. Co., 1 Allen, 187.

cars in the street was illegal, the plaintiff's conduct, in thus attempting to cross the train, was not contributory negligence.¹ It is negligence for one in charge of stock to ride on top of cars in which the cattle are transported;² and, wherever it appears that a plaintiff voluntarily placed himself in a dangerous position, where a collision could not have been avoided by the train-men, such conduct is held negligence as matter of law.³

The method of switching, known as making a "running" or "flying" switch, is constantly a fruitful source of accident to persons walking, or being upon the tracks. It consists in detaching the portion of the train to be switched off while the cars are in motion, the fore part of the train advancing with increased speed, while the rear portion, proceeding more slowly, is, at the proper time, switched off upon the desired track; or, the engine may push forward a car or part of a train with considerable speed, and then giving it a strong propulsion send it off alone on the desired switch. This practice, in many courts, is condemned as negligent, even toward trespassers.⁴ And, when the cars are suffered to run over a crossing, after being detached from the train, in making a flying switch, whereby travelers are injured, it is held negligence of an aggravated nature, and the practice is not unfrequently sharply denounced by the judges.⁵

¹ Rauch v. Lloyd, 31 Penn. St. 358.

² Little Rock, &c., R. R. Co. v. Miles, 40 Ark. 298; McCorkle v. Chicago, &c., R. R. Co., 61 Iowa, 555.

³ Wilds v. Hudson River R. R. Co., 29 N. Y. 315; Brooks v. Buffalo, &c., R. R. Co., 25 Barb. 600; s. c. 1 Abb. App. Dec. 211; Central R. R. Co. v. Moore, 24 N. J. Law, 824; Grows v. Maine, &c., R. R. Co., 67 Me. 100; Lewis v. Balto., &c., R. R. Co., 38 Md. 588; McMahan v. Northern, &c., R. R. Co., 39 Id. 438. See,

also, Pittsburgh, &c., R. R. Co. v. Kuntson, 69 Ill. 103.

⁴ Illinois, &c., R. R. Co. v. Baches, 55 Ill. 379; Chicago, &c., R. R. Co. v. Dignan, 56 Id. 487; Illinois, &c., R. R. Co. v. Hammer, 72 Id. 347; s. c. 85 Id. 526; Haley v. N. Y., &c., R. R. Co., 7 Hun, 84; Sutton v. Id., 66 N. Y. 243; Kay v. Penn. R. R. Co., 65 Penn. St. 269; s. c. 3 Am. Rep. 628; Murphy v. Chicago, &c., R. R. Co., 38 Iowa, 539; s. c. 45 Id. 661.

⁵ French v. Taunton, &c., R. R.

§ 73. *Injuries to domestic animals trespassing on railway tracks.*—By the common law of England, the owner of cattle is required to confine them to his own premises. Fences, in her majesty's kingdom, are to keep one's cattle in, not to keep other people's cattle out. The owner may drive his cattle from place to place, upon the highway, and he may lawfully herd them upon a common, but, if he permits them to run at large, without a keeper, he is guilty of negligence. If they trespass upon the premises of another, he is a wrong-doer, and liable in damages for any injury consequent upon their trespass.¹

This rule, that the owner of domestic animals must keep them at home, and that there is no obligation to fence against them, in the absence of statutes requiring owners of land to fence, or permitting stock to run at large, prevails in several of the older States of the Union. It is the law in Maine,² New Hampshire,³ Vermont,⁴

Co., 116 Mass. 537; *Hinckley v. Cape Cod, &c.*, R. R. Co., 120 Id. 257; *Butler v. Milwaukee, &c.*, R. R. Co., 28 Wis. 487; *Brown v. New York, &c.*, R. R. Co., 32 N. Y. 597; *Chicago, &c., R. R. Co. v. Garvey*, 58 Ill. 83.

¹ *Lade v. Shepherd*, 2 Strange, 1004; *Stevens v. Whistler*, 11 East, 51; *Star v. Rookesby*, 1 Salk. 335; *Ricketts v. East and West India Docks, &c.*, Ry. Co., 12 C. B. 160; S. C. 16 Jur. 1072; 21 L. J. (C. P.), 201; 12 Eng. Law & Eq. 520; 7 Eng. Ry. Cases, 295; *Dickinson v. London, &c.*, Ry. Co., 1 Harr & R. 399; *Ellis v. Id.*, 2 Hurl. & N. 424; S. C. 26 L. J. (Exch.), 349; 3 Jur. (N. S.), 1008; *Sharrod v. Id.*, 4 Exch. 580; S. C. 14 Jur. 23; 20 L. J. Exch. 185; 7 Dow & L. 213; 6 Eng. Ry. Cases, 239; *Tillett v. Ward*, (Q. B. Div.), 22 Am. Law Reg. N. S. 245; 3 Kent's Com. 536; 3 Black. Com. 211; *Coolley on Torts*, 337; 2 *Waterman on Trespass*, § 858, *et seq.*

² *Little v. Lathrope*, 5 Greenleaf, 35; *Lord v. Wormwood*, 29 Me. 282; S. C. 50 Am. Dec. 586; *Perkins v. Eastern, &c.*, R. R. Co., 29 Me. 307;

S. C. 50 Am. Dec. 589; *Norris v. Androscoggin, &c.*, R. R. Co., 39 Me. 273; S. C. 63 Am. Dec. 621; *Wyman v. Penobscot, &c.*, R. R. Co., 46 Me. 162; *Wilder v. Maine, &c.*, R. R. Co., 65 Me. 332; S. C. 20 Am. Rep. 698; *Webber v. Closson*, 35 Me. 26 [but modified by statute in 1834; *Sturtevant v. Merrill*, 33 Me. 62; *Knox v. Tucker*, 48 Me. 375.]

³ *Makepeace v. Worden*, 1 N. H. 16; *Cressey v. Northern R. R. Co.*, 59 Id. 564; S. C. 47 Am. Rep. 227; *Avery v. Maxwell*, 4 N. H. 36; *Wheeler v. Rowell*, 7 Id. 515; *Mayberry v. Concord, &c.*, R. R. Co., 47 Id. 391; *Giles v. Boston, &c.*, R. R. Co., 55 Id. 552.

⁴ *Trow v. Vermont, &c.*, R. R. Co., 24 Vt. 488; S. C. 58 Am. Dec. 191; *Jackson v. Rutland, &c.*, R. R. Co., 25 Vt. 150; S. C. 60 Am. Dec. 246; *Hurd v. Id.*, 25 Id. 116; *Holden v. Shattuck*, 34 Vt. 336; *Keenan v. Cavanaugh*, 44 Vt. 262; *Congdon v. Central, &c.*, R. R. Co., 56 Vt. 390; S. C. 48 Am. Rep. 793; *Morse v. Rutland, &c.*, R. R. Co., 27 Vt. 49.

Massachusetts,¹ Connecticut,² Rhode Island,³ New York,⁴ New Jersey,⁵ Pennsylvania,⁶ Delaware,⁷ Maryland,⁸ Kentucky,⁹ Michigan,¹⁰ Wisconsin,¹¹ Minnesota,¹² Indiana,¹³

¹ *Rust v. Low*, 6 Mass. 90; *Thayer v. Arnold*, 4 Metc. 589; *Stearns v. Old Colony, &c., R. R. Co.*, 1 Allen, 493; *Eames v. Salem, &c., R. R. Co.*, 98 Mass. 560; *Lyons v. Merrick*, 105 Id. 71; *Maynard v. Boston, &c., R. R. Co.*, 115 Id. 458; s. c. 15 Am. Rep. 119; *McDonnell v. Pittsfield, &c., R. R. Co.*, 115 Id. 564; *Towne v. Nashua, &c., R. R. Co.*, 124 Id. 101; *Darling v. Boston, &c., R. R. Co.*, 121 Id. 118; *Rogers v. Newburyport, &c., R. R. Co.*, 1 Allen, 16.

² *Isbell v. New York, &c., R. R. Co.*, 27 Conn. 393; *Bulkley v. Id.*, 27 Id. 479; *Housatonic, &c., R. R. Co. v. Knowles*, 30 Conn. 313.

³ *Tower v. Providence, &c., R. R. Co.*, 2 R. I. 404.

⁴ *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; s. c. 49 Am. Dec. 239, and Mr. Freeman's scholarly note, pp. 248-273, in which the whole law in point is set out; s. c. 4 N. Y. 349; 53 Am. Dec. 384; *Clarke v. Syracuse, &c., R. R. Co.*, 11 Barb. 112; *Marsh v. New York, &c., R. R. Co.*, 14 Id. 364; *Terry v. Id.*, 22 Id. 575; *Bowman v. Troy, &c., R. R. Co.*, 37 Id. 516; *Cowles v. Balzer*, 47 Id. 562; *Bowyer v. Burlew*, 3 N. Y. Super. Ct. 362; *Halloran v. N. Y., &c., R. R. Co.*, 2 E. D. Smith, 257. In New York the common law rule is to some extent changed by statute. Read, upon this point, *Spinner v. New York, &c., R. R. Co.*, 67 N. Y. 153.

⁵ *Coxe v. Robbins*, 9 N. J. Law, 384; *Chambers v. Matthews*, 18 Id. 368; *Vandergrift v. Rediker*, 22 Id. 185; s. c. 51 Am. Dec. 262; *Price v. Central, &c., R. R. Co.*, 31 Id. 229; s. c. 32 Id. 19.

⁶ *Knight v. Abert*, 6 Penn. St. 472; s. c. 47 Am. Dec. 478; *Railroad Co. v. Skinner*, 19 Penn. St. 298; s. c. 57 Am. Dec. 654; *Reeves v. Delaware, &c., R. R. Co.*, 30 Penn. St. 455; *Powell v. Penn. R. R. Co.*, 32 Id. 416; *Phila., &c., R. R. Co. v. Hummel*, 44 Id. 378; *Id. v. Sparen*, 47 Id. 403;

North Penn. R. R. Co. v. Rehman, 49 Id. 106; *Drake v. Phila., &c., R. R. Co.*, 51 Id. 240; *Gregg v. Gregg*, 55 Id. 227; *Gillis v. Penn. R. R. Co.*, 59 Id. 142; *Penn. R. R. Co. v. Riblet*, 66 Id. 166. See, also, *Sullivan v. Penn. R. R. Co.*, 30 Id. 240.

⁷ *Vandergrift v. Delaware, &c., R. R. Co.*, 2 Hous. 297.

⁸ *Richardson v. Milburn*, 11 Md. 340; *Baltimore, &c., R. R. Co. v. Lamborn*, 12 Id. 257; *Keech v. Baltimore, &c., R. R. Co.*, 17 Id. 33; *Baltimore, &c., R. R. Co. v. Mulligan*, 45 Id. 487; *Annapolis, &c., R. R. Co. v. Baldwin*, 60 Id. 88; s. c. 45 Am. Rep. 711.

⁹ *Louisville, &c., R. R. Co. v. Ballard*, 2 Metc. 177; *Louisville, &c., R. R. Co. v. Milton*, 14 B. Mon. 75; s. c. 58 Am. Dec. 647, but modified by statute; see *Kentucky Central R. R. Co. v. Lebus*, 14 Bush, 518; *Louisville, &c., R. R. Co. v. Wainscott*, 3 Id. 149; *O'Bannon v. Louisville, &c., R. R. Co.*, 8 Id. 350.

¹⁰ *Williams v. Michigan, &c., R. R. Co.*, 2 Mich. 260; s. c. 55 Am. Dec. 59; *Johnson v. Wing*, 3 Id. 163.

¹¹ *Harrison v. Brown*, 5 Wis. 27; *Stucke v. Milwaukee, &c., R. R. Co.*, 9 Wis. 203; *Chicago, &c., R. R. Co. v. Goss*, 17 Id. 428; *Bennett v. Chicago, &c., R. R. Co.*, 19 Id. 145; *Galpin v. Id.*, 19 Id. 604; *McCall v. Chamberlain*, 13 Id. 640.

¹² *Locke v. St. Paul, &c., R. R. Co.*, 15 Minn. 350, modified by statute in 1876 [Laws 1876, ch. 24, § 1]; *Fitzgerald v. St. Paul, &c., R. R. Co.*, 29 Minn. 336; s. c. 43 Am. Rep. 212; *Witherell v. St. Paul, &c., R. R. Co.*, 24 Minn. 410.

¹³ *Page v. Hollingsworth*, 7 Ind. 317; *Williams v. New Albany, &c., R. R. Co.*, 5 Ind. 111; *LaFayette, &c., R. R. Co. v. Shriner*, 6 Id. 141; *Brady v. Ball*, 14 Id. 317; *Indianapolis, &c., R. R. Co. v. McClure*, 26 Id. 370; *Indianapolis, &c., R. R. Co. v. Harter*, 38 Id. 558; *Jeffersonville, &c., R. R. Co.*

and Kansas.¹ In these States it has generally been held that permitting stock to run at large is such negligence, on the part of the owner, as to bar his right of recovery for injuries to them, unless such injury was wanton or wilful.² The general principles of the law of contributory negligence, of course, apply to cases of injury to stock. If the injury is the result of mutual carelessness, as in any other case neither has a remedy against the other; but, if it be not in any degree ascribable to the negligence of one party, due regard being had to the circumstances of his position, he may recover from the other;³ but, where each is in fault, neither can recover.⁴ The plaintiff's negligence, in order to a recovery, must, as in any other case, be the proximate or immediate cause of the injury,⁵ and it

v. Adams, 43 *Id.* 403; *Id. v. Underhill*, 48 *Id.* 389; *Cincinnati, &c., R. R. Co. v. Street*, 50 *Id.* 225; *Pittsburgh, &c., R. R. Co. v. Stuart*, 71 *Id.* 505; *New Albany, &c., R. R. Co. v. Tilton*, 12 *Ind.* 3; *Michigan, &c., R. R. Co. v. Fisher*, 27 *Id.* 96.

¹ *Wells v. Beal*, 9 *Kan.* 597; *Baker v. Robbins*, 9 *Id.* 303; *Sherman v. Anderson*, 27 *Id.* 333; *s. c.* 41 *Am. Rep.* 414; *Union Pacific Railroad Co. v. Rollins*, 5 *Kan.* 168; *Kansas, &c., R. R. Co. v. Mower*, 16 *Id.* 573; *Larkin v. Taylor*, 5 *Id.* 433; *Central Branch, &c., R. R. Co. v. Lea*, 20 *Id.* 353; *Atchison, &c., R. R. Co. v. Hegwir*, 21 *Kan.* 622; *Compiled Laws 1879, 784, § 30. Compare Pacific, &c., R. R. Co. v. Brown*, 14 *Kan.* 469; *Kansas, &c., R. R. Co. v. Landis*, 20 *Id.* 406; *Id. v. McHenry*, 24 *Id.* 504; *Mo. Pac. R. R. Co. v. Wilson*, 28 *Id.* 637; *Central, &c., R. R. Co. v. Phillippi*, 20 *Id.* 9.

² See the cases cited above, and especially *Railroad Co. v. Skinner*, 19 *Penn. St.* 298; *s. c.* 57 *Am. Dec.* 654, and *Tonawanda R. R. Co. v. Munger*, 5 *Denio*, 255; *s. c.* 49 *Am. Dec.* 239 (note).

³ *Reeves v. Delaware, &c., R. R.*

Co., 30 *Penn. St.* 455; *Waldron v. Portland, &c., R. R. Co.*, 35 *Me.* 422; *Balcom v. Dubuque, &c., R. R. Co.*, 21 *Iowa*, 102; *Whitbeck v. Id.*, 21 *Id.* 103; *Illinois, &c., R. R. Co. v. Goodwin*, 30 *Ill.* 117; *Fisher v. Farmers', &c., Co.*, 21 *Wis.* 74; *Knight v. Toledo, &c., R. R. Co.*, 24 *Ind.* 402; *Indianapolis, &c., R. R. Co. v. Wright*, 22 *Id.* 377; *Mentges v. New York, &c., R. R. Co.*, 1 *Hilt.* 425; *Annapolis, &c., R. R. Co. v. Baldwin*, 60 *Md.* 88; *s. c.* 45 *Am. Rep.* 711; *Eames v. Salem, &c., R. R. Co.*, 98 *Mass.* 560; *Tower v. Providence, &c., R. R. Co.*, 2 *R. I.* 404.

⁴ *Haigh v. London, &c., Ry. Co.*, 1 *Fost. & Fin.* 646; *Williams v. Michigan, &c., R. R. Co.*, 2 *Mich.* 265; *s. c.* 55 *Am. Dec.* 59; *Illinois, &c., R. R. Co. v. Middlesworth*, 43 *Ill.* 65; *Ohio, &c., Ry. Co. v. Eaves*, 42 *Id.* 288; *Pittsburgh, &c., R. R. Co. v. Stuart*, 71 *Ind.* 504; *Railroad Co. v. Skinner*, 19 *Penn. St.* 298; *s. c.* 57 *Am. Dec.* 654; *Perkins v. Eastern, &c., R. R. Co.*, 29 *Me.* 307; *s. c.* 50 *Am. Dec.* 589.

⁵ *Rockford, &c., R. R. Co. v. Irish*, 72 *Ill.* 405; *St. Louis, &c., R. R. Co. v. Todd*, 36 *Id.* 409; *South, &c.,*

must appear that permitting the stock to run at large, contributed proximately to the injury, in order to bar a recovery.¹ It is sometimes held that turning stock out to graze, even though it is negligence, must be regarded a remote, and cannot be the proximate cause of the injury.² In some States the English rule is held in a more or less modified form. Thus, it is held in several jurisdictions, that it is proper to make a distinction between carelessly or rashly permitting stock to roam upon the track of a railway, to the peril of the lives and limbs of passengers and employees and the property of the company, and using due care to restrain cattle, which, in spite of such precautions, break out and are injured. In the one case there is gross negligence, barring any recovery, and in the other there is no negligence at all. This is a rational and just distinction. It is declared in many cases.³

R. R. Co. v. Williams, 65 Ala. 74; Toledo, &c., R. R. Co. v. McGinnis, 71 Ill. 347; Ewing v. Chicago, &c., R. R. Co., 72 Id. 25; Peoria, &c., R. R. Co. v. Champ, 75 Id. 578; Central, &c., R. R. Co. v. Davis, 19 Ga. 437; Pacific, &c., R. R. Co. v. Houts, 12 Kan. 328; Searles v. Milwaukee, &c., R. R. Co., 35 Iowa, 490; Gates v. Burlington, &c., R. R. Co., 39 Id. 45; Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio St., 172; s. c. 62 Am. Dec. 246; Smith v. Chicago, &c., R. R. Co., 34 Iowa, 506; Kuhn v. Id., 42 Id. 420; Schwarz v. Hannibal, &c., R. R. Co., 58 Mo. 207.

¹ Richmond v. Sacramento, &c., R. R. Co., 18 Cal. 351; Corwin v. New York, &c., R. R. Co., 13 N. Y. 42; Cairo, &c., R. R. Co. v. Murray, 82 Ill. 76; Illinois, &c., R. R. Co. v. Baker, 47 Id. 295; Kuhn v. Chicago, &c., R. R. Co., 42 Iowa, 420; Fritz v. Milwaukee, &c., R. R. Co., 34 Id. 377; Ewing v. Chicago, &c., R. R. Co., 72 Ill. 25; Cairo, &c., R. R. Co. v. Woolsey, 85 Id. 370; Flint, &c., R. R. Co. v. Lull, 28 Mich. 510; Belle-

fontaine, &c., R. R. Co. v. Reed, 33 Ind. 476; Isbell v. New York, &c., R. R. Co., 27 Conn. 393.

² Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio St. 172; s. c. 62 Am. Dec. 246; Central, &c., R. R. Co. v. Lawrence, 13 Id. 67; Cleveland, &c., R. R. Co. v. Elliott, 4 Id. 474; Vicksburg, &c., R. R. Co. v. Patton, 31 Miss. 157; Central, &c., R. R. Co. v. Phillippi, 20 Kan. 9. See, also, Washington v. Baltimore, &c., R. R. Co., 17 West Va. 190; Bemis v. Connecticut, &c., R. R. Co., 42 Vt. 375; s. c. 1 Am. Rep. 339; Kentucky, &c., R. R. Co. v. Lebus, 14 Bush, 518; Lawson v. Chicago, &c., R. R. Co., 57 Iowa, 672.

³ McCandless v. Chicago, &c., R. R. Co., 45 Wis. 365; Curry v. Id., 43 Id. 665; Lande v. Id., 33 Id. 640; Fisher v. Farmers', &c., Co., 21 Id. 74; Towne v. Nashua, &c., R. R. Co., 124 Mass. 101; Estes v. Atlantic, &c., R. R. Co., 63 Me. 308; Pacific, &c., R. R. Co. v. Brown, 14 Kan. 469; Cairo, &c., R. R. Co. v. Woolsey, 85 Ill. 370; Ohio, &c., R.

In a number of the States the English rule on this point is distinctly repudiated, and one more suited to the wants of a new and comparatively thinly settled country has grown up instead. In these States a fence is regarded as something to keep animals out, rather than to keep them in, and it is held not a trespass for cattle to wander upon unenclosed lands. Statutes define what is a "lawful fence," and declare that no one whose close is not surrounded by such a fence shall recover damages from his neighbor, whose cattle break in and do him an injury. It is, therefore, not contributory negligence in these jurisdictions to allow cattle to run at large. This may be known as the American rule, in contradistinction to the rule we have hitherto been considering. It was set forth with much force and cogency of reasoning in the great case of *Kerwhacker v. Cleveland, &c., R. R. Co.*,¹ by the Supreme Court of Ohio, in 1854, in which it is declared to be the common law of Ohio that the owner of domestic animals is guilty neither of an unlawful act nor of an omission of ordinary care in keeping or caring for them, by allowing such stock to run at large on the range of unenclosed lands; that there is no law which requires land owners to fence their land, and that this equally applies to railway corporations; that the

R. Co. v. Fowler, 85 Id. 21; *Toledo, &c., R. R. Co. v. Johnston*, 74 Id. 83; *Bulkley v. N. Y. &c., R. R. Co.*, 27 Conn. 479; *Isbell v. Id.*, 27 Id. 393; *White v. Concord, &c., R. R. Co.*, 30 N. H. 188; *Trout v. Virginia, &c., R. R. Co.*, 23 Gratt. 619; *Pearson v. Milwaukee, &c., R. R. Co.*, 45 Iowa, 497; *South, &c., Ala. R. R. Co. v. Williams*, 65 Ala. 74; *Balcom v. Dubuque, &c., R. R. Co.*, 21 Iowa, 102; *Macon, &c., R. R. Co. v. Davis*, 13 Ga. 68; *Knight v. Toledo, &c., R. R. Co.*, 24 Ind. 402; *St. Louis, &c., R. R. Co. v. Todd*, 36 Ill. 409. But, for a contrary rule, to the

effect that even where animals escape from a well-fenced enclosure, without their owner's fault, and stray upon a railway track and are there injured, they are trespassers, and for a negligent injury to them the owner cannot recover; see *Pittsburgh, &c., R. R. Co. v. Stuart*, 71 Ind. 504; *Spinner v. New York, &c., R. R. Co.*, 67 N. Y. 153; *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. 104, and compare *Atchison, &c., R. R. Co. v. Hegwir*, 21 Kan. 622.

¹ 3 Ohio St. 172; s. c. 62 Am. Dec. 246.

owner who leaves his lands unenclosed takes the risk of intrusions upon them from the animals of other persons running at large, and that the owner of the animals, on his part, takes the risk, in allowing them to be at large, of their loss or of injury to them by unavoidable accidents arising from any danger into which they may wander. This is a complete abrogation of the English rule. The later cases in this State follow it,¹ and a similar doctrine is maintained by the courts of Illinois,² Iowa,³ Missouri,⁴ California,⁵ Colorado,⁶ Oregon,⁷ Nevada,⁸ Alabama,⁹ West Virginia,¹⁰ Georgia,¹¹ Mississippi,¹² Arkan-

¹ Cincinnati, &c., R. R. Co. v. Waterson, 4 Ohio St. 431; Cleveland, &c., R. R. Co. v. Elliott, 4 Id. 474; Central, &c., R. R. Co. v. Lawrence, 13 Id. 67; Marietta, &c., R. R. Co. v. Stevenson, 24 Id. 48; Cincinnati, &c., R. R. Co. v. Smith, 22 Id. 227; s. c. 10 Am. Rep. 729. But the right to allow domestic animals to run at large has been abridged by statute, Sloan v. Hubbard, 34 Ohio St. 585.

² Seeley v. Peters, 10 Ill. 130; Bass v. Chicago, &c., R. R. Co., 28 Ill. 9; Chicago, &c., R. R. Co. v. Cauffman, 38 Id. 424; Stoner v. Shugart, 45 Id. 76; Illinois, &c., R. R. Co. v. Baker, 47 Id. 295; Headen v. Rust, 39 Id. 186; Toledo, &c., R. R. Co. v. Bray, 57 Id. 514; Rockford, &c., R. R. Co. v. Lewis, 58 Id. 49; Toledo, &c., R. R. Co. v. Ingraham, 58 Id. 20; Id. v. Barlow, 71 Id. 640; Rockford, &c., R. R. Co. v. Rafferty, 73 Id. 58; Chicago, &c., R. R. Co. v. Kellam, 92 Id. 245; s. c. 34 Am. Rep. 128.

³ Wagner v. Bissell, 3 Iowa, 396; Alger v. Mississippi, &c., R. R. Co., 10 Iowa, 268; Herold v. Meyer, 20 Id. 378; Smith v. Chicago, &c., R. R. Co., 34 Id. 506; Whitbeck v. Dubuque, &c., R. R. Co., 21 Id. 103; Van Horn v. Burlington, &c., R. R. Co., 59 Id. 33; Inman v. Chicago, &c., R. R. Co., 60 Id. 459; Miller v. Id., 59 Id. 707; Frazier v. Nortinus, 38 Id. 82; Searles v. Milwaukee, &c., R. R. Co., 35 Id. 490, modified by statute in 1870. See Hallock v.

Hughes, 42 Iowa, 516; Little v. McGuire, 38 Id. 560; s. c. 43 Id. 447.

⁴ Gorman v. Pacific, &c., R. R. Co., 26 Mo. 442; Hannibal, &c., R. R. v. Kenney, 41 Id. 271; Tarwater v. Hannibal, &c., R. R. Co., 42 Id. 193; McPheeters v. Id., 45 Id. 23; Crafton v. Hannibal, &c., R. R. Co., 55 Id. 580; Silver v. Kansas City, &c., R. R. Co., 78 Id. 528; s. c. 47 Am. Rep. 118; Clardy v. St. Louis, &c., R. R. Co., 73 Mo. 576; Comings v. Hannibal, &c., R. R. Co., 48 Mo. 512.

⁵ Waters v. Moss, 12 Cal. 535; Comerford v. Dupuy, 17 Id. 308; Logan v. Gedney, 38 Id. 579.

⁶ Morris v. Fraker, 5 Colo. 425.

⁷ Campbell v. Bridwell, 5 Oregon, 311.

⁸ Chase v. Chase, 15 Nev. 259.

⁹ Mobile, &c., R. R. Co. v. Williams, 53 Ala. 595; South Ala., &c., R. R. Co. v. Williams, 65 Id. 74; Alabama, &c., R. R. Co. v. McAlpine, 71 Id. 545.

¹⁰ Blaine v. Chesapeake, &c., R. R. Co., 9 West Va. 252; Baylor v. Balto., &c., R. R. Co., 9 Id. 270.

¹¹ Macon, &c., R. R. Co. v. Lester, 30 Ga. 914; Georgia, &c., R. R. Co. v. Anderson, 33 Ga. 110; Macon, &c., R. R. Co. v. Baber, 42 Id. 301; Georgia, &c., R. R. Co. v. Neely, 56 Id. 540; Macon, &c., R. R. Co. v. Vaughn, 48 Id. 464.

¹² Vicksburg, &c., R. R. Co. v. Patton, 31 Miss. 157; Memphis, &c., R. R. v. Blakeney, 43 Id. 218; Raiford v.

sas,¹ South Carolina,² North Carolina,³ Texas,⁴ Virginia,⁵ and Nebraska.⁶

It is held not contributory negligence, as matter of law, to permit cattle to go at large, even though it is in violation of a statute.⁷ There is a contrary rule in Kansas,⁸ while in Illinois, whether or not such a practice is contributory negligence, is usually held a proper question for the jury.⁹

In Iowa, where stock is "lawfully" running at large, it is said not to be contributory negligence in an action against a railway company for negligently running cattle down.¹⁰ There is, however, at present a statute in that State which requires a railroad company to fence its track against animals running at large.¹¹ When contributory negligence is the issue in actions against railway companies for injuries to cattle run down upon the track, it is very generally held a proper question to go to the jury.¹²

Mississippi, &c., R. R. Co., 43 Id. 233; New Orleans, &c., R. R. Co. v. Field, 46 Id. 573; Mobile, &c., R. R. Co. v. Hudson, 50 Id. 572; Dickson v. Parker, 3 How. 219; S. C. 34 Am. Dec. 78; Mississippi, &c., R. R. Co. v. Miller, 40 Miss. 45.

¹ Little Rock, &c., R. R. Co. v. Finley, 37 Ark. 562.

² Danner v. South Carolina, &c., R. R. Co., 4 Rich. (Law), 329; S. C. 55 Am. Dec. 678; Wilson v. Wilmington, &c., R. R. Co., 10 Rich. (Law), 52; Murray v. South Carolina, &c., R. R. Co., 10 Id. 227; Rowe v. Railroad Co., 7 S. C. 167; Simkins v. Columbia, &c., R. R. Co., 20 Id. 258; Jones v. Id., 20 Id. 249. But, in Wilson v. Wilmington, &c., R. R. Co., *supra*, the rule is held of no application to the case of a dog killed on a railway track.

³ Laws v. North Carolina, &c., R. R. Co., 7 Jones, (Law), 468.

⁴ Walker v. Herron, 22 Texas, 55; Texas, &c., R. R. Co. v. Young, 60 Texas, 201.

⁵ Trout v. Virginia, &c., R. R. Co., 23 Gratt. 619.

⁶ Delaney v. Errickson, 11 Neb. 533; Burlington, &c., R. R. Co. v. Franzer, 15 Id. 365.

⁷ Owens v. Hannibal, &c., R. R. Co., 58 Mo. 387; Schwarz v. Id., 58 Id. 207; Mumpower v. Id., 59 Id. 245.

⁸ Central, &c., R. R. Co. v. Lea, 20 Kan. 353.

⁹ Rockford, &c., R. R. Co. v. Irish, 72 Ill. 405; Cairo, &c., R. R. Co. v. Woolsey, 85 Id. 370. Compare Galena, &c., R. R. Co. v. Crawford, 25 Ill. 529; Toledo, &c., R. R. Co. v. Fergusson, 42 Id. 449; Id. v. McGinnis, 71 Id. 346; Rockford, &c., R. R. Co. v. Rafferty, 73 Id. 58; Cairo, &c., R. R. Co. v. Murray, 82 Id. 77; Chicago, &c., R. R. Co. v. Engle, 84 Id. 397.

¹⁰ McCool v. Galena, &c., R. R. Co., 17 Iowa, 461.

¹¹ Spence v. Chicago, &c., R. R. Co., 25 Iowa, 139; Stewart v. Id., 27 Id. 282; Fritz v. Milwaukee, &c., R. R. Co., 34 Id. 338; Pearson v. Id., 45 Id. 497.

¹² Southworth v. Old Colony, &c., R. R. Co., 105 Mass. 342; Housatonic, &c., R. R. Co. v. Waterbury,

Where a local municipal ordinance permits cattle to run at large, it is, nevertheless, negligence on the part of the owner of stock to suffer it to do so upon the highway in the vicinity of a railroad track.¹

But it is not negligence to turn animals loose upon one's own land, where there is an unfenced or defectively fenced railway track adjoining or running through it, which the railway is required by law to fence.²

In States where the modified or American rule prevails, as distinguished from the stricter English rule, railway companies are liable only for the ordinary negligence of their servants toward animals straying on their tracks,³ and the owners of animals turned out upon the range assume some of the risks incident to their possibly wandering upon the track, which is the same as

23 Conn. 101; Indianapolis, &c., R. R. Co. v. Wright, 13 Ind. 213; Ellis v. London, &c., Ry. Co., 2 Hurl & N. 424; S. C. 26 L. J. (Exch.) 349; Fawcett v. York, &c., Ry. Co., 16 Q. B. 610; S. C. 15 Jur. 173; 20 L. J. (Q. B.) 222; Midland, &c., R. R. Co. v. Daykin, 17 C. B. 126; S. C. 25 L. J. (C. P.) 73.

¹ Williams v. Michigan, &c., R. R. Co., 2 Mich. 259; S. C. 55 Am. Dec. 59; Fritz v. First Div., &c., R. R. Co., 22 Minn. 404; Chicago, &c., R. R. Co. v. Engle, 84 Ill. 397; Marsh v. New York, &c., R. R. Co., 14 Barb. 364; Clark v. Syracuse, &c., R. R. Co., 11 Id. 112; Bowman v. Troy, &c., R. R. Co., 37 Id. 516; Halloran v. New York, &c., R. R., 2 E. D. Smith, 257; Tonawanda R. R. Co. v. Munger, 5 Denio, 255; S. C. 49 Am. Dec. 239 (and note); S. C. *sub nom.*, Munger v. Tonawanda R. R. Co., 4 N. Y. 349; S. C. 53 Am. Dec. 384; Louisville, &c., R. R. Co. v. Ballard, 2 Metc. 177; Michigan, &c., R. R. Co. v. Fisher, 27 Ind. 97; Van Horn v. Burlington, &c., R. R. Co., 59 Iowa, 33; Miller v. Chicago, &c., R. R. Co., 59 Id. 707; Inman v. Id., 60 Id. 459.

² Wilder v. Maine, &c., R. R. Co., 65 Me. 332; S. C. 20 Am. Rep. 698;

McCoy v. California, &c., R. R. Co., 40 Cal. 532; S. C. 6 Am. Rep. 623; Rogers v. Newburyport, &c., R. R. Co., 1 Allen, 16; Shepard v. Buffalo, &c., R. R. Co., 36 N. Y. 641; Mead v. Burlington, &c., R. R. Co., 52 Vt. 278. "It would be a novel doctrine to hold that a railway company, by violating the law, could restrict one's rightful use of his own land."—Mr. Freeman's note to Munger v. Tonawanda R. R. Co., 49 Am. Dec. 239, 271.

³ Durham v. Wilmington, &c., R. R. Co., 82 N. C. 352; Vicksburg, &c., R. R. Co. v. Patton, 31 Miss. 157; Mississippi, &c., R. R. Co. v. Miller, 40 Miss. 45; New Orleans, &c., R. R. Co. v. Field, 46 Id. 574; Gorman v. Pacific, &c., R. R. Co., 26 Mo. 442; Alger v. Mississippi, &c., R. R. Co., 10 Iowa, 268; Macon, &c., R. R. Co. v. Baber, 42 Ga. 300; Baltimore, &c., R. R. Co. v. Mulligan, 45 Md. 487; St. Louis, &c., R. R. Co. v. Vincent, 36 Ark. 451; Louisville, &c., R. R. Co. v. Milton, 14 B. Mon. 61; S. C. 58 Am. Dec. 647; Bellefontaine, &c., R. R. Co. v. Bailey, 11 Ohio St. 333; Hawker v. Baltimore, &c., R. R. Co., 15 West Va. 628.

to say that the owners assume the risk of all unavoidable accidents; the railway company on their part assuming to operate the road, wherever the track is unfenced, with due care to avoid any injury to cattle that may stray upon their premises.¹

“Persons living contiguous to railroads,” says the Supreme Court of Mississippi, “have the same right as others in more remote localities to turn their cattle upon the ranges, but they assume the risk of their greater exposure to danger. The cattle are liable to go upon the road; the company cannot detain them damage feasant any more than any other land-owner, nor can they treat them as unlawfully there, and, therefore, relax their care and efforts to avoid their destruction. The only justification of the company for injury to them is, that in the prosecution of their lawful and ordinary business, the act could not have been avoided by the use of such care, prudence and skill as a discreet man would put forth to prevent or avoid it.”²

§ 74. *Duty of a railway company to maintain fences.*
—At common law a railway company is not bound to maintain fences sufficient to keep cattle off its tracks. It

¹ Macon, &c., R. R. Co. v. Davis, 18 Ga. 680; Central, &c., R. R. Co. v. Davis, 19 Id. 437; Memphis, &c., R. R. Co. v. Blakeney, 43 Miss. 218; Raiford v. Mississippi, &c., R. R. Co., 43 Id. 233; Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio St. 172; S. C. 62 Am. Dec. 246; Kentucky, &c., R. R. Co. v. Lebus, 14 Bush. 518; Little Rock, &c., R. R. Co. v. Finley, 37 Ark. 562.

² New Orleans, &c., R. R. Co. v. Field, 46 Miss. 573. See, also, Richmond v. Sacramento, &c., R. R. Co., 18 Cal. 351; Macon v. California, &c., R. R. Co., 40 Id. 532; Blaine v. Chesapeake, &c., R. R. Co., 9 West Va.

252; Baylor v. Baltimore, &c., R. R. Co., 9 Id. 270; Washington v. Baltimore, &c., R. R. Co., 17 Id. 190; Central, &c., R. R. Co. v. Lawrence, 13 Ohio St. 66; Rockford, &c., R. R. Co. v. Irish, 72 Ill. 404; Macon, &c., R. R. Co. v. Lester, 30 Ga. 911; Id. v. Baber, 42 Id. 300; Georgia, &c., R. R. Co. v. Neely, 56 Id. 540; Locke v. First Div., &c., R. R. Co., 15 Minn. 350; South, &c., R. R. Co. v. Williams, 65 Ala. 74; Pearson v. Milwaukee, &c., R. R. Co., 45 Iowa, 497; Trout v. Virginia, &c., R. R. Co., 23 Gratt. 619; Baltimore, &c., R. R. Co. v. Mulligan, 45 Md. 486; Gorman v. Pacific, &c., R. R. Co., 26 Mo. 441.

stands in this regard upon precisely the same footing as any other owner of land.¹ But an obligation on the part of a railway to make and maintain a fence may arise out of contract.² And such a contract will be implied, if in granting the right of way the award of damages was made on the understanding that a fence would be erected and maintained by the company.³ In Kentucky, *per contra*, it is held that neither the grantor of right of way to a railway company through his property, nor the company itself, is under any legal obligation to maintain fences.⁴ When the track is not fenced by the railroad company, it will be held to assume the risk of damage to its own property, as the result of all intrusions from animals, just as other proprietors are held to do who leave their lands unen-

¹ *Rex v. Pease*, 4 Barn & Adol. 30; *Star v. Rookesby*, 1 Salk. 335; *Adams v. McKinney*, Add. 258; *Rust v. Low*, 6 Mass. 94; *Stackpole v. Healy*, 16 Id. 33; s. c. 8 Am. Dec. 121; *Lyman v. Gipson*, 18 Pick. 422; *Pool v. Alger*, 11 Gray, 489; *Hartford v. Brady*, 114 Mass. 468; *McDonald v. Pittsfield, &c.*, R. R. Co., 115 Id. 564; *Mills v. Stark*, 4 N. H. 512; s. c. 17 Am. Dec. 444; *Halladay v. Marsh*, 3 Wend. 142; s. c. 20 Am. Dec. 678; *Brooks v. New York, &c.*, R. R. Co., 13 Barb. 597; *Terry v. Id.*, 22 Id. 579; *Railroad Co. v. Skinner*, 19 Penn. St. 298; s. c. 57 Am. Dec. 654; *Knight v. New Orleans, &c.*, R. R. Co., 15 La. Ann. 105; *Moore v. Levert*, 24 Ala. 310; *Hurd v. Rutland, &c.*, R. R. Co., 25 Vt. 116; *Perkins v. Eastern, &c.*, R. R. Co., 29 Me. 307; s. c. 50 Am. Dec. 589; *North Eastern, &c.*, R. R. Co. v. *Sineath*, 8 Rich. (Law) 185; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; s. c. 53 Am. Dec. 384.

² *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; s. c. 49 Am. Dec. 239 (and the note); *Fernow v. Dubuque, &c.*, R. R. Co., 22 Iowa, 528; *Joliet, &c.*, R. R. Co. v. *Jones*, 20 Ill. 221;

Drake v. Penn. R. R. Co., 51 Penn. St. 240; *McDowell v. New York, &c.*, R. R. Co., 37 Barb. 195; *Quimby v. Vermont, &c.*, R. R. Co., 23 Vt. 393; *Trow v. Id.*, 24 Id. 487; s. c. 58 Am. Dec. 191; *Norris v. Androscoggin, &c.*, R. R. Co., 39 Me. 273; s. c. 63 Am. Dec. 621; *Jackson v. Rutland, &c.*, R. R. Co., 25 Vt. 150; s. c. 60 Am. Dec. 246. Compare *Star v. Rookesby*, 1 Salk. 335; *Binney v. Proprietors*, 5 Pick. 505; *Adams v. Van Alstyne*, 25 N. Y. 232; *Knox v. Tucker*, 48 Me. 373; *Lawrence v. Coombs*, 37 N. H. 335.

³ *Trow v. Vermont, &c.*, R. R. Co., 24 Vt. 487; s. c. 58 Am. Dec. 191; *Lawton v. Fitchburg R. R. Co.*, 8 Cush. 230; s. c. 54 Am. Dec. 753; *In re Rensselaer, &c.*, R. R. Co., 4 Paige, 553.

⁴ *Louisville, &c.*, R. R. Co. v. *Milton*, 14 B. Mon. 75; s. c. 58 Am. Dec. 647. See *Louisville, &c.*, R. R. Co. v. *Ballard*, 2 Metc. 177; *Id. v. Wain-scott*, 3 Bush. 149; *O'Bannon v. Louis-ville, &c.*, R. R. Co., 8 Id. 350, and compare, to the same point, *Indianapolis, &c.*, R. R. Co. v. *Brownburg*, 32 Ind. 199.

closed.¹ In *Vicksburg, &c., R. R. Co. v. Patton*,² the court says: "As a proprietor, the company is under no greater obligation to fence its road than any other owner of land; but, in the event of an injury, the fact that the road was not fenced must and should exercise an influence in weighing the degree of care to be employed by the company. When an injury is done, the omission to fence will be weighed along with the other circumstances in determining the measure of diligence to be used by the company or its agents. The want of the fence will increase the care required in order to prevent wrong."³ In England, and in most, if not all of the States of the Union, the duty of maintaining a sufficient fence upon each side of their tracks is imposed upon railway companies by statute, the object being to prevent collisions with cattle straying upon the road.⁴ The English statute has served in some sort as a model, and there is, accordingly, an enactment in material particulars essentially similar to that of 8 & 9 Vict., c. 20, in Maine,⁵ New

¹ Roll. Abr. Trespass, 565, pl. 3; *2 Waterman on Trespass*, 299; *Kerwhacker v. Cleveland, &c., R. R. Co.*, 3 Ohio St. 172, 185; s. c. 62 Am. Dec. 246; *Atlantic, &c., R. R. Co. v. Burt*, 49 Ga. 606; *Macon, &c., R. R. Co. v. Vaughn*, 48 Id. 464; *Vicksburg, &c., R. R. Co. v. Patton*, 31 Miss. 157; *Memphis, &c., R. R. Co. v. Orr*, 43 Id. 279; *New Orleans, &c., R. R. Co. v. Field*, 46 Id. 573; *Gorman v. Pacific, &c., R. R. Co.*, 26 Mo. 442; *Sherman v. Anderson*, 27 Kan. 333; s. c. 41 Am. Rep. 414; *Annapolis, &c., R. R. Co. v. Baldwin*, 60 Md. 88; s. c. 45 Am. Rep. 711.

² 31 Miss. 157.

³ Compare *Chase v. Chase*, 15 Nevada, 259; *Wills v. Walters*, 5 Bush. 351; *Studwell v. Ritch*, 14 Conn. 292; *Hine v. Munson*, 32 Id. 219; *Mann v. Williamson*, 70 Mo. 661; *Jones v. Witherspoon*, 7 Jones (Law), 555; *Deyo v. Stewart*, 4 Denio, 101; *Mooney v. Maynard*, 1 Vt. 470; s. c.

18 Am. Dec. 699; *Hinshaw v. Gilpin*, 64 Ind. 116; *Duffees v. Judd*, 48 Iowa, 256; *York v. Davies*, 11 N. H. 241; *Campbell v. Bridwell*, 7 Oregon, 311; *Gregg v. Gregg*, 56 Penn. St. 227, as to the rule that whenever an owner of land is bound to maintain a fence, and his neighbors' cattle, by reason of his failure so to do, enter upon his land and do damage, there being no negligence or fault on the part of the owner of the trespassing cattle, such owner of land so damaged cannot recover therefor, his own negligent wrong-doing having occasioned the mischief.

⁴ Railway Clauses Consolidation Act, 8 & 9 Vict., c. 20, § 68; *Fawcett v. York, &c., Ry. Co.*, 20 L.J. (Q. B.) 222.

⁵ *Norris v. Androscoggin, &c., R. R. Co.*, 39 Me. 273; s. c. 63 Am. Dec. 621; *Perkins v. Eastern, &c., R. R. Co.*, 29 Me. 307; s. c. 50 Am. Dec. 589; *Wyman v. Penobscot, &c., R. R. Co.* 46 Me. 162; *Wilder v. Maine*,

Hampshire,¹ Vermont,² Massachusetts,³ Connecticut,⁴ Minnesota,⁵ Ohio,⁶ Illinois,⁷ Michigan,⁸ Wisconsin,⁹ Missouri,¹⁰ New York,¹¹ Indiana,¹² Iowa,¹³ Kansas,¹⁴ and Ne-

&c., R. R. Co., 65 Me. 333; s. c. 20 Am. Rep. 698.

¹ *Smith v. Eastern, &c.*, R. R. Co., 35 N. H. 356; *Horn v. Atlantic, &c.*, R. R. Co., 35 Id. 169; *Dean v. Sullivan, &c.*, R. R. Co., 22 Id. 316; *Cressey v. Northern, &c.*, R. R. Co., 56 Id. 390; s. c. 47 Am. Rep. 227.

² *Trow v. Vermont, &c.*, R. R. Co., 24 Vt. 487; s. c. 58 Am. Dec. 191; *Nelson v. Id.*, 26 Id. 717; *Holden v. Rutland, &c.*, R. R. Co., 30 Id. 298; *Congdon v. Central, &c.*, R. R. Co., 56 Id. 390; s. c. 48 Am. Rep. 793.

³ *Rogers v. Newburyport, &c.*, R. R. Co., 1 Allen, 16; *Eames v. Boston, &c.*, R. R. Co., 14 Id. 151; *Baxter v. Boston, &c.*, R. R. Co., 102 Mass. 383; *Maynard v. Id.*, 115 Id. 458; s. c. 15 Am. Rep. 119.

⁴ *Bulkley v. New York, &c.*, R. R. Co., 27 Conn. 480.

⁵ *Whittier v. Chicago, &c.*, R. R. Co., 24 Minn. 394; *Gillam v. Sioux City, &c.*, R. R. Co., 26 Id. 268; *Fitzgerald v. St. Paul, &c.*, R. R. Co., 29 Id. 336; s. c. 43 Am. Rep. 212.

⁶ *Cincinnati, &c.*, R. R. Co. v. *Smith*, 22 Ohio St. 227; s. c. 10 Am. Rep. 722; *Sloan v. Hubbard*, 34 Ohio St. 585.

⁷ *Galena, &c.*, R. R. Co. v. *Crawford*, 25 Ill. 529; *Terre Haute, &c.*, R. R. Co. v. *Augustus*, 21 Id. 186; *Toledo, &c.*, R. R. Co. v. *Crane*, 68 Id. 355; *Chicago, &c.*, R. R. Co. v. *Umphenour*, 69 Id. 198; *Peoria, &c.*, R. R. Co. v. *Barton*, 80 Id. 72; *Chicago, &c.*, R. R. Co. v. *Saunders*, 85 Id. 288; *Indianapolis, &c.*, R. R. Co. v. *Hall*, 88 Id. 368.

⁸ *Gardner v. Smith*, 7 Mich. 410; *Bay City, &c.*, R. R. Co. v. *Austin*, 21 Id. 390; *Robinson v. Grand Trunk R. R. Co.*, 32 Mich. 322; *Toledo, &c.*, R. R. Co. v. *Eder*, 45 Id. 329; *Grand Rapids, &c.*, R. R. Co. v. *Monroe*, 47 Id. 152. Compare *Williams v. Michigan, &c.*, R. R. Co., 2 Mich. 259; s. c. 55 Am. Dec. 59.

⁹ *Brown v. Milwaukee, &c.*, R. R.

Co., 21 Wis. 39; *McCall v. Chamberlain*, 13 Id. 637; *Blair v. Milwaukee, &c.*, R. R. Co., 20 Id. 254; *Sika v. Chicago, &c.*, R. R. Co., 21 Id. 370; *Curry v. Chicago, &c.*, R. R. Co., 43 Id. 665; *Veerhusen v. Id.*, 53 Id. 689.

¹⁰ *Miles v. Hannibal, &c.*, R. R. Co., 31 Mo., 407; *Burton v. North, Mo., &c.*, R. R. Co., 30 Id. 372; *Gorham v. Pacific, &c.*, R. R. Co., 26 Id. 441; *Cary v. St. Louis, &c.*, R. R. Co., 60 Id. 213; *Collins v. Atlantic, &c.*, R. R. Co., 65 Id. 230; *Silver v. Kansas City, &c.*, R. R. Co., 78 Id. 528; s. c. 47 Am. Rep. 118; *Morris v. St. Louis, &c.*, R. R. Co., 58 Mo. 78.

¹¹ *Suydam v. Moore*, 8 Barb. 358; *Staats v. Hudson River R. R. Co.*, 4 Abb. App. Dec. 287; s. c. 3 Keyes, 196; 33 How. Pr. 139; *Rhodes v. Utica, &c.*, R. R. Co., 5 Hun, 344; *Brooks v. New York, &c.*, R. R. Co., 13 Barb. 594; *McDowell v. New York, &c.*, R. R. Co., 37 Barb. 195; *Spinner v. Id.*, 67 N. Y. 153; *Tracy v. Troy, &c.*, R. R. Co., 38 Id. 433; *Corwin v. New York, &c.*, R. R. Co., 13 Id. 42.

¹² *Williams v. New Albany, &c.*, R. R. Co., 5 Ind. 111; *Toledo, &c.*, R. R. Co. v. *Cory*, 39 Id. 218; *Indianapolis, &c.*, R. R. Co. v. *Kinney*, 8 Id. 402; *Cleveland, &c.*, R. R. Co. v. *Crossley*, 36 Id. 370; *Jeffersonville, &c.*, R. R. Co. v. *Ross*, 37 Id. 545; *Louisville, &c.*, R. R. Co. v. *Cahill*, 63 Id. 34; *Id. v. Whitsell*, 68 Id. 297; *Cincinnati, &c.*, R. R. Co. v. *Hildreth*, 77 Id. 504.

¹³ *Aylesworth v. Chicago, &c.*, R. R. Co., 30 Iowa, 457; *Stewart v. Burlington, &c.*, R. R. Co., 32 Id. 561; *Hinman v. Chicago, &c.*, R. R. Co., 28 Id. 491; *Hammond v. Id.*, 43 Id. 168; *Pearson v. Milwaukee, &c.*, R. R. Co., 45 Id. 497; *Davis v. Chicago, &c.*, R. R. Co., 40 Id. 292.

¹⁴ *Kansas, &c.*, R. R. Co. v. *McHenry*, 24 Kan. 501; *St. Joseph, &c.*, R. R. Co. v. *Grover*, 11 Kan. 302; *Kansas, &c.* R. R. Co. v. *Mower*, 16

vada.¹ These statutes have been held not to require railway companies to fence their track within the limits of incorporated cities and towns,² nor at highway crossings.³ Such statutes, moreover, have in general been held to be remedial in their nature, and hence have been liberally construed.⁴

And in actions against railway companies, for killing or injuring stock, in consequence of a failure to make or maintain proper fences, these enactments are usually held to apply only to the negligence or misconduct of the defendant. The common law rule, that a plaintiff to maintain an action for damages from negligence, must himself be free from contributory fault, remains unchanged, and this, although the defendant may have failed in a statutory duty.⁵ But, in Indiana, it has been held that the liability of a railway company, not fencing its track as re-

Id. 573; *Hopkins v. Kansas, &c., R. R. Co.*, 18 Id. 462. But, see *Sherman v. Anderson*, 27 Id. 333; S. C. 41 Am. Rep. 414; *Missouri, &c., R. R. Co. v. Leggett*, 27 Kan. 323; *Atchison, &c., R. R. Co. v. Cash*, 27 Id. 587.

¹ *Walsh v. Virginia, &c., R. R. Co.*, 8 Nev. 111.

² *Meyer v. North Mo., &c., R. R. Co.*, 35 Mo. 352; *Edwards v. Hannibal, &c., R. R. Co.*, 66 Id. 571; *Davis v. Burlington, &c., R. R. Co.*, 26 Iowa, 549; *Rogers v. Chicago, &c., R. R. Co.*, 26 Id. 558; *Illinois, &c., R. R. Co. v. Williams*, 27 Ill. 49; *Chicago, &c., R. R. Co. v. Rice*, 71 Id. 567.

³ *Soward v. Chicago, &c., R. R. Co.*, 30 Iowa, 551; *Missouri, &c., R. R. Co. v. Leggett*, 27 Kan. 323; *Louisville, &c., R. R. Co. v. Francis*, 58 Ind. 389; *Vanderkar v. Rensselaer, &c., R. R. Co.*, 13 Barb. 390; *Parker v. Id.*, 16 Id. 315; *Halloran v. New York, &c., R. R. Co.*, 2 E. D. Smith, 257; *Marfell v. South Wales, &c., Ry. Co.*, 8 C. B. (N. S.), 525; S. C. 7 Ins. (N. S.), 240; 29 L. J. (C. P.), 315; 8 Week. Rep. 765; 2 L. T. (N. S.), 629. But see *Brace v. New York, &c.,*

R. R. Co., 27 N. Y. 269; *Toledo, &c., R. R. Co. v. Howell*, 38 Ind. 447; *Id. v. Owen*, 43 Id. 405; *Walton v. St. Louis, &c., R. R. Co.*, 67 Mo. 56; *Davis v. Burlington, &c., R. R. Co.*, 26 Iowa, 549.

⁴ *Tracy v. Troy, &c., R. R. Co.*, 38 N. Y. 433; *Ohio, &c., R. R. Co. v. Brubaker*, 47 Ill. 462; *Rockford, &c., R. R. Co. v. Heflin*, 65 Id. 367.

⁵ *Kansas, &c., R. R. Co. v. McHenry*, 24 Kan. 501; *Marsh v. New York, &c., R. R. Co.*, 14 Barb. 364; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; S. C. 49 Am. Dec. 239; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 350; S. C. 53 Am. Dec. 384; *Curry v. Chicago, &c., R. R. Co.*, 43 Wis. 665; *Hance v. Cayuga, &c., R. R. Co.*, 26 N. Y. 428; *Browne v. Providence, &c., R. R. Co.*, 12 Gray, 55; *Eames v. Boston, &c., R. R. Co.*, 14 Allen, 151; *Kansas City, &c., R. R. Co. v. Landis*, 24 Kan. 406; *Toledo, &c., R. R. Co. v. Thomas*, 18 Ind. 215; *Indianapolis, &c., R. R. Co. v. Shimer*, 17 Id. 295; *Pittsburgh, &c., R. R. Co. v. Methven*, 21 Ohio St. 586; *Rockford, &c., R. R. Co. v. Irish*, 72 Ill. 405.

quired by the statute, for injuries to cattle is so absolute that even the contributory negligence of the owner of the cattle is no defence.¹ Contributing to a breach in the fence is such negligence on the part of a plaintiff as will bar his recovery from the company.² Any failure on the part of the plaintiff to perform any duty devolving upon him, in reference to the fence, contributing to the injury will be a defense for the company,³ even though the fence may have been damaged by the railroad itself.⁴ But where the railroad has built its fence in a defective manner, it is presumed to have knowledge of the defects, and it is not in such a case incumbent upon a plaintiff to notify the company of it.⁵ A failure to repair a division fence, when it is a plaintiff's duty to repair it, is negligence,⁶ but in Texas it is not negligence to leave the repair of fences to the railroad company,⁷ and in Vermont, where a plaintiff knew that a fence was defective, and that his horse was "breecy," the company was, nevertheless, held

¹ *Jeffersonville, &c., R. R. Co. v. Ross*, 37 Ind. 545; *Louisville, &c., R. R. Co. v. Cahill*, 63 Id. 34; *Id. v. Whitesell*, 68 Id. 297.

² *Ellis v. London, &c., Ry. Co.*, 2 Hurl. & N. 424; S. C. 26 L. J. (Exch.), 349; S. C. 3 Jur. (N. S.), 1008; *Haigh v. London, &c., Ry. Co.*, 1 Fost. & Fin. 646; S. C. 8 Week. Rep. 6; *Sandusky, &c., R. R. Co. v. Sloan*, 27 Ohio St. 341; *Dayton, &c., R. R. Co. v. Miami Co. Infirmary*, 32 Id. 566; *Duffy v. New York, &c., R. R. Co.*, 2 Hilt. 496; *Eames v. Boston, &c., R. R. Co.*, 14 Allen, 151; *Illinois, &c., R. R. Co. v. McKee*, 43 Ill. 120; *Id. v. Arnold*, 47 Id. 173; *Chicago, &c., R. R. Co. v. Seirer*, 60 Ill. 295; *Koutz v. Toledo, &c., R. R. Co.*, 54 Ind. 515; *Indianapolis, &c., R. R. Co. v. Petty*, 25 Id. 414; *Id. v. Adkins*, 23 Id. 340; *Id. v. Shimer*, 17 Id. 295; *Id. v. Wright*, 13 Id. 213; *Jones v. Sheboygan, &c., R. R. Co.*, 42 Wis. 306.

³ *Poler v. New York, &c., R. R. Co.*, 16 N. Y. 476; *Chicago, &c., R. R. Co. v. Seirer*, 60 Ill. 295.

⁴ *Terry v. New York, &c., R. R. Co.*, 22 Barb. 575.

⁵ *Hammond v. Chicago, &c., R. R. Co.*, 43 Iowa, 169. Compare, upon the question of a plaintiff's duty to notify the company of a defect in the fence, *Chicago, &c., R. R. Co. v. Seirer*, 60 Ill. 295.

⁶ *Sandusky, &c., R. R. Co. v. Sloan*, 27 Ohio St. 341; *Warren v. Keokuk, &c., R. R. Co.*, 41 Iowa, 484; *St. Louis, &c., R. R. Co. v. Washburn*, 97 Ill. 293; *Rockford, &c., R. R. Co. v. Lynch*, 67 Ill. 149; *Toledo, &c., R. R. Co. v. Pease*, 71 Id. 174; *Georgia, &c., R. R. Co. v. Anderson*, 33 Ga. 110.

⁷ *Texas, &c., R. R. Co. v. Young*, 60 Texas, 201.

liable for killing the horse when it had passed the fence and gotten upon the track.¹

When an adjacent owner has contracted, for a consideration, to erect and maintain a fence which the law requires the railway company to make, but has failed to perform his contract, he cannot recover from the company for injury to his stock, on the ground that there was no fence, or that the fence was defective and insufficient.² So, also, where the owner of the land agrees or assents to the failure of the railway company to erect fences or cattle-guards, there can be no recovery.³ And, when the plaintiff undertakes to repair a fence, it is a question for the jury whether his repairs were such as a prudent and cautious man would have made.⁴

In many of the States where fence laws have been enacted, as well as where the common law rule obtains, it has been held that the owners of cattle, wrongfully in the highway, or in an adjoining close, cannot recover, under the statute, for their injury or destruction by the railway;⁵ even though animals were lawfully in the highway in

¹ Congdon *v.* Central, &c., R. R. Co., 56 Vt. 390; s. c. 48 Am. Rep. 793. See, also, South, &c., R. R. Co. *v.* Williams, 65 Ala. 74; Cressey *v.* Northern, &c., R. R. Co., 59 N. H. 564; s. c. 47 Am. Rep. 227.

² Ellis *v.* Pacific, &c., R. R. Co., 48 Mo. 231; Talmadge *v.* Rensselaer, &c., R. R. Co., 13 Barb. 493; Georgia, &c., R. R. Co. *v.* Anderson, 33 Ga. 110; Warren *v.* Keokuk, &c., R. R. Co., 41 Iowa, 484; Cincinnati, &c., R. R. Co. *v.* Waterson, 4 Ohio St. 424; Indianapolis, &c., R. R. Co. *v.* Petty, 25 Ind. 413; Pittsburgh, &c., R. R. Co. *v.* Smith, 26 Id. 124; Terre Haute, &c., R. R. Co. *v.* Smith, 16 Id. 102. But see, also, New Albany, &c., R. R. Co. *v.* Maiden, 12 Ind. 10, and Baltimore, &c., R. R. Co. *v.* Johnson, 59 Id. 188.

³ Whittier *v.* Chicago, &c., R. R.

Co., 24 Minn. 394; Hurd *v.* Rutland, &c., R. R. Co., 25 Vt. 116; *contra*, Cincinnati, &c., R. R. Co. *v.* Hildreth, 77 Ind. 504.

⁴ Poler *v.* New York, &c., R. R. Co., 16 N. Y. 476; Chicago, &c., R. R. Co. *v.* Seirer, 60 Ill. 295.

⁵ Trow *v.* Vermont, &c., R. R. Co., 24 Vt. 487; s. c. 58 Am. Dec. 191; Staats *v.* Hudson River R. R. Co., 4 Abb. App. Dec. 287; s. c. 3 Keyes, 196; Woolson *v.* Northern, &c., R. R. Co., 19 N. H. 267; Chapin *v.* Sullivan, &c., R. R. Co., 39 Id. 564; Giles *v.* Boston, &c., R. R. Co., 55 Id. 552; Van Horn *v.* Burlington, &c., R. R. Co., 59 Iowa, 33; Miller *v.* Chicago, &c., R. R. Co., 59 Id. 707; Inman *v.* Id. 60 Id. 459; Missouri, &c., R. R. Co. *v.* Leggett, 27 Kan. 323; Eames *v.* Salem, &c., R. R. Co., 98 Mass. 560.

charge of a suitable keeper, and breaking away, escape into a lot adjoining a railway track, insufficiently fenced, and thence get upon the track and suffer injury.¹ But there is a better rule in Alabama,² where it is held that contributory negligence cannot be imputed to an owner of stock, that escapes from lawful custody, and gets upon the track and is injured.³ Neither, in Iowa, does the lawful exposure of stock to danger, by the owner, constitute such wilful negligence on his part as to bar a recovery, as matter of law.⁴

When a railroad divides a farm into two parts, it is not negligence on the part of the owner to allow his stock to cross the track from one part of the farm to the other at any point, if there be no public way or other assigned place for crossing;⁵ but it is negligence to suffer a blind horse to wander about in the neighborhood of an unfenced railway.⁶

In New York there has been some inconsistency in the decisions upon this point. It appears, however, to be the law in that State that a railway company cannot avoid liability for injuries to stock, in consequence of their failure to comply with the provisions of the statute,

¹ Pittsburgh, &c., R. R. Co. v. Stuart, 71 Ind. 504; Spinner v. New York, &c., R. R. Co., 67 N. Y. 153; Giles v. Boston, &c., R. R. Co., 55 N. H. 552; Mayberry v. Concord, &c., R. R. Co., 47 Id. 391; North Penn. R. R. Co. v. Rehman, 49 Penn. St. 104; McDonnell v. Pittsfield, &c., R. R. Co., 115 Mass. 564; Eames v. Boston, &c., R. R. Co., 14 Allen, 151; Indianapolis, &c., R. R. Co. v. Shimer, 17 Ind. 295; Id. v. Adkins, 23 Id. 340; Hance v. Cayuga, &c., R. R. Co., 26 N. Y. 428.

² South. & North. &c., R. R. Co. v. Williams, 65 Ala. 74.

³ To the same effect, see Kansas, &c., R. R. Co. v. Wiggins, 24 Kan. 588; Trout v. Virginia, &c., R. R. Co., 23 Gratt. 619; Chicago, &c., R.

R. Co. v. Kellam, 92 Ill. 245; s. c. 34 Am. Rep. 128.

⁴ Smith v. Kansas, &c., R. R. Co., 58 Iowa, 622. See, also, White v. Concord, &c., R. R. Co., 30 N. H. 188; Evansville, &c., R. R. Co. v. Barbee, 74 Ind. 169; Sawyer v. Vermont, &c., R. R. Co., 105 Mass. 196; Midland, &c., Ry. Co. v. Daykin, 17 C. B. 126.

⁵ Housatonic, &c., R. R. Co. v. Waterbury, 23 Conn. 101. See, also, Jeffersonville, &c., R. R. Co. v. Ross, 37 Ind. 549; Indianapolis, &c., R. R. Co. v. Townsend, 10 Id. 39; Bellefontaine, &c., R. R. Co. v. Reed, 33 Id. 476; Matthews v. St. Paul, &c., R. R. Co., 18 Minn. 434.

⁶ Knight v. Toledo, &c., R. R. Co., 24 Ind. 402. Compare Macon,

merely because the owner of the stock has been guilty of negligence in permitting it to stray at large. And the reason upon which that court proceeds, is that the statute imposes a public duty superior to any merely individual interest.¹ There are some decisions in New York to the contrary. *Munger v. Tonawanda R. R. Co.*,² an early and leading case, in which the cause of action arose prior to the passage of the fence law,³ decided that the common law rule, with reference to the duty of restraining cattle, is the law of New York, and that one whose cattle are injured in consequence of straying about and going upon a railroad track is a trespasser, and, therefore, cannot recover. This case has been followed, whenever the cause of action does not involve the act of 1848, as to fences.⁴ It is impossible to reconcile all the decisions of the lower courts of New York, in the endeavors of the judges to apply the provisions of the fence law to the common law rule of *Munger v. Tonawanda R. R. Co.* A line of decisions hold that, under the statute as a police regulation, a plaintiff may recover for an injury to his cattle, consequent upon a defective fence, notwithstanding the circumstance that the cattle were allowed to roam at large in the vicinity of the track;⁵ and another line, of equal value, lay down an exactly contrary rule.⁶

&c., *R. R. Co. v. Davis*, 13 Ga. 68; *St. Louis, &c., R. R. Co. v. Todd*, 36 Ill. 409.

¹ *Corwin v. New York, &c., R. R. Co.*, 13 N. Y. 42; *Duffy v. Id.*, 2 Hilt. 496; *Munch v. Id.* 29 Barb. 647; *Morrison v. New York, &c., R. R. Co.*, 32 Barb. 568; *McDowell v. Id.*, 37 Id. 195; *Hodge v. Id.*, 27 Hun, 394; *Wheeler v. Erie Ry. Co.*, 2 Thomp. & C. 634.

² 4 N. Y. 349; s. c. 53 Am. Dec. 384; s. c. *sub nom.*, *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; s. c. 49 Am. Dec. 239.

³ Laws of 1848, page 221.

⁴ *Halloran v. New York, &c., R. R.*

Co., 2 E. D. Smith, 257; *Fitch v. Buffalo, &c., R. R. Co.*, 13 Hun, 668; *Clark v. Syracuse, &c., R. R. Co.*, 11 Barb. 112; *Bowman v. Troy, &c., R. R. Co.*, 37 Barb. 516; *Spinner v. New York, &c., R. R. Co.*, 67 N. Y. 156; *Eaton v. Delaware, &c., R. R. Co.*, 57 Id. 396.

⁵ *Waldron v. Rensselaer, &c., R. R. Co.*, 8 Barb. 390; *Labussiere v. New York, &c., R. R. Co.*, 10 Abb. Pr. 398 (n); *Brady v. Rensselaer, &c., R. R. Co.*, 3 Thomp. & C. 537; s. c. 1 Hun, 378; *Shepard v. Buffalo, &c., R. R. Co.*, 36 N. Y. 641.

⁶ *Marsh v. New York, &c., R. R. Co.*, 14 Barb. 364; *Mentges v. Id.*,

The case of *Hance v. Cayuga, &c., R. R. Co.*,¹ which decides that the owner of cattle which escape from his enclosure and go upon a railway track, and are injured, though guilty of no actual negligence, is, nevertheless, chargeable with contributory negligence, and can maintain no action against the railway company, although it had been guilty of negligence in maintaining the fence and cattle-guards, stands alone in the New York reports. The rule in that State is plainly the reverse of this.² *Corwin v. New York, &c., R. R. Co.*,³ is cited as the leading case upon this point. In this case, decided in 1855, it is distinctly laid down that no failure on the part of an owner of stock, as to confining it, can operate to excuse a railway corporation for a failure to comply with the provisions of the statute as to fences, and this is still the law in New York.

Judge Cooley says: "Indeed, if contributory negligence could constitute a defense, the purpose of the statute might be in a great measure, if not wholly, defeated; for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large or even on his grounds in the vicinity of the road, so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."⁴ This is a reasonable view, and one which has been adopted, even in cases where animals were at large in violation of law.⁵

¹ *Hilt.* 425; *Shanahan v. Id.*, 10 *Abb. Pr.* 398.

² 26 *N. Y.* 428.

³ See New York cases already cited.

⁴ 13 *N. Y.* 42.

⁴ *Flint, &c., R. R. Co. v. Lull*, 28 *Mich.* 510.

⁵ *Cairo, &c., R. R. Co. v. Woolsey*, 85 *Ill.* 370; *Fritz v. Milwaukee, &c., R. R. Co.*, 34 *Iowa*, 337; *Louisville, &c., R. R. Co. v. Cahill*, 63 *Ind.* 34.

In several of the New England States, where it appears that an owner of stock has knowingly suffered his cattle to run at large in the highway in the neighborhood of a railroad, and that the railroad company has neglected to fence its tracks, the courts have held that, in respect of negligence, "honors are easy" between plaintiff and defendant, and hence that there can be no recovery.¹ There is much the same rule in Wisconsin.² The Wisconsin court seem to have distinguished between actions brought against railway companies for injuries to cattle from failure on their part to construct the fence required by statute, and such as are brought for injuries from failure on the part of the railroad to maintain in good repair, fences already made. In the latter case, it holds that the negligence of the plaintiff would be sufficient to defeat his action.³

One cannot be deprived of the proper and ordinary use of his own property by the failure of a railway company to perform its statutory duty. Therefore, it is not negligence for an owner of stock to pasture it upon his own premises, although he knows that the fence between his land and the railroad, which it is the duty of the company to keep in order, is out of repair and defective.⁴

¹ *Wilder v. Maine, &c., R. R. Co.*, 65 Me. 333; s. c. 20 Am. Rep. 698; *Trow v. Vermont, &c., R. R. Co.*, 24 Vt. 488; s. c. 58 Am. Dec. 191; *Eames v. Salem, &c., R. R. Co.*, 98 Mass. 560; *McDonnell v. Pittsfield, &c., R. R. Co.*, 115 Id. 564; *Woolson v. Northern, &c., R. R. Co.*, 19 N. H. 267; *Towns v. Cheshire, &c., R. R. Co.*, 21 Id. 364; *Chapin v. Sullivan, &c., R. R. Co.*, 39 Id. 564; *Mayberry, v. Concord, &c., R. R. Co.*, 47 Id. 391; *Giles v. Boston, &c., R. R. Co.*, 55 Id. 552; *Tower v. Providence, &c., R. R. Co.*, 2 R. I. 404.

² *Sika v. Chicago, &c., R. R. Co.*, 21 Wis. 370.

³ *Lawrence v. Milwaukee, &c., R.*

R. Co., 42 Wis. 322; *Jones v. Sheboygan, &c., R. R. Co.*, 42 Id. 306; *Curry v. Chicago, &c., R. R. Co.*, 43 Id. 665; *Bennett v. Id.*, 19 Id. 145. Compare *Joliet, &c., R. R. Co. v. Jones*, 20 Ill. 221; *Dunnigan v. Chicago, &c., R. R. Co.*, 18 Wis. 28; *Louisville, &c., R. R. Co. v. Spain*, 61 Ind. 460; *Ricketts v. East & West India Docks, &c., R. R. Co.*, 21 L. J. (C. P.) 201; s. c. 16 Jur. 1072, 12 Eng. Law & Eq. 520; *Manchester, &c., Ry. Co. v. Wallis*, 14 C. B. 213; s. c. 23 L. J. (C. P.) 185.

⁴ *Congdon v. Central, &c., R. R. Co.*, 56 Vt. 390; s. c. 48 Am. Rep. 793; *Rogers v. Newburyport, &c., R. R. Co.*, 1 Allen, 16; *Shepard v. Buf-*

§ 75. *Negligent communication of fire.*—What constitutes contributory negligence on the part of an owner of property situated near a railroad track, which is damaged or destroyed by fire negligently permitted to escape from the company's locomotives, is a question that has very frequently presented itself.

It is the settled rule of law in England that, while a railway company, authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted therefrom, provided it has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, and is not guilty of negligence in the management of the engine, still, in the event of its own negligence, it is no defense that the plaintiff who has used his land in a natural and proper way, for the purpose for which it is fit, has thereby allowed it to become peculiarly liable to take fire by neglecting to clear away combustible matter accumulating thereon. The gist of the action is negligence.¹

“When the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that if dam-

falo, &c., R. R. Co., 35 N. Y. 644; McCoy v. California, &c., R. R. Co., 40 Cal. 532; s. c. 6 Am. Rep. 623; Cressey v. Northern, &c., R. R. Co., 59 N. H. 564; s. c. 47 Am. Rep. 227; Wilder v. Maine, &c., R. R. Co., 65 Me. 332; s. c. 20 Am. Rep. 698; Mead v. Burlington, &c., R. R. Co., 52 Vt. 278; Brady v. Rensselaer, &c., R. R. Co., 1 Hun, 378; s. c. 3 Thomp. & C. 537.

¹ Vaughan v. Taff Vale Ry. Co., 3 Hurl. & N. 742; s. c. on appeal, 5 Id.

678; Hammersmith, &c., Ry. Co. v. Brand, L. R. 4 H. L. 171; Piggot v. Eastern Counties Ry. Co., 3 Man., G. & S. 230; Aldridge v. Great Western Ry. Co., 3 Id. 515; Bliss v. London, &c., Ry. Co., 2 Fost. & Fin. 341; Dimmock v. North Staffordshire Ry. Co., 4 Id. 1058. Compare Blyth v. Birmingham Water Works Co., 11 Exch. 783, per Martin B.; Shaw v. Roberts, 6 Adol. & E. 83, per Denham, C. J.

age results from the use of such thing, independently of negligence, the party using it is not responsible."¹

In this case, touching upon the question of the duty of the land-owner to protect himself and his out-lying property from the danger incident to the proximity of the railroad track, one of the judges says: "It would require a strong authority to convince me that, because a railway runs along my land, I am bound to keep it in a particular state;" and another says: "The plaintiff used his land in a natural and proper way for the purposes for which it was fit; the defendants come to it, he being passive, and do it a mischief."

In this country the weight of authority sustains the English rule as declared in the case just cited. "The conclusion from the cases," says the Supreme Court of Pennsylvania,² "is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence, must have done some act, or omitted some duty, which is the proximate cause of his injury concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements, in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the company will be guilty of negligence."³

In a comparatively recent case in New Jersey, it is said: "In the leading case in Illinois,⁴ it is assumed that

¹ *Vaughan v. Taff Vale Ry. Co.*, cited above.

² *Philadelphia, &c., R. R. Co. v. Hendrickson*, 80 Penn. St. 182; S. C. 21 Am. Rep. 97.

³ See, also, *Philadelphia, &c., R. R. Co. v. Schultz*, 93 Penn. St. 341;

Lehigh Valley R. R. Co. v. McKeen, 90 Id. 122; S. C. 35 Am. Rep. 644; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; S. C. 21 Am. Rep. 100; *Id. v. Kerr*, 62 Penn. St. 353; S. C. 1 Am. Rep. 431.

⁴ *Chicago, &c., R. R. Co. v. Simon-*

the same duty which will compel the railway company to clear its railway of combustibles, imposes an equal obligation on the owner of the contiguous land, but the distinction is obvious. The company uses a dangerous agent, and must provide proper safe-guards; the land-owner does nothing of the kind, and has the right to remain quiescent.”¹

This view, as to the duty of an owner of land contiguous to a railway track, is approved in several other States. It is the rule in Massachusetts,² Virginia,³ West Virginia,⁴ New Hampshire,⁵ Connecticut,⁶ New York,⁷ Missouri,⁸ Tennessee,⁹ California,¹⁰ Delaware,¹¹ Nebraska,¹² Kansas,¹³ North Carolina,¹⁴ South

son, 54 Ill. 504; S. C. 5 Am. Rep. 155, Breese, J.

¹ *Salmon v. Delaware, &c., R. R. Co.*, 38 N. J. Law, 5; S. C. 20 Am. Rep. 356; S. C. *sub nom.*, Delaware, &c., R. R. Co. *v. Salmon*, 39 N. J. Law, 299; S. C. 23 Am. Rep. 214. See, also, *Morris & Essex R. R. Co. v. State*, 36 N. J. Law, 553; Rev. Stat. of N. J. (1877), 911, §§ 13, 14.

² *Ross v. Boston, &c., R. R. Co.*, 6 Allen, 87. See, also, *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 423; *Hart v. Western, &c., R. R. Co.*, 13 Metc. 99; S. C. 46 Am. Dec. 719; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Ingersoll v. Stockbridge, &c., R. R. Co.*, 8 Allen, 438; Genl. Stat. of Mass., chap. 63, § 101.

³ *Richmond, &c., R. R. Co. v. Medley*, 75 Va. 499; S. C. 40 Am. Rep. 734.

⁴ *Snyder v. Pittsburgh, &c., R. R. Co.*, 11 West Va. 14.

⁵ *Rowell v. Railroad*, 57 N. H. 132; S. C. 24 Am. Rep. 59; Genl. Stat. of N. H., chap. 148, §§ 8, 9.

⁶ *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124; S. C. 38 Am. Dec. 64, and the note.

⁷ *Fero v. Buffalo, &c., R. R. Co.*, 22 N. Y. 209; *Cook v. Champlain*

Trans. Co., 1 Denio, 91; *Webb v. Rome, &c., R. R. Co.*, 49 N. Y. 420; S. C. 10 Am. Rep. 389; *Collins v. New York, &c., R. R. Co.*, 5 Hun, 499; *Bevier v. Delaware, &c., Canal Co.*, 13 Id. 254.

⁸ *Fitch v. Pacific, &c., R. R. Co.*, 45 Mo. 322; *Smith v. Hannibal, &c., R. R. Co.*, 37 Id. 287; *Coates v. Missouri, &c., R. R. Co.*, 61 Id. 38; *Clemens v. Hannibal, &c., R. R. Co.*, 53 Id. 366; S. C. 14 Am. Rep. 460; *Palmer v. Mo. Pac. R. R. Co.*, 76 Mo. 217.

⁹ *Burke v. Louisville, &c., R. R. Co.*, 7 Heisk. 451; S. C. 19 Am. Rep. 618.

¹⁰ *Flynn v. San Francisco, &c., R. R. Co.*, 40 Cal. 14; S. C. 6 Am. Rep. 595.

¹¹ *Jefferis v. Phila., &c., R. R. Co.*, 3 Houst. 447.

¹² *Burlington, &c., R. R. Co. v. Westover*, 4 Neb. 268.

¹³ *St. Joseph, &c., R. R. Co. v. Chase*, 11 Kan. 47; *Kansas, &c., R. R. Co. v. Owen*, 25 Id. 419; *Missouri, &c., R. R. Co. v. Cornell*, 30 Id. 35.

¹⁴ *Doggett v. Richmond, &c., R. R. Co.*, 78 N. C. 305.

Carolina,¹ Indiana,² Maryland,³ Georgia,⁴ and Wisconsin.⁵

In several States the rule of *Vaughan v. Taff Vale Ry. Co.* is denied, and it is held that the presence of the railway imposes additional burdens and responsibility, as to the use of adjacent property, upon the owners thereof, and that a variety of acts and omissions, not otherwise negligent, become so by reason of the juxtaposition of the railroad track. This is the view taken by the courts of Illinois, though the decisions in point found in the reports of that State appear, many of them, to have been applications of the local rule of comparative negligence, rather than any very explicit repudiation of the English rule.⁶

In Iowa,⁷ Vermont,⁸ and Michigan,⁹ the courts have seemed to incline to rules in opposition to the weight of

¹ *McCready v. South Carolina R. Co.*, 2 Strobh. (Law), 356.

² *Louisville, &c., R. R. Co. v. Richardson*, 66 Ind. 43; s. c. 32 Am. Rep. 94; *Pittsburgh, &c., R. R. Co. v. Noel*, 77 Ind. 110; *Id. v. Hixon*, 77 Ind. 111; *Id. v. Jones*, 86 Id. 496; s. c. 44 Am. Rep. 334; *Louisville, &c., R. R. Co. v. Krimming*, 87 Ind. 351; *Id. v. Hagan*, 87 Id. 602.

³ *Baltimore, &c., R. R. Co. v. Woodruff*, 4 Md. 242; s. c. 59 Am. Dec. 72; Rev. Code of Maryland, (1878), 723, § 1.

⁴ *Macon, &c., R. R. Co. v. McConnell*, 27 Ga. 481.

⁵ *Kellogg v. Chicago, &c., R. R. Co.*, 26 Wis. 223; s. c. 7 Am. Rep. 69; *Caswell v. Id.*, 42 Wis. 193; *Martin v. Western, &c., R. R. Co.*, 23 Id. 437; *Erd v. Chicago, &c., R. R. Co.*, 41 Id. 65; *Ward v. Milwaukee, &c., R. R. Co.*, 29 Id. 144; *Murphy v. Chicago, &c., R. R. Co.*, 45 Id. 222; s. c. 30 Am. Rep. 721.

⁶ *Illinois, &c., R. R. Co. v. Mills*, 42 Ill. 409; *Id. v. Frazier*, 47 Id.

505; *Ohio, &c., R. R. Co. v. Shanefelt*, 47 Id. 497; *Chicago, &c., R. R. Co. v. Simonson*, 54 Id. 504; s. c. 5 Am. Rep. 155; *Great Western, &c., R. R. Co. v. Haworth*, 39 Ill. 347; *Bass v. Chicago, &c., R. R. Co.*, 28 Id. 9; *Illinois, &c., R. R. Co. v. Nunn*, 51 Id. 78; *Toledo, &c., R. R. Co. v. Pindar*, 53 Id. 447; s. c. 5 Am. Rep. 57; *Id. v. Maxfield*, 72 Ill. 95; Rev. Stat. of Ill., (1880), 1161, chap. 114, § 89.

⁷ *Kesee v. Chicago, &c., R. R. Co.*, 30 Iowa, 78; s. c. 6 Am. Rep. 643; *Ormond v. Central, &c., R. R. Co.*, 58 Iowa, 742; *Slosson v. Burlington, &c., R. R. Co.*, 60 Id. 215; *Small v. Chicago, &c., R. R. Co.*, 55 Id. 582. See, also, Rev. Code of Iowa, § 1289.

⁸ *Bryant v. Central, &c., R. R. Co.*, 56 Vt. 710. See, also, Genl. Stat. of Vermont (1862), 233, § 78.

⁹ *Marquette, &c., R. R. Co. v. Spear*, 44 Mich. 169; s. c. 38 Am. Rep. 242.

authority. This tendency has, in Illinois and Iowa, been checked by legislation,¹ and it may be believed that at present no court in this country is squarely committed to any rule which contradicts the English doctrine. For the owner of a warehouse near a railway track to leave the windows open in a room in which he had stored husks, rags, cobs and other inflammable material, was held, in Illinois, contributory negligence.² But where only one pane of glass was allowed to remain out of a plaintiff's window in a house adjoining a railroad track, it was held, in Wisconsin, not such contributory negligence as to prevent a recovery, and the court intimates that even a whole window open would not be any worse in point of negligence.³

And in Indiana it is expressly held that an open window, under such circumstances, into which sparks from a locomotive flew and set fire to the building, is not such negligence as to defeat an action.⁴

In New York it is not negligence to leave the doors open, even though the floor is covered with shavings, in a house adjoining the tracks,⁵ nor, in Pennsylvania and Delaware, to suffer the roof of a building situated near the track to get into such a condition that sparks can be blown through and set fire to what is within.⁶

The Pennsylvania court carries the rule, as understood in England, to the very farthest limit. It is a court

¹ See statutes cited *supra*.

² *Great Western, &c., R. R. Co. v. Haworth*, 39 Ill. 347. Compare *Fero v. Buffalo, &c., R. R. Co.*, 22 N. Y. 209.

³ *Martin v. Western, &c., R. R. Co.*, 23 Wis. 437. See, also, *Rowell v. Railroad*, 57 N. H. 132; S. C. 24 Am. Rep. 69; *Ross v. Boston, &c., R. R. Co.*, 6 Allen, 87.

⁴ *Louisville, &c., R. R. Co. v.*

Richardson, 66 Ind. 43; S. C. 32 Am. Rep. 94. Compare *Murphy v. Chicago, &c., R. R. Co.*, 45 Wis. 222; S. C. 30 Am. Rep. 721.

⁵ *Fero v. Buffalo, &c., R. R. Co.*, 22 N. Y. 209. So, also, in *Ross v. Boston, &c., R. R. Co.*, 6 Allen, 87.

⁶ *Phila., &c., R. R. Co. v. Hendrickson*, 80 Penn. St. 183; S. C. 21 Am. Rep. 97; *Jefferis v. Phila., &c., R. R. Co.*, 3 *Houst.* 447.

that seldom does things by halves. In New Jersey it is not negligence to allow leaves and dried grass and other such combustible stuff to accumulate on land lying near the track of a railway.¹ So, in Missouri,² California,³ West Virginia,⁴ Virginia,⁵ Pennsylvania,⁶ Indiana,⁷ and Wisconsin,⁸ but in Vermont, such accumulations are questions for a jury, in respect of the negligence involved.⁹

To allow shavings and other combustible rubbish to accumulate about an unfinished house near a railway track is negligence,¹⁰ while, in some of the western States, to place stacks of grain and ricks of straw upon one's own land near the track is not negligence.¹¹ When a fire commences, from a spark from a locomotive, on the company's own land in an accumulation of dried leaves and grass, and thence spreads to a similar accumulation upon the adjoining land of the plaintiff, the defendant may show that plaintiff's property was in no better condition than its own—and that, therefore, if the fire originally escaped from the locomotive without negligence on the part of the company, the plaintiff was, in that regard, equally in fault.¹²

¹ *Salmon v. Delaware, &c., R. R. Co.*, 38 N. J. Law, 5; S. C. 20 Am. Rep. 356; *Delaware, &c., R. R. Co. v. Salmon*, 39 Id. 299; S. C. 23 Am. Rep. 214.

² *Smith v. Hannibal, &c., R. R. Co.*, 37 Mo. 287; *Fitch v. Missouri, &c., R. R. Co.*, 45 Id. 322.

³ *Flynn v. San Francisco, &c., R. R. Co.*, 40 Cal. 14; S. C. 6 Am. Rep. 595.

⁴ *Snyder v. Pittsburgh, &c., R. R. Co.*, 11 West Va. 15.

⁵ *Richmond, &c., R. R. Co. v. Medley*, 75 Va. 499; S. C. 40 Am. Rep. 734.

⁶ *Penn. R. R. Co. v. Schultz*, 93 Penn. St. 341.

⁷ *Pittsburgh, &c., R. R. Co. v.*

Jones, 86 Ind. 496; S. C. 44 Am. Rep. 334.

⁸ *Kellogg v. Chicago, &c., R. R. Co.*, 26 Wis. 223; S. C. 7 Am. Rep. 69; *Erd v. Id.*, 41 Wis. 65.

⁹ *Bryant v. Central, &c., R. R. Co.*, 56 Vt. 710.

¹⁰ *Coates v. Missouri, &c., R. R. Co.*, 61 Mo. 38; *Murphy v. Chicago, &c., R. R. Co.*, 45 Wis. 222; S. C. 30 Am. Rep. 721; *Macon, &c., R. R. Co. v. McConnell*, 27 Ga. 481.

¹¹ *St. Joseph, &c., R. R. Co. v. Chase*, 11 Kan. 47; *Burlington, &c., R. R. Co. v. Westover*, 4 Neb. 268. Compare *Collins v. New York, &c., R. R. Co.*, 5 Hun, 499.

¹² *Ohio, &c. R. R. Co. v. Shane-*

Conceding the plaintiff's freedom from any duty to use his property with reference to the presence of the railroad, and while he may use his property as he wishes, without anticipating danger from that source, yet, when the fire is kindled, and his property is in peril, it is negligence not to use his best efforts to avoid damage. He must not be supine. He must put the fire out, or rescue his goods, if he can. Failing to do this, he is negligent.¹

And where a plaintiff owned and operated a warehouse near the main line of a railway, and had a switch from that line running to his warehouse, upon which the company used a locomotive, in doing his business, that threw off sparks, and the plaintiff, after noticing the defect in the locomotive and complaining of its use to the company, still continued to allow its use upon his property, such acquiescence on his part, as to the continued employment of the defective engine, was held negligence sufficient to bar his recovery as against the company.²

Where a railway company has negligently set fire to the property of one person, and the fire has spread to the property of another, the question at once arises whether, in an action against the company for damages resulting from the communicated fire, the negligence that kindled the first fire is not too remote to enable the action to be maintained; or, in other words, when the railway com-

felt, 47 Ill. 497; *Fitch v Pacific, &c.*, R. R. Co., 45 Mo. 325. See, also, *Atchison, &c., R. R. Co. v. Stanford*, 12 Kan. 354; s. c. 15 Am. Rep. 362; *Poeppers v. Missouri, &c., R. R. Co.*, 67 Mo. 715; s. c. 29 Am. Rep. 518; *Hoag v. Lake Shore, &c., R. R. Co.*, 85 Penn. St. 293.

¹ *Snyder v. Pittsburgh, &c., R. R. Co.*, 11 West Va. 15; *Little Rock, &c., R. R. Co. v. Hecht*, 38 Ark. 357; *Chicago, &c., R. R. Co. v. Pen-*

nell, 94 Ill. 448; *Kellogg v. Chicago, &c., R. R. Co.*, 26 Wis. 223; *Illinois, &c., R. R. Co. v. McClelland*, 42 Ill. 355; *Toledo, &c., R. R. Co. v. Pindar*, 53 Id. 447; s. c. 5 Am. Rep. 57; *McMarra v. Chicago, &c., R. R. Co.*, 41 Wis. 69; *Doggett v. Richmond, &c., R. R. Co.*, 78 N. C. 305.

² *Marquette, &c., R. R. Co. v. Spear*, 44 Mich. 169; s. c. 38 Am. Rep. 242.

pany has set A's property on fire negligently, and the fire spreads to B's or C's property and burns it up, can B or C maintain an action against the railway company? This is precisely the question that arose in the oft-quoted "Squib Case,"¹—the question of proximate and remote cause. The courts, both in England and the United States, are now agreed that in such a case the action will lie.² It has never been pretended that such an action could not be maintained, except in two overruled cases.³ In *Kuhn v. Jewett, Receiver*,⁴ it appeared that a railway train, laden with petroleum, was wrecked through the negligence of the defendant, and the oil escaping, took fire, ran down into a stream of water, and was borne down in a blaze against the plaintiff's stable some distance below, in consequence of which the stable was destroyed. The defendant was held liable, and the vice-chancellor said: "There can be no doubt, I think, if in this instance the flames of the burning oil had been carried by the wind directly from the point of collision

¹ *Scott v. Shephard*, 2 Wm. Black. 892.

² *Piggot v. The Eastern Counties Ry. Co.*, 3 Man., G. & S. 230; s. c. 54 Eng. Com. Law, 229; *Smith v. London, &c., Ry. Co.*, L. R. 5 C. P. 98; *Fent v. Toledo, &c., R. R. Co.*, 59 Ill. 349; s. c. 14 Am. Rep. 13 [a very able opinion by Chief Justice Lawrence]; *Hart v. Western, &c., R. R. Co.*, 13 Metc. 99 (by Chief Justice Shaw); s. c. 46 Am. Dec. 719; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Cleveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Poeppers v. Missouri, &c., R. R. Co.*, 67 Mo. 715; s. c. 29 Am. Rep. 518; *Henry v. Southern, &c., R. R. Co.*, 50 Cal. 176; *Burlington, &c., R. R. Co. v. Westover*, 4 Neb. 268; *Hooksett v. Concord, &c., R. R. Co.*, 38 N. H. 242; *Troxler v. Richmond, &c., R. R. Co.*, 74 N. C. 377; *Anderson v. Wasatch, &c., R.*

R. Co., 2 Utah, 518; *Delaware, &c., R. R. Co. v. Salmon*, 39 N. J. Law, 299; s. c. 23 Am. Rep. 214; *Small v. Chicago, &c., R. R. Co.*, 55 Iowa, 582; *Atchison, &c., R. R. Co. v. Bales*, 16 Kan. 252; *Baltimore, &c., R. R. Co. v. Shipley*, 39 Md. 251; *Webb v. Rome, &c., R. R. Co.*, 49 N. Y. 420; s. c. 10 Am. Rep. 389; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; s. c. 21 Am. Rep. 100; *Lehigh Valley R. R. Co. v. McKeen*, 90 Penn. St. 122; s. c. 35 Am. Rep. 644. Compare *Insurance Co. v. Tweed*, 7 Wall. 44; *Milwaukee, &c., R. R. Co. v. Kellogg*, 94 U. S. 469; *Insurance Co. v. Transportation Co.*, 12 Wall. 199; *Insurance Co. v. Seaver*, 19 Id. 542.

³ *Ryan v. New York, &c., R. R. Co.*, 35 N. Y. 210; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353; s. c. 1 Am. Rep. 431.

⁴ 33 N. J. Eq. 647.

to the petitioner's building, and it had thus been set on fire and destroyed, that the injury would, in judgment of law, have been the natural and direct, or proximate result of the collision. So, too, if the burning oil had descended from the point where it was first ignited by the mere force of its own gravity, upon the petitioner's building and destroyed it, the connection between cause and effect would have been so close and direct that the defendant's liability could not have been successfully questioned. So, also, if the fire had been carried from the place of its origin to the petitioner's building by a train of combustible matter, deposited in its track by the operation of the laws of nature, the petitioner's injury, I think it could not have been doubted, would have been esteemed the direct result of the defendant's negligence. These principles must rule this case. Their application is obvious, for, although water is almost universally used as a means to extinguish fire, and it seems, at first blush, absurd to say that it can be used for the purpose of extending it, yet it is true, as a matter of fact, that, as an agency for the transmission of burning oil, it is just as certain and effectual in its operation as the wind, in carrying flame, or a spark, or combustible matter, in spreading a fire. In keeping up the continuity between cause and effect it may be just as certain and effectual in its operation as any other material force." Upon a precisely similar state of facts, however, the Supreme Court of Pennsylvania held that even if the defendants were negligent in wrecking their train, still the damage to the plaintiff was too remote to warrant a recovery.¹ But this, in my judgment, is wholly incorrect. Upon what

¹ Hoag v. Lake Shore, &c., R. R. Co., 85 Penn. St. 293; S. C. 27 Am. Rep. 653.

principle of legal ratiocination can it be determined that when fire, negligently kindled by a railway company, is borne through the air upon a burning shingle, or passes over the dried grass of a prairie and sets fire to my house, the company is liable, but when it is floated down in burning oil upon the waters of a creek and sets fire to my property, the company is not liable? The Pennsylvania court is not likely to be followed upon this point.

CHAPTER VI.

THE RULE AS AFFECTING HIGHWAYS OTHER THAN RAILWAYS. THE LAW OF THE ROAD.

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| <p>§ 76. Liability of municipal corporations for injuries from defective highways.</p> <p>77. Traveler's own negligence contributing to the injury.</p> <p>78. Right of pedestrian in the roadway.</p> <p>79. Deviation from the highway.</p> <p>80. Trespass upon the highway.</p> <p>81. Sunday traveling.</p> <p>82. Pedestrians crossing the highway.</p> <p>83. Icy sidewalks.</p> <p>84. Injuries to persons in the highway from something falling from the adjoining property.</p> | <p>§ 85. Children injured upon the highway.</p> <p>86. Collisions upon the highway.</p> <p>87. Injuries upon ferry boats.</p> <p>88. Injuries on and about street cars.</p> <p>89. Walking upon a street railway track.</p> <p>90. Alighting from or boarding moving street cars.</p> <p>91. Riding upon the platforms of street cars.</p> <p>92. Passenger's hand or arm outside of the car window.</p> <p>93. Free passengers and trespassers upon street cars.</p> |
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§ 76. *Liability of municipal corporations for injuries from defective highways.*—At common law no action lies against a municipal corporation for damages occasioned by defective highways.¹ “It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals,² but *quasi* corporations, created by the Legislature for purposes of public policy, are subject by the common law to an indictment for the neglect of duties enjoined on them, but are not liable to an action for such neglect unless the action has been

¹ Russell *v.* Men of Devon, 2 T. R. 667; Bartlett *v.* Crozier (by Chancellor Kent), 17 Johnson, 449; S. C. 8 Am. Dec. 428; Riddle *v.* Proprietors, 7 Mass. 169; s. c. 5 Am. Dec. 35; Mower *v.* Inhabitants of Leicester, 9 Mass. 247; s. c. 6 Am. Dec. 63; Hill *v.* Boston, 122 Mass. 344; S. C. 23 Am. Rep. 332; Adams *v.* Wicasset Bank, 1 Greenl. 361; Reed *v.* Belfast,

20 Me. 246; Farnum *v.* Concord, 2 N. H. 392; Eastman *v.* Meredith, 36 Id. 284; Hyde *v.* Jamaica, 27 Vt. 443; State *v.* Burlington, 36 Id. 521; Chidsey *v.* Canton, 17 Conn. 475; Taylor *v.* Peckham, 8 R. I. 349; 2 Dillon on Munic. Corp., §§ 761, 764.

² See, on this point, Angell & Ames on Corporations, §§ 83, 383, 629, 772.

given by some statute.”¹ Accordingly, inasmuch as among the most important duties which the law imposes upon municipal corporations is that of making and maintaining roads and streets,² and because every member of the community has a personal interest in the condition of the highway, the right to bring a civil action against the corporation for an injury resulting from a breach of this duty has generally been conferred by statute.³ Ordinary care must be exercised by the officers and servants of the corporation to keep the highways in a safe and convenient condition for travelers,⁴ and the duty and responsibility of the corporation with respect to the condition of the highway are not limited to the traveled path, but extend to the whole width of the way.⁵ But ditches, properly constructed for the drainage of the highway at the sides of the traveled way, cannot be regarded defects, as matter of law—nor is the city liable for a failure to place railings between such ditches or drains and the thoroughfare proper.⁶ Except in the States of New Jersey,⁷ Texas,⁸ Michigan,⁹ and South

¹ *Mower v. Inhabitants of Leicester*, *supra*, and compare *Raymond v. City of Lowell*, 6 Cush. 524; S. C. 53 Am. Dec. 57; *Providence v. Clapp*, 17 How. (U. S.) 167; *Jones v. Inhabitants of Waltham*, 4 Cush. 299; S. C. 50 Am. Dec. 783; *Parker v. Boston & Maine R. R. Co.*, 3 Cush. 107; S. C. 50 Am. Dec. 709.

² *Bullock v. Mayor, &c.*, of New York, Ct. of App., N. Y., June 9, 1885; 1 Eastern Reporter, 170, and cases cited; *Shear. & Redf. on Neg.*, §§ 344, 346.

³ 2 Dill. Munic. Corp., § 786; *Richards v. Enfield*, 13 Gray, 344; *City of Lexington v. McQuillan*, 9 Dana, 513; S. C. 35 Am. Dec. 159; *Providence v. Clapp*, 17 How. (U. S.) 167; *Milarky v. Foster*, 6 Oregon, 378; S. C. 25 Am. Rep. 531; *Dutton v. Weare*, 17 N. H. 34; S. C. 43 Am. Dec. 590, and the cases cited, *supra*.

⁴ *Raymond v. City of Lowell*, 6

Cush. 524; S. C. 53 Am. Dec. 57; *Gould v. City of Topeka*, 32 Kan. 485; S. C. 49 Am. Rep. 496; *Johnson v. Whitefield*, 18 Me. 218; S. C. 36 Am. Dec. 721; *Savage v. Bangor*, 40 Me. 176; S. C. 63 Am. Dec. 658. But see *George v. Haverhill*, 110 Mass. 511.

⁵ *Johnson v. Whitefield*, *supra*; *Durant v. Palmer*, 39 N. J. Law, 544; *Vale v. Bliss*, 50 Barb. 358; *Raymond v. City of Lowell*, *supra*; *Street v. Holyoke*, 105 Mass. 85. *Contra*, *Perkins v. Inhabitants of Fayette*, 68 Me. 152; S. C. 28 Am. Rep. 84.

⁶ *Morse v. Inhabitants of Belfast*, Sup. Jud. Ct., Me., January 10, 1885, 1 Eastern Reporter, 67.

⁷ *Pray v. Mayor, &c.*, 32 N. J. Law, 394.

⁸ *City of Navasota v. Pearce*, 46 Texas, 525; S. C. 26 Am. Rep. 279.

⁹ *Detroit v. Blakeby*, 21 Mich. 84; S. C. 4 Am. Rep. 450; *McCutcheon v.*

Carolina,¹ it is not denied that a municipal corporation is liable to private individuals for any injury which results from the failure of the corporation or its agents to keep the streets and ways in a safe and proper condition.² The obligation of the corporation is as great in respect of obstructions as defects, and the traveler who is injured because of an obstruction permitted to be in the highway, may have his action against the town³ in the same way and to the same extent as in case of injury from a defect in the highway. And, to an action of this sort, it is not a defense that the obstruction was necessary for the repair of the street.⁴

Upon the question whether municipal corporations are liable for an injury to a runaway horse or his owner, produced by a defect in a street, the courts are not agreed. In several jurisdictions it is held that highways need not be so constructed that travelers and their horses shall be safe when the horses run away or become unmanageable. This is the rule in Massachusetts,⁵

Homer, 43 Mich. 483; s. c. 38 Am. Rep. 212.

¹ Young v. Charleston, 20 S. C. 116; s. c. 47 Am. Rep. 827.

² Gould v. City of Topeka, 32 Kan. 485; s. c. 49 Am. Rep. 496; Brown- ing v. City of Springfield, 17 Ill. 143; s. c. 63 Am. Dec. 345, and Mr. Freeman's note; O'Neill v. City of New Orleans, 30 La. Ann. 220; s. c. 31 Am. Rep. 221; Noble v. City of Rich- mond, 31 Gratt. 271; s. c. 31 Am. Rep. 726; Drew v. Town of Sutton, 55 Vt. 586; s. c. 45 Am. Rep. 644; Baker v. Portland, 58 Me. 199; s. c. 4 Am. Rep. 274; Dowd v. Chicopee, 116 Mass. 95, and the cases generally cited hitherto.

³ Dutton v. Weare, 17 N. H. 34; s. c. 43 Am. Dec. 590; French v. Brunswick, 21 Me. 29; s. c. 38 Am. Dec. 250; Bennett v. Fifield, 13 R. I. 139; s. c. 43 Am. Rep. 17; Snow v. Adams, 1 Cush. 447; Barber v. Rox- bury, 11 Allen, 320.

⁴ Jacobs v. Bangor, 16 Me. 187; s. c. 33 Am. Dec. 652. But a person injured by an accident occasioned by an authorized public work, constructed and kept in repair in a lawful manner, has no legal remedy; as, where one fell into a cattle-guard near the highway, at a railway crossing, properly constructed and maintained. Jones v. Inhabitants of Waltham, 4 Cush. 299; s. c. 50 Am. Dec. 783; Hawks v. Northampton, 116 Mass. 423. Compare Bailey v. Mayor of New York, 3 Hill, 531; s. c. 38 Am. Dec. 669; Davis v. Leominster, 1 Al- len, 184; Reardon v. City, Sup. Ct., Cal., 1885, Pac. Rep., April 2, 1885; s. c. xix Am. Law Rev. 492. But see, also, City v. Neuding, Sup. Ct., Ohio, 1885, xix Am. Law Rev. 492.

⁵ Davis v. Inhabitants of Dudley, 4 Allen, 558; Titus v. Inhabitants of Northbridge, 97 Mass. 258; Fogg v. Inhabitants of Nahant, 98 Id. 576.

Maine,¹ and Wisconsin.² But in New York,³ Pennsylvania,⁴ Georgia,⁵ Missouri,⁶ Indiana,⁷ Connecticut,⁸ New Hampshire,⁹ and Vermont,¹⁰ it is held that where it appears that the corporation was negligent in constructing or maintaining the highway, and such negligence was a cause of the injury, the action may be sustained, and the mere fact of the runaway is not a defense.¹¹

§ 77. *Traveler's own negligence contributing to the injury.*—In the earliest case in which contributory negligence is pleaded as a defense¹² to an action for damages growing out of the defendant's neglect, it was held that a traveler who suffers an injury from a defect, or obstruction, in the highway, must, in order to recover damages, be able to show that he himself exercised ordinary care to avoid the injury. In that case Lord Ellenborough said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right."¹³ This is the general rule of law as to contributory negligence, which applies, as of course, to actions brought by travelers for injuries received by reason of defects or obstructions upon the highway.¹⁴

¹ Moulton v. Inhabitants of Sanford 51 Me. 127; Perkins v. Inhabitants of Fayette, 68 Id. 152.

² Dreher v. Inhabitants of Fitchburg, 22 Wis. 675; Houfe v. Inhabitants of Fulton, 29 Id. 296; S. C. 9 Am. Rep. 568.

³ Ring v. City of Cohoes, 77 N. Y. 83; S. C. 33 Am. Rep. 574.

⁴ Hey v. City of Philadelphia, 81 Penn. St. 44; S. C. 22 Am. Rep. 733.

⁵ City of Atlanta v. Wilson, 59 Ga. 644; S. C. 27 Am. Rep. 396; 60 Ga. 473.

⁶ Hull v. City of Kansas, 54 Mo. 601; S. C. 14 Am. Rep. 487.

⁷ Brooksville, &c., Turnpike Co. v.

Pumphrey, 59 Ind. 78; S. C. 26 Am. Rep. 76.

⁸ Baldwin v. Turnpike Co., 40 Conn. 238.

⁹ Winship v. Enfield, 42 N. H. 197.

¹⁰ Hunt v. Town of Pownal, 9 Vt. 411.

¹¹ Compare Sherwood v. City of Hamilton, 37 Up. Can. (Q. B.) 410.

¹² Butterfield v. Forrester, 11 East, 60, and see § 4, *supra*.

¹³ *Vide* the opinion in full at page 9, *supra*.

¹⁴ Smith v. Smith, 2 Pick. 621; S. C. 13 Am. Dec. 464; Thompson v. Bridgewater, 7 Pick. 190; Lane v.

When the highway is out of order it is held, as a general rule, not negligent to use it in as prudent a way as practicable, which is to say that using a defective highway is not negligence as a matter of law. It would be an extraordinary rule that made it negligence not to stay indoors whenever the highway is out of repair.¹ But when the condition of the highway is such that it is obviously dangerous to go upon it, and it appears that the plaintiff might easily have taken another course and avoided the danger, there can be no recovery in case of an injury. To go upon such a highway, under such cir-

Crombie, 12 Id. 177; Adams v. Carlisle, 21 Id. 147; Carsley v. White, 21 Id. 255; Palmer v. Andover, 2 Cush. 605; Kirby v. Boylston Market, 14 Gray, 251; Hibbard v. Thompson, 109 Mass. 288; Reed v. Northfield, 13 Pick. 94; s. c. 23 Am. Dec. 662; Horton v. Ipswich, 12 Cush. 493; Johnson v. Whitefield, 18 Me. 286; s. c. 36 Am. Dec. 721; French v. Brunswick, 21 Me. 29; s. c. 38 Am. Dec. 250; Raymond v. City of Lowell, 6 Cush. 524; s. c. 53 Am. Dec. 57; Gerald v. Boston, 108 Mass. 584; Baker v. Portland, 58 Me. 199; s. c. 4 Am. Rep. 274; Steele v. Burkhardt, 104 Mass. 59; s. c. 6 Am. Rep. 191; City of Vicksburg v. Hennessy, 54 Miss. 391; s. c. 28 Am. Rep. 354; Evans v. City of Utica, 69 N. Y. 166; s. c. 25 Am. Rep. 165; King v. Thompson, 87 Penn. St. 365; s. c. 30 Am. Rep. 364; Bruker v. Town of Covington, 69 Ind. 33; s. c. 35 Am. Rep. 202; Town of Albion v. Hetrick, 90 Ind. 545; s. c. 46 Am. Rep. 230; City of Montgomery v. Wright, 72 Ala. 411; s. c. 47 Am. Rep. 422; Erie v. Magill, 101 Penn. St. 616; s. c. 47 Am. Rep. 739; City of Bloomington v. Perdue, 99 Ill. 329; City of Huntington v. Breen, 77 Ind. 29; Henry Co. Turnpike Co. v. Jackson, 86 Id. 111; s. c. 44 Am. Rep. 274; Wilson v. Trafalgar, 93 Ind. 287; McLaury v. City of McGregor, 54 Iowa, 717; Munger v. Marshalltown, 56 Id. 216; s. c. 59 Id. 763; Cressy v. Postville, 59 Id. 62;

Parkhill v. Brighton, 61 Id. 103; Osage City v. Brown, 27 Kan. 74; City of Salina v. Trosper, 27 Id. 545; Corbett v. City of Leavenworth, 27 Id. 673; Maultby v. Id., 28 Id. 745; Loewer v. City of Sedalia, 77 Mo. 431; Drew v. Town of Sutton, 55 Vt. 586; s. c. 45 Am. Rep. 644; Reynolds v. Burlington, 52 Vt. 300; Fassett v. Roxbury, 55 Id. 552; Durant v. Palmer, 39 N. J. Law, 544; Maloy v. New York, &c., R. R. Co., 58 Barb. 182; Templeton v. Montpelier, 56 Vt. 328; Dewire v. Bailey, 131 Mass. 169; s. c. 41 Am. Rep. 219; Weston v. Elevated R. R. Co., 73 N. Y. 595; Aurora v. Dale, 90 Ill. 46; Hutchison v. Collins, 90 Ill. 410; Aurora v. Hillman, 90 Id. 61.

¹ City Council of Montgomery v. Wright, 72 Ala. 411; s. c. 47 Am. Rep. 422; City of Huntington v. Breen, 77 Ind. 29; Henry Co. Turnpike Co. v. Jackson, 86 Id. 111; s. c. 44 Am. Rep. 274; Albion v. Hetrick, 90 Ind. 545; s. c. 46 Am. Rep. 230; Osage City v. Brown, 27 Kan. 74; City of Salina v. Trosper, 27 Id. 545; Dewire v. Bailey, 131 Mass. 169; s. c. 41 Am. Rep. 219; Weston v. Elevated R. R. Co., 73 N. Y. 595; Dooley v. Meriden, 44 Conn. 117; s. c. 26 Am. Rep. 433; Aurora v. Hillman, 90 Ill. 61; Reed v. Northfield, 13 Pick. 94; s. c. 23 Am. Dec. 662; Evans v. City of Utica, 69 N. Y. 166; s. c. 25 Am. Rep. 165; Nave v. Flack, 90 Ind. 205; s. c. 46 Am. Rep. 205.

cumstances, is negligence sufficient to bar an action for damages.¹ Mere knowledge, however, of defects or danger in the highway, on the part of the person injured thereby, is not conclusive evidence of negligence contributing to the injury.² But it has been held in Indiana that a person injured by an obstruction in the highway, of which he has knowledge, and which he attempts to pass in the night, when it was too dark for him to see it, has no remedy, such conduct being negligence *per se*.³ So, also, where one attempts in the dark to pass an open cellarway in a sidewalk, knowing, but for the moment forgetting about it, it is such contributory negligence as will defeat his recovery for injuries sustained by falling into it.⁴ In *City of Bloomington v. Perdue*⁵ it was held that a young woman who was injured by a fall upon a defective pavement, which induced a more serious internal disorder, but who, from ignorance of the nature of her affection, did not promptly call in a physician, was not, on that account, guilty of

¹ *City of Erie v. Magill*, 101 Penn. St. 616; s. c. 47 Am. Rep. 739; *Fleming v. City of Lockhaven*, Sup. Ct., Penn., Week. Notes Cas., Nov. 13, 1884; *Schaefer v. City of Sandusky*, 33 Ohio St. 246; s. c. 31 Am. Rep. 533; *City of Centralia v. Krouse*, 64 Ill. 19; *Durkin v. Troy*, 61 Barb. 437; *Parkhill v. Brighton*, 61 Iowa, 103; *Wilson v. City of Charlestown*, 8 Allen. 137; *Corbett v. City of Leavenworth*, 27 Kan. 673.

² *Reed v. Northfield*, 13 Pick. 94; s. c. 23 Am. Dec. 662; *Marble v. Worcester*, 4 Gray, 404; *Frost v. Waltham*, 12 Allen, 86; *Snow v. Housatonic R. R. Co.*, 8 Id. 450; *Henry Co. Turnpike Co. v. Jackson*, 86 Ind. 111; s. c. 44 Am. Rep. 274; *Estelle v. Lake Crystal*, 27 Minn. 243; *Kelly v. Railroad Co.*, 28 Id. 98; *Evans v. City of Utica*, 69 N. Y. 166; s. c. 25 Am. Rep. 165; *Griffin v. Auburn*, 58 N. H. 121; *Thomas v. Mayor*, 28 Hun, 110; *County Commissioners v.*

Burgess, 61 Md. 29; *Bullock v. Mayor, &c.*, Ct. of App., N. Y., June 9, 1885, 1 Eastern Reporter, 170; *Maultby v. City of Leavenworth*, 28 Kan. 745; *Loewer v. City of Sedalia*, 77 Mo. 431; *Templeton v. Montpelier*, 56 Vt. 328; *Dewire v. Bailey*, 131 Mass. 169; s. c. 41 Am. Rep. 219; *City Council of Montgomery v. Wright*, 72 Ala. 411; s. c. 47 Am. Rep. 422; *Town of Albion v. Hetrick*, 90 Ind. 545; s. c. 46 Am. Rep. 230; *Nave v. Flack*, 90 Ind. 205; s. c. 46 Am. Rep. 205.

³ *President and Trustees of the Town of Mt. Vernon v. Desouchett*, 2 Ind. 586; s. c. 54 Am. Dec. 467.

⁴ *Braker v. Town of Covington*, 69 Ind. 33; s. c. 35 Am. Rep. 202; and, see *King v. Thompson*, 87 Penn. St. 365; s. c. 30 Am. Rep. 364; *Parkhill v. Brighton*, 61 Iowa, 103; *Aurora v. Dale*, 90 Ill. 46; *Hutchison v. Collins*, 90 Id. 410.

⁵ 99 Ill. 329.

contributory negligence; that the disease superinduced by the fall was a proximate effect of the fall, and that an action for damages therefor would lie against the city.¹

The law imposes upon the traveler the duty of ordinary care, and this is the measure of his obligation when he brings an action for damages for an injury sustained by reason of an obstacle or defect in the highway. Accordingly, in proportion as the risk of injury increases, must his care and diligence to avoid injury be increased. It is, therefore, held that a traveler is bound to exercise greater care and attention in passing over a highway while it is undergoing repairs, by which it is partly obstructed, than he would be required to exercise under ordinary circumstances,² and more care in going about in the darkness of the night than in the day-time.³

Where one, by permission of the city authorities, has dug up the sidewalk, or some portion of it, in excavating for a vault, or other proper purpose, and has built a

¹ "I must close this amusing subject," says Mr Irving Browne, at the end of his chapter on Negligence, in "Humorous Phases of the Law," p. 216, "with the case of Bovee v. Town of Danville, 53 Vt. 190, an action for injuries from a defective highway, one of the injuries being a miscarriage, whereby twins prematurely came into the world, and proved love's labor lost. The trial court charged that plaintiff, the mother, was entitled to recover, among other things for any injury to her feelings occasioned by the misfortune. Ross, J., in reviewing this part of the charge, uses this language: 'Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of

a jury. If, like Rachel, she wept for her children, and *would not* be comforted, a question of *continuing* damage is presented, too delicate to be weighed by any scales which the law has yet invented.'

² Jacobs v. Bangor, 16 Me. 187; s. c. 33 Am. Dec. 652.

³ Crofts v. Waterhouse, 3 Bing. 319; Davis v. Falconbridge, a recent English county court case, reported, on this point, in 45 Am. Rep. 650, note; Bruker v. Covington, 69 Ind. 33; s. c. 35 Am. Rep. 202; Maloy v. New York, &c., R. R. Co., 58 Barb. 182; King v. Thompson, 87 Penn. St. 365; s. c. 30 Am. Rep. 364; Parkhill v. Brighton, 61 Iowa, 103; Pierce v. Whitcomb, 48 Vt. 127; s. c. 21 Am. Rep. 120; Evans v. City of Utica, 69 N. Y. 166; s. c. 25 Am. Rep. 165; Rector v. Pierce, 3 Thomp. & C. 416; Durant v. Palmer, 39 N. J. Law, 544.

bridge or passageway over his excavation somewhat higher than the rest of the walk, he is bound to make the passage reasonably safe, but not exactly as safe as though there were no excavation; and, in passing such a place, it is the duty of travelers to exercise somewhat more than their usual care and caution.¹ But when one unlawfully places an obstruction in the highway, whereby an injury is occasioned, he is, of course, liable;² and, where one suffers an injury from an obstruction in the street, for which obstruction he is himself responsible, he cannot recover.³

§ 78. *Right of pedestrian in the roadway.*—A pedestrian has the right to walk in the roadway if he prefers it. Lord Denham says: "A man has a right to walk in the road if he pleases. It is a way for foot passengers as well as for carriages." His lordship, however, wisely adds: "But he had better not, especially at night, when carriages are passing along."⁴

It is also the right of a pedestrian to cross the road or street at any point, not only at regular crossings, but elsewhere.⁵ But a pedestrian, while he has equal, has no

¹ Nolan v. King, 97 N. Y. 565; s. C. 49 Am. Rep. 561; Clifford v. Dam, 81 N. Y. 56; McGuire v. Spence, 91 Id. 303; s. C. 43 Am. Rep. 668; Wasmer v. Delaware, &c., R. R. Co., 80 N. Y. 212; s. C. 36 Am. Rep. 608; Irvine v. Wood, 51 N. Y. 224; s. C. 10 Am. Rep. 603; Rehberg v. Mayor, &c., of New York, 91 N. Y. 137; s. C. 43 Am. Rep. 657; Brusso v. City of Buffalo, 90 N. Y. 679. For a contrary doctrine see City of Lincoln v. Walker, Sup. Ct., Neb., 19 Am. Law Rev. 162, in which it is held that in such a case the pavement must be kept in as safe a condition as though there were no excavation. See, also, Cahill v. Layton, 57 Wis. 600; s. C. 46 Am. Rep. 46; Nave v. Flack, 90 Ind. 205; s. C. 46 Am. Rep. 205.

² Clark v. Chambers, 3 L. R. Q. B. Div. 327; Milarkey v. Foster, 6 Oregon, 378; s. C. 25 Am. Rep. 531; Bennett v. Lovell, 12 R. I. 166; s. C. 34 Am. Rep. 628.

³ Sioux City v. Weare, 59 Iowa, 95. Compare Born v. Albany Plank Road, 101 Penn. St. 334.

⁴ Boss v. Litton, 5 Car. & P. 407; Raymond v. City of Lowell, 6 Cush. 524; s. C. 53 Am. Dec. 57; Coombs v. Purrington, 42 Me. 332; Gerald v. Boston, 108 Mass. 584. See, also, McLauray v. City of McGregor, 54 Iowa, 717; Aurora v. Hillman, 90 Ill. 61.

⁵ Raymond v. City of Lowell, 6 Cush. 524, *supra*; Simons v. Gaynor, 89 Ind. 165; Cotterill v. Starkey, 8 Car. & P. 691; Springett v. Ball, 4 Fort & Fin. 472.

superior or prior rights in the roadway of a street in a city over vehicles.¹ It is, therefore, not such an act of negligence as will bar a recovery for one to walk in the roadway, or attempt to cross the highway elsewhere than at a regular crossing. It is the duty of pedestrians and persons in vehicles alike when on the highway to exercise ordinary care, and there is, it seems, no peculiar application of the general rules of law in point in this class of cases.²

§ 79. *Deviation from the highway.*—In actions against municipal corporations, in cases where a traveler has sustained an injury upon the highway because of some defect or obstruction therein, it is a general rule that a deviation from the generally traveled track or path will be such negligence as to prevent a recovery. The corporation is to be held responsible for the condition of the highway, not for that of the adjoining land. When the traveler, therefore, leaves the highway, and thereby sustains an injury, he has no action against the town.³

But when the traveled part of the highway is obstructed, it may not be negligent to deviate from the road. It is a proper question for the jury.⁴ So it is held not contributory negligence to turn somewhat out of the wrought part of the road to get better sleighing; ⁵ and so,

¹ *Belton v. Baxter*, 54 N. Y. 245; s. c. 13 Am. Rep. 578; s. c. 58 N. Y. 411; *Barker v. Savage*, 45 Id. 191; s. c. 6 Am. Rep. 66; *Brooks v. Schwerin*, 54 N. Y. 343.

² *Thomp. on Neg.* 387, § 6.

³ *City of Scranton v. Hill*, 102 Penn. St. 378; s. c. 48 Am. Rep. 211; *Zettler v. Atlanta*, 66 Ga. 195; *Larrabee v. Peabody*, 128 Mass. 561; *Ramsey v. Rushville*, 81 Ind. 394; *Leslie v. Lewiston*, 62 Me. 468; *Kelley v. Fon du Lac*, 31 Wis. 179;

Ozier v. Hinesburgh, 44 Vt. 220; *McLaury v. City of McGregor*, 54 Iowa, 717; *Drew v. Sutton*, 55 Vt. 586; s. c. 45 Am. Rep. 644. Compare *Aurora v. Hillman*, 90 Ill. 61.

⁴ *Ramsey v. Rushville*, 81 Ind. 394.

⁵ *Joyner v. Great Barrington*, 118 Mass. 463. But, see *Rice v. Montpelier*, 19 Vt. 470; *Green v. Danby*, 12 Id. 338; *Wheeler v. Westport*, 30 Wis. 392, and *Marshall v. Ipswich*, 110 Mass. 522.

when a bridge is impassible, it is not negligent to take a by-road to get across the stream.¹

It is the duty of the town, or other municipal corporation, at any point in the highway where, for any reason, there is danger that travelers may be exposed to injury because of high embankments, or because of any other peril of the way, to make and maintain a suitable fence or railing,² and for any failure so to do, which results in injury to a traveler lawfully pursuing his journey, the corporation is liable. But the traveler, in order to recover, must have been using the highway not as a convenience in caring for his stock, but strictly for traveling. It was accordingly held, in Vermont, that the town was not liable to one whose horse was injured in falling into a gulf upon the side of the road as he was backing it out of a shed, where it had been left merely for convenience.³ The corporation is bound to guard against the ordinary dangers of travel in this respect, but not against extraordinary or remote dangers—*e. g.*, a town is not bound to erect barriers merely to prevent travelers from straying from the highway and from falling into a pit that they may reach by straying.⁴ But while an action,

¹ *Erie v. Schwingle*, 22 Penn. St. 384; and see *Briggs v. Guilford*, 8 Vt. 264.

² *Drew v. Town of Sutton*, 55 Vt. 586; s. c. 45 Am. Rep. 644; *City of Chicago v. Hesing*, 83 Ill. 204; s. c. 25 Am. Rep. 378; *Hey v. Philadelphia*, 81 Penn. St. 44; s. c. 22 Am. Rep. 733; *Collis v. Dorchester*, 6 Cush. 396; *Britton v. Cummington*, 107 Mass. 347; *Page v. Bucksport*, 64 Me. 51; s. c. 18 Am. Rep. 239; *Clapp v. City of Providence*, 17 How. (U. S.) 161; *Savage v. Bangor*, 40 Me. 176; *Baldwin v. Greenwood's Turnpike Co.*, 40 Conn. 238; s. c. 16 Am. Rep. 33; *Munson v. Town of Derby*, 37 Conn. 298; s. c. 9 Am. Rep. 332; *Houfe v. Fulton*, 29 Wis. 296; s. c. 9 Am. Rep. 568; *Manderschid v. City of Dubuque*, 29 Iowa, 73; s. c. 4 Am. Rep. 196; *Oliver v. Worcester*, 102 Mass. 489; s. c. 3 Am. Rep. 485; *Niblett v. Nashville*, 12 Heisk. 684; s. c. 27 Am. Rep. 755.

³ *Sykes v. Town of Pawlet*, 43 Vt. 446; s. c. 5 Am. Rep. 295. See, also, *Rice v. Montpelier*, 19 Vt. 470; *Varney v. Manchester*, 58 N. H. 430; s. c. 42 Am. Rep. 592; *Bassett v. City of St. Joseph*, 53 Mo. 290; s. c. 14 Am. Rep. 446.

⁴ *Puffer v. Orange*, 122 Mass. 389; s. c. 23 Am. Rep. 368; *Murphy v. Gloucester*, 105 Mass. 470; *Warner v. Holyoke*, 112 Id. 362; *Sparhawk v. Salem*, 1 Allen, 30; *Adams v.*

in such a case, may not lie against the corporation, the owner of land adjoining a highway is liable if he digs a pit so near the traveled way that one in passing along falls in and is thereby injured. Such pitfalls, unfenced and unguarded, in close proximity to a traveled road or street, are nuisances for which the owner of the land is liable.¹

This is the law, notwithstanding the general rule that the owner of land adjoining a highway is not liable for a failure to keep his premises in a safe condition for mere trespassers. It is, indeed, a rule of law that if a person traveling on a highway deviates therefrom and falls into a pit on my land, he shall not hold me responsible for his bruises,² but I must not set traps or dig pitfalls upon my land close to the roadside, and leave them unfenced and unguarded for my neighbors to fall into. The mere technical trespass involved in stepping off from the highway and on to the land is not a defense to an action for injuries sustained through such neglect on the part of an owner of land adjacent to the highway.³ And,

Natick, 13 Id. 429; Chapman v. Cook, 10 R. I. 304; S. C. 14 Am. Rep. 686; Davis v. Hill, 41 N. H. 329; Keys v. Village of Marcellas, 50 Mich. 439; S. C. 45 Am. Rep. 52; Taylor v. Peckham, 8 R. I. 352; S. C. 5 Am. Rep. 578.

¹ Beck v. Carter, 68 N. Y. 283; S. C. 23 Am. Rep. 175; Wood on Nuisance, § 289; Homan v. Stanley, 66 Penn. St. 464; S. C. 5 Am. Rep. 389; Sanders v. Reister, 1 Dakota, 151; Vale v. Bliss, 50 Barb. 358; Haughey v. Hart, 62 Iowa, 96; S. C. 49 Am. Rep. 138; Young v. Harvey, 16 Ind. 314; Addison on Torts, 201; Shear & Redf. on Neg., §§ 505, 506; Durant v. Palmer, 39 N. J. Law, 544; Hadley v. Taylor, L. R. 1 C. P. 53; Barnes v. Ward, 9 C. B. 392; S. C. 19 L. J. (C. P.) 195; cf. Corby v. Hill, 4 C. B. (N. S.) 556; Hounsell v. Smyth, 7 Id. 731.

² Beck v. Carter, 68 N. Y. 283, supra; Victory v. Baker, 67 Id. 366; Gillespie v. McGowen, 100 Penn. St. 144; S. C. 45 Am. Rep. 365; Severy v. Nickerson, 120 Mass. 306; S. C. 21 Am. Rep. 514; Indermaur v. Dames, L. R. 1 C. P. 274; S. C. L. R. 2 C. P. 311; Sweeny v. Old Colony R. R. Co., 10 Allen, 368; Sullivan v. Waters, 14 Ir. C. L. Rep. 460; Southcote v. Stanley, 1 Hurl. & N. 247; Hounsell v. Smyth, 7 C. B. (N. S.) 731; S. C. 97 Eng. Com. Law, 731; Howland v. Vincent, 10 Metc. 371; Harlow v. Humiston, 6 Cowen, 189; Stafford v. Ingersol, 3 Hill. 38; Wells v. Howell, 19 Johns. 385; Compare Toll Bridge Co. v. Langrell, 47 Conn. 228.

³ Sanders v. Reister, 1 Dakota, 151; Murray v. McShane, 52 Md. 217; S. C. 36 Am. Rep. 367.

moreover, when a traveler goes from the highway upon adjoining land from necessity, because the highway is temporarily impassable, as from snow drifts, he is not guilty of any trespass whatever, but only does what he has a right to do, if he do no unnecessary damage.¹

This rule is insisted upon in the English cases. "Highways," said Lord Mansfield, "are for the public service, and, if the usual track is impassable, it is for the general good that people should be entitled to pass in another line."² And in Comyn's Digest it is said: "A passenger may break the fence and go *extra viam* as much as is necessary to avoid the bad way."³ Very few cases are found in the reports in this country upon this point, but there are, among the few adjudications upon the subject, none that contradict the English rule.

In *King v. Thompson*,⁴ it is held that an opening in the sidewalk fifteen inches wide and three feet long in front of a cellar window, which was designed for the lighting and ventilation of the cellar, and made in the manner usual in Allegheny City, is not *per se* a nuisance, and that when the street is lighted, and one, passing by in the night, steps into the opening and is thereby injured, the question of his contributory negligence is one proper to go to the jury.⁵

But when one, in a blinding snow storm, steps into

¹ *Campbell v. Race*, 7 Cush. 408; s. c. 54 Am. Dec. 728, and the note; *Morey v. Fitzgerald*, 56 Vt. 487; s. c. 48 Am. Rep. 811; *Holmes v. Seely*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Id. 652; *Carey v. Rae*, 58 Cal. 163; *Henn's Case*, W. Jones, 296; *Pomfret v. Ricroft*, 1 Saund. 323, (note 3); *Absor v. French*, 2 Show, 28; *Young v. —*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 Mau. & Sel. 387; 2 Black. Com. 36; 3 Kent's Com. 424; 3 Cruise's Digest, 89; *Wellbeloved on Ways*, 38; *Woolrych on Ways*, 50; *Angell on Highways*, § 353; *Thomp. on Highways*, § 3; 2 *Waterman on Trespass*, § 703.

² *Taylor v. Whitehead*, 2 Doug. 749.

³ tit. Chem. D. 6.

⁴ 87 Penn. St. 365; s. c. 30 Am. Rep. 364.

⁵ Cf. *Dillon on Munic. Corp.*, § 794; *Stewart v. Alcorn*, 2 Week. Notes Cas. (Penn.) 401.

a hole in the pavement, for which he has no reason to be on the lookout, it is not contributory negligence and he may recover from the town,¹ and when the plaintiff fell into a hole in the sidewalk badly covered up, or so covered as to mislead one coming upon it, it was held that he might have his action against the owner of the adjoining property, whose duty it was to keep the sidewalk, as to this opening, reasonably safe for travelers.² But, where one maintains a hatchway in a pavement, in a public street unsafe for travelers, and a stranger takes the cover off, and one, being injured thereby, recovers damages from the occupant of the property, the latter cannot recover indemnity from the intermeddler, upon the principle *in pari delicto, etc.*³ In Indiana, moreover, where one attempts in the night time to pass an open cellarway in the sidewalk, of which he knew, but which, for the moment, he had forgotten, he is held guilty of contributory negligence sufficient to bar a recovery for injuries sustained by falling into the cellar.⁴

§ 80. *Trespass upon the highway.*—The use of the highway for games or sports, dangerous to travelers, is a trespass, and renders the parties guilty of it liable for all damages occasioned thereby. "The highway is established for the convenience of travelers, and the use of it for any game or sport, that actually exposes or puts to hazard the personal safety of the traveler thereon, is not justifiable, and subjects the party thus using the road improperly to the payment of all damages occasioned thereby to the

¹ *Aurora v. Dale*, 90 Ill. 46.

² *Hutchison v. Collins*, 90 Ill. 410; *Calder v. Smalley*, Sup. Ct., Iowa, N. W. R., June 13, 1885; S. C. xix Am. Law Rev. 664.

³ *Churchill v. Holt*, 131 Mass. 67; S. C. 41 Am. Rep. 191; but see, also, S. C. 127 Mass. 165; S. C. 34 Am. Rep. 355, and *Gray v. Gaslight Co.*,

114 Mass. 149; S. C. 19 Am. Rep. 344.

⁴ *Braker v. Town of Covington*, 69 Ind. 33; S. C. 35 Am. Rep. 202; *cf.* *President, &c., of Mt. Vernon v. Dousouhett*, 2 Ind. 586; S. C. 54 Am. Dec. 467, and the note; and *Dillon on Munic. Corp.*, § 789.

traveler.”¹ And so, where one using the highway not as a traveler,² but for purposes of play or sport, receives an injury from a defect in the highway, it is contributory negligence, and no action will lie against the corporation whose duty it is to keep the highway in repair.³ But, in another line of cases, it appears that mere collateral violations of law upon the highway, not contributing to the injury, will not always bar a recovery; as, where two persons were speeding their horses upon the highway, in violation of a rule as to fast driving, and one purposely ran into the other and injured his sleigh, it was held that the injured party might have his action, in spite of the collateral violation of law on his part.⁴ So, also, where the action was against the city, and the plaintiff, having driven through the streets at a rate of speed forbidden by a municipal ordinance, was injured by a defect in the street, it appearing that the rate of speed did not contribute to the injury, such illegal driving did not prevent a recovery.⁵ And where one placed his team in the street in a manner forbidden by a municipal ordinance, and was run into and injured by the negligence of the defendant, it was held that he might recover, the position of the plaintiff's team not appearing to have contributed to the collision.⁶ The maintenance of a fruit stand, a perma-

¹ *Vosburgh v. Moak*, 1 Cush. 453; S. C. 48 Am. Dec. 613.

² The obligation of the municipality to keep the highways in repair is enforceable only in favor of *bona fide* travelers. *Richards v. Enfield*, 13 Gray, 344. See, also, 2 Dillon on Munic. Corp., § 786.

³ *McCarthy v. Portland*, 67 Me. 167; S. C. 24 Am. Rep. 23; *Blodgett v. Boston*, 8 Allen, 237; *Harper v. Milwaukee*, 30 Wis. 365; *Higginson v. Nahant*, 11 Allen, 530. See, also, *Stickney v. Salem*, 3 Allen, 374; *Stinson v. Gardner*, 42 Me. 248; *Sykes v. Pawlet*, 43 Vt. 446; S. C. 5 Am. Rep. 295; and, for a contrary rule, in favor

of one who stopped his horses by the way to pick some berries, and the horses, becoming frightened, backed down a steep bank negligently left unfenced, see *Britton v. Cunningham*, 107 Mass. 347; and *cf.* *Babson v. Rockport*, 101 Id. 93; *Gregory v. Adams*, 14 Gray, 242.

⁴ *Welch v. Wesson*, 6 Gray, 505. Compare *Schultz v. Milwaukee*, 49 Wis. 254; S. C. 35 Am. Rep. 779 and note, and see § 16, *supra*.

⁵ *Baker v. Portland*, 58 Me. 199; S. C. 4 Am. Rep. 274; *cf.* *Heland v. Lowell*, 3 Allen, 407.

⁶ *Steele v. Burkhardt*, 104 Mass. 59; S. C. 6 Am. Rep. 191; but see, also,

ment structure, upon the sidewalk in the street of a city, so constructed as to encroach upon the highway, is a nuisance, and that, without reference to whether it essentially interferes with the comfortable enjoyment of the sidewalk by travelers or not.¹

Upon the question whether or not it is negligent to leave horses untied and unattended in the public highway, there is not entire unanimity in the decisions. In *Norris v. Kohler*,² on the one hand, it is said: "Leaving the horses unfastened in a public street is undoubted negligence, and so it has been often held," which is the rule declared in several other cases; ³ whereas, in *Wasmer v. Delaware, &c., R. R. Co.*,⁴ on the other hand, it is said: "There is no absolute rule of law that requires one who has a horse in the street to tie him, or to hold him by the reins. It would, doubtless, be careless to leave a horse in a street wholly unattended, without tying him to something. But it is common for persons doing business in streets with horses to leave them standing in their immediate presence, while they attend to the business, and it is not unlawful for them to do so. It is commonly safe so to do, and accidents are rarely occasioned thereby," and in that case it was held that it was not contributory negligence for one peddling kindling wood to leave his horse untied, and go a short distance away from the wagon to solicit a customer, although the horse being frightened by an approaching railway train, ran upon the track, and

Le Baron v. Joslin, 41 Mich. 313; *State v. Edens*, 85 N. C. 522; *Turner v. Holtzman*, 54 Md. 148; S. C. 39 Am. Rep. 361.

¹ *State v. Berdetta*, 73 Ind. 185; S. C. 38 Am. Rep. 117, an interesting and learned opinion. See, also, the annotation in the re-report.

² 41 N. Y. 42.

³ *Deville v. Southern Pacific R. R. Co.*, 50 Cal. 383; *Morris v. Phelps*, 2

Hilt. 38; *Buckingham v. Fisher*, 70 Ill. 121; *Loeser v. Humphrey* (Sup. Ct., Ohio), 32 Albany Law Jour. 56, July 18, 1885; *Gray v. Second Avenue R. R. Co.*, 65 N. Y. 561. Compare *Southworth v. Old Colony, &c., R. R. Co.*, 105 Mass. 342; S. C. 7 Am. Rep. 528; *Davis v. Dudley*, 4 Allen, 557.

⁴ 80 N. Y. 212; S. C. 36 Am. Rep. 608.

the owner going after it in pursuit, was run over and killed, and this, although there was also a city ordinance forbidding any man to leave his horse in the street unless securely tied.¹

A horse unlawfully at large upon a highway is a nuisance, and its owner is liable for any damage done by it, whether the horse is vicious or not.² But where a horse escapes from a proper enclosure without fault on the part of the owner, and does damage, it seems that the owner is not liable.³ When the plaintiff's horse is frightened by some unusual object, likely to frighten horses, upon the highway for which the defendant is legally responsible, and the horse, being so terrified, does damage, runs away, or causes other injury to the plaintiff, the defendant is liable.⁴ But what a city has licensed, for a consideration, cannot be treated as a nuisance, and accordingly there is no action against the city for damages sustained

¹ See, also, *Southworth v. Old Colony, &c.*, R. R. Co., 105 Mass. 342, *supra*; *Titcomb v. Fitchburg R. R. Co.*, 12 Allen, 254; *Albert v. Bleecker, St. R. R. Co.*, 2 Daly, 389; *Griggs v. Fleckenstein*, 14 Minn. 81; *Streett v. Laumier*, 34 Mo. 469.

² *Baldwin v. Ensign*, 49 Conn. 113; s. c. 44 Am. Rep. 205; *Decker v. Gammon*, 44 Me. 322; *Barnes v. Chapin*, 4 Allen, 444; *Lyons v. Merrick*, 105 Mass. 76; *Dickson v. McCoy*, 39 N. Y. 400; *Goodman v. Gay*, 15 Penn. St. 188; *Fallon v. O'Brien*, 12 R. I. 518; s. c. 34 Am. Rep. 713; *Lee v. Riley*, 18 C. B. (N. S.) 722; *Moak's Underhill's Torts*, 296, 297, citing *Southall v. Jones*, 5 Vict. L. R. 402.

³ *Con v. Burbridge*, 13 C. B. (N. S.) 430; *Fallon v. O'Brien*, 12 R. I. 518, *supra*. Compare *Holden v. Shattuck*, 34 Vt. 336.

⁴ *Bennett v. Lovell*, 12 R. I. 166; s. c. 34 Am. Rep. 628, and note; *Forschay v. Glen Haven*, 25 Wis. 288; s. c. 3 Am. Rep. 73; *Ayer v. City of*

Norwich, 39 Conn. 376; s. c. 12 Am. Rep. 396; *Winship v. Enfield*, 42 N. H. 199; *Bartlett v. Hooksett*, 48 Id. 18; *Chamberlain v. Enfield*, 43 Id. 358; *Knight v. Goodyear Rubber Co.*, 38 Conn. 438; s. c. 9 Am. Rep. 406; *Ring v. City of Cohoes*, 77 N. Y. 83; s. c. 33 Am. Rep. 574; *Brooksville v. Pumphrey*, 59 Ind. 78; s. c. 26 Am. Rep. 76; but see, *contra*, *Keith v. Easton*, 2 Allen, 522; *Kingsbury v. Dedham*, 13 Id. 186; *Macomber v. Nichols (Cooley, C. J.)*, 34 Mich. 212; s. c. 22 Am. Rep. 522; *Favor v. Boston, &c., R. R. Co.*, 114 Mass. 350; s. c. 19 Am. Rep. 364; *Rivers v. City Council of Augusta*, 65 Ga. 376; s. c. 38 Am. Rep. 787; *Little v. City of Madison*, 42 Wis. 643; s. c. 24 Am. Rep. 435; *Cole v. City of Newburyport*, 129 Mass. 594, and compare, *Harris v. Mobbs*, 3 L. R. Exch. Div. 268; *Watkins v. Reddin*, 2 Fost. & Fin. 629; *Smith v. Stokes*, 4 Best & S. 84; *Hill v. Board of Aldermen of Charlotte*, 72 N. C. 55; s. c. 21 Am. Rep. 451.

by reason of one's horse becoming frightened at an exhibition of wild animals lawfully upon the highway;¹ nor when the plaintiff's house was set on fire and burned up by licensed fireworks upon a holiday;² nor when the plaintiff was gored by a cow lawfully at large upon the street of a city.³ A defective vehicle or harness, if the defect is known to the plaintiff, is a defense to an action for damages for an injury from a defective highway. It is contributory negligence to go upon the highway with such a conveyance.⁴ "The plaintiff," said Shepley, C. J., "must show that the accident occurred wholly by the defect of the road, and without any fault on his part."⁵ But if the defect in the conveyance is unknown to the plaintiff, it is not as a rule a defense to his action.⁶ Unskillful or reckless driving is also such negligence on the part of a plaintiff as will prevent a recovery in case it contributes to produce the injury;⁷ but, in case it does not appear to have contributed to occasion the mischief, the plaintiff may, nevertheless, recover.⁸ So it is held that permitting a woman to drive a horse upon a highway is not conclusive upon the question of the plaintiff's want

¹ *Cole v. City of Newburyport*, 129 Mass. 594, *supra*; *Little v. City of Madison*, 49 Wis. 605, *supra*.

² *Hill v. Board of Aldermen of Charlotte*, 72 N. C. 55; *Tindley v. City of Salem*, 137 Mass. 171.

³ *Rivers v. City Council of Augusta*, 65 Ga. 376.

⁴ *Jenks v. Wilbraham*, 11 Gray, 142; *Allen v. Hancock*, 16 Vt. 230; *Farrar v. Greene*, 32 Me. 574; *Moore v. Abbott*, 32 Id. 46; *Springett v. Ball*, 4 Fost. & Fin. 472; *Thomp. on Neg.* 1208, § 55.

⁵ *Farrar v. Greene*, *supra*, and see, *Cotterill v. Starkey*, 8 Car. & P. 691.

⁶ *Palmer v. Andover*, 2 Cush. 600; *Hodge v. Bennington*, 43 Vt. 450; *Tucker v. Henniker*, 41 N. H. 317; *Winship v. Enfield*, 42 Id. 197; *Tuttle v. Farmington*, 58 Id. 126. But

see, *contra*, *Anderson v. Bath*, 42 Me. 346; *Perkins v. Fayette*, 68 Id. 152; *Davis v. Dudley*, 4 Allen, 557; *Titus v. Northbridge*, 97 Mass. 258; *Houfe v. Fulton*, 29 Wis. 296; *Hawes v. Fox Lake*, 33 Wis. 438. See, also, *Thomp. on Neg.* 1085, § 3; *Shear. & Redf. on Neg.*, § 416.

⁷ *Flower v. Adams*, 2 Taunt, 314; *Pittsburgh, &c., R. R. Co. v. Taylor*, 104 Penn. St. 306; S. C. 49 Am. Rep. 580; *Peoria Bridge Association v. Loomis*, 20 Ill. 235; *Acker v. County of Anderson*, 20 S. C. 495; *Cassidy v. Stockbridge*, 21 Vt. 391.

⁸ *Alger v. Lowell*, 3 Allen, 402; *Heland v. Id.*, 3 Id. 407; *Stuart v. Machias Port*, 48 Me. 477; *Welch v. Wesson*, 6 Gray, 505; *Baker v. Portland*, 58 Me. 199; S. C. 4 Am. Rep. 274, and see § 16, *supra*.

of care.¹ The law inclines to require the same degree of care of a woman as of a man;² but it is said that a woman driving a horse upon a highway may be presumed to be somewhat wanting in the amount of knowledge, skill, dexterity, steadiness of nerve, and coolness of judgment—in short, that reasonable degree of competency which we may presume in a man, and that a person meeting her under circumstances threatening collision should govern his own conduct with some regard to her probable deficiencies.³

§ 81. *Sunday traveling.*—“*Dies dominicus non est juridicus*,” but with this qualification Sunday, at common law, differed from no other day in the week. Courts might not lawfully sit upon that day; service of process and arrest in civil causes were prohibited, and no judicial act could be done,⁴ but business transactions of every kind upon that day were valid.⁵ Lord Mansfield says that Sunday is a *dies non juridicus*, not made so by statute but by a canon of the church incorporated into the common law.⁶ Prior to the year A. D. 517, however, the Christians used all days alike for the hearing of causes, not sparing Sunday itself. This they did for two reasons; *first*, to rebuke the heathen superstition as to lucky

¹ Cobb v. Standish, 14 Me. 198; Bigelow v. Rutland, 4 Cush. 247; Babson v. Rockport, 101 Mass. 93; Blood v. Tyngsboro, 103 Id. 509.

² Hassenger v. Michigan, &c., R. R. Co., 48 Mich. 205; S. C. 42 Am. Rep. 470, an instructive opinion of Mr. Justice Cooley; Fox v. Glastenbury, 29 Conn. 204; Snow v. Provincetown, 120 Mass. 580.

³ Daniels v. Clegg, 28 Mich. 33; cf. City of Bloomington v. Perdue, 99 Ill. 329.

⁴ See, upon this point, in general, Hiller v. English, 4 Strobb. (Law), 486; Story v. Elliot, 8 Cowen, 27; S. C. 18 Am. Dec. 423; Coleman v. Henderson, Littell's Select Cases (Kentucky), 171; S. C. 12 Am. Dec. 290, and note;

True v. Plumley, 36 Me. 466; Swan v. Broome, 3 Burr, 1597; S. C. 2 Bl. 526; 1 Wm. Bl. 526; MacKalley's Case, 9 Co. 66; S. C. Cro. Jac. 279, and compare Isaacs v. Beth Hamedash Society, 1 Hilt. 469; Van Riper v. Van Riper, 1 Southard (N. J.), 156; S. C. 7 Am. Dec. 576; Proffatt on Jury Trial, § 455; Browne's Humorous Phases of the Law, 14.

⁵ Comyns v. Boyer, Cro. Eliz. 405; Rex v. Brotherton, Stra. 702; Prinsor's Case, Cro. Car. 602; Waite v. Hundred of Stoke, Cro. Jac. 496. See, also, City Council v. Benjamin, 2 Strobb. 508; S. C. 49 Am. Dec. 608, and the note.

⁶ Swan v. Broome, *supra*.

and unlucky days, and *second*, that, by keeping their own courts always open, they prevented Christian suitors from resorting to the heathen tribunals.¹

"But, in the year 517, a canon was made: '*Quod nullus episcopus vel infra positus die dominico causas judicare præsumat*;' and this canon was ratified in the time of Theodosius, who fortified it with an imperial constitution: '*Solis die [quem dominicum recte dixere majores] omnium omnino litium et negotiorum quiescat intentio.*' Other canons were made, in which vacations were appointed. These, and other canons and constitutions, were received and adopted by the Saxon kings of England. They were all confirmed by William the Conqueror, and Henry II., and so become part of the common law of England."² By statute 29, Car. II.,³ which has been copied, in most of the States of the Union, it is provided, *inter alia*, that: "No tradesman, artificer, workman, labourer or other person whatsoever, shall do or exercise any worldly labour, business or work, of their ordinary calling upon the Lord's day, or any part thereof, work of necessity and charity only excepted." The adjudications in the several States, and in England, under these statutes are very numerous,⁴ but with them, for the purposes of this treatise, we are not concerned, except so far as in the New England States it has been held that the wrong-doing involved in traveling upon the Lord's day, whenever it is not a work of "necessity or charity," is a defense to actions brought by travelers for

¹ Sir Henry Spelman, quoted by Lord Mansfield in *Swan v. Broome*, *supra*.

² *Story v. Elliot*, 8 Cowen, 27; s. c. 18 Am. Dec. 423, a very interesting opinion, in which the learning upon this point is fully set out.

³ Chap. 7, § 1.

⁴ Many cases are collected in Browne's "Humorous Phases," &c.,

14-47. See, also, *Myers v. Meinrath*, 101 Mass. 366; s. c. 3 Am. Rep. 368, and note; *Allen v. Duffie*, 43 Mich. 1; s. c. 38 Am. Rep. 159, and note; *State v. Larry*, 7 Baxt. 95; s. c. 32 Am. Rep. 555, and note; *Robeson v. French*, 12 Metc. 24; s. c. 45 Am. Dec. 236; *Coleman v. Henderson*, *Littell's Select Cases (Kentucky)*, 171; s. c. 12 Am. Dec. 290, and the note.

injuries from defective highways, collisions or any other misadventure upon such Sunday journey.

This anomalous and erratic doctrine was first announced by Chief Justice Shaw, of Massachusetts, in the case of *Bosworth v. Inhabitants of Swansea*.¹ It was an action brought by a person injured, while traveling upon Sunday, by a defect in a highway, and it was held, as an application of the local statute, which provides that "no person shall travel on the Lord's day, except from necessity or charity," and that "every person so offending shall be punished by a fine not exceeding ten dollars for every offense," that the traveler, in order to maintain his action, must show that he was traveling from necessity or charity, and that a failure so to do would prevent any recovery. In many subsequent cases this rule has been applied by the Massachusetts courts—and it is settled law in that State that, when one travels on a Sunday, except upon an errand of "necessity or charity," he can maintain no action for any injury that he may sustain by reason of a defect in the highway, or from collision, or railway accident, or other misadventure. In effect, such a traveler, in Massachusetts, takes his life in his hand, and goes forth at his own proper peril.

It is held, for example, not to be a traveling from necessity or charity to go, on Sunday, to see whether a house, into which you propose to move on Monday, has been properly cleaned and put in order;² nor to walk along the streets of Boston to see your employer for the purpose of getting him to change your hours of labor on week days;³ nor to ride in the street cars from one city to another to call upon a stranger;⁴ nor to travel about

¹ 10 Metc. 363; S. C. 43 Am. Dec. 441.

³ *Connolly v. Boston*, 117 Id. 64.

² *Smith v. Boston, &c., R. R. Co.*, 120 Mass. 492.

⁴ *Stanton v. Metropolitan R. R. Co.*, 14 Allen, 485.

for the purpose of furnishing fresh meat to marketmen ;¹ nor for the purpose of selling pigs ;² nor to go to see your friend, on the way home from a funeral (when you venture out on Sunday to a funeral you must go straight there and straight back) ;³ nor for a traveling insurance agent, whose sick sister had written to him to meet her and carry her home, to go on Sunday by rail to a point at which he expected to receive another letter from that sister as to their proposed journey home together ;⁴ nor to perform the ordinary duties of a street car conductor.⁵ In each of these cases the plaintiff found himself remediless. So, also, where the plaintiff had merely tied his horse by the roadside and another drove against it he could not recover, inasmuch as, although the plaintiff was attending a camp meeting, it did not clearly appear that he attended from religious motives ;⁶ and if one lets a horse for a Sunday drive and the horse is injured, by the neglect of the person who hires it, the owner cannot recover.⁷

On the contrary, the Massachusetts courts have held it a journey made from "necessity or charity," within the contemplation of the statute, for one to drive his horse upon the highway on Sunday morning to get a maid-servant, in order that she might prepare necessary food for

¹ Jones v. Andover, 10 Id. 18.

² Bradley v. Rea, 103 Mass. 188; S. C. 4 Am. Rep. 524.

³ Davis v. Somerville, 128 Mass. 594; S. C. 35 Am. Rep. 399.

⁴ Bucher v. Fitchburg R. R. Co., 131 Mass. 156; S. C. 41 Am. Rep. 216.

⁵ Day v. Highland Street R. R. Co., 135 Mass. 113; S. C. 46 Am. Rep. 447.

⁶ Lyons v. Desotelle, 124 Mass. 387.

⁷ Gregg v. Wyman, 4 Cush. 322, but the court has receded from this position in the later case of Hall v.

Corcoran, 107 Mass. 251; S. C. 9 Am. Rep. 30, in which it was held, when the owner of a horse let it, on the Lord's day, to be driven for pleasure to a particular place, and the hirer drove it to a different place and in doing so injured it, that, although the contract of hiring was illegal and void, the owner might, nevertheless, maintain tort for the conversion of the horse. In the opinion, Mr. Justice Gray reconsiders at length the question presented in Gregg v. Wyman, which was overruled by a unanimous court. Compare Nodine v. Doherty, 46 Barb. 59.

the family during the day,¹ or for one to take a walk merely for exercise, and to get the air.² And when one travels from one town to another to visit a sick friend whom he thinks may need his assistance,³ or goes on Sunday to a camp meeting of spiritualists,⁴ he is entitled to go to the jury on the question, whether he was traveling lawfully or not. It is also lawful, under the statute, to travel on Sunday for the purpose of visiting a sick child, or other near relative.⁵ And where the defendant's dog frightened the plaintiff's horse so that it ran away and broke his buggy, the plaintiff was allowed his action, although he was riding at the time unlawfully upon the Sabbath day.⁶ In this case it is said that the plaintiff's unlawful traveling on the Lord's day will not defeat his right to recover, unless his unlawful act was a contributory cause of the injury he sustains.⁷ But this, in my opinion, is not the law in Massachusetts upon this point, and even if it were, it hardly helps things much, since in *Hall v. Corcoran*,⁸ it is expressly declared that in these cases the illegal Sunday traveling "necessarily contributes" to the injury—from which the inference is that there is no escape.⁹

The Massachusetts doctrine upon this point obtains,

¹ *Crosman v. City of Lynn*, 121 Mass. 301.

² *Hamilton v. City of Boston*, 14 Allen, 475.

³ *Doyle v. Lynn, &c., R. R. Co.*, 118 Mass. 195; S. C. 19 Am. Rep. 431.

⁴ *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; S. C. 12 Am. Rep. 720.

⁵ *Pearce v. Atwood*, 13 Mass. 324, 350; *Gorman v. Lowell*, 117 Id. 65.

⁶ *White v. Lang*, 128 Mass. 598; S. C. 35 Am. Rep. 402. Compare on this point *Schmid v. Humphrey*, 48 Iowa, 652; S. C. 30 Am. Rep. 414.

⁷ *White v. Lang*, *supra*, by Morton, J.

⁸ 107 Mass. 251; S. C. 9 Am. Rep. 30.

⁹ See, also, as indicating the attitude of this court upon this general question, *McGrath v. Merwin*, 112 Mass. 467; S. C. 17 Am. Rep. 119; *Wallace v. Merrimack, &c., Co.*, 134 Mass. 95; S. C. 45 Am. Rep. 301, wherein the general Massachusetts rule is applied to one who, in sailing his yacht on Sunday, was negligently injured in a collision. Compare *Myers v. Meinrath*, 101 Mass. 366; S. C. 3 Am. Rep. 368; *Cox v. Cook*, 14 Allen, 165; *Commonwealth v. Sampson*, 97 Mass. 407.

in Maine, where one who travels on Sunday to visit a friend, in violation of the statute, cannot maintain an action against the town for injuries from a defective highway.¹ But if a woman walks only about a mile in a town, for exercise on Sunday, she is held not a traveler in such a sense as to bar her recovery against the town for injuries suffered during such a walk from a defect in the street,² and when a man walking on the Lord's day for exercise went into a beer shop and drank a glass of beer, and on resuming his walk was injured by a defect in the highway, it was held that he might recover.³ But if one lets his horse for a pleasure drive on Sunday, and the horse is injured by the hirer's neglect the owner is remediless.⁴

Vermont is the only other State in the Union where this theory prevails. In that State the Massachusetts rule upon this subject is followed, and there is no recovery for injuries received from a defect in the highway by one who is traveling on Sunday in violation of the statute.⁵ But where the plaintiff traveled eight miles on Sunday, from one town to another, to visit his two little sons from whom he was separated during the week, and whose mother was dead, and was injured by a defect in the highway, it was held that a recovery would not be defeated by the Vermont statute, which prohibits travel on

¹ *Cratty v. Bangor*, 57 Me. 423; S. C. 2 Am. Rep. 56. See, also, *Hinckley v. Penobscot*, 42 Me. 81; *Tillock v. Webb*, 56 Id. 100.

² *O'Connell v. City of Lewistown*, 65 Me. 34; S. C. 20 Am. Rep. 673. Compare *Hamilton v. Boston*, 14 Allen 475.

³ *Davidson v. City of Portland*, 69 Me. 116; S. C. 31 Am. Rep. 253. See, also, *Atkinson v. Sellers*, 5 C. B. (N. S.) 442; *Taylor v. Humphreys*, 10 Id. 429; *Regina v. Rymer*, 13 Cox's C. C.

378; *Peplow v. Richardson*, 4 L. R. (C. P.) 168.

⁴ *Parker v. Latner*, 60 Me. 528; S. C. 11 Am. Rep. 210. But see, *Morton v. Gloster*, 46 Me. 520, and compare *Hall v. Corcoran*, 107 Mass. 251; S. C. 9 Am. Rep. 30; *Stewart v. Davis*, 31 Ark. 518; S. C. 25 Am. Rep. 576; *Nodine v. Doherty*, 46 Barb. 59; *Frost v. Plumb*, 40 Conn. 111; S. C. 16 Am. Rep. 18; *Smith v. Rollins*, 11 R. I. 464; S. C. 23 Am. Rep. 509.

⁵ *Johnson v. Town of Irasburgh*, 47 Vt. 28; S. C. 19 Am. Rep. 111.

Sunday except for attendance at places of moral instruction and from necessity.¹

In *Baldwin v. Barney*,² it was held by the Supreme Court of Rhode Island, that where one driving carefully on Sunday on a highway in the State of Massachusetts was negligently run into and injured, he could maintain an action in Rhode Island against the person who injured him, without showing that he was traveling at the time of the injury upon an errand either of necessity or charity.³ In the opinion in this case, Chief Justice Durfee, explicitly repudiates the Massachusetts doctrine, which has found no favor outside of the three States in New England that have been long committed to it. It is generally denied throughout the Union in both State and Federal Courts.⁴

The objections to such a rule suggest themselves, but Chief Justice Dixon, in *Sutton v. Town of Wauwatosa*,⁵ has drawn the indictment in a very quotable fashion as follows: "The cases may be summed up, and the result stated generally to be the affirmance of two very just and

¹ *McClary v. Lowell*, 44 Vt. 116; s. c. 8 Am. Rep. 366. Note that in Pennsylvania it is a work of necessity or charity for a child to visit his father on Sunday, and to make a journey in a wagon so to do. *Logan v. Matthews*, 6 Penn. St. 417, but in Massachusetts it is in doubt, whether a young fellow may lawfully travel on a Lord's day to visit his sweetheart. *Buffington v. Swansey*, 2 Am. Law Rev. 235, cited in Browne's "Humorous Phases," 17.

² 12 R. I. 392; s. c. 34 Am. Rep. 670.

³ This is a good case for people in Massachusetts to make a note of, if they are given to taking drives on Sunday.

⁴ *Philadelphia, &c., R. R. Co. v. Philadelphia, &c., Towboat Co.*, 23 How. (U.S.) 209, wherein it is said that "the Massachusetts decisions upon the Sunday law depend on the peculiar

legislation and customs of the State, *more than on any general principles of law or justice.*" *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; *Platz v. City of Cohoes*, 89 Id. 219; s. c. 42 Am. Rep. 286; *Commonwealth v. Louisville, &c., R. R. Co.*, 80 Ky. 291; s. c. 44 Am. Rep. 475; *Phila., &c., R. R. Co. v. Lehman*, 56 Md. 209; s. c. 40 Am. Rep. 415; *Yonoski v. State*, 79 Ind. 393; s. c. 41 Am. Rep. 614; *Loeb v. City of Attica*, 82 Ind. 175; s. c. 42 Am. Rep. 494; *Wilkinson v. State*, 59 Ind. 416; s. c. 26 Am. Rep. 84. [Compare with this case, *Whitcomb v. Gilman*, 35 Vt. 297]; *Sutton v. Town of Wauwatosa*, 29 Wis. 21; s. c. 9 Am. Rep. 534; *Mohney v. Cook*, 26 Penn. St. 342; *Baldwin v. Barney*, 12 R. I. 392; s. c. 34 Am. Rep. 670; *Cooley on Torts*, § 157, and see, also, § 61, *supra*.

⁵ *Supra*.

plain principles of law as applicable to civil actions of this nature, namely : First, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing, or producing the wrongful act complained of ; and, secondly, that the fault, want of due care, or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. Under the operation of the first principle, the defendant cannot exonerate himself, or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other, and independent wrong or violation of law. Wrongs or offenses cannot be set off against each other in this way. 'But we should work a confusion of relations, and lend a very doubtful assistance to morality,' say the court in *Mohney v. Cook*, 'if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he, too, is a public offender.' Himself guilty of a wrong not dependent on, nor caused by that charged against the plaintiff, but arising from his own voluntary act, or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both, that such a defense should be allowed to prevail. It would extend the maxim *ex turpe causa non oritur actio* beyond the scope of its legit-

imate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong and to visit unmerited and over rigorous punishment upon the plaintiff, constitute the sole motive for such defense on the part of the person making it."

§ 82. *Pedestrians crossing the highway.*—Pedestrians have no superiority of right at street crossings over teams. Persons upon the highway on foot in the act of crossing, and those upon the highway riding upon vehicles, have the right of way in common, each equally with the other, and in its exercise, each is bound to use ordinary care for his own safety, and to avoid doing injury to any others who may be in the exercise of the equal right of way with them.¹ The pedestrian has, however, the right to cross the street at any point, and is by no means restricted to the regular crossings,² although he is entitled to a somewhat higher measure of care on the part of a driver of a team, when he attempts to cross at a regular crossing.³ It is the duty, as we have seen,⁴ of one upon the highway who attempts to cross a railway track upon the same level as the roadway, to look attentively up and down the track in order to see whether or not a train is approaching. So, in some jurisdictions, it is held to be the duty of a pedestrian, upon attempting to cross a highway, and especially in attempting to cross the street of a city, to look carefully up and down the street in order not to put

¹ *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Barker v. Savage*, 45 N. Y. 191; S. C. 6 Am. Rep. 66; *Belton v. Baxter*, 54 N. Y. 245; S. C. 13 Am. Rep. 578; *Brooks v. Schwerin*, 54 N. Y. 343; *Myers v. Dixon*, 3 Jones & S. 390; *Beach v. Parmeter*, 23 Penn. St. 196.

² *Raymond v. City of Lowell*, 6

Cush, 524; S. C. 53 Am. Dec. 57; *Simons v. Gaynor*, 89 Ind. 165; *Cotterill v. Starkey*, 8 Car. & P. 691, and see, *Boss v. Litton*, 5 Id. 407.

³ *Williams v. Richards*, 3 Car. & Kir. 81.

⁴ § 63, *supra*.

himself into the way of approaching vehicles, and that a failure so to do is negligence as a matter of law.¹ But, in Massachusetts, such a failure is only evidence of negligence, and the plaintiff is entitled to have it go to the jury.²

One must not take desperate chances, or make nice calculations as to his ability to dodge approaching vehicles, in attempting to cross the crowded thoroughfares in New York. Accordingly, where one attempted to cross a street by rushing in front of a passing street car, but was run over by a cart which he had seen and calculated that he should be able to dodge, such conduct at a crossing was held contributory negligence in an action by the injured party against the owner of the cart.³ But it is not negligent, *in se*, says the Supreme Court of Louisiana, to wear a sun-bonnet in the street which may prevent a woman from seeing perfectly in all directions.⁴ Aged and infirm persons, it is to be remembered, have the same rights upon the highway as young, and active, and agile persons,⁵ but it devolves upon such persons to exercise the greater care in proportion to their disability,⁶ *e. g.*, a pedestrian, far advanced in years, must not venture upon an icy sidewalk when he might just as well have taken a safer course on the other side of the street,⁷ and one whose eye-sight is poor must exercise greater caution than one who sees perfectly.⁸

When a pedestrian is run over in a public street and

¹ *Barker v. Savage*, 45 N. Y. 191; s. c. 6 Am. Rep. 66; *Baker v. Pendergast*, 32 Ohio St. 494; s. c. 30 Am. Rep. 620. See, also, *Sheehan v. Edgar*, 58 N. Y. 631; *Woolf v. Beard*, 8 Car. & P. 373.

² *Shapleigh v. Wyman*, 134 Mass. 118; *Bowser v. Wellington*, 126 Id. 391; *Williams v. Grealy*, 112 Id. 79. Compare *Stock v. Wood*, 136 Id. 353.

³ *Belton v. Baxter*, 54 N. Y. 245; s. c. 13 Am. Rep. 578.

⁴ *Shea v. Reems*, 36 La. Ann. 969.

⁵ *Shapleigh v. Wyman*, 134 Mass. 118; *Boss v. Litton*, 5 Car. & P. 407; *Barker v. Savage*, *supra*.

⁶ *Winn v. City of Lowell*, 1 Allen, 177; *Davenport v. Ruckman*, 37 N. Y. 568; *Peach v. Utica*, 10 Hun, 477; *Sleeper v. Sandown*, 52 N. H. 244; *City of Centralia v. Krouse*, 64 Ill. 19.

⁷ *City of Centralia v. Krouse*, *supra*.

⁸ *Peace v. Utica*, *supra*.

injured by one of a coasting party who accidentally struck him with his sled, the coasting going on without any license from the city authorities, there is no action against the city;¹ nor for a similar injury received by a person while crossing Boston Common along one of the paths where coasting was going on.²

§ 83. *Icy sidewalks*.—A very considerable amount of litigation has been occasioned by the presence of ice and snow upon the highways and in the streets of northern towns and cities. In this section it is proposed to consider the rules of law upon that subject so far as they impinge upon the law of contributory negligence. In those States where ice and snow are likely to accumulate in large quantities upon the public highways, the proper authorities are usually required, by statute or municipal ordinance, in respect of obstructions from those causes, to exercise ordinary care and diligence to keep the highways in a reasonably safe and convenient condition. When the highways are blocked up or incumbered with snow, it must be removed or trodden down to the extent of rendering the road or street passable. It may be supposed that this would be the duty, at least, of a municipal corporation, even in the absence of an express statutory requirement, under that more general rule of law that the highways are to be kept in reasonably good and convenient condition.

Upon the question how far ice and snow upon a sidewalk will constitute a "defect," we look to the case of *Providence v. Clapp*,³ as the leading authority. This case arose under the Rhode Island statute requiring

¹ *Schultz v. City of Milwaukee*, 49 Wis. 254; S. C. 35 Am. Rep. 779; *Faulkner v. Aurora*, 85 Ind. 130; S. C. 44 Am. Rep. 1; *Ray v. Manchester*, 46 N. H. 59; *Pierce v. New Bedford*, 129 Mass. 534; S. C. 37 Am. Rep. 387; *Hutchinson v. Concord*, 41 Vt. 271.

² *Steele v. City of Boston*, 128 Mass. 583. See, also, *Clark v. Waltham*, 128 Id. 567.

³ 17 How. (U. S.) 161.

towns to keep the highways in order, which, also, specifically required the removal of snow and ice when it obstructed passage along the way. It seems that the plaintiff, walking upon the street in the night, slipped and fell and injured himself upon a ridge of trodden snow and ice in the middle of the sidewalk, and it was held that, without reference to any specific requirement in the statute as to the removal of snow and ice from the pavement, it was the duty of the city to use ordinary care and diligence to restore the street, after a fall of snow, to a reasonably safe and convenient condition, and that whether the street is in that condition or not is a proper question for the jury. It is a fair conclusion from the opinion in that case that, while snow when it first falls, or ice when it first forms, and until the municipality has had a reasonable time to remove the obstruction and restore the highway to a safe and convenient condition, are not defects or obstructions for which the corporation may be held liable, the accumulation of ice or snow, if it causes injury, after a reasonable time has elapsed in which it might have been removed, is such a defect in the highway as will render the city liable. The court said: "The treading down of snow when it falls in great depth, or in case of drifts, so that the highway or street shall not be blocked up or incumbered, may, in some sense and for the time being, have the effect to remove the obstructions; but as it respects sidewalks and their uses, this remedy would be, at best, temporary, and, in case of rain or extreme changes of weather, would have the effect to increase rather than remove it. . . . The just rule of responsibility and the one, we think, prescribed by the statute, whether the obstruction be by snow or any other material, is the removal or abatement so as to render the highway, street or sidewalk at all

times safe and convenient, regard being had to its locality and uses." ¹

It is the general rule, in accordance with this view, that snow and ice *per se* are not defects for which a city may be held responsible, but that accumulation of snow or ice, after a reasonable time has elapsed within which they might have been removed, are actionable obstructions and defects,² and when one is injured by reason of such an accumulation, if he himself, at the time of the injury, was in the exercise of due care under the circumstances, he may maintain an action against the corporation whose duty it was to keep the highway in order.³

It is also a sound rule that mere slipperiness, arising from a smooth surface of ice or snow upon a sidewalk, is not such a defect as will render the city liable to one who sustains injuries from a fall thereon.⁴ But when the construction or shape of the pavement is such as to hold the water, and so render accumulations of ice inevitable or probable in cold weather, for slipperiness so caused the city may be liable;⁵ and so, also, when a pedestrian using

¹ *Providence v. Clapp*, (by Nelson, J.), 17 How. (U. S.) 161.

² "The fault for which the town is chargeable, consists in permitting the defect to remain, not in causing it to exist." *Billings v. Worcester*, 102 Mass. 329; s. c. 3 Am. Rep. 460.

³ *McLaughlin v. City of Corry*, 77 Penn. St. 109; s. c. 18 Am. Rep. 432; *Dooley v. City of Meriden*, 44 Conn. 117; s. c. 26 Am. Rep. 433; *Luther v. Worcester*, 97 Mass. 269; *Seeley v. Town of Litchfield*, 49 Conn. 134; s. c. 44 Am. Rep. 213; *Billings v. Worcester*, 102 Mass. 329; s. c. 3 Am. Rep. 460; *Nason v. Boston*, 14 Allen, 508; *Collins v. City of Council Bluffs*, 32 Iowa, 324; s. c. 7 Am. Rep. 200; *Todd v. City of Troy*, 61 N. Y. 506; *Dewire v. Bailey*, 131 Mass. 169; s. c. 41 Am. Rep. 219; *Mosey v. Troy*, 61 Barb. 580; *Mayor v. Marriott*, 9 Md. 160; *Cook v. City of Milwaukee*, 24 Wis. 270;

Cloughersy v. City of Waterbury, Sup. Ct. Err., Conn., 1885, Alb. Law Jour., April 11, 1885; s. c. xix Am. Law Rev. 492.

⁴ *Cook v. City of Milwaukee*, 24 Wis. 270; s. c. 1 Am. Rep. 183; *Stanton v. Springfield*, 12 Allen, 566; *Johnson v. Lowell*, 12 Allen, 572; *Gilbert v. Roxbury*, 100 Mass. 185; *Durkin v. Troy*, 61 Barb. 437; *City of Chicago v. McGiven*, 78 Ill. 352; *City of Chicago v. Bixby*, 84 Ill. 82; s. c. 25 Am. Rep. 429; *McKellar v. City of Detroit*, Sup. Ct., Mich. N. W. Rep., June 13, 1885; s. c. 19 Am. Law Rev. 664. Compare *Billings v. Worcester*, 102 Mass. 329; s. c. 3 Am. Rep. 460; *Kenney v. City of Cohoes*, 16 N. Y. Week. Dig. 206; *Kelly v. Newman*, 62 How. Prac. 156.

⁵ *Stanton v. Springfield*, 12 Allen, 566; and see *Billings v. Worcester*, 102 Mass. 329.

due care is injured by falling on a portion of a city sidewalk made of glass and iron, and worn smooth and slippery, and it appears that the slipperiness of the pavement was the sole cause of his fall, he may maintain an action against the city for damages for the injury he sustained.¹

So much for the duty and liability of the town, or other municipal corporation whose duty it is to keep the highway in order, with respect of ice and snow.

Turning to the reciprocal obligation of the traveler upon the highway, at times when the presence of ice and snow render traveling especially or unusually hazardous, we find that many cases insist upon the rule that when a person voluntarily attempts to pass over a sidewalk which he knows to be dangerous by reason of the ice or snow upon it, when he might avoid it, is guilty of such contributory fault as will prevent a recovery from the corporation whose duty it is to keep the way in a safe condition, in case of an injury because of such an attempt.²

When there is snow and ice upon the ground it is the duty of pedestrians to exercise increased care and caution in going about. They must in each instance exercise ordinary care under the circumstances in determining whether to proceed or to return, when confronted with a dangerous pavement or roadway, and if they are guilty of negligence in concluding to proceed, they cannot recover in case they receive injuries.³ But it is not

¹ *Cromarty v. City of Boston*, 127 Mass. 329; S. C. 34 Am. Rep. 381. See, also, *Crocheron v. North Shore, &c., Ferry Co.*, 1 N. Y. Super. Ct. 446; S. C. 56 N. Y. 656; and compare *Borough of Mauch Chunk v. Kline*, 100 Penn. St. 119; S. C. 45 Am. Rep. 364, wherein a municipality is held not liable for an injury to one who slipped upon the icy surface of cobble stones in a street crossing.

² *Shaefer v. City of Sandusky*, 33 Ohio St. 246; S. C. 31 Am. Rep. 533; *City of Erie v. Magill*, 101 Penn. St.

613; S. C. 47 Am. Rep. 739; *City of Quincy v. Barker*, 81 Ill. 300; S. C. 25 Am. Rep. 278; *Thomas v. Mayor, &c.*, 28 Hun, 110; *Wilson v. City of Charlestown*, 8 Allen, 137; *Durkin v. Troy*, 61 Barb. 437; *City of Centralia v. Krouse*, 64 Ill. 19; *Twogood v. Mayor, New York Common Pleas*, 1883, cited in 44 Am. Rep. note, 279. See, also, *City of Aurora v. Hillman*, 90 Ill. 61; *Lovenguth v. City of Bloomington*, 71 Id. 238; *Osage City v. Brown*, 27 Kan. 74.

³ *Horton v. Ipswich*, 12 Cush. 488.

necessarily negligent for one who knows there is ice upon the pavement to attempt to pass over it, even at night. In such a case one is bound to exercise only ordinary care and prudence.¹ Nor, in an action against a town by a husband and wife, for injuries sustained by the wife, by falling on a ridge of ice, which was a plain defect in the highway, will the husband's knowledge of the bad condition of the pavement at that point and that his wife was going there, coupled with his failure to warn her of the risk and caution her to beware of it, prevent a recovery from the town.²

The owner of city property is not liable for injuries sustained by one in passing over the pavement in front of his premises and slipping on ice formed by water dripping from his house, there being no defect in the premises, no obstruction of the sidewalk by the adjacent owner, and no duty imposed upon him, either by ordinance or statute, to keep the pavement free from ice;³ but the city may, of course, in such a case, be liable upon the grounds already set forth.⁴ Neither is a street car company which, in the lawful and orderly exercise of its franchise, clears the snow from its tracks, liable to the owner of adjacent property for injury done him, by reason of the snow so cleared from the street railway track obstructing the flow of water in the gutter and

¹ *Evans v. City of Utica*, 69 N. Y. 166; s. c. 25 Am. Rep. 165; *Dewire v. Bailey*, 131 Mass. 169; s. c. 41 Am. Rep. 219; *Weston v. Elevated Ry. Co.*, 73 N. Y. 595; *cf.* *Henry County Turnpike Co. v. Jackson*, 86 Ind. 111; s. c. 44 Am. Rep. 274; *Kelly v. Railroad Co.*, 28 Minn. 98; *Griffin v. Auburn*, 58 N. H. 121.

² *Street et ux. v. Inhabitants of Holyoke*, 105 Mass. 82; s. c. 7 Am. Rep. 500; *cf.* *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73; *Whittaker v. West Boylston*, 97 Id. 273.

³ *Moore v. Gadsden*, 87 N. Y. 84; s. c. 41 Am. Rep. 352. See, also, *City of Keokuk v. Independent District of Keokuk*, 53 Iowa, 352; s. c. 36 Am. Rep. 226; *Wenzlick v. McCotter*, 87 N. Y. 122; s. c. 41 Am. Rep. 358.

⁴ *Reich v. Mayor, &c.*, 17 N. Y. Week. Dig. 140; *Kenney v. City of Cohoes*, 16 Id. 206; *Kelly v. Newman*, 62 How. Prac. 156; *Mosey v. Troy*, 61 Barb. 580; *Mayor, &c., v. Marriott*, 9 Md. 160, and the cases cited to this point, *supra*.

causing it to back up upon the adjoining property.¹ The question whether or not, one who leaves the sidewalk and takes to the roadway on foot and is injured by coming upon a pile of snow in the street, is in a position to complain of such pile of snow as a defect, must be left to the jury.²

It is much questioned whether city ordinances, or, as they are called in New England, by-laws, requiring the owners or occupants of houses upon public highways to clear the snow from before their houses, are valid. Chief Justice Shaw, in an early case in Massachusetts, thought they were, and so decided,³ and such regulations have been upheld in that State by subsequent decisions, in no degree, however, relieving the city or town from its proper responsibility for the condition of its ways.⁴ But a contrary view is more usually taken, and such ordinances have, as a rule, found little favor.⁵

The weight of authority brings us to the following conclusions upon this subject: that ice and snow upon the highway are not *in se* defects for which the town is liable; that wherever the town is bound to maintain the public highways, it is bound to clear away or remove, within a reasonable time, snow that falls or ice that forms upon the traveled portion of the public ways, and that for a failure so to do an action may be maintained; that for mere slipperiness, the result of natural causes, there can be no liability, or, in other words, that a municipal corporation is not liable to suits for damages because water will freeze upon the ground in cold weather; that

¹ Short *v.* Baltimore City Passenger Ry. Co., 50 Md. 73; S. C. 33 Am. Rep. 298.

² Gerald *v.* Boston, 108 Mass. 584. Compare Hall *v.* Lowell, 10 Cush. 260; Stanton *v.* Springfield, 12 Allen, 566.

³ Goddard, Petitioner, &c., 16 Pick. 504; S. C. 28 Am. Dec. 259.

⁴ Kirby *v.* Boylston Market Association, 14 Gray, 252.

⁵ Gridley *v.* City of Bloomington, 88 Ill. 554; S. C. 30 Am. Rep. 566; but see, also, City of Hartford *v.* Talcott, 48 Conn. 525; S. C. 40 Am. Rep. 189.

the traveler must exercise somewhat more than his usual care and prudence in going about when there is snow and ice upon the ground; that it is contributory negligence on his part to go upon pavements, or parts of the highway that he knows to be dangerous by reason of the presence of ice or snow, when he might avoid it and take another course; that mere knowledge that the pavement is icy or slippery is not sufficient to fasten negligence upon one who goes upon it; and that city ordinances which require every man to sweep the snow from before his own door, are of somewhat questionable validity.

§ 84. *Injuries to persons in the highway from something falling from the adjoining property.*—It is the duty of the owners of property adjoining a public highway to take reasonable and ordinary care to prevent anything from falling into the highway to the injury of persons who are lawfully there. Accordingly, when buildings whose walls are upon the street become ruinous, and are likely to fall, it is the duty of the owner to take proper steps to prevent them from falling into the highway.¹ Such a building is, moreover, a public nuisance, for which an indictment will lie;² but when one, in the exercise of due care in using the highway, is injured by something falling from such a ruinous and tumble-down structure, he may have his action against the owner or occupant of the property.³ And there is a like rule when something falls out of a window and injures one passing along the highway beneath;⁴ and so when a hanging sign falls upon the head of a pass-

¹ *Mullen v. St. John*, 57 N. Y. 567; S. C. 15 Am. Rep. 530 (by Dwight, C.); *Rector of the Church of the Ascension v. Buckhart*, 3 Hill. 193.

² *Regina v. Watts*, 1 Salk. 357.

³ The cases cited *supra*, and *Mur-*

ray v. McShane, 52 Md. 217; S. C. 36 Am. Rep. 367. But see, *contra*, *Mahoney v. Libbey*, 123 Mass. 20; S. C. 25 Am. Rep. 6.

⁴ *Byrne v. Boadle*, 2 Hurl. & C. 722.

er-by,¹ there is an action against the owner or occupant of the property, but not against the city as for a defect in the highway.² It seems, however, that the municipality is liable for injuries to passers-by from defectively hung awnings over the pavement,³ but not for snow that falls from an adjoining roof to the injury of a traveler.⁴ When signs are negligently put up, the person who is responsible for the defective hanging is liable;⁵ and so when buildings are so constructed as to project ice or snow upon the highway during a thaw, the owner of the property is liable for damage resulting to a passer-by;⁶ or when, in erecting a wall upon property adjoining the highway, a brick is carelessly allowed to fall upon the head of a traveler,⁷ an action may be maintained, but not in favor of trespassers or persons not exercising due care.⁸

In *Byrne v. Boadle*⁹ it appears that an injury was caused by the falling of a barrel into the highway from the upper window of a shop. To the point of the proprietor's liability Baron Pollock said: "There are many accidents from which the presumption of negligence cannot arise; but this is not true in all cases. . . . It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and, I think, that such a

¹ *Salisbury v. Herchenroder*, 106 Mass. 458; s. c. 8 Am. Rep. 354.

² *Taylor v. Peckham, City Treasurer, &c.*, 8 R. I. 349; s. c. 5 Am. Rep. 578; *Hewitson v. City of New Haven*, 37 Conn. 475; s. c. 9 Am. Rep. 342; *Jones v. Boston*, 104 Mass. 75; s. c. 6 Am. Rep. 194.

³ *Drake v. Lowell*, 13 Metc. 292; *Day v. Milford*, 5 Allen, 98.

⁴ *Hixon v. Lowell*, 13 Gray, 59; *cf.* *Rowell v. City of Lowell*, 7 Id. 100; *Shipley v. Fifty Associates*, 101 Mass. 251.

⁵ The cases *supra*.

⁶ *Garland v. Towne*, 55 N. H. 55; s. c. 20 Am. Rep. 164; *Hixon v.*

Lowell, 13 Gray, 59. See, also, *Kearney v. London, &c., Ry. Co.*, L. R. 6 Q. B. 759; *Rylands v. Fletcher*, L. R. 1 Exch. 265; affirmed, L. R. 3 H. L. 330; s. c. 3 Hurl. & C. 774; *Bigelow v. Reed*, 51 Me. 325.

⁷ *Jager v. Adams*, 123 Mass. 26; s. c. 25 Am. Rep. 7.

⁸ *Zoebisch v. Tarbell*, 10 Allen, 385; *Roulston v. Clark*, 5 E. D. Smith, 366; *Stone v. Jackson*, 16 C. B. 199; s. c. 32 Eng. Law & Eq. 349; *Bolch v. Smith*, 7 Hurl. & N. 736.

⁹ 2 Hurl. & C. 722; s. c. 33 L. J. (Exch.), 13; 9 L. T. (N. S.), 450; 12 Week. Rep. 279.

case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident would be *prima facie* evidence of negligence.”¹

§ 85. *Children injured upon the highway.*—The general rules of law which require the exercise of especial care toward children of tender years when they are exposed or expose themselves to the danger of injury from the negligence of others,² and which, in some jurisdictions, impute the negligence of a parent or custodian to the infant who brings an action for damages for injuries sustained by reason of another person’s want of care and caution,³ are applicable, of course, in all respects, to actions brought for injuries which befall children upon the highway. The question often arises whether children may lawfully and properly play in the street, and whether, in case they are injured, while at play upon the highway, by the negligence of the driver of a vehicle or otherwise, there can be a recovery, or whether such conduct on their part is not such contributory negligence as to bar the action. In New York it seems that children may lawfully play in the street;⁴ and so in Pennsylvania⁵ and in

¹ See, also, *Scott v. London Docks Co.*, 3 Hurl. & C. 596; s. c. 11 Jur. (N. S.), 204; 34 L. J. (Exch.), 17, 220; 11 Week. Rep. 410; 11 L. T. (N. S.), 148; 10 Jur. (N. S.), 1107; *Maddox v. Cunningham*, 68 Ga. 431; s. c. 45 Am. Rep. 500. And compare, *Domat on Civil Law*, § 1557.

² *Vide* §§ 39, 41, *supra*.

³ Chap. IV, *supra*, *in loco*.

⁴ *McGary v. Loomis*, 63 N. Y. 104; s. c. 20 Am. Rep. 512; *McGuire v. Spence*, 91 N. Y. 303. Compare *Pearshall v. Post*, 20 Wend. 111, Mr. Justice Cowen’s opinion at page 131; *Cos-*

grove v. Ogden, 49 N. Y. 255; s. c. 10 Am. Rep. 361; *Ihl v. Forty-second St. Ry. Co.*, 47 N. Y. 317; s. c. 7 Am. Rep. 450.

⁵ *Pittsburgh, &c., R. R. Co. v. Pearson*, 72 Penn. St. 169; *Kay v. Penn. R. R. Co.*, 65 Id. 369; s. c. 3 Am. Rep. 628; *Philadelphia, &c., R. R. Co. v. Long*, 75 Penn. St. 257. Compare *Smith v. Hestonville, &c., R. R. Co.*, 92 Id. 450; s. c. 37 Am. Rep. 705; *Gillespie v. McGowen*, 100 Penn. St. 144; s. c. 45 Am. Rep. 365; *Fairbanks v. Kerr*, 70 Penn. St. 86; s. c. 10 Am. Rep. 664.

New Hampshire,¹ while in Maine² and Massachusetts³ the courts incline to the opposite view, and refuse a remedy to children who are injured while playing in the street. It appears, therefore, that the courts are not agreed upon the point. The New York rule is well announced by Chief Justice Church in *McGary v. Loomis*:⁴ "A point is made upon an exception to the remark of the judge that the child had the right to play on the sidewalk. This language was used in connection with the remark that the child had a right to be on the sidewalk, and the whole force of the remark as to the right to play was, that being on the sidewalk, the fact of playing there would not constitute contributory negligence so as to defeat a recovery. If it did not mean this it had no relevancy to the case, and was not for that reason error. There was no occasion for a charge as to the legal right of children to play on the sidewalk, to the exclusion of or interference with persons passing and repassing, nor was any such idea intended. That it is not unlawful, wrongful or negligent for children on the sidewalk to play is a proposition which is too plain for comment."⁵ But, on the other hand, we find the Supreme Court of Maine saying: "When children appropriate a part of the road for their sports, and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged, although the

¹ *Varney v. Manchester*, 58 N. H. 430; S. C. 42 Am. Rep. 592; *Petition of Mt. Washington Road Co.*, 35 N. H. 134

² *Stinson v. City of Gardiner*, 43 Me. 248.

³ *Tighe v. Lowell*, 119 Mass. 472; *Lyons v. Brookline*, 119 Id. 491. Compare *Stickney v. Salem*, 3 Allen, 374; *Hunt v. Salem* 121 Mass. 294; *Blod-*

gett v. Boston, 8 Allen, 237; *Stock v. Wood*, 136 Mass. 353; *Gibbons v. Williams*, 135 Id. 333.

⁴ 63 N. Y. 104, *supra*.

⁵ In the later case of *McGuire v. Spence*, 91 N. Y. 303, this right of children, upon general principles, to play in the street, is further insisted upon.

injuries may take place through a defect in the road."¹ And, in *Blodgett v. Boston*,² the Supreme Judicial Court of Massachusetts said: "We by no means intend to say that a child, who receives an injury caused by a defect in a street while passing over or through it, would be barred of all remedy against a town merely because he was also engaged in some childish sport or amusement. There would exist in such a case the important element that he was actually traveling over the way. But this element is wholly wanting in the case at bar. We have the naked case of an appropriation of a portion of a public street to a use entirely foreign to any design to pass or repass over it for the purpose of travel within the meaning of the statute. It is to this precise case that we confine the expression of our opinion." In later cases in this State it is plainly declared to be the law that whenever children make a play-ground of the highway, they are remediless in case of injury from defects in the street.³

"It being legally possible," said Chief Justice Doe, of New Hampshire, "to cease moving forward or backward in a street without discontinuing a traveler's use of the street, and it being possible for a child as well as an adult to make a traveler's use of it for recreation, there may be some doubt how the line is to be drawn between the law and the fact in such a case as *Blodgett v. Boston*. Of the case of a boy injured while using a portion of the highway solely for the purpose of enjoying the amusement of coasting, the court there say it would hardly be contended that the town could be held liable. Perhaps such a case should be considered in connection with the case of the boy's parents injured while using the same portion of the highway solely for the purpose of enjoying the amusement of a sleigh-ride. In the highway act

¹ *Stinson v. City of Gardiner*, 42 Me. 248.

² 8 Allen, 237.

³ See the cases cited *supra* to this point.

there is no arbitrary rule of discrimination against the amusements of children, no prohibition of the use of gravitation as a motive power, and no requirement that a person going out to drive for amusement, or for fresh air and health of body or mind, shall not turn in the road more than once, or shall not go over the same route more than twice."¹

The sounder view, in my judgment, is, that it is not *in se* negligence for children to amuse themselves in the street nor, necessarily, negligent in parents to permit their children to do so. Much must depend upon the circumstances of each individual case. It is easy to see that for children of tender years to be allowed to play in the lower part of Broadway, in the city of New York, might not improperly be held negligence as matter of law. While upon many other streets, even in the great cities which are not greatly thronged with teams and pedestrians, it might as justly be held entirely prudent to allow children to amuse themselves. Any straiter rule than this would deny to the children of the poor in the cities the benefit of air and exercise. If all children must go to the park, or be attended by a nurse to escape the imputation of negligence, how shall the children of parents, whose lack of means forbids these luxuries, take exercise, and what is the parent of such children to do? The courts of Pennsylvania have taken an eminently just and humane view of this matter,² and what seems to be the only view that does not deny to poor parents the ordinary blessings of light and air for their children. This is not at all the same thing as to justify the use of the highway for sports or games to the inconvenience or

¹ *Varney v. Manchester*, 58 N. H. 430; S. C. 42 Am. Rep. 592.

² *Phila., &c., R. R. Co. v. Long*, 75 Penn. St. 257; *Pittsburgh, &c., R. R. Co. v. Pearson*, 72 Id. 169; *Glassey v.*

Hestonville Street R. R. Co., 57 Id. 172. Compare *O'Flaherty v. Union R. R. Co.*, 45 Mo. 70, and see § 45, *supra*.

trouble of travelers. The lawful purposes and uses of the king's highway are well defined. When sport, either of children or adults, interferes with the regular and proper use of the street it is a nuisance for which the law provides an action or an abatement. Conceding this, it may well be insisted that children shall not, because they play in the highway without interfering with the rights of others, be, on that account, denied a remedy when they are injured through the carelessness or negligence of others.

Aside from the question of the right of children to play upon the highway, there is, perhaps nothing peculiar or worthy of mention in the law as it affects the rights and liabilities of this class of persons upon the highway, which, as properly pertaining to the subject-matter of this treatise, is not adequately considered elsewhere.

§ 86. *Collisions upon the highway.*—The law of the road in the United States requires travelers in vehicles, when they approach each other upon a highway, each to turn to the right, if it be reasonably practicable so to do, and statutes in most of the States prescribe it explicitly. These statutes usually provide that travelers shall, in passing, each turn to the right of "the centre¹ of the road."² When one is on the wrong side of the road at the time of a collision it is *prima facie* evidence of negligence upon his part,³ but will not, as matter of law, defeat the action if it appears that it did not contribute to produce the injury for which the action is brought, and the plaintiff be himself free from the imputation of negligence in other

¹ *Anglice*, middle.

² As to what this means, see *Earing v. Lansing*, 7 Wend. 185; *Palmer v. Barker*, 3 Fairf. (Me.) 338; *Smith v. Dygert*, 12 Barb. 613; *Jaquith v. Richardson*, 8 Metc. 213.

³ *Burdick v. Worrall*, 4 Barb. 596;

Damon v. Inhabitants of Scituate, 119 Mass. 66; S. C. 20 Am. Rep. 315; *Smith v. Gardiner*, 11 Gray, 418; *Spoford v. Harlow*, 3 Allen, 176; *Jones v. Andover*, 10 Id. 18. See, also, *Steele v. Burkhardt*, 104 Mass. 59; S. C. 6 Am. Rep. 191.

respects.¹ Being upon the proper side of the road, however, will not, of itself, be conclusive evidence of an exercise of due care and caution. One may be upon the right side and yet be wrong,² especially if it appears that by taking the other side, instead of rigidly adhering to the right, the injury might have been avoided.³ The law of the road is said, in Pennsylvania, to apply only to travelers who approach each other in coming from opposite directions,⁴ but in Louisiana it is held to apply equally to persons moving in the same direction when one attempts to pass the other.⁵ When one traveler attempts, as he has a right to do, to pass another who is ahead of him and moving in the same direction, it is said that the one ahead is not under any legal obligation to turn to either side to allow the one behind to go on in front of him,⁶ and that the one who attempts to pass does so at his peril, and is responsible for all damages which he thereby causes to the one whom he attempts to pass.⁷ But, in an action against a town for injuries sustained through a defect in the highway while attempting to pass another traveler going in the same direction, it is distinctly declared that such attempt, if not made recklessly, is not *in se* negligent, and, accordingly, not contributory negligence which will prevent a recovery.⁸ It is not negligent, says the Supreme Court of Kansas, not to be on the lookout for a runaway team that dashes up from be-

¹ Kennard *v.* Burton, 25 Me. 39; s. c. 43 Am. Dec. 249; Parker *v.* Adams, 12 Metc. 415; s. c. 46 Am. Dec. 694; Simmonson *v.* Stellenmerf, 1 Edm. Sel. Cas. 194; Clay *v.* Wood, 5 Espin, 44; Chaplin *v.* Hawes, 3 Car. & P. 555; Wayde *v.* Lady Carr, 2 Dow & Ry. 255, and the cases generally last cited.

² Parker *v.* Adams, *supra*.

³ Brooks *v.* Hart, 14 N. H. 307; Johnson *v.* Small, 5 B. Mon. 25; Good-

hue *v.* Dix, 2 Gray, 181; Smith *v.* Gardiner, 11 Gray, 418; O'Malley *v.* Dorn, 7 Wis. 236.

⁴ Bolton *v.* Colder, 1 Watts, 360.

⁵ Avegno *v.* Hart, 25 La. Ann. 235; s. c. 13 Am. Rep. 133.

⁶ Bolton *v.* Colder, *supra*.

⁷ Avegno *v.* Hart, *supra*.

⁸ Fopper *v.* Wheatland, 59 Wis. 623; Mochler *v.* Town of Shaftsbury, 46 Vt. 580; s. c. 14 Am. Rep. 634.

hind, and runs against your vehicle and does you an injury,¹ but it is such contributory negligence as will prevent a recovery to hitch a horse by the roadside in such a way that the hind wheel of your buggy stands in the rut of the beaten track, so that another person in driving by runs into it without diverging to any degree from the track.² The law of the road does not usually apply to persons on horseback who must, as a rule, yield the road to a vehicle,³ especially to one heavily loaded.⁴ It is an almost unnecessary reiteration of elementary rules to say that contributory negligence, upon the part of one who brings his action for damages for injuries sustained upon the highway by reason of the negligence of another, is a defense in the same sense and to the same extent that it is in actions for any other class of injuries. There is nothing that I know peculiar in this respect in actions of this nature. The plaintiff must himself be free from fault contributing to produce or occasion the mischief of which he complains, or his right of action is gone.⁵

§ 87. *Injuries upon ferry boats.*—A ferryman is a common carrier and, as such, becomes liable for the safety of his passengers and their baggage as soon as he signifies his readiness or willingness to receive them.⁶ But,

¹ Moulton v. Aldrich, 28 Kan. 300.

² Le Baron v. Joslin, 41 Mich. 313.

³ Dudley v. Bolles, 24 Wend. 465.

⁴ Washburn v. Tracy, 2 D. Chip. (Vt.) 128; s. c. 15 Am. Dec. 661; Beach v. Parmenter, 23 Penn. St. 196.

⁵ Kennard v. Burton, 25 Me. 39; s. c. 43 Am. Dec. 249; Parker v. Adams, 12 Metc. 415; s. c. 46 Am. Dec. 694; Lane v. Crombie, 12 Pick. 177; Monroe v. Leach, 7 Metc. 274; Mabley v. Kittleberger, 37 Mich. 360; Moody v. Osgood, 54 N. Y. 488; Wynn v. Allard, 5 Watts & S. 524; Drake v. Mount, 33 N. J. (Law), 441; Lane v. Bryant, 9 Gray, 245; Wood v. Luscombe, 23 Wis. 287; Larrabee

v. Sewall, 66 Me. 376; Harpell v. Curtis, 1 E. D. Smith, 78; McLane v. Sharpe, 2 Harr. (Del.) 481; Fales v. Dearborn, 1 Pick. 344; Daniels v. Clegg, 28 Mich. 32; Brooks v. Hart, 14 N. H. 307; Knapp v. Salisbury, 2 Camp. 500; Jones v. Boyce, 1 Stark. 493; Chaplin v. Hawes, 3 Car. & P. 554; Pluckwell v. Wilson, 5 Id. 375; Williams v. Holland, 6 Id. 23; Wayde v. Lady Carr, 2 Dow & R. 255.

⁶ May v. Hanson, 5 Cal. 360; s. c. 63 Am. Dec. 135; Richards v. Fuqua's Admr. 28 Miss. 792; s. c. 64 Am. Dec. 121; Griffith v. Cave, 22 Cal. 235; Clark v. Union Ferry Co., 35 N. Y. 485; Willoughby v. Horridge, 12 C.

when one, in taking his property upon a ferryboat, retains possession of it, the liability of the ferryman is thereby essentially modified. He is liable for negligence, but is not an insurer as to such property.¹ In view of the construction of ferryboats, and the habit of passengers to crowd toward the bow as the boat approaches the landing, it is held not necessarily negligent—that is, not negligent as matter of law, for a passenger on a ferryboat to stand near the bow as the boat is landing.² But, where a child six years of age, in leaving a ferryboat constructed in the usual manner, fell through the guards where the boat fitted in to the slip and was drowned, it appearing that no similar accident had ever happened, the ferry company were held not liable.³ And when one drove a spirited team upon a ferryboat and negligently suffered them to get away from him, whereupon they became frightened, plunged overboard, and were drowned, it was held that in the absence of any proof of negligence on the part of the ferry company, they were not liable for the loss.⁴

B. 745; *Self v. Dunn*, 42 Ga. 528; *Albright v. Penn*, 14 Texas, 290; *Littlejohn v. Jones*, 2 McMull, 365; s. c. 39 Am. Dec. 132; *Sanders v. Young*, 1 Head, 219; *Wilson v. Hamilton*, 4 Ohio St. 722; *Miller v. Pendleton*, 8 Gray, 547; *Claypool v. McAllister*, 20 Ill. 504; *Chevallier v. Straham*, 2 Texas, 115; s. c. 47 Am. Dec. 639, and the note; *Slimmer v. Merry*, 23 Iowa, 94; *Angell on Carriers*, § 82; *Story on Bailments*, § 496; 2 Kent's Com. 599.

¹ *Wyckoff v. The Ferry Co.*, 52 N. Y. 32; s. c. 11 Am. Rep. 650; *Harney v. Rose*, 26 Ark. 3; s. c. 7 Am. Rep. 595. See, also, upon the general question of *when* the liability of a common carrier attaches to a ferryman, *Blakeley v. Le Duc*, 19 Minn. 187; *Gourdine v. Cook*, 1 Nott & M. 19; *Cohen v. Hume*, 1 McCord, 444; *White v.*

Winisimmet Co., 7 Cush. 156; *Wharton on Neg.*, § 707.

² *Peverly v. City of Boston*, 136 Mass. 366; s. c. 49 Am. Rep. 37; *Cleveland v. Steamboat Co.*, 68 N. Y. 306; *Gannon v. Union Ferry Co.*, 29 Hun, 631; *Hawks v. Winans*, 74 N. Y. 609; s. c. 42 N. Y. Super. Ct. 451; but, see *contra*, *Cunningham v. Lyness*, 22 Wis. 245.

³ *Loftus v. Union Ferry Co.*, 84 N. Y. 455; s. c. 38 Am. Rep. 533. Compare *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1, and see, also, *Crocheron v. North Shore, &c., Ferry Co.*, 56 Id. 656.

⁴ *Dudley v. Camden and Phila. Ferry Company*, 33 N. J. (Equity) 25; s. c. 36 Am. Rep. 501; to the same effect, see *Evans v. Rudy*, 34 Ark. 385; *Yerkes v. Sabin*, 97 Ind. 141; s. c. 49 Am. Rep. 434.

§ 88. *Injuries on and about street cars.*—In actions brought against street car companies, by passengers and others, for injuries sustained by reason of the negligence of the company's employees *in faciendo* or *in non faciendo*, contributory negligence is very often a defense. We, therefore, in this and the following sections proceed to consider the law in point as affecting that defense in actions of this nature. Street railway companies, as carriers of passengers, are common carriers and *ipso facto* bound to the full measure of a carrier's liability for the safety of those who ride in their cars. They are accordingly liable for injuries that result to their passengers from the negligence of their servants and agents within the scope of their proper employment.¹ Among the duties which the law imposes upon the street railway company is that of protecting its passengers from insult or assault, and for a failure in this regard the passenger may have his action, if the company's servants are in any respect negligent or blameworthy.² The company is also responsible for an unlawful assault or for an excess of force on the passenger by its employees acting in the line of their duty,³ but not

¹ *Holly v. Atlanta Street Railroad*, 61 Ga. 215; s. c. 34 Am. Rep. 97; *Balto. City Passenger R. R. Co. v. Kemp*, 61 Md. 619; s. c. 48 Am. Rep. 134; *Putnam v. Broadway, &c., Ry. Co.*, 55 N. Y. 108; s. c. 14 Am. Rep. 190; *cf. Pittsburgh, &c., R. R. Co. v. Hinds*, 53 Penn. St. 512; *New Orleans, &c., R. R. Co. v. Burke*, 53 Miss. 200; s. c. 24 Am. Rep. 689; *Weeks v. New York, &c., R. R. Co.*, 72 N. Y. 50; s. c. 28 Am. Rep. 104.

² See the cases cited, *supra*.

³ *Passenger Railroad Co. v. Young*, 21 Ohio St. 518; s. c. 8 Am. Rep. 78; *Higgins v. Watervliet, &c., R. R. Co.*, 46 N. Y. 23; s. c. 7 Am. Rep. 293; *Sanford v. Eighth Ave. R. R. Co.*, 23 N. Y. 343; *Jackson v. Second Ave. R. R. Co.*, 47 Id. 274; s. c. 7 Am. Rep. 448; *cf. Sherley v. Billings*,

8 Bush. 147; *Hoffman v. New York, &c., R. R. Co.*, 87 N. Y. 25; s. c. 41 Am. Rep. 337; *Chicago, &c., R. R. Co. v. Flexman*, 103 Ill. 546; *Keokuk, &c., Packet Co. v. True*, 88 Id. 608; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; s. c. 2 Am. Rep. 39; *Carter v. Louisville, &c., R. R. Co.*, 98 Ind. 552; s. c. 49 Am. Rep. 780; *Johnson v. Chicago, &c., R. R. Co.*, 58 Iowa, 348; *Benton v. Id.*, 55 Id. 496; *Nevin v. Pullman, &c., Car Co.*, 106 Ill. 222; s. c. 46 Am. Rep. 688; *Bryant v. Rich*, 106 Mass. 180; s. c. 8 Am. Rep. 311; *Ramsden v. Boston, &c., R. R. Co.*, 104 Mass. 117; s. c. 6 Am. Rep. 200; *Limpus v. London Genl. Omnibus Co.*, 1 Hurl. & C. 541; *Bayley v. Manchester, &c., Ry. Co.*, L. R., 7 C. P. 415; *The Thetis, L. R.*, 2 A. & E. 365.

when the act of the employee is wanton or malicious and outside the apparent scope of his duty.¹

In *Goddard v. Grand Trunk Ry. Co.*² the court, upon this point, says: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. . . . He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants. If this duty to the passenger is not performed—if this protection is not furnished—but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible."

It is held in New York that a street car conductor is not bound to eject a passenger who addresses insulting remarks to his fellow-passengers, although he is manifestly intoxicated, if, upon being admonished by the conductor, he remain quiet and unoffensive, and that the company is not to be held responsible for the results of a subsequent unlooked for attacks committed by the drunken passenger upon the passenger whom he had previously insulted.³ But in the District of Columbia it seems that when one appears to be drunk, being

¹ *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122; s. c. 7 Am. Rep. 418. [This case has been doubted and, perhaps, to some extent, even overruled. See *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180; *Mott v. Consumer's Ice Co.*, 73 Id. 543, and, although it is questioned and disapproved in *Wood's Master & Servant*, §§ 587, 655, 656, I am still constrained to regard the position it takes as sound, and the case itself as good law.] See, also, *Marion v. Chicago, &c., R. R. Co.*, 59 Iowa,

428; s. c. 44 Am. Rep. 687; *Wabash, &c., R. R. Co. v. Rector*, 104 Ill. 301; *Towanda Coal Co. v. Heeman*, 86 Penn. St. 418; *Brown v. Hannibal, &c., R. R. Co.*, 66 Mo. 588; *Little Miami, &c., R. R. Co. v. Wetmore*, 19 Ohio St. 110; s. c. 2 Am. Rep. 373; *McManus v. Crickett* (by Lord Kenyon), 1 East. 106.

² 57 Me. 202; s. c. 2 Am. Rep. 39.

³ *Putnam v. Broadway, &c., R. R. Co.*, 55 N. Y. 108; s. c. 14 Am. Rep. 190.

sick and unable to sit up properly, and vomiting, the conductor may lawfully eject him from the car, and that, too, whether his sickness proceeds from drunkenness or not.¹ Where passengers are intoxicated and disorderly, and, upon being admonished by the conductor, refuse to be quiet, it is the plain duty of the conductor to compel them to leave the car. Street cars are for the exclusive use and benefit of sober and orderly folk. That a passenger is drunk will not, of itself, justify the conductor in ejecting him, but if, in addition to that, he is disorderly and refuses to be controlled, or is, by reason of his cups, disgusting and offensive to the other passengers, he has, being in that condition and so deporting himself, no right to ride, and the conductor may lawfully require him to leave the car.² The driver of a street car must, like the driver of any other vehicle upon the highway, exercise ordinary care not to run over pedestrians, or to drive his car into collision with wagons or carriages also upon the street. His failure in this respect will render the company liable in damages to the person injured;³ as where, from idle curiosity the driver, instead of watching his horses and looking ahead and otherwise properly attending to his duties, stares at a young lady in a doorway,⁴ or

¹ Lemont *v.* Washington, &c., R. R. Co., 1 Mackey, 180; S. C. 47 Am. Rep. 238. See, also, S. C. 2 Mackey, 502; S. C. 47 Am. Rep. 268, upon another point which will interest the curious reader.

² Lemont *v.* Washington, &c., R. R. Co., 1 Mackey, 180, *supra*, and see, also, Pittsburg, &c., R. R. Co. *v.* Hinds, 53 Penn. St. 512; Flint *v.* Norwich, &c., Trans. Co., 34 Conn. 554; S. C. 6 Blatchf. 158; Pearson *v.* Duane, 4 Wall. 605; Vinton *v.* Middlesex R. R. Co., 11 Allen, 304; Murphy *v.* U. P. R. R., 118 Mass. 228;

New Orleans, &c., R. R. Co. *v.* Burke, 53 Miss. 200; S. C. 24 Am. Rep. 689; Pittsburg, &c., R. R. Co. *v.* Pillow, 76 Penn. St. 510; S. C. 18 Am. Rep. 424.

³ Railroad Co. *v.* Gladmon, 15 Wall. 401; Albert *v.* Bleecker St. R. R. Co., 2 Daly, 389; Cohen *v.* Dry Dock, &c., R. R. Co., 69 N. Y. 170; Pendleton St. R. R. Co. *v.* Shires, 18 Ohio St. 255; Id. *v.* Stallman, 22 Id. 1; Liddy *v.* St. Louis, &c., R. R. Co., 40 Mo. 506.

⁴ Baltimore, &c., R. R. Co. *v.* McConnell, 43 Md. 534, 553.

looks at a fire,¹ or a pigeon,² or talks to his friend riding with him upon the platform,³ or otherwise neglects his business to gratify his own curiosity or idleness.⁴ When the driver's negligence has been the occasion of a collision, and an injured passenger brings his action against the person with whom the car collided, who was also at fault, the negligence of the driver of the street car in which the plaintiff rode cannot, as we have seen,⁵ be imputed to the plaintiff to bar his recovery.⁶

§ 89. *Walking upon a street railway track.*—Inasmuch as he who walks upon the track of a steam railway is usually a trespasser, going at his peril, and entitled only to that small measure of care on the part of the railway company that the law requires to be exercised even toward mere trespassers or bare licensees, it has been held in Louisiana that it is a trespass to walk upon the track of a street railway laid in the thoroughfares of a city or town,⁷ but this is denied in California.⁸ Under the rule in Louisiana, one who is run down while walking upon a street car track, in the absence of wantonness upon the part of the driver of the car, has no remedy, his contributory negligence in walking upon the track being

¹ Commonwealth v. Metropolitan R. R. Co., 107 Mass. 236.

² Mangam v. Brooklyn R. R. Co., 38 N. Y. 455.

³ Mentz v. Second Avenue R. R. Co., 2 Robt. 356; s. C. 3 Abb. App. Dec. 274.

⁴ Pendrill v. Second Avenue R. R. Co., 2 Jones & S. 481; s. C. 43 How. Pr. 399; Oldfield v. New York, &c., R. R. Co., 14 N. Y. 310; Cook v. Metropolitan R. R. Co., 98 Mass. 361. But see Citizens' Street Ry. Co. v. Carey, 56 Ind. 396; Bulger v. Albany, &c., R. R. Co., 42 N. Y. 459; Boland v. Missouri, &c., R. R. Co., 36 Mo. 484; Albert v. Bleecker St. R. R. Co., 2 Daly, 389; Lynam v. Union R. R. Co., 114

Mass. 83; Suydam v. Grand St. R. R. Co., 41 Barb. 375; s. C. 17 Abb. Pr. 304; Thomp. on Neg. 398, §§ 3, 4, where the cases are collected.

⁵ § 36, *supra*.

⁶ Bennett v. New Jersey R. R. & Trans. Co., 36 N. J. Law. 225; s. C. 13 Am. Rep. 435; Thompkins v. Clay St. Ry. Co., Sup. Ct., Cal., January 21, 1885, xix Am. Law Rev. 163, 318.

⁷ Johnson v. Canal St. Ry. Co., 27 La. Ann. 53; Childs v. New Orleans St. Ry. Co., 33 Id. 154. See, also, Hearn v. St. Charles St. Ry. Co., 34 Id. 160.

⁸ Shea v. Potrero, 44 Cal. 414; *cf.* Robinson v. Western Pacific R. R. Co., 48 Id. 409.

held sufficient to prevent a recovery.¹ But this is believed to be an untenable position. In no proper sense can the pedestrian who walks in the roadway, as he has a right to do, upon the street car track, be said to be a trespasser. The street car company have no such exclusive, proprietary right to any part of the street as entitles them to warn the public off, or gives them a license to abate any part of that ordinary care in going through the streets with their vehicles which is justly required of other persons who drive upon the highway. The steam railroad company owns the land upon which it runs its trains, or, if it does not, its easement is an exclusive right to use the land except at public crossings. The railroad track is not a king's highway nor a part of a highway, and for the railway the law very properly and justly insists upon a clear track,² not only as the right of the railway company, but also from the most obvious considerations of general convenience and policy. It were safer to drive the car of Juggernaut through Broadway than to abate anything from the strictness of this rule. The franchise of the street railway company, on the other hand, is a mere easement to use the highway in common with the public generally. There is nothing exclusive or proprietary in their ownership of this right or franchise, and they have no higher right to use the street than the humblest pedestrian.³ Moreover, the reasons which render it prudent and proper to hold persons who walk upon railway tracks trespassers, are wholly wanting in the case of persons walking in the highway upon a street car track. The measure, or *quantum* of care and prudence which will constitute "ordinary care," with respect to street railways, on the part of those who have to do with

¹ See the cases cited, *supra*.

² *Railroad Co. v. Norton*, 24 Penn. St. 465; S. C. 64 Am. Dec. 672.

³ *Adolph v. Central, &c., R. R. Co.*, 65 N. Y. 554; *Government St. R. R. Co. v. Hanlon*, 53 Ala. 70.

them, is much less than is required to be exercised by persons who are brought in any way in connection with steam railways.¹

The danger of accident from collision with street cars is very trifling as compared with that from collision with trains of cars running at a high rate of speed upon a railway. Street cars never run very fast, and are easily and almost instantly stopped.² What, therefore, might be gross negligence as respects a steam railway, might be perfectly prudent and perfectly proper to be done in dealing with street cars. We must not, therefore, attempt to apply to street railways the rules of law applicable to steam railways. The cases are essentially different, and the reason for the rule ceasing, the rule itself must also cease. It is in accordance with this view that the courts hold that the rule that one upon approaching a railway crossing upon the highway, must look carefully up and down the track before he attempts to cross, is not to be applied to one who attempts to cross a street car track upon the highway.³

Due care, that is to say, ordinary care, under the circumstances, must be exercised both in walking upon a street railway track and also in attempting to cross it. A failure to have done this on the part of one who brings his action against the company for injuries received while being upon the track, will be held a legal offset to the negligence of the company's servants; but it is not necessary in such an action for the plaintiff to establish his carefulness to the same extent as in a similar action against a railway company. He need not show absolutely that he looked carefully up and down the track

¹ *Thomp. on Carriers*, 444, § 6.

114 *Mass.* 83; *Mentz v. Second Avenue R. R. Co.*, 2 *Robt.* 356; *S. C.* 3

² *Meesel v. Lynn, &c.*, *R. R. Co.*,

Abb. App. Dec. 274; but see, also,

³ *Allen*, 234.

³ *Nyam v. Union, &c.*, *R. R. Co.*,

Kelly v. Hendrie, 26 *Mich.* 255.

before venturing upon it. It need only appear that he was in the exercise of ordinary care, and he will not be held a trespasser if he walks upon the track. He has his common law right to walk there if he chooses,¹ and wherever the servants of the street railway company fail to exercise the ordinary care of any other person who drives a vehicle upon the highway not to run over him, the company is liable.²

§ 90. *Alighting from or boarding moving street cars.*
—It is well settled that it is not contributory negligence *in se* for one to alight from or to board a moving street car;³ and here, again, we find the severity of the rule, as applicable to steam railways, essentially relaxed.⁴ “Ordinarily,” says the Court of Appeals of New York, “it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly,⁵ or when the person is infirm and clumsy, or is incumbered with children, packages or other hinderances, or when there are other unfavorable conditions, when it would be reckless to do so; and a court might, upon undisputed evidence, hold, as matter of law, that there was negligence in doing so. But in most

¹ § 78, *supra*; and see *Government St. R. R. Co. v. Hanlon*, 53 Ala. 70, 81.

² *Vide* the preceding section and cases there cited; and *Thomp. on Neg.* 396, 397.

³ *Eppendorf v. Brooklyn City, &c.*, R. R. Co., 69 N. Y. 195; S. C. 25 Am. Rep. 171; *Mettlestadt v. Ninth Avenue R. R. Co.*, 4 Robt. 377; *Rathbone v. Union R. R. Co.*, 13 R. I. 709; *People's Passenger R. R. Co. v. Green*, 56 Md. 84. See, also, *Diethick v. Balto., &c., R. R. Co.*, 58 Id. 347.

⁴ See two recent and very full and

learned Indiana cases upon this point. *Terre Haute, &c., R. R. Co. v. Buck*, 96 Ind. 346; S. C. 49 Am. Rep. 168; *Stoner v. Pennsylvania Co.*, 98 Ind. 384; S. C. 49 Am. Rep. 764; and §§ 52, 53, *supra*.

⁵ The Supreme Court of Texas, however, has held a charge that it is negligence to alight from a rapidly moving railway train, while it is not negligence to alight from one moving slowly, error and ground upon which appellant may have a new trial. *Texas, &c., R. R. Co. v. Murphy*, 46 Texas, 356.

cases it must be a question for a jury. Here, there was nothing exceptional, and no reason apparent why plaintiff might not, with prudence, have expected to enter the car with safety. He had the right to expect that the speed of the car would continue arrested until he was safely on the car. It was the act of the driver in letting go the brake without notice, and thus suddenly giving the car a jerk while plaintiff was getting upon it, that caused the accident.¹”

In a recent Maryland case it appeared that, while the plaintiff with several other passengers was riding upon the front platform of the defendant's street car, the car ran off the track, and the passengers upon the platform, at the request of the driver, got off and assisted in replacing the car on the track. When this was done, the passengers proceeded to get upon the front platform again, and the plaintiff, in trying to climb over the wire enclosure at the front of the car, as the car was moving, fell under the wheels, and his foot was crushed. He had given up his seat in the car to an elderly lady and had gone out upon the front platform because there was no other seat for him inside. In this state of facts, the question of the driver's negligence in starting the car before his passengers had all safely gotten on again, and of the negligence of the passenger in trying to board the car in motion at the front platform, and in spite of the railing which was three feet high and entirely enclosed the platform, was held a proper one for the jury, the court declining to say that the passenger's conduct was negligent as matter of law.²

§ 91. *Riding upon the platforms of street cars.*—It is an equally well established rule that the mere fact of rid-

¹ Eppendorf v. Brooklyn City, &c., R. R. Co., 69 N. Y. 195, *supra*.

² People's Passenger R. R. Co. v. Green, 56 Md. 84.

ing on the platform of a street car is not conclusive evidence of negligence.¹ "The seats inside are not the only places," says the Supreme Judicial Court of Massachusetts, "where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full and then to stand on the platforms till they are full, and continue to stop and receive them after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of its danger. There is, therefore, no basis upon which the court can decide upon the evidence reported that the plaintiff did not use ordinary care" [he was injured while standing on the platform]. "It was a proper case to be submitted to the jury upon the special circumstances which appeared in evidence."² It is not negligent to take a car upon which there is no place to ride except the platform, and, having taken such a car, it is not negligent to remain upon it, and to ride upon the platform; or, to express the same rule in another way, it is not negligent to ride upon the platform from necessity, when the alternative is to ride there or get off the car.³ Neither is it negligent *in se* to ride upon the

¹ Fleck v. Union Ry. Co., 134 Mass. 481; Nolan v. Brooklyn City, &c., R. R. Co., 87 N. Y. 63; S. C. 41 Am. Rep. 345; Thirteenth St., &c., R. R. Co. v. Boudrou, 92 Penn. St. 475; S. C. 37 Am. Rep. 707 (and the note); Germantown Passenger R. R. Co. v. Walling, 97 Penn. St. 55; S. C. 37 Am. Rep. 711; S. C. 2 Am. & Eng. Ry. Cas. 20 (and the note); Meesel v. Lynn, &c., R. R. Co., 8 Allen, 234; Maguire v. Middlesex R. R. Co., 115

Mass. 239; Burns v. Bellefontaine, &c., R. R. Co., 50 Mo. 139; Spooner v. Brooklyn City, &c., R. R. Co., 54 N. Y. 230; S. C. 13 Am. Rep. 570; "Street Railways," 24 Alb. Law Jour. 365; "Rights of street car platform passengers," by Eugene McQuillen, 20 Cent. Law Jour. 104.

² Meesel v. Lynn, &c., R. R. Co., 8 Allen, 234.

³ Ginna v. Second Avenue R. R. Co., 67 N. Y. 596; Germantown Pas-

platform even when there is room inside the car;¹ nor is it necessarily negligence, being upon the platform, not to take hold of the railing to prevent being thrown off;² nor to stand down upon the steps of the platform, if one holds on to the railing.³ But to stand in a dangerous position upon the platform, after an opportunity is offered the passenger of exchanging it for a safer one, is contributory negligence.⁴ The law does not regard one platform of a street car with any more favor than the other, and it is no more an act of negligence to ride upon the front than upon the rear platform.⁵ But it is held that a rule which prohibits passengers from riding upon the front platform is a reasonable rule, and where a passenger, having been informed of the rule, violates it without some extenuating circumstances, he has no remedy in case of injury by reason of the mere negligence of the company's servants;⁶ as, for an example, when one sits upon the steps of the front platform in spite of the rule of the company and the warning of the driver,⁷ or upon the window sill, with one foot upon the

senger R. R. Co. v. Walling, 97 Penn. St. 55; Thirteenth St., &c., R. R. Co. v. Boudrou, 92 Id. 475; S. C. 37 Am. Rep. 707; Clark v. Eighth Avenue R. R. Co., 36 N. Y. 135; S. C. 32 Barb. 657; Augusta, &c., R. R. Co. v. Renz, 55 Ga. 126; Hadencamp v. Second Avenue R. R. Co., 1 Sweeney (N. Y. Super. Ct.), 490; Sheridan v. Brooklyn City, &c., R. R. Co., 36 N. Y. 39; Werle v. Long Island R. R. Co., 98 Id. 650.

¹ Burns v. Bellefontaine, &c., R. R. Co., 50 Mo. 139; Maguire v. Middlesex R. R. Co., 115 Mass. 239. But see, *contra*, Andrews v. Capitol, &c., R. R. Co., 2 Mackey, 137; S. C. 47 Am. Rep. 266; Solomon v. Central Park, &c., R. R. Co., 1 Sweeney (N. Y. Super. Ct.), 298.

² Ginna v. Second Avenue R. R. Co., 67 N. Y. 596.

³ Fleck v. Union R. R. Co., 134 Mass. 481; Huelsenkamp v. Citizens' R. R. Co., 34 Mo. 45; S. C. 37 Id. 567.

⁴ Ward v. Central Park, &c., R. R. Co., 33 N. Y. 392; S. C. 11 Abb. Prac. (N. S.), 411; S. C. 42 How. Prac. 289.

⁵ Meesel v. Lynn, &c., R. R. Co., 8 Allen, 234; Maguire v. Middlesex R. R. Co., 115 Mass. 239; Nolan v. Brooklyn City, &c., R. R. Co., 87 N. Y. 63; S. C. 41 Am. Rep. 345; People's Passenger R. R. Co. v. Green, 56 Md. 84; Germantown Passenger R. R. Co. v. Walling, 97 Penn. St. 55; Burns v. Bellefontaine, &c., R. R. Co., 50 Mo. 139.

⁶ Wills v. Lynn, &c., R. R. Co., 129 Mass. 351; Balto. City Passenger R. R. Co., 30 Md. 224.

⁷ Wills v. Lynn, &c., R. R. Co., *supra*, and *cf.* Solomon v. Central

iron rail of the dash-board upon the front platform.¹ And, in a recent case the Supreme Court of Michigan held it contributory negligence, and intimates that it is evidence of exceeding stupidity and folly for one, at the invitation of the driver, when there is plenty of room unoccupied inside the car, to ride upon the front platform and sit on the driving bar.²

Park, &c., R. R. Co., 1 Sweeney (N. Y. Super. Ct.), 298; Clark v. Eighth Ave. R. R. Co., 36 N. Y. 135.

¹ Heckrott v Buffalo St. R. R. Co., Super. Ct. of Buffalo, Nov., 1883, 13 Am. Law Record, 295.

² Downey v. Hendrie, 46 Mich. 498, re-reported for substance 41 Am. Rep. 347 (in the note). The court said: "The point is understood as being, that granting the driving bar to have been, as the plaintiff knew, a dangerous seat, and, also, admitting that the fact of his occupying it was a proximate contributory cause of his injury, yet, as his sitting there was at the driver's invitation, it ought not to be reckoned as contributory negligence. There is no doubt that it has been laid down as a rule that an assignment of the passenger by the carrier to a position of danger may, in case of injury, estop the carrier from setting up the occupation of that position as contributory negligence. But the rule is plainly not one of universal application. Regard must be had to the passenger's capacity to lookout for himself; to the opportunity there may be to get a safer position; to the distinctness, certainty and extent or degree of the peril, and so on. Take the case of a child, and the case of a man every way qualified to take care of himself; the case where the position given seems tolerably safe, and no better perceived; and the case where it is manifestly one full of danger, and a safe one is known which is equally accessible. It would be very unreasonable to apply the rule equally to all. May the ordinary passenger, with his eyes open, and with abundant accommodations before him which are safe, accept an invitation from the car-

rier to ride on the cow-catcher, and then, if injury arise from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might, would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being, and, in substance, to stultify himself in order to cast a liability on another. 'Judges cannot denude themselves of the knowledge of the incidents of railway traveling which is common to us all.' [Siner v. Great Western Ry. Co., L. R. 4 Exch. 123; Dublin, &c., Ry. Co. v. Slattery, 3 App. Cas. 1155; Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 274]. And, in the example put, the negligence would be so obvious, and its commission so palpably and, certainly, inexcusable, that a court would not be justified in treating the question of the passenger's responsibility as an open one. A direct charge would be called for. Other cases may be supposed, where, from the nature of the circumstances, a blind acceptance of the carrier's suggestion, however hazardous, would not so clearly reveal the passenger's disregard of that primary duty, which rests on every one, to exert his own will and judgment to guard against needless perils, as to justify the judge in taking the matter from the jury. No doubt the riding on a cow-catcher would, to ordinary apprehension, if not in fact, be an exposure to consequences more serious than any at all probable to arise from riding on the driving bar of a street car in the way in which the plaintiff rode on this occasion; but the unfitness of the situation, and the fact

In *Andrews v. Capitol, &c., Railroad Co.*,¹ it is held that if there is standing room inside a street car, with straps for holding on, it is negligent to ride upon the platform; but such a rule is against the current of authority. So, also, it has been held that where a woman stands up in a street car she must, whenever it is possible, hold on to the straps that hang from the ceiling, and that not to do so when she might, is such negligence on her part as will prevent a recovery, in case she suffers an injury which such a course might have prevented.² While, at the other extreme, we find it held in New York that it is not negligent in a passenger to leave his seat in a railway train before the cars stop, upon approaching his destination, on the ground that he did as passengers usually do.³

§ 92. *Passenger's hand or arm outside of the car window.*—Where a passenger in a street car puts his arm, or elbow, outside of the car window, voluntarily, and without any qualifying or extenuating circumstances impelling him to it, it is held, in Pennsylvania, to be the duty of the court to declare the act negligence, as matter of law.⁴ But in an earlier case the same court held, where one, in riding upon the defendant's street car with his arm extending out of an open window, was struck by a passing load of hay and his arm broken, that if the injury was

that it involves great risk of some injury, more or less severe, and is, therefore, one of extreme danger, is just as conspicuous in the one case as in the other." *Downey v. Hendrie, supra.* Compare *Camden, &c., R. R. Co. v. Hoosey*, 99 Penn. St. 492; S. C. 44 Am. Rep. 120.

¹ 2 Mackey, 137; S. C. 47 Am. Rep. 266.

² *Whipple v. West Phila., &c., St. R. R. Co.*, 11 Phila. 345.

³ *Wylde v. Northern, &c., R. R.*

Co., 53 N. Y. 156; *cf.* *Nichols v. Sixth Ave. R. R. Co.*, 38 Id. 131; *Willis v. Long Island R. R. Co.*, 34 Id. 670. And see, *Zemp v. Wilmington, &c., R. R. Co.*, 9 Rich. (Law), 84; S. C. 64 Am. Dec. 763, an early case upon railroad law, wherein it is held not negligent, as matter of law, for one to ride upon the platform of a railway train.

⁴ *People's Passenger Railway Co. v. Lauderbach*, Sup. Ct., Penn., xix Am. Law Rev. 163.

caused by the contributory negligence of the passenger, or by the sole negligence of the driver of the wagon, there should be no recovery against the company, and the jury below, having been allowed to find that the passenger was without fault, the case turned upon the negligence, or freedom from negligence, of the street car driver.¹

In Minnesota, where a passenger on a street car sat down and placed his hand on the window sill, with his fingers outside, and his hand was injured by coming in contact with some planks piled within an inch of the car by the city authorities, to be used in constructing a sewer underneath the track, it was held that the question of the passenger's contributory negligence was for the jury.² And in Louisiana it is held not negligent, as matter of law, for a passenger to allow his arm to project from the window of a street car "a few inches," in a case in which it appears that the passenger's arm so exposed was struck by a passing car, belonging to the same company, as the cars met each other upon a curve—it being decided, also, that it is negligent for a street railway company to have two tracks laid so near together that such an accident can happen.³

§ 93. *Free passengers and trespassers upon street cars.*—When a newsboy is allowed free access to the cars for the purpose of selling his papers to the passengers, he is held to enjoy that license with its accompanying perils. He is not a passenger, and if injured by the mere carelessness or neglect of the company's servants, he has no remedy against the company.⁴ So, also, when a passen-

¹ Federal St. R. R. Co. v. Gibson, 96 Penn. St. 83.

² Dahlberg v. Minnesota St. R. R. Co., Sup. Ct., Minn., Jan. 21, 1885, xix Am Law Rev. 332.

³ Summers v. Crescent City Rail-

road Co., 34 La. Ann. 139; S. C. 44 Am. Rep. 419; Germantown Passenger R. R. Co. v. Brophy, 105 Penn. St. 38.

⁴ Fleming v. Brooklyn City, &c., R. R. Co., 1 Abb. New Cas. 433-

ger has left the car and is going about his business, the relation of carrier and passenger is thereby terminated; and toward such a person the duty of the company is not that of extraordinary diligence, as during the continuance of that relation, but only such care as the law requires toward each other.¹ Drivers and conductors of street cars have no authority, plainly, to carry passengers free, but when they suffer or invite young children to ride upon the cars, without collecting fare from them, and these children are negligently injured upon the car, it is generally held that the company is liable, and, in the absence of contributory neglect, an action may be maintained.²

A street car driver or conductor, in Massachusetts, who performs his ordinary duties on Sunday, can maintain no action for an injury sustained by reason of a collision with a car of another company while so employed.³ Neither can one in that State who rides in a street car on Sunday, for the purpose of making a social visit, recover damages from the street car company for an injury received in consequence of their neglect.⁴ These decisions would not, however, be followed elsewhere.⁵

See, also, *Duff v. Allegheny R. R. Co.*, 91 Penn. St. 458; S. C. 36 Am. Rep. 675.

¹ *Platt v. Forty-second St. R. R. Co.*, 2 Hun, 124. See, also, *Merrill v. Eastern Railroad Co.*, Sup. Jud. Ct., Mass., *Holmes, J.*, 1885, 31 Alb. Law Jour. 593.

² *Brennan v. Fairhaven, &c., R. R. Co.*, 45 Conn. 284; S. C. 29 Am. Rep. 678; *Caldwell v. Pittsburgh, &c., R. R. Co.*, 74 Penn. St. 421; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; S. C. 9 Am. Rep. 11; S. C. 125 Mass. 130; *Day v. Brooklyn City, &c., R.*

R. Co., 12 Hun, 435; *Philadelphia, &c., R. R. Co. v. Hassard*, 75 Penn. St. 367; *East Saginaw, &c., City R. Co. v. Baker*, 27 Mich. 503. See, also, *Abell v. Western, &c., R. R. Co.*, Ct. of App., Md., April 22, 1885, xix Am. Law Rev. 498, and §§ 58, 69, 70, *supra*. Compare *McDonough v. Metropolitan Ry. Co.*, 137 Mass. 210.

³ *Day v. Highland St. R. R. Co.*, 135 Mass. 113; S. C. 46 Am. Rep. 447.

⁴ *Stanton v. Metropolitan Railroad Co.*, 14 Allen, 485.

⁵ §§ 61, 81, *supra*.

CHAPTER VII.

THE RULE AS IT QUALIFIES THE LAW OF MASTER AND SERVANT—OR EMPLOYER AND EMPLOYED OF EVERY CLASS.

- § 94. Servant's own contributory negligence, a bar.
95. Master's individual neglect, a ground for an action.
96. So, when the master's negligence combines with that of a co-servant in producing the injury.
97. *Respondeat superior*.
98. The exception to the rule of *respondeat superior*.
99. Later English cases following *Priestley v. Fowler*.
100. The United States rule—*Murray v. South Carolina Railway Co.*
101. *Farwell v. Boston & Worcester R. R. Co.*
102. The rule stated.
103. Reason for the rule.
104. The modification in Kentucky.
105. Leading authority in Kentucky. *Louisville, &c., R. R. Co. v. Collins*.
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111. Applications of this doctrine.
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132. Where the master orders the servant into danger, or into a service which he did not contract to perform.
133. The patent and latent dangers of the employment.
134. Overhead railway bridges, depot roofs, &c.
135. Injuries to train-men in coupling cars.
136. Knowledge on the part of the employer.
137. The obligation of the servant.
138. He must possess a fair measure of skill for the service he undertakes, and must inform himself, at the outset, of the duties and dangers peculiar to his work.

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| <p>§ 139. His knowledge when a bar.</p> <p>140. When the servant is held to have waived the danger of defect.</p> <p>141. Servant must obey rules established to promote his safety.</p> <p>142. Liability of a servant to a fellow-servant.</p> <p>143. Statutory modifications of the rule which exempts a master from liability to one servant for the</p> | <p>negligent wrong-doing of a co-servant.</p> <p>§ 144. Should the employee be allowed to make a contract releasing his employer from the liability imposed by these statutes.</p> <p>145. The laws of other countries as to the liability of an employer for injuries to one employee caused by the carelessness of a fellow-employee.</p> |
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§ 94. *Servant's own contributory negligence a bar.*—The rule of law that a plaintiff, in order to maintain his action for damages for an injury occasioned by the negligence of another, must himself be free from contributory negligence is, when the action involves only the individual neglect of the servant and his employer, in no way affected by the consideration that the relation of master and servant subsists between the parties. If the servant is to recover damages, in such a case, from his master, he, like any other plaintiff, comes into court under the legal obligation of showing, or having it sufficiently appear, that his own negligence has contributed in no legal sense to the injury. His own contributory fault will defeat him in an action against his employer just as it would in an action against any one else.¹

§ 95. *Master's individual neglect a ground for an action.*—Every man is liable for his own torts and breaches of contract, and a master to his servant neither less nor more than to other persons. This is, like the preceding proposition, elemental law. If a servant is injured through the direct negligence of his master, as where the

¹ *Hubgh v. New Orleans, &c., R. R. Co.*, 6 La. Ann. 495; S. C. 54 Am. Dec. 565; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; S. C. 41 Am. Dec. 771; *Abend v. Terre Haute, &c., R. R. Co.*, Sup. Ct., Ill., 1884, 19 Cent. L. J. 350; *McKinne v. California, &c., R. R. Co.*, Sup. Ct., Cal., 1884, 5 Pac. Rep. 505; *Galveston, &c., R. R. Co. v. Drew*, 59 Texas, 10; S. C. 46 Am. Rep. 261; *Wright v. Rawson*, 52 Iowa, 329; S. C. 35 Am. Rep. 275; *Cowles v. Richmond, &c., R. R. Co.*, 84 N. C. 309, and the cases generally hereinafter cited.

master is present giving orders or superintending the work, the master is answerable in damages to the same extent as he would be if the relation of master and servant did not subsist. And the master when taking a hand and engaging in a common labor with the servant does not thereby lose his position as an employer, or become a fellow-servant in such a legal sense that the servant impliedly undertakes to assume the risk of injury from his negligence when so jointly engaged.¹

“The doctrine that a servant on entering the service of an employer takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow-servants engaged in the common employment, has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow-servants, may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him, in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position, and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because, by some arrangement between the joint masters, one of them takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow-laborer.”²

¹ *Ryan v. Fowler*, 24 N. Y. 410; *Leonard v. Collins*, 70 Id. 93; *Anderson v. New Jersey Co.*, 7 Robt. 611; *Keegan v. Kavanagh*, 62 Mo. 230; *Ashworth v. Stanwix*, 3 El. & El. 701; s. c. 7 Jur. (N. S.) 467; 30 L. J. (Q. B.) 183; 4 L. T. (N. S.) 85; *Roberts v. Smith*, 2 Hurl. & N. 213.

² *Crompton, J.*, in *Ashworth v. Stanwix*, cited above. See, also, as in point, *Flike v. Boston, &c., R. R. Co.*, 53 N. Y. 550; s. c. 13 Am. Rep. 545; *Shear. & Redf. on Neg.*, § 89; *Ormond v. Holland, El., Bl. & El.* 102; *Baker v. Allegheny R.R. Co.*, 95 Penn. St. 211; s. c. 40 Am. Rep. 634; *Gil-*

§ 96. *So when the master's negligence combines with that of a co-servant in producing the injury.*—Whenever the negligence of the master, united to the negligence of a fellow-servant, contributes to the injury, the servant injured thereby may recover from the common employer. The servant will not be held to have taken any chances of negligence on the part of his master. It is believed that no case has gone so far as to hold that where such combined negligence contributes to the injury the servant may not recover. It would be both impolitic and unjust to allow an employer, under these circumstances, to evade the penalty of his misconduct in neglecting to provide for the security of his servant. Contributory negligence in order to defeat a right of action in such a case must be solely the negligence of the party injured, or the negligence of a co-employee unmixed with any negligence or default upon the part of the common employer.¹

§ 97. *Respondeat superior.*—A well-known principle of law, which makes every man liable for his own wrongdoing or breaches of contract whenever they have caused actual or legal damage, holds him liable also for those of his duly authorized agent so long as that agent acts within the scope of his authority. This is the doctrine of *respondeat superior*. The agent is the *alter ego*, doing the bidding and guided by the mind of the principal for whose misfeasances, inattentions and negligences, in the line of his duty, the principal is held liable. The reason of the

man *v.* Eastern R. R. Co., 10 Allen, 233; S. C. 13 Id. 433; Ford *v.* Fitchburg R. R. Co., 110 Mass. 240; S. C. 14 Am. Rep. 598; Holden *v.* Id., 129 Id. 268, 273; Harkins *v.* Standard Sugar Refinery, 122 Id. 400, 405.

¹ Paulmier *v.* Erie Ry. Co., 34 N. J. (Law), 151; Clark *v.* Soule, 137 Mass. 380; Crutchfield *v.* Richmond, &c., R. R. Co., 76 N. C. 320; Cayzer

v. Taylor, 10 Gray, 274; Booth *v.* Boston, &c., R. R. Co., 73 N. Y. 38; S. C. 29 Am. Rep. 97; Hayes *v.* Western R. R. Co., 3 Cush. 270; Stetler *v.* Chicago, &c., R. R. Co., 46 Wis. 497; S. C. 29 Am. Rep. 102 (note); Durgin *v.* Munson, 9 Allen, 396; Cone *v.* Delaware, &c., R. R. Co., 81 N. Y. 206; S. C. 37 Am. Rep. 491.

rule is nowhere clearly stated, and speculative and philosophical writers have found much fault with it. But, whether based upon a sound reason or not, it is found in the Roman law; has been crystallized into a maxim,¹ and from the days of Charles II. has been the unchallenged rule of the common law of England.² The first recorded reference to it is in the case of *Michael v. Allestree*.³ It appears in this old case that a servant was sent by his master to Lincoln's Inn Fields, a place where people are always going about, with two ungovernable horses attached to a coach; that the servant then drove them to make them tractable and fit them for the coach, and that the horses, because of their ferocity, ran upon the plaintiff and hurt and grievously wounded him. Upon which facts shown, the master, as well as the servant, was held liable in case. Another early case announcing the doctrine is *Turberville v. Stampe*.⁴ Following these earlier authorities is a great army of adjudications both in this country and in England enforcing and establishing the rule. It is beyond dispute,⁵ and "a rule," says Judge

¹ "*Qui facit per alium facit per se.*"

² Austin's Lectures on Jurisprudence (3d London edition), 513; Doctor and Student, Dial. 2, ch. 42; Holmes' Common Law, Lect. I.

³ 2 Levintz, 172; S. C. *sub nom.*, *Michell v. Allestry*, 1 Vent. 295; *sub nom.*, *Mitchil v. Alestree*, 3 Keb. 650.

⁴ 1 Lord Raym. 264 (by Lord Holt).

⁵ *Limpus v. London Omnibus Co.*, 1 Hurl. & C. 526; *Burns v. Poulson*, L. R. 8 C. P. 563; S. C. 29 L. T. (N. S.) 329; *Patten v. Rea*, 2 C. B. (N. S.) 606; *Booth v. Mister*, 7 Car. & P. 66; *Sadler v. Henlock*, 4 El. & Bl. 570; S. C. 24 L. J. (Q. B.) 138; 1 Jur. (N. S.) 677; *Quarman v. Burnett*, 6 Mee. & W. 499; *Ware v. Barataria, &c.*, Canal Co., 15 La. 169; S. C. 35 Am. Dec. 189, and the note in which Mr. Freeman has considered at much

length the question of a master's liability in these classes of cases; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; *Bryant v. Rich*, 106 Id. 180; S. C. 8 Am. Rep. 311; *Sherley v. Billings*, 8 Bush. 147; S. C. 8 Am. Rep. 451; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516; S. C. 45 Am. Rep. 54; *Allison v. Western, &c.*, R. R. Co., 64 N. C. 382; *Snyder v. Hannibal, &c.*, R. R. Co., 60 Mo. 413; *Tuel v. Watson*, 47 Vt. 634; *Mitchell v. Robinson*, 80 Ind. 281; S. C. 41 Am. Rep. 812; *Blake v. Ferris*, 5 N. Y. 48; S. C. 55 Am. Dec. 304; *Thomas v. Winchester*, 6 N. Y. 397; S. C. 57 Am. Dec. 455; *Lannen v. Albany Gaslight Co.*, 46 Barb. 264; S. C. 44 N. Y. 459; *Courtney v. Baker*, 60 N. Y. 1; S. C. 5 Jones & S. 249; *Thorpe v. New York, &c.*, R. R. Co., 76 N. Y. 406; *Vogel v. Mayor, &c.*, of New

Thompson, "so plain and easy of application that it could not be made clearer by illustration."¹

§ 98. *The exception to the rule of respondeat superior.*—In 1837 the great case of *Priestley v. Fowler*² was decided, being the first recorded exception in the English law to the ancient rule of *respondeat superior*. It was decided by Lord Abinger without any reference to the earlier doctrine, but it constitutes a clear exception, from which has flown in a copious flood all the modern law as to fellow-servants and a common employment. It is not extravagant to say that this decision in its influence upon subsequent jurisprudence is second to no adjudication to be found in the reports. No other reported case has changed the current of decision more radically than this. All subsequent common law report books contain refinements upon the doctrine, here for the first time announced, that the superior may not under given conditions be held to respond for the tortious or negligent acts of his agent. The case was as follows: A butcher sent one of his men to deliver meat on a wagon which had been loaded by another employee, but loaded too heavily. The wagon broke down and the man's thigh was broken. His lordship decides that the butcher was not liable for the injury. The ground of the decision is not plain. It does not appear whether the wagon broke down because it was not in proper condition for the journey, or because it had been carelessly overloaded, and the opinion does not say whether the butcher is not liable because the law does not imply a contract of warranty as to the safe condition of the wagon on the part of the employer, or because the law does not imply a

York, 92 Id. 17; *Shea v. Reems*, 36 La. Ann. 969; *Cooley on Torts*, 533; *Wood on Master and Servant*, § 279; *Smith on Master and Servant*, 130; *Hill on Torts*, 407; *Shear. & Redf. on Neg.*, § 59; *Wharton on Neg.*, § 157.
¹ *Thomp. on Neg.* 885.
² 3 Mees. & W. 1.

contract to indemnify against the negligence of his servant. No authorities are cited in support of the position taken, but several instances are loosely suggested, as if by way of analogy, with the skill which advocates possess in suggesting analogies, several of which are quite as applicable to other relations as to the relation of master and servant.

§ 99. *Later English cases following Priestley v. Fowler.*—The question arose again in England, in 1850, in the suit of *Hutchinson v. The York, New Castle and Berwick Railway Company*.¹ This case, although *Priestley v. Fowler* is the earlier authority, has been regarded the leading English case, properly speaking, upon the subject. Here it is explicitly laid down that there is no implied contract of indemnity between employer and employed, but an implied contract on the part of the servant to run the ordinary risks of the service. In the judgment, Alderson, B., says: "The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case we are of opinion that the master is not, in general, responsible when he has selected persons of competent care and skill." He continues, giving the reason for this rule, as follows: "They have both engaged in a common service, the duties of which impose a certain risk on each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master," which comes only something short of assigning as a reason for the rule that when he is hurt he knows exactly who hurt him. "He knew," continued the learned Baron, "when

¹ 5 Exch. 343; S. C. 14 Jur. 837; 6 Eng. Rail. Cas. 588; 19 L. J. (Exch.) 296.

he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill and care, but also from the want of it on the part of his fellow-servant, and he must be supposed to have contracted on the terms that, as between himself and his master, he would run the risk." This is an implied contract; "a risk," he says, "which Hutchinson must be taken to have agreed to run when he entered into the defendant's service." In a single sentence, in conclusion, his lordship defines both the principle and the terms of the implied contract, as follows: "The principle is, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is common master of both." This statement of the rule has been accepted in the English courts as the law in point, and a long line of authorities, from 1850 to the passage of the "Employers' Liability Act," in 1880, are found in the reports, affirming and reiterating the doctrine.¹

§ 100. *The United States rule. Murray v. South Carolina Railroad Company.*—The first case in this

¹ *Wigmore v. Jay*, 5 Exch. 354; s. c. 19 L. J. (Exch.) 300; *Seymour v. Maddox*, 16 Q. B. 326; s. c. 20 L. J. (Q. B.) 327; *Skipp v. Eastern Counties Ry. Co.*, 9 Exch. 223; s. c. 23 L. J. (Exch.) 23; *Couch v. Steel*, 3 El. & Bl. 402; s. c. 18 Jur. 575; 23 L. J. (Q. B.) 121. (In this case the doctrine is applied to the relation of ship owner and seaman.) *Brydon v. Stewart*, 2 Macq. 30; s. c. 1 Pat. Sc. App. 447; s. c. *sub nom.* *Marshall v. Stewart*, 33 Eng. Law & Eq. 1; *Bartonshill Coal Co. v. Reid*, 3 MacQueen, 266; s. c. 4 Jur. (N. S.) 767; 1 Pat. Sc. App. 796; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300; s. c. 4 Jur. (N. S.) 772; 1 Pat. Sc. App. 785; *Wilson v. Merry*, L. R. 1 Sc. & Div. App. Cas. 326; *Woodley v. Metropolitan Ry. Co.*, 2 Exch. Div. 384; *Tarrant v. Webb*, 18 C. B. 797; s. c. 25 L. J. (N. S.) C. P. 263; *Conway v. Belfast, &c., Ry. Co.*, 11 Ir. C. L. 353; *Griffiths v. London Docks, &c., Co.*, 50 L. T. (N. S.) 755; s. c. 12 Q. B. Div. 493; affirmed in the High Court of Appeal, June 24, 1884.

country involving the rights of employees in this respect, as against their employers, was *Murray v. South Carolina R. R. Company*,¹ decided in 1841. *Priestley v. Fowler* had been decided three years before, but Mr. Justice Evans, of the South Carolina Court, seems not to have had Lord Abinger's opinion before him. In his opinion, however, in this case, Judge Evans comes to the same conclusion as that reached in *Priestley v. Fowler*, by an essentially similar process of reasoning. The case is as follows: A fireman, upon a locomotive owned and operated by the defendant corporation, was injured while engaged in the discharge of his duty by reason of the engine on which he was employed being thrown from the track, in consequence of the negligent and careless conduct of the engineer who had charge of the engine, and who refused to lessen the speed or stop the engine after his attention had been called to the obstacle on the track which occasioned the accident. These facts presented fairly the question, whether the railroad company was liable to one servant for an injury arising from the negligence of another servant, and the court held that in such a case the servant could not recover. Judge Evans argues: "Is it incident to this contract," (that between plaintiff and defendant, as master and servant), "that the company should guarantee him against the negligence of his co-servants? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither, are within his contract, and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The

¹ 1 *McMillan's Law*, 385; S. C. 36 Am. Dec. 268.

regular movement of the train of cars to its destination, is the result of the ordinary performance by each of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, it is on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other. Nor is the company liable to one for the misconduct of another, and, as a general rule, I would say that, where there was no fault in the owner, he would be liable only for wages to his servants, and so far has this doctrine been carried that in the case of seamen, even wages are forfeited if the vessel be lost and no freight earned.”¹ This case was followed soon after, in Massachusetts, in the case of—

§ 101. *Farwell v. Boston & Worcester R. R. Co.*,² in which the opinion of the court was pronounced by Chief Justice Shaw. In this case, which also presents the precise question fairly, the earlier cases of *Priestley v. Fowler*,³ and *Murray v. South Carolina R. R.*,⁴ are cited as authority. The rule as laid down in those cases is expounded and enforced with such learning and ability, and with such cogency of logic, that this opinion has ever since been regarded one of the most profound and masterly to be found in any of our law reports. It has been cited with admiration and approval, it may safely be said, in all the courts of this country, as well as in England. With these two leading American adjudications as cases of first impression, handed down at nearly the same time, declaring the

¹ *Murray v. South Carolina R. R. Co.*, 1 *McMillan's Law*, 385, 388; 339 S. C. 36 Am. Dec. 268.

² 4 Metc. 49; S. C. 38 Am. Dec.

³ 3 Mees. & W. 1, *supra*.

⁴ 1 *McMillan's Law*, 385, *supra*.

law as just previously held in England, this doctrine became, in process of time, firmly established as the American rule.

§ 102. *The rule stated.*—It is the common-law rule in every State and territory of the Union and in the Federal courts, that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness or misconduct of other servants in his employ, engaged in the same common or general service or employment, denominated fellow-servants or co-employees, unless the employer himself has been at fault.

The rule is so undisputed that it is sufficient to cite one leading or recent decision in point in each jurisdiction.¹

¹ *Keilley v. Belcher*, 3 Sawyer, 500; *Chicago, &c., R. R. Co. v. Ross*, 8 Fed. Rep. 544; affirmed by the Supreme Court of the U. S., Dec. 1, 1884, 112 U. S. 377; *Quinn v. New Jersey Lighterage Co.*, U. S. Circ. Ct., New York, E. D., April 2, 1885, 23 Fed. Rep. 363; s. c. 32 Alb. Law Jour. 86; *Alabama, &c., R. R. Co. v. Waller*, 48 Ala. 459; *McLean v. Blue Point, &c., Co.*, 51 Cal. 255; *Summerhays v. Kansas, &c., R. R. Co.*, 2 Colo. 484; *Colorado, &c., R. R. Co. v. Ogden*, 3 Id. 499; *Burke v. Norwich*, 34 Conn. 475; *Georgia, &c., R. R. Co. v. Rhodes*, 56 Ga. 645; *Shields v. Yonge*, 13 Id. 349; s. c. 60 Am. Dec. 698; *Crusselle v. Pugh*, 67 Ga. 430; s. c. 44 Am. Rep. 724; *Chicago, &c., R. R. Co. v. Rusch*, 84 Ill. 570; *Sullivan v. Toledo, &c., R. R. Co.*, 58 Ind. 26; *Robertson v. Terre Haute, &c., R. R. Co.*, 78 Ind. 77; s. c. 41 Am. Rep. 552; *Peterson v. Whitebreast Coal, &c., Co.*, 50 Iowa, 673; s. c. 32 Am. Rep. 143; *Union Trust Co. v. Thomason*, 25 Kan. 1; *Louisville, &c., R. R. Co. v. Caven's Admr.*, 9 Bush. 559; *Camp v. Church Wardens*, 7 La. Ann. 321; *Magee v. Boston Cordage Co.*, Sup. Ct., Me., June 20, 1885, 1 Eastern Reporter, 126; *Carle v. Ban-*
gor, &c., R. R. Co., 43 Me. 269; *Blake v. Maine, &c., R. R. Co.*, 70 Id. 60; s. c. 35 Am. Rep. 279; *Hanrathy v. Northern, &c., R. R. Co.*, 46 Md. 280; *Smith v. Lowell Manfg. Co.*, 124 Mass. 114; *Johnson v. Boston Towboat Co.*, 135 Id. 209; s. c. 46 Am. Rep. 458; *Chicago, &c., R. R. Co. v. Bayfield*, 37 Mich. 205; *Smith v. Flint, &c., R. R. Co.*, 46 Mich. 258; s. c. 41 Am. Rep. 161; *Joslin v. Grand Rapids Ice Co.*, 50 Id. 516; s. c. 45 Am. Rep. 54; *Foster v. Minnesota, &c., R. R. Co.*, 14 Minn. 360; *Brown v. Winona, &c., R. R. Co.*, 27 Id. 162; s. c. 38 Am. Rep. 285; *Tierney v. Minnesota, &c., R. R. Co.*, Sup. Ct., Minn., April 6, 1885; 32 Albany Law Jour. 133; *Memphis, &c., R. R. Co. v. Thomas*, 51 Miss. 639; *Howd v. Mississippi, &c., R. R. Co.*, 50 Id. 178; *Gibson v. Pacific, &c., R. R. Co.*, 46 Mo. 163; *Gormly v. Vulcan Iron Works*, 61 Id. 492; *McAndrews v. Burns*, 39 N. J. Law, 118; *Slater v. Jewett*, 85 N.Y. 61; s. c. 39 Am. Rep. 627; *Brock v. Rochester, &c., R. R. Co.*, Ct. of App. of N. Y., Feb. 10, 1885, 32 Albany Law Jour. 52; *Sherman v. Syracuse, &c., R. R. Co.*, 17 N.Y. 153; *Laning v. N. Y., &c., R. R. Co.*, 49 Id. 512; *Murphy v. Boston & Albany*

§ 103. *Reason for the rule.*—It is clear that this exception to the rule of *respondeat superior* in favor of employers had its origin in the common law in the case of *Priestley v. Fowler*¹ in England, and in *Murray v. South Carolina R. R. Co.*² in the United States. We shall look in vain in the reports of either country for any earlier adjudications than these in point. A consideration of the later cases will show that the doctrine has been mainly developed under the influence upon the jurisprudence of each country of the great railway corporations. A very large proportion of the cases in which the question of an employer's liability to his employees in this regard has arisen, have been railway cases, and the commercial importance and power of these corporations have extended the rule in their interest much beyond what might, under other circumstances, have been expected. But, while the origin of the rule is not far to seek, and its development from 1837 to the present time can be intelligently appreciated, with the principal underlying causes of its extension and growth, in the opinion of the author no entirely satisfactory reason for the exception has ever been found. The reasons of the rule have never been better stated than by the great Chief Justice of Massachusetts, in *Farwell v. Boston & Worcester R. R. Co.*³ His opinion contains, in substance, all the arguments which in forty succeeding years have been dis-

R. R. Co., 88 N. Y. 146; s. c. 42 Am. Rep. 240; *Hardy v. Carolina, &c.*, R. R. Co., 76 N. C. 5; *Murray v. South Carolina R. R. Co.*, 1 McMul. 385; s. c. 36 Am. Dec. 268; *Whaalan v. Mad River R. R. Co.*, 8 Ohio St. 249; *Lehigh Valley Coal Co. v. Jones*, 86 Penn. St. 432; *Key Stone Bridge Co. v. Newberry*, 96 Id. 246; s. c. 42 Am. Rep. 543; *Fox v. Sandford*, 4 Sneed, 36; *Nashville, &c.*, R. R. Co. v. *Wheless*, 10 Lea. 741; s. c. 43

Am. Rep. 317; *Price v. Houston, &c.*, R. R. Co, 46 Texas, 535; *Hard v. Vermont, &c.*, R. R. Co., 32 Vt. 472; *Brabbits v. Chicago, &c.*, R. R. Co., 38 Wis. 289; *Luebke v. Chicago, &c.*, R. R. Co., 59 Id. 127; s. c. 48 Am. Rep. 483. See, also, *Cooley on Torts*, 541; 1 *Redfield on Railways*, § 131, *et seq.*

¹ 3 Mees. & W. 1.

² 1 McMillan's Law, 385.

³ 4 Metc. 49.

covered by the courts in favor of the rule as therein adopted, and they amount, it is submitted, in reality to this: that from considerations of public policy and general convenience, the law will refuse, in the absence of an express contract, to imply a contract on the part of the employer of liability for the negligence of his employee as to a fellow employee, but will, from the same considerations, in the absence of an express contract, imply a contract on the part of the employee to run the risk as to his co-employees of all the ordinary and extraordinary dangers of the common employment. If this be an essentially fair statement of what is proposed as the *ratio decidendi*, it is safe to charge that it is not entirely satisfactory. It may be briefly urged, in objection to the present state of the law upon this point—(a) that, inasmuch as it is essentially a question of agency, it is a violent rule that allows the judges to say, as matter of law, beforehand, in every case where a servant injures a fellow-servant, that he is not *quod hoc* the master's agent, when it is not denied that he is his master's agent for some purposes. Shall the courts presume to say, when the question of agency is properly a question of fact, that when injury results, there is no agency, while when advantage results the agency is not to be disputed? If the servant is the master's agent there is an end of controversy; and were not the Scotch judges right, in *Wilson v. Merry*,¹ in holding that in such a case the question of the agency must go to the jury? Is not such a rule very nearly what is called judge-made law? (b) It may further be asserted that, upon this subject, as to the question of public policy, judges, as a rule, are not more capable of deciding than other equally informed and experienced men, and that in assuming that the rule of the non-

¹ L. R. 1 Sc. App. 326; s. c. 19 L. T. (N. S.), 30.

liability of employers is the better policy, questions of fact are involved which the policy of the law has usually referred to juries. Moreover, this question of public policy and general convenience was decided for us in the very infancy of the great corporate interests of the country, when railways were an experiment, and powerful private corporations had not been born. What was sound public policy before the middle of the century, even if it is conceded that the judges of forty years ago divined it aright, when *Priestley v. Fowler* and *Murray v. South Carolina R. R. Co.* were handed down, may, in view of the extraordinary change in position as regards employer and employee, reasonably be challenged in 1885. It is quite possible that what was good public policy then, is not policy in any sense now. (c) Is it in point of fact true that the employee takes the risk of the employment, by entering into it with his eyes open? Verily, he does in a legal point of view in the present attitude of the law toward him. If he is injured, as the law is, he gets no damages, and it is a legal presumption that every man knows the law. But this is not enough to sustain the position. It proceeds upon the presumption, not of law, but of fact, that the employee actually thinks of the possibility of injury, and deliberately decides to take the risk. This is an assumption contrary to all human experience, and the position seems wholly untenable. In reality the servant does not voluntarily and intelligently decide to assume any such risk as the law casts upon him. (d) But, it is said, as a controlling argument, that there is the implied contract on the part of the servant, implied through considerations of public convenience. To which it may be replied that the policy is questioned. It is insisted, also, that, aside from this supposed consideration of public policy, there is no consideration whatsoever for

such a contract, the price of labor not being pretended to be in any proportion to the risk—*e. g.*, a railway brakeman receives smaller wages than a conductor, while his exposure to danger is many times more; and a fireman is paid less for risking his life every other night than a station agent is paid for running no risk at all. Moreover, this implied contract, fastened upon the employee, is one which, on the one hand, he did not make for himself, but which, on the other hand, if he consulted his interests, he would wholly refuse to make if the matter were brought to his notice. By what right does a court assume to frame this contract for him? To which the only answer is, by virtue of considerations of public policy and under the operation of the rule of *stare decisis*. Because Lord Abinger in England, in 1837, and Judge Evans in South Carolina, in 1841, in cases of novel impression, believed that public policy required the adoption of this rule at that day—when at least it is barely possible that these two judges were mistaken—all the courts of the two countries follow these precedents, and the law is as it is. That is to say, the rule in its present shape exists because two judges made a law which it is not the prerogative of any tribunal to make.¹

§ 104. *The modification in Kentucky.*—Under a statute in Kentucky, giving punitive damages in case of death resulting from wilful neglect, it is held that when the wilful neglect of the defendant is established, the contributory negligence of the plaintiff is no bar to his recovery.²

¹ See a full discussion of this whole subject in "Employers' Liability for Personal Injuries to their Employees," a pamphlet written for the Commonwealth of Massachusetts in accordance with a resolution of the legis-

lature. By Charles G. Fall, Esq., of the Suffolk Bar, Boston, 1883.

² Louisville, &c., R. R. Co. v. Goodell, 17 B. Mon. 586; Id. v. Sickings, 5 Bush. 1; Id. v. Filburn, 6 Id. 574; Id. v. Mahony, 7 Id. 235;

The statute is as follows: "If the life of any person is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."¹ "Wilful neglect," within the meaning of this statute, is such conduct as implies malice, or a reckless disregard of human safety, *i. e.* such negligence as is *quasi-criminal*; ² but if the killing be intentional, it does not come within the statute. "The redress of injuries consisting in the destruction of life resulting from negligence, is the exclusive subject to which all the provisions of the statute relate;" ³ neither will the statute apply where the injuries do not result in death; ⁴ nor in cases where the *wilful* neglect of the defendant is not clearly made out.⁵

§ 105. *Leading authority in Kentucky.*—The leading case in Kentucky, considering an employer's liability in this regard, is *Louisville, &c., R. R. Co. v. Collins*,⁶ in which the opinion was written by Chief Justice Robertson. This case settled the law as to the liability of an employer to his employee for injuries occasioned by the negligence of a fellow-servant, and the doctrine of that

Digby v. Kenton Iron Works Co., 8 Id. 166; *Jacobs v. Louisville, &c., R. R. Co.*, 10 Id. 263; *Claxton v. Lexington, &c., R. R. Co.*, 13 Bush. 636; *Jones Admr. v. Louisville, &c., R. R. Co.*, Superior Court of Ky., 1885, to be reported.

¹ 2 Stanton's Rev. Stat. Ky., 510, § 3; Genl. Stat. 1873, chap. 57; § 3.

² Board of Internal Improvements *v. Searce*, 2 Duv. 576; *Louisville, &c., Canal Co. v. Murphy*, 9 Bush. 522; *Louisville, &c., R. R. Co. v. Case*, 9 Id. 728; *Jacobs v. Louisville,*

&c., R. R. Co., 10 Id. 263; *Claxton v. Lexington, &c., R. R. Co.*, 13 Id. 642; *Lexington v. Lewis' Admx.*, 10 Bush. 677; *Hansford's Admx. v. Payne*, 11 Id. 380; *Chiles v. Drake*, 2 Metc. 146.

³ *Spring's Admr. v. Glenn*, 12 Bush. 172.

⁴ *Louisville, &c., R. R. Co. v. Collins*, 2 Duv. 114; *Id. v. Robinson*, 4 Bush. 507.

⁵ *Sullivan v. Louisville Bridge Co.*, 9 Bush. 81.

⁶ 2 Duv. 114.

decision has sometimes been understood to be something near the Georgia and Illinois rule of "comparative negligence." It is, however, not exactly that, as a careful reading of the leading case will show.¹ It was a simple case presenting the question fairly. A railway engineer ordered a young and inexperienced laborer to go under an engine, which was standing on the track with steam up, for the purpose of making repairs, and the engineer neglected to check the hind wheels, and the engine started, cutting off both the legs of the laborer. The court held that, while the laborer may have been negligent, yet, as the negligence of the engineer was wilful, the company must pay damages. The court said: "The only consistent or maintainable principle of the corporation's responsibility is that of agency. *Qui facit per alium facit per se*. It is, therefore, responsible for the negligence or unskillfulness of its engineer, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graded by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employees, associated with the engineer in conducting the cars, the negligence must be gross,² but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers constituting a distinct class, all standing on the same platform of equality and power and engaged in a merely incidental but independent service, no one of them, as between himself and his co-equals, is the corporation's agent, and, therefore, it is not, on the principle of agency or otherwise, responsible for damages to one of them resulting from the act or omission of another of

¹ *Vide* § 31, *supra*, for an extended discussion of that case. ² *i. e.*, wilful, see § 31, *supra*.

them, although each of the company's employees would be its agent as to entire strangers to it."¹

This is the Kentucky doctrine. It is, perhaps it should be admitted, something more than the general rule, but it is plainly not the same thing as the rule of "comparative negligence."²

§ 106. *The rule in Illinois.*—In Illinois, under the influence of the rule of comparative negligence, the general rule, as to an employer's liability to his employee for the negligence of a co-employee, is so modified that a comparison is instituted between the negligence of plaintiff and defendant, and if it appear that the negligence of the former is slight while that of the latter is gross, the plaintiff may recover. So thoroughly is this pernicious principle engrafted upon the jurisprudence of that State that it is asserted even here.³

§ 107. *The rule in Tennessee.*—A somewhat similar qualification of the rule has been asserted in Tennessee. There, a plaintiff may not recover if, by the exercise of ordinary care, he could have avoided the mischief, but if only by extraordinary care could it have been avoided, he may recover; and it is also held that a plaintiff's negligence which is not sufficient altogether to defeat a recovery, may be looked to in mitigation of damages.⁴

"Where a party," says McKinney, J., in the leading case, "brings an injury upon himself, or contributes to it, the mere want of a *superior* degree of care or diligence

¹ Louisville, &c., R. R. Co. v. Collins, 2 Duv. 114.

² See, particularly, Louisville, &c., R. R. Co. v. Robinson, 4 Bush. 507; Digby v. Kenton Iron Works Co., 8 Bush. 166, and cf. § 31, *supra*.

³ Chicago, &c., R. R. Co. v. Gregory, 58 Ill. 272; Id. v. Sullivan, 63 Id. 293; Fairbank v. Haentzsche, 73

Id. 236; St. Louis, &c., R. R. Co. v. Britz, 72 Id. 256; Toledo, &c., R. R. Co. v. O'Connor, 77 Id. 391; Foster v. Chicago, &c., R. R. Co., 84 Id. 165; and see §§ 25, 26, 27, *supra*.

⁴ Whirley v. Whiteman, 1 Head, 610; Nashville, &c., R. R. Co. v. Carroll, 6 Heisk. 347.

cannot be set up as a bar to the plaintiff's claim for redress, and, although the plaintiff may himself have been guilty of negligence, yet, unless he might, by the exercise of *ordinary* care, have avoided the consequence of the defendant's negligence, he will be entitled to recover."¹

§ 108. *Who are fellow-servants.*—A servant, in law, is any person, male or female, minor or of full age, paid or unpaid, who works for another with his knowledge and consent. Two or more such persons working for the same master are co-employees, or fellow-servants. The earliest case in which the question, as bearing upon the matter of negligence, arose, was *Priestley v. Fowler*,² decided in the English Court of Exchequer, in 1837. In this case, two men, working for a butcher and riding in his van, were held fellow-servants. Here, there was a similar occupation, and they had full knowledge, or opportunity for knowledge, of each other's care and character and judgment. In the next case, *Murray v. South Carolina R. R. Co.*,³ decided in the Court of Appeals, of South Carolina, in 1841, an engineer and fireman, employed together upon the same locomotive, were held fellow-servants. In *Farwell v. Boston and Worcester R. R. Co.*,⁴ decided in 1842, a locomotive engineer and a switchman are declared to be within the rule. In *Brown v. Maxwell*,⁵ a New York case, decided in 1844, a workman and his foreman, whose orders the workman was required to obey, were held co-employees. In 1850, in *Albro v. Agawam Canal Co.*,⁶ the rule as originally declared in Massachusetts, in *Farwell v. Boston*

¹ *Whirley v. Whiteman*, *supra*; and see §§ 24, 30, *supra*. ⁴ 4 Metc. 49; s. c. 38 Am. Dec. 339.

² 3 Mees. & W. 1.

³ 1 McMillan's Law, 385; s. c. 36 Am. Dec. 268. ⁵ 6 Hill, 592; s. c. 41 Am. Dec. 771.

⁶ 6 Cush. 75.

and Worcester R. R. Co.,¹ was extended, and an operative and his superintendent were held fellow-servants. In 1856, the New York Court of Appeals took a similar ground in *Sherman v. The Rochester and Syracuse R. R. Co.*² In *Wiggett v. Fox*,³ an English case decided in the same year, there is a still more radical extension of the doctrine, which in that case is held to apply to an employee of a sub-contractor, whose negligence caused injury to the defendant's servant, and who was hired to do work by the piece. The wages of the employee were paid by the defendant, but he worked under the direction of the sub-contractor. In the later cases, the rule has been sufficiently extended to include almost every possible employee of any employer.

§ 109. *The rule stated.*—In the present state of the law the essence of common employment is a common employer and payment from a common fund. The weight of authority is to the effect that all who work for a common master, or who are subject to a common control, or derive their compensation from a common source, and are engaged in the same general employment, working to accomplish the same general end, though it may be in different departments, or grades of it, are co-employees, who are held in law to assume the risk of one another's negligence.⁴

¹ *Supra.*

² 17 N. Y. 153.

³ 11 Exch. 832; s. c. 2 Jur. (N. S.) 955; 25 L. J. (Exch.) 188.

⁴ *Wigmore v. Joy*, 5 Exch. 354; s. c. 14 Jur. 838; 19 L. J. (Exch.), 300; *Feltham v. England*, 2 L. R. (Q. B.), 33; s. c. 4 Fost. & Fin. 460; 7 Best & S. 676; *Wonder v. Baltimore, &c.*, R. R. Co., 32 Md. 411; s. c. 3 Am. Rep. 143; *Thayer v. St. Louis, &c.*, R. R. Co., 22 Ind. 26; *Foster v. Minnesota, &c.*, R. R. Co., 14 Minn. 360; *Collier v. Steinhart*, 51 Cal. 116;

Zeigler v. Day, 123 Mass. 152; *Lawler v. Androscoggin, &c.*, R. R. Co., 62 Me. 463; s. c. 16 Am. Rep. 492; *Peterson v. Whitebreast C. & M. Co.*, 50 Iowa, 673; s. c. 32 Am. Rep. 143; *McLean v. Blue Point M. Co.*, 51 Cal. 255; *Lehigh Valley Coal Co. v. Jones*, 86 Penn. St. 432; *McGowan v. St. Louis, &c.*, R. R. Co., 61 Mo. 528; *O'Connor v. Roberts*, 120 Mass. 227; *Malone v. Hathaway*, 64 N. Y. 5; s. c. 21 Am. Rep. 573; *Blake v. Maine, &c.*, R. R. Co., 70 Me. 60; s. c. 35 Am. Rep. 297. "Superiority in grade

Lord Cranworth, in the famous case of *Bartonshill Coal Co. v. Reid*,¹ defined the relation as follows: "To constitute fellow-laborers within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same, or even similar acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engineer and switchman, the man who lets the miners down into, and who afterwards brings them up from the mine, and the miners themselves—all these are fellow-servants and *collaborateurs* within the meaning of the doctrine in question." This is, in general, a fair statement of the prevailing rule as held in England and this country. It must be admitted that the terms "fellow-servant" and "common employment," under late decisions both in England and the United States, are of very comprehensive import.²

or rank does not change the relation." Woods' "Master & Servant," p. 847, *et seq.*

¹ 3 Macq. H. L. Cas. 266; s. c. 4 Jur. (N. S.), 767; 1 Pat. Sc. App. 796, decided in 1858. "Reid and McGuire were both victims of the same accident which, though melancholy, has settled the law," quaintly observes the reporter.

² *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; s. c. 37 Am. Rep. 343; *Summersell v. Fish*, 117 Id. 312; *Hofnagle v. New York, &c., R. R. Co.*, 55 N. Y. 608; *Weger v. Penn. R. R. Co.*, 55 Penn. St. 460; *Marshall v. Schricker*, 63 Mo. 308; *Columbus, &c., R. R. Co. v. Arnold*, 31 Ind. 174; *Railway Co. v. Lewis*, 33 Ohio St. 196; *Cooper v. Milwaukee, &c., R. R. Co.*, 23 Wis. 668; *St. Louis, &c.,*

R. R. Co. v. Britz, 72 Ill. 256; *Kansas, &c., R. R. Co. v. Salmon*, 11 Kan. 83; *Gilshannon v. Stony Brook, &c., R. R. Co.*, 10 Cush. 298; *Seaver v. Boston, &c., R. R. Co.*, 14 Gray, 466; *Manville v. Cleveland, &c., R. R. Co.*, 11 Ohio St. 417; *McAndrews v. Burns*, 30 N. J. Law, 117; *Valtez v. Ohio, &c., R. R. Co.*, 85 Ill. 500; *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419; *Baulec v. New York, &c., R. R. Co.*, 59 N. Y. 356; s. c. 5 Lans. 436; 62 Barb. 623; *Sammon v. Id.*, 62 N. Y. 251; *Ohio, &c., R. R. Co. v. Hammersley*, 28 Ind. 371; *Tunney v. Midland Ry. Co.*, 1 L. R. (C. P.), 291; *Murphy v. Smith*, 19 C. B. (N. S.), 361; s. c. 12 L. T. (N. S.) 605; *Allen v. New Gas Co.*, 1 Exch. Div. 254; s. c. 45 L. J. 668; *Howells v. Steel Co.*, L. R. 10 Q. B. 62;

§ 110. *When the servant is deemed the agent of the master, or his vice-principal, the rule of non-liability is qualified.*—By the Supreme Court of the United States, and in several of the State courts, it is held that where the negligent servant is, in his grade of employment, superior to the injured servant, or where one servant is placed by the employer in a position of subordination, and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master, as his *alter ego*, or vice-principal, when such inferior servant, without fault, and while in discharge of his duty, is injured by the negligence of the superior servant, the master is liable in damages for the injury.¹

- s. c. 44 L. J. (Q. B.), 25; 32 L. T. (N. S.), 19; 23 Weekly Rep. 335; Conway v. Belfast Ry. Co., Ir. R. 9 C. L. 498; Wilson v. Merry, L. R. 1 H. L. Cas. Sc. App. 326; Peschel v. Chicago, &c., R. R. Co., 21 N. W. Rep. 269; s. c. 20 Cent. L. J. 203; Mobile, &c., R. R. Co. v. Smith, 59 Ala. 245; Wilson v. Madison, &c., R. R. Co., 81 Ind. 226; Colorado, &c., R. R. Co. v. Martin, Sup. Ct., Colo., 1884, 4 W. C. Rep. 563; s. c. xix Am. Law Rev. 163; Johnson v. Boston Towboat Co., 135 Mass. 209; s. c. 46 Am. Rep. 458; Magee v. Boston Cordage Co., Sup. Jud. Ct., Mass., June 20, 1885, 1 Eastern Reporter, 126.
- ¹ Railroad Co. v. Fort, 17 Wall. 553; affirming s. c. 2 Dill. 259; Mann v. Oriental Print Works, 11 R. I. 152; Little Miami, &c., R. R. Co. v. Stevens, 20 Ohio, 415; Dixon v. Rankin, 1 Am. R. R. Cas. 567, and note; Cleveland, &c., R. R. Co. v. Keary, 3 Ohio St. 201; Whaalan v. Mad River, &c., R. R. Co., 8 Id. 249; Berea Stone Co. v. Kraft, 31 Id. 287; Greenleaf v. Illinois, &c., R. R. Co., 29 Iowa, 14; Cooper v. Iowa Central R. R. Co., 44 Id. 134; Patterson v. Pittsburgh, &c., R. R. Co., 76 Penn. St. 389; Brothers v. Cartter, 57 Mo. 373; s. c. 14 Am. Rep. 424; Whalen v. Centenary Church, 62 Id. 226; Cook v. Hannibal, &c., R. R. Co., 63 Id. 397; Louisville, &c., R. R. Co. v. Bowles, 9 Heisk. 866; Nashville, &c., R. R. Co. v. Jones, 9 Id. 27; Chicago, &c., R. R. Co. v. Bayfield, 37 Mich. 205; Lalor v. Chicago, &c., R. R. Co., 52 Ill. 401; Mullan v. Phila. Steamship Co., 78 Penn. St. 25; s. c. 21 Am. Rep. 2; Kansas, &c., R. R. Co. v. Little, 19 Kan. 267; Walker v. Bowling, 22 Ala. 294; Moon's Admr. v. Richmond, &c., R. R. Co., 78 Va. 745; s. c. 49 Am. Rep. 401; Chicago, &c., R. R. Co. v. Ross, 112 U. S. 377; s. c. 8 Fed. Rep. 544; Wharton on Neg., § 229; Thompson on Neg., 1028, § 34; Shearman & Redf. on Neg., § 102; Brabbitts v. Chicago, &c., R. R. Co., 38 Wis. 289; Cumberland, &c., R. R. Co. v. State, 44 Md. 283; Fuller v. Jewett, 80 N. Y. 46; s. c. 36 Am. Rep. 575; Toledo, &c., R. R. Co. v. Ingraham, 77 Ill. 309; Dobbin v. Richmond, &c., R. R. Co., 81 N. C. 446; s. c. 31 Am. Rep. 512; Braun v. Chicago, &c., R. R. Co., 53 Iowa, 595; Booth v. Boston, &c., R. R. Co., 73 N. Y. 38; s. c. 29 Am. Rep. 97; Railway v. Sullivan, 5 Tex.

§ III. *Applications of this doctrine.*—It is held in Ohio that where one servant is a subordinate, and subject to the orders and control of another servant, and such inferior servant is injured while in discharge of his duty, without fault, through the negligence of his superior, the master is liable. In such a case the superior servant is held to be the vice-principal.¹ And in Rhode Island the same rule is applied as between an engineer of a manufacturing establishment and his fireman. When, therefore, the engineer ordered the fireman into an extra hazardous position, to perform a duty outside of that which he was engaged to perform, in consequence of which he was injured, the company was held liable.² In several jurisdictions it is held that an employer is liable for the negligence of a superintendent which causes injury to a mere employee; that the negligence of such a superior officer as this one, entrusted with the general management and control of a business, is the negligence of the employer, for which he is liable.³ So held in

Law Rev. 183, Sup. Ct., Texas, 1885; Davis v. Central Vermont R. R. Co., 55 Vt. 84; s. c. 45 Am. Rep. 590; Ryan v. Bagaley, 50 Mich. 179; s. c. 45 Am. Rep. 35; Dowling v. Allen, 74 Mo. 13; s. c. 41 Am. Rep. 298; Wilson v. Willimantic, &c., Co., 50 Conn. 433; s. c. 47 Am. Rep. 653; Flike v. Boston, &c., R. R. Co., 53 N. Y. 549; s. c. 13 Am. Rep. 545; Crispin v. Babbitt, 81 N. Y. 516; s. c. 37 Am. Rep. 521; McCasker v. Long Island, &c., R. R. Co., 84 N. Y. 77; Gunter v. Graniteville Manfg. Co., 18 S. C. 262; s. c. 44 Am. Rep. 573; Cowles v. Richmond, &c., R. R. Co., 84 N. C. 309; s. c. 37 Am. Rep. 620; Malone v. Hathaway, 64 N. Y. 5; s. c. 21 Am. Rep. 573; Mitchell v. Robinson, 80 Ind. 281; s. c. 41 Am. Rep. 812; Corcoran v. Holbrook, 59 N. Y. 517; s. c. 17 Am. Rep. 369; Atlanta Cotton Factory v. Speer, 69 Ga. 137; s. c. 47 Am. Rep. 750.

¹ Berea Stone Co. v. Kraft, 31 Ohio St. 287; City of Toledo v. Cone, Sup. Ct. of Ohio, 1885, xix Am. Law Rev. 330.

² Mann v. Oriental Print Works, 11 R. I. 152.

³ Railroad Co. v. Fort, 17 Wall. 553; Cook v. Hannibal, &c., R. R. Co., 63 Mo. 397; Washburn v. Nashville, &c., R. R. Co., 3 Head, 638; Railway v. Sullivan, Sup. Ct., Texas, 1885, 5 Texas Law Rev. 183; Dobbin v. Richmond, &c., R. R. Co., 81 N. C. 446; Wilson v. Willimantic, &c., Co., 50 Conn. 433; s. c. 47 Am. Rep. 653; Gunter v. Graniteville Manfg. Co., 18 S. C. 262; s. c. 44 Am. Rep. 573; Dowling v. Allen, 74 Mo. 13; s. c. 41 Am. Rep. 298. See, also, Peschel v. Chicago, &c., R. R. Co., Sup. Ct., Wis., 21 N. W. Rep. 269; Meyhew v. Sullivan Mining Co., Sup. Jud. Ct., Me., 1885, Albany Law Jour., Feb. 21, 1885; s. c. xix Am. Law Rev. 328.

England of a foreman,¹ and, in Missouri, of an architect and superintendent having general charge of building a church;² and of a "section boss" upon a railroad;³ and of the captain of a ship;⁴ and of an ordinary superintendent, although engaged at the time of the injury at the same work with the servant injured.⁵ And in Iowa, a foreman is a fellow-servant of the men under him, within a statute authorizing employees to recover from the employer for injuries by the negligence of other employees.⁶

§ 112. *Test whether one is a mere servant or the representative of the master.*—It has been held that the power to employ and discharge servants, or to purchase and change machinery is the true test whether an employee is or not a representative of his master.⁷

But this is, in the author's judgment, a narrow and somewhat superficial view. It seems plain that if the person in question is employed to perform any of the duties of a master, either these or any others that a master alone may properly do, then is the person no longer a mere servant, but at once, and *ipso facto*, the agent, the *alter ego* of his employer. In *Gunter v. Graniteville Manufacturing Co.*,⁸ McIver, J., says: "The test as to whether an employee is the representative of the master, is, not whether such employee has the power to employ or discharge hands, or to purchase or change machinery,

¹ *Grizzle v. Frost*, 3 Fost. & Fin. 622.

² *Whalen v. Centenary Church*, 62 Mo. 226.

³ *Louisville, &c., R. R. Co. v. Bowles*, 9 Heisk. 866.

⁴ *Ramsay v. Quinn*, Irish Common Pleas, 4 Cent. Law Jour. 478. See, also, *Wharton's Neg.*, § 229.

⁵ *Crispin v. Babbitt*, 81 N. Y. 516; s. c. 37 Am. Rep. 521; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *McCasker v. Long Island, &c., R. R. Co.*, 84 N. Y. 77.

⁶ *Houser v. Chicago, &c., R. R. Co.*, 60 Iowa, 230; s. c. 46 Am. Rep. 65.

⁷ *Stoddard v. St. Louis, &c., R. R. Co.*, 65 Mo. 514; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Kansas, &c., R. R. Co. v. Little*, 19 Kan. 267; *Walker v. Bowling*, 22 Ala. 294; *Lanning v. New York, &c., R. R. Co.*, 49 N. Y. 521; *Shear. & Redf. on Neg.*, § 103.

⁸ 18 S. C. 362; s. c. 44 Am. Rep. 573.

for while these are some of the duties of the master they are not all of his duties, and hence an employee who is not intrusted with either of these powers may still be the representative of the master. The true test is *whether the person in question is employed to do any of the duties of the master*; if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him, must be regarded as the negligence of the master." This is the rule most consonant with justice and right reason.¹

§ 113. *Should there be one rule in this particular applicable to corporations and another less stringent one applicable to other hirers of labor?*—The constructive or presumed presence of the corporation in the acts of its servants is a favorite doctrine with some judges and text-writers. Under the influence of this theory, in some jurisdictions there is attempted a distinction in this regard between a corporation and a natural person. Inasmuch as bodies corporate can, from their very nature, act only through an agent it is urged that, unless this executive agent is to be deemed for the purposes of this rule the corporation itself, there will result in favor of the corporation an immunity which is denied to men who carry on their business in person.²

A corporation should unquestionably be held liable in damages for the negligence of its servant whenever that servant, under the operation of an impartial rule, stands to it in the relation of vice-principal. Whenever

¹ Compare Shear. & Redf. on Neg., § 104. *Brickner v. New York, &c., R. R. Co.*, 49 N. Y. 672; *Cumberland, &c., R. R. Co. v. Hogan*, 45 Md. 229; *Id. v. Moran*, 44 Id. 283.

² 1 Redfield on Railways, 310. § 2, and notes; *Patterson v. Pittsburgh, &c., R. R. Co.*, 76 Penn. St. 389;

a body corporate comes, in its relations to its employees fairly within the general rule of law which regulates the liability of a master for the neglect of his servant then it should answer, like any other master in like case, for the servant's negligence. It is not easy to see why the rule should go farther, or why there is any reason in fact or in law, for carving out a rule especially applicable to corporations. Under the operation of the rule as it stands, the corporation is liable whenever it ought to be liable. Judge Redfield, in his work on Railways, attempts to extend the doctrine, but it may well be questioned whether the rule, if generally adopted, would be salutary in its effect. The English courts refuse to recognize such a distinction,¹ and in at least one court in this country it has been rather savagely criticised. In the case of the Evansville, &c., R. R. Co. v. Baum,² the court says: "Nor will sound policy maintain the application of a rule of law to railways, or corporations, on this subject, which shall not be applied alike to others—as has been intimated in some quarters. *The suggestion is not fit to be made, much less sanctioned in any tribunal pretending to administer justice impartially.*"

§ 114. *Chicago, Milwaukee, and St. Paul R. R. Co. v. Ross.*³—This case came up from the Circuit Court of the United States for the District of Minnesota. It involved the liability of a railway corporation for an injury to one of its servants resulting from the negligence of another, and as the deliberate judgment of the Supreme Court of the United States upon this frequently recurring

¹ *Allen v. New Gas Co.*, 1 Exch. Div. 251; *Conway v. Belfast Ry. Co.*, Ir. R., 9 C. L. 498; *Howells v. Landore Sieman's Steel Co.*, L. R. (10 Q. B.) 62; s. c. 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Week. Rep. 335; 31 L. T. (N. S.) 433.

² 26 Ind. 74.

³ 112 U. S. 377. Handed down by the Supreme Court of the United States, December 1, 1884, affirming s. c. 8 Fed. Rep. 544.

and most important question, it has attracted much attention and provoked much criticism and comment. It is a little remarkable that the question has never before been squarely presented to the Supreme Court. In the multitude of decisions upon this point, we find no Supreme Court case upon the question as here presented, and as it has frequently presented itself in the State courts of last resort. In this state of the matter it was fortunate that a case arose which required that august tribunal to pass upon this precise question, and the opinion is worthy of very careful consideration. The case was a simple one involving nothing but the bare question whether a railway company is liable to a locomotive engineer for the neglect of a train-conductor. The facts were these: The conductor of a freight train, which left Minneapolis at about midnight, neglected to notify the engineer of an order which he had received from the train-dispatcher to stop the train at South Minneapolis until a gravel train coming toward the city and not running on schedule time passed. The engineer, not having received the order, through the negligence of the conductor, and without fault on his part, ran his train into the gravel train, and, being injured, sued the company. He had judgment in the court below, and upon a writ of error prosecuted to the Supreme Court of the United States the judgment was there affirmed.¹ It appeared in evidence that the conductors of each train were guilty of gross negligence, and that this negligence caused the collision. The court argues that the conductor by virtue of his general control and charge of the train, and of his power and authority to direct the other persons employed with him to move the

¹ Mr. Justice Field delivered the opinion. Bradley, Matthews, Gray and Blatchford, JJ., dissenting. It is to be regretted that four justices of such pre-eminent ability felt compelled to dissent, for verily the doctrine of this case has come to stay.

train, represented the company; that ordinary prudence on his part would have prevented the accident, and that, therefore, the company must be held liable in damages, for his failure to exercise it. The precise point decided in this case is that a conductor of a regular railway train is not a fellow-servant of the other persons employed to run that train, but is the vice-principal, representing the company, for whose negligent acts, when they result in injury to the other employees upon the train, the company is liable, and in arriving at this conclusion the court enters into a very full and discriminating discussion of the general rule. The opinion, in my judgment, contains very much the clearest and ablest presentation of the law in this behalf, and the fairest and most satisfactory argument upon it to be found in any English or American decision upon the subject. It is certainly entitled to outrank and to outweigh *Farwell v. Boston & Worcester R. R. Co.*,¹ or *Bartonshill Coal Co. v. Reid*,² in point of sound logic and right reason, as certainly, it is submitted, as the "Massachusetts doctrine," as it is sometimes called, and its trend or tendency, is to be superseded and changed in this country by legislation more or less modeled after the English Employers' Liability Act.³ A Kentucky text-writer may be pardoned for reminding his brethren that the doctrine of the Supreme Court of the United States as expounded in this case is the Kentucky doctrine declared many years ago in *Louisville & Nashville R. R. Co. v. Collins*,⁴ by our great Chief Justice Robertson, and which has since been the rule in this State. It is certainly the rule of humanity as it may confidently be declared the rule of even justice. This late decision of the Supreme Court may be expected to have

¹ 4 Metc. 49; s. c. 38 Am. Dec. 339.

² 3 Macq 295.

³ 43 & 44 Vic., chap. 42.

⁴ 2 Duv. 114.

a powerful influence in this country at least, upon the future of the rule regulating a master's liability to a servant for the negligence of another servant. It is contrary to the general course of decision ; but, partly for this reason, as well as because of its intrinsic force and reasonableness, and because it is the judgment of our high court of appeal, it will have the greater tendency to attract attention and to assist in checking the extension of the rule of non-liability which, already, in some jurisdictions, has proceeded to the extent of holding every possible employee, from a general superintendent entrusted with the entire control of a great business to an office boy, or a porter, a fellow-servant.

§ 115. *What is common employment.*—It is generally held that all servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow-servants in a common employment. In the earlier cases, the term common employment is used to designate the employment of two or more workmen by one master—*e. g.*, the two employees of the butcher in *Priestley v. Fowler*.¹ As soon as the rule became recognized law, the courts were called upon to say what classes of cases the term included. Having established the rule they were asked to apply it, and as case after case arose, it became necessary to determine whether it should have a wide or a narrow application. On the one hand it might be held to include only those employees who worked side by side in a similar occupation, as masons building a wall, or carpenters a house, or weavers attending adjacent looms ; and, on the other hand, it might be so extended as to include all employees of every grade who are hired

¹ 3 Mees. & W. 1.

by the same person, as, all the hands in a factory, or all the employees of a railway corporation; and, between the two extremes would be found many various degrees, where the rule might be held to include or exclude occupations more or less dissimilar. The chief embarrassment seems to have been to settle whether it should be strictly confined to persons engaged in similar occupations, or should include any and every occupation however essentially unlike. Some courts have done one thing, and some another, and decisions abound excluding and including almost every mentionable occupation. It is said by a very competent authority, that twenty years ago no more than a dozen cases could be found in which the point is raised. Now, there are hundreds and hundreds of wholly irreconcilable decisions in point. No court, as far as my reading has gone, has attempted to define the term, to circumscribe it by metes and bounds, or attempted more than to say that the particular case before it was one where common employment ought or ought not to be a defense. Indeed, the term is one which, from the very nature of the subject, cannot be defined. It is entirely impossible to anticipate all the various kinds of employment in their varying degrees of similarity. In Massachusetts the rule has received its widest development. The Supreme Judicial Court of that State holds the most liberal views upon this subject,¹ and the influence of that independent and exceptionally able tribunal has, in this particular, been strongly felt throughout the Union, so that, it may be admitted, the Massachusetts rule is the general rule.

§ 116. *Illustrations.*—It has, under the influence of the Massachusetts doctrine, or otherwise, been held that all the employees of a railway corporation in almost

¹ Shear. & Redf. on Neg., § 102; and the Massachusetts cases, *supra*.

every possible combination or association, are fellow-servants in a common employment, and this, notwithstanding that the negligent servant is of a grade superior to the servant injured, or that the two are employed in entirely distinct and separate departments of the common service—*e. g.*, an engineer of a locomotive and the fireman working with him;¹ an engineer and a brakeman on the same train;² an engineer and a brakeman on different trains of the same company;³ an engineer and conductor on the same train;⁴ an engineer and a switch-tender;⁵ an engineer and a telegraph operator;⁶ an engineer and a track repairer;⁷ an engineer and an inspector of the track;⁸ an engineer and a shoveler on a gravel train;⁹ an engineer of a switchengine and a car repairer;¹⁰ an engineer and a station agent;¹¹ an engineer and a servant employed at a station, whose duties involved the coupling and uncoupling of cars;¹²

¹ *Murray v. South Carolina R. R. Co.*, 1 *McMil.* 385; s. C. 36 *Am. Dec.* 268.

² *St. Louis, &c., R. R. Co. v. Britz*, 72 *Ill.* 256; *Summerhays v. Kansas, &c., R. R. Co.*, 2 *Colo.* 284; *Sherman v. Rochester, &c., R. R. Co.*, 17 *N. Y.* 153; *Nashville, &c., R. R. Co. v. Wheless*, 10 *Lea*, 741; s. C. 43 *Am. Rep.* 317.

³ *Wright v. N. Y., &c., R. R. Co.*, 25 *N. Y.* 562; *Louisville, &c., R. R. Co. v. Robinson*, 4 *Bush*, 507; *Pittsburgh, &c., R. R. Co. v. Devinney*, 17 *Ohio St.* 197; *Randall v. Baltimore, &c., R. R. Co.*, 109 *U. S.* 478. See, also, *Armour v. Hahn*, 111 *Id.* 313; *Hough v. Railroad Co.*, 100 *Id.* 213.

⁴ *Ragsdale v. Memphis, &c., R. R. Co.*, 59 *Tenn.* 426; *Slater v. Jewett*, 85 *N. Y.* 61; s. C. 39 *Am. Rep.* 627. *Contra*, *Chicago, &c., R. R. Co. v. Ross*, 112 *U. S.* 377.

⁵ *Farwell v. Boston and Worcester R. R. Co.*, 4 *Metc.* 49; s. C. 38 *Am. Dec.* 339.

⁶ *Slater v. Jewett*, 85 *N. Y.* 61; s. C. 39 *Am. Rep.* 627.

⁷ *Boldt v. New York, &c., R. R. Co.*, 18 *N. Y.* 432; *Whaalen v. Mad River R. R. Co.*, 8 *Ohio St.* 249; *Ohio, &c., R. R. Co. v. Collarn*, 73 *Ind.* 261; s. C. 38 *Am. Rep.* 134; *Gormley v. Ohio, &c., R. R. Co.*, 72 *Ind.* 32.

⁸ *Waller v. Southeastern Ry. Co.*, 2 *Hurl. & C.* 102; *Coon v. Syracuse, &c., R. R. Co.*, 5 *N. Y.* 492; *Lovejoy v. Boston, &c., R. R. Co.*, 125 *Mass.* 79; s. C. 28 *Am. Rep.* 206.

⁹ *Ohio, &c., R. R. Co. v. Tindall*, 13 *Ind.* 366. See, also, *St. Louis, &c., R. R. Co. v. Britz*, 72 *Ill.* 256.

¹⁰ *Chicago, &c., R. R. Co. v. Murphy*, 53 *Ill.* 336; *Valtez v. Ohio, &c., R. R. Co.*, 85 *Id.* 500.

¹¹ *Evans v. Atlantic, &c., R. R. Co.*, 62 *Mo.* 49; *Brown v. Minneapolis, &c., R. R. Co.*, 23 *Am. Law Reg.* 335. See, also, *Brown v. Winona, &c., R. R. Co.*, 27 *Minn.* 162; s. C. 38 *Am. Rep.* 285.

¹² *Wilson v. Madison, &c., R. R. Co.*, 81 *Ind.* 226.

an engineer and any employee of the railroad company, including, specifically, the general superintendent, the supervisor of the road, a section boss, and a common laborer;¹ an engineer and the laborers on a gravel or construction train;² an engineer and the servants of a contractor, engaged in furnishing wood to the railroad under the contract, being on the train;³ a conductor and a brakeman on the same train;⁴ a conductor and a brakeman on another train;⁵ a conductor of a construction or gravel train and the laborers employed upon the same;⁶ a conductor and the servants of a contractor working upon his train;⁷ a conductor traveling on a train other than his own in going to his post of duty, and the other employees in charge of such train;⁸ a conductor and a switchman;⁹ a conductor and a fireman;¹⁰ a conductor and a station baggage master;¹¹ a brakeman, in addition to the relations *supra*, and another brakeman

¹ *Mobile, &c., R. R. Co. v. Smith*, 59 Ala. 245. This should seem to be the culmination of the rule as far as it affects railway corporations.

² *Chicago, &c., R. R. Co. v. Keefe*, 47 Ill. 108; *Ryan v. Cumberland, &c., R. R. Co.*, 23 Penn. St. 384.

³ *Illinois, &c., R. R. Co. v. Cox*, 21 Ill. 20; but not an engineer and a detective in the employ of the railway company, walking on the track. *Pyne v. Chicago, Burlington and Quincy R. R. Co.*, 54 Iowa, 223.

⁴ *Dow v. Kansas Pacific R. R. Co.*, 8 Kan. 642; *Sherman v. Rochester, &c., R. R. Co.*, 17 N. Y. 153; *Hayes v. Western R. R. Co.*, 3 Cush. 270.

⁵ *Pittsburgh, &c., R. R. Co. v. Devinney*, 17 Ohio St. 197.

⁶ *Gilshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *Cassidy v. Maine, &c., R. R. Co.*, 70 Me. 488; *Abend v. Terre Haute, &c., R. R. Co.*, Sup. Ct., Ill., 1884; 20 Cent. L. J. 77; *McGowan v. St. Louis, &c., R. R. Co.*, 61 Mo. 528; *Ryan v. Cumberland,*

&c., R. R. Co., 23 Penn. St. 384; *Chicago, &c., R. R. Co. v. Keefe*, 47 Ill. 108; *O'Connell v. Baltimore, &c., R. R. Co.*, 20 Md. 212; *Cumberland Coal Co. v. Scally*, 27 Id. 589; *Rodman v. Mich., &c., R. R. Co.*, Sup. Ct., Mich., 1884; 31 Albany Law Jour. 34. *Contra*, *Chicago, &c., R. R. Co. v. Swanson*, 16 Neb. 254; *Id. v. Bayfield*, 37 Mich. 205; *Moon's Admr. v. Richmond, &c., R. R. Co.*, 78 Va. 745; s. c. 49 Am. Rep. 401; *Lalor v. Chicago, &c., R. R. Co.*, 52 Ill. 401.

⁷ *Illinois, &c., R. R. Co. v. Cox*, 21 Ill. 20.

⁸ *Manville v. Cleveland, &c., R. R. Co.*, 11 Ohio St. 417. See, also, *Vick v. New York, &c., R. R. Co.*, 95 N. Y. 267; s. c. 47 Am. Rep. 36.

⁹ *Wilson v. Madison, &c., R. R. Co.*, 81 Ind. 226.

¹⁰ *Slater v. Jewett*, 85 N. Y. 61; s. c. 39 Am. Rep. 627.

¹¹ *Colorado, &c., R. R. Co. v. Martin*, Sup. Ct., Colo., 4 W. C. Rep. 563; s. c. 19 Am. Law Rev. 163.

on the same train ;¹ a brakeman and a car inspector ;² a brakeman and a train dispatcher ;³ a brakeman and a switch tender ;⁴ a brakeman and the mechanics in a repair shop, including the inspector of machinery ;⁵ a brakeman and a "section boss" ;⁶ a fireman, in addition to the relations *supra*, and the master-machinist of the railway company ;⁷ a fireman and the servants of an independent contractor at work for the company, and being upon the train ;⁸ a fireman and a track repairer ;⁹ a carpenter or other employees of a railway company, and the men in charge of the train by which they are carried to their work ;¹⁰ an employee going on a train to his work and a

¹ Hayes *v.* Western R. R. Co., 3 Cush. 270.

² Mackin *v.* Boston, &c., R. R. Co., 135 Mass. 201; s. c. 46 Am. Rep. 456; Smith *v.* Flint, &c., R. R. Co., 46 Mich. 258; s. c. 41 Am. Rep. 161; Ballou *v.* Chicago, &c., R. R. Co., 54 Wis. 259; s. c. 41 Am. Rep. 31; Michigan, &c., R. R. Co. *v.* Smithson, 45 Mich. 212; Columbus, &c., R. R. Co. *v.* Webb, and Railroad Co. *v.* Fitzpatrick, Sup. Ct. of Ohio, Ohio Law Jour., Nov. 22, 1884; s. c. 19 Am. Law Rev. 163. *Contra*, O'Neil *v.* St. Louis and Iron Mountain, &c., R. R. Co., 9 Fed. Rep. 337; Smith *v.* Chicago, &c., R. R. Co., 42 Id. 520.

³ Robertson *v.* Terre Haute, &c., R. R. Co., 78 Ind. 77; s. c. 41 Am. Rep. 552.

⁴ Slattery's Admr. *v.* Toledo, &c., R. R. Co., 23 Ind. 83.

⁵ Wonder *v.* Baltimore, &c., R. R. Co., 32 Md. 418; s. c. 3 Am. Rep. 143; Besel *v.* New York, &c., R. R. Co., 70 N. Y. 171; *cf.* Murphy *v.* Boston, &c., R. R. Co., 88 N. Y. 146; s. c. 42 Am. Rep. 240. *Contra*, Condon *v.* Missouri, &c., R. R. Co., 78 Mo. 567; Blessing *v.* Id., 77 Id. 410.

⁶ Slattery *v.* Toledo, &c., R. R. Co., 23 Ind. 81. *Contra*, Nashville, &c., R. R. Co. *v.* Carroll, 6 Heisk. 347. See, also, Waller *v.* Southeast-

ern Ry. Co., 2 Hurl. & Colt. 102; s. c. 7 Jur. (N. S.) 501; 32 L. J. (Exch.) 205; but not the train-men running a material train, and a section boss; Moon's Admr. *v.* Richmond, &c., R. R. Co., 78 Va. 745; s. c. 49 Am. Rep. 401.

⁷ Columbus, &c., R. R. Co. *v.* Arnold, 31 Ind. 174; but not a fireman and the company's bridge builder; Davis *v.* Central, &c., R. R. Co., 55 Vt. 84; s. c. 45 Am. Rep. 590; Gillenwater *v.* Madison, &c., R. R. Co., 5 Ind. 339; s. c. 61 Am. Dec. 101, (and note.)

⁸ Illinois, &c., R. R. Co. *v.* Cox, 21 Ill. 20; *cf.* Davis *v.* Central, &c., R. R. Co., *supra*.

⁹ Whaalen *v.* Mad River R. R. Co., 8 Ohio St. 249; Boldt *v.* New York, &c., R. R. Co., 18 N. Y. 432; Ohio, &c., R. R. Co. *v.* Collarn, 73 Ind. 261; s. c. 38 Am. Rep. 134; King *v.* Boston, &c., R. R. Co., 9 Cush. 112; s. c. 129 Mass. 277, (n.) But see, *contra*, a very carefully considered case, Chicago, &c., R. R. Co. *v.* Moranda, 93 Ill. 302; s. c. 34 Am. Rep. 168.

¹⁰ Seaver *v.* Boston, &c., R. R. Co., 14 Gray, 466; Gillshannon *v.* Stony Brook R. R. Co., 10 Cush. 228; Morgan *v.* Vale of Neath Ry. Co., 5 Best. & S. 736; s. c. L. R. 1 Q. B. 149; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; 14 Week. Rep. 144;

signal man ;¹ a carpenter at work for a railway company and servants of the company in charge of a turn-table ;² a road master and a common laborer ;³ a master and mate of a vessel ;⁴ a "gang boss," or foreman, and an ordinary laborer ;⁵ the master of a lighter and one of the crew ;⁶ the chief engineer on a steam vessel and one of the crew ;⁷ an "underlooker" in a mine, whose duty it was to examine the roof of the mine and prop it when dangerous, and one of the miners ;⁸ but not a "mining captain" and the miners.⁹

§ 117. *Servants of different masters.*—It is generally held that those only are fellow-servants, within the intent of this rule, who are the servants of the same master. "A fellow-servant," says Dalrymple, J., in *McAndrews v.*

(affirming s. c. 5 Best & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Weekly Rep. 1031); *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; s. c. 2 Jur. (N. S.) 691; *Vick v. New York, &c., R. R. Co.*, 95 N. Y. 267; s. c. 47 Am. Rep. 36; *Brick v. Rochester, &c., R. R. Co.*, 98 N. Y. 211. *Contra*, *O'Donnell v. Allegheny, &c., R. R. Co.*, 59 Penn. St. 239; *Gillenwater v. Madison, &c., R. R. Co.*, 5 Ind. 339; s. c. 61 Am. Dec. 101.

¹ *Moran v. New York, &c., R. R. Co.*, 3 N. Y. 770.

² *Morgan v. Vale of Neath Ry. Co.*, *supra*; *cf.* *Killea v. Faxon*, 125 Mass. 485; *Colton v. Richards*, 123 Id. 484; *Kelley v. Norcross*, 121 Id. 508.

³ *Lawler v. Androscoggin, &c., R. R. Co.*, 62 Me. 463; s. c. 16 Am. Rep. 492; *Brown v. Winona, &c., R. R. Co.*, 27 Minn. 162; s. c. 38 Am. Rep. 285; and *cf.* *Foster v. Minnesota, &c., R. R. Co.*, 14 Minn. 360; [but it is otherwise as to a road-master and a fireman; *Davis v. Vermont, &c., R. R. Co.*, 55 Vt. 84; s. c. 45 Am. Rep. 590. See, also, *Ryan v. Bagaley*, 50 Mich. 179; s. c. 45 Am. Rep. 35.]

⁴ *Mathews v. Case*, Sup. Ct., Wis., Nov. 25, 1884. See, also, *Connolly v. Davidson*, 15 Minn. 519; s. c. 2 Am. Rep. 154.

⁵ *Keystone Bridge Co. v. Newberry*, 96 Penn. St. 246; s. c. 42 Am. Rep. 543. See, also, *Mitchell v. Robinson*, 80 Ind. 281; s. c. 41 Am. Rep. 812; *Houser v. Chicago, &c., R. R. Co.*, 60 Iowa, 230; s. c. 46 Am. Rep. 65; and *contra*, *Railroad Co. v. Bowler*, 9 Heisk. 866; *Luebke v. Chicago, &c., R. R. Co.*, 59 Wis. 127; s. c. 48 Am. Rep. 483; *East Tennessee, &c., R. R. Co. v. Duffield*, 12 Lea. 63; s. c. 47 Am. Rep. 319; *Guthrie v. Louisville, &c., R. R. Co.*, 11 Lea. 372; s. c. 47 Am. Rep. 286; *Dowling v. Allen*, 74 Mo. 13; s. c. 41 Am. Rep. 298.

⁶ *Johnson v. Boston Towboat Co.*, 135 Mass. 209; s. c. 46 Am. Rep. 458.

⁷ *Searle v. Lindsay*, 11 C. B. (N. S.) 429.

⁸ *Hall v. Johnson*, 3 Hurl. & C. 589; *cf.* *Kelly v. Howell*, 41 Ohio St. 246.

⁹ *Ryan v. Bagaley*, 50 Mich. 179; s. c. 45 Am. Rep. 35.

Burns,¹ "I take to be any one who serves and is controlled by the same master." Whenever a definition of the term fellow-servant is attempted, it is made an essential element of the relation, that it include only servants of the same master.² In the very nature of the case, under the rule of non-liability, the relation of fellow-servants to the same master must actually subsist, if the master is to escape responsibility for the negligence of his servant, or the rule to have any proper application. If, when the negligence of one servant injures another, it cannot be made clearly to appear that the servant injured and the servant whose fault occasioned the injury are the servants of the same master, then the rule does not apply, and the injured person will be free to seek his remedy under some other rule of law. It is obvious that, in the majority of cases, this question cannot arise. It will usually happen that the fact of a common master will be beyond dispute; but, in a class of cases a difficulty in this respect presents itself which we now proceed to consider.

§ 118. *The rule stated.*—It is generally held that the employees of an independent contractor are not fellow-servants of the employees of the proprietor for whom the contractor is engaged to work. If, therefore, the employee of such contractor is injured through the negligence of a servant of the proprietor, the maxim *respondeat superior* usually applies, and the proprietor is liable in damages for the injury.³

It is accordingly held, that the servant of a lighterman, at work upon his master's barge unloading a ship, is not

¹ 39 N. J. Law, 119.

² *Smith v. New York, &c., R. R. Co.*, 19 N. Y. 132; *Svenson v. Atlantic Steamship Co.*, 57 N. Y. 112; *Crusselle v. Pugh*, 67 Ga. 430; S. C. 44 Am. Rep. 724; *Shear. & Redf. on Neg.*, § 116; *Abraham v. Reynolds*,

5 Hurl. & N. 142; S. C. 6 Jur. (N. S.) 53, 8 Week. Rep. 181.

³ *Smith v. New York, &c., R. R. Co.*, 19 N. Y. 127; *Svenson v. Steamship Co.*, 57 Id. 108; *Burke v. Norwich, &c., R. R. Co.*, 34 Conn. 474; *Young v. New York, &c., R. R. Co.*,

a fellow-servant with one of the crew;¹ but, where a steamship company employed a stevedore to unload its vessels, and this stevedore employed his own men, and used his own machinery, when one of the crew was injured through the fault of one of his servants, it was held in Pennsylvania a proper question for the jury, whether this stevedore was a servant of the steamship company, or a contractor, and whether or not the injured servant was a fellow-servant.² So, also, it is held that the servants of a contractor, and those of a sub-contractor, are not co-servants within the meaning of this rule.³

The rule as here stated is unquestionably sound and just. Upon what principle of right can the servants of one man, be held to be the fellow-servants of another man's servants? If the servant be held by his implied contract, to assume all the risks of the negligence of his co-servant, is not this the end of his contract? How can he be held to assume the risk of the negligence of any other man's servants, with whom he may chance to be employed or associated? How can he exercise any influence upon such servants, or what duty does he owe to their master, to report delinquencies if he happen to discover them? Upon what principle can he be held to sustain any relation to them? Is he not a mere stranger?

30 Barb. 229; *Woodley v. Metropolitan Ry. Co.*, 2 Exch. Div. 284 (dissenting opinions of Mellish & Baggallay J.J.); *Abraham v. Reynolds*, 5 Hurl. & N. 142; s. c. 6 Jur. (N. S.) 53, 8 Week. Rep. 181; *Swainson v. Northeastern Ry. Co.*, 3 Exch. Div. 341; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; s. c. 33 Am. Rep. 423. And see, particularly, *Devlin v. Smith*, 89 N. Y. 470; s. c. 42 Am. Rep. 311; *Coggin v. Central, &c., R. R. Co.*, 62 Ga. 685; s. c. 35 Am. Rep. 132.

¹ *Svenson v. Steamship Co.*, *supra*.

² *Haas v. Phila. Steamship Co.*, 88

Penn. St. 269; s. c. 32 Am. Rep. 462, but see, *Riley v. State Line Steamship Co.* 29 La. Ann. 791; s. c. 29 Am. Rep. 349.

³ *Hunt v. Penn. &c., R. R. Co.*, 51 Penn. St. 474; *Goodfellow v. Boston, &c., R. R. Co.*, 106 Mass. 461; *Curley v. Harris*, 11 Allen, 113; *Murphy v. Caralli*, 3 Hurl. & C. 462; s. c. 10 Jur. (N. S.) 1207, 34 L. J. (Exch.) 14, 13 Week. Rep. 165; *Murray v. Currie*, 6 L. R. (C. P.) 24; s. c. 40 L. J. (C. P.) 26, 23 L. T. (N. S.) 557, 19 Week. Rep. 104, and compare, *Devlin v. Smith*, 89 N. Y. 470; s. c. 42 Am. Rep. 311.

Is not the rule as laid down in some late Massachusetts and English cases the perfection of injustice? In these cases it is plainly declared that a servant is to be held to assume the risk, not only of the carelessness of all the other employees of his master, but of all the servants of all the various persons or corporations with whom he may be associated in any work assigned him, and a master is held free from liability, in almost every conceivable set of circumstances, for the negligence of his servant, though operating to injure persons with whom he is not the most remotely connected, upon the bare fact being shown that his servant and the injured person were, in some more or less intimate way, associated in labor. Under the operation of the rule as announced in these cases, a servant is absolutely remediless, and a master absolutely free from liability, for the most aggravated negligence of his employees. For practical purposes, the rule might as well be made absolute by statute, so perfectly is the ancient rule of *respondeat superior* set aside as to master and servant in cases of this nature.¹

§ 119. *As between different railway corporations having running connections.*—Where the servants of one railway company have been injured by reason of the negligence of the servants of another railway company, there existing between the two companies an arrangement by which one company runs its cars over the tracks of the other company, or one forms a junction with the other, by which the roads of the two companies constitute the whole, or some part of a trunk, or through line, or by which one uses the railway station of the other, we find the authorities for the most part consistent in holding

¹ *Albro v. Agawam Canal Co.*, 6 112 Id. 400; *Wiggett v. Fox*, 11 Exch. Cush. 75; *Johnson v. Boston*, 118 832; S. C. 2 Jur. (N. S.) 955, 25 L. J. Mass. 114; *Connors v. Hennessy*, 112 Exch. 188.
Id. 96; *Harkins v. Sugar Refinery*,

that in such a case, the employees of the two roads are not fellow-servants, and that either company is liable to the servants of the other for the negligence of its own servants.¹

§ 120. *As to volunteers.*—There are a number of striking English cases upon this branch of the subject. In *Degg v. Midland Ry. Co.*,² it is held that, when one voluntarily assists the servant of another, in an emergency, he cannot recover from the master, for an injury caused by the negligence or misconduct of the servant, and the reason assigned is, that a stranger cannot by his officious conduct impose upon an employer a greater duty than that which he owes to his employees in general. This is the rule as to a *mere* volunteer, and it seems also to be the law in this country.³ But wherever there is a temporary employment of a bystander, in an emergency, by a servant, who may be held to have had the authority to contract for the assistance, the master will be liable if

¹ *Smith v. New York, &c., R. R. Co.*, 19 N. Y. 127; *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 423; *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637; s. c. 48 Am. Rep. 689; *Carroll v. Minnesota, &c., R. R. Co.*, 13 Minn. 30; *Sawyer v. Rutland, &c., R. R. Co.*, 27 Vt. 370. *Contra*, *Mills v. Alexandria, &c., R. R. Co.*, 2 McArthur, 314; *Cruty v. Erie Ry. Co.*, 3 N. Y., Sup. Ct. (T. & C.) 244. See, also, *Warburton v. Great Western Ry. Co.*, L. R. 2 Exch. 30, s. c. 36 L. J. (Exch.) 9, 15 L. T. (N. S.) 361, 15 Week. Rep. 108, 4 Hurl. & Colt, 695. Nor can a railway escape liability by an agreement of lease, placing its employees and trains under the control of the manager of another road. *Wabash, &c., R. R. Co. v. Peyton*, 106 Ill. 534; s. c. 46 Am. Rep. 705, but, see, *Foley v. Chicago, &c., R. R. Co.*, 48 Mich. 622; s. c. 42 Am. Rep. 481; *Singleton v. Southwestern R. R. Co.*,

70 Ga. 464; s. c. 48 Am. Rep. 574; *Abbott v. Johnstown, &c., R. R. Co.*, 80 N. Y. 27; s. c. 36 Am. Rep. 572.

² 1 Hurl. & N. 773; s. c. 3 Jur. (N. S.) 395, 26 L. J. (Exch.) 171.

³ *Flower v. Penn. &c., R. R. Co.*, 69 Penn. St. 210; s. c. 8 Am. Rep. 251; *New Orleans, &c., R. R. Co. v. Harrison*, 48 Miss. 112; s. c. 12 Am. Rep. 356; *Everhart v. Terre Haute, &c., R. R. Co.*, 78 Ind. 292; s. c. 41 Am. Rep. 567; *Honor v. Albrighton*, 93 Penn. St. 475; *Osborne v. Knox, &c., R. R. Co.*, 68 Me. 49; s. c. 28 Am. Rep. 16. Compare *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637; s. c. 48 Am. Rep. 689; *Kelly v. Johnson*, 128 Mass. 530; s. c. 35 Am. Rep. 398; *Brown v. Byroads*, 47 Ind. 435; *Central R. R. Co., of Ga. v. Sears*, 53 Ga. 630. See, also, *McCullough v. Shoneman*, 105 Penn. St. 169.

such an assistant is injured by the negligence of his servants.¹

The justness of the rule in general is beyond dispute. When the service is entirely voluntary, the volunteer may reasonably be held to assume the risks of his undertaking, and the employer may properly be held not to owe him any duty. And, even though the service be not voluntary, as where an employee of a railway company, a conductor of a freight train at a way station, compelled a bystander—a mere lad—by a threat, to uncouple some cars, and the boy's leg was run over and cut off, the company was held not liable.² But, where one assists the servants of another, at their request, for the purpose of expediting his own business, or the business of the master, the rule is otherwise, and if he is injured by the servant's negligence, the master is liable. In such a case the relation of fellow-servants is held not to exist; and, in case of injury, the rule of *respondeat superior* applies.³

Accordingly we find, in *Wright v. London & North-western Ry. Co.*,⁴ that, where the plaintiff had shipped a heifer by defendant's railway, and, upon the arrival of the train at the station, was assisting in shunting the horse-box, in order to avoid delay in getting the heifer out, and while so assisting was run against and hurt, the defendant was held liable. There was evidence that there was an insufficient number of servants at hand to unload the heifer promptly, and that the stationmaster knew that the plaintiff was assisting in the shunting, and

¹ *Bradley v. New York, &c., R. R. Co.*, 62 N. Y. 99, and compare, *Terre Haute, &c., R. R. Co. v. McMurray*, 98 Ind. 358; S. C. 49 Am. Rep. 752; *Louisville, &c., R. R. Co. v. McVay*, 98 Ind. 391; S. C. 49 Am. Rep. 770.

² *New Orleans, &c., R. R. Co. v. Harrison*, 48 Miss. 112, on the ground that the conductor's act was out of the line of his duty.

³ *Holmes v. North Eastern Ry. Co.*, L. R. 4 Exch. 254, affirmed L. R. 6 Exch. 123. [This is a case, says Chief Justice Coleridge, of the greatest authority, in, that seven judges in the Exchequer Chamber affirmed the decision, for the reasons given by the judges in the Court of Exchequer].

⁴ 1 Q. B. Div. 252; S. C. L. R., 10 Q. B. 298.

assented to it. The court held that in such a case as this the plaintiff was not a mere volunteer, but that he was on the defendants premises with their consent, assisting their servants for the purpose of hastening the delivery of his own goods, and that hence they were liable to him for the negligence of their servants.¹

§ 121. *Partnerships and receivers as employers.*—A servant who is employed by a partnership concern, and is injured by the negligence of a member of the firm, if the work is within the scope of the partnership business, may have his action against the firm.² So, also, it is held that the receiver of an insolvent corporation, being in control of the property, is answerable in his official capacity to employees, for injuries, whenever the corporation itself would otherwise be liable.³

§ 122. *The obligation of the master.*—“The only ground,” said the Court of Appeals, of New York, in *Warner v. Erie Ry. Co.*,⁴ “of liability of a master to an employee, for injuries resulting from the carelessness of a co-employee, which the law recognizes, is that which arises from personal negligence, or from want of

¹ *Wright v. London, &c., Ry. Co.*, *supra*. See, also, *Potter v. Faulkner*, 1 Best & S. 800; s. c. 8 Jur. (N. S.) 259, 31 L. J. (Q. B.) 30, 10 Week. Rep. 93, 5 L. T. (N. S.) 455 [wherein a plaintiff recovered nothing, being held a mere volunteer]; *Cleveland v. Spier*, 16 C. B. (N. S.) 398 [wherein a passerby, being appealed to, by workmen upon a gas pipe in a street, for information, and being injured by their negligence while giving the information, it was held that he was something more than a mere volunteer, and might recover from the master of the workmen]; and *Ormond v. Hayes*, 60 Texas, 180 [wherein a passenger upon a railway train, who, upon arriving at his destination, went forward to the bag-

gage car to assist in getting out his baggage, and was negligently run over and killed while so doing, was allowed his action against the company].

² *Ashworth v. Stanwix*, 3 El. & El. 701; s. c. 7 Jur. (N. S.) 467, 30 L. J. (Q. B.) 183, 4 L. T. (N. S.) 85; *Connolly v. Davidson*, 15 Minn. 519; s. c. 2 Am. Rep. 154. See, also, *Zeigler v. Day*, 123 Mass. 152.

³ *Meara's Admr. v. Holbrook*, 20 Ohio St. 137; s. c. 5 Am. Rep. 633. See, also, *Slater v. Jewett*, 85 N. Y. 61; s. c. 39 Am. Rep. 627. [In this case such an action is brought against a receiver of the Erie railway, and the right to bring it, is not questioned].

⁴ 39 N. Y. 468.

proper care and prudence in the management of his affairs, or the selection of his agent or machinery and appliances." This is a complete statement of the rule as now established. It appears accordingly that the master's liability in this regard is three-fold :

- (a.) for his own personal negligence ;
- (b.) for defective or dangerous machinery, appliances, tools, or premises ;
- (c.) for incompetent or unfit servants.

We have considered the first of these in a former section,¹ and it is not necessary here to do more than suggest the rule. We may, therefore, proceed to consider the liability of the master to an employee for—

§ 123. *Defective, dangerous, or unfit machinery, appliances, tools, or premises.*—In general, a master is bound to exercise ordinary care in respect of the machinery, appliances, tools, materials and premises, which he furnishes to his servants, for the prosecution of the work required of them. If he fail in this regard, and injury result, he is liable. It is his duty not to require his servants to work for him on dangerous premises, or in dangerous buildings, or with dangerous tools, machinery, materials, or appliances. If the servant is injured while in the discharge of his duty, and without his own contributory fault, through the master's dereliction in this respect, the servant may have his action against him.² Personal negligence is the gist of the action, and it must, therefore, appear, to render the master liable, that he knew, or from the nature of the case ought to have known, of the unfitness of the means of labor furnished to the servant, and that the servant did not know, or could not reasonably

¹ § 95, *supra*.

² See upon this point, Mr. Justice Harlan's learned opinion in *Hough v.*

Railway Co., 100 U. S. 213, and cases cited in the reporter's note.

be held to have known of the defect. Knowledge on the part of the employer, and ignorance on the part of the employee are of the essence of the action; or, in other words, the master must be at fault and know of it, and the servant must be free from fault, and ignorant of his master's fault, if the action is to lie. The authorities all state the rule with these qualifications.¹

¹ *Wright v. New York, &c.*, R. R. Co., 25 N. Y. 562; *Booth v. Boston, &c.*, R. R. Co., 67 Id. 593; S. C. 73 N. Y. 38; 29 Am. Rep. 97; *Murphy v. Boston, &c. R. R. Co.*, 88 N. Y. 146; S. C. 42 Am. Rep. 240; *Laning v. New York, &c.*, R. R. Co., 49 N. Y. 521; S. C. 10 Am. Rep. 417; *Ryan v. Fowler*, 24 N. Y. 410; *Fuller v. Jewett*, 80 Id. 46; S. C. 36 Am. Rep. 575; *Vosburgh v. Lake Shore, &c.*, R. R. Co., 94 N. Y. 374; S. C. 46 Am. Rep. 148; *Cone v. Delaware, &c.*, R. R. Co., 81 N. Y. 206; S. C. 37 Am. Rep. 491; *Flike v. Boston, &c.*, R. R. Co., 53 N. Y. 549; S. C. 13 Am. Rep. 545; *Corcoran v. Holbrook*, 59 N. Y. 519; *Hickey v. Taaffe*, Ct. of App. of N. Y. June 2, 1885, 1 Eastern Reporter, 7; *Hawley v. New York, &c.*, R. R. Co., 82 N. Y. 370; *Daley v. Shaaf*, 28 Hun, 314; *Ellis v. New York, &c.*, R. R. Co., 95 N. Y. 546; *Holden v. Fitchburg R. R. Co.* (an instructive and learned opinion by Gray, C. J.), 129 Mass. 268 (and many cases there cited; S. C. 2 Am. & Eng. Ry. Cases, 94; *Ford v. Fitchburg R. R. Co.*, 110 Id. 240; *Cayzer v. Taylor*, 10 Gray, 274; *Snow v. Housatonic, &c.*, R. R. Co., 8 Allen, 441; *Hackett v. Manfg. Co.*, 101 Mass. 101; *Arkerson v. Dennison*, 117 Id. 407; *Walsh v. Peet Valve Co.*, 110 Id. 23; *Wheeler v. Wason Manfg. Co.*, 135 Id. 294; *Magee v. Boston Cordage Co.*, Sup. Jud. Ct., Mass., June 20, 1885, 1 Eastern Reporter, 126; *Baker v. Allegheny R. R. Co.*, 95 Penn. St. 211; S. C. 40 Am. Rep. 634; *Patterson v. Pittsburgh, &c.*, R. R. Co., 76 Penn. St., 389; S. C. 18 Am. Rep. 412; *Johnson v. Bruner*, 61 Penn. St., 58; *O'Donnell v. Allegheny R. R. Co.*, 59 Id. 239; *Ardesco Oil Co. v. Gilson*, 63 Id. 146; *Riley v. State Line Steamship Co.*, 29 La. Ann. 791; S. C. 29 Am. Rep. 349; *Greenleaf v. Ill., &c.*, R. R. Co., 29 Iowa, 14; *Muldowney v. Id.* 39 Id. 615; *Tuttle v. Chicago, &c.*, R. R. Co., 48 Id. 236; *Brann v. Id.*, 53 Id. 595; *Baldwin v. Railroad Co.*, 50 Id. 680; *Way v. Illinois, &c.*, R. R. Co., 40 Id. 341; *Halloway v. Henley*, 6 Cal. 209; *McGlynn v. Brodie*, 31 Id. 376; *Baxter v. Roberts*, 44 Id. 187; *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81; *Quaid v. Cornwall*, 13 Id. 601; *Hayden v. Manfg. Co.*, 29 Conn. 549; *St. Louis, &c.*, R. R. Co. v. *Valirius*, 56 Ind. 512; *Columbus, &c.*, R. R. Co. v. *Arnold*, 31 Id. 174; *Thayer v. St. Louis, &c.*, R. R. Co., 22 Id. 26; *Indianapolis, &c.*, R. R. Co. v. *Love*, 10 Id. 554; *Shanny v. Androscoggin, &c.*, R. R. Co., 66 Me. 420; *Buzzell v. Manfg. Co.*, 48 Id. 113; *Wonder v. Baltimore, &c.*, R. R. Co., 32 Md. 411; S. C. 3 Am. Rep. 143; *Cumberland R. R. v. Hogan*, 45 Id. 229; *Hardy v. Carolina, &c.*, R. R. Co., 76 N. C. 5; *Cowles v. Richmond, &c.*, R. R. Co., 84 Id. 309; S. C. 37 Am. Rep. 620; *Fifield v. Northern, &c.*, R. R. Co., 42 N. H. 225; *Harrison v. Central R. R. Co.*, 31 N. J. Law, 293; *Paulmier v. Erie Ry. Co.*, 34 Id. 151; *Smith v. Oxford Iron Co.*, 42 Id. 467; S. C. 36 Am. Rep. 535; *Manfg. Co. v. Morrissey*, 40 Ohio St. 148; S. C. 48 Am. Rep. 669; *Columbus, &c.*, R. R. Co. v. *Webb*, 12 Id. 475; *Mad River R. R. Co. v. Barber*, 5 Id. 541; *Guthrie v. Louisville &c.*, R. R. Co., 11 Lea, 372; S. C. 47 Am. Rep. 286; *East Tennessee, &c.*, R. R. Co. v. *Duffield*, 12 Id. 63; 47 Am. Rep. 319; *Nashville, &c.*, R. R. v. *Jones*, 9 Heisk. 27; *Id. v. Elliott*, 1

§ 124. *The master's duty as to machinery, &c., a continuing duty.*—Not only must the master furnish safe and suitable means and facilities to his servants, for performing the work he requires of them, but the law imposes upon him the additional duty of taking care that this machinery, and these tools and instrumentalities of labor are kept in a safe and proper condition. Having provided safe and suitable machinery, the master's duty is not done. He cannot remain passive. He must continue to take ordinary care, and see to it that the machinery is properly inspected, and kept in repair, and in no way allowed to grow dangerous or unfit by use.¹

Caldw. 611; Atchison, &c., R. R. Co. v. Holt, 29 Kan. 149; Id. v. Moore, 29 Id. 632; Noyes v. Smith, 29 Vt. 59; Hathaway v. Michigan, &c., R. R. Co., 51 Mich. 253; s. C. 47 Am. Rep. 569; Foley v. Chicago, &c., R. R. Co., 48 Mich. 622; s. C. 42 Am. Rep. 481; Botsford v. Michigan, &c., R. R. Co., 33 Id. 256; Fort Wayne, &c., R. R. Co. v. Gildersleeve, 33 Id. 134; Michigan, &c., R. R. Co. v. Smithson, 45 Id. 212; Huizega v. Cutler, &c., Lumber Co., 51 Id. 272; Houston, &c., R. R. v. Dunham, 49 Texas, 181; Id. v. Oram, 49 Id. 341; International R. R. Co. v. Doyle, 49 Id. 190; Hobbs v. Stauer Sup. Ct., Wis., 1885, xix Albany Law Jour. 490; Wedgewood v. Chicago, &c., R. R. Co., 41 Wis. 478; s. C. 44 Id. 44; Dorsey v. Phillips, &c., Co., 42 Id. 583; Ballou v. Chicago, &c., R. R. Co., 54 Id. 259; s. C. 41 Am. Rep. 31; Flannagan v. Railroad Co., 45 Wis. 98; s. C. 50 Id. 462; Chicago, &c., R. R. Co. v. Russell, 91 Ill. 298; Indianapolis, &c., R. R. Co. v. Toy, 91 Id. 474; s. C. 33 Am. Rep. 57; Toledo, &c., R. R. Co. v. Asbury, 84 Ill. 429; Indianapolis, &c., R. R. Co. v. Flanigan, 77 Id. 365; Columbus, &c., R. R. Co. v. Troesch, 68 Id. 545; s. C. 18 Am. Rep. 578; Chicago, &c., R. R. Co. v. Jackson, 55 Ill. 492; Illinois, &c., R. R. Co. v. Welch, 52 Id. 183; Chicago, &c., R. R. Co. v. Swett, 45 Id. 197; Missouri Furnace Co. v. Abend, 107 Id. 44; s. C. 47 Am. Rep. 425; East, &c., R. R. Co. v. Hightower, 92 Ill. 139; Le Claire v. First Div., &c., R. R. Co., 20 Minn. 9; Greene v. Minneapolis, &c., R. R. Co., 31 Id. 248; s. C. 47 Am. Rep. 785; Flynn v. Kansas, &c., R. R. Co., 98 Mo. 195; s. C. 47 Am. Rep. 99; Dowling v. Allen, 74 Mo. 13; s. C. 41 Am. Rep. 298; Stoddard v. St. Louis, &c., R. R. Co., 65 Mo. 514; Dale v. St. Louis, &c., R. R. Co., 63 Id. 455; Conroy v. Iron Works' Co., 62 Id. 35; Porter v. Hannibal, &c., R. R. Co., 60 Id. 160; Lewis v. St. Louis, &c., R. R. Co., 59 Id. 495; Devitt v. Pacific, &c., R. R. Co., 50 Id. 302; Gibson v. Id. 46 Id. 163; s. C. 2 Am. Rep. 497; Brickman v. South Carolina, &c., R. R. Co., 8 S. C. 173; Holland v. Chicago, &c., R. R. Co., 5 McCrary, 549; Dillon v. Union Pacific R. R. Co., 3 Dill. 319; Jones v. Yeager, 2 Id. 64; Woodworth v. St. Paul, &c., R. R. Co., 5 McCrary, 574; Patterson v. Wallace, 1 Macq. 748; Clarke v. Holmes, 6 Hurl & N. 349; s. C. 7 Id. 937; Marshall v. Stewart, 2 Macq. 30; Griffith's v. London, &c., Docks Co., 50 L. T. (N. S.) 755; s. C. 12 Q. B. Div. 493. Judgment affirmed in the High Court of Appeal, June 24, 1884.

¹ Fuller v. Jewett, 80 N. Y. 46; s. C. 36 Am. Rep. 575; Laning v. New York, &c., R. R. Co., 49 N. Y. 521;

The duty of maintaining machinery in repair, for the protection and safety of employees, is the same in kind as the duty of furnishing a safe and proper machine in the first instance, and an employer is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep the machinery in safe condition. This rule has been somewhat modified in recent decisions affecting the liability of railway companies for injuries to their employees from the defective condition of cars received by them from other roads in the usual course of business, for transportation. If these cars come into their possession in apparent good order, it has been held that the receiving company is under no obligation as to its employees to inspect them, and is not liable for injuries to them occasioned by defects in such cars.¹

This is a harsh rule, and the reasoning upon which these cases are based is not satisfactory. In *O'Neil v. St. Louis Iron Mountain & Southern Ry. Co.*,² it is denied by Treat, D. J., in the Circuit Court of the United States, for the Eastern District of Missouri. In this case it is held that where an accident occurs to an employee, from such a cause, he may recover from the company, the court sturdily insisting upon the importance of holding

s. C. 10 Am. Rep. 417; *Warner v. Erie Ry. Co.*, 39 Id. 468; *Brick v. Rochester, &c. R. R. Co.*, 98 N. Y. 211; *Ford v. Fitchburg, R. R. Co.*, 110 Mass. 240; s. C. 14 Am. Rep. 598; *Shanny v. Androscoggin Mills*, 66 Me 420; *Brann v. Chicago, &c., R. R. Co.*, 53 Iowa, 595; *Solomon R. R. Co. v. Jones*, 30 Kan. 601; *Atchison, &c., R. R. Co. v. Holt*, 29 Id. 149; *Condon v. Mo. Pac. R. R. Co.*, 78 Mo. 567; *Kain v. Smith*, 25 Hun, 149; *Toledo, &c., R. R. Co. v. Moore*, 77 Ill. 217; *Hough v. Railway Co.*, 100 U. S. 213; *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; *Gilman v. Eastern R. R. Co.*, 13 Allen, 440; *Pierce on Railroads*, § 370.

¹ *Ballou v. Chicago, &c., R. R. Co.*, 54 Wis. 259; s. C. 41 Am. Rep. 31; *Smith v. Flint, &c., R. R. Co.*, 46 Mich. 258; *Michigan, &c., R. R. Co. v. Smithson*, 45 Id. 212; *Mackin v. Boston, &c., R. R. Co.*, 135 Mass. 201; *Baldwin v. Chicago, &c., R. R. Co.*, 50 Iowa, 680. See, also, *Davis v. Detroit, &c., R. R. Co.*, 20 Mich. 105; *Hulett v. St. Louis, &c., R. R. Co.*, 67 Mo. 240; *Lovejoy v. Boston, &c., R. R. Co.*, 125 Mass. 79; s. C. 28 Am. Rep. 206; *Foley v. Chicago, &c., R. R. Co.*, 48 Mich. 622; s. C. 42 Am. Rep. 481.

² 9 Fed. Rep. 337.

employers to a strict account in the matter of injuries to their employees.

§ 125. *Master must provide safe and good, but not the safest and best appliances.*—We have seen that the law requires the master to furnish safe and reasonably good machinery to his servant, and to keep that machinery in reasonably good order; or, in other words, that the law imposes upon an employer the duty of ordinary care, both as to furnishing the instrumentalities of labor, and also as to keeping them in repair. And here, it is necessary to be careful not to go further. The law imposes no further or higher obligation upon an employer than this. As a general rule he is not under obligation to make use of the safest appliances and instruments, nor to change his machinery with every new invention, nor to introduce every supposed improvement in appliances.¹

In *Kelley v. Silver Spring Co.*,² it is held that where an employer has kept imperfect and unfenced machinery in use for a long time, and it has been safely used by his employees, he is not liable in damages for an injury to one of them, occasioned by its unfitness.³ While, *per contra*, some courts go to the other verge of the rule and hold that railway companies, in equipping their roads

¹ *Wonder v. Baltimore, &c., R. R. Co.*, 32 Md. 411; s. c. 3 Am. Rep. 143; *Jones v. Granite Mills*, 126 Mass. 84; *Keith v. Id.*, 126 Id. 90; *Ft. Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541; *Burke v. Witherbee*, 98 N. Y. 562; *Western, &c., R. R. Co. v. Bishop*, 50 Ga. 465; *Leonard v. Collins*, 70 N. Y. 90; *Botsford v. Michigan, &c., R. R. Co.*, 33 Mich. 256; *Ladd v. New Bedford, &c., R. R. Co.*, 119 Mass. 412; s. c. 20 Am. Rep. 331; *Greenleaf v. Illinois, &c., R. R. Co.*, 29 Iowa, 14;

Devitt v. Pacific, &c., R. R. Co., 50 Mo. 302; *East Tennessee, &c., R. R. Co. v. Duffield*, 12 Lea, 63; s. c. 47 Am. Rep. 319; *Dynen v. Leach*, 26 L. J. (Exch.) 221.

² 12 R. I. 112; s. c. 34 Am. Rep. 615.

³ See, also, *Sullivan v. India Manufacturing Co.*, 113 Mass. 396; *Burke v. Witherbee*, 98 N. Y. 562; *Hayden v. Manfg. Co.*, 29 Conn. 548; *Hobbs v. Stauer*, Sup. Ct., Wis., 19 Am. Law Rev. 690; *Schroeder v. Michigan Car Co.*, Sup. Ct., Mich., Jan. 28, 1885, 32 Alb. Law Jour. 134.

with freight cars, as between those that are more and those that are less dangerous in their construction, are bound to use the safer kind, and are responsible to their employees if they do not.¹

Either extreme is within the rule. The obligation of the master is to act in good faith, with ordinary care, and whether the rule shall be more or less stringently applied will depend upon the circumstances of each case. In some avocations, good faith and ordinary care alike may justify the continued use of very primitive and inefficient apparatus; in others, nothing short of the most perfect appliances may be justifiable. The courts will hardly ever be in danger of misapplying so simple and so reasonable a rule.²

§ 126. *Master not a guarantor of the safety, or sufficiency, of his appliances.*—Neither is the master to be held to insure the safety, or sufficiency, of his machinery. His duty is fully discharged when he has furnished proper appliances and instrumentalities, and while he keeps them in ordinary repair. The test of his liability, therefore, is not the question: “Was the machinery absolutely safe?” nor, “Could the master have done anything which he did not do to render it safe?” but, “Did the master exercise ordinary care?” “Did he do anything affecting the safety of the machinery, which, in the exercise of ordinary care, he should not have done; or did he omit anything that ordinary prudence dictates?”³

¹ Greenleaf *v.* Illinois, &c., R. R. Co., 29 Iowa, 14; St. Louis, &c., R. R. Co. *v.* Valirius, 56 Ind. 511. See, also, Toledo, &c., R. R. Co. *v.* Wand, 48 Id. 476; Hegeman *v.* Western, &c., R. R. Co., 13 N. Y. 9; Smith *v.* New York, &c., R. R. Co., 19 Id. 127.

² See the luminous opinion of Mr. Justice Harlan in Hough *v.* Texas and

Pacific R. R. Co., 100 U. S. 213; 1 Redf. on Railways, 521, note; Wharton on Neg., §§ 211, 212, 213; Maginnis *v.* Canada Southern Bridge Co., 49 Mich. 171; Batterson *v.* Chicago, &c., R. R. Co., 49 Id. 184.

³ Leonard *v.* Collins, 70 N. Y. 90; Indianapolis, &c., R. R. Co. *v.* Toy, 91 Ill. 474; Ladd *v.* New Bedford, &c., R. R. Co., 119 Mass. 412; In-

It is obvious that, were the master the warrantor of the machinery in his factory, or the tools and appliances which he furnished to his servants—if he were held, as to his servants, to guarantee that no harm should come from defects or faults in the instrumentalities employed in performing their labor, there would be no end to his liability. It would be a most mischievous doctrine. The possibility of injury from machinery, under the rule of law requiring ordinary care in respect to it from the master, is one of the proper risks that the servant takes into account when he enters the service. The tendency of one or two of the State courts to extend the rule as to the responsibility of the master in this regard until it shall amount, for practical purposes, to a warranty of all his tools and machinery and premises, is, in the writer's opinion, without any sound basis in the reason of the case, and it may easily be believed that such a rule, as a rule, would be as nearly wholly bad as any rule of law is ever likely to be.¹

§ 127. *Incompetent and unfit employees.*—The responsibility of a master to each of his servants for the competency and fitness of the other servants he employs to work with them, is, in every way, analogous to the duty he owes them in regard to the machinery and all the other instrumentalities he furnishes for the performance of the work. As it is his duty to furnish only safe facil-

dianapolis, &c., R. R. Co. v. Love, 10 Ind. 554; Devlin v. Smith, 89 N. Y. 470; S. C. 42 Am. Rep. 311; East Tenn., &c., R. R. Co. v. Duffield, 12 Lea, 63; S. C. 47 Am. Rep. 319; Hard v. Vermont, &c., R. R. Co., 32 Vt. 473; Wood's Master and Servant, 696; Skerritt v. Scallan, 11 Ir. C. L. R. 389; Ormond v. Holland, El. Bl. & El. 102; Shear & Redf. on Neg., § 87. See, also, Chicago, &c., R. R.

Co. v. Swett, 45 Ill. 197; Hayden v. Smithville Manfg. Co., 29 Conn. 548.

¹ See East., &c., R. R. Co. v. High-tower, 92 Ill. 139; Indianapolis, &c., R. R. Co. v. Toy, 91 Ill. 474; Warner v. Erie Ry. Co., 49 Barb. 558; S. C. 39 N. Y. 468; Steffen v. Chicago, &c., R. R. Co., 46 Wis. 259; Morrison v. Construction Co., 44 Wis. 405; Smith v. Chicago, &c., R. R. Co., 42 Wis. 520; DeGraff v. New York, &c., R. R. Co., 76 N. Y. 125.

ities for the work, in the shape of tools, machinery, premises, etc., and to use ordinary care, as we have shown, to keep them in a safe and sound condition, so the law imposes upon him the duty, as toward his servants, of seeing to it that only competent and suitable persons are employed to perform his work in association with them. And here, also, the measure of his obligation is ordinary care. He must take ordinary and reasonable precautions not to employ reckless, dissipated or incompetent servants for positions where their fault may injure their fellow-servants, and if he fail to do this, he is liable in case of such an injury.¹

So the master is liable if his servant is injured, not through the unfitness or incompetence of a fellow-servant, but because an insufficient number of servants are provided to do the required work properly, and with due regard to the safety of those performing it. It is equally wrong to hire too few as to hire unfit servants. The master must provide servants enough in every instance to do his work.²

§ 128. *The duty as to servants also a continuing duty.*—As in the matter of machinery, etc., so, in regard to servants, the master must not only use ordinary care in hiring only such as are fit and competent and reason-

¹ *Cowles v. Richmond, &c., R. R. Co.*, 84 N. C. 309; *S. C. 37 Am. Rep. 620*; *Laning v. New York, &c., R. R. Co.*, 49 N. Y. 521; *Illinois, &c., R. R. Co. v. Welch*, 52 Ill. 183; *Houston, &c., R. R. Co. v. Oram*, 49 Texas, 341; *Tyson v. North Alabama, &c., R. R. Co.*, 61 Ala. 554; *S. C. 32 Am. Rep. 8*; *Noyes v. Smith*, 28 Vt. 63; *Cayzer v. Taylor*, 10 Gray, 274; *McMahon v. Davidson*, 12 Minn. 357; *Hogan v. Central Pac., &c., R. R. Co.*, 49 Cal. 128; *Davis v. Detroit, &c., R. R. Co.*, 20 Mich. 105; *Moss v. Pacific, &c., R. R. Co.*, 49 Mo. 167; *Frazier v. Penn., &c., R. R. Co.*, 38 Penn. St. 104.

² *Booth v. Boston, &c., R. R. Co.*, 73 N. Y. 38; *S. C. 29 Am. Rep. 97*; *Flike v. Boston, &c., R. R. Co.*, 53 N. Y. 549; *S. C. 13 Am. Rep. 545*; *Chicago, &c., R. R. Co. v. Taylor*, 69 Ill. 461; *S. C. 18 Am. Rep. 626*; *Luebke v. Chicago, &c., R. R. Co.*, 59 Wis. 127; *S. C. 48 Am. Rep. 483*; *Lake Shore, &c., R. R. Co. v. Lavalley*, 36 Ohio St. 221; *Smith v. Chicago, &c., R. R. Co.*, 42 Wis. 526; *Vose v. London and Yorkshire Ry. Co.*, 2 Hurl. & N. 728.

ably skillful, but it is his duty not to retain a servant in his employ when he discovers him to be unfit for the place he occupies. It is as wrong to retain an unfit servant as to employ one at the start, and this is the rule when a servant, who was originally competent and skillful when employed, has become, subsequently, either from habits of intemperance, or from any other cause, incompetent, or habitually careless and reckless.¹

§ 129. *The master not held to warrant the faithfulness or competency of his servants.*—Again, as has appeared in regard to machinery, the master does not warrant the competency and faithfulness of any of his servants to the rest. His liability is not of so strict a nature as this. His duty in the matter of employing and retaining and watching over his servants is measured by the rule of ordinary carefulness and prudence, and when he has selected them with discretion, and omitted nothing that prudence dictates in overseeing them, he has done what the law requires of him.²

§ 130. *The master may act through an agent and become responsible for his acts.*—Obviously, an employer may

¹ Laning v. New York, &c., R. R. Co., 49 N. Y. 521; s. c. 10 Am. Rep. 417; Columbus, &c., R. R. Co. v. Troesch, 68 Ill. 545; s. c. 18 Am. Rep. 578; Chapman v. Erie Ry. Co., 55 N. Y. 579; Corson v. Maine, &c., R. R. Co., 76 Me. 244; Baulec v. New York, &c., R. R. Co., 59 N. Y. 356; s. c. 5 Lans. 436; 62 Barb. 623; 17 Am. Rep. 325; Michigan, &c., R. R. Co. v. Dolan, 32 Mich. 510; Shanny v. Androscoggin Mills, 66 Me. 418; Illinois, &c., R. R. Co. v. Jewell, 46 Ill. 99. See, also, Curran v. Merchant's Manufacturing Co., 130 Mass. 374; s. c. 39 Am. Rep. 457; Ohio, &c., R. R. Co. v. Collarn, 73 Ind. 261; s. c. 38 Am. Rep. 134; Gillenwater v. Madison, &c., R. R. Co., 5 Ind. 339; s. c. 61 Am. Dec. 101.

² Tarrant v. Webb, 18 C. B. 797; Ormond v. Holland, El., Bl. & El., 102; Indianapolis, &c., R. R. Co. v. Love, 10 Ind. 554; Faulkner v. Erie Ry. Co., 49 Barb. 324; Columbus, &c., R. R. Co. v. Troesch, 68 Ill. 545; s. c. 18 Am. Rep. 578; Beaulieu v. Portland Co., 48 Me. 291; Moss v. Pacific, &c., R. R. Co., 49 Mo. 167; s. c. 8 Am. Rep. 126; Blake v. Maine, &c., R. R. Co., 70 Me. 60; s. c. 35 Am. Rep. 297; Lawler v. Androscoggin R. R. Co., 62 Me. 467; s. c. 16 Am. Rep. 492. See, also, Cotton v. Edwards, 123 Mass. 484; Cummings v. Grand Trunk Ry. Co., 4 Cliff. 478.

perform all his duties in respect of his machinery and his employees through agents, and will, in such a case, be responsible for their acts. In this respect a corporation stands on the same footing as an individual, and both are equally bound to use, with respect of employees and machinery, such care and prudence as the nature and dangers of their business require. If either entrust their duties to an agent they are equally responsible if injury results from the improper acts of their representative.¹

§ 131. *The rule as to minor servants.*—The rule of law which exempts an employer from liability to one of his employees for an injury occasioned by the fault of a co-employee, proceeding upon the theory of the implied contract that the servant takes the risks of his employment, has been applied in many jurisdictions to minor servants. Assuming that an adult employee does tacitly contract with his employer that if he is injured through the carelessness of a fellow-employee he will bear the consequences, the rule, in all its strictness, has been held to apply to children ten, twelve and fourteen years old, injured without any contributory carelessness through the carelessness of some other so-called fellow-employee, with whom, in some instances, they had no association or connection. If this rule has any substantial basis it is the basis of an implied contract. Upon no other

¹ Michigan, &c., R. R. Co. v. Dolan, 32 Mich. 510; Corcoran v. Holbrook, 59 N. Y. 517; Crispin v. Babbitt, 81 N. Y. 516; s. c. 37 Am. Rep. 521; Mitchell v. Robinson, 80 Ind. 281; s. c. 41 Am. Rep. 812; Flike v. Boston, &c., R. R. Co., 53 N. Y. 549; s. c. 13 Am. Rep. 545; Ryan v. Bagaley, 50 Mich. 179; s. c. 45 Am. Rep. 35; Tyson v. North Ala., &c., R. R. Co., 61 Ala. 554; Harper v. Indianapolis, &c., R. R. Co., 47 Mo. 567; Brickner v. New York, &c., R. R. Co., 2 Lans. 506; affirmed, 49 N. Y. 672; Wilson v. Willimantic, &c., Co., 50 Conn. 433; s. c. 47 Am. Rep. 653; Cowles v. Richmond, &c., R. R. Co., 84 N. C. 309; Magee v. Boston Cordage Company, Sup. Jud. Ct., Mass., June 20, 1885, 1 Eastern Reporter, 126; Gunter v. Graniteville Manfg. Co., 18 S. C. 362; s. c. 44 Am. Rep. 573. Compare § 110, *supra*.

ground yet suggested is it for an instant tenable. Inasmuch as minors are not bound by their express contracts with their employers,¹ having, in contemplation of law, no power to make a contract, it is not plain upon what theory this rule can in justice be held to apply to them. If the policy of the law refuses to bind a minor by his own deliberate express contract to his employer, much more, it is submitted, should the policy of the law refuse to fix upon an employee of tender years so onerous and artificial an implied contract as this. The law in this regard is in a very unsatisfactory condition. It is held that the fact of infancy does not alter or modify the rule, and in this position, as in very many of the others tending to extend the rule, the Massachusetts Supreme Judicial Court takes the lead.²

Even in those cases in which the facts were such that a judgment for the infant plaintiff was sustained, and in which the master was held to a somewhat higher degree of responsibility and care as to his infant employees, the rule itself is not questioned. It is in every such case that I have found, assumed to be the law that under a proper state of facts an infant employee can, neither less nor more than an adult, recover for injuries that befall him through the carelessness of his co-employees.³

¹ Read, as to this point, 2 Kent's Com. 193; *Gartland v. Toledo, &c., R. R. Co.*, 67 Ill. 498; *Nashville, &c., R. R. Co. v. Elliott*, 1 *Caldw.* 611; *Fones v. Phillips* 39 *Ark.* 17; *S. C.* 43 *Am. Rep.* 264; *Wood v. Fenwick*, 10 *Mee. & W.* 195; *Keane v. Boycott*, 2 *Henry B.* 511; *R. v. St. Petroix*, 4 *T. R.* 196; *R. v. Arundel*, 5 *Mau. & Sel.* 257; *R. v. Chillesford*, 4 *Barn. & C.* 94.

² *King v. Boston, &c., R. R. Co.*, 9 *Cush.* 112; *Curran v. Manfg. Co.*, 130 *Mass.* 374; *S. C.* 39 *Am. Rep.* 457; *Sullivan v. India Manfg. Co.*, 113 *Id.* 396;

O'Connor v. Adams, 120 *Id.* 427; *Fones v. Phillips*, 39 *Ark.* 17; *S. C.* 43 *Am. Rep.* 264; *Brown v. Maxwell*, 6 *Hill.* 592; *S. C.* 41 *Am. Dec.* 771; *Gartland v. Toledo, &c., R. R. Co.*, 67 *Ill.* 498; *Hayden v. Manfg. Co.*, 29 *Conn.* 548; *Nashville, &c., R. R. Co. v. Elliott*, 1 *Coldw.* 611; *Ohio, &c., R. R. Co. v. Hammersley*, 28 *Ind.* 371; *cf. Hickey v. Taaffe*, *Ct. of App., N. Y.*, June 2, 1885, 1 *Eastern Reporter*, 7, a decision under the New York statute designed to protect minor servants.

³ *Hill v. Gast*, 55 *Ind.* 45; *Coombs-*

§ 132. *Where the master orders the servant into danger, or into a service which he did not contract to perform.*—If the master order the servant into danger, or into a service other than that for which he was employed, his obedience will not, as a matter of law, be negligence; in case he is injured in such an undertaking, and for such an injury, it is held that the master is liable. So, also, has the servant his action when he is exposed to some sudden or unusual danger, by the master's neglect, in performing his work.¹ But where a servant wanders voluntarily away from his post of duty, prompted by curiosity or idleness, and is injured, he has no remedy.²

§ 133. *The patent and latent dangers of the employment.*—It follows almost necessarily from what has gone before, in view of the consideration that a master is not to be held to warrant the safety of the machinery he furnishes to his servants, but that the measure of his responsibility in regard to it is ordinary care and prudence, that a master is not liable to an employee for latent defects in the tools, machinery, materials or

v. New Bedford Co., 102 Mass. 572; S. C. 3 Am. Rep. 506; *Dowling v. Allen*, 74 Mo. 13; S. C. 41 Am. Rep. 298; *Wood's Master and Servant*, § 349; *Fort v. Union Pacific R. R. Co.*, 2 Dill. 259; S. C. 17 Wall. 553; *Atlanta Cotton Factory v. Speer*, 69 Ga. 137; S. C. 47 Am. Rep. 750; *Grizzle v. Frost*, 3 Fost. & Fin. 622; *Britton v. Great Western Co.*, L. R. 7 Exch. 130; *Anderson v. Morrison*, 22 Minn. 274.

¹ *Mann v. Oriental Print Works*, 11 R. I. 153; *Chicago, &c., R. R. Co. v. Bayfield*, 37 Mich. 205; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; S. C. 27 Am. Rep. 510; *Fort v. Union Pacific R. R. Co.*, 17 Wall. 553; S. C. 2 Dill. 259; *Anderson v. Morrison*, 22 Minn. 274; *Luecke v. Chicago, &c., R. R. Co.*, 59 Wis. 127; S. C. 48 Am. Rep. 483; *Chicago, &c., R. R. Co. v.*

Harney, 28 Ind. 28; *Fairbank v. Haentzsche*, 73 Ill. 237; *Lalor v. Chicago, &c., R. R. Co.*, 52 Id. 404; *Bradley v. New York, &c., R. R. Co.*, 62 N. Y. 99; *Patterson v. Pittsburgh, &c., R. R. Co.*, 76 Penn. St. 394; S. C. 18 Am. Rep. 412; *Dowling v. Allen*, 74 Mo. 13; S. C. 41 Am. Rep. 298; *Miller v. Union Pacific R. R. Co.*, 4 McCrary, 115; *Thompson v. Chicago, &c., R. R. Co.*, 4 Id. 629. *Contra. Cummings v. Collins*, 61 Mo. 520; *Williams v. Churchill*, 137 Mass. 243.

² *Wright v. Rawson*, 52 Iowa, 329; S. C. 35 Am. Rep. 275; *Sinclair v. Berndt*, 87 Ill. 174; *Honor v. Albrighton*, 93 Penn. St. 475; *Texas, &c., R. R. Co. v. Vallie*, 60 Texas, 481; *Batchelor v. Fortescue*, 11 L. R. Q. B. Div. 474.

appliances furnished for the work. If an injury befalls an employee by reason of a defect which ordinary inspection and oversight would not, or did not detect, ordinary care in the premises having been exercised, then the master is not liable. It is one of the assumed risks of the employment.¹

It is the theory of the decisions that the servant takes the risk only of what may be denominated "seen dangers," but by this is understood nothing more than that a servant is entitled, when there is any danger connected with the machinery or employment in which he is engaged and which ordinary inspection and carefulness on his part will not enable him to avoid, to have it distinctly announced to him. It is meant that, as to such danger, it is particularly the duty of the employer to warn him. He is plainly entitled to have them pointed out when he enters upon the service. When this is done in good faith they become a part of his contract, but for any failure in this regard, when injury ensues, the master is liable;² and the obligation to warn the employee of danger is the greater in proportion as the employee is inexperienced and in need of the caution, and greater as to minor employees than to adults.³ Accordingly, it is held that wherever the em-

¹ *Malone v. Hathaway*, 64 N. Y. 5; S. C. 21 Am. Rep. 573; *Georgia, &c., R. R. Co. v. Kenney*, 58 Ga. 485; *Ladd v. New Bedford, &c., R. R. Co.*, 119 Mass. 412; S. C. 20 Am. Rep. 331; *Ford v. Fitchburg R. R. Co.*, 110 Id. 240; S. C. 14 Am. Rep. 598; *Riley v. Steamship Co.*, 29 La. Ann. 791; S. C. 29 Am. Rep. 349; *Murphy v. Boston, &c., R. R. Co.*, 88 N. Y. 146; S. C. 42 Am. Rep. 240; *Readhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412.

² *Parkhurst v. Johnson*, 50 Mich. 70; S. C. 45 Am. Rep. 28; *Swoboda v. Ward*, 40 Id. 420; *Baker v. Alle-*

gheny R. R. Co., 95 Penn. St. 211; S. C. 40 Am. Rep. 634; *Smith v. Oxford Iron Co.*, 42 N. J. Law. 467; S. C. 36 Am. Rep. 535; *Coombs v. New Bedford, &c., Co.*, 102 Mass. 585; S. C. 3 Am. Rep. 506; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Paulmier v. Erie Ry. Co.*, 34 N. J. Law, 151; *Sullivan v. India Manfg. Co.*, 113 Mass. 396; *International, &c., R. R. Co. v. Doyle*, 49 Texas, 190.

³ *Parkhurst v. Johnson*, 50 Mich. 70; S. C. 45 Am. Rep. 28; *Coombs v. New Bedford, &c., Co.*, 102 Mass. 585; *O'Connor v. Adams*, 120 Id. 427; *Wood's Master and Servant*,

ployee's means of information are equal to or greater than those of his employer, the employer will be excused from giving the warning, and will not be liable in case of injury from a defect of that sort.¹

But this is, perhaps, but little more than to say that the servant, as well as the master, is bound to ordinary care. For patent defects the master, as a rule, is not liable, and in one case at least it is held that they need not be pointed out, even to minor employees.²

§ 134. *Overhead railway bridges, depot roofs, &c.*— Among "seen dangers," or patent defects, some courts have classed such railway bridges as have covers or overhead frame-work, so constructed that a man standing upon the top of a freight car cannot pass under them without being struck. There are a number of cases which, in substance, have held that it is neither negligent nor criminal for a railway company to build bridges in this way; that such structures are among the ordinary risks of the employment of freight train-men; that, when they are informed of the existence and situation of such bridges, they must be held to assume the risk of being hit by them, and that, therefore, when they are hit and killed, or injured by them, it is the result of their own negligence for which the company is not liable. The duty of freight train-men requires them, or some of them,

§ 349; *Sullivan v. India Manfg. Co.*, 113 Mass. 396; *Grizzle v. Frost*, 3 Fost. & Fin. 622; *Fort v. Pacific, &c.*, R. R. Co., 17 Wall. 554; S. C. 2 Dill. 259.

¹ *Georgia, &c., R. R. Co. v. Kenney*, 58 Ga. 485; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541.

² *Fones v. Phillips*, 39 Ark. 17; S. C. 43 Am. Rep. 264, a decision not to be commended. See, also, two recent Tennessee cases, wherein a railway company is held liable to em-

ployees for patent defects in tools furnished them, the tool being in each case a maul or hammer, and the defect in one case being of such a character, that the servant might have seen it if he had looked. *Guthrie v. Louisville, &c., R. R. Co.*, 11 Lea. 372; S. C. 47 Am. Rep. 286, and in the other, of such an obvious nature, that the servant used it only under protest. *East Tennessee, Virginia & Georgia R. R. Co. v. Duffield*, 12 Lea, 63; S. C. 47 Am. Rep. 319.

to be upon the top of the cars much of the time when the train is in motion; they must stand erect, and go rapidly from one car to another, in the night as well as in the day-time. If the roof or overstructure of the bridge is so low that it will strike a brakeman standing erect upon the top of his train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building and maintaining these man-traps. Such bridges are, notwithstanding all that can be urged against them, lawful structures in New Jersey, New York, Maryland, Missouri, Pennsylvania, and, by a very recent decision, in Virginia.¹

§ 135. *Injuries to train-men in coupling cars.*—It is not, as has already appeared, negligence *in se* to engage in a dangerous occupation, or to do dangerous work.² It is accordingly held not negligence as a matter of law, for a brakeman to make dangerous couplings of freight cars;³ nor even to go between the cars while the train is in motion to couple or uncouple them.⁴ While it is the

¹ *Baylor v. Delaware, &c., R. R. Co.*, 40 N. J. (Law), 23; s. c. 29 Am. Rep. 208; *Owen v. New York, &c., R. R. Co.*, 1 Lans. 108. [See, also, *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; s. c. 20 Am. Rep. 552]; *Baltimore, &c., R. R. Co. v. Strickler*, 51 Md. 47; s. c. 34 Am. Rep. 291; *Devitt v. Pacific, &c., R. R. Co.*, 50 Mo. 302; *Rains v. St. Louis, &c., R. R. Co.*, 71 Mo. 164; s. c. 36 Am. Rep. 459; *Pittsburgh, &c., R. R. Co. v. Sentmeyer*, 92 Penn. St. 276; s. c. 37 Am. Rep. 684; *Clark's Admr. v. Richmond, &c., R. R. Co.*, 78 Va. 709; s. c. 49 Am. Rep. 394. See, also, *Lovejoy v. Boston, &c., R. R. Co.*, 125 Mass. 79; s. c. 28 Am. Rep. 206; *Wells v. Burlington, &c., R. R. Co.*, 56 Iowa, 520; *Hall v. Union Pacific*

R. R. Co., 5 McCrary, 465; *Chicago, &c., R. R. Co. v. Russell*, 91 Ill. 298; s. c. 33 Am. Rep. 54; *Sewell v. City of Cohoes*, 75 N. Y. 45; s. c. 31 Am. Rep. 418; *Warden v. Old Colony R. Co.*, 137 Mass. 204.

² § 12, *supra*, and § 139 *infra*.

³ *Baird v. Chicago, &c., R. R. Co.*, 61 Iowa, 359; *Beems v. Id.*, 58 Id. 150; *Pennsylvania Co. v. Long*, 94 Ind. 250. Compare *Farley v. Chicago, &c., R. R. Co.*, 56 Iowa, 337; *Missouri, &c., R. R. Co. v. Holley*, 30 Kan. 465.

⁴ *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Beems v. Chicago, &c., R. R. Co.*, 58 Iowa, 150. But see, *contra* *Williams v. Iowa, &c., R. R. Co.*, 43 Iowa, 396; *Marsh v. South Carolina R. R. Co.*, 56 Ga. 274.

duty of train-men to observe the condition of the cars or other appliances with which they are required to work ;¹ and although it is negligent in them voluntarily and unnecessarily to use defective or dangerous tools or machinery,² still, in rushing in between moving cars to make a coupling, it is not negligent in a brakeman to assume that the bumpers are in proper condition, and to act upon that assumption.³ He must, however, obey all the rules prescribed by the company, with respect to couplings, looking to his safety and convenience ; a failure in any respect to do this is such negligence upon his part, as will wholly prevent a recovery in the event of an injury of which such disobedience upon his part may be regarded a cause ; as, for an example, omitting to use a stick in making the coupling, as the rule required, if the requirement of the rule had been properly brought to his knowledge ;⁴ or, uncoupling cars while in motion, in violation of the company's rule.⁵

In general, any negligence upon the part of a brakeman, in making couplings, if it amount to a want of ordinary care, contributing proximately to cause the injury, will prevent a recovery from the company.⁶ In Georgia it is held negligent for a conductor to make couplings, it being the duty of the brakeman, unless, in some emergency, it be especially necessary for the conductor to do

¹ *Lake Shore, &c., R. R. Co. v. McCormick*, 74 Ind. 440.

² *Umbach v. Lake Shore, &c., R. R. Co.*, 83 Ind. 191; *Perigo v. Chicago, &c., R. R. Co.*, 55 Iowa, 326; *Jackson v. Kansas, &c., R. R. Co.*, 31 Kan. 761.

³ *King v. Ohio, &c., R. R. Co.*, 11 Biss. 326; *Wedgwood v. Chicago, &c., R. R. Co.*, 41 Wis. 478. See, also, *Texas, &c., R. R. Co. v. McAttee* 61 Texas, 695.

⁴ *Fay v. Minneapolis, &c., R. R. Co.*, 30 Minn. 231; *Hulett v. St. Louis, &c., R. R. Co.*, 67 Mo. 239.

⁵ *Lockwood v. Chicago, &c., R. R. Co.*, 55 Wis. 50.

⁶ *Muldorney v. Illinois, &c., R. R. Co.*, 39 Iowa, 615; *Chicago, &c., R. R. Co. v. Ward*, 61 Ill. 130; *Riley v. Connecticut, &c., R. R. Co.*, 135 Mass. 292; *Toledo, &c., R. R. Co. v. Asbury*, 84 Ill. 429; *Sears v. Central, &c., R. R. Co.*, 53 Ga. 630; *Cunningham v. Chicago, &c., R. R. Co.*, 5 McCrary, 465; *Kresanowski v. Northern Pacific R. R. Co.*, 5 Id. 528; *Hallikan v. Hannibal, &c., R. R. Co.*, 71 Mo. 113; *Sweeney v. Boston, &c. R. R. Co.*, 128 Mass. 5.

it.¹ But when the cars are so constructed, the bumpers being of different heights, or being in any other respect so made, that the slightest indiscretion on the part of the operative will prove fatal to him, it has been held that when injury results from such causes, the company is liable.² "The machinery and cars," says the Supreme Court of Illinois, "furnished for use, should not be so unskilfully constructed that the slightest indiscretion on the part of the operatives would prove fatal."³

It is, as the weight of authority indicates, well settled that, however dangerous it may be to make these couplings, when one, after being duly advised of the danger, and warned to take care, undertakes the work, the manifest risk involved becomes a part of his contract, and if injury result, in the absence of wantonness on the part of the company, there can be no recovery.⁴ The railways have, by no means, it is believed, provided as they ought against accidents to train-men in making couplings in freight trains. The contrivances for connecting the cars of a freight train are rude and murderous, but as the law stands, if one chooses to run the risk, and contracts to perform such service as is required of a brakeman on a freight train, he has, in case he is hurt, no legal remedy.

§ 136. *Knowledge on the part of the employer.*—In determining the master's liability, inasmuch as the meas-

¹ *Sears v. Central, &c., R. R. Co.*, 53 Ga. 630.

² *Toledo, &c., R. R. Co. v. Fredricks*, 71 Ill. 294; *Crutchfield v. Richmond, &c., R. R. Co.*, 76 N. C. 320; S. C. 78 Id. 300.

³ *Toledo, &c., R. R. Co. v. Fredricks*, *supra*. Compare *Ft. Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Schroeder v. Michigan Car Co.*, Sup. Ct., Mich., January 28, 1885, 32 Albany Law Jour. 134; *Indianapolis, &c., R. R. Co. v. Flanigan*, 77

Ill. 365; *Greenleaf v. Illinois, &c., R. R. Co.*, 29 Iowa, 14, and § 125, *supra*.

⁴ *Hathaway v. Michigan, &c., R. R. Co.*, 51 Mich. 253; S. C. 47 Am. Rep. 569 (a case in which this branch of the general question is fully discussed); *Northern, &c., R. R. Co. v. Husson*, 101 Penn. St. 1; S. C. 47 Am. Rep. 690. See, also, *Smith v. Flint, &c., R. R. Co.*, 46 Mich. 258; S. C. 41 Am. Rep. 161; *Ballou v. Chicago, &c., R. R. Co.*, 54 Wis. 250; S. C. 41 Am. Rep. 31.

ure of it is ordinary care, it is plain that his knowledge or want of knowledge of that which occasioned the injury, will be a most material element in the case. If he knew, or was under a legal obligation to know, and the servant did not know, or was not bound to know, of the danger, the servant having exercised due care, then the master is, as we have already shown, liable. So it will come to pass, generally, that the master's knowledge is of the essence of his liability.¹

To state it broadly, without the qualifications, if the master knows of the danger, or defect, he is liable; if he does not know, he is not liable. By knowledge, in such a statement as this, is meant both what the master actually knows and what it is negligence for him not to know.² Says Lord Cranworth in *Paterson v. Wallace*:³ "It is the master's duty to be careful that his servant is not induced to work under the notion that tackle or machinery is staunch and secure, when, in fact, the master *knows, or ought to know, that it is not so.*" This rule is everywhere sustained.⁴

It being the duty of the employer to keep himself informed of the condition of his machinery, tools, premises, etc., notice of a defect will be presumed after the

¹ See cases cited at § 123, *supra*.

² Compare § 12, *supra*, for a discussion of the element of knowledge on the part of a plaintiff.

³ 1 Macq. H. L. Cas. 748.

⁴ *Wright v. New York, &c., R. R. Co.*, 25 N. Y. 562; *Gibson v. Pacific, &c., R. R. Co.*, 46 Mo. 163; s. c. 2 Am. Rep. 497; *Lewis v. St. Louis, &c., R. R. Co.*, 59 Id. 495; s. c. 21 Am. Rep. 385; *Greenleaf v. Illinois, &c., R. R. Co.*, 29 Iowa, 14; *Sullivan v. Louisville Bridge Co.*, 9 Bush. 81; *Mobile, &c., R. R. Co. v. Thomas*, 42 Ala. 672; *Colorado, &c., R. R. Co. v. Ogden*, 3 Colo. 497; *Walsh v. Peet Valve Manfg. Co.*, 110 Mass. 23. [See, also, *Johnson v. Boston*

Towboat Co., 135 Id. 209, in which the rule is evaded.] *Columbus, &c., R. R. Co. v. Troesch*, 68 Ill. 545; s. c. 18 Am. Rep. 578; *Baxter v. Roberts*, 44 Cal. 187; *Spelman v. Iron Co.*, 56 Barb. 151; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Guthrie v. Louisville, &c., R. R. Co.*, 11 Lea, 372; s. c. 47 Am. Rep. 286. See, also, *Frazier v. Penn., &c., R. R. Co.*, 38 Penn. St. 104; *Boyle v. Mowry*, 122 Mass. 251; *Pennsylvania R. R. Co. v. Wachter*, 60 Md. 395; *Texas, &c., R. R. Co. v. Carlton*, 60 Texas, 397; *Mo. Pac. R. R. Co. v. Haley*, 25 Kan. 35; *Russell v. Village of Canastota*, 98 N. Y. 496.

lapse of a sufficient time.¹ But in insisting upon the rule that the master's knowledge, or negligent ignorance, will render him liable to an employee for an injury resulting from dangerous or defective machinery, and the like instrumentalities of labor, the correlative duty on the part of the servant is not to be overlooked. In connection with the master's knowledge, there must be the servant's want of knowledge. If the servant runs the risk with his eyes open, he will ordinarily have no remedy, no matter what the knowledge on the part of the master. This is fully discussed in the following sections.²

§ 137. *The obligation of the servant.*—The obligation of the servant to use ordinary care to prevent and avoid injuries to himself is correlative to the duty of the master to exercise ordinary care not to expose him to danger. The servant is under no less obligation to provide for his own safety than the master is to provide for it for him. He may, like any other plaintiff, in various ways contribute, to such a degree, to his injury as to destroy his right of action. The measure of his duty is ordinary care, and unless he exercise that, in good faith, his conduct is negligent, and when such negligence contributes, in the legal sense, to an injury that happens to him, it is held to be contributory negligence, and his action against his master is barred. His duty, as affecting his right of recovery against his master in case of injury while in his service, may be considered under the following heads, proceeding from the general rule that he must exercise ordinary care to the specific and particular obligations imposed upon him :

¹ Chicago, &c., R. R. Co. v. Russell, 91 Ill. 298; s. c. 33 Am. Rep. 54; Kibele v. City of Philadelphia, 105 Penn. St. 41; Indianapolis, &c., R. R. Co. v. Flanigan, 77 Ind. 365; Chicago, &c., R. R. Co. v. Doyle, 18

Kan. 58. See, also, Vosburgh v. Lake Shore, &c., R. R. Co., 94 N. Y. 374; s. c. 46 Am. Rep. 148; Edwards v. New York, &c., R. R. Co., 98 N. Y. 245.

² See, also, §§ 12, 13, 23, *supra*.

§ 138. *He must possess a fair measure of skill for the service he undertakes, and must inform himself at the outset of the duties and dangers peculiar to his work.*—

It is not properly within the scope of this treatise to consider particularly the duty of a servant to be qualified for the position he assumes. It need not here be more than alluded to, but when a servant enters upon his duties in any employment involving risk of life or limb, it is his duty to inform himself of the danger to which he is to be exposed. As we have seen it to be the duty of the master to point out such dangers as are not patent,¹ so it is the duty of the employee to go about his work with his eyes open. He may not wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. If the master provides written or printed instructions or warning, it is his duty to read them. He must not go blindly and heedlessly to his work, when there is danger. He must inform himself. This is the law everywhere.²

§ 139. *His knowledge when a bar.*—The servant is held, by his contract of hiring, to assume the risk of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part. He has, therefore, no right of action, in general, against

¹ § 133, *supra*.

² *Wilson v. Willimantic, &c., Co.*, 50 Conn. 433; s. c. 47 Am. Rep. 653; *Chicago, &c., R. R. Co. v. Clark*, 108 Ill. 113; *Id. v. Warner*, 108 Id. 538; *Lake Shore, &c., R. R. Co. v. McCormick*, 74 Id. 440; *Illinois, &c., R. R. Co. v. Jewell*, 46 Id. 99; *Chicago, &c., R. R. Co. v. Jackson*, 55 Id. 492; s. c. 8 Am. Rep. 661; *Ladd v. New Bedford, R. R. Co.*, 119 Mass. 412; s. c. 20 Am. Rep.

331; *Hathaway v. Michigan, &c., R. Co.*, 51 Mich. 253; s. c. 47 Am. Rep. 569; *Michigan, &c., R. R. Co. v. Smithson*, 45 Mich. 212, (by Cooley, J.); *Cunningham v. Chicago, &c., R. R. Co.*, 5 McCrary, 465; *Northern, &c., R. R. Co. v. Husson*, 101 Penn. St. 1; s. c. 47 Am. Rep. 690; *Atchison, &c., R. R. Co. v. Plunkett*, 25 Kan. 188; s. c. 2 Am. & Eng. Ry. Cas. 128; *Wait's Actions and Defenses*, 417, and cases there cited.

his master for an injury befalling him from such a cause. His right to recover will often depend upon his knowledge or ignorance of the danger. If he knew of it, or was under a legal obligation to know of it, it was part of his contract, and he cannot, in general, recover.¹

There need be no confusion here between the ordinary risks of his employment, on the one hand, and his contributory negligence on the other. Assuming the risks of an employment is one thing, and quite an essentially different thing from incurring an injury through contributory negligence. It is not contributory negligence, *per se*, to engage in a dangerous occupation. Men may properly and lawfully do work that is essentially dangerous work, or work that is, for some reason or another, more than ordinarily dangerous for the time being, and to contract to do such work is not, in itself, an act of negligence.²

Accordingly, an employee may know that his work is dangerous, and yet not be guilty of contributory neg-

¹ *Mad River, &c., R. R. Co. v. Barber*, 5 Ohio St. 541; *Dale v. St. Louis, &c., R. R. Co.*, 63 Mo. 455; *Mansfield, &c., Co. v. McEnery*, 91 Penn. St. 185; s. c. 36 Am. Rep. 662; *Pingree v. Leyland*, 135 Mass. 308; *Umbeck v. Lake Shore, &c., R. R. Co.*, 83 Ind. 191; *Perigo v. Chicago, &c., R. R. Co.*, 55 Iowa, 326; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Coombs v. New Bedford, &c., Co.*, 102 Mass. 572; s. c. 3 Am. Rep. 506; *Chicago, &c., R. R. Co. v. Jackson*, 55 Ill. 492; *Toledo, &c., R. R. Co. v. Asbury*, 84 Id. 429; *Chicago, &c., R. R. Co. v. Clark*, 108 Id. 113; *Id. v. Warner*, 108 Id. 538; *Davis v. Detroit, &c., R. R. Co.*, 20 Mich. 105; *Dillon v. Union Pacific R. R. Co.*, 3 Dill. 319; *Bryant v. Burlington, &c., R. R. Co.*, Sup. Ct., Iowa, N. W. Rep., June 13, 1885; s. c. 19 Am. Law Rev. 669; *Coolbroth v. Maine, &c., R. R. Co.*, Sup. Jud. Ct., Me., March 7, 1885; 1 Eastern Reporter, 140; *Powers v. New York, &c., R. R. Co.*, 98 N. Y. 274; *Jackson v. Kansas, &c., R. R. Co.*, 31 Kan. 761. But see, also, where judgments have been sustained, notwithstanding that the servant had knowledge of the defect or danger which resulted in his injury, *Dorsey v. Phillips*, 42 Wis. 583; *Fairbank v. Haentzsche*, 73 Ill. 236; *Holmes v. Clarke*, 6 Hurl. & N. 349; s. c. 7 Id. 937; *Mo. Pacific R. R. Co. v. Holley*, 30 Kan. 465; *Baird v. Chicago, &c., R. R. Co.*, 61 Iowa, 359; *Farley v. Id.*, 56 Id. 337; *Beems v. Id.*, 58 Id. 150; *Lawless v. Conn., &c., R. R. Co.*, 136 Mass. 1.

² *Pennsylvania Co. v. Long*, 94 Ind. 250; *Baird v. Chicago, &c., R. R. Co.*, 61 Iowa, 359; *Beems v. Id.*, 58 Id. 150; *Flynn v. Kansas, &c., R. R. Co.*, 78 Mo. 195; s. c. 47 Am. Rep. 99; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; s. c. 47 Am. Rep. 425.

ligence in doing it. This is not such knowledge as the rule in question contemplates.¹

§ 140. *When the servant is held to have waived the danger or defect.*—This is, by far, the most important branch of the subject. It is the rule applicable to this matter that if the servant, when the defect or danger is brought to his knowledge—when he discovers that the machinery, buildings, premises, tools, or any other instrumentalities of his labor, are unsafe or unfit, or that a fellow-servant is careless or incompetent—continues in the employment, without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury.²

¹ See *Laning v. New York, &c., R. Co.*, 49 N. Y. 521; *S. C. 10 Am. Rep. 417*; *Mehan v. Syracuse, &c., R. R. Co.*, 73 N. Y. 585; *Hawley v. New York, &c., R. R. Co.*, 82 Id. 370; *Daley v. Shaaf*, 28 Hun. 314; *Aldridge v. Blast Co.*, 78 Mo. 559; but the rule is modified in case of an infant employee; *Smith v. Hestonville, &c., R. R. Co.*, 92 Penn. St. 450; *S. C. 37 Am. Rep. 705*.

² *Devitt v. Pacific, &c., R. R. Co.*, 50 Mo. 302; *O'Rorke v. Id.*, 22 Fed. Rep. 189, [a case decided late in the year 1884, in the U. S. Cir. Ct., for the Dist. of Colo.]; *Foley v. Chicago, &c., R. R. Co.*, 48 Mich. 622; *S. C. 42 Am. Rep. 481*; *Fort Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Id. 133; *Davis v. Detroit, &c., R. R. Co.*, 20 Id. 105; *Fones v. Phillips*, 39 Ark. 17; *S. C. 43 Am. Rep. 264*; *Dillon v. Union Pacific R. R. Co.*, 3 Dill. 319; *Kielley v. Belcher, &c., Co.*, 3 Sawyer, 500; *Jones v. Yeager*, 2 Dill. 64; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; *S. C. 20 Am. Rep. 331*; *Dorsey v. Phillips*, 42 Wis. 583; *Robinson v. Houston, &c., R. R. Co.*, 46 Texas, 540; *Dale v. St. Louis, &c., R. R. Co.*, 63 Mo. 455; *Buzzell v. Manfg. Co.*, 48 Me. 113; *Sullivan v.*

Louisville Bridge Co., 9 Bush. 81; *Hayden v. Manfg. Co.*, 29 Conn. 548; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *S. C. 34 Am. Rep. 615*; *Hough v. Texas, &c., R. R. Co.*, 100 U. S. 213, (and the cases collected in the reporter's note); *Cooley on Torts*, 559; *Shearman & Redf. on Neg.*, § 96; *LeClaire v. First Div., &c., R. R. Co.*, 20 Minn. 9; *Wright v. New York, &c., R. R. Co.*, 25 N. Y. 562; *Laning v. New York, &c., R. R. Co.*, 49 N. Y. 521; *S. C. 10 Am. Rep. 417*; *Gibson v. Erie Ry. Co.*, 63 Id. 449; *S. C. 20 Am. Rep. 552*; *Georgia, &c., R. R. Co. v. Kenney*, 58 Ga. 485; *Western, &c., R. R. Co. v. Johnson*, 55 Id. 133; *Lumley v. Caswell*, 47 Iowa, 159; *Chicago, &c., R. R. Co. v. Jackson*, 55 Ill. 492; *S. C. 8 Am. Rep. 661*; *Id. v. Asbury*, 84 Id. 429; *Perigo v. Chicago, &c., R. R. Co.*, 55 Iowa, 326; *Hanrathy v. Northern, &c., R. R. Co.*, 46 Md. 280; *Crutchfield v. Richmond, &c., R. R. Co.*, 78 N. C. 300; *Frazier v. Penn. R. R. Co.*, 38 Penn. St. 104; *Cowles v. Richmond, &c., R. R. Co.*, 84 N. C. 309; *S. C. 37 Am. Rep. 620*; *Sullivan v. India Manufacturing Co.*, 113 Mass. 396; *Clark v. St. Paul and Sioux City R. R. Co.*, 28 Minn. 128;

But, as has already been suggested, the severity of this rule is somewhat relaxed in favor of persons who are too young or too ignorant to appreciate the dangers to which they are exposing themselves.¹

Whenever an employee discovers anything affecting the safety of the machinery, or appliances, which he is obliged to use, or the fitness and competence of the servants with whom he is associated, it is his duty to inform his employer at once of the fact. He cannot be silent, and escape the consequences. Failure to speak promptly is such contributory negligence as will bar a recovery from the master in case he is injured by the defect in the machinery, or the unfitness of the servant.² That the servant, in such a case, has lost his right of action is conceded, but the authorities disagree somewhat as to whether it should be put upon the ground of waiver, or of contributory negligence.³ But if, when the master is notified of the defect in the machinery, or of the incompetence in the servant, he promises to remedy it within a reasonable time, the servant will not be presumed to have consented to it, or to have waived his rights by remaining for such reasonable time in the service; but mere complaint to the master, unless a promise to repair is made, will not justify the servant in continuing to expose himself to the danger.⁴

Assop v. Yates, 2 Hurl. & N. 767; *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130.
Skipper v. Eastern Ry. Co., 24 Eng. L. & E. 396; s. c. 9 Exch. 223; ² *Patterson v. Pittsburgh, &c., R. Co.*, 76 Penn. St. 389; s. c. 18 Am. Rep. 412; *Toledo, &c., R. Co. v. Eddy*, 72 Ill. 138; *Lumley v. Caswell*, 47 Iowa, 159; *Crutchfield v. Richmond, &c., R. R.*, 78 N. C. 300; *Allerton Packing Co. v. Egan*, 86 Ill. 253; *Davis v. Detroit, &c., R. Co.*, 20 Mich. 105; *Clark v. St. Paul, &c., R. R. Co.*, 28 Minn. 128.
Griffiths v. Gidlow, 3 Hurl. & N. 648; *Woodley v. Metropolitan, &c., Ry. Co.*, 2 Exch. Div. 384; *Ogden v. Rummens*, 3 Fost. & Fin. 751; *Dynen v. Leach*, 26 L. J. (N. S.) Exch. 221.
¹ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; s. c. 3 Am. Rep. 506; *Laning v. New York, &c., R. R. Co.*, 49 N. Y. 521; s. c. 10 Am. Rep. 417; *Hill v. Gust*, 55 Ind. 45; *Grizzle v. Frost*, 3 Fost. & Fin. 622;
³ *Clark v. St. Paul, &c., R. R. Co.*, 28 Minn. 128.
⁴ *Galveston R. R. v. Drew*, 59

It is also asserted by some courts, and it is, perhaps, the prevailing view, that the servant need not, for every slight defect, abandon the service, even though he knew of it. He may run some risk, such as a prudent man would run, without losing his right of action against the master, in case injury results. Judge Thompson¹ makes a pertinent criticism of this impingement upon the general rule, as follows: "This modification of the rule cannot be defended on strictly logical grounds, for, if the servant has full knowledge of the defect, and yet the defect is of such a character as not to lead to a reasonable probability that it will result in injury to him, how can negligence be imputed to the master for suffering it to continue. The rule as thus modified, in effect, declares that the master is bound to take more care of the servant than the servant is bound to take of himself." To which one might reply: Yea, verily, but it is a pretty good rule of law after all. The doctrine is fully set forth in *Patterson v. Pittsburgh, &c., R. R. Co.*,² by Mr. Justice Gordon, and it is clearly the rule in many jurisdictions.³

Texas, 10; s. c. 46 Am. Rep. 261; East Tenn., &c., R. R. Co. v. Duffield, 12 Lea, 63; s. c. 47 Am. Rep. 319; Kroy v. Chicago, &c., R. R. Co., 32 Iowa, 257; Patterson v. Pittsburgh, &c., R. R. Co., 76 Penn. St., 389; s. c. 18 Am. Rep. 412; Ford v. Fitchburg R. R. Co., 110 Mass. 241; s. c. 14 Am. Rep. 598; Hough v. Texas, &c., R. R. Co., 100 U. S. 213; Conroy v. Vulcan Iron Works, 62 Mo. 38; Cooley on Torts, § 559; Shearman & Redf. on Neg., § 96; Wharton on Neg., § 220; Snow v. Housatonic R. R. Co., 8 Allen, 441; Huddleston v. Machine Shop, 106 Mass. 282; Missouri Furnace Co. v. Abend, 107 Ill. 44; s. c. 47 Am. Rep. 425; Manfg. Co. v. Morrissey, 40 Ohio St. 148; s. c. 48 Am. Rep. 669; Greene v. Minneapolis, &c., R. R. Co., 31 Minn. 248; s. c. 47 Am. Rep. 785; Moak's Underhill's Torts, 61, 62.

¹ Thomp. on Neg. 1010.

² 76 Penn. St., 389; s. c. 18 Am. Rep. 412.

³ Greene v. Minneapolis, &c., R. R. Co., 31 Minn. 248; s. c. 47 Am. Rep. 785, [a carefully considered case]; Flynn v. Kansas, &c., R. R. Co., 78 Mo. 195; s. c. 47 Am. Rep. 99; Keegan v. Kavanaugh, 62 Id. 232; Ford v. Fitchburg R. R. Co., 110 Mass. 240; s. c. 14 Am. Rep. 598; Kroy v. Chicago, &c., R. R. Co., 32 Iowa, 357; Colorado, &c., R. R. Co. v. Ogden, 3 Colo. 499; Buzzell v. Manfg. Co., 48 Me. 113; Wharton on Neg., § 221; Hawley v. New York, &c., R. R. Co., 82 N. Y. 370; [compare this case with Mehan v. Syracuse, &c., R. R. Co., 73 Id. 585;] Greenleaf v. Dubuque, &c., R. R. Co.,

§ 141. *Servant must obey rules established to promote his safety.*—It is contributory negligence of an aggravated character on the part of an employee to disobey reasonable rules and regulations enacted to protect him from injury. If he is injured through such a gross and unwarranted disregard of his own safety, his remedy is gone. Such negligence is the most pronounced contributory negligence possible. It properly leaves the person injured by it wholly remediless.¹

The disobedience of the servant must, however, have been the proximate cause of the injury; unless it were, it will, upon familiar grounds, cut no figure in the case.² Accordingly, it was held in Indiana, that a locomotive engineer, though violating the rules of the company in running his engine at a rate of speed far in excess of that prescribed by the printed regulations furnished him, and by which he was bound to be guided, was, nevertheless, not guilty of contributory negligence in standing at his post in the face of an impending collision which was rendered imminent by a misplaced switch, when, by jumping from the locomotive, he might have escaped

33 Iowa, 52; Shear. & Redf., § 95; Clarke v. Holmes, 7 Hurl. & N. 937; s. c. *sub nom.*, Holmes v. Clarke, 6 Id. 349; Holmes v. Worthington, 2 Fost. & Fin. 533. Note the *dictum* of Byles, J., in Clarke v. Holmes, *supra*, "but a servant knowing the *fact* may be utterly ignorant of the *risks*." See, also, §§ 134, 135, *supra*, as to the risks from overhead railway structures and from coupling freight cars, and compare Vosburgh v. Lake Shore, &c., R. R. Co., 94 N. Y. 374; s. c. 46 Am. Rep. 148.

¹ Memphis, &c., R. R. Co. v. Thomas, 51 Miss. 637; Lockwood v. Chicago, &c., R. R. Co., 55 Wis., 50; Fay v. Minneapolis, &c., R. R. Co., 30 Minn. 231; Lyon v. Detroit, &c., R. R. Co., 31 Mich. 429;

Shanny v. Androscoggin Mills, 66 Me. 420; Gates v. Burlington, &c., R. R. Co., 39 Iowa, 45; Locke v. Sioux City, &c., R. R. Co., 46 Id. 109; Hubgh v. New Orleans, &c., R. R. Co., 6 La. Ann. 495; s. c. 54 Am. Dec. 565; Illinois, &c., R. R. Co. v. Houck, 72 Ill. 285; Beckham v. Hillier, Sup. Ct., N. J., New Jersey Law Jour., April, 1885; s. c. 19 Am. Law Rev. 494. And see, also, Ohio, &c., R. R. Co. v. Collarn, 73 Ind. 261; s. c. 38 Am. Rep. 134; *cf.* George v. Gobey, 128 Mass. 289; s. c. 35 Am. Rep. 376.

² Ford v. Fitchburg R. R. Co., 110 Mass. 240; s. c. 14 Am. Rep. 598; Marshall v. Stewart, 2 Macq. H. L. Cas. 30; s. c. 1 Pat. Sc. App. 447; 33 Eng. Law & Eq. 1.

injury. For an injury which he sustained under such circumstances, though at the time he was violating a plain rule of the company, he was held entitled to recover, it not appearing that his violation of the rule was the proximate cause of the collision.¹

§ 142. *Liability of a servant to a fellow-servant.*—It is now well settled that one servant may maintain an action against a fellow-servant for damages resulting from such fellow-servant's negligence in the discharge of his duties in the common employment.²

In *Albro v. Jaquith*³ the Supreme Judicial Court of Massachusetts decided in 1855 that such actions were not maintainable. This was an action of tort against the superintendent of the cotton and woolen mill of the Agawam Canal Company, to recover damages for an injury sustained from the escape of gas, caused by the negligence of the defendant in the management of the apparatus used in lighting the mill, and the defendant had judgment upon the ground that there was no contract stipulating for care between the defendant and the plaintiff, and that the act complained of was a mere act of non-feasance for which the servant was liable only to the master, and also upon the further ground that the matter was *res adjudicata*, because an action had been previously brought against the mill owners for the same injury by the same plaintiff,⁴ wherein it had been adjudicated that

¹ *Pennsylvania R. R. Co. v. Roney*, 89 Ind. 453; S. C. 46 Am. Rep. 173. See, also, *Cottrill v. Chicago, &c.*, R. R. Co., 47 Wis. 634; S. C. 32 Am. Rep. 796; *cf.* § 15, *supra*.

² *Osborne v. Morgan*, 130 Mass. 102; S. C. 39 Am. Rep. 467; S. C. 137 Mass. 1, overruling *Albro v. Jaquith*, 4 Gray, 99; S. C. 64 Am. Dec. 56; *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 Id. 547; S. C. 32 Am. Rep. 114; *Rogers v. Over-*

ton, 87 Ind. 410; *Griffiths v. Wolfram*, 22 Minn. 185; *Swainson v. North-eastern Ry. Co.*, 3 Exch. Div. 341, 343; *Wright v. Roxburgh*, 2 Ct. of Sess. Cas. (3d series), 748; *cf.* *Wiggett v. Fox*, 11 Exch. 832, 839; *Degg v. Midland Ry. Co.*, 1 Hurl. & N. 773, 781.

³ 4 Gray, 99; S. C. 64 Am. Dec. 56.

⁴ *Albro v. Agawam Canal Co.*, 6 Cush. 75.

the negligence of the superintendent, being the negligence of a fellow-servant, did not confer upon the injured employee any right of action against the common employer. This was equivalent to holding that servants in a common employment owe to each other no duty even of ordinary care that can be enforced in a court of justice—a doctrine which has been much criticised by the text-writers,¹ and one so obviously opposed to plain principles of justice and right legal reason that, in 1881, the court completely receded from its anomalous and erratic position, and, in a case in which the facts were for substance the same, held, overruling *Albro v. Jaquith*, that in Massachusetts such actions may be maintained, thereby falling in line with other courts in this country, as well as those of England and Scotland, upon this point. The right to bring these actions, which ought never to have been for an instant questioned, will, it may safely be said, never hereafter be denied in any court where the common law obtains. The servant, moreover, is liable as well to his master as to his fellow-servant for any damage that comes of his negligence,² and when a master has been compelled to pay the damages caused by the negligence of his servant, he may sue the servant and recover back the money paid.³ The servant is also, as of course, liable to any third person injured by his negligent wrong-doing. He is in no way excused or shielded, by reason of the liability of his master in certain cases for the consequences of his acts, from personal respon-

¹ Shear. & Redf. on Neg., § 112; Thomp. on Neg. 1062, § 3; Wharton on Neg., § 245; Story on Agency, § 453, (*d*) note; Bigelow's Leading Cases on Torts, 710; Addison on Torts, 245; Dicey on Parties, 465, note, Judge Thompson says: "This case must rank as a mere judicial ab-
eration. If it had been decided by a

less eminent court it would not deserve to be mentioned in terms of respect. Thomp. on Neg. 1062, § 3.

² *Page v. Wells* (by Cooley, J.), 37 Mich. 415, 421.

³ *Davis v. Garrett*, 6 Bing. 716; *Zulke v. Wing*, 20 Wis. 408. See, however, *White v. Phillipston*, 10 Metc. 108.

sibility for the wrong he does. This, however, is not pertinent to our treatise, and is, therefore, merely alluded to.

§ 143. *Statutory modifications of the rule which exempts a master from liability to one servant for the negligent wrong-doing of a co-servant.*—It became evident, early in the course of the development of the law upon this point, that, in order to preserve to the employee any vestige of the right of action which the common law gave him against his employer, in a proper case, for personal injuries attributable to the negligence of another, and received in the course of the common employment, the tendency to extend the rule which had its inception, in England, in the case of *Priestley v. Fowler*,¹ and, in the United States, in the early cases of *Murray v. South Carolina R. R. Co.*² and *Farwell v. The Boston & Worcester R. R. Co.*,³ and under the operation of which the defense of a common employment had come to be urged to the practical destruction of all such rights of action, would have to be checked, and could only be checked by legislation. Accordingly, on the 7th of September, 1880, Parliament changed the law of England by passing the Employers' Liability Act,⁴ which, pending its final enactment, was popularly known as "the Gladstone Bill," and which, at the time, attracted much attention both here and in England. The statute provides, in sections 1 and 2, that common employment, so called, shall not be a defense where a workman receives personal injury :

1. By reason of any defect in the ways, works, machinery or plant connected with or used in the business

¹ 3 Mee. & W. 1.

² 4 Metc. 49; S. C. 38 Am. Dec.

³ 1 McMullan's Law, 385; S. C. 36 Am. Dec. 268.

⁴ 43 and 44 Vict., chap. 42.

of the employer, which defect existed in consequence of the negligence of the employer, or of an employee by him entrusted with the duty of guarding against any defect.

2. By reason of the negligence of any person entrusted with superintendence.

3. By reason of the negligence of any superior workman whose orders the person injured was bound to obey.

4. By reason of obeying proper rules or by-laws, or any rule or by-law duly approved by certain public officers therein specified.

5. By reason of the negligence, on a railway, of any person at the time in control of the train.

Unless the person injured knew, or failed, when necessary, to give notice of the defect which caused the injury.

Section 3 limits the sum recoverable as compensation.

Section 4 limits the time for recovery of compensation.

Section 5 makes any penalty received by any other act, part payment.

Section 6 relates to the trial of actions.

Section 7 provides for the service of a notice of any injury received.

Sections 8, 9 and 10, respectively, defines terms used in the act, tell when it shall go into operation, by what title it shall be called, and how long it shall continue in force.

From this *resumé* of the statute it appears that the defense of common employment has not been wholly abolished in England, and that where the employer who causes and the employee who receives the injury are fellow-servants of the same grade, the liability of the master remains as before. Had it been intended to abolish this defense in all cases, it might have been accom-

plished in a single sentence. It rather brings back the law to the original position in which it stood in 1837, after *Priestley v. Fowler*¹ had been decided. The authority of that case is not overthrown, and it is still good law in Westminster Hall; but the thousand refinements upon the doctrine of *Priestley v. Fowler*, which the English courts were not slow to distinguish, and under the operation of which English employers in recent years have, for the most part, gone scot-free of any liability or responsibility for the personal injuries which their servants or employees have sustained in the course of their employment through the negligence of others, for whom the common employer was justly responsible, will no longer avail as defenses in actions of this nature.

Comparatively recent legislation in several of the States and Territories of the Union has modified for us in this country the rule of non-liability which the courts of every jurisdiction, as we have seen, have uniformly declared. With the exception of Rhode Island, this legislation changes the settled rule only as it affects the liability of railway corporations.

In California,² Dakota,³ Georgia,⁴ Iowa,⁵ Kansas,⁶

¹ 3 Mee. & W. 1.

² Codes & Statutes of California, 6971, § 1971, modified by 6970. § 1970, so as to make the change in the law of no practical value.

³ Revised Code of Dakota, 1877, page 396, art. 2, precisely, *verbatim et literatim*, the same as the law of California.

⁴ Code of 1873, page 521, 3036 (2981). In this State the law, so far as the liability of railway companies is concerned, is completely changed. The material part of the statute is,

viz.: "Injury by co-employee.—If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." Code, § 3036 (2981), enacted by the legislature during the session of 1855-56. See, also, *Thompson v. Central, &c., R. R. Co.*, 54 Ga. 509.

⁵ Revised Code of 1880, vol. I, page 342, § 1307, viz.: "Every corporation operating a railway shall be lia-

⁶ Revised Laws of Kansas, 1879, page 784, ch. 84. § 4914. taken from Statutes of 1876, 869, § 4604, enacted

March 4, 1874, viz.: "Every railroad company, organized or doing business in this State, shall be liable for all

Mississippi,¹ Montana,² Rhode Island,³ Wiscon-

ble for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding." The note to this section is as follows, viz.: "Under the statute prior to the passage of chap. 169, Laws of 1862, it was held in harmony with the current of common law authority that the principal is not liable for damages sustained by an employee for the

negligence of a co-employee in the same general service; and that the 14th section of the act entitled An Act to grant railroad companies the right of way, approved January 18, 1853, did not change the general rule on the subject. After the act of 1862 took effect, it was held that while the seventh section thereof gave an employee of a railroad company a right to recover for injuries caused by the negligence of a co-employee, the liability was nevertheless measured by a different standard and rule as to negligence from what it is in cases of injuries to passengers. While extraordinary care and caution are required with respect to passengers, ordinary care only is due to the employee." See, also, a long list of authorities in support of the new doctrine, in the same note, pp. 343, 344, 345, 346.

damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." In 1873 the case of *Kansas Pacific R. R. Co. v. Salmon*, 11 Kan. 93, was decided, and owing to the hardship felt to exist in this case, the law was changed by the statute referred to above in the following year. The jury in the court below had given a verdict for \$7,500 to a widow for personal injuries resulting in the death of her husband, and a new trial was refused. The case was then taken up on error and decided against the plaintiff, upon the ground that a previous statute making railways liable for negligence in certain cases (Laws of 1870, ch. 93, § 1), did not apply to negligence between co-employees of a railway company.

¹ Revised Code of 1880, 309, § 1054, viz.:—"Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of their agents, engineers, or clerks, or for the mismanagement

of their engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable except for the gross negligence of its servants."

² Laws of Revised Statutes (1879), 471, § 318, viz.: "That in every case, the liability of the corporation to a servant or employee acting under the orders of his superior, shall be the same, in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger." See, also, Laws, &c., of the Territory of Montana, 1873 (extra), 104 and 109 note.

³ Public Statutes of 1882, 553, ch. 204, § 15, viz.: "If the life of any person, being a passenger in any stage-coach, or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or

sin,¹ Wyoming,² and Missouri,³ statutes, the substance of which is set out in the notes, have been

carelessness of such common carriers, proprietor or proprietors, or by the unfitness, or negligence, or carelessness of their servants or agents, in this State, such common carriers, proprietor or proprietors, shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person, one-half thereof to go to the husband or widow, and one-half thereof to the children of the deceased."

¹ Laws of 1875, published March 18, 1875, approved March 4, 1875, viz.: "Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other servant or agent thereof, without contributory negligence on his part, when sustained within this State, or when such agent or servant is a resident of, and his contract of employment was made in, this State; and no contract, rule or regulation between any such corporation and any agent or servant shall impair or diminish such liability."

² Compiled Laws of Wyoming (1876), 512, ch. 97, § 1. Approved December 7, 1869, viz.: "An Act to protect railroad employees who are injured while performing their duty." "Any person in the employment of any railroad company in this Territory, who may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing, shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against

them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock, of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company." § 2. "This act shall take effect from and after its passage."

³ 1 Revised Statutes (1879), 349. ch. 25. § 2121, viz.: "Damages for injuries resulting in death in certain cases, when and by whom recoverable." "Whosoever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting, or managing any locomotive, car or train of cars; or of any master, pilot, engineer, agent or employee, whilst running, conducting or managing any steamboat, or any of the machinery thereof; or of any driver of any stage-coach, or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage-coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay, for every person or passenger so dying, the sum of \$5,000, which may be sued

passed, under the wholesome operation of which the old rule of non-liability is practically abrogated. Except in California and Dakota, it may be said that in each of the States and Territories just mentioned—in all six States and two Territories—the old rule is entirely abandoned, and an adequate remedy provided by the statutes for the proper protection of railway employees, while in California and Dakota the statutes define the limit of liability, and *quoad hoc* recognize and assert the propriety of legislation upon this subject. Even in Massachusetts, the stronghold of the most radical doctrines as to non-liability and common employment as a defense, an interesting struggle has gone on in the legislature for several years in the attempt to secure a statute for that State which shall abrogate the old rule, and under which, protection may be extended to those classes of employees now for the most part unprotected in the courts as the law stands.¹

for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defence, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency." "Although," says Mr. Fall ["Employer's Liability," 41], "at first sight this law would seem to afford a remedy for injuries sustained by a servant, and was quoted during the discussion in England" [over the Gladstone Bill] "to show that in Missouri it changed the rule of the common law, the Court of Appeals has

decided (one judge dissenting) that the phrase 'any person' does not include fellow-servant and that his remedy (see 64 Mo. 112; overruling 36 Mo. 13; 59 Mo. 285; Revised Statutes, p. 350, note) remains the same as it was before the statute was passed."

¹ An Employer's Liability Bill, drawn, and advocated with much ability, by Charles G. Fall, Esq., of the Suffolk Bar, was defeated in the Massachusetts Legislature, May 1st, 1885, by the slender majority of 85 to 70. Further efforts before future legislatures are to be made. See, for a history of the whole matter, and for full information upon the question, "Employers' Liability for Personal Injuries to their Employees," by Charles G. Fall, Esq., of the Boston Bar, Boston, 1883—a pamphlet from which I have drawn without stint in preparing this section. See, also, "Liability of Masters to Servants," by Judge Cooley, 2 Southern Law Rev. (N. S.), 108; "Master's Liability to

§ 144. *Should the employee be allowed to make a contract, releasing his employer from the liability imposed by these statutes.*—Immediately upon the passage of such statutes as are considered in the preceding section, the question arises whether the employee may lawfully contract himself out of the operation of the act. In the English Act,¹ there is nothing either permitting or forbidding such a contract; and, no sooner was it enacted, than many railway and mining corporations, as also many other companies and private individuals, who employ large numbers of servants, attempted to compel their laborers to sign contracts of hire releasing them from liability for damage under the act; and these contracts have been declared valid and enforceable, in the Court of Queen's Bench, in the case of *Griffiths v. The Earl of Dudley*.² Such contracts are, I am informed, very generally made by English operatives; and, inasmuch as the courts uphold them, and all efforts to amend the act of 43 and 44 Vict, so as to render them illegal have failed, when it is considered that in more than ninety per centum of all the actions of this nature which are brought in the English Courts of Record, the contributory negligence of the plaintiff is, as has been shown by a careful examination of the court records as to this very point, a valid defense, we see that the practical benefits of the act are in reality, speaking from the standpoint of the employee, less than they at first sight appear to be. It is moreover, asserted, and the assertion has at least a show of foundation, that English employers have found that the operation of the act, in connection with the contract of exemption required from the employee, has been to di-

Servants," by Francis Wharton, 3 Id. 730; and two able articles upon the same subject, by A. B. Jackson,

Esq., of the Minneapolis, Minn., bar, 5 Id. 200 and 380.

¹ 43 and 44 Vict. ch. 42.

² L. R. 9 Q. B. Div. 357.

minish materially the amount of gross recoveries by employees in actions of this nature, in the English courts since 1880—which is only another way of saying that the Employer's Liability Bill is money in the pocket of the employer, and a corresponding actual money loss to the employee.

In this country, so far as my reading goes, such contracts are forbidden by statute only in Iowa,¹ and in Massachusetts.² But it is held in Kansas, that a railway company may not contract in advance with its employees for the waiver, and release of the statutory liability imposed upon such companies for the negligence of one employee causing injury to another employee without regard to the negligence of the company.³ In *Griffiths v. The Earl of Dudley*,⁴ it is held that an employee may not only contract himself out of the operation of the act of 43 and 44 Vict. ch. 42, but that such a contract on his part will operate so as to bind his widow in the event of his death from injury, and thus bar her right to sue; that is to say, that an employee by such a contract, not only cuts himself off from his right of action under the act, but also prevents the prosecution of an action by his widow under Lord Campbell's Act. It not being questioned that the contract bars an action by the personal representatives, it was argued that the widow obtained a new and inde-

¹ In the statute to which reference has already been made. 1 Rev. Code of 1880, 342, § 1307, viz.; "No contract which restricts such liability" (*i.e.* the liability imposed by the statute), "shall be legal or binding."

² Chapter 74, § 3, of the Public Statutes says: "No person or corporation shall, by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment, and which

result from the employer's own negligence, or from the negligence of other persons in his or its employ." This must, however, be understood to refer only to the common law liability of the employer as understood by the courts of Massachusetts.

³ *Kansas, &c., R. R. Co. v. Peavey*, 29 Kan. 169; S. C. 44 Am. Rep. 630. See, also, *Union Pacific R. R. Co. v. Harris*, Sup. Ct., Kansas, April 10, 1885, 20 Cent. Law Jour. 414; S. C. xix Am. Law Rev. 669.

⁴ L. R. 9 Q. B. Div. 357.

pendent right of action under the act of 27 and 28 Vict. ch. 95; that this right her husband had no power to contract away, and that while he might have the power to bargain away his own right to recover damages, he should not be allowed to bargain away the right of his family, under the Act of Lord Campbell. But the court thought this an unsound view, and held, without any dissent, that the contract was valid to bar alike the one right and the other.¹ In *Roesner v. Hermann*,² it was held, in the United States Circuit Court, for the Seventh Circuit, that a contract between an employer and his employee, by which the employee, *in consideration of the employment*, releases and discharges his employer from all his common law liability for damages, for injury or death of the employee, resulting from the employer's negligence, is void as against public policy.

The weight of authority in this country is plainly in favor of a doctrine, upon this point, the opposite of that asserted in the English case of *Griffiths v. The Earl of Dudley*,³ and it is easy to learn from the practical outcome of the English act—which was intended to secure greater protection for the employee, but which in verity, does him more harm than good—that, if anything of substantial benefit is to come to the serving class, from legislation of this character, such contracts of exemption as we have been considering must be made illegal and impossible; otherwise, the shield turns itself into a sword, and the last end of such legislation is, for the class sought to be benefited, worse than the first.

§ 145. *The laws of other countries as to the liability of an employer, for injuries to an employee, caused by the*

¹ *Griffiths v. Earl of Dudley*, *supra*. Compare *Wilson v. Merry*, L. R. 1 H. L. Sc. App. 326; *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555.

² 10 Biss. 486.

³ L. R. 9 Q. B. Div. 357, *supra*.

carelessness of a fellow-employee.—In Scotland, the courts made a persistent but ineffectual fight against the influence of the case of *Priestley v. Fowler*.¹ In the case of *Sword v. Cameron*,² decided in 1839, a year after *Priestley v. Fowler*, the Scotch judges declined to follow the English authority. It was an action to recover damages from the owner of a quarry, because one of the quarrymen, while carelessly blasting a rock, had injured a fellow-workman. The court held the employer responsible for the negligence of his workman, and the plaintiff had judgment against him. In *Dixon v. Rankin*,³ decided in 1852, the Scotch Court again disapproved of the position taken by the English Court, and after carefully reviewing *Priestley v. Fowler*,⁴ unanimously followed the rule of *Sword v. Cameron*.⁵ Lord Justice Clerk, in delivering the opinion after declaring the obligation of the employer as to safe and suitable machinery and apparatus, it being an action wherein a master was held liable for an accident in a coal-pit, says: "In this obligation is equally included—as he cannot do everything himself—the duty to have all acts by others whom he employs done perfectly and carefully in order to avoid risk. The obligation to provide for the safety of the lives of his servants by fit machinery, is not greater or more inherent in the contract, than the obligation to provide for their safety, from the acts done by others whom he also employs. The other servants are employed by him to do acts which, of course, he cannot do himself; but they are acting for him, and instead of himself, as his hands. For their careful and cautious attention to duty, for their neglect of precautions, by which danger to life may be caused, he is just as much responsible as for such misconduct on his

¹ 3 Mee. & W. 1, see §§ 98, 99, *supra*.

² 1 Scotch Sess. Cas. 493.

³ 14 Scotch Sess. Cas. 420.

⁴ 3 Mee. & W. 1.

⁵ *Supra*.

own part, if he were actually working or present ; and this particularly holds to the person he entrusts with the direction and control over any of his workmen, and who represents him in such a matter. The servant, then, in the contract of service in Scotland, undertakes no risks from the dangers caused by other workmen from want of care, attention, prudence and skill which the attention and presence of the master or others acting for him, might have prevented. His master is bound to him in obligations which are to protect him from such dangers. The principle of the contract in England being different, of course, different results follow."¹

Again, in *Gray v. Brassey*,² the same doctrine is emphasized, the judges still refusing to follow the rule of *Priestley v. Fowler*. The Lord President said that the master was liable for the negligence of his authorized servants as well as for his own negligence, and Lord Cunningham, for the court, said : " Although our reports for many years show that masters have been held liable to all third parties (without excepting fellow-servants) suffering from the negligence and unskillfulness of other servants hired by the employer, followed up by the late case of *Rankin v. Dixon*, in the Second Division, the books hardly show the extent of the understanding in Scotland, as it is believed there is no man of common intelligence, and experience in our affairs, who entertains a different opinion. Many industrious people may have relied on that security ; and, at any rate, when servants in this country have suffered severe injury from the fault of another workman hired by the master, we are not entitled suddenly to abrogate the responsibility of the latter, existing at the date of their employment. The law of Scotland on this point has been long established and acted on,

¹ *Dixon v. Rankin*, *supra*.

² 15 Court of Sessions Cases, 135.

while this question is new in England, arising merely under an act recently passed; and I must, with perfect deference, remark that the reasons assigned in the English cases for the distinction urged by the defender, do not appear to be altogether satisfactory or reasonable."¹

But, in 1858, the House of Lords, in the cases of *Bartonshill Coal Co. v. Reid*, and *Id. v. McGuire*,² overruled the unanimous judgments of the Scotch judges in favor of the plaintiffs in the actions to which I have referred, rendered upon the ground that an employer is liable to his employee for the negligence of his authorized agent, though that agent is a fellow-servant of the injured person, in accordance with the rule of the earlier case of *Sword v. Cameron*.³ Thus the Scotch law was brought into harmony with the position taken by the English courts upon this question, and what had been declared law by twenty-five judges was changed by this judgment, and the law of both countries was made the same."⁴

In Ireland, the courts have always followed *Priestley v. Fowler*. The question first came before those courts in 1858, in *McEnery v. Waterford & Kilkenny Ry. Co.*,⁵ which affirmed the English rule, and all the Irish decisions subsequent uniformly accept it.

In France, under the Civil Code, it seems that an employer is liable to an employee for the negligence of a co-employee.⁶ And in Italy the law is the same. The Italian Code was modeled upon the French Code, and

¹ See, also, to the same effect, *Baird v. Addie*, 16 Court of Sessions Cas. 490; *Brownlie v. Tennant*, Id. 998; *O'Byrne v. Burn*, Id. 1025; *Hill v. Caledonian Ry. Co.*, Id. 569.

² 3 Macq. H. L. Cases, 266, 4 Jur. (N. S.) 767, 772, 1 Pat. Sc. App. 785, 796.

³ *Supra*.

⁴ Fall's *Employer's Liability*, 33.

⁵ 8 Ir C. L. R. 312.

⁶ Civil Code, Art. 1382, 1383, 1384. Compare *Serandat v. Saisse*, L. R. 1 P. C. 152, a decision by the judicial committee of the Privy Council on appeal from the Mauritius which is under the control of the French law; *cf.* Fall's *Employer's Liability*, 33.

that section which considers this subject is an almost literal translation of the French.¹

In Prussia, upon the authority of Mr. Fall, who may be called as an expert witness, it may be said that employers are held liable, for the most part, for injuries to their servants, occasioned by the negligence of their fellow-servants.²

It appears, therefore, that the position of the English and American courts upon the matter of an employer's liability to his employees for personal injuries is somewhat anomalous; that it is very far from being a satisfactory position, and that there is a growing tendency to modify the extreme grounds the courts have taken by legislation, and even to abolish entirely common employment as a defense. It seems that the law in its present attitude has been developed under the more or less conscious influence of the great railway corporations of the country. It cannot be doubted that such an influence, at the best, is a bad influence, and the tendency of the courts to go to the very verge upon this point in the interest of these companies, may well be checked by appropriate legislation.

¹ Italian Civil Code, Art. 1153.

² Fall's Employer's Liability, 35, citing Holtzendorff's Encyclopædia.

CHAPTER VIII.

THE RULE IN SPECIAL AND PARTICULAR CASES.

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| § 146. Intoxication as a defense in actions of negligence. | § 150. The rule in the Admiralty. |
| 147. Deafness, blindness or other physical infirmity as a defense. | 151. Contributory negligence as a defense in actions between attorney and client. |
| 148. Negligence as a defense in actions upon policies of insurance. | 152. Between physician and patient. |
| 149. In actions against telegraph companies, for failure in the transmission or delivery of telegraphic dispatches. | 153. Between innkeeper and guest. |
| | 154. Miscellaneous. |

§ 146. *Intoxication as a defense in actions of negligence.*—Intoxication on the part of a plaintiff is not, as a general rule, in itself and as a matter of law, such negligence, or evidence of such negligence, as will bar a recovery when an action is brought for injuries sustained by reason of the culpable and negligent default of another.¹ “A drunken person sometimes acts with great care, although the contrary is undoubtedly the general rule.”² The law refuses, therefore, to impute negligence, as of course, to a plaintiff from the bare fact that at the moment of suffering the injury he was intoxicated. Intoxication is one thing, and negligence sufficient to bar an action for damages quite another thing. “Intoxicated persons,” it is said in *Alger v. Lowell*,³ “are not removed

¹ *Stuart v. Machias Port*, 48 Me. 477; *Weymire v. Wolfe*, 52 Iowa, 533; *Loewer v. City of Sedalia*, 77 Mo. 431; *City of Salina v. Trosper*, 27 Kan. 545; *Alger v. Lowell*, 3 Allen, 406; *Baker v. Portland*, 58 Me. 199; s. c. 4 Am. Rep. 274; *Baltimore, &c., R. R. Co. v. Boteler*, 38 Md. 568; *Burns v. Elba*, 32 Wis. 605; *Thorp v. Brookfield*, 30 Conn. 321; *Healy*

v. New York, 3 Hun, 708; *Ditchett v. Spuyten Duyvil, &c.*, R. R. Co., 5 Id. 165; *O'Hagan v. Dillon*, 10 Jones & S. 456; *Cramer v. Burlington*, 42 Iowa, 315; *Robinson v. Pioche*, 5 Cal. 460; *Shear. & Redf. on Neg.*, § 574; *Thomp. on Neg.* 1174, § 22, 1203, § 50, and *cf.*, § 66 *supra*.

² *Shear. & Redf. on Neg.*, § 487.

³ 3 Allen, 406.

from all protection of law, the plaintiff was bound to show that he was in the exercise of due care, and the jury were so instructed. If he used such care, by himself or others, his intoxication had nothing to do with the accident; the city may be liable under some circumstances,¹ for an injury sustained by . . . an intoxicated person if the condition of the injured person does not contribute in any degree to occasion the injury"—which is very nearly the same thing as to say that the mere concurrence in point of time between the plaintiff's intoxication, and the happening of the injury will not, in itself, be sufficient to bar the right to recover. When contributory negligence is the issue, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety, or he may have his action. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk. As sober men are frequently careless and guilty of negligence, so it very occasionally happens that drunken men are careful and prudent, or if negligent, that their intoxication cut no figure in the matter. From which the law infers that there is no proper and necessary connection between sobriety and carefulness, nor between inebriety and negligence. This is a view, however, to be taken with the qualification that while intoxication is not, as a matter of law, to be regarded contributory negligence, it is held that it tends to show negligence on the part of the plaintiff.² "Intoxication is competent, but not conclusive evidence of negligence."³ The plaintiff is, therefore, on the one hand,

¹ "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it," said Heydenfeldt, J., in the case of *Robinson v. Pioche*, 5 Cal. 460.

² *Aurora v. Hillman*, 90 Ill. 61; *Illinois, &c., R. R. Co. v. Cragin*, 71

Id. 177; *City of Rock Island v. Vanlandschoot*, 78 Id. 485.

³ *Abbott's Trial Evidence*, 585, § 12, citing *Stuart v. Machiasport*, 48 Me. 477; *Baker v. Portland*, 58 Id. 199; S. C. 4 Am. Rep. 274; *Wynn v. Allard*, 5 Watts & S. (Penn.) 524.

entitled to an instruction to the effect that his intoxication is not, as matter of law, contributory negligence or conclusive evidence of such negligence as will prevent a recovery; and the defendant on his part is entitled to an instruction to the effect that the intoxication of the plaintiff is evidence of negligence, from which the jury are at liberty to infer such negligence as will bar the action.¹ Under the Georgia Code in certain classes of actions against railway companies, the intoxication of the plaintiff is made an absolute defense,² but this is counter to the current of authority.

Drunkenness, however, on the part of a trespasser is universally held to be such negligence as will prevent entirely any recovery of damages for injuries sustained at the time, or by reason of the trespass. Intoxication under these circumstances is, in law, a more serious irregularity than intoxication merely. When one comes upon my premises without warrant, and in addition to the wrong-doing involved in the trespass, drinks himself drunk, and thus renders himself helpless and irresponsible, and under these circumstances, and being in that condition, sustains an injury, he is in no position to call upon me for damages for anything he has suffered, for which any conduct upon my part, short of a wanton and wilful infliction of injury is the cause or occasion.³ Drunkenness is a wholly self-imposed disability, and in consequence is not to be regarded with that kindness and indulgence which we instinctively concede to blindness, or deafness, or any other physical infirmity. Trespassers

¹ *Wynn v. Allard*, 5 Watts & S. 524; *Illinois, &c., R. R. Co. v. Cragin*, 71 Ill. 177; *Cleghorn v. New York, &c., R.R. Co.*, 56 N. Y. 44; *People v. Eastwood*, 14 Id. 562; *Wood v. Andes*, 11 Hun, 543; *Cassedy v. Stockbridge*, 21 Vt. 391; *Chicago, &c. R. R. Co. v. Bell*, 70 Ill. 102; *Fitzgerald v.*

Weston, 52 Wis. 354; *City of Salina v. Trospen*, 27 Kan. 545.

² Code of Ga., § 2972, and § 3034, *cf. Southwestern R. R. Co. v. Hankerson*, 61 Ga. 114.

³ *Mulherrin v. Delaware, &c., R. R. Co.*, 81 Penn. St. 366.

go at their peril. That is settled law. Much more is it just to hold that they make themselves drunk at their peril. Disabilities, moreover, of any kind are to be a shield, and never a sword. It would be a strange rule of law that regarded a certain course of conduct negligent and blame-worthy upon the part of a sober man, but that held the same conduct, on the part of the same man when intoxicated, venial and excusable. Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances.¹ Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculis*. When they make themselves drunk, and in that helpless condition wander upon the premises of sober men and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence; and the courts consistently hold that such intoxicated trespassers have no standing in any forum where justice is impartially administered. Many cases illustrate and enforce this doctrine. *Herring v. Wilmington & Raleigh R. R. Co.*² is the leading case. The facts were these: Two of the plaintiff's slaves, being allowed to go about on Sunday as they pleased, became intoxicated; and, wandering upon the defendant's track, lay down and fell asleep at a point upon a straight line in the road where they could be seen from an approaching train, for more than a mile. They were, however, run over by a passing train, one of them being killed and the other seriously injured. The plaintiff argued that under these circumstances the law should imply negligence upon the part of the defendant's train-men, but the court held that position not tenable, and insisted that being upon

¹ *Chicago, &c., R. R. Co. v. Bell*, 70 Ill. 102; *Toledo, &c., R. R. Co. v. Riley*, 47 Id. 514. ² 10 Ired. 402; S. C. 51 Am. Dec. 395.

the track, in a condition of helpless intoxication, was in itself such contributory negligence as would prevent a recovery. This is the rule consistently adhered to by all the courts in actions brought by trespassers upon railway property for injuries sustained in a fit of intoxication.¹

It is to be presumed that a person of mature years will not stand still upon a railway track and deliberately suffer himself to be run down. It is also a presumption that all men are in the possession of their senses, and will exercise ordinary diligence in times of danger to take care of themselves. It is in accordance with these assumptions held, that when an engineer of a locomotive-engine sees ahead of him a man upon the track, he may presume that the man possesses ordinary capacity, that he can see, and hear, and reason from cause to effect, and that, as a train approaches him, he will step aside and not be run over. It is, therefore, not negligence on the part of the engineer not to stop his train and go forward and push such a person off the track, nor is it wrong not to slacken the speed of the train, but to rely upon the person on the track, if he may reasonably be supposed to see or hear the train, to take care of himself.² The train-men need not, in order to escape the imputation of negligence, assume that persons they see upon the track are deaf or blind, or paralyzed or idiots, but are justified in acting freely upon the contrary assumptions.

¹ *Denman v. St. Paul, &c., R. R. Co.*, 26 Minn. 357; *McClelland v. Louisville, &c., R. R. Co.*, 94 Ind. 276; *Yarnall v. St. Louis, &c., R. R. Co.*, 75 Mo. 575; *Little Rock, &c., R. R. Co. v. Pankhurst*, 36 Ark. 371; *Houston, &c., R. R. Co. v. Smith*, 52 Texas, 178; *Id. v. Sympkins*, 54 Id. 615; s. c. 38 Am. Rep. 632; *Illinois, &c., R. R. Co. v. Hutchinson*, 47 Ill. 408; *Manly v. Wilmington, &c., R. R. Co.*, 74 N. C. 655; *Richardson v. Id.* 8 Rich. (Law), 120; *Felder v. Louisville, &c., R. R. Co.*, 2 McMull. 403; *Southwestern R. R. Co. v. Hankerson*, 61 Ga. 114; *Weymire v. Wolfe*, 52 Iowa, 543; *Lake Shore, &c., R. R. Co. v. Miller*, 25 Mich. 279.

² *Indianapolis, &c., R. R. Co. v. McClaren*, 62 Ind. 568; *Lake Shore, &c., R. R. Co. v. Miller*, 25 Mich. 279; *Philadelphia, &c., R. R. Co. v. Spearen*, 47 Penn. St. 304; *Houston, &c., R. R. Co. v. Smith*, 52 Texas, 178.

“ If an engineer sees a team and carriage, or a man, in the act of crossing the track far enough ahead of him to have ample time, in the ordinary course of such movements, to get entirely out of the way before the approach of the engine; or if he sees a man walking along upon the track at a considerable distance ahead, and is not aware that he is deaf or insane, or, from some other cause, insensible of the danger; or if he sees a man or a team approaching a crossing, too near the train to get over in time, he has a right to rely upon the laws of nature and the ordinary course of things, and to presume that the man driving the team, or walking upon the track, has the use of his senses, and will act upon the principles of common sense, and the motive of self-preservation, common to mankind in general, and that they will, therefore, get out of the way; that those on the track will get off, and those approaching it will stop in time to avoid the danger; and he, therefore, has the right to go on without checking his speed, until he sees that the team, or man, is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible, in time to avoid disaster. If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not or would not, and he should, therefore, take means to stop his train in time. A more stringent rule than this—a rule that would require the engineer to check his speed, or stop his train, whenever he sees a team crossing the track, or a man walking on it, far enough ahead to get out of the way in time, until

he can send ahead to inquire why they do not ; or which would require the engineer to know the deafness or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness, or other personal peculiarities, of all those persons he may see approaching, or upon the track, and more especially of all those who may be approaching the crossing upon a highway—though not seen—any such rule, if enforced, must effectually put an end to all railroads as a means of speedy travel or transportation, and reduce the speed of trains below that of canal boats, forty years ago, and would effectually defeat the object of the legislature in authorizing this mode of conveyance. But how are railway companies, or their engineers or employees, to know the personal peculiarities, the infirmities, personal character, or station in life, of the hundreds of persons crossing or approaching their track? By inspiration or intuition? And if they do not know, then how and why shall the company be required to run their road, or regulate their own conduct, or that of their servants, by such personal peculiarities of strangers, of which they know nothing? These questions suggest their own answers.”¹

An intoxicated person, it is, however, to be remembered, is not, by reason of his intoxication, so far beyond the pale of the law that he may be injured with impunity. He is as much entitled to care and caution on the part of others as though he were sober, and plainly much more in need of it.² Accordingly, if he is injured when, by the exercise of ordinary care upon the part of the person inflicting the injury, he might have escaped the injury, he may, in spite of his intoxication, have his action,³

¹ *Lake Shore, &c., R. R. Co. v. O'Keefe v. Chicago, &c., R. R. Co., Miller*, 25 Mich. 279. See, also, 32 Iowa, 467; *Whalen v. St. Louis, &c., R. R. Co.*, 60 Mo. 323.

² *Robinson v. Pioche*, 5 Cal. 460;

³ *Kean v. Baltimore, &c., R. R.*

In an action to recover for injuries sustained by the plaintiff to his property, by reason of the negligent and careless conduct of the defendant, it is insufficient as a defense to admit the injury, and aver that at the time the damage was done, the defendant was intoxicated by liquor, sold to him by the plaintiff.¹ This sort of a plea amounts to setting up the contributory negligence of the plaintiff in selling liquor, by means of which the defendant became intoxicated and did the damage, in bar of the action. Neither does the purchasing and drinking of liquor constitute contributory negligence, which would bar a recovery in an action in which it appears that the plaintiff, having bought liquor from the defendant, drank of it until he became intoxicated and unconscious; and in that condition was expelled from the defendant's saloon late in the night, and died from the consequent exposure.² From these two cases it appears that it is not contributory negligence either to sell liquor to the man who, when he is made drunk by it, does you an injury, or to buy and drink the liquor yourself, although, as a result of your spree, you suffer an injury at the hands of the liquor-seller.³ Intoxication is one of the things that may be proven by the opinions of witnesses, and it is held that in this particular, one need not be an expert in order to be a competent witness.⁴ It is, also, error to exclude evidence that the plaintiff was intoxicated at the time of the happening of the accident.⁵

Co., 61 Md. 154; *Houston, &c., R. Co. v. Reason*, 61 Texas, 613; *Thomp. on Neg.* 1174, § 22.

¹ *Cassady v. Magher*, 85 Ind. 228.

² *Weymire v. Wolfe*, 52 Iowa, 533.

³ See, also, as in point, *McCue v. Klein*, 60 Texas, 168; S. C. 48 Am. Rep. 260.

⁴ *People v. Eastwood*, 14 N. Y. 562; *McKee v. Nelson*, 4 Cowen, 355; *Woolheather v. Risley*, 38 Iowa,

486; *Brannon v. Adams*, 76 Ill. 331; *Thomp. on Neg.* 779, § 2, and cases collected.

⁵ *Wynn v. Allard*, 5 Watts & S. 524; *Illinois, &c., R. R. Co. v. Cragin*, 71 Ill. 177. See, also, *Cassedy v. Stockbridge*, 21 Vt. 391; *Wood v. Andes*, 11 Hun, 543; *Rock Island v. Vanlandschoot*, 58 Ill. 485; *Hubbard v. Mason City*, 60 Iowa, 400.

While, what constitutes negligence, is a question of law—the question, whether or not there was intoxication, belongs to the jury as an issue of fact.

§ 147. *Deafness, blindness, or other physical infirmity as a defense.*—As a general rule of law, it may be said that physical infirmities, of themselves, do not constitute a defense for a failure to exercise ordinary care under given circumstances. The bluntness of one faculty will not excuse a failure to use the other—as, for an example, deafness will not operate to palliate a failure to use the sense of sight. When one is conscious that his hearing is defective, instead of exercising less, he should, rather, exercise greater care in other respects. What is lacking in the sense of hearing, must, if possible, be made up by increased vigilance in looking out for danger with the eye.¹

And so, also, in case of blindness, common prudence requires that the blind should exercise far greater care in proportion to the danger to which men, in general, are constantly exposed, than is required of those in full possession of the faculty of sight.² The old and the infirm, however, not less than the young and the agile, have a right to move about and attend to their business, and are entitled to the protection of the law in so doing.³ Says Chief Justice Hunt, in the opinion in the case of

¹ *Cleveland, &c., R. R. Co. v. Terry*, 8 Ohio St. 570; *Central, &c., R. R. Co. v. Feller*, 84 Penn. St. 226; *Morris, &c., R. R. Co. v. Haslan*, 38 N. J. Law, 147; [but compare with this case, *New Jersey, &c., Trans. Co. v. West*, 32 N. J. Law, 91]; *Steves v. Oswego, &c., R. R. Co.*, 18 N. Y. 422; *Butterfield v. Western, &c., R. R. Co.*, 10 Allen, 532; *Chicago, &c., R. R. Co. v. Still*, 19 Ill. 508; *Illinois, &c., R. R. Co. v. Ebert*, 74 Id. 399; *Hanover, &c., R. R. Co. v. Coyle*, 54 Penn. St. 396; *Elkins v.*

Boston, &c., R. R. Co., 115 Mass. 190.

² *Oyshterbank v. Gardner*, 49 N. Y., Super. Ct. 263; *Winn v. Lowell*, 1 Allen, 177; *Sleeper v. Sandown*, 52 N. H. 244; *Peach v. Utica*, 10 Hun, 477; *cf. City of Centralia v. Krouse*, 64 Ill. 19; *Davenport v. Ruckman*, 37 N. Y. 568; *Thomp. on Neg.* 431, § 9, 1203, § 51.

³ *Stewart v. Ripon*, 38 Wis. 584; *Davenport v. Ruckman*, 37 N. Y. 568; *cf. Phillips v. Dickerson*, 85 Ill. 11.

O'Mara v. Hudson, &c., R. R. Co.:¹ "The old, the lame, and the infirm, are entitled to the use of the street, and more care must be exercised towards them by engineers than towards those who have better powers of motion. The young are entitled to the same rights, and cannot be expected to exercise as good foresight and vigilance as those of maturer years."

Physical disabilities of the character considered in this section, which may be designated as natural or providential disabilities, are to be conceded a far higher indulgence in the law than the self-inflicted disability of drunkenness. It may be said that men make themselves drunk at their own proper peril, but men are not to be held blind, or deaf, or lame, or aged, in any such sense. "A blind man is not required to see at his peril," says Mr. Justice Holmes.² Toward these classes of persons, it is a well settled rule that there is required to be exercised by the public generally especial care and prudence, while, perhaps, all that can be said of a drunken man in this respect, is that he is not to be wantonly injured.⁸

It is plainly the law that negligence will never be imputed to the halt, or the blind, or the deaf, simply and solely because they go about their business, as other men do, in as careful a way as their faculties permit. Such conduct upon the part of such person, is never, *in se*, contributory negligence. They must exercise what care they can—up to the measure of ordinary care, under the circumstances, and if they do, there is no room to impute negligence. "A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or the

¹ 38 N. Y. 445.

² Holmes' Common Law, 109.

⁸ Illinois, &c., R. R. Co. v. Hutchinson, 47 Ill. 408; Field on Damages,

§§ 198, 199; Wharton on Neg., §§ 306, 307, 332, 389, *a*; Shear. & Redf. on Neg., § 413.

walk is in a safe condition. He walks by a faith justified by law, and if his faith is unfounded, and he suffers an injury, the party in fault must respond in damages. So one whose sight is dimmed by age, or a near-sighted person whose range of vision was always imperfect, or one whose sight has been injured by disease," [and it might have been added, in view of the caution in the succeeding sentence, one wholly blind, or deaf, or otherwise a victim of some disabling physical infirmity,] "is each entitled to the same rights, and may act upon the same assumption. Each is, however, bound to know that prudence and care are in turn required of him, and that if he fails in this respect, any injury he may suffer is without redress."¹

§ 148. *Negligence as a defense in actions upon policies of insurance.*—The negligence of the assured, his agents or servants, in the absence of fraud or wilfulness, occasioning a loss by a peril insured against, is no defense to an action, either on a fire or marine policy.² As it is often expressed, loss occasioned by negligence is one of the principal risks against which men insure. So the insurance company has been held liable where the accident arose from the careless use of fire in drying the plastering

¹ Davenport v. Ruckman, 37 N. Y. 568, (Hunt, C. J.) affirming S. C. 10 Bosw. 20. See, also, Cox v. Westchester Turnpike Co., 33 Barb. 413; Frost v. Waltham, 12 Allen, 85; Thompson v. Bridgewater, 7 Pick. 188; Renwick v. New York, &c., R. Co., 36 N. Y. 133; Holmes' Common Law, 109; Thomp. on Neg. 1203, § 51.

² American Insurance Co. v. Insley, 7 Penn. St. 223; S. C. 47 Am. Dec. 509; Hillier v. Allegheny, &c., Ins. Co., 3 Penn. St. 470; S. C. 45 Am. Dec. 656, and note; Cumberland, &c., Ins. Co. v. Douglas, 58 Penn. St. 419; Nelson v. Suffolk Ins. Co., 8 Cush. 497;

Gates v. Madison, &c., Ins. Co., 5 N. Y. 469; S. C. 55 Am. Dec. 360; Tilton v. Hamilton Ins. Co., 1 Bosw. 392; O'Brien v. Commercial Ins. Co., 6 Jones & S. 526; Brown v. Kings Co., &c., Ins. Co., 31 How. Pr. 512; Bulman v. Monmouth Ins. Co., 35 Me. 227; Johnson v. Berkshire Ins. Co., 4 Allen, 388; Columbia Ins. Co. v. Lawrence, 10 Peters, 517; Waters v. Merchants Ins. Co., 11 Id. 213; Henderson v. Western, &c., Ins. Co., 10 Rob. (La.) 164; S. C. 43 Am. Dec. 179; Sherwood v. General Ins. Co., 1 Blatchf. 255; Shaw v. Robberds, 6 Ad. & El. 75; May on Insurance, §§ 407-411.

of a room,¹ or from the negligent use of fire in compounding chemicals in a drug store.² Neither will the use of the premises as a house of prostitution avoid the policy if there is nothing in the policy forbidding it.³ But where the negligence is so gross as to squint at fraud, or to amount to positive misconduct and wrong-doing, as where a steamboat captain, in order to increase the speed of his boat for the purpose of winning a race, makes use of turpentine for fuel, and in consequence the boat takes fire and burns up, the insurer is not liable.⁴

So, also, in respect of policies of life insurance, it is the rule that accidental or unintentional self-destruction is not within a condition forfeiting a policy for suicide.⁵ This is equally the rule "whether death result from taking poison by mistake, supposing it a wholesome medicine, or taking an overdose of a dangerous medicine; or from an act done in frenzy or delirium, as by leaping from a window, tearing off a bandage from an artery; or from an act done under the stress of an overpowering force"⁶ as, for an example, where one, being intoxicated, took poison by mistake without intent to destroy his life,⁷ or where one holding an accident policy, was injured in carelessly attempting to jump on to the step of an omnibus while in motion.⁸ But, in Iowa, it was held where one was insured against accidents, while traveling on the convey-

¹ *Troy, &c., Ins. Co. v. Carpenter*, 4 Wis. 29.

² *Brown v. Kings Co., &c., Ins. Co.*, 31 How. Pr. 512.

³ *Behler v. German, &c., Ins. Co.*, 68 Ind. 353.

⁴ *Citizens, &c., Ins. Co. v. Marsh*, 5 Penn St. 387.

⁵ *Breasted v. Farmer's Loan & Trust Co.*, 8 N. Y. 299; s. c. 59 Am. Dec. 482; *Dean v. American Mutual Life Ins. Co.*, 4 Allen, 102; s. c. 1 *Bigelows Life & Acc. Ins. Cas.* 195; *Cooper v. Massachusetts, &c., Ins.*

Co., 102 Mass. 227; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317; s. c. 39 Am. Rep. 660; *May on Insurance*, § 307.

⁶ Mr. Freeman's note, 59 Am. Dec. 489, § 3.

⁷ *Equitable Life Ass. Soc. v. Pater-son*, 41 Ga. 338; s. c. 5 Am. Rep. 535; s. c. 3 *Bigelow's Life & Acc. Ins. Cas.* 534.

⁸ *Champlin v. Railway Passenger Ins. Co.*, 6 Lans. 71.

ances of any common carrier, provided he complied with the rules and regulations of the carrier, and exercised due diligence looking to his self-protection, and while riding on a railway train, stood upon the step of the car, upon approaching a station, in violation of the carriers rule, which was known to him, and was in consequence thrown from the train and injured, that there could be no recovery on the policy.¹

§ 149. *In actions against telegraph companies for failure in the transmission or delivery of telegraphic dispatches.*—In *Koons v. Western Union Telegraph Co.*,² it was held that where the sender of a telegraphic dispatch, intending to write a certain word, negligently writes what more resembles another word—"two" being so written as to appear to be "ten"—the telegraph company is not liable for damages caused by transmitting the word as it appeared to be written, which is perhaps equivalent to a rule that, in dealing with a telegraph company, illegible chirography will be held, if it occasion any trouble or injury, such negligence or default on the part of the sender of the dispatch as will prevent his recovery of damages from the company.

In *Given v. Western Union Telegraph Co.*,³ it was held, by Mr. Justice Miller, that when a message is sent to one who is at the time of its receipt out of town, and consequently not at his usual place of business, and the company delivers the message to his wife at his house, who does not know where her husband is, and cannot,

¹ *Bon v. Railway Passenger Assurance Co.*, 56 Iowa, 664; S. C. 41 Am. Rep. 127. See, also, as in point upon the general question of accidental self-destruction as a defense as distinguished from suicide, *Breasted v. Farmer's Loan & Trust Co.*, 8 N. Y. 299; S. C. 59 Am. Dec. 482, and the

learned annotation at pages 487-497; *Bliss on Life Ins.*, § 228; *Bunyon on Life Ass.* (2d. Ed.) 71; *May on Ins.*, § 308; *Reynolds on Life Ins.*, 105, 107.

² 102 Penn. St. 164.

³ U. S. Circ. Ct., S. D., Iowa, June 11, 1885, 24 Fed. Rep. 119.

therefore, forward the dispatch to him promptly, the failure of the husband to inform his wife of his whereabouts for the day, or his failure to notify the telegraph company in advance where he may be reached, or the failure of the wife to act promptly to the end of getting the dispatch into her husband's hands, amounts to such contributory negligence upon the part of the plaintiff as will defeat a recovery of damages for any injury resulting from the failure to receive the dispatch promptly.¹

§ 150. *The rule in the Admiralty.*—In Admiralty the matter of negligence and contributory negligence is dealt with in a peculiar way. When one brings his action in the Court of Admiralty for damages for an injury he has sustained in collision by reason of the culpable negligence of another, the plaintiff's own contributory negligence is not a defense as in a court of English common law, neither is there a comparison instituted between the negligence of plaintiff and defendant, to the end that a judicial balance may be struck as is the rule in Illinois, nor does the plaintiff's negligence, as in Georgia and Tennessee, go in mitigation of damages.

The general principles of the law maritime on which depend the right to recover in the Court of Admiralty for damage arising by collision, were thus stated by Lord Stowell:²

¹ *Haec fabula docet* that, when a man goes away from home, if only for a day, he must, in order to render the Western Union Telegraph Company liable for a failure to deliver his dispatches promptly, tell his wife where he is going, or at the very least, notify the company before he leaves, where he may be reached during that day. See, also, *Western Union Telegraph Co. v. Blanchard*, 68 Ga. 299; S. C. 45 Am. Rep. 480, and Mr. Browne's extended annotation, where-

is considered at length, and many cases are collected. *Western Union Telegraph Co. v. Reynolds*, 77 Va. 173; S. C. 46 Am. Rep. 715.

² "The *Wardrop-Sims, Jones*, 2 Dods. 83, 85, cited by Lord Gifford in the House of Lords; *Hay v. Le Neve*, 2 Shaw's Appl. Cases, 395; who also cited a similar statement of the law by the same learned judge, from a *M.S.* note of the case of *The Lord Melville*, 1816, *ibid.* See *The Catherine of Dover, Dawson*, 2 Hagg. Ad. 145, 154." I have taken this citation

“There are four possibilities under which a loss of this sort may occur.

“*1st.* It may happen without blame being imputed to either party; as, where a loss is occasioned by a storm, or by any other *vis major*; in that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.

“*2ndly.* A misfortune of this kind may arise where both parties are to blame, where there has been a want of skill and due diligence on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both.

“*3rdly.* It may happen by the misconduct of the suffering party alone; and then the rule is, that the suffering party must bear his own burthen.

“*4thly.* It may have been the fault of the ship, which ran the other down; and in this case, the injured party would be entitled to an entire compensation from the other.”

Upon these four famous propositions, formulated and declared by the foremost of English admiralty judges, hangs all the law in admiralty upon the matter of the recovery of damages in collision.

“These rules,” says Mr. Maclachlan,¹ “with a difference to be immediately pointed out, are also the law of the French Code,² which differs from the French Ordinance of 1681³ only in this, that the modern law, improved by the clear expositions of Emerigon,⁴ and Valin⁵

and note bodily, from Maclachlan's “Law of Merchant Shipping,” 3d London Edition (1880), page 304.

¹ “Law of Merchant Shipping” cited, *supra*, page 305.

² Code de Com., art. 407, which

reduces the third and fourth rules into one.

³ Liv. 2, t. 7, art. 10, 11.

⁴ Emerigon des Assur. vol. I. page 408, c. 12, § 14.

⁵ 2 Valin, 178, 179, 180.

provides for the case of accidental collision.¹ The defect, so remedied in the French law, exists in the laws of Oleron² and of Wisby,³ from which the ordinance of Louis XIV. borrowed extensively; and yet the principle overlooked in these earlier and later codes, is obviously accepted by the Digest,⁴ the common source of much of the legislation of those times."

"It has been," the same writer continues, "the custom of writers upon jurisprudence, to bestow much attention and but little praise on a rule somewhat resembling the second of these,⁵ in consequence of its dividing the loss, between the parties for a reason quite unknown to English Law, which the jurists of Cleirac's time called *judicium rusticorum*, the rule of arbitrators who compromise where they cannot decide."

It is with the second of Lord Stowell's rules that, for the purposes of this treatise, we have to do. Where both parties are in fault, it is, in accordance with this rule, settled law in courts of admiralty, that the loss shall be equally divided between them. This rule is universally declared by all the foreign ordinances and jurists, and is universally applied both here and in England in admiralty.⁶

I have found no better elucidation of the rule in question than that contained in the letter of the Registrar of the Admiralty Court in London to Lord Chancellor Selborne, written in 1873, when the Lord Chancellor moved his bill in the House of Lords, which

¹ Boulay-Paty, *Droit Marit*, vol. IV, 492, t. 12, § 6.

² Oleron, art. 15—1 Pardess, 334.

³ Wisby, art. 29, 30, 49, 50, 51, 65—1 Pardess, 481 *et seq.*

⁴ Dig. 9, 2, 29, § 2 and 4.

⁵ Lord Stowell's Rules, *supra*.

⁶ The Baltimore, 8 Wall. 377; The Catharine, 17 How. (U. S.) 170; The

Continental, 14 Wall. 345; The Constitution, Gilp. 579; *Boggs v. Parr*, 3 Hughes, 504; *Vaux v. Sheffer*, 8 Moo. P. C. 75; *The Sappho*, 9 Jur. 560; 1 Parson's Mar. Law, 189; *Lees' L. Brit. Sh.* 255; 3 Kent's Com. 231; *Maclachlan's L. of Merch. Sh.*; (3d London ed.), ch. VI, pp. 304-321, incl.

afterwards became law as the Supreme Judicature Act,¹ in which it was proposed to abolish the difference between the common law courts and the Court of Admiralty in damage causes at sea, by extinguishing with a stroke of the pen this ancient rule. Mr. Rothery, the Registrar, comes to the defense of the rule in a letter addressed to the Lord Chancellor, an extract from which I have set out in the note,² in which, assuming that the rule is

¹ 36 and 37 Vict. ch. 66 (1873).

² The learned Registrar says, omitting such part of the letter as is prefatory and complimentary:

"I will take your Lordship's figures, and will assume that A and B are the owners of two vessels, worth respectively 10,000*l.* and 50,000*l.*; that they come into collision, and that both alike are to blame for the collision, that being a condition precedent to the equal division of the damages.

"And, first, I will assume that A's vessel goes to the bottom, and that B's is uninjured—a not very unusual occurrence in collision at sea. Then A, who has lost 10,000*l.* by the sinking of his vessel, would, under the Admiralty rule, both being to blame, be entitled to recover one half of his loss, or 5,000*l.* from B.

"Secondly. Let us assume that B's vessel goes to the bottom, and that A's is uninjured; then B, who has lost 50,000*l.* by the sinking of his vessel, will be entitled to recover one moiety of his loss, or 25,000*l.* from A.

"Thirdly. I will suppose that both go to the bottom, both being alike to blame for the collision. Then A, having lost 10,000*l.* by the sinking of his vessel, is entitled to recover 5,000*l.* from B, for a moiety of his damage; while B is entitled to recover 25,000*l.* from A, for the moiety of his damage. Each loses 30,000*l.*; A, by having to bear the loss of one moiety of his own vessel, or 5,000*l.*, and by having to pay to B 25,000*l.* for the moiety of his, B's, loss; and B, by having to bear the loss of one moiety of his own vessel, or 25,000*l.*, and by having to

pay to A 5,000*l.* for a moiety of his, A's, loss. The mistake of those who think that the owner of a vessel worth 10,000*l.* might, by a collision with a vessel worth 50,000*l.*, recover, under the Admiralty law, no less a sum than 30,000*l.* as a compensation, arises from their supposing that the amount at stake is a common fund, to be divided between two claimants, not a joint loss which has to be apportioned between them.

Let us now see what the result would be under the Common Law rule, where, if both are to blame, neither can recover anything. In the first of the three cases cited above, the whole loss of 10,000*l.* would fall upon A; in the second, the whole loss of 50,000*l.* would fall upon B; and in the third case, B's loss would be 50,000*l.*, while A's loss would be only 10,000*l.*, or one-fifth part that of B. And this, too, be it observed, although both may have been equally to blame for the collision, and although the fact whether one or both went to the bottom would depend very much upon the accident, of which parts of the two vessels came into collision. A rule which depends upon so mere an accident can, I venture to submit, hardly be so equitable as the rule which directs that a loss, resulting from the common fault of two parties, shall be equally divided between them." "A Defense of the Rule of the Admiralty Court, etc., in a letter to the Right Hon. Lord Selborne, etc., by H. C. Rothery, M. A., Registrar, etc., 1873."

misunderstood and, taking his cue from the argument against it in the House of Lords, he argued with such force and cogency of logic in its favor that, in the Judicature Act as finally adopted, the rule is not only preserved as to the Courts of Admiralty, but is made the rule of the other courts in like case, where it used not to be.¹

In this country, however, as in England prior to the passage of the Supreme Judicature Act,² when an action for collision is brought in a court of common law, the admiralty rule is disregarded, and if the plaintiff, by his own negligence, contributed in any degree to occasion the collision, he has no remedy.³

§ 151. *Contributory negligence as a defense in actions between attorney and client.*—We find very few reported cases of actions brought against attorneys for negligence,⁴ and, therefore, few cases in which the contributory negligence of the client is pleaded as a defense. In such decisions as there are, we find the case turning rather on the right than the measure of the recovery.⁵

¹ 36 and 37 Vict. ch. 66, § 25, subs. 9.

² 36 and 37 Vict. ch. 66.

³ *Broadwell v. Swigert*, 7 Ben. M. 39; S. C. 45 Am. Dec. 47 (and the note); *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; *Owners of the steamboat Farmer v. McCraw*, 26 Ala. 189; S. C. 62 Am. Dec. 718; *Vanderplank v. Miller*, 1 Moody & M. 169 (by Lord Tenterden.) See, also, *The Clara*, 102 U. S. 200; *The Morgan v. The Zebra*, 2 Hughes, 64; *The R. L. Maybey*, 4 Blatchf. 88; *The Scranton and The Emerald Isle*, 2 Ben. 25; *The Morning Light*, 2 Wall. 550; *Union S. S. Co. v. New York and Virginia S. S. Co.*, 24 How. (U. S.) 307; 1 *Parson's Shipping and Adm.* 525; *Abbott's Shipping*, 230; 2 *Sedgwick on Damages* (7th edition), 351 (note); *Cohen's Adm.* 215, 224.

⁴ In *Sedgwick on Damages* (6th

edition), 635, in the note, it is suggested that the reason for the paucity of authorities upon this point is, either that attorneys are "a very faithful class," or "very skillful in covering the tracks of any devious steps."

⁵ *Godefroy v. Jay*, 7 Bing. 413; *Hoby v. Built*, 3 Barn. & Ad. 350; *Langdon v. Godfrey*, 4 Fost. & Fin. 445. "In other cases where their negligence has been such as to furnish a right of action against them (*i. e.*, actions of negligence by clients against their attorneys), the rule of damages is the same with that in like case against sheriffs. The plaintiff is entitled to be in the same position as if the attorney had done his duty." *Sedgwick on Damages* (6th ed.), 635, citing *Tatham v. Lewis*, 65 Penn. St. 65. See, also, 2 *Sedg. on Dam.* (7th ed.) 447, (note); and *Weeks on At-*

In the recent case of *Read v. Patterson*,¹ the contributory negligence of the client is expressly held a bar to an action upon his part, for damages sustained by reason of the negligence of his attorney, and aside from this single adjudication, I have not found any case in point. It appears that, in 1860, Patterson placed in the hands of his attorney, Read, some notes for collection; that Read obtained a judgment upon each of the notes, and that executions were issued in due time and severally returned unsatisfied. Then came the war; *inter arma silent leges*; which is to say, returning to the vernacular, that nothing further was done, toward collecting these notes, until 1866, when Read had *alias* executions issued, upon which returns were not made up to the time when this suit was brought, in 1871. The plaintiff had judgment against his attorney in the court below for the whole amount of the judgments remaining unpaid, but upon appeal, the court held that, although the defendant was negligent in not collecting the money, inasmuch as the judgment debtor was perfectly solvent during all the years which had elapsed since the issuing of the *alias* executions, yet that negligence not being the proximate or natural occasion of the loss, the plaintiff ought not to recover, for the plain reason that he himself, at any time, without reference to what his attorney did, or omitted to do, might have had executions issued upon the judgments, which could have been collected; that this failure upon the part of the plaintiff to proceed as he might have done, was the true proximate cause of his failure to get his money, and that, having employed other counsel to assist in enforcing the claim, which, in fact, as it appears, was practically a repudiation of the defendant as his

torneys at Law, ch. xii., page 470, in which the liability of attorneys to their clients, with respect of negligence generally, is very fully consid-

ered, and a great number of cases are cited.

¹ 11 Lea, (Tenn.) 430.

attorney in the premises, which counsel also failed to take the proper steps to collect the judgments, he was guilty of such contributory default as would prevent a recovery from the defendant. This decision, reversing the judgment of the court below, was rendered at the April term, 1883—more than twenty-three years after Read obtained the original judgments—and granted a new trial.

§ 152. *In actions between physician and patient.*—It is a well settled rule of law that when a patient has, by his own imprudence, negligence, or disregard of the directions of his physician, directly contributed to the aggravation of his disease or disorder, he cannot recover damages for anything which is the result of mere negligent or unsuccessful treatment by the physician. Contributory negligence here, as in any other case, is a bar to the action. Many cases in all the courts enforce this rule.¹

“Nothing can be more clear,” said Mr. Justice Woodward,² “than that it is the duty of the patient to cooperate with his professional adviser, and to conform to the necessary prescriptions; but if he will not, or, under the pressure of pain, cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible. No man may take advantage of his own wrong, or charge his misfortune to the account of another.”

If the patient is insane, and so incapable of exercising

¹ Potter v. Warner, 91 Penn. St. 168; Bogle v. Winslow, 5 Phila. 136; 362; S. C. 36 Am. Rep. 668; Gwynn v. Duffield, 61 Iowa, 64; S. C. 47 Am. Rep. 802; Hibbard v. Thompson, 109 Mass. 286; McCandless v. McWha, 22 Penn. St. 261; S. C. 25 Id. 95; Haire v. Reese 7 Phila. 138; Chamberlin v. Morgan, 68 Penn. St. 168; Geiselman v. Scott, 25 Ohio St. 86; Wohlfahrt v. Beckert, 92 N. Y. 490; S. C. 44 Am. Rep. 406; Thomp. on Neg. 1215, § 63; Whart. on Neg., § 737; Shear. & Redf. on Neg., § 443.

² McCandless v. McWha, 22 Penn. St. 261, *supra*.

proper care, or of co-operating with his physician, contributory negligence is not to be imputed to him, and the physician is bound to take a just account of this incapacity on the part of his patient, and act accordingly.¹

In *Hibbard v. Thompson*,² it is held that, in an action of negligence brought by a patient against his physician, in which it appears that, although the plaintiff, while under treatment, has injured himself by his own carelessness, the physician has also inflicted a distinct and separate injury by careless and unskillful treatment, the plaintiff may have his action, provided that the injurious results of the patient's negligence can be distinctly and clearly separated and distinguished from those which flowed from the malpractice of the physician; or, in other words, that when in actions of this nature the damages are capable of apportionment, so that it can be made to appear with reasonable distinctness what part is due to the plaintiff's neglect and what to the wrong-doing of the defendant, then an action may be maintained by the plaintiff for the injury resulting from the defendant's separate default.³

It is not, however, contributory negligence for a patient, after one physician has injured him by negligent treatment, to refuse to allow another physician to make a somewhat dangerous experiment upon him for the purpose of repairing the injury, unless there is reasonable assurance of the success of the experiment.⁴ In the case in which this doctrine is declared, the court says: "Is it the duty of a person who has been injured by the malpractice of a physician or surgeon, to make any experiment which may be suggested to him, however plausible it may appear? A man who is not

¹ *People v. New York Hospital*,
(by *Ordranax, C.*) 3 *Abb. N. C.* 229.

² 109 *Mass.* 286.

³ *Cf.*, § 24, *supra*.

⁴ *Chamberlin v. Morgan*, 68 *Penn.*
St. 168.

himself a physician, and cannot be expected to know anything upon the subject, cannot be himself a judge of such matters. It was very reasonable for the father of Hattie Morgan to say, when Dr. Richardson proposed to put her under the influence of an anæsthetic and attempt to reduce the limb, 'that, so long as she was improving so fast as she had done since he came home, he should not have it disturbed.' Had Dr. Chamberlin proposed this experiment, there might be some reason to hold that he should have the opportunity of redeeming his mistake; or even if he had called in Dr. Richardson to act on his behalf. Mr. Morgan merely requested Dr. Richardson to examine his daughter's arm and give his opinion about it. That did not oblige him to adopt his advice, or to incur the hazard and expense of another operation. He owed no such duty to Dr. Chamberlin. It was offered to prove that the injury could then have been reduced. But how was Mr. Morgan or Hattie to have known this? Had the experiment failed it might well have been urged that, as she was improving, she ought to have been let alone, and that Dr. Chamberlin was relieved from all responsibility by the case having been taken out of his hands."¹

§ 153. *In actions between innkeeper and guest.*—The innkeeper, like the common carrier, is an insurer, and responsible to his guests, for losses and damage of every character, except such as are occasioned by the act of God, the king's enemy, or the party complaining.² Another view of the innkeeper's liability is that he is excused for losses occasioned by *vis major*, or irresistible force, such as

¹ Chamberlin *v.* Morgan, *supra*. Upon the question of the liability of the physician in general for negligence or ignorance, see *State v. Hardister*, 38 Ark. 605; s. c. 42 Am.

Rep. 5; and *contra*, *State v. Schulz*, 55 Iowa, 698; s. c. 39 Am. Rep. 187.

² Chitty on Contracts, 675; Parsons on Contracts, vol. 2, p. 146; Story on Contracts, vol. 2, § 909; Saunders on Neg. 212.

robbery and fire.¹ But whether the innkeeper is to be held to the one degree of liability or the other, it is plain that he is liable for losses occasioned by theft, unless the contributory negligence of the guest is the proper proximate cause of the loss.² It is not contributory negligence, as a matter of law, in the guest not to lock or bolt his door. At most, it is only a circumstance to go to the jury upon the question of the guest's negligence.³ This is the ancient learning in *Cayle's Case* :⁴ "The innkeeper in that case," saith Lord Coke, "is bound in law to keep them" [the goods of his guest] "safe without any stealing or purloining, and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber door in which he is lodged, and that he left the chamber door open ; but he ought to keep the goods and chattels of his guest there in safety. And, although the guest doth not deliver his goods to the innkeeper to keep, nor acquaints him with them, yet, if they be carried away or stolen, the innkeeper shall be charged. And, although they who stole or carried away the goods be unknown, yet the innkeeper shall be charged. But if the guest's

¹ Story on Bailments, § 472; Redf. on Carriers, § 596; Wharton on Neg., § 678; 2 Kent's Com. 593; Thompson on Neg. 1215, § 62.

² *Mason v. Thompson*, 9 Pick. 280; S. C. 20 Am. Dec. 471; *Dickinson v. Winchester*, 4 Cush. 121; *Houser v. Tully*, 62 Penn. St. 92; S. C. 1 Am. Rep. 390; *Clute v. Wiggins*, 14 Johns. (N. Y.), 175; S. C. 7 Am. Dec. 449, and note; *Dunbier v. Day*, 12 Neb. 596; S. C. 41 Am. Rep. 772; *Murchison v. Sergeant*, 69 Ga. 206; S. C. 47 Am. Rep. 754; *Lanier v. Youngblood*, 73 Ala. 587; *Addison on Torts* (Dud. & Bay. ed.), 612, 613, 614; *Story on Contracts*, § 748; 2 Kent's Com., 592; *Herbert v. Markwell* (unreported), Q. B. Div., Dec. 19, 1881; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515; *Spice v. Bacon*, L. R. 2 Exch. Div. 463; *Cashill v. Wright*, 6

El. & Bl. 891; *Armistead v. Wilde*, 17 Q. B. 261. It is not within the proper scope of this treatise to consider the liability of innkeepers in detail under the various statutes which affect that liability in England and in every State in the Union. The careful practitioner need not be reminded, however, that such a statute will almost certainly, in any jurisdiction, need to be consulted when a case of this nature is in hand.

³ *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515; *Spice v. Bacon*, L. R. 2 Exch. Div. 463; *Bohler v. Owens*, 60 Ga. 185; *Classen v. Leopold*, 2 Sweeney, 705; *Cayle's Case*, 8 Coke's Rep. 32.

⁴ 8 Co. 32; 26 Eliz.; S. C. 1 Smith's Leading Cases, 8th ed. (1885), 249, and the note.

servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged, for then the fault is in the guest to have such companion or servant. But if the innkeeper appoints one to lodge with him, he shall answer for him." [If] "The innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not," [and] "the guest lets them lie in an outward court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest. The words are *hospitibus damnum non eveniat.*" Such was the early strictness of the common law, which, indeed, has been only somewhat modified in modern times by statute. It is still the law, in the quaint language of Lord Coke, that "it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber door in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety."¹

"I agree," says Lord Ellenborough, "in what is stated in Cayle's Case, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but, if the guest takes the key, it is a very proper question for a jury whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in

¹ Cayle's Case, 8 Co. 32, 33. See, also, to the point that it is not negligence in law for the guest to leave his door unlocked or unbolted, *Murchison v. Sergent*, 69 Ga. 206; s. c. 47 Am. Rep. 754; *Buddenburgh v. Benner*, 1 Hilt. 84; *Gill v. Libby*, 36 Barb. 70; *Classen v. Leopold*, 2 Sweeney, 707; *Lanier v. Youngblood*, 73 Ala. 587; *Hadley v. Upshaw*, 27 Texas, 547; *Addison on Torts*, 612; cf. 1 *Smith's Leading Cases*, 8th ed. (1885), 249, 253.

order to prevent persons from intruding themselves into his room.”¹ And Mr. Addison says: “Where a guest, having the key delivered to him, omits to use it, and a thief comes into his room by the door, and steals his goods, that is, or may be, evidence for the jury of contributory negligence, which will disentitle him to recover against the innkeeper.”²

One may also, without necessarily exposing himself to the imputation of negligence, accept and occupy a room in a hotel, the door of which has no lock or no bolt, or is otherwise incapable of being securely fastened.³ In such a case the proper question is not whether the door was actually locked or not, or whether the room was occupied when the door could not be locked, but whether the loss would or would not have happened had the guest exercised the ordinary care of a prudent man under the circumstances. “The fact of the guest having the means of securing himself, and choosing not to use them, is one which, with the other circumstances of the case, should be left to the jury. The weight of it must of course depend upon the state of society at the time and place. What would be prudent in a small hotel in a small town, might be the extreme of imprudence in a large hotel in a city like Bristol, where probably three hundred bed-rooms are occupied by people of all sorts.”⁴ It is not correct, however, to say that there is no duty on the part of the guest to lock his door, and consequently, that there is no negligence involved in leaving it unlocked.⁵ A jury of prudent men, it is believed, would more frequently regard

¹ Burgess v. Clements, 4 Maul. & Sel. 306.

² Addison on Torts, 612.

³ Lanier v. Youngblood, 73 Ala. 587; Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515.

⁴ Montague Smith, J., in Oppenheim

v. White Lion Hotel Co., L. R. 6 C. P. 515.

⁵ Spice v. Bacon, L. R. 2 Exch. Div. 463, overruling Mitchell v. Woods, 16 L. T. (N. S.), 676, a case at *nisi prius*, in which, upon that theory, the judge had directed a verdict for the plaintiff.

such a failure, if the guest had anything valuable in his possession, a grossly negligent omission of a plain duty, than a proper and prudent thing to do. So, where a guest makes an ostentatious display of his money in the presence of strangers in the public rooms of the hotel, and then leaves it in his room, with the door ajar or unlocked, a charge that gross negligence on the part of the guest would relieve the landlord, and that it was for the jury to say whether or not such conduct was gross negligence was, upon appeal, declared correct.¹ It is never necessary to show gross negligence on the part of a landlord in order to maintain an action against him for loss of goods. Any want of ordinary care contributing to the loss is sufficient.² In the case of *Hayward v. Miller*³ it appears that the plaintiff, who was a guest in the defendant's hotel, in searching for his room in the night, along a hall dimly lighted, opened a door which he supposed to be the door of his room and stepped in, but which was in reality the door to the elevator, and next to his own door. In consequence of this mistake he fell from the second floor to the cellar, and suffered serious injuries. The court held that the defendant was grossly negligent in leaving the elevator door in such a condition that it could be opened from the outside, and that the plaintiff's attempt to find his room, without the guidance of a servant, inasmuch as he had been a guest of the hotel before, and was somewhat familiar with the hallways in that part of the house, was not such contributory negligence as would prevent a recovery of damages from the innkeeper.⁴

¹ *Armistead v. Wilde*, 17 C. B. 261; and compare *Cashill v. Wright*, 6 El. & Bl. 891.

² *Jalie v. Cardinal*, 35 Wis. 118.

³ 94 Ill. 349; s. c. 34 Am. Rep. 229.

⁴ See, also, to the same point, and to the point of the liability in general of one who invites others to come upon his premises, *Camp v. Wood*, 76 N. Y. 92; s. c. 32 Am. Rep. 282; *Southcote v. Stanley*, 1 Hurl. & N. 250;

It is not negligence, as the law is declared in the Common Pleas in Philadelphia,¹ for one who is being fitted with new clothing in a tailor's or clothier's store, to leave his coat and vest, with his watch and money, in a compartment behind a curtain, such as are common in such stores and into which he was shown by the salesman for the purpose of changing his clothes and trying on his new suit, while he walked to another part of the store to stand before a mirror. In the case cited, it appears that a customer who did so was robbed of his watch and money during an absence from the compartment of about four minutes. The plaintiff asked the court to extend the law governing innkeepers, and apply it to clothing-house keepers. This the court declined to do, upon essentially the same grounds upon which it is refused to hold palace and sleeping car companies either innkeepers or common carriers,² but held the defendants liable as bailees for hire, and as such bound to exercise a high degree of care and diligence,³ and that the plaintiff was guilty of no negligence in leaving his clothing in the defendants care as he did.

§ 154. *Miscellaneous.*⁴—When a city undertakes to celebrate a holiday, and the municipal authorities have licensed an exhibition of fireworks, it is held that there can be no action against the city on behalf of one who

Pickard v. Smith, 10 C. B. (N. S.), 470; Axford v. Pryor, 4 Week. Rep. 611; Bolch v. Smith, 7 Hurl. & N. 736; McAlpin v. Powell, 70 N. Y. 126; s. c. 26 Am. Rep. 555, and the note, and cf. Larue v. Farren Hotel Co., 116 Mass. 67; Bennett v. Louisville, &c., R. R. Co. (by Harlan, J.), 102 U. S. 577.

¹ McCollin v. Reed, 16 Week. Notes Cas. 287, decided June 11, 1885.

² See Welch v. Pullman Palace Car

Co., 16 Abb. N. S. 352; Jeffords v. Crump, 5 Week. Notes Cas. 10.

³ Citing as authority for such a view, Pullman Palace Car Co. v. Gardner, 14 Week. Notes Cas. 17.

⁴ In this section I have included such matters as I thought of interest, and perhaps, in some sort, necessary to be included in a complete treatment of the subject, and which I have not been able to find a more suitable place for in the preceding chapters.

sustains personal injuries through the negligence of the servants of the city in discharging the fireworks, for the purpose of the celebration,¹ neither can an action be maintained against the municipality because one's house is set on fire, and burned by squibs or firecrackers set off upon a holiday by a crowd of men and boys collected in the street, if the city ordinances have made such fireworks lawful;² nor even is the town chargeable for resulting damages when the fireworks are discharged by citizens in violation of an ordinance, and although the council and officers, and a majority of the citizens, actively participated in the pyrotechnics, and the town officers made no attempt to stop the demonstration.³ But it is not such contributory negligence as will bar a recovery, to stand in the street and look at fireworks, and one who is injured while so doing, by the negligence of another in shooting Roman candles may have his action.⁴

In the case of *Murphy v. The City of Brooklyn*,⁵ it is held that the sea-shore is not a highway for public travel, either on foot or in vehicles; and that, while any one may, unless the public authorities by lawful action interfere, go thereon between high and low water-mark, for any lawful purpose, he must use it as he finds it, and can look to no one for damages sustained from any defect therein. When, therefore, one who walks upon the sea-shore falls into an excavation on private property near high water-mark, and suffers injury thereby, the rule of law that one who causes an excavation to be made on his own land so near a highway that a traveler thereon without

¹ *Tindley v. City of Salem*, 137 Mass 171; *Morrison v. Lawrence*, 98 Id. 219.

² *Hill v. Board of Aldermen of Charlotte*, 72 N. C. 55.

³ *Ball v. Town of Woodbine*, 61 Iowa, 83; S. C. 47 Am. Rep. 805.

⁴ *Bradley v. Andrews*, 51 Vt. 530; *cf. Moebus v. Becker*, 46 N. J. Law, 41; *Fairbanks v. Kerr*, 70 Penn. St. 86; S. C. 10 Am. Rep. 654; *Morgan v. Cox*, 22 Mo. 373, and the annotation in *Thomp. on Neg.* 238.

⁵ 98 N. Y. 642.

fault falls into the hole and is injured may be held liable for the damages, does not apply.

It seems that, while the contributory negligence of a plaintiff will prevent a recovery in an action for damages for a personal injury occasioned by the negligence of the defendant, the fact that the plaintiff's property is a nuisance is not a defense to an action for negligently injuring it. This is the inference from the case of *The Mayor of Colchester v. Brooke*,¹ a much bequoted authority. This was a case of a man who planted an oyster-bed in a public river, in such a way and at such a place as to constitute it a nuisance, and the defendant passing carelessly over it with boats, was held liable for the damage, notwithstanding the fact that the oyster-bed was an obstruction and a nuisance. It does not appear from the opinion, whether this conclusion was reached because the court regarded the commission of a nuisance as an offense of a lower grade than an act of contributory negligence, or because it is the policy of the law to protect property more scrupulously than life and limb, or because collateral violations of law are not a defense in actions of negligence; but upon whatever theory the conclusion was reached, the doctrine of the case is often criticised. It is usual to contrast it with the cases of *Davies v. Mann*,² and *Hartfield v. Roper*,³ to the end of pointing the moral that the law has more regard for the safety of oysters and asses than it has for little children.⁴ The joke is "something musty," at the best, and appears hardly to have a sound basis, inasmuch as the case decides nothing more than that a collateral violation of law on the part of the plaintiff, is not a defense to an action of negligence; while the cases just referred to, of which *Hartfield v. Roper*⁵ is

¹ 7 Q. B. 339, decided by Lord Denham in the Queen's Bench in 1845.

² 10 Mee. & W. 546.

³ 21 Wend. 615; S. C. 34 Am. Dec. 273.

⁴ See §§ 10, 18, *supra*.

⁵ *Supra*.

a type, hold that a parent's negligence may sometimes properly be imputed to an infant child in bar of an action by it, for an injury sustained by the negligence of another, and of *Davies v. Mann*,¹ it may be said that it is aptly designated "the donkey case," and does not decide anything.²

In *King v. American Transportation Co.*³ it is held that it is not an act of contributory negligence to put up a wooden building upon your own property, although that property is situated near a dock upon a navigable river, and the house is consequently exposed to the sparks and fire from steamers touching at that dock. When such a house, so built, is set on fire by sparks from a steamer and burned, the owner may have his action against the steamboat company, although he put his house there in the face of the risk.

Dr. Wharton has set out the law upon injuries to contestants at games in his treatise on Negligence.⁴ It appears from his exposition that under the Roman law, which is full and explicit upon this question, there is, in general, no liability on either side when one or the other contestant suffers an injury during the progress of a game involving violent exercise, or contests of strength or dexterity, unless there be malice or an intentional infliction of harm.⁵

In *Marks v. Borum*⁶ the Supreme Court of Tennessee decided, in the year of grace 1873, that the act of a negro in coming upon the defendant's premises stealthily, in the darkness of the night, with the plain intent to steal his chickens, did not constitute such contributory wrong-

¹ *Supra*.

² See §§ 10, 18, *supra*, and 1 Sedgwick on Damages, 293; 2 Thomp. on Neg. 1179.

³ 1 Flippin, 1.

⁴ § 406.

⁵ Wharton on Neg., § 406, and the citations; Wharton's Crim. Law (7th ed.), § 1012; *Penn. v. Lewis*, Addison, 279; *Fenton's Case*, 1 Lewin, 179; Addison on Torts, 494.

⁶ 1 Baxt. 87; S. C. 25 Am. Rep. 764.

doing as would defeat a recovery of damages for injuries sustained by reason of the defendant's shooting buck shot at him. This settles the law, it may be divined, at least in Tennessee, as to the point that stealing chickens by the darkies is not contributory negligence.¹

¹ In the following cases the general principles of the law of contributory negligence are applied in actions involving the rights of owners of animals, for injuries by or to them, *Mareau v. Vanatta*, 88 Ill. 132; *Williams v. Moray*, 74 Ind. 25; *Houghey v. Hart*, 62 Iowa, 96; S. C. 49 Am. Rep. 138; *Young v. Harvey*, 16 Ind. 314; *Conradt v. Clauve*, 93 Id. 476; *Green, &c., St. Ry. Co. v. Bresmer*, 97 Penn. St.

103; *Wharton on Neg.*, § 926; *Shear. & Redf. on Neg.*, §§ 199, 471; *Thomp. on Neg.*, 222. Inasmuch as there is nothing pertinent to my treatise, which is peculiar or noteworthy in actions of this character, nothing more is necessary than to cite some late or leading cases—which I have done—thereby referring the practitioner to the sources of information.

CHAPTER IX.

THE BURDEN OF PROOF.

§ 155. General statement.

156. The burden upon the plaintiff.

157. The burden upon the defendant.

§ 158. These rules further considered.

159. The rule in New York.

160. Conclusions.

§ 155. *General statement.*—The question whether the burden of proof, where contributory negligence is the issue, is upon plaintiff or defendant, resolves itself, in the last analysis, into a matter of legal presumptions. If the plaintiff may be presumed to have been in the exercise of ordinary care, then the burden of showing his contributory negligence will plainly be upon the defendant. If ordinary care on the part of the plaintiff is not to be presumed, then it will devolve upon him to disprove contributory negligence. If neither ordinary care, nor the want of it, are to be presumed in the absence of evidence, then, if the facts show a duty of care, the plaintiff must furnish some evidence that he exercised it, but otherwise he need not, which is something near to saying that in this condition of the presumptions, there is no rule as to the *onus probandi* in these cases.

It is a general rule of law that the burden of proof is upon him who maintains the affirmative of the issue—that he who asserts a fact material to the issue, must prove it. But when this general rule is to be applied in actions where it is sought to recover for an injury from the negligence of another, the courts have found very considerable difficulty. There is the elementary rule that contributory negligence on the part of the plaintiff is sufficient to defeat his action, and, when attention is directed to this rule stated in this usual way, it seems clear that

such negligence is a matter of defense, and that it should devolve upon the defendant to prove it. This view assumes the ordinary care of the plaintiff, and that he has fully made out his *prima facie* case when the negligence of the defendant is shown. It throws the burden of proof, as to contributory negligence, upon the defendant, if the plaintiff can prove his case without showing it, which is the same thing as to proceed upon the assumption that the plaintiff is not bound to prove affirmatively that he was free from negligence. In the earliest reported case, however, in which contributory negligence appears to have been passed upon as a defense in an action of negligence, there is, it may be, an intimation that an essential element of the plaintiff's case is, that he appear free from contributory neglect. "Two things," says Lord Ellenborough in that early case,¹ "must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." From which it has been inferred that, in his lordship's view, freedom from contributory negligence as a part of the plaintiff's cause of action, is an affirmative issue, to be alleged and proved equally with the other necessary element in the case—*i. e.*, the defendant's culpable negligence contributing to the injury. He says, indeed, "two things must concur," the fault of the defendant and the freedom from fault of the plaintiff, but this, as the law stands, is not disputed, and in my opinion, inasmuch as that case contains no more explicit statement upon the question than this, we are not justified in citing *Butterfield v. Forrester* as authority for the proposition that the burden is upon the plaintiff when contributory negligence is an issue. Those who object to casting this burden

¹ *Butterfield v. Forrester*, 11 East, 60.

upon the plaintiff, urge that it is equivalent to a presumption of law that the plaintiff was negligent, and that this the law ought not to presume against the plaintiff any more than against the defendant. But this is nothing more than a play upon the word presumption, and, as a bit of legal ratiocination, is scarcely better than to say that the law presumes that the witness will lie, and, therefore, imposes the obligation of an oath, or, in an action upon a note, presumes it a forgery until the signature is proven. There is, indeed, in every action at law, this sort of a presumption against the plaintiff upon every fact essential to his cause of action. The *onus* is upon him to establish his facts, and, *quoad hoc*, the presumption, if you please to say so, is against him. This sort of a presumption is an incident of every possible action, and, while justice is administered as it now is, it cannot be changed. It involves no more of an injustice, nor of unfairness in respect to the legal presumption, to require the plaintiff to show, or to have it sufficiently appear, that his own negligence did not contribute to occasion the injury for which the suit is brought, than to require him to prove the signature on the note upon which he sues, or to prove that conditions precedent have been duly performed when he brings an action on a contract which involves that question. When one comes into court, and claims damages for an injury to his person, or his property by reason of the negligence of another, it is not clear why it is unfair to presume that his own carelessness contributed to the resulting injury. In more than ninety per centum of all the actions of negligence that are brought in courts of justice, it appears that the plaintiffs' own negligence did, of a verity, help to cause the injury. Is it then, indeed, so violent a presumption that the plaintiff in any individual case was careless? If, in very deed, he is proved to be careless, nine times out

of ten—or, for the matter of that, fifty-one times in a hundred—may we not reasonably presume in any given case that he was careless? Where is the injustice? Moreover, is there not another presumption that every man is able to take care of himself and his property, and, by the exercise of ordinary care, can keep out of mischief? If so, where is the wrong, when he brings his action of negligence, in assuming that he has failed to exercise his capacity to take care of himself? What is casting upon the plaintiff the burden of showing himself to have exercised due care, more than to require him to prove that he performed his legal duty—a thing required to be proved very frequently in simple actions upon a contract? Without reference to the reported cases, and upon general principles, it may be said that there ought to be no inflexible rule as to the *onus probandi* in these cases—but that in some sort, each case, or each class of cases, should be a rule unto itself. It must in fairness depend upon the presumption of care in any given case. If the circumstances of the case are such as to make it a reasonable presumption that the plaintiff was careless, then it should be a part of his case, and an essential part, to allege and prove his freedom from contributory negligence. In such a case the burden of proof is very properly upon him, and such cases very frequently arise. Perhaps that is the just presumption in a majority of instances. But in another class of cases the reasonable presumption is exactly the other way, and when such a case arises, the presumption being that the plaintiff, at the time of the happening of the injury, was in the exercise of due and ordinary care, the burden of proof should be upon the defendant. He should, as a necessary element of his defense, allege and prove the concurrent wrong-doing or negligence of the plaintiff. When the peculiar circumstances of the case raise the presumption of care on the

part of the plaintiff, it is an injustice, or at least an inequality, to impose upon him the burden of proving his own freedom from fault, but when the peculiar circumstances of the case raise the contrary presumption, it is a plain injustice not to impose upon the plaintiff the burden of showing that his own conduct was what it should have been. When the circumstances of any case are such as not to raise any presumption either way, which, in practice, it is believed, is a case not likely to arise frequently, then let the court apply its arbitrary rule, and place the burden upon either plaintiff or defendant, as the rule may be.

The burden of proof in actions of negligence, when contributory negligence is an issue, is no nearer an exact science than that, and, in the nature of the case, can never be reduced to any exacter certitude. Until all the accidents from which men suffer can be made to fall into assigned categories, and until men, by common consent, will expose themselves and their property to danger, and expose others and the property of others to danger, only under defined conditions, and expressed and agreed limitations, that is to say, until men get hurt and hurt other people only by rule, there can be no rule as to the burden of proof in these cases, at once inflexible and just.

§ 156. *The burden upon the plaintiff.*—Upon turning to the decisions we shall find that the decided weight of authority is in favor of the rule that the burden is upon the plaintiff in these actions to show his own freedom from contributory negligence; that as part of his case, to be affirmatively established, he must make it appear that he himself was not in fault; that until he has shown the absence of contributory negligence, and the presence of ordinary care in himself, his case is not duly presented.

This is the rule in Massachusetts,¹ Maine,² Mississippi,³ Louisiana,⁴ North Carolina,⁵ Michigan,⁶ Oregon,⁷ Illinois,⁸ Connecticut,⁹ Iowa,¹⁰ and Indiana.¹¹

¹ Lane v. Crombie, 12 Pick. 177; Adams v. Carlisle, 21 Id. 146; Bigelow v. Rutland, 4 Cush. 247; Bosworth v. Inhabitants of Swansea, 10 Metc. 363; s. c. 43 Am. Dec. 441; Parker v. Adams, 12 Metc. 415; s. c. 46 Am. Dec. 694; Lucas v. New Bedford R. R. Co., 6 Gray, 64; Robinson v. Fitchburg R. R. Co., 7 Id. 92; Callahan v. Bean, 9 Allen, 401; Hickey v. Boston, &c., R. R. Co., 14 Id. 429; Gaynor v. Old Colony R. R. Co., 100 Mass. 208; Murphy v. Deane, 101 Id. 455; Allyn v. Boston, &c., R. R. Co., 105 Id. 77; Lane v. Atlantic Works, 107 Id. 104; Crafts v. Boston, 109 Id. 519; Prentiss v. Boston, 112 Id. 43; Hinckley v. Cape Cod R. R. Co., 120 Id. 257; Corcoran v. Boston, &c., R. R. Co., 133 Id. 507; Riley v. Conn. River R. R. Co., 135 Id. 292; Wheelwright v. Boston, &c., R. R. Co., 135 Id. 225; Stock v. Wood, 136 Id. 353. But the burden of proof is upon the defendant to show gross or wilful negligence upon the part of the plaintiff. Copley v. New Haven, &c., R. R. Co., 136 Mass. 6. This case is miscited by Mr. Freeman in his note to the case of Farish v. Reigle, 11 Grattan, 697, in 62 Am. Dec. 666, 687, in support of the general proposition that in Massachusetts "contributory negligence is a matter of defense, and the burden of establishing it is upon the defendant," whereas, in fact, the rule in that State is exactly the contrary.

² Foster v. Dixfield, 18 Me. 380; French v. Brunswick, 21 Id. 29; s. c. 38 Am. Dec. 250; Kennard v. Burton, 25 Me. 39; s. c. 43 Am. Dec. 249; Merrill v. Hampden, 26 Me. 234; Perkins v. Eastern, &c., R. R. Co., 29 Id. 307; Dickey v. Maine Telegraph Co., 46 Id. 483; Buzzell v. Laconia Manfg. Co., 48 Id. 113; Gleason v. Bremen, 50 Id. 222; Benson v. Titcomb, 72 Id. 31; Chase v. Maine, &c., R. R. Co., Sup. Jud. Ct., Me., Jan. 19, 1885, 1 Eastern Rep. 96; Leasan v. Id., Sup. Jud. Ct., Me., Jan. 26, 1885, 1 Eastern Rep. 100.

³ Central, &c., R. R. Co. v. Mason,

51 Miss. 234; City of Vicksburg v. Hennessy, 54 Id. 391.

⁴ Moore v. City of Shreveport, 3 La. Ann. 645.

⁵ Manly v. Wilmington, &c., R. R. Co., 74 N. C. 655; Doggett v. Richmond, &c., R. R. Co., 78 Id. 305; Owens v. Id., 88 Id. 502.

⁶ Detroit, &c., R. R. Co. v. Van Steinburg, 17 Mich. 99; Lake Shore, &c., R. R. Co. v. Miller, 25 Id. 274; LeBaron v. Joslin, 41 Id. 313; Teipel v. Hilsendegen, 44 Id. 461, (by Cooley, J.); Mitchell v. Chicago, &c., R. R. Co., 51 Id. 236; s. c. 47 Am. Rep. 566.

⁷ Kahn v. Love, 3 Oregon, 206; Walsh v. Oregon, &c., R. R. Co., 10 Id. 250; cf. Conroy v. Oregon Construction Co., U. S. Circ. Ct., Dist., Oregon, March 6, 1885, Rep. 486.

⁸ Aurora, &c., R. R. Co. v. Grimes, 13 Ill. 585; Dyer v. Talcott, 16 Id. 300; Galena, &c., R. R. Co. v. Fay, 16 Id. 558; s. c. 63 Am. Dec. 323; Chicago v. Major, 18 Ill. 349; Galena, &c., R. R. Co. v. Jacobs, 20 Id. 478; Chicago, &c., R. R. Co. v. Hazard, 26 Id. 373; Id. v. Gregory, 58 Id. 272; Kepperly v. Ramsden, 83 Id. 354; Missouri Furnace Co. v. Abend, 107 Ill. 44; s. c. 47 Am. Rep. 425.

⁹ Park v. O'Brien, 23 Conn. 339; Button v. Frink, 51 Conn. 342; s. c. 50 Am. Rep. 24.

¹⁰ Rusch v. Davenport, 6 Iowa, 443; Reynolds v. Hindman, 32 Id. 148; Plaster v. Ill., &c., R. R. Co., 35 Id. 449; Carlin v. Chicago, &c., R. R. Co., 37 Id. 316; Muldowney v. Ill., &c., R. R. Co., 39 Id. 615; s. c. 36 Id. 462; s. c. 32 Id. 176; Patterson v. Burlington, &c., R. R. Co., 38 Id. 279; Way v. Ill., &c., R. R. Co., 40 Id. 341; Nelson v. Chicago, &c., R. R. Co., 38 Id. 564; Murphy v. Id., 38 Id. 539; s. c. 45 Id. 661; Greenleaf v. Ill., &c., R. R. Co., 29 Id. 14; s. c. 4 Am. Rep. 181; Bonce v. Dubuque, &c., R. R. Co., 53 Iowa, 278; Slosson v. Burlington, &c., R. R. Co., 55 Id. 294. See, also, Brentner v. Chicago, &c., R. R. Co., Sup. Ct., Iowa, N. W. Rep., May 16, 1885, xix Am. Law Rev. 668.

¹¹ Mount Vernon v. Dusouchett, 2

Although this rule has not in general found favor with the text-writers and the theorists and critics, it is submitted that, if there is to be any inflexible rule, this is the one which will most often subserve the ends of substantial justice. If men who appear as plaintiffs in actions of negligence, were, as a matter of fact, careful more often than they are careless; if, in practice, it were found that the defense of contributory negligence only now and then availed the defendant anything, then the opposite rule would be the better rule; but in point of fact these men generally blunder, and are generally in fault. Contributory negligence is a good defense in a great majority of the cases. It follows then that, if we are to have an inflexible rule, it must, in order to do even justice as nearly as possible, take account of this element in these cases. It must be grounded and predicated upon the presumption of negligence rather than the presumption

Ind. 586; s. c. 54 Am. Dec. 467; Wayne Co. Turnpike Co. v. Berry, 5 Ind. 286; Wabash Canal Co. v. Mayer, 10 Id. 400; Indianapolis, &c., R. R. Co. v. Keely, 23 Id. 133; Evansville, &c., R. R. Co. v. Dexter, 24 Id. 411; Id. v. Hiatt, 17 Id. 102; Jeffersonville, &c., R. R. Co. v. Hendricks, 26 Id. 228; Toledo, &c., R. R. Co. v. Bevin, 26 Id. 443; Pittsburgh, &c., R. R. Co. v. Vining, 27 Id. 513; Michigan, &c., R. R. Co. v. Lantz, 29 Ind. 528; Riest v. Goshen, 42 Id. 339; Hathaway v. Toledo, &c., R. R. Co., 46 Id. 25; Jackson v. Indianapolis, &c., R. R. Co., 47 Id. 454; City of Anderson v. Hervey, 67 Id. 420; Gormley v. Ohio, &c., R. R. Co., 72 Id. 31; Jeffersonville, &c., R. R. Co. v. Lyon, 72 Id. 107; Williams v. Moray, 74 Id. 25; Toledo, &c., R. R. Co. v. Brannagan, 75 Id. 490; Huntington v. Breen, 77 Id. 29; Pittsburgh, &c., R. R. Co. v. Noel, 77 Id. 110; Pennsylvania Co. v. Gallentine, 77 Id. 322; Louisville, &c., R. R. Co. v. Head, 80 Id. 117; Bloomington v. Rogers, 83 Id. 261; Wilson v. Trafalgar Co., 83 Id. 326; Louisville, &c., R. R. Co. v. Orr, 84 Id. 50; Rushville v. Poe, 85 Id. 83; Louisville, &c., R. R. Co. v. Kringing, 87 Id. 351; Id. v. Hagen, 87 Id. 602; Gheens v. Golden, 90 Id. 427; Louisville, &c., R. R. Co. v. Lockridge, 93 Id. 191. In this State the declaration, or complaint, must aver or show the absence of negligence upon the part of the plaintiff. Board of Trustees, &c., v. Mayer, 10 Ind. 401; Evansville, &c., R. R. Co. v. Hiatt, 17 Id. 102; Indianapolis, &c., R. R. Co. v. Keely's Admr., 23 Id. 134; Jeffersonville, &c., R. R. Co. v. Hendricks' Admr., 26 Id. 230; Williams v. Moray, 74 Id. 27; Pennsylvania Co. v. Gallentine, 77 Id. 329; Louisville, &c., R. R. Co. v. Boland, 53 Id. 402; Rogers v. Overton, 87 Id. 411. Cf. the note to the case of President and Trustees of the Town of Mount Vernon v. Dusouchett, (the case in which this rule had its origin), 2 Ind. 586, in 54 Am. Dec. 467, 470.

of care, for verily that is the presumption of fact in these cases. When the average plaintiff comes into court with his action of negligence, the mathematical chance is more than six to one, at the very lowest, that, when the evidence is all in, it will give the defendant a verdict, on the ground of the plaintiff's own participating and concurring default. It must appear, as the law stands, before a verdict for the plaintiff can be sustained, that the plaintiff was not guilty of contributory negligence. It is an essential element in the case upon which the issue depends, and, inasmuch as the chances are very largely in favor of the defendant when the question of contributory negligence is raised, it is difficult to see upon what ground it is unjust or unreasonable to put the burden of proof upon the plaintiff. The fact must be established in order to the plaintiff's success, and the chances are that it cannot be established. Where is the unfairness in requiring him to establish it as part of his case? or upon what ground shall it be held proper to impose upon the defendant the duty of establishing the want of care on the part of the plaintiff? In my judgment, no arbitrary and inflexible rule upon this matter is just; but, if there is to be such a rule, I am unable to understand how any other rule than that which puts the burden of proof upon the plaintiff can be in any wise defended.

Mr. Freeman, the learned editor of the *American Decisions*, says, by way of criticism of this view:¹ "It is certainly a presumption of fact or common sense that persons are ordinarily prudent. In fact the very phrases which obtain in legal terminology, of 'ordinary prudence or care,' or 'the care ordinarily exhibited by persons reasonably prudent under the same circumstances,' convey with them, and are based upon the supposition that

¹ 62 Am. Dec. 687, note.

people as a general rule are ordinarily careful. Whereas, the authorities that render it necessary for the plaintiff to free himself from negligence in the first place, seem necessarily to assume that people are usually negligent. The anomaly of requiring the party holding the affirmative to negatively prove part of his case is apparent, while the necessarily attendant presumption of the negligence of mankind in general, requires for its support the mind of a cynic or a pessimist." It is upon this key that all the objections to the rule which puts the burden of proof upon the plaintiff in these cases, proceed. But such an objection begs the question and is founded upon a wholly unwarranted assumption. The question of the carefulness and prudence of mankind in general is not involved. The question of contributory negligence affects only the few who get hurt in their persons or property by reason of some other person's neglect. Uncounted millions of the human family are born, and live out their allotted span, and die, and bring no single action of negligence in all the days of their life. With them and their care or carelessness, we have nothing to do, except that from their conduct on the average, we get a meaning for those phrases that Mr. Freeman quotes. "Ordinary care," it seems hardly necessary to say, means the care of the average prudent man who does not get hurt in his person or property. By his supposed conduct under given circumstances we test the propriety and fitness of the conduct of a man who has suffered an injury and brings an action for redress. Now the precise question is, not whether the race is upon the whole a careful race, but whether the few out of the multitude, who suffer injuries are upon the whole careful and prudent. Dividing the human family into the injured and the uninjured, and subdividing the first class into those who bring, and those who do not bring actions in courts of justice for the redress of their

injuries, we inquire whether that class of the injured who bring civil suits for damages are, upon the average, careful and prudent men and women. Perhaps it may not seem to involve any revolting amount of cynicism to take the ground that this class of persons are not, upon the whole, or in a majority of cases, up to the average in point of carefulness and prudence; or were not, at the time of the happening of the injury of which they complain, in full exercise of that full *quantum* of care and prudence that passes among men as "ordinary care;" that it is a fair presumption in any given case, that the injured person was at fault, and that the rule that imposes upon such plaintiffs the burden of showing themselves free from contributory negligence is, in a vast majority of cases, shown to be a reasonable rule of law, by the fact that, in a vast majority of cases, it turns out that the plaintiff was in fault, and, in fact, a joint author of the injury of which he complains. It may even seem after a full consideration, that the rule which would make contributory negligence a matter of defense, and something in every instance for the defendant to allege and prove, is grounded more in a sentiment than in right reason.

§ 157. *The burden upon the defendant.*—In many jurisdictions it is the rule that contributory negligence is matter of defense, and that the burden of establishing it is upon the defendant. Where this rule obtains, the plaintiff has made his case when he has shown injury to himself, and negligence on the part of the defendant which was a proximate cause of it. It then devolves upon the defendant to allege and prove contributory negligence as matter of defense, the presumption being in favor of the plaintiff, that he was, at the time of the accident, in the exercise of due care, and that the injury was caused wholly by the defendant's negligent miscon-

duct. This is the doctrine of the Supreme Court of the United States,¹ and it is the rule in Alabama,² California,³ Georgia,⁴ Kentucky,⁵ Kansas,⁶ Maryland,⁷ Minnesota,⁸ Missouri,⁹ New Hampshire,¹⁰ New Jersey,¹¹ Nebraska,¹² Ohio,¹³ Pennsylvania,¹⁴ Rhode Island,¹⁵ South Caroli-

¹ *Railroad Co. v. Gladmon*, 15 Wall, 401; *Indianapolis, &c., R. R. Co. v. Holst*, 93 U. S. 291; *Hough v. Railway Co.*, 100 Id. 213; *Crew v. St. Louis, &c., R. R. Co.*, 20 Fed. Rep. 87; *Conroy v. Oregon Construction Co.*, U. S. Circ. Ct., for the Dist. of Oregon, March 6, 1885, Rep. 486; *Secord v. St. Paul, &c., R. R. Co.*, 5 McCrary 515; *Morgan v. Bridge Co.*, 5 Dillon, 96; *Dillon v. Union Pacific R. R. Co.*, 3 Id. 325; *Wabash, &c., R. R. Co. v. Century Trust Co. of New York*, U. S. Circ. Ct., for the Dist. of Indiana, Woods, J., May 9, 1885, 32 Albany Law Jour. 96. *Contra*, *Beardsley v. Swann*, 4 McLean, 333; *Hull v. Richmond*, 2 Woodb. & M. 337, 345; *Dunmead v. Am. &c., Co.*, 4 McCrary, 244.

² *Smoot v. The Mayor*, 24 Ala. 112; *Mobile, &c., R. R. Co. v. Crenshaw*, 65 Id. 566.

³ *Finn v. Vallejo St. Wharf Co.*, 7 Cal. 255; *May v. Hanson*, 5 Id. 360; s. c. 63 Am. Dec. 135; *Gay v. Winter*, 34 Cal. 153; *Robinson v. Western, &c., R. R. Co.*, 48 Id. 426; *McQuilken v. Central, &c., R. R. Co.*, 50 Id. 7; *Macdougall v. Central, &c., R. R. Co.*, 63 Id. 431; *Nehrbas v. Id.*, 62 Id. 320.

⁴ *Thompson v. Central, &c., R. R. Co.*, 54 Ga. 509. *Contra*, *Branan v. May*, 17 Ga. 136; *Campbell v. Atlanta, &c., R. R. Co.*, 53 Id. 488.

⁵ *Paducah, &c., R. R. Co. v. Hoehl*, 12 Bush. 41; *Louisville Canal Co. v. Murphy*, 9 Id. 522; *Kentucky, &c., R. R. Co. v. Thomas*, 79 Ky. 160; *Louisville, &c., R. R. Co. v. Goetz*, 79 Id. 442; s. c. 42 Am. Rep. 227.

⁶ *Kansas, &c., R. R. Co. v. Pointer*, 9 Kan. 620; s. c. 14 Id. 38; *Kansas, &c., R. R. Co. v. Phillibert*, 25 Id. 583.

⁷ *Irwin v. Sprigg*, 6 Gill. 206; *Baltimore v. Morriott*, 9 Md. 160; *Northern, &c., R. R. Co. v. State*, 31 Id. 357; *Frech v. Phila., &c., R. R. Co.*,

39 Id. 574; *County Commissioners v. Burgess*, 61 Id. 29. See, also, *Twigg v. Ryland*, Ct. of App. of Md., Am. Law Reg., March, 1885; s. c., xix Am. Law Rev. 319.

⁸ *Hocum v. Weitherick*, 22 Minn. 152.

⁹ *Thompson v. North Mo. R. R. Co.*, 51 Mo. 190; *Hicks v. Pacific, &c., R. R. Co.*, 65 Id. 34; s. c. 64 Id. 430; *Buesching v. St. Louis Gas Light Co.*, 73 Id. 219; s. c. 39 Am. Rep. 503, and the note.

¹⁰ *White v. Concord, &c., R. R. Co.*, 30 N. H. 207; *Smith v. Eastern, &c., R. R. Co.*, 35 Id. 366.

¹¹ *Moore v. Central, &c., R. R. Co.*, 24 N. J. Law, 268; *Durant v. Palmer*, 29 Id. 544; *N. J. Express Co. v. Nichols*, 32 Id. 166; s. c. 33 Id. 434.

¹² *City of Lincoln v. Walker*, Sup. Ct., Neb., 20 N. W. Rep. 113, Albany Law Jour., Nov. 22, 1884, xix Am. Law Rev. 162.

¹³ *Cleveland, &c., R. R. Co. v. Crawford*, 24 Ohio St. 636; *Balto., &c., R. R. Co. v. Whitacre*, 35 Id. 627. See, also, *Little Miami, &c., R. R. Co. v. Stevens*, 20 Id. 415.

¹⁴ *Beatty v. Gilmore*, 16 Penn. St. 463; *Erie v. Schwingle*, 22 Id. 384; *Bush v. Johnson*, 23 Id. 209; *Penn. R. R. Co. v. McTighe*, 46 Id. 316; *Allen v. Willard*, 57 Id. 374; *Waters v. Wing*, 59 Id. 211; *Penn. Canal Co. v. Bentley*, 66 Id. 30; *Penn. R. R. Co. v. Weber*, 72 Id. 27; s. c. 76 Id. 157; *Hays v. Gallagher*, 72 Id. 136, (distinguishing 59 Id. 211); *Weiss v. Penn. R. R. Co.*, 79 Id. 387; *Mallory v. Griffey*, 85 Id. 275. *Contra*, *Federal St. R. R. Co. v. Gibson*, 96 Id. 83; *Baker v. Fehr*, 97 Id. 70; *Phila., &c., R. R. Co. v. Boyer*, 97 Id. 91. In the later cases the Pennsylvania Court inclines, it seems, to the other rule, putting the burden of proof upon the plaintiff.

¹⁵ *Cassidy v. Angell*, 12 R. I. 447; s. c. 34 Am. Rep. 690.

na,¹ Texas,² Wisconsin,³ West Virginia,⁴ Vermont,⁵ and Colorado,⁶ as well as in England.⁷

But, in all those jurisdictions where contributory negligence is held a matter of defense, whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him. In such a case it devolves upon the plaintiff, as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and, where the circumstances attending the injury were such as to raise a presumption against him in respect of the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault.⁸ And when the plaintiff's case, on the face of it, shows contributory negligence, there should be a nonsuit,⁹ but if there

¹ *Danner v. South Carolina R. R. Co.*, 4 Rich. (Law) 329; s. c. 55 Am. Dec. 678; *Carter v. Columbia, &c., R. R. Co.*, 19 S. C. 20; s. c. 45 Am. Rep. 754; *Roof v. Railroad Co.*, 4 S. C. 61.

² *Texas, &c., R. R. Co. v. Murphy*, 46 Texas, 356; *Houston, &c., R. R. Co. v. Cowser*, 57 Id. 293; *Dallas, &c., R. R. Co. v. Spicker*, 61 Id. 427; s. c. 48 Am. Rep. 297. *Contra*, *Walker v. Herron*, 22 Id. 55.

³ *Milwaukee, &c., R. R. Co. v. Hunter*, 11 Wis. 160; *Achtenhagen v. Watertown*, 18 Id. 331; *Potter v. Chicago, &c., R. R. Co.*, 21 Id. 372; s. c., 22 Id. 615; *Hoyt v. Hudson*, 41 Id. 105; *Prideaux v. Mineral Point*, 43 Id. 513; s. c. 28 Am. Rep. 558, and the note; *Hoth v. Peters*, 55 Id. 405. The older cases are overruled. *Chamberlain v. Milwaukee, &c., R. R. Co.*, 7 Id. 431; *Dressler v. Davis*, 7 Id. 527.

⁴ *Sheff v. City of Huntington*, 16 West Va. 317.

⁵ *Barber v. Essex*, 27 Vt. 62; *Hill v. New Haven*, 37 Id. 501.

⁶ *Sanderson v. Frazier*, Sup. Ct. Colo., W. C. Rep., Feb. 19, 1885; s. c. xix Am. Law Rev. 312.

⁷ *Holden v. Liverpool Gas Co.*, 3 C. B. 1; *Davey v. London, &c., Ry. Co.*, 11 L. R. (Q. B. Div.) 213; *Bridge v. Grand Junction Ry. Co.*, 3 Mee. & W. 244; *Martin v. Great Northern, &c., Ry. Co.*, 16 C. B. 179.

⁸ *Baltimore, &c., R. R. Co. v. Whitacre*, 35 Ohio St. 627; *Hays v. Gallagher*, 72 Penn. St. 140; *New Jersey Express Co. v. Nichols*, 33 N. J. Law, 434; *Dallas, &c., R. R. Co. v. Spicker*, 61 Texas, 427; s. c. 48 Am. Rep. 297; *Winship v. Enfield*, 42 N. H. 197; *Louisville, &c., R. R. Co. v. Goetz*, 79 Ky. 442; s. c. 42 Am. Rep. 227; *Miller v. St. Louis, &c., R. R. Co.*, 5 Mo. App. 471; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; s. c. 47 Am. Rep. 425; *Prideaux v. City of Mineral Point*, 43 Wis. 513; s. c. 28 Am. Rep. 558, and the note.

⁹ *Starry v. Dubuque, &c., Ry. Co.*, 51 Iowa, 419; *Prideaux v. City of Mineral Point*, 43 Wis. 513; s. c. 28 Am. Rep. 558; *Baltimore, &c., R. R. Co. v. Whitacre*, 35 Ohio St. 627; *Cassidy v. Angell*, 12 R. I. 447; s. c. 34 Am. Rep. 690; *Lee v. Woolsey*, Sup. Ct., Penn., March 16, 1885, 16 Week. Notes, Cas. 337; *Schum v.*

be any real question as to the plaintiff's negligence, he should not be nonsuited, but the question is for the jury.¹ In the early and leading case of *Zemp v. Wilmington & Manchester R. R. Co.*,² it is said that declarations of the plaintiff, in the nature of admissions, that the injury resulted from his own carelessness, and that he alone was in fault, the admissions having been made almost immediately after the accident in which the injury was received and before the plaintiff was fully informed of the causes of the accident, are not conclusive evidence of contributory negligence, but are to be left to the jury to receive their appropriate weight in connection with other evidence.

§ 158. *These rules further considered.*—In *Park v. O'Brien*,³ the Supreme Court of Errors of Connecticut, sets forth the rule that in these actions the burden is upon the plaintiff to establish that his own negligence did not concur in producing the mischief of which he complains, in the following luminous language. "We accord entirely with the decisions cited by the plaintiff in error, the defendant below, to show that, in this suit, the burden of showing that the injury was not attributable to the want of reasonable care on his part, rested on the plaintiff. The reason of this rule is that the plaintiff must prove all the facts which are necessary to entitle him to recover, and this is one of those facts. It was necessary for the plaintiff to prove; first, negligence on the part of the defendant in respect to the collision alleged, and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But in order to prove this latter part, the plaintiff must show

Penn. R. R. Co., Sup. Ct. Penn.,
Jany., 1885, xix Am. Law Rev. 331;
Longenecker v. Penn. R. R. Co., 105
Penn. St. 328.

¹ See the cases generally last cited.
² 9 Rich. (Law), 84; S. C. 64 Am.
Dec. 763.

³ 23 Conn. 339.

that such injury was not caused in whole, or in part, by his own negligence, for although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence. Therefore the plaintiff would not prove enough to entitle him to recover, by merely showing negligence on the part of the defendant, but he must go further, and also prove the injury to have been caused by such negligence, by showing a want of concurring negligence on his own part contributing materially to the injury. Hence, to say that the plaintiff must show the latter, is only saying that he must show that the injury was owing to the negligence of the defendant. And as the defendant had the right to have the jury informed as to what facts the plaintiff must prove, in order to recover, he had a right to require the court to instruct them that it was incumbent on the plaintiff to prove a want of such concurring negligence on his part."

Perhaps there is no more explicit and satisfactory statement of the rule in the reports than this. It is not, however, a favorite rule with the text-writers and commentators, who almost universally incline to indorse the opposite doctrine, which makes contributory negligence a matter of defense, and puts the burden of proving it upon the defendant.¹ Mr. Redfield to this point says:² "Although the majority of the American courts lay down the rule . . . that the burden of proof is upon the plaintiff to show that he was guilty of no negligence on his own part, we think the point is not well defined in these terms. All that is meant, we apprehend, is, that where there is any evidence tending to prove, either

¹ Shear. & Redf. on Neg., § 43; Railways (5th ed.), 253, notes; 28 Am. Thomp. on Neg., 1176; Thomp on Rep. 563, Mr Browne's note; 62 Am. Carriers of Passengers, 257, *et seq.*; Dec. 686, Mr. Freeman's note.
Wharton on Neg., § 423; 2 Redf. on

² 2 Redf. on Railways, 253, *supra*.

directly, or from the manner of the accident, that there might have been fault on the part of the plaintiff, he must assume the burden, upon the whole issue, of satisfying the jury that the injury occurred through the fault of the defendant, and that his own want of care, at the time, did not in any sense contribute directly to it. The result of the rule thus stated would be that, where there was no evidence of any want of care on the part of the plaintiff, the law will presume none existed, as in regard to good character in a witness, or sanity in one where there is no proof. . . . It has sometimes been claimed, that the plaintiff must give affirmative evidence of his own exercise of due care and caution at the time the injury occurred. But this in principle is much like one giving evidence of the good character of his witnesses, before any impeachment, and we think should never be required."

In *Kansas Pacific R. R. Co. v. Pointer*,¹ the court, arguing to the same effect, says: "It seems to us also correct to hold that the *onus probandi*, as to the negligence of the plaintiff is on the defendant, that, if the record shows negligence on the part of the defendant, and is silent as to the conduct of the plaintiff, it makes out a case for recovery. We are aware of contrary decisions, and that in some States it is held that the burden is on the plaintiff to show affirmatively that he exercised due care, and was without fault. But if it is shown that a party has done wrong and caused injury thereby, is not a *prima facie* case for compensation made? Logically the wrong-doer should always compensate, and the wrong and the injury always entitle to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation. This is not strictly justice,

¹ 14 Kan. 37.

the wrong-doer causing injury ought not to be released from making any compensation, simply because the injured party is also a wrong-doer, and helped produce the injury. But many considerations, especially the difficulty of correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized, that where the wrong, the negligence of both parties, contributes to the injury, the law will not afford any relief. But if the wrong-doer ought always to compensate for the injury he has wrought, and is relieved from the obligation to compensate only by the fact that the wrong of the injured party helped to cause the injury, it is incumbent on him to show such wrong. It is matter of defense to avoid the consequences of his own wrong."

These arguments in favor of the rule which places the burden of proof as to the contributory negligence of the plaintiff upon the defendant, proceed, it is suggested with deference, always upon the reasonableness, or justice, of the presumption of carefulness upon the part of the plaintiff. This presumption is after the analogy of the presumption of innocence in the criminal law, and is always defended upon the same grounds as that presumption. Mr. Redfield, in the passage just quoted from his valuable work upon the Law of Railways, says that the opposite rule is very much like requiring evidence of the good character of one's witnesses before their character is impeached, and assumes that the presumption in favor of the plaintiff's carefulness and prudence is like the presumption in favor of the sanity of plaintiff. Now, in point of fact, the character of most persons whose testimony is offered in evidence in courts of justice, is good, or good enough so that it cannot be successfully impeached, and it is beyond cavil that an overwhelming

majority of those who bring actions in the courts are not crazy. Whereas, as I have endeavored to show¹ it is not a fact that a majority of those persons who bring actions of negligence, were themselves free from the imputation of contributory negligence, but, on the contrary, it is a fact, that in a very large proportion of the cases it turns out that the plaintiff was himself at least partly to blame, and that his own negligence, concurring with that of the defendant, produced the mischief of which he complains. Inasmuch as that is true, the presumption of fact in any individual case is that the plaintiff was himself careless. The mathematical chance is largely against the plaintiff in these actions, taking account of all the actions that are brought. He succeeds not oftener than twice or three times in ten in actions of this nature. The presumption, therefore, that the plaintiff was careful is not in these actions a reasonable presumption. The chances are that he was careless, and the presumption accordingly should be that he was careless, to the extent of requiring him, as a material part of his case, to show his freedom from contributory fault. This, however, need not in every instance be proved by affirmative testimony, but it may be inferred from all the circumstances of the case. This is well set forth by Wells, J., in *Mayo v. Boston & Maine R. R. Co.*,² in the following language. "The burden rests upon the plaintiff" (to show his own freedom from negligence). "Although in form a proposition to be established affirmatively, it is not necessarily to be proved by affirmative testimony addressed directly to its support. The burden is held to be upon the plaintiff for the reason that it is a subordinate proposition, necessarily involved in the more general one upon which the action is founded, to wit, that the injury to the plaintiff was

¹ See page 383 *et seq.*, *supra*.

² 104 Mass. 137, 140.

caused by the negligent or wrongful conduct of the defendant. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established as effectually as by affirmative testimony, all the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault.”¹

§ 159. *The rule in New York.*—The courts of New York seem to have dealt with this question, at least in the earlier cases, in a spirit of compromise. In the later volumes of the reports there is to be observed a decided tendency toward the rule that the plaintiff, as part of his case, must establish his freedom from contributory neglect, putting, accordingly, the burden of proof upon him; but in the earlier cases it appears that the court endeavored to avoid committing itself irrevocably to either of the two antagonistic rules, letting each case depend upon its own peculiar circumstances in the matter of the burden of proof as to contributory negligence. On the one hand they avoid giving the odds arbitrarily, in every case, to the plaintiff, by assuming his carefulness, as matter of law, at the start, and, on the other hand, the plaintiff is not handicapped with an obligation, in respect of the evidence, which assumes the contrary. Under this ruling each case may be said to be the rule unto itself. If the plaintiff's case, from the evidence, turns out to be of such a char-

¹ To the same effect, see *Smith v. Boston Gaslight Co.*, 129 Mass. 318; *Craig v. New York, &c., R. R. Co.*, 118 Id. 437; *Commonwealth v. Boston &c, R. R. Co.*, 126 Id. 61; *Hinckley v. Cape Cod R. R. Co.*, 120 Id. 257; *Way v. Ill., &c., R. R. Co.*, 40 Iowa, 345; *Tolman v. Syracuse, &c., R. R. Co.*, 98 N. Y. 198, 202; S. C. 50 Am. Rep. 649; *Railroad Company v. Gladmon*, 15 Wall. 401, 407; *Teipel v. Hilsendegen* (by Cooley, J.), 44 Mich. 461.

acter as in any degree to implicate him in respect of negligence, then the burden of proof is upon him to clear himself of blame, and his freedom from fault must appear as a factor of his *prima facie* case. But if, *per contra*, the plaintiff's case involves no such implication, he may rest when he has shown the injury sustained and the defendant's fault, and the burden of proof will then be upon the defendant, to go free, if he may, because of the contributory fault of the plaintiff, which it is for him to establish. It is only upon such a theory as this that the decisions of the New York courts can be reconciled. An extended and somewhat careful reading of the cases seems to warrant this distinction. Judge Thompson says: "In New York . . . the decisions are irreconcilable;"¹ but it is believed that hardly one in the long list can be found where this rule, fairly applied, will not appear to have controlled the ruling as to the burden of proof. In *Johnson v. Hudson River R. R. Co.*,² which was referred to with approval in the Supreme Court of the United States by Mr. Justice Hunt³ in *Railroad Co. v. Gladmon*,⁴ the court says: "I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct, on the occasion of the injury, was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously through a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though

¹ *Thomp. on Neg.*, 1177.

² 20 N. Y. 65.

³ By a somewhat curious misarrangement of authorities this extract from the opinion of Denio, J., in the case of *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, is quoted in the

case of *Railroad Co. v. Gladmon*, 15 Wall. 401, 406, by Mr. Justice Hunt, and cited as taken from the opinion in the case of *Oldfield v. New York, &c., R. R. Co.*, 14 N. Y. 310, affirming *s. c.* 3 E. D. Smith, 103.

⁴ 15 Wall. 401, 406.

there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no evidence would be required. . . . The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of men to take care of themselves and keep out of difficulty may be properly taken into consideration." It is in this spirit that the New York cases proceed, and by way of summing up, in the same opinion, the learned judge says: "The true rule, in my opinion, is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry the case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove *prima facie* the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune upon himself. No more certain rule can be laid down."

In a majority of cases, as has been already suggested, under the operation of this rule, the burden will fall upon the plaintiff, because it will most generally happen that something in the circumstances of the case puts the

plaintiff in a position where it is necessary and proper for him to show not only that the defendant was wrong, but that he was right. Wherever this is the case, this rule very justly imposes the burden of proof upon him; but whenever it is not the case, as it will very occasionally happen, the burden of proof as to contributory negligence is upon the defendant. That this is exactly the New York rule as the older judges, at the least, understood it, a long line of cases—otherwise irreconcilable—sufficiently demonstrates.¹

The development of the law in New York upon this point is a curious, but very satisfactory demonstration, in my judgment, of the essential reasonableness and propriety of that rule of evidence which makes it incumbent upon the plaintiff, as part of his case, to show his own freedom from contributory fault when he brings an action of negligence. We find in the New York reports, as Judge Thompson suggests, a great number of wholly irreconcilable decisions upon the point in question. The Court of Appeals of that State has, in individual cases,

¹ *Spencer v. Utica, &c., R. R. Co.*, 5 Barb. 337; *Hackford v. New York, &c., R. R. Co.*, 6 Lans. 381; s. c. 43 How. Pr. 222; *Robinson v. Id.*, 65 Barb. 146; *Suydam v. Grand St. R. R. Co.*, 41 Id. 375; *Bush v. Brainard*, 1 Cowen, 78; *Harlow v. Humiston*, 6 Id. 189; *Button v. Hudson River, &c., R. R. Co.*, 18 N. Y. 248; *Wilds v. Id.*, 24 Id. 430; *Squire v. Central Park R. R. Co.*, 4 Jones & Sp. 436; *Johnson v. Hudson River, &c., R. R. Co.*, 20 N. Y. 65; s. c. 6 Duer, 633; 5 Duer, 21; *Ryan v. Hudson River, &c., R. R. Co.*, 1 Jones & Sp. 137; *Holbrook v. Utica, &c., R. R. Co.*, 16 Barb. 113; s. c. 12 N. Y. 236; *De Benedetti v. Mauchin*, 1 Hilt. 213; *Ernst v. Hudson River, &c., R. R. Co.*, 24 How. Pr. 97; s. c. 32 Id. 262; 19 Id. 205; 32 Barb. 159; 35 N. Y. 9; 39 Id. 61; *Curran v. Warren Chemical Manfg. Co.*, 36 N. Y. 153; *Burke v. Broadway, &c., R. R. Co.*, 34 How. Pr. 239; s. c. 49 Barb. 529; *Besiegel v. New York, &c., R. R. Co.*, 14 Abb. Pr. (N. S.), 29; *Warner v. New York, &c., R. R. Co.*, 44 N. Y. 465; s. c. 45 Barb. 299; *Gillespie v. Newburgh*, 54 N. Y. 468; *Reynolds v. New York, &c., R. R. Co.*, 58 Id. 248 (reversing s. c. 2 N. Y. Super. Ct. 644); *Cordell v. New York, &c., R. R. Co.*, 6 Hun, 461; s. c. 64 N. Y. 535; 70 Id. 119; *Hale v. Smith*, 78 Id. 480; *Hart v. Hudson River Bridge Co.*, 80 Id. 622; s. c. 84 Id. 56; *Riceman v. Havemeyer*, 84 Id. 647; *Jones v. New York, &c., R. R. Co.*, 10 Abb. N. C. 200; s. c. 62 How. Pr. 450; *Becht v. Corbin*, 92 N. Y. 658; *Lee v. Troy Citizens' Gas Light Co.*, 98 N. Y. 115; *Tolman v. Syracuse, &c., R. R. Co.*, 98 Id. 198; s. c. 50 Am. Rep. 649; *Debevoise v. New York, &c., R. R. Co.*, 98 Id. 377; s. c. 50 Am. Rep. 683.

taken now one position and now the other upon the matter of the burden of proof in actions of this nature. But, taken together, the reported cases seem to indicate that the court, after groping about, or perhaps beating about, for some middle ground, and after much reluctance and some plain mistakes, has finally come squarely to the position that the burden of proof is upon the plaintiff to show that his own conduct, *in faciendo* or *in non faciendo*, did not, in the legal intent, contribute to occasion the mischief of which he complains. Turning to the report books we find that in the case of *Spencer v. Utica, &c., R. R. Co.*, decided in 1849,¹ the Supreme Court declared it a "stern and unbending rule" that the plaintiff in these actions "must establish the proposition that he himself was without negligence and without fault."² This is the earliest case in which it is clear that any New York court undertook to lay down a rule upon this point. The cases cited by the learned judge in support of his position, "which," he says, "has been settled by a long series of adjudged cases,"³ do not, in my opinion, very clearly declare such a doctrine. No one of them is any stronger authority to this point than the case of *Butterfield v. Forrester*,⁴ from which the rule is a mere inference. But, in 1849, we find the Supreme Court of New York committed to the position that the burden of proof is upon the plaintiff, and all the earlier cases, as far as they go, inclining, it may be said, to that rule. In 1873 the same court took an opposite ground, declaring that "the concurring negligence of the plaintiff is matter of defense, and the plaintiff is under no obligation to prove anything to entitle him

¹ 5 Barb. 337.

² "This is a stern and unbending rule which has been settled by a long series of adjudged cases, which we cannot overrule if we would," citing *Bush v. Brainard*, 1 Cowen, 78; *Brown v. Maxwell*, 6 Hill, 592; *Rath-*

bun v. Payne, 19 Wend. 399; *Harlow v. Humiston*, 6 Cowen, 189, 191; *Corlies v. Cumming*, 6 Id. 181, 184; *Brownell v. Flagler*, 5 Hill, 282.

³ *Spencer v. Utica, &c., R. R. Co.*, 5 Barb. 337, 338.

⁴ 11 East, 60.

to recover but the injury, and that it was caused by defendant's negligence."¹ The question first came before the Court of Appeals in 1858, in the case of *Button v. Hudson River R. R. Co.*,² wherein a very singular position was taken. The reporter seems to have thought that the case declared the rule that the burden is upon the plaintiff, for in the head note he says: "In an action for negligence the burden is upon the plaintiff to prove affirmatively that he is guiltless of any negligence proximately contributing to the injury." If only the opinion were equal to the syllabus there would be no room for conjecture or dispute, and we might count this earliest utterance of the court of last resort in New York in favor of one rule. But in the opinion Mr. Justice Strong says: "The other point" [for the appellant],³ "presents the question upon whom was the burden of proof, in reference to negligence of the intestate, conducing to the injury—whether it belonged to the plaintiff to prove affirmatively the absence, or to the defendant to prove affirmatively the presence of such negligence. In regard to all the circumstances essential to the cause of action, the plaintiff held and was required to sustain the affirmative. Among those circumstances were that the defendants were negligent, and that the injury resulted from that negligence. If the intestate was negligent, and his negligence concurred with that of the defendants in producing the injury, the plaintiff had no cause of action. . . . In this view the exercise of due care by the intestate was an element of the cause of action. Without proof of it, it would not appear that the negligence of the defendants caused the injury." This language is plain, and indicates clearly the mind of a court that would put the burden of

¹ *Hackford v. New York, &c., R. R. Co.*, 6 *Lans.* 381. See, also, *Robinson v. Id.*, 65 *Barb.* 146.

² 18 *N. Y.* 248.

³ Mr. Charles O'Connor was counsel for the appellant.

proof upon the plaintiff in such an action. This utterance, moreover, is fortified by an imposing array of authorities, including *Spencer v. Utica, &c., R. R. Co.*, to which I have already referred, and the cases cited by the Supreme Court judge in that case,¹ as well as many other English and American decisions that require the plaintiff, as part of his case, to establish his own freedom from negligent default. This done, the court continues: "It must not be understood that it was incumbent on the plaintiff, in the first instance, to give evidence for the direct and special object of establishing the observance of due care by the intestate; it would be enough if the proof introduced of the negligence of the defendants and the circumstances of the injury, *prima facie* established that the injury was occasioned by the negligence of the defendants, as such evidence would exclude the idea of a want of due care by the intestate aiding to the result." This is not far from saying that the plaintiff must show himself free from fault, which he may do by showing the defendant in fault—no very luminous proposition. In the reporter's note it is said of Selden, J.: "The latter objected to an implication which he conceived to lurk in the opinion of Strong, J. (*but which Strong, J., disclaimed*), that, in the absence of proof of any circumstances importing negligence on the part of the plaintiff, there might be a presumption thereof which he is required to repel, whereas, his negligence must be inferred from evidence and is not to be presumed." From which it is to be inferred that so much of Mr. Justice Strong's opinion as plainly imposes upon the plaintiff the burden of proof in these cases is to be read as of some esoteric or acroamatical significance, being designed to announce

¹ See note 2, page 442, *supra*.

something quite different from what it appears to announce,

Without any attempt to place this case as either for or against the rule which puts the burden of proof upon the plaintiff, we find in *Johnson v. Hudson River R. R. Co.*¹ that Mr. Justice Denio, after declaring that "the person injured must not by his own negligence have contributed to the injury," and insisting that "this is an element in the definition of the cause of action," defines the rule as follows: "I am of opinion that it is not a rule of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent." This should seem to imply that such a rule obtained in the courts of New York at that period, generally, if not as "a rule of universal application." The influence of this decision, as I have already indicated,² is—so far as it may be regarded as authoritative at present, and not, by implication at least, overruled—in favor of allowing each case to be a rule unto itself on this point, requiring the plaintiff to show, or the defendant to show, contributory negligence as the circumstances of each particular case may warrant.

Passing by the case of *Wilds v. Hudson River R. R. Co.*,³ a landmark in the law on this point in New York, we come to the case of *Ernst v. Hudson River R. R. Co.*,⁴ wherein the court for the first time was fully and plainly committed to the rule that requires the burden of proof to be upon the plaintiff. The language is unqualified: "A party suing for negligence must come into court faultless. He must not present a mere balanced case. The burden of proof is upon him and he must satisfy the court, by the greater weight of testimony, that, without any carelessness or blame on his part, he has suffered an

¹ 20 N. Y. 65.

² See pages 439 *et seq.*, *supra*.

³ 24 N. Y. 430.

⁴ 24 How. Prac. 97.

injury." This seems to have been the culmination of a long series of years of doubt and vacillation, and here the court has rested. The later cases, without exception I believe, impose upon the plaintiff the burden of proving, as an essential element of his case, that his own conduct did not contribute to occasion the injury.¹ It is sometimes said that the plaintiff must prove "affirmatively" that he was himself free from negligence, but by this it is believed nothing more is meant than that the fact of such freedom from negligence on the part of the plaintiff must be made to appear. It is a necessary element in the plaintiff's case, and something for him to show. In the very recent case of *Tolman v. Syracuse, &c., R. R. Co.*,² Finch, J. says: "The burden was upon the plaintiff of showing affirmatively, either by direct evidence, or the drift of surrounding circumstances, that the deceased was himself without fault, and approached the crossing with prudence and care, and with sense alert to the possibility of approaching danger."³ From which it may be inferred that when it is said that the plaintiff must "show affirmatively," etc., it is meant that the fact must appear, if not by the drift of surrounding circumstances, by direct evidence to the point. In *Lee v. Troy Citizens' Gaslight Co.*,⁴ it is held that it is not essential that

¹ *Warner v. New York, &c., R. R. Co.*, 44 N. Y. 465; *Reynolds v. Id.*, 58 Id. 248; *Cordell v. Id.*, 75 Id. 330; *Hale v. Smith*, 78 Id. 480; *Hart v. Hudson River Bridge Co.*, 80 Id. 622; s. c. 84 Id. 56; *Riceman v. Have-meyer*, 84 Id. 647; *Becht v. Corbin*, 92 Id. 658; *Jones v. New York, &c., R. R. Co.*, 10 Abb. N. C. 200; s. c. 62 How. Prac. 450; *Lee v. Troy Citizens' Gaslight Co.*, 98 N. Y. 115; *Tolman v. Syracuse, &c., R. R. Co.*, 98 Id. 198; s. c. 50 Am. Rep. 649; *Debevoise v. New York, &c., R. R. Co.*, 98 Id. 377; s. c. 50 Am. Rep. 683.

² 98 N. Y. 198, 202; s. c. 50 Am. Rep. 649 decided February, 1885.

³ To the same effect see *Hart v.*

Hudson River Bridge Co., 80 N. Y. 622; s. c. 84 Id. 56; in which the court says: "It was incumbent upon the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the death of the deceased. But it needs not that this be done by the positive and direct evidence of the negligence of the defendant and of the freedom from negligence of the deceased. The proofs may be indirect, and the evidence had by showing circumstances from which the inference is fairly to be drawn that these principal and essential facts existed."

⁴ 98 N. Y. 115.

the complaint, in an action of negligence, shall specifically allege absence of contributory negligence on the part of the plaintiff; that such an allegation is substantially involved in the averment that the injury complained of was occasioned by the negligence of the defendant, and that to prove this averment it is necessary, the burden being upon the plaintiff, for the plaintiff to establish the fact that his own negligence did not cause or contribute to cause the injury.¹

In Connecticut² and Vermont³ there is to be observed, especially in the earlier decisions, some of which are cited in the notes, a tendency to the same incertitude upon this question that I have considered at length in the New York cases.⁴

§ 160. *Conclusions.*—Upon the question of where to

¹ In 1872, Mr. Justice Hunt, who may be supposed to have been familiar with the trend of the New York decisions, said, in his opinion in the Supreme Court of the United States in the case of *Railroad Company v. Gladmon*, 15 Wall. 401, 407: "The later cases in the New York Court of Appeals, I think, will show that the trials have almost uniformly proceeded upon the theory that the plaintiff is not bound to prove affirmatively that he was himself free from negligence, and this theory has been accepted as the true one. Generally, as here, the proof which shows the defendant's negligence shows also the negligence or caution of the plaintiff." While the latter remark is clearly true, and serves to emphasize what has already been said as to the requirement of affirmative proof of the plaintiff's freedom from negligence, it is obvious that the former part of the learned justice's *dictum* would not now be made by any informed lawyer or judge. The Court of Appeals is as clearly committed to the rule declared for the first time in *Ernst v. Hudson River R. R. Co.*, 24 How. Prac. 97, *supra*, as the Supreme Court of the United

States can ever be to the opposite rule. Mr. Justice Hunt's *dictum* was hardly correct in 1872, and would not now be correct at all.

² *Beers v. Housatonic, &c.*, R. R. Co., 19 Conn. 566; *Park v. O'Brien*, 23 Id. 339; *Fox v. Glastenbury*, 29 Id. 204; *Bell v. Smith*, 39 Id. 211.

³ *Lester v. Pittsford*, 7 Vt. 158; *Barber v. Essex*, 27 Id. 62; *Trow v. Vermont, &c.*, R. R. Co., 24 Id. 487; *Hyde v. Jamaica*, 27 Id. 443; *Hill v. New Haven*, 37 Id. 501; *Walker v. Westfield*, 39 Id. 246; *Bovee v. Town of Danville*, 53 Id. 183.

⁴ Consult upon the general question of the burden of proof as to contributory negligence, *Abbott's Trial Evidence* 594, §§ 33-38 incl.; *Shear & Redf. on Neg.*, §§ 43, 44; *Thomp. on Neg.*, 1053, § 48, 1175, § 24, 1253, § 36; *Wharton on Neg.*, §§ 421, 423, 430, incl., 477, 990; *Field on Damages*, 182, §§ 189, 190, 191: "Contributory Negligence and the Burden of Proof," by Edward E. Sprague, Esq., of New York; 6 *New York State Bar Association Reports*, 28 *Am. Rep.*, note at page 563; 39 *Am. Rep.*, note at page 511. See, also, 15 *Western Jurist* (1883), 197, 209, 529.

put the burden of proof in actions of negligence when contributory negligence is the issue, which we have considered in this chapter, we find the courts of last resort by no means agreed. On the one hand, in Massachusetts, Connecticut, Maine, Michigan, Iowa, Indiana, Illinois, Mississippi, Louisiana, North Carolina, Oregon, and New York the burden is upon the plaintiff. In each of these States the rule is, as it is well expressed in *Cordell v. New York, &c., R. R. Co.*¹ by the Court of Appeals of New York, that "care on the part of one seeking to hold another liable for neglect must be established by proof. Where there is no proof of such care the court should nonsuit. . . . Absence of negligence will never be presumed;" or, as it is well put by Judge Cooley in *Teipel v. Hilsendegen*²: "When one sues to recover damages for a negligent injury the *gravamen* of his complaint is that he has been damnified by the wrongful and negligent action of the defendant, without having contributed thereto by negligent conduct of his own. The absence of contributory negligence is therefore a part of his case, and it is quite proper to say that he should show that he acted with due care." But, on the other hand, in Alabama, California, Colorado, Georgia, Kansas, Kentucky, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, Wisconsin, and Vermont, as well as by the Supreme Court of the United States, and in England, it is held that contributory negligence is matter of defense, and that the burden is upon the defendant, unless the plaintiff's own case raises a presumption of negligence on his part, to allege and prove the concurrent default of the plaintiff. "The rule intended," says Chief Justice Ryan in the case of Pri-

¹ 64 N. Y. 535.

² 44 Mich. 461.

deaux *v.* City of Mineral Point,¹ “is, that a plaintiff giving evidence of the negligence of the defendant and the resulting injury to himself, without showing any contributory negligence, is bound to go no further; he is not required to negative his own negligence. If, however, the plaintiff, in proving the injury, shows contributory negligence sufficient to defeat the action, he disproves his own case of injury by the negligence of the defendant alone. If the plaintiff’s evidence leave no doubt of the fact, his contributory negligence is taken, as matter of law, to warrant a nonsuit. If the plaintiff’s evidence leave the fact in doubt, the evidence of contributory negligence on both sides should go to the jury.”

Between these two antinomies there seems to be no practicable middle ground. The courts in New York, Connecticut, and Vermont strove to find some tenable mean, but the result has been that, in the two former States, the courts have at last settled down to the rule that puts the burden upon the plaintiff, while in the latter State the tendency is toward the other rule. In Vermont, perhaps it is safe to say, the law is not settled. As long ago as the year 1880, Mr. Browne, in his note to the case of *Buesching v. St. Louis Gaslight Co.*,² after an extended review of the later New York decisions, summed up as follows: “We think the following is the rule deducible from the New York decisions: If on the plaintiff’s affirmative evidence it clearly appears that he himself was materially negligent, he may be nonsuited,³ otherwise the defendant, assuming that negligence on his part is shown, must give his proof. If on the whole case it

¹ 43 Wis. 513; S. C. 28 Am. Rep. 558.

² 39 Am. Rep., 503, 513; S. C. 73 Mo. 219.

³ This, it may be remarked, is the rule everywhere. In any jurisdiction

where the English common law rule as to contributory negligence obtains, the plaintiff, it is believed, would suffer a nonsuit if his own case demonstrated his negligence.

does not clearly appear that the plaintiff was free from negligence, he may be nonsuited; but if the evidence is conflicting and doubtful it must go to the jury." This, as a statement of the rule, is hardly more than a circumlocution, and is about equivalent to a rule that the burden of proof is upon the plaintiff. Since 1880, when this statement of the law was published, the Court of Appeals has taken somewhat advanced ground in favor of the rule, and reiterated many times the doctrine first announced in *Ernst v. Hudson River R. R. Co.*¹ in 1862, so that in New York the rule may be considered as well settled as any rule of law is ever likely to be.

While, as the reports show, there is no tendency on the part of any court which holds that the burden of proof in these cases is upon the plaintiff, to recede from that position, it is suggested that, from the opinions in the reports of those States where the contrary rule obtains, it may be spelled out that the doctrine which makes contributory negligence, *semper ubique*, matter of defense, and puts the burden always upon the defendant, is not regarded entirely satisfactory. It is those courts that have all the trouble over the matter. Were their position more tenable, and if their doctrine were less grounded in a sentiment, it is, with deference, submitted that the reported cases might show less floundering, and fewer attempts to modify and extenuate, with a correspondingly higher measure of evenness and certitude.

¹ 24 How. Prac. 97.

CHAPTER X.

LAW AND FACT.

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| § 161. Contributory negligence a mixed question of law and fact. | § 163. Contributory negligence as a question of fact. |
| 162. Contributory negligence as matter of law. | |

§ 161. *Contributory negligence a mixed question of law and fact.*—As a general proposition of law, it is agreed that cases of negligence present a mixed question of law and fact, by which it is meant to say, that in an action in a court of justice in which the negligence of either plaintiff or defendant is an issue, or the issue, it devolves upon the court to say, as matter of law, what is, or amounts to negligence, and upon the jury to say, as matter of fact, in the light of the instruction from the bench, whether or not, in the particular case at bar, the facts as proven to their satisfaction, warrant the imputation of negligence. In other words, the court tells the jury what negligence is, and the jury tells the court what the facts of the case show upon the question of negligence; the judge defines negligence in the charge, and the jury apply the definition to the facts in the verdict. “Negligence,” says the Supreme Court of California, “is always a mixed question of law and fact, and when the facts are doubtful, they must be submitted to the jury under such instructions from the court as will enable them to apply the law to the facts.”¹ An uncounted multitude of authorities might be cited in support of this elementary proposition.² Dr. Wharton, in his discussion

¹ *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45, 50.

² Wharton on Neg., § 420 (either edition), and the cases collected;

of this subject says: "Negligence, we must remember at the outset, is not a fact which is the subject of direct proof, but an inference from facts put in evidence. A witness is asked, not whether A. was negligent at a particular juncture, but what were the facts of the case, and from these, negligence, if there be any, is to be inferred."¹ It is the province of the jury, not only, in such cases as

Thomp. on Neg., 1235, § 10; Wells' Law & Fact, §§ 263-265 incl.; Holmes' Common Law, 120 *et seq.*; and see, *Herring v. Wilmington, &c.*, R. R. Co., 10 Ired. (Law), 402; S. C. 51 Am. Dec. 395; *Wright v. Malden, &c.*, R. R. Co., 4 Allen, 289; *Cleveland, &c.*, R. R. Co. *v. Terry*, 8 Ohio St. 584; *Detroit, &c.*, R. R. Co. *v. Van Steinburg*, 17 Mich. 99, 118; *Trow v. Vermont, &c.*, R. R. Co., 24 Vt. 487; S. C. 58 Am. Dec. 191; *Barton v. St. Louis, &c.*, R. R. Co., 52 Mo. 253; S. C. 14 Am. Rep. 418; *Keller v. New York, &c.*, R. R. Co., 24 How. Prac. 172; *Pittsburgh, &c.*, R. R. Co. *v. McClurg*, 56 Penn. St. 300; *Norris v. Litchfield*, 35 N. H. 277; *Raymond v. City of Lowell*, 6 Cush. 524; S. C. 53 Am. Dec. 57; *Lane v. Atlantic Works*, 107 Mass. 104; *Gerald v. Boston*, 108 Id. 580; *Knight v. Ponchartrain, &c.*, R. R. Co., 23 La. Ann. 462; *Whirley v. Whiteman*, 1 Head. 610; *Union Pacific R. R. Co. v. Rollins*, 5 Kan. 180; *Lake Shore, &c.*, R. R. Co. *v. Miller*, 25 Mich. 274; *Baker v. Fehr*, 97 Penn. St. 70; *Germantown, &c.*, R. R. Co. *v. Walling*, 97 Id. 55; *Fitts v. Cream City, &c.*, R. R. Co., 59 Wis. 323; *City of Montgomery v. Wright*, 72 Ala. 411; S. C. 47 Am. Rep. 422; *Lanier v. Youngblood*, 73 Ala. 587; *Hall v. Union Pacific R. R. Co.*, 4 McCrary, 257; *Harris v. Id.*, 4 Id. 454; *Delgar v. City of St. Paul*, 4 Id. 634; *McKeever v. Market St., &c.*, R. R. Co., 59 Cal. 294; *Kansas, &c.*, R. R. Co. *v. Ward*, 4 Colo. 30; *Colorado, &c.*, R. R. Co. *v. Holmes*, 5 Id. 197; *Behrens v. Kansas, &c.*, R. R. Co., 5 Id. 400; *Atlanta, &c.*, R. R. Co. *v. Wyly*, 65 Ga. 120; *South, &c.*, R. R. Co. *v. Singleton*, 66 Id. 252; *Cook v. Western, &c.*, R. R. Co., 69 Id. 619; *Chicago, &c.*, R. R. Co. *v. Pennell*, 94 Ill. 448; *Wabash, &c.*, R. R. Co. *v. Elliott*, 98 Id. 408; *Pennsylvania Co. v. Stoelke*, 104 Id. 201; *Wabash, &c.*, R. R. Co. *v. Shacklet*, 105 Id. 364; S. C. 44 Am. Rep. 791; *Ohio, &c.*, R. R. Co. *v. Collarn*, 73 Ind. 261; S. C. 38 Am. Rep. 134; *Cincinnati, &c.*, R. R. Co. *v. Peters*, 80 Ind. 168; *Pennsylvania Co. v. Dean*, 92 Id. 459; *McLaury v. City of McGregor*, 54 Iowa, 717; *Slosson v. Burlington, &c.*, R. R. Co., 60 Id. 215; *Central, &c.*, R. R. Co. *v. Henigh*, 23 Kan. 347; *Atchison, &c.*, R. R. Co. *v. Smith*, 28 Id. 561; *County Com. v. Burgess*, 61 Md. 291; *Johnson v. Boston Towboat Co.*, 135 Mass. 209; *Peverly v. Boston*, 136 Id. 366; *Tyler v. New York, &c.*, R. R. Co., 137 Id. 238; *Loewer v. City of Sedalia*, 77 Mo. 431; *Ruland v. South Newmarket*, 59 N. H. 291; *Dudley v. Camden Ferry Co.*, 45 N. J. Law, 368; *Moebus v. Becker*, 46 Id. 41; *Palmer v. Dearing*, 93 N. Y. 7; *Ochsenbein v. Shapley*, 85 Id. 214; *Bucher v. New York, &c.*, R. R. Co., 98 Id. 128; *Walsh v. Oregon, &c.*, R. R. Co., 10 Oregon, 250; *Texas, &c.*, R. R. Co. *v. Herbeck*, 60 Texas, 602; *Louisville, &c.*, R. R. Co. *v. Goetz*, 79 Ky. 442; *Claxton's Adm. v. Louisville, &c.*, R. R. Co., 13 Bush. 636; *Thompkins v. Kanawha Board*, 21 West Va. 224; *Fassett v. Roxbury*, 55 Vt. 552; *Kemp v. Phillips*, 55 Id. 69; *Metropolitan, &c.*, Ry. Co. *v. Jackson*, 3 L. R. App. Cas. 193; *Dublin, &c.*, Ry. Co. *v. Slattery*, 3 Id. 1155; *Manzoni v. Douglas*, 6 L. R. Q. B. Div. 145.

¹ Wharton on Neg. (2d ed.), § 420.

these, to find the facts, but to draw for themselves the inferences from the facts. Says the Supreme Court of California to this point: "The testimony consists of a series of circumstances from which the jury are to find on the issue of negligence. The jury under such circumstances, are to make such inferences from the testimony as legitimately and justly follow, on which to base their verdict. They are not only to find the facts, but the inferences from them,"¹ and to the same effect in *Longenecker v. Pennsylvania R. R. Co.*,² it is said: "Upon a state of facts admitted, or proved by direct and undisputed testimony, the court may pronounce the law applicable thereto; but when alleged facts are the subject of inference from other facts and circumstances shown by the evidence, it is the exclusive province of the jury to consider the testimony and ascertain the facts under proper instructions from the court."

In the trial of a cause in which the negligence of either party is an issue, it is a preliminary question of law for the court, whether there is any evidence that ought reasonably to satisfy the jury that an alleged fact is established. If there is evidence from which the jury can properly find the question for the party upon whom the burden of proof rests, it should be submitted, but on the other hand, if the evidence is wholly insufficient to justify the jury in such finding, and the court would be justified in setting aside the verdict, as against evidence, if they did so find, then the testimony should be withdrawn from the consideration of the jury, and the question is one of law.³

Inasmuch as contributory negligence is nothing else than negligence merely, on the part of one who is plaint-

¹ *McKeever v. Market St. R. R. Co.*, 59 Cal. 294, 300.

² *Longenecker v. Pennsylvania R. R. Co.*, 105 Penn. St. 328, *supra*.

³ 105 Penn. St. 328, 332.

iff in an action of negligence, all the rules of law applicable to the negligence of the defendant, or negligence merely, are applicable, without addition or abatement, to the negligence of the plaintiff, or contributory negligence,¹ and the same rules that apply to contributory negligence upon this point are equally to be applied to comparative negligence as that doctrine obtains in Illinois.²

§ 162. *Contributory negligence as matter of law.*—What amounts to negligence is, as we have already seen, a question of law. It is for the court to say, in a majority of instances, what is, and what is not, negligence as an abstract proposition. When, therefore, the facts of a given case are undisputed, and the inferences, or conclusions to be drawn from the facts, indisputable; when the standard of duty is fixed and defined, so that a failure to attain it is negligence beyond a cavil, then contributory negligence is matter of law. In such a case there would be nothing for the jury to decide. The case has decided itself, and it only remains to the court to declare the rule. When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them, than that the plaintiff was, or was not, at fault, then it is the province of the court to determine the question of contributory negligence as one of law,³ and

¹ *Hoye v. Chicago, &c., R. R. Co.*, Sup. Ct. Wis., March 31, 1885, 23 N. W. Rep. 14; *Thomp. on Neg.*, 1178.

² *Wabash, &c., R. R. Co. v. Elliott*, 98 Ill. 481; *Wells' Law & Fact*, 221 § 263.

³ *Fernandes v. Sacramento City R. R. Co.*, 52 Cal. 45; *Abend v. Terre Haute, &c., R. R. Co.*, Sup. Ct. Illinois, Sept. 27, 1884, 19 Cent. Law Jour. 350, and the annotation by Eugene McQuillin, Esq.; *Hoye v. Chicago, &c., R. R. Co.*, Sup. Ct. Wis., March 31, 1885, 23 N. W. Rep.

14; *West Chester, &c., R. R. Co. v. McElwee*, 67 Penn. St. 311; *Rudolph v. Fuchs*, 44 How. Prac. 155; *Baker v. Fehr*, 97 Penn. St. 70; *German-town, &c., R. R. Co. v. Walling*, 97 Id. 55; *City Council of Montgomery v. Wright*, 72 Ala. 411; S. C. 47 Am. Rep. 422; *Colorado, &c., R. R. Co. v. Holmes*, 5 Colo. 197; *McLaury v. City of McGregor*, 54 Iowa, 717; *Moebus v. Becker*, 46 N. J. Law, 41; *Curran v. Warren Manfg. Co.*, 36 N. Y. 153; *Walsh v. Oregon Railway & Navigation Co.*, 10 Oregon, 250.

when the case is all against the plaintiff, there may properly be a nonsuit; but, in the language of Mr. Field,¹ "to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded, or established beyond controversy." It will, it is plain, in point of fact, very rarely occur that the case which the evidence discloses, either for or against the plaintiff, is so clear and incontestable as to leave no room for difference of opinion as to the merits. In almost every case something will appear upon which there may be contrariety of judgment, so that, in the majority of instances, the question of the plaintiff's negligence will be one of fact to be ultimately determined by the jury. In the case of *Detroit, &c., R. R. Co. v. Van Steinburg*,² Judge Cooley says: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind, the standard of ordinary prudence, and measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and, perhaps, better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care."³ The

¹ Field on Damages, 519.

² 17 Mich. 99, 120.

³ In the very able opinion of Lord, J., in *Walsh v. Oregon R. R. & Navigation Co.*, 10 Oregon, 250, 258, it is said to this point:—"Twelve men,

drawn from the body of the community, comprising men of various occupations and grades of intelligence, better secures that average judgment which it is the aim of the law to obtain, and which, the law assumes,

next judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury."

That contributory negligence is matter of law is plainly the exception and not the rule. In a perfectly plain case, plain as to the facts at issue, and plain as to all the reasonable inferences from those facts, the negligence of the plaintiff may be a question for the court alone; but, inasmuch as questions about which there can be no dispute are not often litigated, it does not often occur that a court is warranted in taking the question wholly from the jury. It is sometimes insisted that whenever there is any evidence, even the slightest, that tends to prove a fact from which the negligence or due care of the plaintiff might be inferred, it should be submitted to the jury;¹ but the better rule is that there must be a substantial basis for difference of opinion, or some reasonable ground of dispute, or the court may refuse to entertain it. In *Cotton v. Wood*² it is said: "To warrant a case

better understand the ordinary affairs of life, and can draw wiser and safer conclusions from admitted facts thus occurring than can one man, or a single judge," citing *Railroad Co. v. Stout*, 17 Wall. 657; *Greenleaf v. Illinois, &c. R. R. Co.*, 29 Iowa, 36. Judge Holmes, however, says, in *The Common Law*, 124: "A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances, far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on

the whole, to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all, should be continually growing." It is not a question that each of these views is sound, and it may be admitted that the best judges can administer justice as well, in nine cases in ten, without, as with a jury, or better, for the matter of that, without any reflection even upon a jury much beyond the average of juries.

¹ *Cumberland, &c., Iron Co. v. Scally*, 27 Md. 589; *Flori v. St. Louis*, 3 Mo. App. 231.

² 8 C. B. (N. S.) 568.

of this class being left to the jury it is not enough that there be some evidence. A mere *scintilla* of evidence is not sufficient, but there must be proof of well-defined negligence."¹ This is also the rule in this country, and one "which," says Judge Thompson, "ought to prevail universally."² Among the cases in the reports in which the court has passed upon the question of negligence as matter of law, are those in which the conduct of the plaintiff was such as to shock the mind of an ordinarily prudent man, and to evince a plain disregard of common care and caution, as, for an example, in cases where it appeared that the plaintiff took desperate chances in crossing a railway track, or jumped from a rapidly moving train, or lay down in a fit of intoxication upon a railway track, or disobeyed plain rules enacted with a view to his protection from some obvious danger, or crawled under a train of cars, or rode upon a locomotive as a passenger, subjects which I have considered at some length in chapters V and VII.³ In such cases as these a court may well say that the plaintiff's plain and reckless disregard of his own safety was negligence as matter of law. But even here it is not to be overlooked, that cases may arise in which, while there is no dispute as to the facts, there is yet room for difference of opinion as to the inferences and conclusions which may be drawn from those facts. It is for the jury not only to find the facts but to make the proper inferences and draw the conclusions from those facts; and when such a case arises the question of negligence is no longer one of law, even upon the undisputed

¹ See, also, *Toomey v. London, &c., Ry. Co.*, 3 C. B. (N. S.) 146; *Cornman v. Eastern Counties Ry. Co.*, 4 Hurl. & N. 781, 786; *Jewell v. Parr*, 13 C. B. 916; *Jackson v. Metropolitan Ry. Co.*, 3 App. Cas. 193.

² *Thomp. on Neg.* 1237, citing *Beaulieu v. Portland Co.*, 48 Me. 291; *Greenleaf v. Illinois, &c., R. R. Co.*, 29 Iowa, 22; *Lehman v. Brooklyn*, 29 Barb. 234; *cf. Wharton on Neg.* § 421 and note.

³ *q. v. in loco.*

facts, but should be left to the jury—which we now proceed to consider.

§ 163. *Contributory negligence as a question of fact.*—In general it cannot be doubted that the question of negligence is a question of fact and not of law.¹ Whenever there is any doubt as to the facts, it is the province of the jury to determine the question; or whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is likewise a question for the jury. It belongs to the jury, not only to weigh the evidence and to find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts.² Judge Cooley says,³ “Negligence, as I under-

¹ Detroit, &c., R. R. Co. v. Van Steinburg, 17 Mich. 99, 118 (by Cooly, J.); Trow v. Vermont, &c., R. R. Co., 24 Vt. 497; s. c. 58 Am. Dec. 191; North Penn. R. R. Co. v. Heileman, 49 Penn. St. 60; Linfield v. Old Colony, &c., R. R. Co., 10 Cush. 569; Barton v. St. Louis, &c., R. R. Co., 52 Mo. 253; s. c. 14 Am. Rep. 418; Keller v. New York, &c., R. R. Co., 24 How. Prac. 172; Huelsencamp v. Citizen's Railway Co., 34 Mo. 54; Fassett v. Roxbury, 55 Vt. 552; Kemp v. Phillips, 55 Id. 69; Thompkins v. Kanawha Board, 21 West Va. 224; Louisville, &c., R. R. Co., v. Goetz, 79 Ky. 442; s. c. 42 Am. Rep. 227; Claxton's Admr. v. Lexington, &c., R. R. Co., 13 Bush. 636; Texas, &c., R. R. Co. v. Herbeck, 60 Texas, 602; Walsh v. Oregon R. R. and Trans. Co., 10 Oregon, 250; Ochsenbein v. Shapley, 85 N. Y. 214; Palmer v. Dearing, 93 Id. 7; Bucher v. New York, &c., R. R. Co., 98 N. Y. 128; Dudley v. Camden Ferry Co., 45 N. J. Law, 368; Moebus v. Becker, 46 Id. 41; Ruland v. South Newmarket, 59 N. H. 291; Loewer v. City of Sedalia, 77 Mo. 431; Johnson v. Boston Tow-Boat Co., 135 Mass 209; Shapleigh v. Wyman, 134 Id. 118; Randall v. Conn. River R. R. Co., 132 Id. 269; Tyler v. New York, &c., R. R. Co.,

137 Id. 238; Born v. Albany Plank Road, 101 Penn. St. 334; Longenecker v. Pennsylvania R. R. Co., 105 Id. 328; County Commissioners v. Burgess, 61 Md. 291; Osage City v. Brown, 27 Kan. 74; Atchison, &c., R. R. Co. v. Smith, 28 Id. 561; Hatfield v. Chicago, &c., R. R. Co., 61 Iowa, 434; Houser v. Id., 60 Id. 230; Slosson v. Burlington, &c., R. R. Co., 60 Id. 215; Pennsylvania Co. v. Dean, 92 Ind. 459; Ramsey v. Rushville, 81 Id. 394; Wabash, &c., R. R. Co. v. Shacklet, 105 Ill. 364; Id. v. Elliott, 98 Id. 481; Cook v. Western, &c., R. R. Co., 69 Ga. 619; South, &c., R. R. Co., v. Singleton, 66 Id. 252; Kansas, &c., R. R. Co., v. Ward, 4 Colo. 30; McKeever v. Market St. R. R. Co., 59 Cal. 294.

² Hoyer v. Chicago, &c., R. R. Co., Sup. Ct. of Wisconsin, March 31, 1885, 23 N. W. Rep. 14; Longenecker v. Pennsylvania R. R. Co., 105 Penn. St. 328; Nelson v. Chicago, &c., R. R. Co. 60 Wis. 324; Hill v. City of Fon du Lac, 56 Id. 246; Sutton v. Town of Wauwatosa, 29 Id. 21; McKeever v. Market St. R. R. Co., 59 Cal. 294; Johnson v. Bruner, 61 Penn. St. 58, and the cases generally cited *supra*.

³ Detroit, &c., R. R. Co. v. Van Steinburg, 17 Mich. 99, 118.

stand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence, under all the existing circumstances, in view of the probable danger of injury. The injury is, therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the parties' conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."¹

In the ultimate determination of the question whether the plaintiff was guilty of negligence, two separate inquiries are involved. First. What was ordinary care

¹ To the same effect see *Briggs v. Taylor*, 28 Vt. 183; *North Pennsylvania R. R. Co. v. Heileman*, 49 Penn. St. 60; *Meesel v. Lynn, &c.*, R. R. Co., 8 Allen, 234; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Park v. O'Brien*, 23 Id. 347; *Isbell v. New York, &c.*, R. R. Co., 27 Id. 393; *Button v. Frink*, 51 Conn. 342; S. C. 50 Am. Rep. 24; *Ireland v. Oswego, &c.*, R. R. Co., 13 N. Y. 533; *Oldfield v. New York, &c.*, R. R. Co., 14 Id. 310; *Ernst v. Hudson River, &c.*, R. R. Co., 35 Id. 38.

under the circumstances? and second. Did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care it may be remarked that it is not always a fixed standard, and in many cases it must first be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law and a matter with which a jury can properly have nothing to do. This is well illustrated by the rule which requires one who crosses a railway track to be on his guard, and, before attempting to cross, to look attentively up and down the track. In the early periods of the development of the law upon this point it was the rule that one, under such circumstances, must exercise due care. In case of an action for a negligent running down of the plaintiff at a crossing, under that rule, it was incumbent upon the jury, first to set up the standard of ordinary care in their own minds, and then to say whether or not the plaintiff has come up to the standard. But as the law now stands the standard is fixed. One must look up and down the track; anything short of that is negligence. So that, at present, the jury, having the standard set up for them, have only to say whether the plaintiff did look up and down, and so bring himself within the protection of the rule. When the law has outgrown, in any particular, the featureless generality that one must exercise due care, and has come to require, or prohibit, specific acts, and to say that is negligence and this is carefulness, the function of the jury is so far forth curtailed, and the tendency plainly is to make the question of negligence, in this way, more and more a question of law, *quoad hoc*, and less and less a question for the caprice of a jury. "When a case

arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore, it aids its conscience by taking the opinion of the jury. But, supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is, or is not, blameworthy, and therefore, unless explained, is, or is not, a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. . . . The trouble with many cases of negligence is that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination."¹

It appears, therefore, on the one hand, that, as the law is developed, and approaches more and more to the fixedness and certitude of the exact sciences, outgrowing the abstract and the general, and growing up to the concrete and the particular, enriching itself by statutes

¹ The Common Law, by O. W. Holmes, Jr., pp. 123, 129.

and judicial decisions, and thereby settling and determining point after point in the law of negligence, the function of the jury in respect of the standard of conduct is, in a corresponding degree, curtailed; while, on the other hand, in the very nature of things, and by reason of the essential variety and complexity of the cases, that, whatever be the standard of conduct, must continue forever to perplex the courts, the function of the jury in respect of the particular facts of each particular case—that is, the function of the jury in measuring individual conduct by the juridical yardstick, and so determining for each plaintiff and defendant whether his conduct is, or is not, up to the standard of ordinary care under the circumstances, can never be curtailed, but, however fixed the standard, must forever remain.

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